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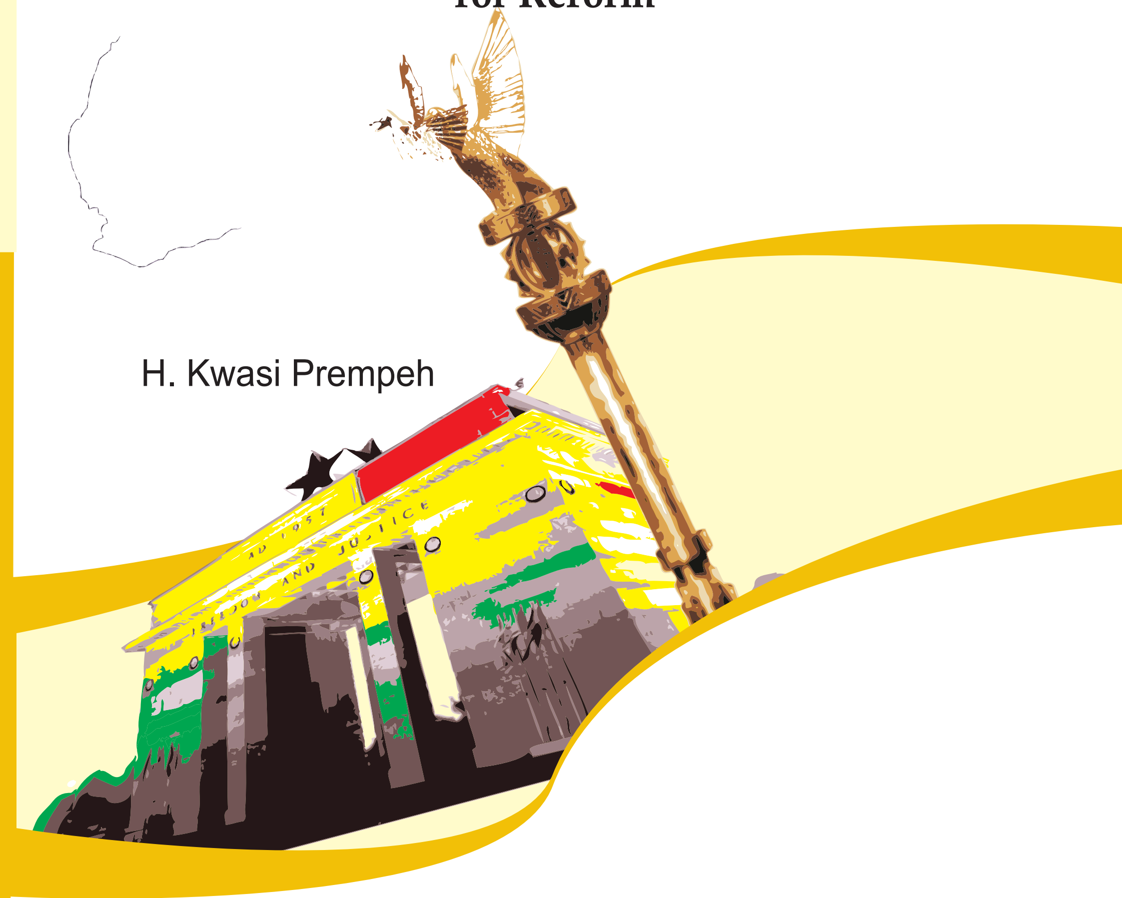

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Constitutional Review Series
No. 3

Reforming the Constitution of Ghana for a New Era: Averting the Peril of a Constitution without Constitutionalism

A Presentation at the CDD-Ghana / United Nations Development Fund (UNDEF) Public Lecture, 2009

The Ghana Center for Democratic Development (CDD-Ghana) is an independent, non-partisan and non-profit research think tank based in Accra, Ghana. CDD-Ghana is dedicated to the promotion of democracy, good governance and the development of a liberal political and economic environment in Ghana in particular and Africa in general. In so doing, CDD-Ghana seeks to enhance the democratic content of public policy and to advance the cause of constitutionalism, individual liberty, the rule of law, and integrity in public life.

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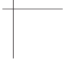
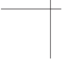
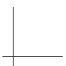
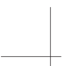





Preface

Astute readers of this important and timely booklet will not fail to be struck by the profound implications of the author's chosen title for the essay. The main title – Reforming the Constitution of Ghana for a new era – tells us immediately that the author is inviting us to brace ourselves for some exciting intellectual adventures in hitherto unexplored territory. Indeed, when I first received the written invitation to write this short Preface, the first thing that arrested my attention, rather forcibly, was the use of the word "Reforming" instead of which I was expecting to read "reviewing". It was not until I read the contents of the essay that I understood the use of the word "Reforming" in the title. Yes, the author is not content to simply review.

He means to reform, that is, to bring about decisive amendment of what is defective, vicious, corrupt or depraved in our constitutional system. Anyone who takes the trouble to read through the booklet will, no doubt, come to the conclusion that the author succeeds in this endeavor beyond measure.

As to the subtitle, "Averting the Peril of a Constitution without Constitutionalism," I knew pretty clearly what to expect, and I must say, I was not in the least disappointed, in the end. As it happens, I had, many years ago, met and interacted with Kenya's famed constitutional Scholar, Okoth – Ogendo (of blessed memory), the originator of the expression "Constitutions without constitutionalism" in the African context.

In the relatively new area of Comparative Constitutional Law in the generic firmament of legal scholarship, Professor H. Kwasi Prempeh, the Ghanaian-

born author of this booklet is a powerful force to reckon with. He is thorough and comprehensive, and as accurate as humanly possible in his analysis and comparative critique of constitutional models. And he is lucid in his narratives. The present effort is meant as a contribution to the national search for a viable constitutional settlement, officially launched by His Excellency the President of Ghana when he inaugurated the national Constitution Review Commission on January 11, 2010.

Professor Prempeh's account and critique of the "imperial Presidency" that seems to have been created by the 1992 Constitution is the most exhaustive and sophisticated account I have read or seen anywhere, and I am sure readers will be delighted and stimulated by what he says, and especially by the respectful way in which he says what he says. I do enthusiastically commend this booklet as truly worthy of wide readership, and would humbly draw the attention of the Constitution Review Commission to its contents.

A Preface is not and should not be a critique of the work to which it is prefixed. Since, however, I do know the author, as well as leading members of the publishing institution the (CDD) rather well, I thought I should draw attention to what I consider to be a somewhat strange posture of ambivalence on the subject of the present constitutional mandate that the President must choose a majority of his Cabinet Ministers from the ranks of the sitting members of parliament.

There appears to be a serious proposal of a "modified fusion" of Executive

and Legislative branches of Government. Under such a constitutional arrangement as is suggested an elected President may appoint as Ministers a minimum number of MPs who may "be eligible only for appointment to Cabinet (author's emphasis) positions, not to any ministerial position outside the Cabinet and not to a position as a deputy minister or regional minister".

I see in the above proposal the unfortunate ultimate result of a tendency to reinforce, if not canonize, the widespread perception within the body politic of Ghana that the position of an MP is necessarily, and in all circumstances inferior to that of a Minister. The fact of the matter is that the two offices are different from each other, and are to be compared horizontally, or side by side, not perpendicularly, with one on top of the other. What is more, such a perception tends to engender hostility towards any constitutional provision that amounts to a mandatory exclusion of MPs from the President's Government. Such mandatory exclusion, as is well known, occurred under Ghana's Third Republican Constitution of 1979 to 1981 and has existed under the Constitution of the USA since its inception in 1787.

For me, it is far more salutary to read Prof. Prempeh's powerful argument against the imposition on the President of "a constitutional requirement to choose some ministers from amongst current MPs," especially in light of a real possibility of a "divided government" under our present constitutional system.

Now, as one of the framers of the 1979 Constitution of the Third Republic, it seems to me important to point out that that Constitution did not in anyway,

shape or form take away the President's freedom, and indeed his prerogative, to choose an MP, whom he considered the best person for the job, as a Minister. What the Constitution did was to mandate the non-fusion of the offices of MP and Minister in the following unequivocal words: "A member of Parliament appointed a Minister of State shall resign from Parliament before he assumes office." (Article 65(2)).

The rationale is obvious: to ensure the institutional integrity of Parliament as an independent and countervailing branch of Government, vis-a-vis the Presidency. I believe it is critical for the success of our constitutional democracy not to compromise on this basic principle of the independence of Parliament.

I hope I have provided just a flavor of the stimulating and edifying satisfaction that awaits all readers of this well-researched and enlightened exposition and intelligent analysis of our constitutional law and history.

Prof. Emeritus S.O Gyandoh Jr.
Former Dean, Faculty of Law Legon
Partner, Gyandoh Asmah & Co.

Progress and Retreat

Political developments in Ghana over the course of the last decade and a half have earned the country well-deserved praise and support from democracy promoters and the international community. In the years since the restoration of democratic rule in 1993, the country has registered unprecedented gains in civil and political liberties. Along with a reinvigorated civil society, Ghana now boasts one of the freest and most robustly independent, if occasionally licentious, print and electronic media in the world. Moreover, regular, independently-administered elections and constitutionally-imposed term limits on presidential tenure have helped to routinize political succession and turnover, reversing the country's long post colonial history of dictatorships, *coups d'etat* and short-lived governments. Notably, national elections held in 2000 and 2008 resulted, in each case, in an opposition party replacing its rival incumbent as the governing party.

These are nontrivial accomplishments, especially when viewed in the light of Ghana's troubled and unstable past and in comparison with trends elsewhere in Africa. Yet, as Ghanaians settle into a hopeful new era of democratic peace and stability, certain patterns and habits from the past

have re-emerged in the country's governance and politics. Notably, power and resources remain highly centralized and concentrated in the hands of a presidency with vast unregulated discretion; rampant use of political patronage continues to frustrate prospects for the emergence of a meritocratic and stable public administration; the national legislature remains largely a talking chamber when it is not dutifully serving as a rubber stamp for the executive; and the judiciary, while institutionally independent, remains relatively tame, its jurisprudence often unambitious.

In short, Ghana's remarkable progress in the area of *democracy* has not been matched by similar progress in *constitutionalism.* The distinction is a significant one. Democracy and constitutionalism are not synonymous with one another, although they work best as a complementary pair. With democracy, we are concerned with the question "Who ought to exercise the public power?" Democracy answers that question in favor of the citizens as a whole, and provides safeguards and mechanisms to protect the right of the people to elect periodically the government of their choosing. Constitutionalism has a different focus. The issue that lies at the heart of constitutionalism is not "who shall rule", but "what the limits on the exercise of power should be, regardless of who rules." Thus, while democracy confers power and legitimacy on government, constitutionalism is concerned with regulating and disciplining the government's exercise of its power. If the periodic election is democracy's main event, constitutionalism, concerned as it is with regulating the uses and abuses of power, assumes overriding importance *in the period between elections*, that is, after the high drama of elections is over. In that regard, constitutionalism may be said to take off where democracy leaves off.

A distinction must also be made between constitutionalism and a *constitution.* A constitution, simply defined, is "the fundamental and organic law of a nation or state, establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise."[1] Thus defined, a constitution is, generally speaking, value-neutral; it may be liberal or authoritarian, democratic or autocratic, republican or monarchical, written or unwritten. In contrast, constitutionalism is a value-laden idea. While a constitution can take on diverse ideological forms or serve regimes of diverse political or ideological origin or complexion, the idea of constitutionalism is generally incompatible with certain types of regime. Central to the concept of constitutionalism is the idea that those entrusted with public power, like all trustees or fiduciaries, must exercise that power within certain structural, procedural and substantive limits; limits that are designed to safeguard against abuses and dangers associated commonly with unregulated or absolute power. Thus, while a constitution gets its force from being the "supreme law of the land," constitutionalism goes beyond a mere concern with positive law to express a normative commitment to certain goals and principles concerning the appropriate uses and regulation of power, notably accountability, transparency, and checks and balances in the governmental system.

The significance of the distinction outlined above, between constitutionalism and a constitution, is underscored by the fact that the phenomenon of "constitution without constitutionalism" has been a common feature of political life in postcolonial Africa. The late Kenyan legal scholar Okoth-Ogendo coined the aphorism "constitution without

constitutionalism"[2] to describe the apparent paradox of a commitment on the part of Africa's postcolonial elites to "the idea of a constitution", on the one hand, and, on the other hand, their "rejection of the classical notation of constitutionalism".

Okoth-Ogendo's aphorism sought to capture the nature of the organization of power in an Africa that, at the time of his writing, had already been through three decades of *de facto* or *de jure* one-party regimes and authoritarian ideologies. Much indeed has changed since Okoth-Ogendo's famous essay, not least in places like Ghana, where a commitment to the idea of democracy—and to limits on presidential tenure—may be said to have taken root within the body politic. Still, the central insight of Okoth-Ogendo's apt observation, the idea that the mere existence of a constitution, even a democratic constitution, does not guarantee constitutionalism remains true. In fact, despite her remarkable progress in the area of democracy, the persistence in a post-authoritarian Ghana of certain patterns and practices associated with the *ancien regime,* including the essential elements of an "imperial presidency," suggests that Ghana, too, continues to face the prospect of a constitution without constitutionalism, even if to a lesser degree than in the past or than other African states.

The need to secure Ghana's impressive progress in democracy with corresponding progress in constitutionalism has become more urgent with the country's recent discovery of oil and, with it, concerns that Ghana too might fall victim to the legendary "oil curse". Contrary to the belief held by many Ghanaians, the fact that Ghana's oil, unlike others in Africa,

comes during the "age of democracy" does not immunize the country against the peril of the oil curse. To the contrary, the politics of democratic elections themselves, in particular the zero-sum factional rivalry for the spoils of power they appear to have become in contemporary Ghana, might exacerbate, rather than restrain, the dangers commonly associated with oil wealth. By simultaneously raising, for political entrepreneurs, both the material value of being in power and the opportunity cost of being out of power, petrodollars in Ghana could magnify the scourge of corruption and the use of violence and vote-rigging in national elections. Allocation of oil wealth on the basis of discriminatory political criteria could similarly fuel factional grievance and geo-ethnic rivalry and, in the process, endanger social peace and cohesion. By injecting into the public treasury substantial new amounts of rent,[3] Ghana's oil is likely to further unbalance the country's already lopsided constitutional and political system in which presidential control over the use and distribution of public resources is subject to little credible countervailing oversight or accountability. As Paul Collier succinctly puts it, "The heart of the resource curse is that resource rents make *democracy* malfunction."[4]

Studies have demonstrated that the resource curse is "primarily a political/institutional and not an economic phenomenon".[5] The danger of the oil curse is "exacerbated" in those oil-exporting states where there is an "acute over concentration of power within the executive that makes it difficult to construct meaningful checks and balances."[6] In fact, the weight of the empirical evidence shows that having credible countervailing institutions in place *beforehand* is an important factor in mitigating the risk of resource curse.[7]

In a December 2007 *Policy Brief*,[8] the Bank of Ghana acknowledged the governance implications and challenges of Ghana's anticipated oil windfall. Noting that Ghana's apparently "prudent" management of recent aid flows "gives some comfort as regards its ability to manage anticipated oil windfalls," the Bank nonetheless expressed agreement with the view that "oil is different".[9] As the Bank explained, "it is harder to abuse aid rents as compared to oil resource rents," because, while "aid is normally delivered through a framework that involves linked conditions on past or prospective government behavior," with oil rents there are "no such [external] checks and balances on government."[10] According to the Bank, studies of resource-rich countries that have escaped the natural resource curse point to "sound institutions and good governance structures" as playing a "key role."

Yet, in Ghana, popular expectation that the country's newfound oil wealth will be properly applied and accounted for continues to rest largely on politicians' "trust me" assurances of judicious management of the projected oil revenues (and on a proposed legislative framework riddled with political and executive discretion). Indeed the structure and quality of politics and governance—and, for that matter, of constitutionalism—in Ghana today indicate that Ghana's much acclaimed democracy is still *institutionally* ill-prepared to mitigate or deal with the problems and dangers associated with sudden oil wealth.

As Ghana embarks on a new round of constitutional review and reform, the central goal of that project must be to redress the persistent deficit of constitutionalism, of a lack of credible and robust checks and balances,

transparency and accountability in the workings of government.

Of "Implementation Defects" and "Design Defects"

Among those who acknowledge the shortcomings and deficiencies in the workings of government in contemporary Ghana, not all agree, however, about the need for constitutional reform. Some opponents of constitutional reform[11] argue that while Ghana's current constitution is, like every other constitution, imperfect, it nonetheless provides an adequate (even more than adequate) framework for good governance and constitutionalism, and that little will be gained by tinkering with or even overhauling the constitution. To these constitutional reform skeptics, the shortcomings and disappointments in the workings of government under the current constitution are to be blamed not so much on defects or gaps in the text or design of the constitution as on the failure of Ghana's governing elites to rise to the challenge of statecraft and statesmanship. According to this view, then, the constitutionalism deficits in Ghana's Fourth Republic are largely the result of "implementation" defects, not "design" defects or defects inherent in the constitution itself.

There is *some* validity to the "implementation defects" theory of Ghana's constitutional system and its apparent weaknesses. Both the elite operators of the constitution and the citizens who must act to operationalize and enforce the terms of the constitution have often failed to live up to the high ideals and purposes behind various provisions of the constitution. For

example, although article 2 of the Constitution opens the doors of the Supreme Court to "any person" who alleges a violation of the Constitution to invoke the authority of the Court in order to enforce compliance with the commands of the Constitution, citizens have, by and large, failed to seize the opportunity to bring lawsuits to challenge the constitutionality of laws and actions of government. Similarly, despite possessing a range of constitutional powers with which to enforce executive accountability and play a countervailing function within our system of government, Parliament has confined itself to the margins, dutifully doing the bidding of the President but little else. In short, Ghana's political elites and citizens alike could do more, a great deal more in fact, to fill many of the gaps that currently exist in the workings of the Constitution and thus help to make good on the Constitution's promise. As the implementation defects theory sees it, then, agitation for constitutional reform in Ghana is simply a case of the bad workman who would rather blame his tools than change his ways. It is, in some respects, a claim one cannot easily dismiss.

Where the implementation defects theory fails, however, is in its implicit suggestion or presumption that the way to guarantee desirable constitutional outcomes or good governance is to focus on the behavior of the human operators of the constitution and, thus, find "the right men and women" who would faithfully honor the high ideals of the constitution. While it would be a happy state of affairs to find such men and women to run the affairs of state, counting on such expectations is a pipe dream. Constitutionalism is not predicated upon the availability or emergence of virtuous elites or enlightened statesmen. To the contrary, any system of government or institution must assume imperfection, indeed self-interest,

on the part of its human operators. A good constitution ought to factor into the design of its institutions the universal fact that the human operators of any institution, left to their own devices, will in fact act out their self-interest or factional interest. As Ghanaian social scientist and scholar Maxwell Owusu has noted, "The universal predisposition of power holders *everywhere* is to use state power for their own ends, rather than for the public good."

Thus, rather than count on a government of enlightened statesmen as the antidote to the problems of constitutional governance, the wiser policy for constitutional framers and reformers is to proceed on the basis of a skeptical, but realistic, view of man. Constitutions that fail to anticipate this universal truth about "human nature" tend to entrust power to the elite without adequately constraining the use of such power. In so doing, they leave in place gaps and loopholes that are bound to invite opportunism, gamesmanship and other self-interested behavior on the part of politicians and state actors. The challenge of constitution making and design, therefore, consists of, first, empowering (and thus enabling government to act) and, then, simultaneously, constraining government and state actors in their exercise of power. The latter goal, which is at the crux of constitutionalism, is to design the constitution as a structure of incentives and disincentives that aim, through the use of various devices including bright-line rules and prohibitions, to minimize opportunities and tendencies for self-dealing and self-interested behavior on the part of governing elites.

In his prescient 1960's book *Politics in West Africa*, described by a recent

reviewer as "a potentially powerful classic of constitutional engineering for troubled African nations,"[12] the economist and Nobel laureate Sir W. Arthur Lewis explained why the same assumptions about human nature that underpine the design of modern economic systems ought to inform the design of a good political system:

> Economic philosophers insist that it is absurd to devise an economic system on the assumption that men are motivated mainly by a desire to serve; on the contrary, the function of a good economic system is to transmute into social benefit the drive for personal gain which keeps the system going. This is achieved (or sought) by a system of controls which tries to ensure that money can be made only by serving the public: only by offering the market what it wants. Business men seek constantly to escape these controls; strengthening the market to prevent manipulation is one of the continuing tasks of economic democracy. The same applies to political systems. Politicians, like business men, are motivated by the desire for money, power and prestige as well as by the desire to serve. A good political system assumes that politicians are ordinary men, and seeks through its control to ensure that politicians can fulfill their personal ambitions only by serving the public. A political system whose functioning depended on the altruism of politicians would be just as much an absurdity as an economic system depending on the altruism of business men.[13]

This indeed is the basic insight and lesson which James Madison, perhaps the most famous of the framers of the American constitution, teaches

constitutional designers in No. 51 of the *Federalist Papers*:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*[14]

Madison and his fellow framers of the American constitution embarked on their historic mission with a clear awareness that the government they were helping to design would be operated by fallible and self-interested men. The Madisonian solution, however, was not to give up on the possibility of "good government" or hope for the arrival of virtuous men: "Enlightened statesmen will not always be at the helm." Rather, Madison's proposed remedy for the self-interested (human) tendencies inherent in those who must govern us was two-fold: first, make that government politically accountable to the governed, as in a democracy ("a dependence on the people"); but additionally (based on what "experience has taught mankind"), install "auxiliary precautions" to constrain the behavior of the governing elites.

In short, democratic elections, while necessary, are inadequate as a check or protection against abuse or misuse of governmental power. Thus, while Ghanaians must continue to rely on the prospect of power alternation through periodic democratic elections to improve the quality of our

political class over time, we must also use appropriate "auxiliary precautions" (e.g., a constitution or institutions more generally) to constrain and discipline the behavior and actions of the governing elites in the period between elections. Instead of expecting, as the "implementation defects" theory implicitly does, that social progress or good governance will come from having "the right people" at the helm or from politicians doing "the right thing", we are better off assuming the worst possible outcome from the process of elections and politics, and, having done that, proceed to frame for ourselves a constitutional system and accompanying institutions designed such that *whoever happens to secure legitimate control of government* through the democratic process will find themselves appropriately enabled *and* constrained in how and to what ends they might use public power. In this way, the constitution can help correct some of the natural imperfections of electoral democracy.

The aim here is not constitutional perfection. Such a goal would be equally misplaced, as perfectionism in constitutional design is an unattainable goal. However, merely because we cannot strive for a perfect constitution does not mean that any constitution will do or that we must not attempt to improve on the constitutional status quo. In Ghana's case, while the 1992 Constitution is satisfactory in many respects and contains a number of attractive features,[15] overall it is far too enabling and permissive and insufficiently regulatory or constraining in its organization and distribution of state power. Some of these constitutional inadequacies and gaps have become manifest as power has alternated between the two main rival factions of the Ghanaian political class without taming the tendency toward political opportunism and self-dealing in government.

While we may be "stuck" (at least in the short run) with a given political class, we need not be stuck with flaws or gaps in our constitution. Nor must we leave these design defects to persist, in a vain hope or expectation that, with time, they may yet correct themselves. Constitutional flaws are not like wine; they do not get better with age. On the contrary, if remediable institutional flaws and gaps are merely tolerated and not corrected, "bad" habits and conventions might form around them and, over time, these would calcify and become embedded in our political ethos and culture, defying concerted efforts to reverse or undo their effects at a future date.

In the remainder of this paper, I will attempt to identify and address some of the flaws, gaps and unintended consequences that have been revealed in the design and workings of the 1992 Constitution over the course of its existence and also offer some perspectives and proposals for constitutional reform. This is not an attempt at a comprehensive review of the Constitution. This paper focuses only on the primary pillars and institutions of state as established under the Constitution, namely the presidency and Parliament, the judiciary and bill of rights, and two "Fourth Branch" institutions, CHRAJ and the Electoral Commission. Although they are also matters that deserve consideration in the process of constitutional reform, this paper does not address concerns relating to the Council of State (its utility, composition, etc.), the length of the presidential or parliamentary term of office, devolution and local government (including the role for chiefs), representation and participation of "diasporan" citizens in national affairs, or the Transitional Provisions.

The Imperial Presidency and the Fourth Republic

The Ghanaian president under the Fourth Republic is an "imperial president." Our elected president, while he remains in office, is literally the monarch of all that he surveys. Nothing good that needs to get done, and nothing bad that needs to be undone, in this country has much chance of proceeding or succeeding without the personal initiative, intervention or interest of "His Excellency" the President. No public issue that calls for a resolution seems too big or too small for the president's "IN" box.

By the laws and conventions of our constitution, the Ghanaian president is at one and the same time the nation's *chief lawgiver* (upon whose sole initiative all laws in the land are made and unmade); its *chief financial controller* (who controls the nation's purse strings and the manner of its allocation); its *chief personnel director* (who can summarily make and unmake all manner of public careers, high and not so high); its *chief landlord* (in whom is vested all public lands and the power of eminent domain); its *chief patron* (who dispenses all manner of largesse and benefits, from car loans to MPs to lucrative public contracts); its *chief local governor* (whose commands issued directly or through loyal local agents reaches every corner of his sovereign estate); its *chief deal-maker and -breaker* (who makes and unmakes investment and other commercial contracts); and its *chief grievance solver* (on whose desk all public grievances that have any chance of quick resolution must land).

These multiple hats worn by the Ghanaian president are separate and apart

from the president's ceremonial role as head of state, a role that also makes every holder of the exalted office the nation's chief mourner, its chief conferrer of awards and honors, and its chief celebrant. Indeed, our presidents deem themselves, and we, too, routinely call them, “Father of the Nation,” which appellation, besides its patriarchal presumptuousness, implicitly acknowledges all of us as the president's children. This litany of roles and powers, reposed in one man, bespeaks a monarch more than it does the elected head of a constitutional republic.

Ghana's imperial presidency is, of course, not an invention of the current Fourth Republican Constitution. It has a long ancestry in our political and constitutional tradition as a nation-state. This form of rule, in which power is centered around one man (no woman yet!), however, imposes substantial costs on the progress and development of the country. First, making the president—any president—the alpha and omega in everything that matters to the life and health of the country means, in effect, that the pace and direction of the nation's progress must rest, uneasily, on the initiative, judgment and abilities of one individual and of the choices and decisions he or she makes. Second, the persistence of an imperial presidency reinforces the pattern of personalization of power—a pattern that further undermines the prospects of building strong institutions within the state. Third, an imperial presidency causes policy instability and discontinuity whenever there is a change in government, as each new occupant of the exalted office feels entitled and empowered to make abrupt and idiosyncratic reversals of policy and commitments made by their predecessor. Fifth, concentrating so much power in the hands of a president within the context of Ghana's already highly centralized unitary

state reinforces the longstanding capital-city-centered bias in our national development planning and resource allocation, further marginalizing the needs and interests of more distant rural communities. Lastly, as "power corrupts, and absolute power corrupts absolutely," an overconcentration of power and resources in a single officeholder creates the conditions and opportunity for corruption and abuse of power.

There are those who would contend that our indigenous culture and traditional systems of chiefly rule, not our own political or constitutional choices and agency, are to blame for the phenomenon of an imperial presidency. Besides its disabling determinism, the "culture" excuse simply does not stand up to scrutiny. Important works of scholarship by a long and distinguished line of scholars who have had occasion to study various branches and aspects of our traditional forms of rule flatly refute many of the conventional stereotypes that regard the traditional monarch or chief as an absolute ruler who shares power with no one.[16] To the contrary, power within our indigenous systems has traditionally been dispersed among multiple officeholders, the most influential of whom do not occupy their offices at the pleasure of the chief. In fact, within the traditional constitutional set-up, the chief or monarch is constitutionally enjoined to govern only with the active participation of a council of traditional officeholders or "elders" who, like the chief, have an independent source of legitimacy within the traditional polity.

Rather than submit to a pseudo-cultural rationalization of Ghana's imperial presidency, a more productive line of inquiry is to investigate and seek to understand in what ways our own agency, and in particular our

constitutional design and practices, dating back to the immediate postcolonial period (even to the colonial era), may have contributed to creating, over time, the kind of hegemonic presidency that persists to this day. Ghana's tradition of imperial presidency is not the creature of the current constitution or the product of a historical accident; it is, I argue, the result, in large measure, of certain constitutional and political choices we have made in the course of our life as a nation-state.

I will attempt, next, to identify some aspects of our current constitution that facilitate or reinforce the phenomenon of the imperial presidency in the Fourth Republic.

Article 108. This provision of the Constitution reads as follows:

> Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of, the President (a) proceed upon a bill including an amendment to a bill, that, in the opinion of the person presiding, makes provision for any of the following (i) the imposition of taxation or the alteration of taxation otherwise than by reduction; or (ii) the imposition of a charge on the Consolidated Fund or other public funds of Ghana or the alteration of any such charge otherwise than by reduction; or (iii) the payment, issue or withdrawal from the Consolidated Fund or other public funds of Ghana of any moneys not charged on the Consolidated Fund or any increase in the amount of that payment, issue or withdrawal; or (iv) the composition or remission of any debt due to the Government of Ghana; or (b) proceed upon a motion, including an amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any

of the purpose specified in paragraph (a) of this article.

According to the reading of Article 108 adopted by successive Speakers of the Ghana Parliament, members of Parliament are, by virtue of article 108, precluded from introducing or "even merely debating" on their own initiative any bill or motion or amendment which, if passed, would impose even a *de minimis* fiscal obligation on the state, unless that bill has been introduced by or on behalf of the President.[17] Predictably, not a single bill has been originated or introduced by a member (or group of members) of Parliament in his or her own name since the Fourth Republic came into being in 1993. There is widespread agreement that article 108 is a major part of the explanation for this outcome.

Apart from making the President effectively the holder of the "power of the purse,"[18] article 108, as currently understood, has several other far reaching implications. Since legislation is the primary instrument for making or reforming national policy, and as nearly every proposed policy or program entails some expenditure of public resources in its implementation, the practical effect of the conventional understanding of article 108 is to confer on the President exclusive power or monopoly in the important area of policy or legislative initiative. Such exclusivity is bound to impoverish policy-making in Ghana, as it limits to one—the president's—the range of possible policy solutions to any given public problem.

Conversely, inertia or a disinclination on the part of the President to attend to a particular public problem, especially one that requires the expenditure

of public resources, means, in the light of article 108, that the problem would be left to fester unresolved. In looking to the President as practically the sole initiator and proponent of legislative reform, and denying the same opportunity to the entire body of Parliament, the current interpretation of article 108 assumes, in effect, a president in the nature of a *philosopher-king*; one who is the sole repository of wisdom within the state.

Article 108 also has a deleterious effect on the nature and quality of representation that can be expected from members of Parliament. A Member of Parliament who cannot propose or introduce any fiscally-consequential legislation or amendment (however minimal or remote the fiscal consequence), but is reduced to voting only "for" or "against" the president's bills, cannot truly be called a *legislator* or a representative of his or her constituents' interests. For such MPs, who are rendered constitutionally incapable of using the legislative or budgetary process to secure the provision of *public goods* for their national or local constituents, "representation" has often been reduced to perverse practices like taking personal out-of-pocket responsibility for the episodic or recurring financial demands of individual constituents—a practice that is potentially corrupting, as it forces MPs to extend themselves financially beyond the limits of their own resources.

There are, of course, alternative ways to read article 108 that avoid the perverse outcomes associated with the current interpretation. In fact, the historical origins of article 108 suggest that the conventional interpretation of the provision, which is accepted by the Parliament of the Fourth Republic, is *incorrect*. Article 108 has its origins in British colonial

constitutions.[19] In the specific case of the Gold Coast, the colonial ancestor of article 108 can be found in the *Gold Coast Colony (Legislative Council) Order in Council, 1925*, commonly known as the Guggisberg Constitution. Sections 51 and 52 of that constitution provided as follows:

> Every Member of the Council may, upon due notice being given, propose any Ordinance or resolution which does not impose a tax or dispose of or change any part of the public revenue.
>
> No Member of the Council may propose any Ordinance, vote, or resolution, the object or effect of which is to impose any tax or to dispose of or charge any part of the public revenue, unless such Ordinance, vote, or resolution, shall have been proposed by the direction or with the express sanction of the Governor.

Similarly, the 1946 (Burns) Constitution, while conferring on a member of the Legislative Council the right to "introduce any Bill or propose any motion" for appropriate action by the Council, also provided a limitation in section 34 as follows:

> Except by or with the direction or recommendation of the Governor signified thereto, the Council shall not proceed upon any Bill, amendment, motion or petition which, in the opinion of the President [of the Council] or the Presiding Member, would dispose of or charge any public revenue or public funds of the Gold Coast or revoke or alter any disposition thereof or charge thereon, or impose, alter or repeal any rate, tax or duty.

These restrictions on legislative initiative in the colonial assembly became a part of Ghana's parliamentary and constitutional tradition upon the attainment of independence. Thus, section 41(2) of the Ghana (Constitution) Order in Council, 1957—i.e., the Independence Constitution—contained language roughly identical to section 34 of the Burns Constitution. Although the 1960 (First Republican) constitution did not explicitly include similar language, the practice was followed in the First Republic as a matter of parliamentary tradition. Like the Independence constitution, however, both the 1969 and 1979 constitutions contained express language *identical* to the current article 108.

Importantly, the article 108-type restriction contained in the various colonial constitutions was understood at the time as having carved out of a legislative councilor's general right to introduce a bill, a narrow exception for “money” bills, which bills were deemed to be “government bills” that could be introduced only by or under the authority of the Governor. In other words, the article 108-type restriction contained in colonial constitutions was recognized as an *exception* to the general rule, not the rule itself. As a rule, a legislative councilor was free to introduce any bill on his own motion; the exception to this general rule applied only to so-called financial bills (essentially, the budget or appropriations and finance bills as well as supplementary estimates), which only the Governor, usually acting through his Financial Secretary, had the authority to put before the legislative council.

The authoritative study of the Gold Coast Legislative Council done by Martin Wight supports this narrower reading of the article 108-type

restriction.[20] Wight's work showed that Gold Coast legislative councilors were in fact allowed to introduce legislation in the form of a private member's bill, and some legislative councilors did propose amendments and motions in respect of "non-financial" bills, including bills, motions or amendments that clearly will have had downstream expenditure implications. For example, the Native Administration Ordinance of 1927 was introduced as a private member's bill by Nana Ofori Atta, then an "unofficial member" of the Legislative Council.[21] In 1938, Legislative Council member Kojo Thompson of Accra also introduced an amendment to the Towns Ordinance, withdrawing his proposed amendment later on only after he had been persuaded that a government bill to the same effect was pending.[22] Conversely, when in 1939, Nana Ofori Atta again proposed a motion relating to the *Gold Coast Fund for War Charities Bill*, he was advised that the motion could not stand because it pertained to a "financial bill".[23] Even then, Nana Ofori Atta was able subsequently to get his motion considered and passed after he had obtained the consent of the Governor for his motion, as section 52 of the Legislative Council Order in Council provided. In 1941, Nana Ofori Atta, addressing the Council, finally took on the issue of the constitutional inability of non-executive ("unofficial") members of council to "make any proposal which would add to Government expenditure or which would entail a charge on the revenue," questioning "whether it is wise for Government to turn down a proposition or request made by Unofficial Members in regard to certain matters in which finance is involved."[24]

In short, while the provision that presumably prevents members of the legislature from introducing or initiating finance-impacting legislation has

been part and parcel of Ghana's constitutional and parliamentary tradition dating back to the colonial period, the highly restrictive interpretation given to it by Parliament is not fully supported by applicable historical precedents. More important still, is the fact that, unlike the colonial Legislative Council, which was not a representative or elected body and was, in any case, formally subordinated to the colonial Governor, Ghana's current Parliament is a fully democratic and representative body within a sovereign republic. At the very least, the modern parliament's superior democratic composition and legitimacy must entitle it to substantially *more* powers than its colonial ancestor, not less.

Additional support for a more liberal or less restrictive reading of article 108 comes from the fact that the Constitution confers on the President the power of a veto, pursuant to which the President may refuse his assent to a bill passed by Parliament. If article 108 was intended to give the President a *de jure* or *de facto* monopoly in the initiation of bills and thus *practically* prevent Parliament from considering a bill initiated by a person other than the President or one of his Ministers, there would be little reason to confer on the President a veto power over bills passed by Parliament, as the President will, in that event, be given a veto over bills he himself will have caused to be introduced in Parliament.

Interpreting article 108 correctly—as allowing MPs the right to originate and introduce bills in their own names except "taxing" and "spending" bills—will not only restore MPs to their rightful role as legislators in a system of checks and balances, it will also make for *responsible* representation in Parliament by affording MPs the opportunity to develop

and put forth their own constructive legislative proposals or alternatives to aspects of existing or proposed government policy with which they might disagree. This, in turn, should give rise to a reasonable expectation that the parliamentary opposition would act constructively by offering their own concrete legislative proposals for the consideration of Parliament, rather than merely oppose or act indifferently toward the Government's proposed bills. Indeed, the current interpretation of article 108, which would require MPs to consider and vote only on bills introduced by the Executive, effectively prevents individual members of Parliament from coalescing around policy issues and developing legislative agendas on the basis of interests other than party affiliation (or self-interest).

Because article 108 leaves it to the Speaker's ruling (“in the opinion of the person presiding”) to determine whether a non-government bill or amendment may be allowed, it is possible at a future time that a Speaker may interpret article 108 less restrictively and thus allow certain private members' bills or amendments to stand. Relying on this prospect is, however, a rather chancy proposition. The more reliable route to reform in this case would be to simply repeal article 108, and thereby enable MPs, acting individually or in conjunction with one another, to originate and sponsor legislation in their own name. Since no bill can constitutionally become law unless it has received, first, the support and approval of a majority of Parliament and, then, the assent of the President, it makes little sense to further prevent a member of Parliament from putting forth policy ideas and proposals for legislative consideration merely on the ground that such proposals, *if* enacted into law, might impose some expenditure

obligations on the State. Repeal of article 108 will not disturb the President's sole power of legislative initiative with regard to the *national budget.* Under article 179(1) it is the President—and only the President—who "shall cause to be prepared and laid before Parliament at least one month before the end of the financial year, estimates of the revenues and expenditures of the Government of Ghana for the following financial year."

Article 78. Article 78, clause 1, requires that a majority of the President's ministers be selected from among Members of Parliament. Read in conjunction with clause 2 of the same article, which grants the President the power to appoint "such number of ministers as may be necessary for the efficient running of the State," article 78(1) confers on the President, in effect, the power to appoint any MP—as well as any *number* of MPs—as Minister of State. Article 78 reinforces Parliament's subordination to the President in a variety of ways.

First, MPs who double as Ministers are, in principle, duty-bound to support and defend the policies, programs and actions of the Administration when these come up for public scrutiny or criticism. This shifting of MP's loyalties is reinforced by the fact that, under the Constitution of the Fourth Republic, the Executive is not "responsible", individually or collectively, to Parliament. Ghana's Parliament cannot cause the fall of the Government or the removal of a Minister through a "no confidence" or censure vote (art. 82(5)). Ministers hold their office solely at the sufferance of the President (art. 81). Thus, where an issue that is dear to the President comes up for a vote in Parliament, the President can reasonably count on the support and

vote of all of his Minister-MPs. In fact, because it empowers and enables the President to reward *any* MP with a ministerial office at any time, article 78 gives the President substantial political leverage not only over current Minister-MPs but also over backbenchers (i.e., current MPs who hold no ministerial office), especially those of the President's party but also independents, who may be led by the prospect of a ministerial appointment to demonstrate loyalty to the President by their conduct in Parliament.

Besides causing MPs of the President's party to align their interests with the President's, article 78 helps to further enfeeble Parliament as a countervailing institution by enabling the President to "poach" the best and most influential MPs to the side of the Executive. The President's "gain" in this regard, namely his ability to build and strengthen the capacity of his cabinet and administration by selecting some of the best talent in Parliament, represents a "loss" to Parliament, as MPs who are appointed as Ministers tend to place their obligations and commitments as Ministers over and above their responsibilities to the institution of Parliament. Conversely, article 78 ties the President's hand as to where to draw the majority of his Ministers. The President *must* select a majority of his Ministers from among the current class of MPs, without regard to the quality of that pool. If a President is dissatisfied with the choices available to him in the current pool of MPs, he can draw on more substantial talent from outside Parliament only by offering more token ministerial appointments to MPs in order to satisfy the "MP majority" constraint imposed by article 78. The net result is an increase in token ministerial appointments (for MPs) and concomitant expansion in the overall number of Ministers.

The idea of Ministers serving simultaneously as MPs is not a novel proposition. In fact, in the pure/Westminster form of the parliamentary system, Ministers must be drawn entirely from the membership of Parliament. But under that system, too, Ministers are responsible to the legislative assembly; the legislature can cause or threaten the dissolution of the cabinet and force new elections by passing a vote of no-confidence. This parliamentary check on the Executive is absent from Ghana's constitution. In that regard, the Ghana Constitution is not a "true" hybrid. Starting with a basically presidential framework, the Constitution borrows a feature of the parliamentary system (ministerial office-holding by MPs) that strengthens the hand of the President vis-à-vis Parliament, but fails to balance that with the related Westminster feature of Ministers/ Government being responsible to Parliament for their survival in office. The net effect of the Ghanaian "hybrid" is a Parliament that is available to serve the purposes of the President, including supplying the majority of the President's Ministers, but gets no countervailing power in return.

It is difficult to discern any other logic or objective behind Article 78(1) other than to assure the President a supine legislature, one that is dominated by his appointees or loyal backbenchers.

The Problem of Prior "Existing Law". The real and full scope of the powers of Ghana's President cannot be gleaned or deduced from the literal text of the Constitution. The Constitution declares the President to be "the Head of State and Head of Government and Commander-in-Chief of the Armed Forces" (art. 57) and vests in the holder of that office the "executive authority of Ghana" (art. 58). Other parts of the Constitution designate the

President as the appointing authority over various constitutional and political offices; and still others confer more specific authority on the President to perform certain stated functions (e.g., to determine the salaries and related allowances and benefits of certain specified office holders). But even the aggregate of all the references in the constitutional text to the presidency and its various roles fails to capture the full measure of the president's substantive powers. To appreciate the full breadth of the powers of the contemporary Ghanaian president one must look beyond the text of the 1992 Constitution to volumes of pre-Fourth Republic *statutes* and other enactments, some of them with a lineage going back to the colonial period, that were in force and became part of the "existing law" at the time of the transition to the Fourth Republic.

The contemporary Ghanaian presidency is not a spontaneous creature of the 1992 Constitution. The occupant of the office is, in reality, merely the present-day successor to an office that has been existence in one form or another and under varying titles for as long as the Ghanaian state has existed. Contrary to the transformative or "revolutionary" rhetoric that has often accompanied the overthrow of one regime or the transition to a new one, there has in fact been a remarkable degree of continuity, legally at least, between Ghana's various regimes. In particular, while each new constitution or regime change has reconstituted the *form* of the Executive, the authoritative legal underpinnings—and thus the *substance*—of executive power in Ghana have survived these regime changes largely undiminished. In fact, every newly-constituted republican president of Ghana has inherited and retained from the previous constitutional order, whether military or civilian, the bulk of the cumulative authority vested in

the holder of the highest executive office under pre-existing laws, including military decrees and other subsidiary legislation.

In the 1992 Constitution, this cumulative outcome has been accomplished by a combination of two "holdover" provisions, namely article 11(d) of the Constitution and article 33(a) of the First Schedule to the Constitution. Article 11(d) affirms the continuing validity in the Fourth Republic of all "existing law," which necessarily includes all Acts of Parliament, military decrees and subsidiary legislation enacted by past regimes that are still on the statute books. Additionally, article 33(a) of the First Schedule transfers from the P.N.D.C. to the President of the Fourth Republic the cumulative powers, authority and prerogatives previously vested in the PNDC under the laws of that regime.

This is not a novelty of the 1992 Constitution. Our last three republican constitutions had provisions roughly identical to current article 11(d) and article 33(a) of the First Schedule. In the 1979 Constitution, for example, the respective holdover provisions were article 126(d) and article 12(a) of the First Schedule to that constitution, and roughly identical language is found in article 4(d) of the 1969 Constitution and article 14(a) of the First Schedule to that constitution. Article 40 (d) of the 1960 Constitution also preserved all "enactments in force immediately before Republic day."

The cumulative legal effect of this routine practice of "carrying over" the entire corpus of pre-existing statutes and subsidiary legislation from one regime to the next is a president of the Fourth Republic the bulk of whose substantive day-to-day powers and prerogatives are derived from statutes

that date back to the administrations of Nkrumah, the N.L.C., Busia, Acheampong/Akuffo, Limann, and Rawlings of the P.N.D.C. era. The continuity in the substance and content of executive power in Ghana indeed goes all the way back to the initial transition from the colonial Governor and Governor-General to the installation of our first Prime Minister and, later, our first President. Notably, the Constitution (Consequential Provisions) Act, 1960, which came into effect contemporaneously with the 1960 Constitution, provided that, in regard to powers conferred by pre-republican enactments, the President of Ghana, upon the coming into being of the First Republic, stepped into the shoes of the colonial Secretary of State, the Governor, the Governor General, and the Prime Minister. Additionally, pursuant to that statute, any reference in a then pre-existing enactment to “Her Majesty the Queen” was to be treated as a reference to the President. This continuity in the statutory and administrative basis of executive power in Ghana means that the contemporary Ghanaian presidency is, to all intents and purposes, a lineal descendant of the office of colonial Governor.

By far, however, it is Ghana's First Republic that has had the greatest and most enduring influence on the conception and character of presidential and executive power in the state. There are a few reasons for this.

First, the office of President of Ghana was first conceived and installed under the 1960 (First Republican) Constitution, and the mark placed on that office by its first occupant has served, consciously or unconsciously, as the referent for much of our present-day conceptions of executive or presidential power. This is not unusual. In the history of modern

government, the precedents, traditions and conceptions of governance, even the style of leadership, introduced by or associated with founding leaders have tended to endure and become part of a nation's constitutional ethos. For example, the precedent set by the first president of the United States, George Washington, in deciding not to hold office for more than two terms started the American tradition of a two-term limit on the tenure of the President, a tradition which did not become law until the Twenty-second Amendment to the United States Constitution was adopted in 1951.

It is equally the case in Ghana, as the late political scientist and politician Yakubu Saaka observed at the dawn of the Fourth Republic, that "the most important facets of Ghanaian politics . . . have been conditioned by the Nkrumah period."[25] Professor Saaka specifically mentioned "perceptions of the presidency" as one of those salient features of contemporary Ghanaian politics that bear the imprint of the First Republic.

The 1960 Constitution in fact conferred on the First President extraordinarily wide powers and, correspondingly, reduced the powers of the National Assembly.[26] As President Nkrumah sought to explain at the time, "The increased authority given to the President is to enable him to exercise the positive leadership that is so vital to a country seeking to pull itself by the bootstrap. . . There are some jobs in the world that can be done by a committee, others need a managing director."[27] Presidential supremacy within the Ghanaian constitutional order was thus defended at its inception as "necessary in order to allow opportunity for decisive action in pushing forward our development."[28] The Constitution of the First Republic was accordingly designed as an enabler and accelerator of strong

undivided executive power, but not also as a regulator of such power. Subsequent constitutions may have toned down the excesses of this "original sin", but they, too, have remained far more enabling than regulatory.

Secondly, the formation, growth and development of the office of President and of presidential and executive power in Ghana generally owes much to a number of influential pieces of legislation enacted by the Parliament of the First Republic. Many of these early statutes dealt with the organization and structure of the machinery of government. Notable among these "machinery-of-government" statutes were the Presidential Affairs Act, 1960, the Cabinet and Ministers Act, 1960, the Civil Service Act, 1960 , and the Consequential Provisions Act, 1960. Many of these early statutes and others of a more departmental or function-specific nature conferred on the President substantial authority over the administration of the country. While some of the most obnoxious of the laws passed by the First republican parliament, such as the Preventive Detention Act, did not survive the fall of the Nkrumah government in 1966, a substantial number of current laws and executive and statutory instruments on the basis of which contemporary presidential and executive power is exercised in Ghana have a 1960's origin or antecedent.

Outside of the First Republic, the various military regimes have also left behind a substantial amount of statutory legacy, in the form of NLC, NRC, SMC and AFRC Decrees and PNDC Laws. Given the generally "muscular" and authoritarian character of military regimes and the fact that they all governed without the benefit of a representative legislative

body, the cumulative effect of many (though not all) of these military decrees has been an accretion of authority and power in the executive and administrative half of the State—power that has typically been inherited by the presidency and ministry once a civilian constitutional administration has been installed.

Admittedly, as the Constitution is the supreme law of the land, all "existing laws" are necessarily subject to the various limitations enshrined in the constitution. Even so, existing laws, like new legislation, carry with them a judicial presumption of constitutionality and, thus, remain valid until judicially overturned or legislatively repealed. In reality, a good many of such pre-existing laws, especially those that are not easily recognizable as authoritarian in character, have endured, deriving much of their contemporary legitimacy from longstanding usage, habit, inertia and common acceptance. In fact, once a statute or statutory delegation of executive authority has achieved a degree of institutional and bureaucratic entrenchment as a result of longstanding usage, it tends to be treated as if it were as almost a part of our constitutional custom. In short, in order to fully account for the legal basis of the power and authority of the President of the Fourth Republic we must undertake a comprehensive review of all of the "existing laws" held over from a supposedly bygone era.

Conventions. *Selection of Speaker*. Not all of the President's dominant powers in relation to Parliament are granted expressly or impliedly by the constitution or a statute. Many exist as a matter of convention or routine. A notable example in the Fourth Republic concerns the selection of the Speaker of Parliament. By the terms of article 95(1) of the Constitution, the

Speaker is required to be elected by the members of Parliament. Under the Fourth Republic, it has become customary for the ruling party in Parliament to cede the selection of the Speaker to *the President.* This is particularly significant in light of the fact that the Speaker of Parliament is not a mere referee or enforcer of parliamentary procedure and rules; the Speaker—at least our Speaker—is a crucial player in the business of Parliament, exercising powers under the Standing Orders of Parliament that can be used to accomplish substantive and politically significant ends. For example, it is the Speaker, as presiding officer of the House, who must determine whether a bill, motion or amendment proposed by a Member of Parliament infringes article 108 and is, therefore, not a proper matter for legislative consideration. Again, under the Standing Orders, the Speaker occupies an important gatekeeper role with respect to the committees of the House, as it is she who must decide whether a matter should be referred to a committee for its consideration. In these various ways and others, the Speaker is able, at her will, to exclude certain substantive issues from the legislative calendar and the business of the House. The President's *de facto* selection and removal of the Speaker is thus a matter that ought to receive some attention in the process of constitutional reform.

Cross-Branch Appointments. Another convention that enhances the power of the President vis-à-vis Parliament is the practice of Presidents appointing MPs to serve on—and thus draw sitting allowances as members of—the governing boards of statutory corporations, agencies and commissions. Such cross-branch appointments raise troubling conflicts of interest, as MPs, who are supposed to maintain oversight of agencies and corporations in the public sector, are themselves offered positions of

personal profit on the boards of these same public bodies. In addition, the practice complicates the already over-politicized nature of corporate governance in the parastatal sector—a sector notorious for its loss-making state enterprises, waste, mismanagement and corruption. Instructively, notwithstanding reported financial scandals and various other crises in state enterprises, no committee of Parliament has initiated or held hearings or inquiries into any of these matters.

Rebalancing the Relationship between the President and Parliament

A system of credible checks and balances that includes a strong and effective Parliament should be a principal goal of any effort to reform the 1992 Constitution. Reconfiguring the president-parliament relationship will require the amendment or repeal of various provisions relating to the Executive and Parliament. We have already discussed the repeal of article 108.

With regard to the selection of a majority of the President's Ministers from among members of Parliament, we might consider one of the following two options: (1) revert to the pure presidential system of government as existed under the 1979 Constitution, in which event a person appointed as a Minister of State cannot simultaneously serve as a member of Parliament; or (2) amend article 78 to remove the requirement that the President must appoint a majority of his Ministers from amongst members of Parliament and, instead, permit (not require) the President to appoint

only a small *minority* of *Cabinet* Ministers from Parliament.

There is, of course, a third option, which is to return to the Westminster parliamentary system as under the 1969 Constitution. I have excluded that option from consideration for two reasons: first, under that, the entire line-up of Ministers will be MPs drawn from the majority party or coalition in Parliament, thus making Parliament more of a rubber-stamp for the Executive than even under the current arrangement; and second, returning to the Westminster model brings with it the risk that certain politically important ethno-regional groups may be"excluded" from the Government (as measured by the composition of ministerial appointments) if the majority party in Parliament does not include a single MP from a particular ethno-regional community. Given the ethnic patterns of voting and support for certain political parties in certain regions of the country, this outcome is not merely hypothetical. In fact, precisely that outcome occurred during the Second Republic, when there was no Ewe in the Progress Party (PP) government, as none of the Ewe candidates of the PP in the 1969 elections won election to Parliament, thus providing the PP Government with no PP Ewe in Parliament to appoint as Minister.[29] Thus, during the Second Republic constitutional design conspired with a pattern of ethnic party identification and bloc voting to elect a majority party in Parliament that had no ethnic Ewe to appoint as Minister.[30] In light of the fact that, in contemporary Ghana the ethno-regional composition of ministerial appointments has become a critical popular measure of a government's commitment to "equality" and "inclusion" for key ethno-regional groups, including minorities, a constitutional framework that is insensitive to this concern for ethno-regional "representation" at the

Ministerial level and, thus, makes possible a repetition of the 1969 scenario must be deemed to have failed an essential social and political test *in the contemporary Ghanaian context*. The other two proposals do not suffer the same disadvantage.

Under the first proposal, the President is still free to draw ministerial talent from within Parliament. However a person elected to Parliament who is subsequently appointed as a Minister or deputy Minister must vacate their seat in Parliament. The alternative (second) proposal modifies the current system so that a majority of the President's Ministers would be drawn from *outside* Parliament, while the *possibility* is left open for a limited number of MPs to serve simultaneously as Ministers but only as *Cabinet* ministers. The logic of this latter "modified fusion" is to untie the hands of the President to enable him to draw his ministerial team from *all* sources, including Parliament, but also limit the number of Ministers who can double as MPs in order to ensure that the formation and composition of the President's Government is not accomplished at the expense of the institutional independence and effectiveness of Parliament.

Importantly, my proposed "modified fusion" does not *require* that the President appoint any MP as a Minister; it merely *allows* or permits a president to do so. This modification in the current regime becomes crucial in the event of "divided government," when the President's party does not control a majority in Parliament. Although Ghana has had no experience of divided government, that prospect remains a real one under the current constitution, especially given the requirement that a "run-off" election for president be held when the first round of presidential elections have failed

to produce a winner with an absolute majority (i.e., more than 50%). Where elections produce a Parliament and a presidency controlled by two rival parties, a constitutional provision that required the President to select a majority of his Ministers from—and with the approval of—Parliament (a Parliament dominated or controlled by MPs of the opposition parties) would make it extraordinarily difficult, if not impossible, for the President to form a workable Cabinet or government, or, in the best of cases, force the President into a "power sharing" arrangement of uncertain stability or utility. In light of this possibility of "divided government," it is best not to impose on the President a constitutional requirement to choose some Ministers from amongst current MPs. If, however, the exercise of that power is made optional, instead of mandatory, its use by the President will be dictated, flexibly, by political circumstances. On the other hand, a mandatory exclusion of MPs from the President's Government (as in the pure presidential system) may not be necessary either, as long as the negative impact on Parliament of appointing MPs as Ministers is substantially minimized by restricting the number of such dual-office holding MPs to the barest minimum. In fact, under the proposed "modified fusion" the few MPs who may hold office as Ministers would be eligible only for appointment to *Cabinet* positions, not to any ministerial position outside the Cabinet—and not to a position as a deputy minister or regional minister. This additional constraint is intended to ensure that presidents will not select MPs as Ministers unless they need them to fill a *key* role in the administration. In order to substantially restrict the number of MP-Ministers, another constraint could be introduced, this one to set the maximum number of Minister-MPs at, say, a specified fraction of the size of the Cabinet (e.g., not more than one-third of cabinet, which, given the

size of the Cabinet as provided in article 76, means a number not more than 6).

To further constrain or discipline presidential appetite for patronage appointments, the following proposed amendments should be considered.

First, a limit must be placed on the total number of Ministers and deputy Ministers, not just Minister-MPs. Since the constitution already puts the size of the cabinet at no more than 19, the size of the overall ministerial pool (that is, counting both cabinet and non-cabinet Ministers) may be set at a number that is a reasonable multiple of the size of the cabinet, e.g., no more than twice the size of the Cabinet. Second, the position of Minister "without portfolio" or Minister of State "at the presidency" must be abolished. Third, the constitution must require that the establishment of any new Ministry (other than a ministry named in, and thus contemplated by, the constitution) be done by a specific Act of Parliament, not by presidential fiat. This amendment would supersede the existing legislation (i.e., the Civil Service Act, 1960, as amended) which allows the President to establish, abolish, or re-designate a Ministry at his pleasure. A Ministry must be established only to carry out a designated, statutorily-defined "executive" or administrative function, which must include the execution of an identified portfolio of statutes and regulations. Ministries must not exist that do not have any designated statutes to enforce or implement. Fourth, the practice of cross-branch appointments, whereby MPs are appointed to serve on the boards of public boards, commissions or agencies, must be abolished. In fact, in light of the parliamentary conflict-of-interest provision of article 98(2), which prohibits (except with the

informed permission of the Speaker) MPs from holding "any office of profit or emolument, whether private or public and either directly or indirectly" that would "prejudice the work of a member of Parliament", it seems incongruous that MPs are routinely appointed by presidents—and presumably permitted by the Speaker--to serve (and receive allowances) in various extra-parliamentary positions in the public sector. A bright-line abolition of this practice is recommended. Furthermore, in order to develop a meritocratic ethos in the public corporate sector and shield the management of SOEs from needless political meddling, as well as ensure technocratic and managerial continuity in the public sector, the top and middle management of public corporate enterprises must be recruited by an open competitive process administered by an independent body (e.g., the Public Services Commission) acting in conjunction with the respective boards of directors. The President should be limited, at best, to appointing a non-executive chairman of the board or a few non-executive directors of the board to represent the interest of the Government.

Making Parliament into an effective institution of countervailing power (or "horizontal accountability") within Ghana's constitutional system will require additional changes in the internal workings of Parliament itself. These may be accomplished either through revisions to the Standing Orders of Parliament or by constitutional amendment. First, committees of Parliament must be given the power to initiate hearings or investigations into matters of public concern without having to obtain the prior permission of the whole House or a referral from the Speaker, as is currently the case. The Speaker's gatekeeper role in this area is particularly inappropriate and operates as a counter-democratic fetter on the right of the

elected representatives of the people to attend to the people's business through appropriate oversight. Secondly, instead of the current practice where Ministerial nominees are vetted by an “omnibus” Appointments Committee, Parliament must use sector-specific committees in vetting such nominees. This also means that a nominee who is approved by Parliament to a Ministerial office must be deemed to have been approved only for the specific office to which he was originally appointed. Thus, Ministers who are subsequently reassigned (in a reshuffle) to ministries other than those for which they were originally nominated and approved by Parliament must be required to go through fresh parliamentary approval. Thirdly, in order to constrain the President's use of purely partisan criteria in the selection or appointment of persons to *independent constitutional* offices (including the superior courts, CHRAJ, Electoral Commission, Auditor-General), Parliament must be required to approve such appointments by a *super-majority* (e.g., two-thirds), instead of a simple majority.

Finally, in light of the previous discussion regarding the effects of prior existing law on the powers of the Executive, a comprehensive review of the existing laws of Ghana, covering statutes and subsidiary legislation, must be incorporated into any process of reforming the Constitution. Reform of executive power is, in effect, reform of the state itself; not just how it is ruled from the top by politicians but also how it is administered at layers somewhat removed from the top. Ghana's imperial presidency will not be reformed merely by reforming the “office of president” alone. A good deal of the institutional inertia that frustrates progressive change and reform in Ghana in fact lies hidden beneath the surface of high office,

embedded in the practices and routine of the civil service, which happens to be where "existing law" is most deeply entrenched and often *beloved*.[31]

At a minimum, Parliament must be constitutionally required to review, within a stated time period, all "existing laws," and to repeal or rewrite all of such laws that do not comport with the letter or spirit of the Constitution. The Law Reform Commission should be required to assist Parliament and the Executive in this undertaking. This process of comprehensive law reform must be guided by certain principles. First, all existing statutes that confer on the President or a Minister of State open-ended discretion (e.g., "as he deems fit" or "as he may prescribe," "as he may, in his discretion, determine") in the exercise of delegated authority must be rewritten to remove the subjective element and to require, instead, that any exercise of discretion is appropriately constrained by objective criteria that satisfy the requirements of "administrative justice" or "due process" (e.g., notice, decision in accordance with prior-published rules, standards and procedures; an opportunity to be heard; appeal from adverse decision; timeliness of decision; written reasons, etc.). Secondly, existing laws (including subsidiary legislation) enacted by military regimes must be reviewed and re-enacted as Acts of Parliament or, if found to be no longer needed, repealed. Until such laws are rewritten or repealed, they should not be treated as being on an equal constitutional or juridical status with laws enacted by democratically representative legislatures. Instead, such authoritarian-era laws, because they were enacted without the legitimacy of democratic representation and deliberation, must be accorded a rank in the hierarchy of laws that is constitutionally inferior to laws enacted by democratically representative legislatures. In terms of judicial doctrine,

this would mean that such laws, when challenged in court, should meet with a *presumption of unconstitutionality*, and thus reviewed with a degree of judicial skepticism far stricter than would be usual deference accorded normal legislation.

The Judiciary, Rights and Access to Justice

It is trite to call the judiciary—and for judges to regard themselves as—the "guardians of the Constitution." This characterization of the judiciary is, however, an oversimplification, if not an exaggeration. By virtue of its power of judicial review, the judiciary, notably the Supreme Court, undoubtedly occupies an essential role in Ghana's constitutional scheme. But the power to void an act of the legislature or the executive as unconstitutional is a "reactive" power; the courts cannot, on their own volition, call public officials to order unless their jurisdiction has been properly invoked by an appropriate plaintiff. The promise of judicial review is thus as dependent on citizens' vigilance and initiative as it is on judicial fidelity and commitment to constitutionalism. Guardianship of the constitution is therefore a collective charge, not a duty judges must or can bear alone. What sets the judiciary apart, however, is that, in the end, it is their reading and their meaning of the law as applied to a given case that represents the authoritative and final meaning of the law. The judiciary may not be *the* (sole) guardians of our constitution, but their role as final arbiters of constitutional meaning makes them indispensable to the project of constitutionalism. Concerns about judicial independence and accountability therefore rank among the most important issues

constitutional framers and reformers must address.

A. Strengthening Judicial Independence and Accountability

On top of their traditional adjudicatory functions in mundane criminal and civil matters, Ghana's superior courts are assigned a special role in the interpretation and enforcement of the Constitution. Under the Constitution, the power of "judicial review," or the power to interpret disputed provisions of the Constitution and to void any challenged act that is found to be inconsistent with the Constitution, is vested exclusively in the Supreme Court. But the High Court, which occupies the first rung of the three-tier structure of superior courts, has exclusive original jurisdiction to entertain suits alleging a violation of the Constitution's "bill of rights" (comprising chapter 5 of the Constitution). In effect, the Supreme Court serves, among other things, as the country's sole "constitutional court," except that suits to enforce a provision of the Constitution's bill of rights must commence at the High Court.

As with judiciaries in other democratic states, the Ghanaian judiciary enjoys certain basic constitutional guarantees of judicial independence. Once appointed, judges in Ghana do not hold their offices at the sufferance of politicians; they serve until they have reached a fixed retirement age and may be removed from their judicial posts (for malfeasance) only after a long multilayered process of impeachment. Additionally, the salaries and other benefits to which a judge is entitled may not be varied to the judge's disadvantage; the jurisdiction of the courts may not be diminished or "ousted" by the executive or legislature; and the preparation and management of the judiciary's annual budget falls within the purview of

the Chief Justice's administrative authority, and not that of the Minister of Finance. These provisions and others in the Constitution give the Ghanaian judiciary a good measure of *institutional* independence. Additional reforms are, however, necessary in order to close existing gaps in the twin areas of judicial independence and accountability.[32]

First, article 128(1) of the Constitution must be amended to specify a numerical limit or ceiling to the number of justices of the Supreme Court. Currently the Constitution only provides that the Supreme Court shall consist of the Chief Justice and "not less than nine other Justices." The failure to cap the size of the Supreme Court leaves a President free to appoint any number of Justices to the Supreme Court, as long as he can garner the approval of Parliament. This open invitation to a President to engage in "court packing" represents a danger to the institutional independence of the Supreme Court. Although a constitutional gap of this kind could be remedied by legislation, as has been done with the Supreme Court of the United States,[33] a constitutional amendment might be preferable in Ghana's case. This should be accomplished preferably by means of a non-entrenched provision, so that a future need for a change in the size of the court's membership can be effected legislatively (by super-majority) without the need for a constitutional referendum.

Second, the President's power to appoint Justices of the superior courts (i.e., the Supreme Court, Court of Appeal and High Court) must be subject, in each case, to approval by a super-majority vote (say, two-thirds) of Parliament. Currently only the appointment of Supreme Court-Justices requires the approval of Parliament, and, even then, only by a *simple*

majority of Parliament. Appointments to the Court of Appeal and High Court are made by the President "on the advice of the Judicial Council," without parliamentary approval.[34] It is not clear what real influence or initiative this "advice" function gives the Judicial Council in Ghana's judicial appointment process. What appears certain, however, is that the council's advice function falls far short of the veto-like "advice and consent" role played by the U.S. Senate in federal judicial appointments in the United States and, thus, does not represent a credible countervailing check on the President's appointment power in this area. Given the fact that the High Court in Ghana has original jurisdiction in constitutional "bill of rights" cases, which cases typically involve challenges to executive or legislative action, it is important to ensure that each presidential appointment to the High Court (and, for that matter, to the Court of Appeal) is subject to prior parliamentary scrutiny. Furthermore, requiring that such approval be rendered by a super-majority, instead of a simple majority, of Parliament will minimize the prospect of single-party control and appearance of partisanship in judicial selection. With this proposed amendment, there would be a uniform method of appointment for all judges of the superior courts.

Uniformity is also warranted in the mandatory retirement age of judges. Currently, justices of the Supreme Court and Court of Appeal must retire at 70, while High Court (and Regional Tribunal) judges retire at 65. It is hard to discern a rational or sound policy justification for the difference in the mandatory retirement age of High Court judges and that of judges on the Court of Appeal and Supreme Court. In fact, the ability to extend by five more years the judicial career of a High Court judge who is nearing

mandatory retirement by appointing him or her to the Court of Appeal or Supreme Court is a power (possessed by a President) that could be used to influence improperly certain judges of the High Court.

Third, strengthening judicial independence and accountability within Ghana's constitutional framework also calls for reform of the power of the Chief Justice within the judiciary hierarchy, as certain powers customarily exercised by Ghana's chief justices represent a danger to the *decisional* independence of other judges. Notably, the established practice whereby the chief justice empanels fewer than the full bench of the Supreme Court to hear and decide a case before the court must be abolished. The constitutional authority for this practice is dubious at best. Some have inferred this "empaneling" power from the fact that the Chief Justice is constitutionally the administrative head of the judiciary as well as the presiding justice of the Supreme Court. Neither of these roles, however, implies an empaneling power on the Supreme Court. Although the Chief Justice is the presiding justice of the Supreme Court, his or her role in this regard is properly understood as that of a *primus inter pares*, a "first among equals" not a "boss" seized with the power to determine who among his or her judicial peers on the Supreme Court would sit on a particular case and who would not.

Article 128(2) has also been cited as a possible textual authority for the chief justice's empaneling power. This provision states that the Supreme Court shall be "duly constituted for its work by no less than five Supreme Court Justices" (seven when it is asked to review a case it has previously decided). But nothing in the provision empowers the Chief Justice to

select 5 justices out of membership of the Court to hear and decide a given case, excluding from the case other Justices of the Court. Properly understood, article 128(2) is merely a *quorum* provision, a provision that simply specifies the minimum number of Justices who must be available and present in order for the Court to lawfully exercise its jurisdiction. In other words, if for one reason or another (e.g., sickness, conflict of interest, or temporary absence) certain justices of the Supreme Court are unable to participate in a case, article 128(2) provides that the Court can still be properly constituted to determine the matter if at least 5 Justices of the Court are available.[35] Article 128(2) does not say or imply that the Chief Justice may proceed to select only five justices to hear and decide a case even when the rest of the Justices of the Supreme Court are available and not otherwise disqualified from participating in a particular adjudication.

The current practice, whereby the Chief Justice is able (without guidance or restraint from any binding law) to empanel fewer than the full bench of the Supreme Court to hear a case leaves the chief justice free to indulge in "forum shopping" on the Supreme Court—that is, assigning a given case to a particular panel of judges based on a foreknowledge or an informed guess as to how those judges might decide the case. The respected English legal scholar PS. Atiyah described as "disturbing" a similar power held (formerly) by the Lord Chancellor "of allocating appeal cases to differing panels in the Court of Appeals, or even in the House of Lords."[36] As he rightly observed, "The power to choose (in effect) which judges will hear which cases is plainly one which can be misused, because it will often be known that a certain judge has at least a prima-facie view of the point of law to be decided on the appeal."[37]

At the extreme, an empaneling power of this kind can be used by a Chief Justice to marginalize a duly appointed justice of the Supreme Court and effectively disable that justice from discharging his or her appointed duty as a jurist—essentially making a Justice's appointment subject, after the fact, to the *de facto* approval of the Chief Justice. In light of these concerns, it is proposed that the Constitution be amended to make clear that article 128(2) is merely a quorum provision and that, barring absence or disqualification or recusal of a Justice on conflict-of-interest grounds, the Supreme Court shall sit *en banc* (i.e., as a full bench) in all cases.

The Chief Justice's additional constitutional role as the *administrative* head of the judiciary, which gives the holder of the office the power to make personnel and resource allocation decisions that significantly affect the quality of a judge's professional and personal life (e.g., transfers, assignment of office space, housing, support staff, transportation, etc.), is similarly liable to abuse in ways that could undermine the independence of individual judges, particularly at levels below the Supreme Court. It is therefore important that this power, and the discretion that comes with it, be brought within the scope of article 296 of the Constitution, and in particular subsection (c) of that provision, which requires persons vested with administrative or discretionary power to publish article 296-compliant regulations governing the exercise of such power. As currently written, article 296(c) is susceptible to a reading and interpretation that would appear to exclude the nonjudicial or administrative actions of a judge or judicial officer from the safeguards and protections specified in article 296. An appropriate amendment should clarify that judges or judicial officers are exempt from article 296(c) only when they act in a

judicial capacity, not when they exercise an administrative or nonjudicial discretionary power.

Fourth, the Constitution must impose on judges at all levels of the judiciary an obligation to provide to parties in a case, within a reasonable time after a decision in the case has been rendered, a written judgment setting forth the factual findings, legal analysis, and the reasons upon which a given decision was based. This proposed constitutional amendment would reverse a recent holding of the Supreme Court that judges are not constitutionally obligated to provide written reasons explaining the legal grounds for their judgment. Especially for defendants who may wish to appeal their criminal convictions, it seems incongruous, and arguably a violation of their right to due process, to refuse to provide them with written reasons without which they cannot reasonably be expected to file a meaningful appeal.

Fifth, the branch of contempt law known as "scandalizing the court," which allows a court to punish a person criminally for publicly expressing an opinion, including *post*-judgment comments, that the court deems damaging to the dignity of the judicial institution or a judge must be abolished in Ghana by the repeal or modification of article 19(12), which, as currently written, implicitly preserves all aspects of the common law crime of contempt, including scandalizing the court. As judges in Ghana are not democratically accountable (for good reason), an important avenue for informal democratic oversight and professional criticism of the judges and judicial conduct is lost when the threat of criminal sanction is used to discourage and inhibit public and media criticism of judicial performance.

The *Mensah Bonsu Case* (1995), in which the Supreme Court sentenced a newspaper columnist to a month's imprisonment (with hard labor) for allegedly scandalizing the court by writing and publishing certain scathing comments about the conduct of a justice of the court in a decided case, is illustrative of how the common law crime of scandalizing the court can be used to shield judges from public scrutiny and accountability.[38]

Lastly, the appointment of *sitting* judges to serve on boards of non-judicial public institutions or to chair or serve on commissions of inquiry must be constitutionally prohibited. Cross-branch presidential appointments involving judges endanger judicial independence. The co-opted judges risk being associated in the public mind with the policies or agenda of the appointing president. There is also the additional risk that a judge's performance or service on such commissions of inquiry might be improperly influenced by expectations of elevation to higher judicial office. Moreover, since the proceedings and findings of a commission of inquiry could become the subject of subsequent litigation and judicial review, it is best to keep active judges off such commissions. If a judicial background or substantial legal experience is needed on a commission of inquiry, that role can be equally well discharged by a retired jurist or a senior advocate.

B. Rights and Access to Justice

Ghanaians enjoy under the Fourth Republic unprecedented levels of constitutionally protected liberty and freedom, especially in the area of free speech and expression. Despite this new air of freedom, a widespread and persistent lack of meaningful *access to justice* continues to deny large

numbers of Ghanaians their equal and fair measure of the freedoms and rights which the Constitution promises to all on equal terms. For instance, accused persons in Ghana are routinely held in custody on remand for days and months, even years on end; women and girls continue to be subjected to dehumanizing treatment and servitude under various local customs and traditions; the "innocent until proven guilty" presumption remains a fiction for many criminal suspects who are subject to abusive treatment by law enforcement; agents of the state security services routinely apply heavy-handed and extrajudicial methods in their operations, often in disregard of the rights of their civilian targets; arrest and prosecutorial decisions involving public figures are frequently made selectively and on the basis of partisan criteria; and civilian law enforcement has not yet been completely demilitarized. Gross inefficiencies in the administration of justice, coupled with a marked absence of legal representation for the majority of Ghanaians, means that most instances of violation of constitutional rights go unchallenged and unremedied.

Constitutional reform in the area of rights must focus, among other things, on easing and expanding access to justice, especially for economically deprived citizens and communities. We must bring the promise of constitutional rights and justice within reach of the people who most need the protection of the law. This will require changes in multiple aspects of the justice system. For example, a major "access to justice" problem arises from the fact that our judicial system is highly formalistic, with strict procedures and formalities for filing legal complaints. Compare this to, say, India, another common-law jurisdiction, where the judiciary, when it was faced with monumental access to justice problems that threatened to

undermine public faith in the relevance of constitutional rights, initiated a series of procedural reforms in the 1970s and 1980s that gave birth to the "social action litigation" model. As India's former Chief Justice P.N. Bhagwati explained, the court "could not turn away from the claims and demands of social justice and still honor its claim to being a court for the citizens."[39] Most notably, the Supreme Court of India interpreted its jurisdiction under the Indian Constitution liberally to allow any member of the public or a social organization with knowledge of an alleged violation of the legal rights of another person or class of persons to invoke the court's jurisdiction by merely addressing a *letter* to the court (hence, "epistolary jurisdiction") about the matter.

In Ghana, on the other hand, while the Constitution appropriately dispenses with traditional common-law standing requirements in the case of constitutional claims commenced before the Supreme Court, where the claim involves an alleged violation of individual rights and freedoms the right-to-sue (standing) is limited to the victim of the alleged violation, and the complaint must be filed with the High Court and in proper legal form. Procedural innovation and simplification along the lines of India's epistolary jurisdiction should be seriously considered in Ghana as well, preferably through appropriate constitutional or statutory reform, in order to facilitate and popularize the enforcement of the bill of rights provisions in the Constitution. Thus, as with general constitutional standing under article 2, third-parties and persons acting in the public interest, not just the victims or injured parties themselves must be permitted to sue to enforce constitutional rights on behalf of individuals or groups whose rights may have been violated. Additionally, constitutional rights enforcement in

Ghana would be greatly benefited by a constitutional provision that specifically authorized a court to make an order of monetary compensation against the State or any person responsible for the violation of a fundamental rights or freedom. Courts, however, must not be allowed to award costs against unsuccessful petitioners or plaintiffs in rights enforcement cases, unless the court determines the suit to be intentionally vexatious or frivolous.

The current allocation of jurisdiction, which confers on the High Court exclusive original jurisdiction in the enforcement of the Fundamental Rights provisions of the constitution, is also bound to limit access to justice and human rights enforcement in a country where there are fewer than 100 High Courts branches, nearly all of that number located in the urban and peri-urban parts of the country. The Constitution must require that either a High Court or a High Court judge be available in every district of Ghana to hear bill-of-rights-based cases or else confer on "inferior" or lower courts (i.e., circuit and district courts) concurrent original jurisdiction to entertain and adjudicate constitutional rights claims, at least when such claims are raised as a defense in the course of an ongoing criminal prosecution.

One of the many factors that account for the persistent deficit of citizen-initiated constitutional enforcement in Ghana is the paucity of "public interest" lawyers and the generally underdeveloped tradition of public-interest lawyering or social-action litigation within the legal community. This substantial deficit of rights-based legal representation has created a phenomenon of "rights in search of plaintiffs," and part of the challenge of progressive constitutional reform in Ghana must be to innovate around this

social reality. One idea is to shift the burden and initiative of enforcing certain rights from private citizens to the *government* by reformulating such rights as affirmative obligations or duties that governments must perform without demand. An example of a right that lends itself to this mode of "proactive" governmental self-compliance is the "right to information."

Instead of relying on a citizen-initiated demand or lawsuit as the primary mechanism for enforcing a constitutional right to information, the Constitution should impose directly on the government and its agencies an affirmative legal duty to disclose and publish periodically certain specified information relating to the governance and state of the nation's resources. For example, government could be required, as a matter of constitutional duty, to prepare and publish periodically (e.g., once or twice each year) information on the national accounts (including the level of the national debt, foreign currency reserves, GDP, etc.); the remuneration and other emoluments of the president, ministers, MPs, and other holders of high public office; asset declaration information of identified public officials; receipts accruing to the oil sector and the sources and uses of such receipts; and the regional and district breakdown of government development expenditure identified by project.

Currently, despite a textual guarantee of a constitutional right to information and the recent passage of a Freedom of Information Act, Ghanaians lack access to accurate and timely information about important matters of governance. Reformulating the constitutional right to information (which is passive without citizen initiative) as a self-enforcing

constitutional duty of the government to disclose certain information periodically (without citizen demand) would be an efficient approach to promote transparent and responsible government. To assure the factual integrity of such information, the Constitution could require, additionally, that every disclosed information be certified, first, as accurate by the Bank of Ghana, the Auditor-General and the Public Accounts Committee of Parliament.

Along these same lines, certain provisions of the Constitution's *Directive Principles of State Policy*, which are not specifically justiciable under current doctrine, could be converted into affirmative duties of government enforceable through appropriate legal action. The traditional bifurcation or division of rights into judicially enforceable "civil and political rights," on one hand, and useful but nonjusticiable "social and economic rights" is becoming increasingly anachronistic and, at any rate, reflects a conception of rights that does not answer the acute developmental needs of societies like Ghana's. A constitution such as Ghana's, that grants the state substantial enabling authority and control over national resources constrained only by an obligation to respect certain "negative" liberties of its citizens, is a constitution that does not adequately balance power with responsibility on the part of government.

While it is important to allow a government reasonable latitude in setting its own policy and program priorities, an open-ended discretion in the use of public resources, unconstrained by any binding obligation as to the ends, is hard to defend, especially in the face of a high degree of social and political consensus about the need for public "social capital" investments

in areas like education, health, rural development and environmental protection. It seems appropriate under these circumstances, particularly for an under-developed or developing country like Ghana, to make it constitutionally obligatory for the state to allocate public resources toward certain basic human development or social capital investments.

Although an affirmative constitutional obligation on the part of government to meet certain social needs will necessarily be subject to a "resource availability" or "progressive realization" constraint, the emerging jurisprudence in this area, inspired by certain decisions of the South African Constitutional Court,[40] adopts an innovative and pragmatic remedial scheme for the enforcement of socio-economic rights that requires the state to meet its constitutional obligation not in the form of entitlements to be provided to citizens on an individual case-by-case basis but through funding the provision of a designated public good on a collective basis to the plaintiff communities. Under this approach to "social and economic" rights enforcement, the state's constitutional duty would include a duty to develop and enact appropriate national legislation which commits public resources to a specific program of social investment in a given community as well as a reasonable timetable or rollout to ensure incremental progress ("progressive realization") toward addressing the claimed deprivation.[41]

The Fourth Branch Institutions: CHRAJ and NEC

In a departure from the conventional, Montesquieu-inspired tripartite organization of governmental power, constitutions of contemporary republics in Africa and elsewhere, including Ghana's, feature a set of independent state institutions that defy strict classification as legislative, executive or judicial bodies. In Ghana's Fourth Republic, these "fourth branch" institutions include the Commission on Human Rights and Administrative Justice ("CHRAJ"), the Electoral Commission, the Auditor-General, and the Media Commission. Each of these constitutional bodies is charged with carrying out, independently of the political branches, certain specialized functions that are protective of important constitutional commitments.

With regard to these institutions, constitutional reform must aim to safeguard or reinforce their independence and political neutrality while at the same time making them more effective in their assigned tasks. This will entail, first, revising the mode of appointment of the respective constitutional officeholders. Currently, the Commissioner and deputy commissioners of CHRAJ, as well as the Auditor-General, are each appointed by the President "acting in consultation with the Council of State," while the chairman and other members of the Electoral Commission are appointed by the President "acting on the advice of the Council of State." The difference in phraseology notwithstanding, the effect of these two modes of appointment is practically the same: the power to fill vacancies in CHRAJ, the Electoral Commission and the

Auditor-General belongs effectively to the President without much countervailing restraint from the Council of State, as the composition of that body is dominated by appointees of the President.[42]

Similar to the judiciary, insofar as the effectiveness of Fourth Branch institutions depends, in part, on the degree of public trust in their political neutrality and independence, it is important to ensure that the President's appointment power in respect of these constitutional offices is shared with Parliament and appropriately constrained by a requirement that any such appointment secure the approval of a super-majority of Parliament (to assure bipartisan support). Furthermore, the practice of filling a vacancy in a constitutional office by means of a "contract appointment" or an open-ended "acting" appointment is subversive of the independence of such offices and must be expressly abolished. A provision of the constitution must impose on an appointing authority a firm duty to fill a vacancy in an independent constitutional office with a substantive appointment within a specified period of time after the office has become vacant, say, 60 or 90 days.

A. Commission on Human Rights and Administrative Justice

Currently, CHRAJ has a three-fold mandate to investigate, adjudicate and make appropriate orders to remedy alleged human rights violations, abuse of office (and administrative injustice), and public corruption. This is an extraordinary load of work for a single public body to discharge with equal commitment and success. So far, the bulk of CHRAJ's activities and resources have been taken up by the human rights and administrative justice components of its multiple mandates. For a variety of reasons,

corruption has attracted only episodic attention.

It is proposed that CHRAJ be split into two separate independent constitutional commissions: a leaner Commission on Human Rights and Administrative Justice Commission ("CHRAJ II") and an Anticorruption Commission ("AC"). Separating out anticorruption from the other two mandates would enable CHRAJ II to concentrate its resources on the overlapping areas of human rights and administrative justice, while ensuring that corruption receives the necessary single-minded focus and attention it deserves from a specialized anticorruption commission. As currently constituted, CHRAJ can avoid entanglement with the knotty problem of corruption without still jeopardizing its institutional relevance or credibility, as long as it continues to use its best efforts to deal with its human rights and administrative justice portfolios. A separate Anticorruption Commission will have no choice but to focus on its sole mandate of investigating corruption cases. A separate Anticorruption Commission is especially necessary in this new era of oil wealth, with its associated problems of high corruption. It is additionally proposed that the mandate of the new AC extend to suspected or alleged corruption involving political parties and party officials, as these are easily used as conduits by governments or private sector agents engaged in public corruption.

We must also use the opportunity of constitutional reform to clarify the status of CHRAJ (both the proposed CHRAJ II and the proposed AC) within the constitutional system. Specifically, the constitutional provisions relating to these independent investigative and quasi-

adjudicatory bodies must clarify that orders made by these bodies cannot be reopened and re-litigated *de novo* in the High Court. Rather, adverse findings and orders issued by CHRAJ must be accorded the same juridical weight and status as the findings of an article 278 commission of inquiry, namely, they must be deemed to be the equivalent to the judgment of a High Court and, therefore, judicial challenges to such orders must take the form of an appeal to the Court of Appeal, where they would be reviewed on an "error of law" or abuse of discretion standard.

With respect to the initiation of investigations by CHRAJ II and the AC, a constitutional amendment is also needed to undo the effect of the decision of the Supreme Court in the *Anane Case*, in which the Court held, by a 4-to-1 majority, that CHRAJ lacked jurisdiction to initiate investigations into alleged abuse of office by a public officeholder because no formal complaint to that effect has been lodged with the Commission. The contrary position taken by Justice Date-Bah in his dissenting opinion in that case, namely, that CHRAJ (and, for that matter, the proposed CHRAJ II and AC) is empowered *suo moto* to initiate investigations into alleged or suspected abuse of office or corruption by a public officeholder (i.e., without awaiting the receipt of a formal complaint from an identifiable complainant) must be embraced as the law of the land.

The other aspect of CHRAJ's work that needs re-examination and reform concerns its remedial and enforcement powers. Currently, CHRAJ lacks independent powers of prosecution. The Constitution vests all prosecutorial power exclusively in the Attorney General, who is also a Minister of State, pursuant to article 88(1) of the Constitution. Whether

CHRAJ should be granted independent prosecutorial power or be left to rely on the prosecutorial discretion of the Attorney-General is a matter about which I am agnostic. However, in order to avoid a situation where the Attorney General, acting out of improper political motives, might use its absolute prosecutorial discretion to frustrate or undermine the work of CHRAJ (or AC), especially in the anti-corruption area, there must be some predetermined legal standards, guidelines, or official policy to govern how the Attorney General must deal with a CHRAJ recommendation for criminal prosecution. The total absence of clear legal standards to regulate how the Attorney-General generally exercises its prosecutorial discretion, especially in cases involving alleged political corruption or abuse of office, is unhelpful to CHRAJ's work and arguably also violates the spirit of article 296(a & b) of the Constitution. At a minimum, where the Attorney General rejects a CHRAJ request for prosecution, the Attorney General must be required to provide written reasons that shall be made public.

Whether or not CHRAJ or the proposed successor commissions are granted special powers of independent prosecution, the effectiveness of each of these bodies could still be substantially improved by granting them enhanced administrative and *civil* enforcement powers. For instance, in corruption or abuse of office cases, the respective bodies must be given the power constitutionally or statutorily to impose civil penalties like “disgorgement of profits” (or forfeiture of the corruption proceeds) or other forms of restitution.

B. The National Electoral Commission.

Ghana's Electoral Commission has received well-deserved commendation in many quarters for its impressive record in the area of election administration. A few problem areas, however, remain that deserve consideration in a constitutional reform project.

Among its many functions, the NEC is charged, in article 47 of the Constitution, with reviewing periodically the national electoral constituency map and making appropriate updates and revisions, primarily to capture demographic shifts in the country as reflected in national census data. Apparently acting pursuant to this authority, the NEC has followed a practice of periodically creating additional constituencies, thus adding to the total number of MPs that comprise Parliament. Thus, the number of MPs in the Fourth Republic has increased steadily to the current number of 230, and, if the current trend continues, the number of MPs will continue to grow, theoretically *ad infinitum*.

Article 93(1) of the Constitution may be read loosely as permitting this practice, as it provides only that Parliament “shall consist of not less than one hundred and forty elected members,” thus leaving the total membership of Parliament open-ended. If so, the Framers of the 1992 Constitution appeared to have anticipated an indefinite expansion in the size of each of the three branches of government; hence, no ceiling on the number of Ministers; no ceiling on the number of Supreme Court justices; and no ceiling on the number of Members of Parliament! A constitution of Ghana must be sensitive to matters of economy.

With Parliament, as with the other branches, the better policy is to place a

ceiling or upper-limit on the size of the membership. It is simply too costly a proposition and, as a practice, unsustainable in the long term, for the overall number of MPs to keep growing indefinitely. In place of article 93(1), we must return to the practice under the 1969 Constitution, article 70 of which provided that, "The National Assembly shall consist of **not less than one hundred and forty and not more than one hundred and fifty elected members**." The 1957 Constitution similarly called for a minimum of 104 MPs but also stated that "the total number of MPs shall not exceed one hundred and thirty."

Growth and shifts in population do not necessitate additions to the total number of MPs. What such demographic changes require is a periodic "reapportionment" of parliamentary seats, so that areas of the country that have registered population increases will gain seats at the expense of those areas of the country that have recorded net losses in population, without causing a net increase in the overall number of constituencies. In fact, read properly, the current article 47 enjoins Electoral Commission to do precisely that. The power vested in the Electoral Commission to periodically "alter" constituencies to reflect demographic changes is not a power to automatically *increase* the number of constituencies. Rather what that function entails is a reconfiguration of the *existing* constituencies to account for demographic shifts, without necessarily causing a net increase in the overall number of constituencies.

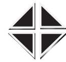
At any rate, given Ghana's economy, the country cannot afford to keep adding to the number of MPs indefinitely. Democracy is not cheap; but we need not make it needlessly expensive either. Even in the most

economically developed democracies, demographic shifts do not occasion a net increase in the number of legislators, only a reapportionment of the existing number of constituencies. For example, the popularly representative half of the U.S. Congress, the House of Representatives, has 435 members, a number set almost exactly a century ago in 1911. The population of the U.S. has grown substantially since then, but the size of the House of Representatives has not changed. What has changed, following each census, is the relative apportionment of seats or the number of seats in the House that the respective states are entitled to: states and regions of the country that have recorded net population growth have gained seats at the expense of states and regions of the country with net population decreases.

Similarly, all the Electoral Commission must do, when the country's population increases or shifts, is re-calculate the “population quota” and re-draw the existing constituency map to ensure, as the constitution commands in article 47(3), that there is roughly the same number of eligible inhabitants in each constituency—a constitutional requirement that has been grossly disregarded and turned into a limited exception rather than the general rule, resulting in problematic and unresolved cases of malapportionment and vote dilution.[43] One way to keep the EC honest in this area is to fix a maximum number for Parliament (200 MPs should be more than enough).

The Electoral Commission is also charged with ensuring that political parties comply with the laws regulating their registration, financial disclosure, and internal structures. The EC has, however, failed to enforce

this mandate, leaving the country and the public purse to be saddled with a number of nominal political parties that have long ceased to meet the statutory requirements for registration. The EC must be constitutionally required periodically to de-register political parties that are out of compliance with applicable law, after appropriate public notice and information has been provided.



Some Final Thoughts on Amendment Procedure

The provisions governing amendments to Ghana's current Constitution are contained in Chapter 25 of the Constitution, titled "Amendment of the Constitution." Chapter 25 classifies the provisions of the Constitution into two, namely "entrenched provisions" and "non-entrenched provisions," and, then, delineates the mechanics for the amendment of each class of provisions. The primary difference in the process of amendment between the two classes of constitutional provisions is that, while a proposed amendment of a provision (or portions of the Constitution) identified as "entrenched" must secure the approval of a super-majority (75%) of *voters* in a national referendum (with a required minimum voter turnout of forty percent of registered voters), amending the rest of the Constitution (the "ordinary" or non-entrenched provisions) requires the approval of only a super-majority (75%) of all *members of parliament*.

The requirement that a bill to amend an ordinary provision of the

Constitution must secure the approval of at least 75% of *all* MPs, is designed to ensure that a proposed amendment of an ordinary provision (i.e., the overwhelming bulk of the Constitution) will not pass unless it enjoys broad cross-party or bipartisan support among the main parliamentary parties. Except during the first four-years of Parliament's life under the Fourth Republic, when a boycott of the transitional parliamentary elections by the New Patriotic Party (NPP) gave the rival National Democratic Congress (NDC) practically total control of Parliament, the generally rough equality in the electoral strength and performance of the two main rival parties in recent elections suggests a high degree of improbability that any one political party alone will be able to secure the 75% vote of Parliament necessary to pass an ordinary amendment. A firm bipartisan consensus among elected politicians thus appears to be the minimum *political* condition an ordinary constitutional provision must obtain in order to pass.

The existence of a strong bipartisan consensus within the political class is, however, not enough to make constitutional reform happen if the matters involved entrenched provisions. For such amendments, the Constitution demands a high degree of political consensus within the *nation* (electorate) as a whole, not merely within the political class.

The high thresholds, both for referendum-voter turnout and for referendum-voter approval, as well as the contingencies associated with each constraint make for a very "rigid" constitution as far as entrenched portions of the Constitution go. Not only is approval by a super-majority (75%) of voters an extraordinarily high threshold to cross, but, especially

if the referendum is not held concurrently with the general elections (parliamentary and presidential), the threshold requirement of a 40% minimum voter turnout might be just as difficult to achieve. Even where the amendment referendum is held concurrently with the general elections in order to maximize voter turnout for the referendum, there is no guarantee that as many voters as voted in the parliamentary/presidential elections would cast a valid vote in the amendment referendum.

Is this a good thing or a bad thing? It depends! "Super-entrenchment" makes the entrenched provisions extraordinarily, if not impossibly, difficult to amend. Preserving the constitutional status quo with respect to an entrenched provision is a good thing if the entrenched provision is "good as it is" and a proposed amendment might (or would) worsen, not improve, things. On the other, if a currently entrenched provision is "bad" or flawed (say, from the standpoint of constitutionalism) and a proposed amendment would "improve" upon it, then super-entrenchment, insofar as it makes successful referendum-passage of a proposed amendment less likely, would have regressive effects.

Of course, the amendment thresholds are not the only variables determining successful or unsuccessful referendum passage. The issue on the ballot itself—the content of the proposed amendment—is likely to affect both voter turnout and the percentage of voter approval. However, all things being equal, amending or repealing the entrenched provisions in Ghana's Constitution faces rather daunting prospects.

Currently, the provisions of the Constitution that are entrenched include

the entire chapter on the Executive, the entire chapter on Fundamental Freedoms, the entire chapter 25 dealing with the amendment of the Constitution, and the provisions of the First Schedule to the Constitution (the so-called Transitional Provisions). Also entrenched are selected provisions relating to Parliament, the judiciary, and CHRAJ.

The blanket entrenchment of the chapter on the Executive raises interesting questions. It is primarily the provisions in this chapter that define what *type* of governmental system we have (presidential, parliamentary, hybrid, etc.), and thus what the basic character of Ghana's constitutional regime is. Was it the intention of the Framers of the Constitution to make our hyper-presidential “hybrid” more or less a permanent part of our constitutional system? Can a case be made for the wholesale chapter entrenchment of the chapter on the Executive? In light of the fact that provisions relating to the Executive (presidential power; length of term; number of Ministers; dual Minister-MP office holding; etc) are at the center of the debate about constitutional reform, the blanket entrenchment of the entire chapter on the Executive subjects the constitution reform project to a high risk of failure—if the required turnout and approval thresholds do not materialize.

Perhaps, then, the place to start the reform of the Ghana Constitution is with chapter 25—the Amendment provisions. Are the requirements for successfully amending an entrenched provision satisfactory or too rigid? Does the Constitution currently “over-entrench” (i.e., entrenches provisions that should not be entrenched) or “under-entrench” (i.e., entrenches too few provisions leaving out others that deserve to be

entrenched)? On what principled basis is a determination to be made as to what provision to entrench and what to leave as ordinary? Do the currently entrenched provisions meet that principled test?

It may well be that for current and future efforts at constitutional reform to be little more than academic exercises, the entrenched article 290 (listing what portions of the Constitution are "entrenched" and, by default, what are not) must be isolated and slated for debate, review and possible amendment *before* we proceed much further. In addition, the 40%/75% thresholds need to be re-examined. The problem is not as much the 75% approval, as it is the 40% voter turnout requirement. If there is an overwhelming multi-party or national consensus on the desirability of a proposed change to an entrenched provision, a 75% approval might be relatively easy to obtain. But to get there, proponents of an amendment must first be able to convince at least 40% of all registered voters in Ghana (based on a register that likely is bloated) to the polls on referendum day. Desirable constitutional change must not be left hostage to voter apathy.

Endnotes

[1] Black's Law Dictionary 7th ed. (1999).

[2] H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Paradox', in Greenberg et al (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993).

[3] In Adam Smith's classic definition , the term *rent* means unearned income or profits “reaped by those who did not sow.” In the literature on the resource curse, the derivative term “rentier state” is used to describe a state that lives off externally generated rents (e.g., aid, oil revenues, marketing board profits, mineral and other natural resource exports) rather than from the surplus production of its population.

[4] Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2007), p. 42 (emphasis mine).

[5] Terry Lynn Karl, 'Ensuring Fairness: The Case for a Transparent Fiscal Social Contract', in Humphreys, Sachs & Stiglitz (eds.), *Escaping the Resource Curse* (2007), ch. 10. See also Terry Lynn Karl, 'Oil-Led Development: Social, Political and Economic Consequences', *Encyclopedia of Energy* Vol. 4 (2004).

[6] Ibid. at p. 265

[7] Ibid. at p. 273 (citing the example of Norway)

[8] Bank of Ghana, “A Framework for the Management of Oil Resources in Ghana—Issues and Proposals,” *Policy Brief*, December 2007.

[9] Ibid. (quoting Collier, 2005).

[10] Ibid.

[11] Although I have advocated a new round of substantive constitutional reform in Ghana since the 1990s, I question and contest the constitutional wisdom and propriety of the President initiating, without even the benefit of an Act of Parliament, a process of comprehensive constitutional review and unilaterally establishing a constitution review commission and naming all its nine-members. See S. Kwaku Asare and H. Kwasi Prempeh, *Amending the Constitution of Ghana: Is the Imperial President Trespassing?*, __ African Journal of Int'l & Comp. Law ___ (forthcoming, 2010).

[12] Yoichi Mine, "Pluralist Governance in the Twenty-First Century Africa: *Politics in West Africa* Revisted," Paper presented to the Sir Arthur Lewis Memorial Conference, September 25-27, 2008, Trinidad , available at htpp://**sta.uwi.edu**/nlc/2008/documents/papers/YMine.doc

[13] W. Arthur Lewis, *Politics in West Africa* (Oxford: 1965), pp. 62-63.

[14] The Federalist No. 51 (1788) (emphasis mine).

[15] *See, e.g.,* Bertrand de Rossanet, 'The Ghanaian Constitutionalism of Liberty', *The Review*, No. 60 (1998), pp. 47-55 (describing the Ghana constitution as "a remarkable document of liberty.")

[16] *See, e.g.,* Ivor Wilks, *One Nation, Many Histories: Ghana, Past and Present* (1996); S.K.B. Asante, *Property Law and Social Goals in Ghana* (1975); K.A. Busia, *Africa In Search of Democracy* (1967); Victor T. Le Vine, *African Patrimonial Regimes in Comparative Perspect*ive, 18 J. Mod. Afr. Studs. 657 (1980); R.S. Rattray, *Ashanti Law and Constitution* (1911).

[17] Peter Ala-Adjettey, *Reflections on the Effectiveness of the Parliament of the Fourth Republic of Ghana*, Kronte ne Akwamu Series No. 2 (CDD-Ghana, 2006), p. 17.

[18] Ibid.

[19] *See* Martin Wight, *British Colonial Constitutions* 1947 (Oxford, 1952).

[20] See generally Martin Wight, *The Gold Coast Legislative Council* (Faber: 1946).

[21] Ibid. , p. 143.

[22] Ibid.

[23] Ibid., p. 160-61.

[24] Ibid., p. 161.

[25] Yakubu Saaka, *Recurrent Themes in Ghanaian Politics: Kwame Nkrumah's Legacy*, 24 Journal of Black Studies 263 (1994).

[26] See generally Leslie Rubin & Pauli Murray, *The Constitution and Government of Ghana* (2nd ed. 1964).

[27] Kwame Nkrumah, *Africa Must Unite* (1964), p. 83.

[28] Ibid.

[29] In the 1969 elections, while the P.P. won all the seats in the Ashanti, Brong Ahafo and Central Regions as well as all the "Akan" seats in the Eastern Region, the rival National Alliance of Liberals (N.A.L.) won all four "non-Akan" seats in the Eastern Region and all the seats in the Volta Region except in the Nkwanta and Krachi constituencies, whose populations are "ethnically polygot". The two P.P. MPs from the Volta Region were therefore not ethnically Ewe. *See* Yaw Twumasi, "The 1969 Election," in Dennis Austin & Robin Luckham, *Politicians and Soldiers in Ghana 1966-1972* (1975), pp. 140-163.

[30] See David Goldsworthy, "Ghana's Second Republic—A Post-Mortem," *African Affairs*, Vol. 72, No. 286 (Jan., 1973), pp. 8-25 (" Since Ghana's lawyers and academics had seen fit to deliver a thoroughly Westminster constitution to the new [Second] republic, the Ewe MPs were automatically denied not only a share in policy-making but also a share in the control of governmental spoils.")

[31] For instance, one cannot quite grasp the whole saga, which has been repeating itself once every four years, of MPs and Ministers and retiring Presidents demanding and being awarded "end-of-term" benefits, gratuities, per diem, car loans and other recurring absurdities in the political half of the state, without first laying the civil service bare and subjecting its quotidian practices, regulations, and entitlements to scrutiny.

[32] For an earlier comprehensive discussion of the subject of judicial independence and accountability in contemporary Ghana from a combination of historical, policy and doctrinal perspectives, including proposals for reform, see H. Kwasi Prempeh, *Toward Judicial Independence and Accountability in an Emerging Democracy: The Courts and the Consolidation of Democracy in Ghana* (IEA, 1997).

[33] Article III, section 1, of the U.S. Constitution establishes a Supreme Court of the United States but not set the size of the court. The number of Justices of the Supreme Court, including the Chief Justice, has remained at 9 since Congress passed the Judiciary Act of 1989. The first Judiciary Act of 1789 originally provided for a supreme court of six justices.

[34] The Judicial Council is a 19-member body comprising the chief justice, the attorney-general, one justice each from the Supreme Court, Court of Appeal and High Court, two representatives of the bar, six other persons representing various special interests and constituencies in the legal and judicial community, and four non-lawyers appointed by the President.

[35] In the case of a petition for a review of a previously-decided case, the quorum is raised to seven.

[36] P.S. Atiyah, Law and Society (2d ed., 1995), p. 17.

[37] Ibid.

[38] For a slightly extended discussion of the *Mensah Bonsu Case* and a comparative perspective on the current state of the law of scandalizing the court, see H. Kwasi Prempeh, *Toward Judicial Independence and Accountability: The Courts and the Consolidation of Democracy in Ghana* (Accra: IEA, 1997).

[39] P.N. Bhagwati, *The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint*, 18 Commonwealth Law Bulletin 1262 (1992), p. 1265-66.

[40] See, e.g., Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, Hum. Rts. Br. 4 (Winter 2006); Albie Sachs, 'The Judicial Enforcement of Socio-Economic Rights', available at http://www.borini.info/uploads/documents/Albie%20Sachs.pdf (last visited, July 5, 2010).

[41] See, e.g., *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

[42] See Art. 89(2), Constitution of the Republic of Ghana, 1992.

[43] See Gordon Crawford, *Democratisation in Ghana: assessing the impact of political aid, (1997-2003),* POLIS Working Paper No. 8 (February 2004); Daniel A. Smith, Consolidating *Democracy? The Structural Underpinnings of Ghana's 2000 Elections, Journal of Modern African Studies*, Vol. 40, No. 4 (Dec., 2002), pp. 621-650;

Notes