Republic of Ghana

CONSTITUTION REVIEW COMMISSION

REPORT OF THE CONSTITUTION REVIEW COMMISSION

FROM A POLITICAL TO A DEVELOPMENTAL CONSTITUTION

PRESENTED TO

HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF GHANA

PROFESSOR JOHN EVANS ATTA MILLS

ON TUESDAY THE 20TH OF DECEMBER 2011

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The complete list of key persons and institutions that assisted the Commission in various ways is attached to this report as an appendix.

LIST OF ABBREVIATIONS

ACA	Anti-Corruption Agency
ADR	Alternative Dispute Resolution
AFRC	Armed Forces Revolutionary Council
AM	Assembly Member
AMJG	Association of Magistrates and Judges of Ghana
ANC	African National Congress
APRM	African Peer Review Mechanism
AU	African Union
BNI	Bureau of National Investigations
CDS	Chief of Defence Staff
CEPS	Customs, Excise and Preventive Service
CHRAJ	Commission on Human Rights and Administrative Justice
CHURCIL	Centre for Human Rights and Civil Liberties
CID	Criminal Investigations Department
COAU	Charter of the Organization of African Unity
CPIB	Corruption Prevention and Investigation Bureau
CPP	Convention People's Party
CRC	Convention on the Rights of the Child
DA	District Assembly
DACF	District Assemblies Common Fund
DACFA	District Assemblies Common Fund Administrator
DCE	District Chief Executive
DCEC	Directorate on Corruption and Economic Crime
DISEC	District Security Council
DPBU	District Planning and Budgetary Unit
DPSP	Directive Principles of State Policy
EC	Electoral Commission
ECG	Electricity Company of Ghana
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EGLE	Every Ghanaian Living Everywhere
EITI	Extractive Industries Transparency Initiative
EOCO	Economic and Organized Crimes Office
ERP	Economic Recovery Programme
FCC	Federal Communications Commission
FCUBE	Free Compulsory Universal Basic Education
GAF	Ghana Armed Forces
GDP	Gross Domestic Product
GES	Ghana Education Service

GIS	Ghana Immigration Service
GMA	Ghana Meteorological Agency
GNPC	Ghana National Petroleum Corporation
GPRS	Ghana Poverty Reduction Strategy
GPS	Ghana Police Service
GRA	Ghana Revenue Authority
GSGDA	Ghana Shared Growth and Development Agenda
HIPC	Heavily Indebted Poor Countries
ICAC	Independent Commission Against Corruption
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICBs	Independent Constitutional Bodies
ICPC	Independent Corrupt Practices and other related offences Commission
ICT	Information and Communications Technology
IEC	Independent Emoluments Commission
IGP	Inspector General of Police
IMF	International Monetary Fund
IPAC	Inter-Party Advisory Committee
IRS	Internal Revenue Service
IULA	International Union of Local Authorities
LAP	Land Administration Project
LI	Legislative Instrument
M&E	Monitoring and Evaluation
MDAs	Ministries, Departments and Agencies
MICS	Multiple Indicator Cluster Survey
MMDCEs	Metropolitan, Municipal and District Chief Executives
MMDAs	Metropolitan, Municipal and District Assemblies
MOFARI	Ministry of Foreign Affairs and Regional Integration
MPs	Members of Parliament
NACOB	Narcotics Control Board
NADMO	National Disaster Management Organisation
NCA	National Communications Authority
NCCE	National Commission for Civic Education
NCD	National Commission for Democracy
NCP	National Convention Party
NCRC	National Constitution Review Conference
NCRD	National Redemption Council Decree
NDAP	National Decentralization Action Plan
NDC	National Democratic Congress

NDPC	National Development Planning Commission
NEPAD	New Partnership for African Development
NGO	Non-Governmental Organisation
NHC	National House of Chiefs
NHIL	National Health Insurance Law
NHIS	National Health Insurance Scheme
NLC	National Liberation Council
NMC	National Media Commission
NPA	National Petroleum Authority
NPC	National Peace Council
NPP	New Patriotic Party
NRC	National Redemption Council
NaRC	National Reconciliation Commission
NRCD	National Redemption Council Decree
NSC	National Security Council
NSPF	National Security Policy Framework
NSS	National Security Strategy
OASL	Office of the Administrator of Stool Lands
OAU	Organization of African Unity
OECD	Organisation of Economic Cooperation and Development
OPEC	Organisation of Petroleum Exporting Countries
PCB	Prevention of Corruption Bureau
PDCs	People's Defence Committees
PM	Presiding Member
PNDC	Provisional National Defence Council
PNDCL	Provisional National Defence Council Law
PRS	Performance Reward Schemes
PSC	Public Services Commission
PURC	Public Utilities Regulatory Commission
PWD	Public Works Department
PWDs	Persons With Disability
RCCs	Regional Coordinating Councils
REGSECs	Regional Security Councils
RM	Regional Minister
ROPAL	Representation of the Peoples (Amendment) Law
RPCU	Regional Planning Coordinating Unit
RWAFF	Royal West African Frontier Force
SADA	Savannah Accelerated Development Authority
SAGA	Semi Autonomous Government Agency
SAP	Structural Adjustment Programme

SDMC	State Diamond Mining Corporation
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
SGMC	State Gold Mining Corporation
SHS	Senior High School
SMC	Supreme Military Council
SOP	Safe Office Practices
SSNIT	Social Security and National Insurance Trust
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIGOV	Union Government
VAT	Value Added Tax
WACA	West Africa Court of Appeal
WAFF	West African Frontier Force
WAJU	Women and Juvenile Unit (of the Police Service)
WHC	World Heritage Convention
WHO	World Health Organisation

PART I

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Constitution Review Commission, a presidential Commission of Inquiry, was set up in January 2010 to consult with the people of Ghana on the operation of the 1992 Constitution and on any changes that need to be made to the Constitution. The Commission was also tasked to present a draft bill for the amendment of the Constitution in the event that any changes are warranted.

Using a highly participatory qualitative inquiry methodology, the Commission directly and indirectly reached millions of Ghanaians (individuals, groups, institutions), including Ghanaians living abroad. The total number of formal submissions received, processed, coded, and stored in a database by the Commission is 83,161. Millions of Ghanaians participated in the consultative processes of the Commission, directly or through traditional and new media, without formally making submissions.

This report captures the establishment, mandate, methodology, and processes of the Commission. It also summarises all the submissions received from Ghanaians on the review of the 1992 Constitution; provides the current state of the law on each distinct set of submissions; states the findings and observations of the Commission on the submissions; and puts forward the recommendations of the Commission on each set of submissions.

The findings and observations of the Commission cover three distinct matters: observations on the historical evolution of our institutions and the implications and options for their current design; specific findings made by the Commission during the process of taking and analysing submissions whilst interacting with thousands of Ghanaians all over Ghana and abroad; and an examination of international experience and best practice.

The recommendations are broken down into proposals for constitutional changes, legislative changes and administrative action. The submissions and the attendant recommendations cover twelve thematic areas, each contained in a chapter in this report.

The Commission found that the 1992 Constitution is a resilient foundation for good governance in Ghana. It has been the basis of the flourishing institutions under the Fourth Republic and has potential for guiding the evolution of the nation's institutions towards peace, prosperity and a good life for its people. Under that Constitution, five (5) successful presidential and parliamentary elections have been conducted, two of them involving a transfer of power from a ruling party to an opposition party. However, the Commission found that there are many areas of the Constitution and of constitutional practice that need to change for the better.

There was an overwhelming call by Ghanaians throughout the country for the institution of a long-term, strategic, and relatively permanent National Development Plan in order to steer the nation into prosperity. This was in spite of the fact that national development planning was not one of the indicative sets of issues that were used by the Commission to facilitate discussions on

the review of the Constitution. The Commission agrees with the people of Ghana and recommends that a new National Development Planning Commission (NDPC) be established by the Constitution as an independent constitutional body, with dedicated funding, charged with the development of a National Development Plan. The new NDPC should be composed of technically competent representatives of major political parties, traditional authority, the private sector, civil society and all regional planning officers.

As far as is practicable, the Plan itself must be based on the Directive Principles of State Policy and must be long-term, strategic, relatively permanent, binding, and holistic, covering both the hard and soft aspects of development. This will improve the current practice of short-term planning and the reliance on political party manifestos that do not garner broad consensus. It will also address the spate of abandoned projects all over the country. Any citizen may enforce the Plan in a court of law or other adjudicatory body. The Plan, including any changes to it, must be approved by Parliament. The Ministries, Departments and Agencies (MDAs) should be responsible for implementing the Plan and the NDPC responsible for monitoring and evaluating the implementation of the Plan and submitting annual Monitoring and Evaluation (M&E) reports to Parliament. The annual budgets of the government would have to be completely consistent with the Plan. This mechanism will ensure that government expenditure is effectively disciplined, especially during election years.

On the Executive, the Commission has made recommendations that clarify the appointing power of the President. In some cases, the recommendation enlarges the pool of consultations before appointment, including with Parliament. Other changes affecting the Executive include the power of the President to appoint any number of ministers from Parliament without a minimum or a cap and a requirement for the President to pay tax.

The recommendations of the Commission relating to the legislative arm of government are aimed at strengthening that branch and making it capable of acting as an effective institution of governance in its own right. The main recommended changes in respect of the Legislature include clarifying the concept of a "Money Bill" thereby making it easier for members of Parliament to introduce private member's bills; ensuring that the censure of a Minister of State by Parliament automatically results in the removal of the Minister from office; and measures to strengthen Parliamentary Committees.

The recommendations of the Commission on the Judiciary recognise the singular role of that branch as the final arbiter over all disputes in the nation. Thus, the recommendations seek to reinforce the independence of the Judiciary; provide for the elaboration of rules, regulations and administrative processes that enhance quick and cheap access to real justice, including making the Court of Appeal the final court in interlocutory matters. The Commission further recommends that the membership of the Supreme Court be capped at fifteen in a non-entrenched provision of the Constitution and for refining the manner in which the review jurisdiction of the Supreme Court is exercised.

Under the chapter on the Public Services, the Commission has made three major sets of recommendations. The first relates to providing for categories of the public services, rather than attempting to list all of them in the Constitution. The second aims to strengthen the Public Services Commission, and the third elaborates on the code of conduct for the services in order to reduce conflict of interest situations and deal with aspects of corruption. Other more specific recommendations on the Public Services include keeping the retirement age at sixty (60), but allowing Parliament to increase it for categories of public servants; the institution of performance contracts for public servants; the regulation of which public officers may engage in partisan politics; and mechanisms for verifying assets declared by public officers.

The Commission has also expanded the list of Independent Constitutional Bodies (ICBs) to include the NDPC, the Office of the Administrator of the District Assemblies Common Fund, the Office of the Administrator of Stool Lands, the Legal Aid Scheme, the Office of the Statistician-General, the Bank of Ghana, the National House of Chiefs and a novel institution, the Independent Emoluments Commission charged with determining the emoluments of all public servants. A special fund is to be created for these bodies in order to deal with the main cause of the ineffectiveness of a good number of them. The bulk of the recommendations made on the ICBs aim to enhance their independence and to ensure that they function effectively and more professionally than at present. They include provisions for the approval by Parliament of some appointments to the ICBs. The membership of the various ICBs has also been generally reduced, except for the Commission on Human Rights and Administrative Justice (CHRAJ); the membership of which has been increased with a requirement to include non-lawyers and for one of the Deputy Commissioners to be responsible for human rights issues relating to children, Persons With Disability (PWDs) and the aged. The tenure of office of the Commissioners of the CHRAJ, Electoral Commission (EC), and the National Commission for Civic Education (NCCE) has been proposed to be fixed at ten (10) years and may not be renewed.

The Commission has made specific recommendations on the EC and the electoral process. The purpose of these recommendations is to regulate better the manner in which districts and constituencies are created; draw the time for parliamentary elections backwards so that they may be held together with presidential elections within sixty (60) days before the inauguration of a new government; make the transfer of power from one administration to the other generally smoother; and amend the Rules of Court to limit interlocutory applications, adjournments, and delays in electoral disputes to ensure the disposal of such cases within a period of six (6) months. Other recommendations aim to allow for the EC to study the system of proportional representation for possible application in Ghana; take adequate administrative measures to ensure the actualisation of the right to vote for categories of prisoners and Ghanaians resident abroad; strengthen the Inter-Party Advisory Committee (IPAC) for improved self-regulation of political parties; and submit annual reports to Parliament.

It is recommended that CHRAJ decisions be directly enforceable in the courts of law and it should be empowered to initiate investigations into any matter within its mandate without a formal complaint. It is further recommended that the National Media Commission (NMC) should have the primary responsibility to authorise the grant or refusal of a broadcast frequency as well as its suspension or withdrawal. The Broadcast Law should be passed without any further delay and the NMC should be empowered under that law to regulate the airwaves and maintain the broadcast standards set in the law.

The Commission has made far-reaching recommendations on decentralisation and local governance. The Constitution should identify the type of decentralisation to be practiced at the level of the Regional Coordinating Council (RCC) as "deconcentration", "devolution" at the District Assembly (DA) level, and "delegation" at the Sub-District levels. To this end, the Commission has further made recommendations for deeper decentralisation through the transfer of more funds from the centre to the districts; moving more power to the units by providing for the direct and popular election of Metropolitan and Municipal Chief Executives but not District Chief Executives; and the establishment of a constituency development fund. The Commission also recommends that the timing of these changes be determined by Parliament. Another recommendation on this theme is that one-third of the Assemblies be composed of traditionally under-represented groups such as women, the youth, persons with disability, the economically disadvantaged, and chiefs. It is expected that the relevant criteria will be provided for by an Act of Parliament which will then be the basis for the Traditional Councils to advise on the composition of that part of the membership of the Assemblies. The criteria should provide for a cap on the number of chiefs that may be appointed to the Assembly.

The Commission has recommended the retention of the institution of Chieftaincy. It has further recommended that the current administrative action by the National House of Chiefs to ensure that women chiefs and queenmothers are represented in the Houses of Chiefs should be sustained. The Commission also recommends that chiefs should bear greater accountability for the resources that are vested in them on behalf of the people. The recommendations on chieftaincy generally improve the role of the institution in governance.

The recommendations on Natural Resources are extensive. The objective of the recommendations is to provide basic principles in the Constitution that should govern the exploitation of the natural resources of the nation. These include the basic principle that those resources belong to Ghanaians and that Ghanaians should be their primary beneficiaries. Other principles relate to the elaborate participation of a broad range of stakeholders in the making of decisions on how the burdens and benefits of exploiting natural resources may be shared equitably; and a greater role for domestic courts in the resolution of disputes relating to natural resources.

The main recommendation on the theme National Security relates to the development of a national security policy premised on human security and containing national security priorities.

Other recommendations relate to a conceptual distinction between security and intelligence, with resulting operational implications.

The recommendations on human rights reinforce the current constitutional provisions and seek to expand them. The main recommendations are to reduce the maximum time a person may be detained before being brought to court from 48 hours to 24 hours and formally abolish the death penalty. Ghana is a *de facto* abolitionist country and this recommendation seeks to substitute for the penalty, life imprisonment without parole—a stiffer penalty for capital crimes than is currently the case in practice. The recommendations call for the recognition of economic, social and cultural rights as fully fledged rights; and provide for the passage of an Affirmative Action Act that, in part, ensures that there is at least 30% representation of each gender in all public offices. Other recommendations on human rights include clarifying and expanding the right to citizenship of categories of Ghanaians; and expanding the rights of children, PWDs and the aged.

The last set of recommendations is on a number of miscellaneous issues and includes proposals for how future reviews of the Constitution may be conducted; an agenda for reducing ethnic tendencies in the nation, corruption and wastage in the public and private spheres - including mechanisms for plugging revenue leakages and the enforcement of recommendations made by the Auditor-General, and the over politicisation of national issues. The Commission has also made recommendations for the retention of the indemnity provisions; the creation of a National Commission on Culture by the Constitution in order to ensure that Ghana's development is based on a sound understanding of our culture; and for the Preamble to the Constitution to be reviewed to reflect the cultural legacy and values of Ghanaian society.

In the conclusion to this report, the Commission recommends measures that the government may wish to take to translate the recommendations into constitutional, legislative and administrative actions that will improve national governance and the people's lives. Mainly, it is recommended that a Technical Committee be set up to assist the government implement the recommendations of the Commission. This Committee will offer expert advice (assisting Cabinet, Parliament, and the Council of State in their deliberations on the proposed changes) and in the development of detailed plans and strategies for the various other processes, including the referendum procedure. The Committee will also work closely with the NCCE, EC, MDAs, Metropolitan, Municipal and District Assemblies (MMDAs), Traditional Authority, the Media, civil society and other stakeholders to educate the nation on the reforms prior to the referendum.

PART II

THE CONSTITUTION REVIEW PROCESS

CHAPTER ONE - THE PROCESS

1.1 BACKGROUND TO THE ESTABLISHMENT OF THE CONSTITUTION REVIEW COMMISSION

1. The establishment of the Constitution Review Commission was an outcome of many fervent calls by Ghanaians to fine-tune the Constitution in order to advance the key democratic gains made since the return to constitutional rule on 7th January 1993. These calls were made by all the major political parties, public servants, civil society organisations, research institutions, government officials, and many others.

2. Ghana has gained international renown for its commitment to peace and political stability, respect for fundamental human rights, well-established electoral processes, and general adherence to democratic principles. Although the 1992 Constitution has served Ghana extremely well and is, therefore, a good basis for advancing accountable, transparent, and participatory democratic governance, there are still some ambiguities, nebulous provisions, and a few deficits in the document that need to be addressed in order to make the Constitution more practical and relevant to the needs of Ghanaians in the twenty-first century.

3. In 2005, the African Peer Review Mechanism (APRM), in its comprehensive review of Ghana, identified several shortfalls in the country's democratic development and governance procedures. Some of the issues raised touched on the large size of the Cabinet and the fact that many of the Ministers are sitting members of Parliament—a situation seen as undermining the separation of powers between the Executive and the Legislature. Concerns about the independence of the Judiciary as well as the insufficient involvement of women in the democratic process were also raised. The report also pointed out the existence of numerous local conflicts over land tenure and chieftaincy.

4. Following the APRM report, the Government of Ghana under President Kufuor drafted a comprehensive Programme of Action to address the shortcomings that were identified. At the African Heads of State meeting in Khartoum in January 2006, President Kufuor pledged his support for a review of the Constitution, following a referendum of the people, if this was necessary to address any constitutional deficits.

5. In the course of the presidential debates leading up to the 2008 general elections, the presidential candidates of all the major political parties declared their intention to institute a process to review the 1992 Constitution of Ghana.

6. On assuming office in January 2009, the government of President Mills initiated a process to review the operation of the 1992 Constitution, invoking the powers conferred on him by Article 278(1) of the Constitution to establish a Commission of Inquiry into any matter of public interest.

7. It needs to be emphasised that Ghana's Constitution review exercise is unique in the sense that it was not prompted by a cataclysmic event as is the norm in many countries. History has taught us that when constitutions fail, nations disintegrate, as the examples of Ivory Coast, Egypt, Libya, Tunisia and Zimbabwe clearly demonstrate, not to mention Yemen, Algeria, Bahrain, Pakistan and Afghanistan. What Ghana did as a nation is the best expression of maturity in this regard; short, low-cost, excellent, routine housekeeping that is proactive and not reactive to any grave national crisis.

1.2. ESTABLISHMENT, COMPOSITION AND WORK ORGANISATION OF THE COMMISSION

1.2.1. CONSTITUTION REVIEW COMMISSION OF INQUIRY INSTRUMENT 2010 (C.1 64)

8. The Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64), which provides for the appointment of the Commission came into force on the 11th of January, 2010. The instrument also provides for the membership of the CRC and the appointment of its members, its terms of reference, its secretariat, its mode of operation and the engagement of Consultants.[1]

1.2.2. COMMISSIONERS AND EXECUTIVE SECRETARY

9. The composition of the Commission is as follows:
    a. Professor Albert Kodzo Fiadjoe, Professor (Emeritus) of Public Law, Chairman of the Commission.
    b. Kumbun-Naa Yiri II, Naa Alhaji Iddirisu Abu, Paramount Chief of Kumbungu Traditional Area, Commissioner.
    c. Osabarimba Kwesi Atta II, Omanhen of Oguaa Traditional Area, Commissioner.
    d. Mr. Akenten Appiah-Menka, Legal Practitioner and Industrialist, Commissioner.
    e. Mrs. Sabina Ofori-Boateng, Legislative Drafting Consultant, Commissioner.

[1] Appendix A, Constitution Review Commission of Inquiry Instrument, 2010 (C. I. 64).

f. The Very Reverend Professor Samuel Kwasi Adjepong, Principal, Methodist University College, and Chairman, African Peer Review Mechanism Governing Council, Commissioner.
g. Dr. Nicholas Yaw Amponsah, Senior Lecturer, Department of Political Science, University of Ghana, Commissioner.
h. Mr. Gabriel Scott Pwamang, Legal Practitioner, Commissioner.
i. Mrs. Jean Adukwei Mensa, Executive Director, Institute of Economic Affairs (IEA), Commissioner.

10. Dr. Raymond Akongburo Atuguba, a Senior Lecturer of the Faculty of Law, University of Ghana, was appointed Executive Secretary and Principal Researcher to the Commission.

1.2.3. TERMS OF REFERENCE OF THE COMMISSION

11. The terms of reference of the Commission are to:
    a. Ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution;
    b. Articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and
    c. Make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

12. The mandate of the Commission was, therefore, not limited to the review of the *text* of the Constitution, but extended to the *operation* of the 1992 Constitution as well.

1.2.4. INAUGURATION OF THE COMMISSION

13. On 11th January, 2010, the nine-member Commission was sworn in by the President. It was tasked to work for a period of two years. The Commissioners subscribed to the Official Oath and the Oath of Secrecy. The Commission commenced its work on the same day it was inaugurated. It has since worked assiduously with quiet efficiency, thoroughness, and integrity.

1.2.5. THE SECRETARIAT

14. The Commission's Secretariat was headed by an Executive Secretary who was assisted by a Director of Finance and Administration as well as seven line managers. The line managers were responsible for the following units:
    a. Consultations and Communication
    b. Research and Legal
    c. Operations
    d. Finance
    e. Media and Events
    f. Information Technology
    g. Documentation and Monitoring & Evaluation

1.2.6. VALUES AND PRINCIPLES FOR THE CONSTITUTION REVIEW PROCESS

15. In executing its mandate, the Commission was guided by the following values and principles:
    a. Every action and recommendation of the Commission must have as an overriding aim the promotion of the unity and cohesion of the Nation.
    b. Every action and recommendation of the Commission must aim at contributing to the attainment of a better standard of living for the people of Ghana in general.
    c. The review exercise, cumulatively, must move the Constitution from a political document to a developmental document, shifting from the *politics of democracy* to the *economics of democracy*, so that Ghanaians may look at it as the source of a better life.
    d. Nation building is the responsibility of all citizens; it is not a task for any one group of persons or political party, thus the review exercise belongs to the people of Ghana and every Ghanaian at home and aboard must be given an opportunity to contribute to the review process.
    e. To reinforce the inclusiveness of the review process, special care must be taken to provide facilities such as translation services to facilitate consultations held in local languages; interpretation services for persons who are speech and hearing impaired; and Braille documentation.
    f. The review process must engender the trust and confidence of the nation. To this end, mechanisms must be developed to ensure that information about the purpose and activities of the Commission are freely available and actively communicated to the Ghana public as a measure of transparency and to facilitate their participation in the process.

g. The consultations with the people of Ghana on the operation of their Constitution must be devised as a low cost, highly participatory process with a range of channels of communication.
h. Information gathered and generated during the review exercise must be documented and preserved for the nation, thus creating an infrastructure for Constitution review and research which can be turned to in the future.
i. All submissions made to the Commission would be assessed for their factual and legal integrity in order to ensure that the Commission would proceed to make its findings, observations and recommendations on secure factual and legal bases.
j. A synthesis of all the submissions received must be submitted to a multi-stakeholder and representative National Constitution Conference for deliberation before the Commission makes its final recommendations.
k. The recommendations of the Commission would be informed by a thorough examination of the historical evolution of Ghana's institutions and how the record of the various institutional configurations have fared.
l. The recommendations of the Commission would be informed by the specific findings and observations made by the Commission during the period of inquiry.
m. The recommendations of the Commission would be informed by international comparative experience and best practice, adapted to fit local circumstances.
n. The entire review process must be closely monitored and evaluated for corrective action and course correction where necessary and to ensure that the Commission functions as an exemplar public service institution.

1.2.7. STRATEGIES AND MODUS OPERANDI OF THE COMMISSION

16. The Commission developed the following detailed strategies from the broad principles outlined above:
    a. A communications strategy;
    b. A media strategy;
    c. A consultations strategy;
    d. A research strategy;
    e. A documentation strategy; and
    f. A Monitoring and Evaluation strategy.

17. The details of the strategies included the following:
    a. Utilising multiple strategies to communicate the existence, mandate and modus operandi of the Commission to the public, including the use of advertisements in the media, posters, banners, handbills, and the Internet (including social media-facebook and twitter).

b. Embarking on outreach programmes to the districts and communities throughout Ghana, using a three-part strategy of educating on the Constitution, informing on issues raised about the operation of the Constitution and eliciting submissions.
c. Using an open-door strategy that allowed Ghanaians to interact freely with the Commission and make their submissions without any hindrance.
d. Utilising multiple avenues for the receipt of submissions from the public, including receipt of oral submissions that were then transcribed and the receipt of submissions through a text-in campaign.
e. Engaging a team of research associates to receive written and oral submissions at the Secretariat from individuals who walk into the Secretariat or phone in to make submissions, including maintaining a 24 hour mobile phone line for receiving oral submissions and SMS submissions.
f. Forming strategic partnerships with the NCCE, MMDAs, the NHC, MOI, the MOFARI and the media (especially GBC), utilising the spread of these institution to reach as many Ghanaians as possible in Ghana and abroad directly and through the media, including the live broadcast of all regional hearings and the National Constitution Review Conference (NCRC) on national TV. The NCRC was also webcast.
g. Holding mini-consultations with some 57 interest groups and institutions in order to learn from them the strengths and weaknesses of the Constitution as they relate to them.
h. Holding special consultations with persons with an intimate knowledge of the operation of the 1992 Constitution, such as sitting and former Presidents, Vice Presidents, Speakers of Parliament and Chief Justices, in order to learn first-hand some unique strengths and weaknesses of the Constitution.
i. Assigning Commissioners to particular thematic research areas in order to encourage specialisation within the Commission.
j. Recruiting young, energetic, curious and hardworking researchers and associate researchers to execute the research assignments of the Commission under the direction of the Executive Secretary and Principal Researcher.
k. Engaging experts to provide research papers and reports on many areas of constitutional governance for the consideration of the Commission.
l. Holding of a National Constitution Review Conference with broad participation from all sections of society.
m. Classifying and storing all documents utilised and developed by the Commission in hard and electronic copies in the CRC library and in easily retrievable electronic databases.
n. Institutionalising a weekly monitoring checklist, monthly monitoring report, a quarterly monitoring assessment, and a mid-term review in order to track the effective

and efficient application of human, material, and financial resources to the desired end and implementing corrective action where necessary.

18. Flowing from the strategies, the modus operandi of the Commission was set out in its Year One and Year Two work plans. Quarterly work plans were subsequently derived from the yearly work plans. Year One was devoted to the establishment of the Secretariat of the Commission; conducting background research; the establishment of various avenues for Ghanaians to interact freely with the Commission; and consultations with the Ghanaian public and various organisations and institutions.

19. In the second year, the Commission accomplished the following:
    a. Completion of the consultation exercise (consultations with Ghanaians living abroad and with persons with unique knowledge and experience in the operation of the Constitution).
    b. Syntheses of all submissions received into thematic matrices.
    c. Holding the National Constitution Review Conference to debate the synthesis of submissions using a deliberative-consensus building strategy.
    d. Qualitative and quantitative analyses of the submissions received.
    e. Research into constitutional history and international comparative experiences.
    f. Development of twelve thematic briefs, one for each of the main themes arising from the analyses of the submissions.
    g. Development of proposals for constitutional change, legislative reform and administrative action.
    h. The drafting of constitutional amendment bills.
    i. Submission of the final report and draft Bills to the President within the original timeframe.

CHAPTER TWO - METHODOLOGY

2.1. INTRODUCTION

1. This chapter discusses the methodology employed by the Constitution Review Commission to carry out its mandate.

2. The Commission operated on the fundamental principle that the review process belongs to the people of Ghana. The methodology of the review process was therefore to ensure the participation of as many Ghanaians as possible.

3. The comprehensive nation-wide consultation process yielded a diverse body of submissions—oral and written —as well as individual and collective submissions.

4. The submissions indicated the views and wishes of Ghanaians regarding the future governance framework of Ghana**.**

5. The Commission adopted a set of analytical tools to depict accurately the core review concerns and aspirations explicated, and the attendant demands and suggestions made by the people of Ghana.

6. Both qualitative and quantitative approaches were employed to understand the weight Ghanaians placed on different issues and submissions. However, the qualitative technique was the key approach used in the review exercise. The quantitative component was intended to augment and strengthen the largely qualitative study in a holistic manner. Such a mixed approach allowed statistically reliable information obtained from numeration to be backed up and enriched by information about the participants' narratives.

7. Five major issues are discussed in this chapter: research strategy and consultations; data coding; data analyses; developing the report; and methodological limitations. Under the section on research strategy and consultations, there is a discussion on the methods used for the background research and the collection of data from different sources. The section on data coding explains how the submissions and data gathered from the field were stored and managed. The data analyses section explains the qualitative and quantitative methods adopted in analysing the submissions that the Commission received. The section on developing the report explains how the recommendations were put together and incorporated into the report. The chapter ends with a section on methodological limitations.

2.2.BACKGROUND RESEARCH

2.2.1. DEVELOPING BACKGROUND RESEARCH ISSUES

8. Prior to the establishment of the Constitution Review Commission, various issues concerning the operation of the 1992 Constitution had emerged in the public domain, including in the media. The urgent need for a significant review of the Constitution had been the subject of media, academic and political discourses. Although many of the constitutional problems had to do with the operation of the Constitution, the discourse resulted in a lot of proposals for textual amendments to the Constitution. Governance institutions and think-tanks also reiterated the need for legislative and administrative measures to give full effect to many constitutional provisions.

9. As part of its research strategy, the Commission conducted a comprehensive review of research material focusing on the performance of the Constitution in the last two decades. The purpose was to isolate and synthesise from these, various constitutional issues and proposals for reform. The Commission also undertook elaborate media monitoring to detail out an exhaustive list of constitutional issues discussed in the media over the twenty year period that the Constitution has been in force.

10. Flowing from these endeavours, the Commission generated forty-four sets of issues. These issues were compiled into an instrument and used as indicative issues for the various consultations. Copies of this instrument were disseminated widely in Ghana, through Ghana's foreign missions to Ghanaians living abroad, and on the Internet. Recipients of the instruments were invited to respond to the issues listed in them and were free to include other submissions. The Commission received many responses from many institutions and individuals in this regard. A copy of the instrument is attached as Appendix A.

11. After the first year of consultations, the Commission conducted an initial trend analysis of the first 75,000 submissions and prepared these in the form of thematic matrices. In all, the Commission identified 12 themes, 77 subthemes, and 548 issues.

12. Out of the 548 issues, the top 25 issues were widely publicised and used to invite SMS submissions in the "text-in campaign" of the Commission.

2.2.2. LIBRARY AND ARCHIVAL RESEARCH

13. The Commission did not merely rely on the submissions it received to make its recommendations. It researched the factual and legal integrity of the submissions; searched for additional dimensions of the issues raised in the submissions; and sought to verify the

dynamics of certain practices relating to the operation of the Constitution. This involved a lot of archival and library research.

14. Before making its recommendations, the Commission also researched Ghana's institutional evolution from a historical perspective in order to unearth all available options and attempts at resolving the issues raised in the submissions and the viability of those options. These were mainly contained in the reports and other documents of previous constitutional committees, the National Commission for Democracy, and the Constituent Assembly of 1992. Others were contained in books, journal articles and research and conference papers. Additionally, it researched international experiences and best practice on the issues. Finally, the Commission consulted an inventory of constitution review reports around the world in order to assess the various ways in which they were presented and then developed a unique format for its report.

2.2.3. EXTERNAL RESEARCH ASSISTANCE

15. Aside from the research output of its research team, the Commission requested research papers and input from many individuals and organisations. The main research papers received by the Commission related to:
    a. Structure of Government.
    b. Strengthening Parliament.
    c. Decentralisation and Local Governance.
    d. Decentralisation and Taxation of Chiefs.
    e. Constitution and Financial Management.
    f. Judicial Pronouncements on the Constitution.
    g. Security Sector and the 1992 Constitution.
    h. Human Rights and the 1992 Constitution.
    i. Transitional Provisions and the Indemnity Clauses.
    j. Amendment Procedures in the 1992 Constitution.

2.2.4. CONSULTATIONS

16. The Commission’s work hinged on the submissions and proposals made by Ghanaians concerning the operation of the 1992 Constitution of Ghana. In this regard, the review process employed a consultations strategy that covered the whole of the Ghanaian population within and outside the borders of the country. The Commission collected data in different geographical settings and at various levels of traditional, political, and administrative organisation – at the individual, group and community levels.

17. In order to ensure that the entire country was covered, such that all the different demographic, ethnic and geo-political groups were included, all the 170 administrative districts were covered in two rounds of consultations. Communities were selected to ensure a proportionate representation of both urban and rural populations.

18. The Consultations had a three-tier objective as follows:
    a. Educating the People on the Constitution and the review process;
    b. Informing the People about the issues raised concerning the Constitution; and
    c. Eliciting more issues and submissions.

19. The Commission held Community and District level Consultations (C&D) in all the 170 administrative districts in the first 6 months of 2010. Eight (8) teams of researchers and research assistants were constituted and trained to assist the Commission undertake the exercise. The Commissioners were assigned to various regions to supervise the exercise. Each team was composed of between five (5) and ten (10) persons. The teams were assisted by many officials of the NCCE, MMDAs, ISD, Traditional Authority, and focal persons from the various communities during the actual consultation exercises. There were five (5) regional teams, covering two regions each, one back-up team, one mop-up team and one M&E team.

20. Preparatory activities for the consultations took several months. These included the establishment of strategic partnerships with many organisations; the engagement and training of lawyers, social scientists and field research assistants, and the development of a set of indicative issues for constitutional review and reporting formats. The reporting format contained sections for information ranging from the author of submissions, through a summary of the submission and details of the submissions, to the provisions of the Constitution implicated by the submissions.

21. The consultations proper were held over a period of at least two days in each district by the different teams. One day was reserved for stakeholder consultations for all major stakeholders in the district while the second day was used for an open forum for all interested persons in the district. In the Greater Accra Region, consultations were held at the sub-metropolitan level. Before the start of consultations, the teams briefed the NCCE and MMDA officials, Traditional Authority, and the community focal persons on the exercise. At the close of the consultations, the teams held meetings with the same persons in order to orient them on continuing the educational effort and the receipt, processing and transmission of submissions to the Commission.

22. In Bawku, Yendi, and Biakoye, the consultations were condensed into one-day events on account of the conflicts in those areas and based on security advice. In the case of Biakoye,

five different research teams conducted the consultations simultaneously in all five traditional areas in the district in order to give all five areas equal treatment and not exacerbate the conflict over which traditional area was superior to the other.

23. After evaluation of the C&D consultations, the Commission realised the need to hold a second round of consultations at the district and community levels based on the high demand from the citizenry and the need to further clarify and assess many submissions received in the first round of consultations. The Commission also wanted to ensure that enough avenues were created for receiving submissions at the community and district levels. Part of the Commission's strategy was to work with the NCCE, the MMDAs, the NHC, and community focal persons to reach all Ghanaians. Hence the Commission saw the follow-up consultations as another avenue to strengthen its relationship with these persons and institutions, assess the work they had done so far, retrieve any submissions they had not yet transmitted to the Commission and generally improve their capacity to deliver on the specific commitments they had made to the Commission. The exercise was christened the Follow-up C&D Consultations.

24. The Follow-up C&D Consultations were held in all 170 administrative districts in the second half of 2010. The approach adopted by the Commission varied from district to district, but generally included door-to-door consultations; visiting and attending different meetings and gatherings of various interest groups including gender groups, youth groups, military training camps, conferences of student representative councils and student unions, assemblies for students and teachers in various second cycle schools, university communities and other tertiary institutions, chiefs' palaces and traditional councils, churches, mosques, football match venues, different branches of the Ghana Private Road and Transport Unions (GPRTU), and various companies.

25. The Commission also held Regional Consultations in all ten (10) regional capitals in the second half of 2010. Each region had two days of consultation, the first of which was devoted to an open forum. The second day was for formal hearing at a sitting of the Commission as a High Court.

26. Activities on the first day of the Regional Consultations included speeches from the Chairman of the Commission; the Regional Minister of the Region; the President or Vice President of the Regional House of Chiefs; and other dignitaries including one Commissioner of the Constitution Review Commission, normally, a Commissioner who hails from that particular region or with very strong ties to the region. The Commission spent the rest of the morning listening to anyone who had a submission to make. This took the form of an open forum. At the same time, officials of the Commission were strategically located to take submissions from person who preferred to make them in private.

27. In the afternoon and evening of the first day, the Commission listened to submissions from various specific institutions and interest groups in the region. The purpose of these regional mini-consultations was to elicit regional variations on the issues raised during the consultations on various thematic areas and to ensure nation-wide and comprehensive consultations on these thematic areas. The deliberations took the form of syndicate group discussions. The themes discussed were:
    a. National Development Planning;
    b. Executive Powers (including transition of executive authority);
    c. Legislative Powers (including transition of legislative authority);
    d. Legal Sector Issues (the Judiciary and the administration of justice);
    e. Decentralization and Local Government;
    f. Independent Constitutional Bodies;
    g. National Elections and related issues;
    h. Natural Resources and Financial Management (including Oil and Gas);
    i. Public Services;
    j. Traditional Authority; and
    k. Human Rights.

    The above themes were varied slightly according to the peculiarities of each Region.

28. A formal Regional Hearing was held on the second day in accordance with the Commission of Inquiry (Practice and Procedure) Rules, 2010 (C.I. 65). During these hearings, the Commission, sitting as a High Court, took evidence from witnesses on the operation of various aspects of the 1992 Constitution. The witnesses were informed of their right to counsel of their choice before they were allowed to make their submissions. Depending on the nature of a witness's submission, the Commission extended the time it took the witness to make the submission. Questions were posed to the witnesses to clarify their submissions, in particular, to ascertain the factual and legal integrity of their submissions. These proceedings were broadcast live on Ghana Television (GTV) and enabled millions of Ghanaians to participate in the proceedings remotely.

29. Also in the second half of 2010, the Commission held National Mini Consultations designed to elicit views on specific thematic issues and the operation of many key institutions of state. They afforded individuals, institutions, and stakeholders an opportunity to express their views on different constitutional thematic areas relevant to their respective fields of endeavour. They also provided an avenue for the collation of group submissions from interest groups. These submissions were generally more detailed and informed than the individual submissions received during the C&D consultations. This is because the individuals, groups, and institutions involved in these consultations had worked on the issues for many years and were intimately affected by them. There were 57 mini consultations held in some four (4) categories.

30. The first category of National Mini Consultations was held on a number of broad thematic areas and drew a variety of public institutions, interest groups, and individuals working in those areas. The areas were as follows:
    a. Governance;
    b. Human rights;
    c. Decentralisation;
    d. Traditional Authority;
    e. Gender;
    f. Children (comprising sessions with children, persons working on children's issues and child rights advocates);
    g. Natural resources (comprising sessions with the Office of the Administrator of Stool Lands, the Lands Commission, the Minerals Commission, the Forestry Commission, the Water Resources Commission, the Ghana Chamber of Mines, and Civil Society Organisations such as the Integrated Social Development Centre (ISODEC), WACAM, Forest Watch and Civic Response, engaged in advocacy for good governance in the extractive sector);
    h. National Economy (comprising sessions with the National Development Planning Commission, the Bank of Ghana, the Statistical Service, the Ghana Revenue Authority, the Ministry of Finance and Economic Planning, the Office of the Auditor General, the Office of the Controller and Accountant-General and think-tanks such as the Centre for Policy Analysis); and
    i. National Security (comprising sessions with the National Security Secretariat, the Ghana Armed Forces, the Ghana Police Service, the Ghana Prisons Service, the Ghana Fire Service, the Ghana Immigration Service, the Narcotics Control Board, and the National Peace Council).

31. The second category of National Mini Consultations was with different independent constitutional bodies as follows:
    a. Commission on Human Rights and Administrative Justice;
    b. Electoral Commission;
    c. National Commission for Civic Education;
    d. National Media Commission; and
    e. Public Services Commission.

32. The third category of National Mini Consultations was held with various specific interest groups as follows:
    a. The Media;
    b. Political Parties;
    c. Persons With Disability;
    d. The Academia (including the Ghana Academy of Arts and Sciences);

e. The private sector (including the Association of Ghana Industries and the Private Enterprise Foundation);
f. The legal sector (including the Ghana Bar Association);
g. Organised labour (spearheaded by the Trades Union Congress and the Ghana Federation of Labour); and
h. Faith-Based Organisations.

33. The fourth category of National Mini Consultations was held with the different arms of government including the Judiciary (at the level of the various courts, the Chief Justice's Committee on Constitution Review, and the Association of Judges and Magistrates of Ghana); Parliament; and various agencies of the Executive including the Council of State and a number of ministries.

34. The consultations with Ghanaians living abroad were held in the first quarter of 2011. These consultations were originally not part of the project design of the Commission. Research, however, revealed that there are about 7.5 million Ghanaians abroad, including Ghanaians who had formally lost their citizenship in order to take up the citizenship of other countries and their descendants. This compares favourably with the 12.5 million voters in Ghana. The Commission realised that a consultative strategy which did not include this segment of Ghanaians would be grossly inadequate considering the intellectual, economic and social support roles that Ghanaians living abroad play and their interest in local politics.

35. For the consultations with Ghanaians living abroad, it was not possible to visit all the countries which have a considerable number of Ghanaian residents there. However, since Ghanaians living abroad share common characteristics, the Commission visited selected countries in Africa, Europe and North-America. The countries were selected based on the following criteria: the estimated number of Ghanaians living there; the interest expressed by the associations of Ghanaians living in those countries to meet with the Commission; the security advice received from Ghana's Mission in the country; and the capacity of the Mission to organise Ghanaians to meeting points in the country. The countries visited were Botswana, Canada, Egypt, Germany, Italy, Kenya, Nigeria, South Africa, The Netherlands, the United Kingdom, and the United States of America. Consultations in La Cote D'Ivoire and Libya were cancelled due to the political instability in those countries at the time. Consultations with Ghanaians living in Burkina Faso were also cancelled because of the inability to mobilise them effectively for the consultations. These developments were regrettable because there is an estimated 1 million Ghanaians living in La Cote D'Ivoire and the same number in Burkina Faso. Also, a huge number of Ghanaians use Libya as a transit point to reach Europe.

36. A distinct feature of the consultations with Ghanaians living abroad was that they concentrated on their specific concerns, although there were significant proposals from them on the reform of many other aspects of the 1992 Constitution. Their specific concerns related to issues of dual nationality, facilities for investment in Ghana, facilities for integration back into the Ghanaian community, their eligibility to vote, and their eligibility to hold public office in Ghana.

37. Special Consultations were held from the last quarter of 2010 to the first quarter of 2011 with key personalities who have deep experiential knowledge of the operation of the 1992 Constitution. These persons are:
    a. H.E. President John Evans Atta Mills, President of the Republic of Ghana;
    b. H.E. Vice President John Dramani Mahama, Vice President of the Republic of Ghana;
    c. Rt. Hon. Joyce Adeline Bamford-Addo, Speaker of the Parliament of the Republic of Ghana;
    d. Her Ladyship Justice Georgina Theodora Wood, Chief Justice of the Republic of Ghana;
    e. H.E. President Jerry John Rawlings, former President of the Republic of Ghana;
    f. H.E. President John Agyekum Kufuor, former President of the Republic of Ghana;
    g. H.E. Vice President Aliu Mahama, former Vice President of the Republic of Ghana;
    h. Rt. Hon. Ebenezer Sekyi-Hughes, former Speaker of the Parliament of the Republic of Ghana;
    i. Justice N.Y.B Adade, former Acting Chief Justice of the Republic of Ghana;
    j. Justice F.Y. Kpegah, former Acting Chief Justice of the Republic of Ghana;
    k. The Presidential Candidate of the New Patriotic Party in the 2008 elections, Hon. Nana Addo Dankwa Akufo-Addo;
    l. The Presidential Candidate of the Convention Peoples' Party in the 2008 elections, Hon. Paa Kwesi Ndoum; and
    m. The Presidential Candidate of the Peoples National Convention in the 2008 elections, Dr. Edward Nasigre Mahama.

38. The *in camera* consultations enabled these persons and their key advisers to speak openly and frankly about the various constitutional and governance deficits the nation faces and how these may be surmounted from their various perspectives. All of them appeared before the Commission, except Justice N. Y. B. Adade and Rt. Hon. Sekyi-Hughes who opted to present written submissions to the Commission because they were out of Accra during that period.

2.2.5. THE SUBMISSIONS

39. The total number of complete and comprehensible submissions received and utilised by the Commission was 83,161.

40. Aside from the submissions gathered from the various types of consultations discussed above, many submissions were mailed, e-mailed or physically lodged at the offices of the Commission or with the various partners of the Commission at the community, district, regional and national levels.

41. As previously noted, a text-in campaign was launched by the Commission as a measure to facilitate the making of submissions to the Commission by SMS messaging. These submissions were received from December, 2010 to June, 2011. The Commission procured the short code "1992' from the National Communications Authority (NCA) and set this up with all the mobile telephone companies. Rancard Solutions, funded by the World Bank, was the text aggregator, with a parallel monitoring mechanism controlled by the Commission. Any Ghanaian could text in their submission from any mobile network at a premium price of 50 Ghana pesewas per text. With about 18 million mobile phone subscribers and call-in centres operated by the mobile companies to assist persons who cannot read and write English, this mechanism had the potential to extend the reach of the Commission and generate submissions from persons not covered during the consultations. In all, over 20,000 submissions, most of which were usable, were received through this mechanism, despite the many technological hitches.

42. The Commission also received Web submissions through its facebook and twitter accounts. The decision to use these tools follows from the fact that over a million Ghanaians are facebook and twitter users. These tools, therefore, provided a platform for easy communication between users and the Commission. Submissions were also received through the Commission's website and e-mail addresses.

2.2.6. DEVELOPING THEMATIC MATRICES

43. The Commission developed thematic matrices from the first 75,000 submissions it received. The Commission had designed reporting formats that were used on the field to display easily relevant data captured from the field. These formats were useful in highlighting key issues that could establish trends across the consultations. The matrices were developed from these reports and provided a means for the easy understanding of the submissions made to the Commission.

44. The submissions received were categorised into 12 thematic areas, 77 sub-thematic areas, and some 548 issues contained in thematic matrices for deliberation at the Conference. The matrices contained an introduction and a historical account of the issues in each theme. They also covered summaries of the submissions for that thematic area; proposals for constitutional changes arising from the submissions; the reasons given for each proposal; the articles of the Constitution implicated by the submissions; and a trend analysis of the submissions. The matrices were the key documents for the deliberations at the Conference and contained a column for the National Constitution Review Conference position on each issue. The last column, "Commission's position on the issue" was left to be filled after the Conference.

2.2.7. NATIONAL CONSTITUTION REVIEW CONFERENCE

45. The National Constitution Review Conference was held between the 1st and 5th of March, 2011, under the theme, "The Constitution: Our Identity." The objectives of the conference were to:
    a. To serve as a representative national platform where the submissions received and processed would be tabled for national debate.
    b. To bring together persons with expertise and knowledge in the various thematic areas implicated by the submissions to assist the conference to arrive at durable solutions and options for constitutional redesign.
    c. To provide an opportunity to relate national experiences and issues with international comparative experiences and best practice.
    d. To begin to build national consensus around the issues tabled for discussion at the conference, using the deliberative consensus building approach to institutional re-design.

46. At the conference, participants were divided into thematic groups for a plenary discussion of the thematic issues. After the plenary discussion, the thematic groups were further divided into syndicate groups to discuss simultaneously the sub-thematic areas under each broad theme. Each sub-thematic group was assisted by a facilitator and a national consultant. Each thematic area was assisted by at least one international consultant. The international consultants numbered about 15 and included Ghanaian international consultants. Their role was to assist the thematic sessions with input and advice on international comparative experiences and best practice.

47. Each issue under consideration was analysed along any one or more of the following six sets of parameters:

a. The strengths of the Constitution relating to the issue and how these may be reinforced;
b. The weaknesses of the Constitution relating to the issue;
c. Any constitutional changes required for remedying any weaknesses of the Constitution;
d. Any legislative changes required for remedying any weaknesses of the Constitution;
e. Any administrative changes required for remedying any weaknesses of the Constitution;
f. Any changes at custom required for remedying any weaknesses of the Constitution.

48. The 2,998 participants at the conference extended the number of issues to 2,996 issues. No new subthemes or themes were added and these remained at 77 and 12 respectively.

2.2.8. DATA CODING

49. The Commission adopted a system of coding the submissions as a core activity of the qualitative and quantitative analysis. The coding approach was made possible by the folder-based storage concept in line with the Nvivo9 Software.

50. A perpetual license for the Nvivo9 software was purchased by the Commission because it possesses features that the Commission considered relevant to its method of data analysis. The relevant features of the software are as follows:
    a. Capacity for Word Frequency Queries: this helps in identifying major themes in the submissions and allows searching for related terms and word stems, for example.
    b. Capacity to generate Datasets and Matrices: this enables the generation and analysis of structured information in table format.
    c. Capacity for Source Classification: this enables geographical tagging and specification of submission type.
    d. Capacity for storing Search Folders and Group Queries: this allows queries and search criteria to be saved so that they can be consistently reapplied as new data comes in.
    e. Capacity for Word Tree View: this enables the quick and inductive coding of submissions.

51. With a folder-based storage model of the Nvivo9 software, and with onsite training and offsite support from the developers of the new software, the Commission accomplished a sophisticated data coding exercise. Ten (10) regional folders were created, encompassing one hundred and seventy (170) district folders and along twelve (12) thematic areas. The themes

were further divided into sub-themes and issues. These sub-themes and issues became nodes in the Nvivo9 software and relevant submissions were coded to the nodes.

52. The thematic areas for the coding exercise were:
    a. National Development Planning;
    b. Executive;
    c. Legislature;
    d. Judiciary;
    e. Public Services;
    f. Independent Constitutional Bodies;
    g. Decentralisation and Local Government;
    h. Traditional Authority;
    i. Lands and Natural Resources;
    j. National Security;
    k. Human Rights; and
    l. Miscellaneous.

2.3.DATA ANALYSIS

53. At the end of the consultations, the Commission had 83,161 usable submissions. The submissions were subjected to qualitative and quantitative analysis both of which were interconnected to ensure that similar thoughts expressed in the submissions were properly understood.

54. The Commission also decided that in analysing the submissions, the frequency and regional distribution of themes and proposals for reform in the body of submissions needed to be carefully evaluated. The Commission therefore settled for a data triangulation approach by using multiple data sources.

2.3.1. QUALITATIVE ANALYSIS

55. Although both qualitative and quantitative approaches were employed in the data analysis, the qualitative approach was privileged considering the fact that the submissions were non-numerical values. This qualitative approach of analysing the submissions ensured that attention was paid to the meaning of similar thoughts and the different ways in which they were expressed.

56. The qualitative approach helped to answer the following critical questions:
    a. What do Ghanaians want?
    b. How do they want it?
    c. Why do they want it?

57. To answer the questions, the context of the submissions was examined in depth. Each step of the analysis combined both coding to the pre-identified themes and the identification of new themes and sub-themes emerging from a critical reading of the submissions. That is to say that as the data were examined, new codes were assigned to new meaningful nodes. This inductive process of coding had a unique capacity to examine the submissions thoroughly and leverage from them all critical constitutional and related issues.

2.3.2. MATRICES

58. During qualitative analyses, the matrices were used to show the tabular relationship that existed within the data collected. It was also to check the submissions and the variations of the submissions, for instance, whether the provision referred to in the submission is entrenched or not and the reasons behind the submissions.

2.3.3. MAPS

59. The Commission procured different kinds of maps by way of expanding analysis and determining the trends of the submissions. The submissions were superimposed on the maps to ensure good deductive inferences and conclusions. The decision to utilise the maps was borne out of the observation that certain submissions received preponderance from certain geographical areas. The following digital maps were procured and superimposed on the data gathered:
    a. District/Regional Map: the Commission conducted a geographical background search of the different submissions to determine the geographical trends of the submissions and why certain submissions were paramount in specific geographical areas.
    b. Population Map: the population map was important for tracking population density biases in the submissions received by the Commission.
    c. Ethnic Map: the ethnic map aided in establishing ethnic trends in the submissions.
    d. Electoral Map: the electoral map helped the Commission to understand the voting patterns in Ghana and in analysing whether those voting patterns affected the trends of submissions.

e. Conflict Map: through this, the Commission was able to identify submissions that may have been preponderant in conflict-prone areas.
f. Resource maps: given that the Commission received so many submissions on natural resources from particular areas of the country, this map allowed the Commission to explain the preponderance of such submissions in those areas.

2.3.4. QUANTITATIVE ANALYSIS

60. While the qualitative approach aimed primarily at analysing the reasons behind every submission, the quantitative approach was geared towards identifying the frequency at which each issue was counted. The quantitative analytical method was used to back the qualitative methods to avoid subjectivity of judgment and strive towards objective conclusions.

2.4.DEVELOPING THE REPORT

2.4.1. DEVELOPING THEMATIC BRIEFS

61. Based on the trends of the submissions, the Commission developed thematic briefs which subsequently became the bulk of this report. Each brief had an introduction, a historical account of the evolution of the institutions implicated in the submissions on that theme, the key issues raised in the submissions, a summary of the submissions made, the law relating to the submissions, the findings and observations of the Commission on the issues, and the recommendations on the issue.

62. The findings and observations of the Commission concentrated on three things. The first was the historical evolution of our institutions and the implications and options for their current design. This involved historical research, including an examination of the reports and records of previous constitution making and constitution review efforts in Ghana. The second was the specific findings made by the Commission during the process of taking and analysing submissions and whilst interacting with thousands of Ghanaians all across Ghana and abroad and the third was an examination of international experiences and best practice.

63. The recommendations of the Commission were broken down into recommendations for constitutional change, legislative change, and administrative action.

2.4.2. DEVELOPING RECOMMENDATIONS

64. The Commission spent a good part of the second year of its work deliberating on the submissions, the matrices, the report of the National Constitution Review Conference and the thematic briefs. All these discussions related to the various institutional options for improving democracy and constitutional governance in Ghana. The discussion also focused on the arguments made in support of the various calls for the retention, amendment, or repeal of specific provisions of the Constitution or for the inclusion of fresh provisions. All Commissioners participated actively in the deliberations.

65. The Commission was guided by the following principles during its deliberations:
    a. The current Constitution is a good document and care must be taken not to engage in its unwarranted amendment. Thus, the Commission would only recommend an amendment of the Constitution where the current provisions or practice have proved deficient and as such justify a remedy.
    b. The Constitution is a living organism, capable of being nurtured for growth and development.
    c. The Constitution contains a number of nebulous provisions and ambiguities and so the Commission must take the opportunity of the review exercise to address these.
    d. Proposals for the review of the Constitution must aim not merely at textual changes in order to remove ambiguities and lay emphasis on parts of it, but more importantly, to create institutional mechanisms that ensure a proper operation of the constitutional design towards agreed ends.
    e. Over all, the review exercise must:
        i. Cultivate and strengthen a culture of good governance.
        ii. Put national development planning on a firm and non-political pedestal.
        iii. Strengthen national culture as a source of our national identity and pride and as a bastion for development.
        iv. Recognise that our diversity as a nation is a source of richness and wealth.
        v. Demystify national security and ensure that the security agencies work in the service of the people and their human security.
    f. The recommendations must aim to move more power and resources from the centre to the units.
    g. The recommendations must aim to address the particular concerns of marginalised groups such as women, PWDs, children, and the aged.
    h. The recommendations must streamline and strengthen Parliament.
    i. The recommendations must deepen decentralisation, improve participatory democracy at the local level, and enhance the role of Traditional Authority in local governance.

j. The recommendations must streamline and strengthen Independent Constitutional Bodies so that they better protect the institutions of state and the rights of the people.
k. The recommendations must ensure that the natural resources of Ghana are developed and utilised in a transparent and participatory manner and that the benefits of those resources inure primarily to the people of Ghana.
l. The review exercise must aim to eradicate corruption, ethnicity, dysfunctional politics, wastage of national resources, revenue leakages, and unbridled government spending.

2.5.METHODOLOGICAL STRENGTHS AND LIMITATIONS

66. A major strength of the Commission's methodology lies in the fact that its approach was comprehensive; covering diverse groups and personalities, thus making the views collated representative of all citizens of Ghana.

67. However, it is important to realise that qualitative methods in general are subject to wide variations and interviewer/observer biases and interpretation. In order to minimise these biases, the following strategies were adopted:
    a. Representatives of the Commission taking oral submissions and transcribing them were paired or worked in teams in order to reduce biases and misinterpretations.
    b. Frequent reviews of the data were conducted during and after each collection phase.
    c. An immediate post-collection coding and review of the data was performed so that errors that could arise due to time lapse were minimised, given that many aspects of the data, such as interviews and observation, were time-sensitive.
    d. During the public fora, all interviews and submissions were typed and mandatory post-interview debriefing sessions were held, creating an opportunity to reconcile all ambiguities and address any misrepresentations by note-takers.

68. Despite the perception that certain government actions and programmes such as the inauguration of the government's Ghana Shared Growth and Development Agenda (GSGDA); government's hard decision to change the duration of the second cycle educational system; and the problems that characterised the School Feeding Programme; would have an effect on the submissions, the Commission notes that there was no evidence from which to conclude that such incidents affected respondents' submissions.

PART III

THEMATIC BRIEFS

CHAPTER THREE - NATIONAL DEVELOPMENT PLANNING

3.1 INTRODUCTION

1. During the consultations held by the Commission, there was widespread, consistent and a clear call for the formulation of a national development plan or vision for Ghana. There was universal agreement on the need for a long-term, strategic and relatively binding National Development Plan (Plan) even though that was not one of the 44 indicative sets of issues used by the Commission for the consultative process.

2. The process of preparing national development plans and visions has given countries worldwide, the opportunity to consider the kind of future they want for themselves and for future generations.

3. Many countries have used the mechanism of national development plans to chart paths of prosperity for their people. The Asian Tigers such as Hong Kong, South Korea, Taiwan, Singapore, and Malaysia in South East Asia, as well as Botswana in Africa have used national development plans to achieve tremendous social, economic and political growth in the last half century.

4. The case for the formulation of a national development plan, and strict adherence to it, is reminiscent of rigid, state-centred, centralised planning, in the former communist or socialist eastern European countries. It is often said that the Soviet Union's experience in development planning has largely been unsuccessful, making any call for central planning an unattractive and uninspiring proposition. However, the Soviet Union's example is just one way of developing and deploying a national development plan.

5. A more nuanced view of the successes or failures of centralised planning is that the story is mixed. Whilst development planning failed in Eastern Europe and in Africa, it succeeded in East Asia. It must also be noted that the failure of central planning in Africa, for example, cannot be fully understood without considering other factors external to the integrity of the development planning and implementation processes. These include the cold war, the short-term nature of the development plans, rampant military interventions, mismanagement, and improper support structures to ensure the viability of the plans. There is no reason why national development planning cannot be successfully deployed in ways that are consistent with other forms of organising societies and improving on lives and livelihoods and that are more acceptable to other ideological leanings.

6. Ghana has made many attempts at formulating and implementing national development plans since 1919. However, these attempts have not been able to harness the huge potential of Ghana and deploy it for social and economic progress relative to its potential.

3.1. HISTORICAL BACKGROUND

7. The first major development plan in the colonial era was the twenty-five-year development plan instituted in the Gold Coast by Governor Gordon Guggisberg. Between 1919 and 1927, the Governor commenced a number of development projects including the building of schools and hospitals; the construction of a deep-water harbour at Takoradi; and land use planning and optimization. His programme has been described as the most ambitious ever proposed in West Africa up to that time.

8. Since independence in 1957, there have been a number of attempts to fast-track the economic and social progress of Ghana through development planning. As a result, the first President of Ghana, Osagyefo Dr. Kwame Nkrumah, instituted the 7-Year Accelerated Development Plan. The main goal of that plan was to achieve steady economic growth and improvements in the living standards of the urban and rural populations. Although the government focused its attention primarily on economic development and did not articulate a clear set of social policy objectives, state interventions in the economy and public expenditure patterns suggested a strong social policy orientation. The plan was largely successful, but cold war politics, which led to a contracted economy and, later, a *coup d'état* terminated the plan.

9. After the 7-Year Accelerated Development Plan, successive governments, military and civilian alike, introduced one development policy or the other, but these have been largely piecemeal in character, and not holistic. They have also been short to medium-term interventions, rather than long-term plans with short to medium-term interventions built into them.

10. The Busia Administration (1969 to 1972) established a Ministry of Social Welfare and Rural Development to spearhead development from the grass roots level. This Ministry has existed to date, although under different names, and achieved varying degrees of limited success across different governments.

11. The Government of General Ignatius Kutu Acheampong (1972 to 1978) instituted plans for general domestication of Ghana's development process. Strategies to ensure this included:
    a. "Operation Feed Yourself" (OFY), a programme intended to ensure domestic self-sufficiency in food production; and
    b. "Capturing the commanding heights of the economy", a programme meant to ensure local participation in high-end economic endeavours in Ghana (including Government majority shareholding in foreign mining and other companies, and "the 'yentua' policy", of repudiating foreign debts).

12. The Limann Administration (1979 to 1981) had a variety of policies to address Ghana's development needs. The policies were not contained in a single document, but were generally

directed at providing incentives to farmers, encouraging the development of local cottage industries, reviving the mining sector and the industries established during the first Republic, and supporting the use of local content in industrial production.

13. The Governments of the Provisional National Defence Council (PNDC) and the National Democratic Congress (NDC) (1981 to 1993) introduced the Economic Recovery Programme (ERP), incorporating a Structural Adjustment Programme (SAP). The ERP and SAP were initiated from the mid-1980s, under the tutelage of the World Bank and the IMF and have basically been continued to date, if even under different names and with minor changes. SAPs the world over were known for the strict external oversight of public expenditure and austerity measures flowing from externally imposed discipline on public expenditure as a condition for continued funding. The SAP resulted in considerable macroeconomic stability; the growth of the private sector; and improved trade. The SAPs, however, led to economic hardship for many and deterioration in many social indicators in Ghana. However, in 1987, on realizing the social costs, the Government of Ghana introduced the Programme of Action to Mitigate the Social Costs of Adjustment (PAMSCAD).

14. From the 1990s, especially with the World Summit on Social Development held in Copenhagen in March 1995, there has been more focus on undoing the ills of SAPs through poverty reduction programmes; employment creation; enhanced expenditures on education, health and other social indicators; and gender equality.

15. In terms of institutional establishments for development planning, the 1979 Constitution provided for the establishment up of a National Development Commission under the chairmanship of the Vice-President.[2] This was the first time a Ghanaian constitution contained such a provision. That Commission was responsible to the President and was mandated to advise the President on planning and developmental policy and strategy. It was also to ensure that the planning and development strategy of the President was effectively carried out. Thus, the NDPC set up under the 1979 Constitution had advisory, monitoring, and evaluation roles.

16. The Committee of Experts Report that developed proposals for the 1992 Constitution addressed the issue of providing for a national economic and financial order in the context of National Development Planning. The Report recommended the provision of a framework for this crucial aspect of national life. Appendix M of the Report provided that a National Economic Development Commission should be established, and be given the responsibility for the strategic analysis of macro-economic and structural reform options. That Commission was also to be responsible for the development of multi-year rolling plans taking into consideration the resource potential and comparative advantage of the different districts of

[2] Article 73 of the 1979 Constitution of the Republic of Ghana.

Ghana, and for the monitoring, evaluation, and co-ordination of development policies, programmes and projects.

17. The Consultative Assembly endorsed the establishment of a National Development Planning Commission (NDPC) which would advise the President on development planning policy and strategy and, monitor, evaluate and coordinate national development policies, programmes and projects. The contemplation of the Consultative Assembly was that with the creation of the NDPC, the Ministry of Finance and Economic Planning would become the Ministry of Finance, retaining responsibility for the budget, revenue and the supervision of financial institutions, while the function of economic planning was taken over by the NDPC.[3]

18. The Consultative Assembly provided further detail on national development planning, noting that planning was a valid tool for achieving development. Consequently it was to cover all aspects of the national economy; be a multi-dimensional process designed to provide a more sensitive and pragmatic approach to decision-making and management; and must be "bottom up." This meant that the organisational structure of the NDPC would be such that planning started from the District Assembly level with the District Planning and Budgetary Unit (DPBU) to the Regional Planning Coordinating Unit (RPCU) and thence to the NDPC. The Report also stated that the consequential approach to planning might be described in five words: integrated, decentralised, participatory, problem-solving, and continuous. The Cross-Sectoral Planning Group for Economic Development, comprising such sector Ministries as the NDPC might consider necessary would be coordinated by the NDPC.[4]

3.2. NATIONAL DEVELOPMENT PLANNING UNDER THE 1992 CONSTITUTION

19. The 1992 Constitution provides for the establishment of an NDPC composed of a minimum of 14 persons including the Minister for Finance, the Governor of the Central Bank, and the Government Statistician. The President is thus empowered to appoint an indefinite number of persons to the NDPC, and the NDPC is responsible to the President.[5]

20. The functions of the NDPC are to advise the President on development planning, policy and strategy by providing a national development policy framework and ensuring that strategies, including consequential policies and programmes, are effectively carried out to enhance the well-being and living standards of all Ghanaians on a sustainable basis.[6]

[3] Official Report of the Proceedings of the Consultative Assembly (Thursday, 30th January 1992, Col. 1764-1765).
[4] Official Report of the Proceedings of the Consultative Assembly (Thursday, 30th January 1992, Col. 1765-1766).
[5] Article 86 of the 1992 Constitution of the Republic of Ghana.
[6] Article 87 of the 1992 Constitution of the Republic of Ghana.

21. The Constitution also provides that the State shall take all steps necessary to establish a sound and healthy economy whose underlying principles shall include undertaking the even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas.[7]

22. To actualise the constitutional provisions on national development planning, two pieces of legislation were passed by Parliament in 1994. These laws are the National Development Planning Commission Act and the National Development Planning (Systems) Act.[8] The two laws established the NDPC under the Office of the President and re-emphasised the advisory role of the NDPC. Therefore, the NDPC lacks the legal capacity to ensure adherence to any development plan it produces, however truly that plan reflects the needs of the people of Ghana.

23. Another relevant law is the Local Government Act.[9] This law provides that the District Assemblies are in charge of the overall development of the Districts, and requires the Assemblies to ensure the preparation and submission, through the Regional Coordinating Council, of development plans of the district to the NDPC for approval.[10]

24. In practice, the NDPC functions as a unit of the Office of the President tasked with the onerous responsibility of making proposals for development plans and monitoring, evaluating and coordinating the nation's development agenda. Development plans from the districts are consolidated by the Regional Planning Officers. These are forwarded to the NDPC for incorporation into relatively short-term national development plans. The NDPC has been instrumental in the design of all the development agendas of Ghana since 1993.

3.3. DEVELOPMENT PLANNING SINCE THE 1992 CONSTITUTION

25. The NDPC has assisted each and every government since 1993 to develop, implement and monitor different national development plans. In 1995, the Rawlings Administration (1993 to 2001) launched the Coordinated Programme of Economic and Social Development Policies, which was simply called the "Ghana Vision 2020." This long-term plan was to guide Ghana to become a middle-income economy in twenty-five (25) years. The First Medium-Term Development Plan (1997-2000) was based on Vision 2020. The priority focus was on human

[7] Chapter 6 of the 1992 Constitution of the Republic of Ghana.
[8] National Development Planning Commission Act, 1994 (Act 479) and the National Development Planning (Systems) Act, 1994 (Act 480).
[9] Local Government Act, 1993 (Act 462).
[10] Section 10 of the Local Government Act, 1993 (Act 462).

development, economic growth, rural development, urban development, infrastructure development and an enabling environment for growth.

26. In 2002, the Kufuor Administration (2001 to 2009) decided to access funds under the Heavily Indebted Poor Countries (HIPC) debt relief initiative. The government then introduced the Ghana Poverty Reduction Strategy (GPRS I) with a focus on Production and Gainful Employment, Human Resource Development and Basic Services, Special Programmes for the Poor and Vulnerable and Governance. The plan was implemented over the period 2003 to 2005. This was done to meet the requirements for debt relief from the international community under the HIPC initiative. Following what was termed a successful implementation of the GPRS I, the Growth and Poverty Reduction Strategy (GPRS II) was designed as a sequel to the GPRS I. This was implemented over the period 2006 to 2009. Under GPRS I and GPRS II, substantial progress was made in the realization of macro-economic stability and the achievement of poverty reduction goals. However, structural challenges also emerged and these were further compounded by the global financial crisis.

27. The current Mills Administration developed the Coordinated Programme of Economic and Social Development Policies, 2010 to 2016. The government launched in 2010, the Ghana Shared Growth and Development Agenda (GSGDA), as a medium-term national development policy framework, and a successor to the GPRS II. It is to be implemented over the period 2010 – 2013. The GSGDA is anchored on the following themes: Ensuring and Sustaining Macroeconomic Stability; Enhanced Competitiveness of Ghana's Private Sector; Accelerated Agricultural Modernization and Natural Resource Management; Oil and Gas Development; Infrastructure, Energy and Human Settlements Development; Human Development, Employment and Productivity and Transparent and Accountable Governance.[11]

28. From the foregoing analysis, it is evident that every government since the inception of the 1992 Constitution of Ghana has adopted a differently styled national development plan for its own purposes. The process of developing and the content of these plans have been generally regarded as micro-political processes owned by the government in power and have been changed with every change of government. Once a government goes out of power, out goes its development plan.

29. It is also clear that, besides Vision 2020, all the development plans Ghana has had since independence have been short to medium-term plans lasting no more than a couple of years. These plans have on occasion been further shortened by unexpected regime changes or truncated due to resource scarcity, the diversion of funds, the misappropriation of funds or cash flow problems.

[11] NATIONAL DEVELOPMENT PLANNING COMMISSION, www.ndpc.gov.gh (last visited June 30, 2011).

30. Ghana's development plans have been largely successful in maintaining macroeconomic stability and some measure of wellbeing, mainly for the upper and middle classes with access to the resources of state. The plans have, however, failed in the structural transformation of the economy from that of a low income country to that of a middle income country in real terms.

31. There are many reasons why development planning has largely failed in Ghana. The overconcentration on hard issues over soft issues of development is one such reason. A quintessential example is the concentration on physical development infrastructure to the exclusion of access to social services. A parallel reason is the overconcentration on economic development (in the limited sense of ensuring macroeconomic stability) to the detriment of social development and real human development and good governance. In general, much of Ghana's history has not shown a development policy that recognises and puts in operation the interdependence of development and good governance (incorporating human rights and social inclusion). Admittedly, the development plans since Vision 2020 have incorporated good governance, but have allocated the rear end of the plans and relatively limited resources to the subject, thus failing in real terms to democratise the spread, reach, and depth of development across the country.

32. It is for all of these reasons that there have been preponderant and overwhelming calls by Ghanaians for the amendment of the provisions in the 1992 Constitution of Ghana on National Development Planning. The submissions received by the Commission on this theme relate to the nature and character of the plan; the scope of the plan; the implementation of the plan; monitoring the plan; and changes to the plan. Other submissions contained proposals for the powers, functions, and composition of the NDPC. These matters are discussed under two subthemes below: National Development Plan and National Development Planning Commission.

SUBTHEME ONE: NATIONAL DEVELOPMENT PLAN (NDP)

ISSUE ONE: NATURE AND CHARACTER OF A NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

33. The nature and character of a national development plan was the subject of many submissions to the Commission. The issue was expressed to cover many dimensions:
    a. Should the Plan be a short-term, medium-term or long-term one?
    b. Should the Plan be a single national plan or should there be different plans for the various regions of the country, taking into account the local needs of the regions?

c. Should the Plan be binding on successive governments or should it change with changes of government?

B. CURRENT STATE OF THE LAW ON THE ISSUE

34. The 1992 Constitution of Ghana does not expressly provide for a national development plan. However, the Constitution provides that the NDPC shall advise the President on development planning, policy, and strategy. [12] The Constitution also provides that the NDPC shall, at the request of the President or Parliament, or on its own initiative make proposals on national development policies, programmes, and projects and coordinate, monitor and evaluate these policies, programmes and projects. This provision is an entrenched provision and may only be amended following a referendum.[13]

35. The Constitution also contains a chapter on basic developmental objectives, styled the Directive Principles of State Policy. These may well form the basis of the National Development Plan. This chapter of the Constitution is non-entrenched[14] and may be amended by Parliament alone.[15]

C. SUBMISSIONS RECEIVED

36. The Commission was overwhelmed, during its consultations, with submissions calling for the institution of a national development plan (the Plan) for the nation. The specific proposals made, and the reasons in support of those proposals are as follows:
    1. The Plan should be national in character for the following reasons:
        a. It will ensure that there is a blueprint for national progress and sustainable development.
        b. It will be the framework for accelerated growth and actual reduction in poverty levels among Ghanaians.
        c. It will ensure that national development is not centred on sectional political party manifestos; manifestos must rather be aligned to the Plan.
        d. It will reduce the party politicization of our development process.
        e. It will serve as a holistic basis for the assessment of the performance of successive governments.
        f. A development plan which is national in character stands a greater chance of being adhered to by successive governments than a sectional policy.

[12] Article 87 of the 1992 Constitution of the Republic of Ghana.
[13] Chapter 25 of the 1992 Constitution of the Republic of Ghana.
[14] Chapter 6 of the 1992 Constitution of the Republic of Ghana.
[15] Chapter 25 of the 1992 Constitution of the Republic of Ghana.

2. The Plan should be binding on all successive government for the following reasons:
    a. This will ensure that projects initiated under a previous government are not abandoned when there is a change of government.
    b. A binding Plan will ensure that national resources, annual budgets and government programmes, projects and initiatives are directed to realizing the ends of the Plan.
    c. It will make it possible for any Ghanaian to enforce adherence to the Plan by successive governments.
    d. It will ensure that national resources are not wasted on projects that do not lead to the ultimate good of the nation.
    e. A binding Plan will lead to the censoring of government officials who act contrary to the Plan.

3. The Plan should be region and district specific, and not national in character for the following reasons:
    a. It will allow of the peculiar needs of the regions and districts to be addressed.
    b. It will make the district and regions partake in deciding their own needs.

4. The Plan should be long-term for the following reasons:
    a. A long-term development framework, incorporating short-term and medium-term goals, accords with international best practice.
    b. Only long-term planning can deal with the intractable developmental challenges that the nation faces.
    c. Only a long-term plan may be incorporated into a National Constitution, since Constitutions are crafted as long-term documents.
    d. A long-term development plan will ensure that the present and the future generations are catered for in development planning.

D. FINDINGS AND OBSERVATIONS

37. The Commission finds that:
    a. There were widespread and consistent calls for a long-term and binding national development plan during the review process. This was the case despite the fact that the list of 44 issues that were put to Ghanaians at the beginning of the consultative exercise did not include an issue on National Development Planning.
    b. Throughout the length and breadth of the country, and even beyond the borders of Ghana, Ghanaians of all walks of life have asked for such a plan to be instituted in order to avert the historical developmental vacillations and retrogressions we have experienced as a nation.

c. The inclusion of definitive provisions on national development in the Constitution will help transform the Constitution from essentially a Political Constitution to a Developmental Constitution, especially as Ghanaians are increasingly looking to the Constitution as a guide for the progress of our nation and a better life.
d. Ghana needs a sustainable development plan which will deliver to Ghanaians improved livelihoods comparable to those of other nations which were similarly poorly situated as pre-independence Ghana almost 60 years ago but have now emerged from their deprivation through development planning.
e. In Ghana's recent history, national development has been geared towards the fulfilment of election promises mainly contained in political party manifestos, rather than towards an all-inclusive programme of ensuring social and economic progress. This tide must be stemmed by a plan which supersedes such manifestos.
f. A constitutional provision for a national development plan provides the contentment and assurance urgently required and desired for institutional certainty on an issue around which the entire nation's sense of direction and survival revolves.

38. The Commission observes that the Committee of Experts that drafted proposals for the 1992 Constitution envisaged a national and long-term development plan from which the budgets of all public institutions, including ministries, would be drawn.[16]

39. The Commission further observes that participants at the National Constitution Review Conference endorsed the widespread call for the nation to adopt for itself a long term and binding national development plan, which will serve as the blueprint for the accelerated development of the country.

40. The Commission observes that many nations have national development plans in one form or the other. Some of these are instructive on the nature and character of such plans.
    a. Uganda has a National Planning Authority established by an Act of Parliament and charged with producing comprehensive and integrated development plans for the country, elaborate in terms of vision and medium-term and long-term plans[17].
    b. The Irish Plan is a roadmap for sustainable economic expansion, social justice and better quality of life for the Irish people.[18] The Plan is also to deliver a programme of integrated investments that will underpin Ireland's ability to grow in a manner that is economically, socially and environmentally sustainable.[19]

[16] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991) app. M.
[17] Section 7 of Uganda's National Planning Authority Act, 2002.
[18] National Development Plan of Ireland (2007-2013), *Transforming Ireland: A Better Quality of Life for All*, p. 14.
[19] The National Development Plan of Ireland (2007-2013), *Transforming Ireland: A Better Quality of Life for All*, p. 99.

c. Kenya's Vision 2030 was developed for the long term to cover the period 2008 to 2030. Its objective is to help transform Kenya into a "middle-income country providing a high quality life to all citizens by the year 2030." It incorporates successive 5-year medium-term plans beginning with the 2008-2012 medium-term plan.
d. In Malaysia, Development Planning is 3-tiered and cascading, covering the long-, medium- and short-term horizons. Vision 2020 was launched in Malaysia in 1991 to cover a 30-year period. It spells out Malaysia's national development aspirations over the long-term and provides a focus for their national development effort. In Malaysia, like Kenya, 5-year medium-term development plans are formulated to make the long term Vision 2020 functional. Short-term planning is achieved through annual budgets.
e. In Zambia, where they have a long-term national planning instrument entitled Vision 2030, which sets out Zambia's long-term vision, they have instituted short-term national development plans to actualise the Vision. The current one is the sixth National Development Plan, 2011-2015.

41. The Commission also observes that in virtually all the jurisdictions where development plans have been crafted, they have been national in character, although they take account of local differences and peculiarities.

42. The Commission further observes that national development plans are almost always long-term visions, although medium-term and short-term plans may be developed from these long term visions.

43. The Commission finally observes that the institution and fidelity to national development plans enhance systematic growth and continuity in development, which, overall have a huge potential to deliver for citizens improved livelihoods.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

44. The Commission recommends that the Constitution should be amended to include an entrenched provision for the development of a national development plan for Ghana.

45. The Commission recommends that the national development plan should be comprehensive, long-term, strategic, multi-year, and binding in nature and enforceable at the instance of any person or institution.

ISSUE TWO: SCOPE OF A NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

46. In making their submissions to the Commission, some Ghanaians addressed the issue as to what matters should be covered under the National Development Plan.

B. CURRENT STATE OF THE LAW ON THE ISSUE

47. As previously noted, the Constitution does not specifically provide for a national development plan as is currently conceived. There are, however, broad political, economic social, educational, and cultural objectives contained in the Constitution under the Directive Principles of State Policy, which may serve as a guide for crafting a National Development Plan. The chapter on the Directive Principles is non-entrenched[20] and may be amended by Parliament alone.[21]

C. SUBMISSIONS RECEIVED

48. The submissions received by the Commission indicated that the national development plan should contain the following:

1. **The Economy**
   The Plan as far as it concerns the economy should aim at:
   a. The regulation of the import and export of goods to and from Ghana.
   b. The regulation of trade and traders in Ghana to ensure that foreigners do not engage in trade reserved for Ghanaians.
   c. The creation of jobs through the setting up of industries and the promotion of the private sector.
   d. The provision of incentives to boost local and indigenous businesses.
   e. The widening of the tax net to cover the informal sector and the taxation of churches.
   f. The standardization of salaries nationwide across all economic sectors.
   g. Transparency in the management of public finances.

2. **Lands and Natural Resources**
   The national development plan should provide for:
   a. The development of a land use policy to address the ownership of land and streamline the process of acquiring land especially for developmental purposes.

[20] Chapter 6 of the 1992 Constitution of the Republic of Ghana.
[21] Chapter 25 of the 1992 Constitution of the Republic of Ghana.

b. A policy on the optimization of land use through the introduction of a high rise building component for all housing projects.
c. The management of natural resources which should benefit the communities in which these resources are exploited to give effect to the principle of equitable and sustainable use of natural resources.
d. The processing of natural resources to add value to the resources in a bid to maximise revenue for the country through the export of semi-processed and finished products.

3. **Agriculture**

The national development plan should promote:

a. An Agricultural Policy aimed at harnessing the huge agricultural potential of the nation.
b. The establishment of factories to process agricultural produce taking into account the major agricultural activity in localities.
c. The production of cash crops other than cocoa, so as to create more jobs and reduce poverty.
d. The provision of incentives to farmers in the form of farm inputs and the payment of salaries, pensions and bonuses for bumper harvests to farmers.
e. The restructuring of the National Farmers Award scheme so that it serves to promote rural farming.
f. The regulation of the factors that trigger off an increase in the prices government pays farmers for their cocoa.
g. The deregulation of the cocoa sector so that the cocoa beans can be sold to bodies other than the government.
h. The development of a policy framework for the fishing industry which will prevent the use of unsustainable fishing methods such as the use of fishing light attractors and pair trawling, and promote year round improvement in fish stock.

4. **Physical Infrastructure**

The national development plan should adopt and pursue:

a. An infrastructure policy which addresses issues including the construction of roads, railways and housing nationwide.
b. A better regulation of the construction industry to ensure high quality work output and adherence to timelines.
c. The installation of streetlights all over the country.
d. The implementation of a street naming programme throughout the country.
e. The introduction of a sustainable maintenance and repair culture that will protect the nation's physical infrastructure from falling into or remaining in disrepair.

5. **Environment and Sanitation**

The national development plan should establish or enforce:

a. An environmental and sanitation policy to tackle issues of environmental pollution and degradation, and waste management and recycling.
b. Reduction in noise pollution.
c. A cleaner environment as a catalyst for tourism.
d. A strong regulator equipped to enforce environmental and sanitation policy.

6. **Information and Communications Technology**

The national development pan should aim at:

a. The development of an ICT policy and the promotion of ICT in all aspects of national life.
b. The provision of computers to rural areas to enhance and facilitate ICT education in the country.

7. **Health**

The national development plan should incorporate a national health policy. The national health policy should aim:

a. To improve the general health of Ghanaians; it should cover the regulation of tobacco and alcohol consumption, emphasise preventive medicine and reinforce regenerative health programmes.
b. To provide increased funding for the health sector, partly by drawing funds from the recent oil and gas find.
c. To improve health facilities and ensure the training and retention of good quality health professionals.
d. To expand and regulate the National Health Insurance Scheme to ensure its sustainability, greater access and efficiency.
e. To regulate and integrate alternative medicine into orthodox medicine.
f. To include in the Constitution an explicit provision on the individual's right to health.
g. To regulate the health sector properly to reduce the incidence of the abuse of patients' rights and negligence by health personnel.
h. To address the poor doctor-patient ratio.
i. To curb corruption in the health sector.

8. **Education**

The national development plan should develop a long term education policy that will:

a. Ensure greater stability in the educational system.

b. Forestall, in particular, the frequent changes in the curriculum and duration of educational programmes. The duration for junior and senior high school education should be fixed and entrenched in the Constitution.
c. Not allow the politicisation and manipulation of the education system according to the pleasure of the government in power.
d. Ensure that any change made to the duration of the educational system would consider the availability of facilities and teachers.
e. Establish an independent body to manage the education sector so as to insulate the sector from political influence and manipulation.
f. Address the many issues that surround the School Feeding Programme, ensuring that it is well structured and sustainably managed.
g. Extend the capitation grant to all children.
h. Ensure the enforcement of the Free Compulsory Universal Basic Education (FCUBE) programme as provided in the Constitution.
i. Foster the extension of the FCUBE programme to cover secondary education and a substantial increase in the level of subsidy to tertiary educational institutions.
j. Address the security and safety concerns of children in schools.
k. Address the conditions of service of teachers and implement strategies for attracting teachers to rural and deprived areas of the country.
l. Address the high cost of education in private universities.
m. Scrap professional certificate courses in the educational curriculum since employers are more interested in candidates with degrees.
n. Establish a national fund for research for all the public universities and research institutions in the country to meet the increasing demand for higher quality education in the country.
o. Ensure the progressive introduction of free education to the higher educational levels as provided in Article 25(1) (c) of the Constitution, although that provision should be expunged from the Constitution to avoid litigation.
p. Grant universities autonomy from the public procurement process since it is very bureaucratic and causes delay.
q. Ensure that private universities are allowed to access government grants on research to reduce the cost of education for the students who attend those institutions.
r. Address the need for a comprehensive policy on Science and Technology for the Country.

9. **The Youth**

The national development plan should incorporate a youth policy that will:

a. Ensure that the youth are not neglected, and also harness the strengths of the youth for effective national development.

b. Situate programmes such as the National Youth Employment Programme (NYEP), the National Service Scheme and various Technical and Vocational Education and Training initiatives in a broader and more permanent framework for the advancement of the interests of the youth.
c. Address youth unemployment.
d. Generally protect the rights of the youth.

10. North-South Developmental Gap

The national development plan should include strategies that aim at:

a. Bridging the developmental gap between the North and the South of Ghana and assisting some depressed areas in the South to catch up with the more developed areas.
b. The provision of extra budgetary support for the development of Northern Ghana.
c. Specific initiatives to promote industries and businesses in Northern Ghana.
d. Specific interventions, especially in the area of education, for some parts of Southern Ghana, just as are available in the Northern parts of Ghana.
e. The cancellation of the policy of free education in Northern Ghana because it is discriminatory.

D. FINDINGS AND OBSERVATIONS

49. The Commission finds that the people of Ghana would like a national development plan that is comprehensive enough to cover the soft and hard aspects of development. The Commission further finds that Ghanaians would like virtually every aspect of national life covered in the national development plan.

50. The Commission observes that in Ghana one of the greatest scores of interparty and governmental castigations and disappointments that emerge after governmental change-over is due to national indebtedness emanating from governmental expenditure and spending on projects which are often abandoned when a new government comes to power. This is attributable in part to the absence of a national development plan.

51. The Commission observes that national development plans the world over are comprehensive and cover both the hard and soft aspects of development, ensuring that economic policies are effectively matched by social policies. This is important for ensuring human capital development and furnishing social safety nets to ensure basic welfare. This is particularly important since Ghana has not had a unified and well-articulated social policy since independence.

52. The Commission further observes that:

a. The Irish National Development Plan includes economic infrastructure to support progress; investment in education, science, technology and innovation; and social inclusion which focuses on ensuring that people have the support necessary to achieve their full potential at all stages of their life.[22]
b. In India, the National Plan focuses on inclusive growth; targeting improvements in the economy, incomes and employment opportunities; and the social sector which includes the youth, health, sports, education, culture, water and sanitation.[23]
c. In Botswana, the plan is based on 7 pillars. These are: an educated and informed nation; an open, democratic and accountable nation; a moral and tolerant nation; a united and proud nation; a safe and secure nation; a prosperous, productive and innovative nation; and a compassionate, just and caring nation.[24]
d. In the case of South Africa, the Development Facilitation Act[25] seeks to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land. The law responds to the contestations over land and its use in post-Apartheid South Africa.

53. The Commission finds that the National Constitution Review Conference advocated a binding, long-term national development plan but did not make any specific proposals on the scope of such a plan. The Conference noted, however, that the Plan should have particular regard for internationally recognised advances in social, economic, and political rights.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

54. The Commission recommends that the proposed long-term strategic national development plan should be expressed in the Constitution to cover all areas of national life so as to make it holistic.

55. Additionally, the Commission emphasises that the Plan should not be limited to the hard aspects of development such as infrastructure, agricultural development, and housing, but address in equal measure, all the soft aspects of development such as national orientation, governance, tolerance, and family life.

[22] The National Development Plan of Ireland (2007-2013), *Transforming Ireland: A Better Quality of Life for All*.
[23] The Eleventh Five Year Development Plan of India (2007-2012).
[24] BOTSWANA NATIONAL VISION COUNCIL VISION 2016, www.vision2016.co.bw (last visited March 11th, 2011).
[25] Development Facilitation Act, No. 67 of 1995 (Zambia).

ISSUE THREE: PROCESS OF DEVELOPING A NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

56. There were two dimensions to the process of developing a national development plan:
    a. Should the process of developing the plan be centralised or decentralised?
    b. Which stakeholders may participate in developing and approving the Plan?

B. CURRENT STATE OF THE LAW ON THE ISSUE

57. Under the law, the NDPC is mandated to prescribe the format for preparing district development plans.[26] All district development plans are submitted to the NDPC, through the Regional Coordinating Councils.[27] When a district development plan has been approved by the NDPC, a District Assembly may seek the permission of the NDPC to modify the approved plan.[28] Again, the NDPC is supposed to be the national coordinating body of the decentralised national development planning system, which system is made up of the District Planning Authorities, the Regional Coordinating Council, sector Ministries, Departments and Agencies (MDAs), and the NDPC[29].

58. The law requires that participatory methodologies be used at the local level to collate views of communities in the process of developing the district plans. Public hearings are mandated for proposed district plans and reports of the hearings are to be attached to the proposed plans when they are forwarded for collation.[30]

C. SUBMISSIONS RECEIVED

59. The Commission received competing submissions on this issue, although the preponderance of views was in favour of a decentralised and participatory process of developing the Plan.

60. There were submissions which called for the development of medium-term development agendas for periods of four years to coincide with each term of government so that every government coming into power will have to follow a particular medium-term development agenda for the duration of their term.

61. Other submissions proposed that the process of making the nation's development policy should have a bottom-up approach and should be based on broad consensus.

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[26]Section 47(1) of the Local Government Act, 1993 (Act 462).
[27]Section 47(2) of the Local Government Act, 1993 (Act 462).
[28]Section 47(3) of the Local Government Act, 1993 (Act 462).
[29]Section 1 of the National Development Planning (Systems) Act, 1994 (Act 480).
[30]Section 3 of the National Development Planning (Systems) Act, 1994 (Act 480).

62. Some submissions were to the effect that the government should develop the Plan centrally and exercise firm control over the process. This is to ensure policy coherence and effectively matching plan to budget.

63. There was a recurrent call for the process of developing the Plan to be decentralised. Many reasons were advanced for this proposal:
    a. Decentralisation will assure, in the process of developing the Plan, direct grass roots participation, a critical ingredient for the integrity, ownership and acceptability of the Plan.
    b. Decentralisation will ensure that the peculiar local resources, needs and concerns of ordinary Ghanaians living in our communities are factored into the Plan.
    c. A decentralised process will allow the participation of traditional authorities who operate at the local level and who are critical stakeholders in any developmental endeavour.
    d. Decentralising the process will also increase the likelihood of the Plan to serve as an instrument for comprehensive development and for bridging the development gaps in our nation. This is because the various developmental disparities will come alive in the localised processes of developing the Plan.

D. FINDINGS AND OBSERVATIONS

64. The Commission finds that the majority of Ghanaians would want the process of crafting the Plan to serve as an opportunity for them to express their views on the development agenda of Ghana.

65. The Commission finds that for a national development plan to succeed, it must be owned and cherished by the people. To be owned and cherished by them, the Plan must be scripted with the full participation of the people. This is best done through a decentralised, bottom-up approach. A decentralised mechanism for developing the Plan is, therefore, non-negotiable for most Ghanaians.

66. The Commission also observes that the processes of articulating national development plans all over the world are generally decentralised in order to capture the knowledge and resources of a broad range of stakeholders.
    a. In the case of Botswana, the Vision 2016 Council which is responsible for the preparation of their National Development Plan has to work with key stakeholder sectors to generate a common understanding of their role in creating progress towards the national Vision. The key stakeholder sectors are not monoliths and themselves must be broken down into smaller groups. The implementation strategy is a bottom-up affair with the key sector strategic plans working to achieve the goals. The Council is also to collaborate with each of the sectors, separately and together, so that they

build and then implement strategies which will drive the nation towards achieving the Vision 2016 goals in each of the Pillars identified. Based on the Strategic Plan for 2009-16, each sector will annually build and implement an Operational Plan for that year. The Council is tasked to commission the translation of materials relating to the Vision into Setswana (the major local language) and other local languages. The Council also relies largely on the public sector, private sector and civil society as its key strategic partners.

b. In Kenya, their Vision 2030 was developed through a consultative process undertaken with stakeholders at all levels of the public sector, the private sector, the media, civil society, and NGOs. In the rural areas, provincial consultative forums were also held throughout Kenya on the Plan. Experts then used the inputs from the consultations to draft the Vision.

c. In Malaysia, the planning process for their Vision 2020 involves regular and on-going consultations with both the private sector and civil society. This process is often deployed when short term and medium-term plans are being designed from the Vision 2020.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

67. The Commission recommends, for inclusion in the Constitution, a provision that mandates broad consultation with a wide range of stakeholders, starting from the grassroots level, in the process of crafting the Plan.

68. The Commission also recommends that the Constitution be amended to require parliamentary approval of the Plan by a two-thirds majority before it becomes operational.

69. The Commission further recommends that once approved by Parliament, the Plan and any amendments to it, be widely disseminated.

ISSUE FOUR: IMPLEMENTATION OF THE NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

70. This issue incorporates two dimensions:
    a. What body should implement the Plan?
    b. How should the Plan be implemented?

B. CURRENT STATE OF THE LAW ON THE ISSUE

71. All District Planning Authorities are mandated to coordinate planning processes and to develop and implement plans in their respective districts.[31] Also, government Ministries and sector agencies can develop plans of their own, but these plans should be in accordance with the broad national development goals[32]. In special circumstances, a joint development board may be established to deal with the implementation of plans for designated areas of national life.[33]

C. SUBMISSIONS RECEIVED

72. The majority of submissions indicated that the NDPC should be responsible for the implementation of the Plan. The main argument in support of this proposal was that the institution responsible for developing the Plan is better able to implement it than another.

73. Other submissions proposed that the existing government MDAs and the MMDAs be responsible for implementing the Plan. This is to ensure that one institution alone, the NDPC, is not charged with developing, implementing and monitoring the Plan. That would amount to placing too much power at the disposal of one state institution without the necessary checks and balances. Besides, the MDAs are established and provided with capacities for implementing development policies and so they should be charged with that task.

74. All those who made submissions on this issue agreed that whatever institution implements the Plan must ensure that the implementation is done in a people-centred fashion. This will require involving the beneficiaries of aspects of the Plan in the implementation process; ensuring people-centred performance monitoring; and urging the timely completion of projects.

D. FINDINGS AND OBSERVATIONS

75. The Commission finds that of the submissions received on this issue, the majority appear to prefer that the NDPC should be the body to implement the Plan.

76. The Commission also finds that Ghana has an elaborate system of MMDAs and MDAs that have the capacity to implement plans, programmes and projects.

[31]Section 2 of the National Development Planning (Systems) Act, 1994 (Act 480).
[32]Section 10 of the National Development Planning (Systems) Act, 1994 (Act 480).
[33]Section 13 of the National Development Planning (Systems) Act, 1994 (Act 480).

77. The Commission observes that both the 1979 and 1992 Constitutions did not give the National Development Planning Commission additional responsibility for implementing the Plan.[34]

78. The Commission observes that international comparative experience does not produce any hard and fast rule on who implements a national development plan.
    a. In Botswana, the Vision 2016 Council is not responsible for implementation of the Vision. The Council is established to monitor and evaluate the effective and timely implementation of the Vision by all stakeholders and to drive the popularization of the Vision. The Council is obliged to organise a national conference every two years in order to allow more stakeholder participation, and to review implementation and progress. The meetings, hearings and investigations of the Council are conducted and reported in such a manner as to ensure transparency and public awareness.
    b. In Kenya, on the other hand, a Semi-Autonomous Government Agency (SAGA) has been established to oversee the implementation of all the projects outlined in the Vision. The Agency works closely with ministries as well as the private sector, civil society and other relevant stakeholder groups.
    c. In Malaysia, aside from the National Planning Council, there is the National Action Council, a sub-unit of Cabinet which considers matters on the implementation of development programmes and projects. It is chaired by the Prime Minister.
    d. In Ireland, the overall coordination of monitoring and implementation of the National Development Plan is the responsibility of the Sectorial Policy Division in the Department of Finance.

79. The Commission observes that, as a general feature, in most of the countries where national development plans and visions have been developed, the implementation of these plans has not been the function of the body that developed them. However, in these jurisdictions, the Commission notes, there are mechanisms in place to ensure collaboration between the agency that develops the Plans and the agencies that are charged with implementing them. As has been observed, in Malaysia, there is a National Action Council which sees to the implementation of the Plans developed by the National Planning Council. The connection between the Plans and the implementing agency is the Prime Minister who chairs both the National Planning Council and the National Action Council.

80. The Commission finds that saddling the NDPC with an additional responsibility for implementing the Plan would lead to the creation of an unwieldy and inefficient bureaucracy. The very essence and continued existence of the various MMDAs and MDAs would be called into question should an additional body be assigned a job that they have been quite

[34] Article 73(3) of the 1979 Constitution of the Republic of Ghana and Article 87(2) of 1992 Constitution of the Republic of Ghana.

capable of executing. Also, all the decades of experience in implementation of plans that the MMDAs and MDAs have gained could go to waste.

81. The Commission finally observes that the United Nations Declaration on the Right to Development requires that all stakeholders must be involved in the implementation of the National Development Plans and this is best done at the MMDA level, incorporating the various decentralised departments of the MDAs.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

82. The Commission recommends that the current position where the NDPC is not an implementing agency should be maintained. The NDPC should only develop the Plan and facilitate, monitor and evaluate its implementation.

83. The Commission recommends that the MDAs and MMDAs be primarily responsible for implementing the National Development Plan.

84. The Commission recommends that any policy, legislation, administrative action, programme, project, initiative, budget and financial disbursement which is inconsistent with the Plan be considered unconstitutional.

85. Additionally, the Commission recommends that the Plan should be the basis for the development of all the operational plans and annual budget of MDAs. Effectively, the fiscal year will become the development year as well, since the Budget becomes more or less the Plan in Action.

86. The Commission recommends that the Constitution be amended to require the President to report to Parliament once a year on all the steps taken to ensure the implementation of the National Development Plan.

ISSUE FIVE: AMENDMENT OR ADAPTATION OF THE NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

87. The variants of this issue were:
    a. How frequently should the Plan be reviewed and changed?
    b. Who should have the power to change the Plan?
    c. What process should be adopted to amend the Plan?

B. CURRENT STATE OF THE LAW ON THE ISSUE

88. The Constitution provides that the NDPC may on its own initiative make proposals for the development of multi-year rolling plans taking into account the resource potential and comparative advantage of the different districts in Ghana.[35] Inherent in this is the power to make new proposals.

89. The Constitution provides that in any law, where a power to make Regulations is conferred,[36] the power shall be construed as a power to amend as the case may be.[37]

C. SUBMISSIONS RECEIVED

90. The bulk of the submissions received on this issue emphasised the need for minimal and only necessary changes to the Plan once it was approved. The submissions also stressed that a broad consensus was necessary if the Plan was to be changed.

91. Some submissions proposed that Parliament should be the body responsible for approving an amendment to the Plan. This proposal was made by those who called for parliamentary approval of the Plan before it becomes operational. Since the initial Plan is approved by Parliament as the representatives of the people of Ghana, that same body should approve any changes to the Plan. Besides, we have always had a multi-partisan and multi-ideological Parliament and so any changes that pass their muster are likely to be in the supreme interest of the nation and be acceptable to the broad majority of Ghanaians.

92. Other submissions proposed that the NDPC should be the body to initiate and effect any amendments to the Plan. This is because changing such a Plan is a technical exercise and should be done by a technical body such as the NDPC. This should, however, be done after wide consultations have been held on the proposed changes. This proposal does not involve Parliament. The reason for this is that the NDPC designs the Plan, and so any amendments to it, especially minor adaptations, must be within its sole remit.

93. Some other submissions proposed that where the development agenda is set, the Constitution must make this development agenda entrenched and binding on all governments so that changes to it may only be made following a referendum of the people.

94. There were also submissions calling for popular periodic reviews of the Plan, after which amendments to it may be effected.

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[35] Article 87(2)(b) of the 1992 Constitution of the Republic of Ghana.
[36] Section 21 of the National Development Planning Commission Act, 1993 (Act 479).
[37] Article 297(d) of the 1992 Constitution of the Republic of Ghana.

D. FINDINGS AND OBSERVATIONS

95. The Commission finds that Ghanaians are generally uncomfortable with a situation where the Plan may be changed too easily.

96. The Commission recognises that there may be need to permit changes to the Plan so that it can remain relevant to the changing development needs of the nation. However, it is important to ensure that the Plan is not too easily changed. This is necessary to ensure that the Plan is indeed binding and long-term and deals with the unacceptable phenomenon of truncated development projects by successive governments. Unduly subjecting a binding long-term development plan to unnecessary amendments and adaptations would defeat the essence of such a plan. Too much flexibility in the Plan may derail it by allowing the making of needless and opportunistic changes for short-term sectional interests.

97. The Commission accordingly finds that the procedure for changing the Plan must be well thought through in order to ensure a balance between stability and continuity and the need to adapt the Plan to changes in the environment. It is imperative not to put the Plan in straight jacket and be made so rigid that its contents and details are cast in stone without due regard for changing circumstances. The Plan must, therefore, contain in-built mechanisms that will permit changes and amendments where necessary.

98. The Commission accordingly finds that changes to the Plan must be spearheaded by the NDPC which is charged with developing the Plan and must involve broad consultations with stakeholders. This will ensure that the body of experts that develops and monitors the implementation of the Plan will be the same body that will propose amendments to it. This way, and because of the NDPC's intimacy with the Plan, there will be harmony between the existing Plan and the proposed amendments.

99. The Commission also finds that to guard against unnecessary changes to the Plan, it would be appropriate to vest the power to effect amendments to the Plan in Parliament as the representatives of the people. Given that the Plan is generated in a bottom-up fashion, it is important that the representatives of the people be active participants in the review of this very important national document. Requiring a two-thirds majority for any amendment to carry will ensure that there is bi-partisan or multi-partisan consensus on any amendments to the Plan. Any proposed amendment by the NDPC must be supported by two-thirds of all members of Parliament. Only the absolutely necessary amendments would receive the relevant multi-partisan support from Parliament and meet the proposed two-thirds majority requirement.

100. The Commission also finds that the main provisions of the Plan, being long-term, will hardly be subject to change. What may change are the short-term and medium-term plans that draw from the long-term plan and the strategies for achieving the Plan. In Kenya, for example, strategies and plans in their Vision 2030 are expected to be systematically reviewed and adjusted every five years.
101. The Commission observes that the Committee of Experts that drafted the proposals for the 1992 Constitution of Ghana, and the Consultative Assembly which considered the draft proposals, did not consider amendments or adaptations to the long-term development policies of the country.

102. The Commission finds that the National Constitution Review Conference proposed that changes to the Plan be effected by the NDPC with the prior approval of Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

103. The Commission recommends as follows:
    a. The authority to amend the Plan should be vested in Parliament.
    b. Parliament may only amend the Plan by a vote of two-thirds majority of all Members of Parliament.
    c. All amendments and adaptations to the Plan should be published.

ISSUE SIX: MONITORING AND EVALUATION (M&E) OF THE IMPLEMENTATION OF THE NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

104. This issue underlies the importance of monitoring the implementation of the Plan so that variances may be identified for corrective action. Given that our nation currently devotes minimal energy and resources to M&E, it is important to underscore the fact that the M&E of the Plan is the only way, in the scheme of things, to ensure the development that all Ghanaians yearn for.

B. CURRENT STATE OF THE LAW ON THE ISSUE

105. The NDPC is empowered by the Constitution to monitor, evaluate and coordinate development programmes.[38] Additionally, MDAs are required to monitor the implementation of their respective approved development plans and submit a report on it to the NDPC[39].

[38]Article 87(2) of the 1992 Constitution of the Republic of Ghana.
[39]Section 10 of the National Development Planning Commission Act, 1994 (Act 480).

C. SUBMISSIONS RECEIVED

106. Most of the submissions received on this subject were to the effect that there must be thorough monitoring and evaluation of the implementation of the Plan to ensure that it does not become a white elephant.

107. Most of the submissions also suggested that the NDPC should be mandated to monitor and evaluate the implementation of the Plan. The argument was that the NDPC has the capacity to do this, having been given that mandate by the Constitution. Again, as the facilitator of the development of the Plan, the NDPC is best placed to develop the necessary performance indicators for effective monitoring and evaluation.

108. Others proposed that an independent body should monitor and evaluate the implementation of the Plan so as to ensure greater objectivity than would have been the case if the NDPC were to do the monitoring and evaluation of the implementation of the Plan.

109. Other submissions proposed that the Monitoring and Evaluation mechanism should include the preparation and presentation to Parliament of quarterly progress reports by the NDPC. This way, Parliament, as the representative of the people, may monitor and evaluate progress in the implementation of the Plan.

D. FINDINGS AND OBSERVATIONS

110. The Commission finds that to be effective, national development plans and visions must have within them mechanisms that would ensure that programmes, projects and activities to be undertaken as part of realizing the Plan and Vision are monitored and evaluated on a regular basis for quantity, quality, process and outcomes.

111. The Commission also finds that an effective monitoring and evaluation system will facilitate the tracking of progress towards the realization of the Plan through the development of baseline studies, benchmarks, and performance and process indicators.

112. The Commission finds that regular monitoring and evaluating will reveal variances and inconsistencies from plans and budgets and these revelations will facilitate proper and timely interventions for course correction and remediation.

113. The Commission observes that:

    a. In Botswana, the Vision 2016 Council (the equivalent of the NDPC) was established to monitor and evaluate the effective and timely implementation of the Vision by all stakeholders.

b. In the National Development Plan of East Timor, the process for monitoring and evaluation provides that Ministries and their directorates are part of the on-going process with incremental annual action plans and achievable performance benchmarks. A process of periodic monitoring and evaluation reporting is suggested, with annual planning reviews under an independent government body overseeing implementation in co-operation with government ministers, civil society organisations and the major stakeholders.[40]

c. In Ireland, the overall coordination of monitoring and implementation of the Plan is the responsibility of the Sectorial Policy Division in the Department of Finance. The Irish Plan further states that a Central Monitoring Committee is established to monitor the implementation of the Plan. The Committee is chaired by the Department of Finance. A special unit within the Sectorial Policy Division of that Department provides the Secretariat to the Monitoring Committee, as well as coordinating on-going oversight of monitoring and implementation.[41]

114. The Commission finds that in accordance with international best practice, a body should be designated to be in charge of the monitoring and evaluation of the Plan.

115. The Commission observes that social mobilization, social justice activism, civic action, strategic litigation, among others, are all additional methods of monitoring the implementation of the Plan.

116. The Commission finally notes that there are too many bodies in Ghana, sometimes with unjustifiable overlapping functions, and so efforts should be made to reduce rather than increase them. There is, for example, a policy Monitoring and Evaluation team at the Office of the President which has functions that are similar to those of the monitoring mandate of the NDPC.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

117. The Commission recommends that the NDPC should be mandated by the Constitution to monitor and evaluate the National Development Plan and to submit annual Monitoring and Evaluation reports to Parliament.

118. The Commission further recommends that every citizen should have the right to enforce adherence to the Plan in a court of law or other adjudicatory body, including the institution of a parliamentary enquiry.

[40] National Development Plan, 2002 (East Timor).
[41] National Development Plan of Ireland (2007-2013), *Transforming Ireland: A Better Quality of Life for All*.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

119. The Commission recommends that the NDPC sets up a Monitoring and Evaluation Unit with adequate resources to discharge that aspect of its mandate.

120. The Commission also recommends that the NDPC sets up an effective Research and Development Unit as a matter of priority.

ISSUE SEVEN: THE PLACE OF THE DIRECTIVE PRINCIPLES OF STATE POLICY IN THE NATIONAL DEVELOPMENT PLAN

A. DIMENSIONS OF THE ISSUE

121. The dimensions of the issue are whether or not there should be a relationship between the two concepts and if so, what the relationship should be.

B. THE CURRENT STATE OF THE LAW ON THE ISSUE

122. The Directive Principles of State Policy are set out in Chapter 6 of the Constitution.[42] They are broad policy objectives for the establishment of a just and free society and the realization of political, economic, social and cultural rights and the right to development in Ghana. They are, by constitutional injunction, meant to guide all citizens, including government officials and political parties, in applying or interpreting the Constitution and other laws and in taking and implementing any policy decisions for the establishment of a just and free society. The President is required to report to Parliament once a year on all the steps taken to ensure the realization of the policy objectives contained in the DPSP, particularly the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.

123. The Supreme Court has now held that the Constitution, in its entirety, is a justiciable document; therefore in the interpretation of the DPSP, it would proceed on the presumption of their justiciability.[43]

C. SUBMISSIONS RECEIVED

124. The generality of the submissions called for the incorporation of the DPSP into the Plan. The reason for this proposal was that the DPSP constitute the nerve centre of the nation's democracy and so the Constitution should make it mandatory for all state institutions to implement the DPSP.

[42] Chapter 6 of the 1992 Constitution of the Republic of Ghana.
[43] *Ghana Lotto Operators* v. *National Lottery Authority* [2007-2008] SCGLR 1088.

125. Other submissions proposed that the DPSP should not be incorporated into the Plan and should not be directly enforceable because they are mere reflections of the ideals of the nation and should remain a guide to governments.

126. The remaining submissions on this issue argued for a link between the DPSP and the Plan, but failed to articulate clearly the exact nature of that linkage.

D. FINDINGS AND OBSERVATIONS

127. The Commission observes that the Committee of Experts which drafted the proposals for the 1992 Constitution suggested that the DPSP should not be justiciable.

128. The Commission observes that the Committee on State Policy of the Consultative Assembly which debated the proposals for the 1992 Constitution emphasised that the DPSP were merely for the guidance of all citizens. The Chairman of the Committee stated that the DPSP were an indication of the expectations of the people of Ghana and a benchmark for comparing the performance of succeeding governments. The Committee fully agreed with the school of thought which advocated the inclusion of the DPSP in the Constitution on a non-justiciable basis. The DPSP can, therefore, be regarded as the aspirations of the nation for good governance, good leadership and responsible stewardship by all persons and institutions formulating and implementing public policy for the establishment of a just and free society.

129. The Commission also observes that Ghana has had varying positions on the justiciability of the DPSP. They had been first held to be non-justiciable,[44] before the position was taken that they were justiciable only to the extent that were read and applied in conjunction with some other justiciable human right or freedom under the Constitution.[45] The position now is to proceed on the presumption that all the DPSP are justiciable. They are legally binding unless it can be shown that a particular principle does not lend itself to enforcement by the courts.[46] This third approach of a rebuttable presumption of justiciability has been described as a better framework for the protection of economic, social, and cultural rights in Ghana.

130. The Commission observes that the raging debate on the enforcement of the DPSP is a microcosm of the larger international human rights debate on the clarity and enforceability of economic, social and cultural rights and the Right to Development.

[44] *New Patriotic Party* v. *Attorney-General* (*The 31st December case)* [1993-94] 2 GLR 35.
[45] *New Patriotic Party* v. *Attorney-General (CIBA case)* [1997-98] 1 GLR 378.
[46] *Ghana Lotto Operators* v. *National Lottery Authority* [2007-2008] SCGLR 1088.

131. The Commission also observes that under the Indian Constitution, the Indian government is mandated to keep the Directive Principles in mind while formulating policies or making laws. However, these are generally non-justiciable in the courts.[47] Though they are not designated as justiciable, they are declared by the law as fundamental to the governance of the country and it is this provision that gives the Indian people the opportunity to hold their leaders accountable to the Principles. Thus, in India the DPSP provide for certain principles of policy to be followed by the State and these are enforceable in the Indian courts[48]. The Supreme Court of India has thus held that the DPSP and the Fundamental Human Rights provisions of the Constitution complemented each other with a view to establishing a welfare state.[49]

132. The Commission finds that the controversy surrounding the status of the DPSP has arisen because of the absence of a National Development Plan. The DPSP should be the basis for the development of a national development plan and adherence to the Plan should be enforceable in court.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

133. The Commission recommends that in the performance of its functions the NDPC should have regard to the Directive Principles of State Policy.

SUBTHEME TWO: NATIONAL DEVELOPMENT PLANNING COMMISSION (NDPC)

ISSUE ONE: COMPOSITION OF THE NDPC

A. DIMENSIONS OF THE ISSUE

134. The dimension to the issue is how to compose an NDPC which has the requisite technical capacities for realizing its mandate while also giving representation to the key institutions that are indispensable for the acceptability and implementation of the Plan.

B. CURRENT POSITION OF THE LAW ON THE ISSUE

135. The National Development Planning Commission is established by the Constitution. It is composed of at least 14 members, including a Chairman. They are all appointed by the

[47] Article 37 of the 1949 Constitution of India.
[48] Article 39 of the 1949 Constitution of India.
[49] *Kesavanananda Bharati* v. *State of Kerala* (AIR 1973 SC 1461).

President.[50] An Act of Parliament adds a Vice-Chairman and a Director-General of the NDPC to the membership of the NDPC.[51] It is important to note that only persons with knowledge relevant to development, economic, social and spatial planning may be appointed to the NDPC by the President.[52] This provision is an entrenched provision and may only be amended following a referendum.[53]

C. SUBMISSIONS RECEIVED

136. All the submissions received on this issue called for changes to the existing composition of the NDPC. The various proposals for the composition of the NDPC and the accompanying reasons are detailed below:
    a. The NDPC should be a purely technical body that is composed solely of persons with the requisite technical capacities and knowledge in development planning and cognate fields. This is because development planning is a technical matter.
    b. The NDPC should be composed of representatives of different interest groups such as farmers, teachers, lawyers, engineers, and other professional bodies. This will make the NDP broadly representative of the society and ensure that the interests of all segments of the society are taken into account in the design and monitoring of the Plan.
    c. The NDPC should include political party representatives. The paramount objective of all political parties is to win political power and ultimately transform the lot of the people. It is important that they are represented on the body which designs and monitors the destiny of the nation. Also, the representation of political parties on the NDPC will make it easier to secure multi-party and broad national consensus on the Plan. Finally, political parties are either in government or are governments-in-waiting, so giving them seats on the NDPC will better secure the continuity of the Plan irrespective of the party in power.
    d. The NDPC should include representatives of some critical government institutions. Some of the institutions that are proposed are the Statistical Service, the Bank of Ghana and the Ministry of Finance. The reasons for this proposal are that these state institutions respectively play vital roles of data gathering and processing, fiscal policy planning, and public financial management and ought to be part of the NDPC. Their inclusion will also ensure that government participation in the design and monitoring of the Plan is assured.
    e. The NDPC should include representation from the local, district and regional levels. This will ensure that the NDPC is better able to use the semi-autonomous local

[50] Article 86(2) of the 1992 Constitution of the Republic of Ghana.
[51] Section 3 of the National Development Planning Commission Act, 1994 (Act 479).
[52] Article 86(2)(f) of the 1992 Constitution of the Republic of Ghana and section 3(1)(h) of National Development Planning Commission Act, 1994 (Act 479).
[53] Chapter 25 of the 1992 Constitution of the Republic Ghana.

government agencies to monitor the implementation of the Plan. The local government institutions are also better able to generate the necessary popular local level participation in the development of district plans and in monitoring the implementation of the Plan at that level.

f. The NDPC should include representatives of the National House of Chiefs. Traditional authority is part of the broader governance structure and must be part of this critical national endeavour. They also control virtually of all lands in Ghana, a critical resource for any development initiative. Finally, traditional authorities in Ghana have a huge mobilizing and convening power that is necessary for garnering local input to the Plan and local level monitoring of the Plan.

D. FINDINGS AND OBSERVATIONS

137. The Commission finds that an NDPC that will be able to deliver on its mandate of developing and monitoring the implementation of a binding, long-term, strategic, multi-year national development plan must be carefully composed in order to ensure both the integrity and acceptability of the NDPC and of the Plan ultimately.

138. The Commission observes that the 1979 Constitution introduced for the first time in the history of Ghana, a body to be in charge of development planning. The National Development Commission was to comprise the Vice-President, as many Ministers of State as the President might appoint, regional representatives, the Government Statistician and such other persons as might be appointed by the President having regard to their knowledge and experience in the relevant areas of economic or social planning.[54]

139. The Commission also observes that the Committee of Experts which drafted the Proposals for the 1992 Constitution proposed a National Economic Development Commission which would include key government appointees and Ministers, representatives from the private sector, organised labour, regional administrations, minority parties represented in Parliament and such other appointees as the President on the advice of the Prime Minister might appoint.

140. The Commission further observes that during the deliberations of the Consultative Assembly, all the proposals of the Committee of Experts regarding the membership of the Commission were accepted, except for the addition of the representatives of the minority parties, the private sector and organised labour.

141. The Commission finds that a body that is mandated to develop a national development plan and monitor its implementation should be representative of the people and must be multi-sectorial.

[54] Article 73 of the 1979 Constitution of the Republic of Ghana.

142. The Commission finds that only a few of the submissions received on this issue advocated the retention of the current composition of the NDPC.

143. The Commission finds that all the proposals for changes to the composition of the NDPC are supported by very valid and compelling reasons.

144. The Commission observes that the National Constitution Review Conference agreed to the submissions made on this issue. Two alternative proposals were made at the Conference:
    a. The NDPC should be made up of institutional representatives, technical persons and political party representatives.
    b. There should be 21 members of the NDPC. Out of this number, 14 should be institutional representatives and the remaining 7 should be independent personalities who do not represent any institution, but who are persons with relevant expert knowledge relating to development.

145. The Commission observes that:
    a. In Botswana, a highly successful African nation in the area of development, the Vision 2016 Council is made up of at most 50 people, as follows:
        i. The Chairperson, appointed by the President from a short list of nominees, presented by the Council;
        ii. A Vice Chairperson, appointed in the same manner as the Chairperson;
        iii. 10 representatives from Government, including at least 3 from ministerial level and 3 from Permanent Secretary (Chief Director) level;
        iv. 2 representatives of political parties, nominated by the All Party Caucus (similar to the Inter-Party Advisory Committee (IPAC) in Ghana); and
        v. 38 representatives from NGOs, Civil Society (including parastatals, the universities, churches, organised labour and the media) and the private sector.
    b. In Malaysia, the highest decision making body in economic and socio-economic matters is the National Planning Council which is the economic arm of Cabinet. Members comprise key economic Ministers. It is chaired by the Prime Minister. At the officer level, detailed deliberations take place in the National Development Planning Committee (NDPC) which is the highest policy-making forum for development planning. The Malaysian NDPC is a committee of senior government officials, including the heads of all economic development ministries and the Governor of the Central Bank, chaired by the Chief Secretary to Government.
    c. In India the Prime Minister is the ex-officio Chairman of the Planning Commission and there is a nominated Deputy Chairman, who is given the rank of a full Cabinet Minister. Cabinet Ministers in India with certain important portfolios act as part-time

members of the Commission, while the full-time members are experts in various fields like economics, industry, science and general administration.

146. The Commission finds that the current composition of the NDPC, numbering 37 members is first of all unwieldy and does not give room for the delivery of its mandate. Besides, it does not include representatives of some critical players (such as chiefs and political parties) in development planning and monitoring. The NDPC should, however, not be so large as to make it unwieldy and thereby reduce its effectiveness.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

147. The Commission recommends the amendment of the Constitution to provide for the establishment of an NDPC that is independent, professional, multi-partisan and represents critical stakeholders in the development arena in Ghana. The Commission recommends that the membership of the NDPC should be as follows:
    a. The Minister responsible for Finance;
    b. The Governor of the Bank of Ghana;
    c. The Government Statistician (Statistician-General);
    d. All Regional Planning Officers or their equivalents for all Administrative Regions as ex-officio members;
    e. 1 representative, with relevant expert knowledge pertaining to development, nominated by each of the major political parties.
    f. 2 Representatives of the National House of Chiefs with relevant expert knowledge pertaining to development.
    g. 2 Representatives of the private sector with relevant expert knowledge pertaining to development.
    h. 2 Representatives from organised labour.
    i. 2 Representatives of civil society with relevant expert knowledge pertaining to development.
    j. The Director-General of the NDPC as a Member-Secretary.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

148. The Commission recommends that Parliament should by legislation define “major political party” for the purpose of determining the political party membership of the NDPC.

ISSUE TWO: INDEPENDENCE OF THE NATIONAL DEVELOPMENT PLANNING COMMISSION (NDPC)

A. DIMENSIONS OF THE ISSUE

149. The dimensions to this issue were three-fold:
    a. Should the NDPC continue to be responsible to the President?
    b. Should the NDPC be responsible to Parliament?
    c. Should the NDPC be autonomous and independent of all the arms of government?

B. CURRENT STATE OF THE LAW ON THE ISSUE

150. The current the state of the law is that the NDPC is responsible to the President.[55]

C. SUBMISSIONS RECEIVED

151. Some of the submissions advocated that the current arrangement where the NDPC is responsible to the President should be retained for the following reasons:
    a. The NDPC is a sensitive state institution which can make or unmake a President depending on the degree of synchrony between its plans and those of the President.
    b. The President must maintain control over the NDPC. This is the practice in many countries where development planning is controlled by the government in power.

152. Other submissions advocated that the NDPC should be responsible to Parliament for the following reasons:
    a. Parliament should generally have oversight of the Executive, including the NDPC.
    b. Making the NDPC responsible to Parliament will ensure that the representatives of the people in Parliament closely monitor the activities of the NDPC.

153. Still, there were submissions that advocated that the NDPC should be autonomous and constitutionally independent. It was argued that the NDPC, which is expected to be the nerve centre of national development, must be free of the apparent hold of partisan politics from the Executive and Legislature.

D. FINDINGS AND OBSERVATIONS

154. The Commission finds that the overwhelming desire of Ghanaians is to have an NDPC that is not responsible to the Presidency but that is constitutionally independent. This independence would make the designing and monitoring of development policies, programmes and projects non-partisan, ensuring that the Plan is not tied to the life of any one particular government.

[55] Article 86(3) of the 1992 Constitution of the Republic of Ghana.

155. The Commission finds that the independent constitutional bodies established under the Constitution have performed creditably. Some of them, such as the CHRAJ, have actually gained international reputation for excellent performance. Conversely, many bodies that are direct appendages to the Executive have not been able to establish their independence of thought and action, and their effectiveness has suffered. The mandate of the NDPC will be better served if it is established as an independent constitutional body.

156. The Commission observes that the National Constitution Review Conference proposed that the NDPC should be autonomous and independent of governmental control. The Conference was of the view that the bane of the NDPC has been the control exercised over it by successive Presidents. This is because changes of governments have meant changes in the composition of the NDPC and in the development plans that it produces. Therefore, if the NDPC is to thrive as a viable institution and function effectively, it must be constitutionally independent.

157. The Commission also observes that in countries with some good results in development planning, planning commissions are independent. In Botswana and Uganda, independent national planning bodies have produced development plans which have helped advance their development agenda. As noted earlier, our recent history teaches us that the effectiveness of independent constitutional bodies lie mainly in their autonomy and independence. In Botswana, the National Planning Council tasked with driving the development of Botswana is answerable to the nation, though its members are appointed by the President. In Uganda, the National Planning Authority is not under the direction or authority of anybody while evaluating the performance of a Ministry or sector with regard to the targets set out in a plan.[56] This is the case even though the President appoints the Chairperson, Deputy Chairperson and three other members of the Authority.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

158. The Commission recommends that the Constitution be amended to make the NDPC an independent constitutional body that is subject only to the Constitution in the performance of its functions.

[56] Section 15 of the National Planning Act, 2002, which was passed pursuant to Article 125 of the 1995 Constitution of the Republic of Uganda.

ISSUE THREE: ORGANISATIONAL STRUCTURE OF THE NDPC

A. DIMENSIONS OF THE ISSUE

159. The following were the dimensions of this issue:
   a. Who should chair the NDPC and how should the Chairperson be selected?
   b. Should the NDPC have a Deputy Chairperson?
   c. Should the NDPC have an Executive Director/Director-General; if so, how should she be selected?
   d. How should the Secretariat of the NDPC be structured?
   e. Should the NDPC be decentralised?

B. CURRENT STATE OF THE LAW ON THE ISSUE

160. The Chairperson of the NDPC is appointed by the President.[57] The Chairperson heads a Commission which must number at least 14.[58] The NDPC, as part of its structure, has a Director-General, who is the head of the secretariat of the Commission.[59] The NDPC is empowered to create divisions necessary for the performance of its duties.[60]

C. SUBMISSIONS RECEIVED

161. The submissions were that:
   a. The NDPC should be headed by a Chairperson who is a technocrat since this will ensure that the NDPC executes its mandate professionally.
   b. The NDPC should be headed by a life Chairperson, to ensure continuity.
   c. The NDPC should be chaired by the President, and in his absence the Vice President, so that the NDPC is given the highest political attention.
   d. The NDPC should be headed, not by a politically appointed Chairman, but by an Executive Director in order to ensure functionality and avoid politicizing the development process.
   e. The NDPC should be decentralised so that the units can take greater account of peculiar local development needs in the design and monitoring of the Plan.
   f. The NDPC should be serviced by a technical secretariat.

D. FINDINGS AND OBSERVATIONS

162. The Commission finds that a functional organisational structure is critical for the mandate of the NDPC.

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[57] Article 86(2) of the 1992 Constitution of the Republic of Ghana.
[58] Article 86(2) of the 1992 Constitution of the Republic of Ghana.
[59] Section 10 of the National Development Planning Commission Act, 1994 (Act 479).
[60] Section 9(1) of the National Development Planning Commission Act, 1994 (Act 479).

163. The Commission observes that under the 1979 Constitution, the National Development Commission was chaired by the Vice-President.[61]

164. The Commission observes that the organisational structure of national development planning bodies vary across the world, although all of them have technical support facilities. In Uganda, there is a Secretariat responsible for the day-to-day administration of the Authority which is headed by an Executive Director. In Malaysia, development planning is undertaken by the Economic Planning Unit of the Prime Minister's Office and is headed by a Director-General. In Kenya, there is a Ministry of State for Planning, National Development and Vision 2030 under the Office of the Prime Minister and it is headed by a Minister of State. There is, however, a Vision Delivery Secretariat which provides leadership for the realization of Vision 2030. The Secretariat is managed by a Director-General under the overall guidance of the Vision 2030 Delivery Board that plays a policy-making and advisory role.

165. The Commission observes that international best practice requires a slim but effective bureaucracy for effective development planning and monitoring.

166. It is the view of the Commission that the mandate of the NDPC should be limited to the development of the Plan and monitoring its implementation. Going beyond this will mean competing with the MMDAs and MDAs in their implementation role. Given the decentralised processes for developing and monitoring the Plan, the NDPC does not need to be decentralised in its structure to incorporate local specificities effectively into the overall national development framework.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

167. The Commission recommends that the members of the NDPC should elect from among themselves a Chairperson and a Deputy Chairperson.

168. The Commission recommends that the NDPC be supported by a technical secretariat headed by a Director-General.

[61] Article 73(2)(a) of the 1979 Constitution of the Republic of Ghana.

ISSUE FOUR: APPOINTMENT OF THE CHAIRPERSON, DEPUTY CHAIRPERSON, MEMBERS AND STAFF OF THE NDPC SECRETARIAT

A. DIMENSIONS OF THE ISSUE

169. The concern was how the mode of appointing the members of the NDPC and the personnel of the NDPC Secretariat would ensure the technical competence, independence and autonomy of the NDPC. It is essential for the integrity and acceptability of the work of the NDPC that its members and personnel have technical competence, independence and autonomy.

B. CURRENT POSITION OF THE LAW ON THE ISSUE

170. The President appoints the Chairman and Members of the NDPC. The President also appoints the Director-General and the staff of the NDPC.[62]

C. SUBMISSIONS RECEIVED

171. The submissions received on the mode of appointment of personnel to the NDPC could be summarised as follows:
    a. The President as the Chief Executive of Ghana should appoint the Chairperson and the Executive Director of the NDPC.
    b. The powers of the President should be limited in the appointment of the members and the staff of the NDPC so that they are not completely responsible to him.
    c. An independent body such as Parliament should appoint the members and the staff of the NDPC.
    d. The members and the staff of the NDPC should be appointed by an independent body set up specifically for the purpose with responsibility to Parliament. This is to ensure that the Commission is not politically tainted.
    e. The President should appoint the members and the staff of the NDPC acting in consultation with all relevant stakeholders.
    f. The President should appoint the members and the staff of the NDPC based on set criteria, and subject to parliamentary approval.

D. FINDINGS AND OBSERVATIONS

172. The Commission finds that the independence and professional status of the Chairperson, members, and staff of the NDPC is critical to the integrity and acceptability of the national development plan and the monitoring reports produced by the NDPC.

173. The Commission observes that the National Constitution Review Conference proposed that the Chairperson, members, and staff of the NDPC should be appointed by the President.

[62] Article 195 of the 1992 Constitution of the Republic of Ghana.

174. The Commission observes that development planning institutions in all jurisdictions have technical secretariats which service their respective institutions. The Commission considers this essential because a technical secretariat ensures continuity in corporate institutional memory.

175. The Commission also observes that the practice of a constitutional body electing its own Chairperson as a way of ensuring independence is not alien to the 1992 Constitution. The National Media Commission, for instance, is empowered to elect its own Chairman.[63]

176. The Commission also observes that:
    a. In Botswana, the Chairperson and Deputy Chairperson of the Vision 2016 Council are appointed by the President from a shortlist presented to the President by the Council. The other members are appointed from the government, or by the various interest groups represented on the Council.
    b. In Uganda, the Executive Director of the National Planning Authority is appointed by the sector Minister on the recommendation of the Authority.
    c. In India, the Prime Minister, who is leader of government business, is the head of the National Development Council.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

177. The Commission recommends that all appointments to the NDPC should be formally made by the President.

178. The Commission recommends that the members of the NDPC, except the ex officio members, should be nominated for appointment by the institutions that they represent.

179. The Commission recommends that, as a function of its independence, neutrality, and autonomy, members of the NDPC should elect a Chairperson and Deputy Chairperson from among its members, other than ex officio members, at their first meeting.

180. The Commission recommends that the technical secretariat of the NDPC should be headed by a Director-General appointed by the NDPC, in consultation with the Public Services Commission, and the Director-General must be answerable to the NDPC.

[63] Article 166 of the 1992 Constitution of the Republic of Ghana.

ISSUE FIVE: TENURE OF OFFICE OF THE CHAIRPERSON, DEPUTY CHAIRPERSON, MEMBERS, AND DIRECTOR-GENERAL OF THE NATIONAL DEVELOPMENT PLANNING COMMISSION

A. DIMENSIONS OF THE ISSUE

181. The key dimension of the issue is what mode of appointment to adopt in order to ensure that the members of the NDPC do not become beholden to the appointing authority. Another dimension of the issue was how to sustain the institutional knowledge of the NDPC, that is, how to ensure that a reconstituted NDPC does not consist entirely of new members.

B. CURRENT STATE OF THE LAW ON THE ISSUE

182. The Constitution does not directly provide for the tenure of, and removal from office of members of the NDPC. The Constitution, however, provides that the power to appoint includes the power to remove from office[64]. It is on this basis that every President since the 1992 Constitution came into force has appointed a new NDPC. The laws governing the NDPC also provide for the cessation of membership on grounds of ill-health, the inability to perform the duties of the office, and stated misconduct. A member may also resign from the Commission.

C. SUBMISSIONS RECEIVED

183. The submissions received on this issue were as follows:
    a. There is a need to ensure that the tenure of the members of the Commission is not designed to end with that of any government. This will underline the long-term character of the Plan and the fact that the Plan supersedes narrow political party manifestos or the agendas of particular governments.
    b. A member of the Commission should serve up to 2 terms of 6 years each.

D. FINDINGS AND OBSERVATIONS

184. The Commission finds that every President under the 1992 Constitution has appointed a new NDPC.

185. The Commission observes that the National Constitution Review Conference proposed that members of the NDPC should have a 5 year term, overlapping that of the Presidency, in order to signal the continuity of the NDPC beyond particular governments. The tenure should be renewable for another term only.

[64] Article 297 of the 1992 Constitution of the Republic of Ghana.

186. The Commission also observes that in Botswana, membership of the Council is for a period of 3 years, with 50% of the members having an overlapping term to ensure continuity. Existing members are eligible for reappointment. This arrangement ensures continuity while using a gradualist approach to replace members so that there are no entrenched positions on the Council over a long period of time.

187. To ensure the independence of the NDPC so that it is able to develop and monitor the implementation of the Plan, in the supreme interest of the nation and not in accordance with any sectional interests, the Commission supports submissions which call for stringent provisions to ensure and protect the tenure of NDPC members.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

188. The Commission recommends that members of the NDPC, other than ex-officio members, should be appointed for a maximum of two 5-year terms, which may not be held in succession.

189. The Commission also recommends that the removal of the Chairperson, Vice-Chairperson and a member of the NDPC should involve an elaborate procedure, equivalent to the procedure for removing the Chairperson and members of other independent constitutional bodies.

190. The Commission recommends that the term of office of the Director-General should be subject to contract. This contract should be between the Director-General and the NDPC.

ISSUE SIX: WHAT SHOULD BE THE FUNCTIONS OF THE NATIONAL DEVELOPMENT PLANNING COMMISSION?

A. DIMENSIONS OF THE ISSUE

191. National development planning bodies the world over perform planning, implementation and monitoring functions. This issue sought to identify the combination of functions that will be appropriate for the NDPC.

B. CURRENT STATE OF THE LAW ON THE ISSUE

192. The NDPC, under the 1992 Constitution advises the President on development issues. The NDPC on its own initiative or at the request of the President or Parliament may conduct

studies in the area of planning and propose development plans based on the resource potential of the nation.[65]

C. SUBMISSIONS RECEIVED

193. The submissions received on this issue could be summarised as follows:
    a. The NDPC should be an advisory body only.
    b. The NDPC should develop a national development plan.
    c. The NDPC should implement the Plan.
    d. The NDPC should monitor and evaluate the implementation of the Plan.
    e. The NDPC should prepare quarterly reports on the implementation of the Plan.
    f. The NDPC should review political party manifestos so that they conform to the Plan.
    g. The NDPC should be in charge of economic and financial management of the country.
    h. The NDPC should have exclusive responsibility for broad and long-term national development planning.

D. FINDINGS AND OBSERVATIONS

194. The Commission finds that Ghanaians would want the NDPC to perform one or more of the following functions: design a long-term development plan; implement the Plan; monitor and evaluate the implementation of the Plan.

195. The Commission further finds from the discussions with major stakeholders that the current status of the NDPC as an advisory body to the President hinders the NDPC from fulfilling its potential to deliver a national development agenda.

196. The Commission also observes that under the 1979 Constitution the National Development Commission was tasked to advise on the planning and development strategy of the President and ensure that it was effectively carried out.[66]

197. The Commission observes that the National Constitution Review Conference proposed that the NDPC should be mandated to draw up a long-term, holistic, multi-year, strategic national development plan which may not be altered by any government, although the short- and medium-term plans that are drawn from the Plan may be changed periodically. The Conference also proposed that the functions of the NDPC should be expanded to include the monitoring and evaluation of the implementation of the Plan. Additionally, the Conference

[65] Article 87 of the 1992 Constitution of the Republic of Ghana.
[66] Article 73(3) of the 1979 Constitution of the Republic of Ghana.

finally proposed that the functions of the NDPC and the economic planning mandate of the Ministry of Finance and Economic Planning need to be clarified.

198. The Commission further observes that:
    a. In Botswana, the National Development Council is tasked with monitoring the implementation of the Vision 2016, including instituting corrective action. It also has additional responsibility for propagating the Vision and generating and sustaining ownership of the Vision by the citizenry.
    b. The National Development Council of Nepal is tasked with providing directives to the National Planning Commission (NPC) on matters relating to developing development plans and for periodic monitoring and the evaluation of the plans.
    c. The National Development Council (NDC) of India is tasked to develop plans and implement them, including strengthening and mobilizing the efforts and resources of the nation in support of the implementation of the Plan. In Indian there is a two-tier structure: the National Development Council and a Planning Commission. The Planning Commission works under the general guidance of the National Development Council. Both are chaired by the Prime Minister. The National Development Council operates as the governance and policy making body, while the Planning Commission does the actual formulation of the Five Year Plans, Annual Plans, State Plans, and the monitoring of Plans, Programmes, Projects and Schemes.
    d. The Chinese National Development and Reform Commission (NDRC) is charged with formulating policies for economic and social development and guiding the restructuring of China's economic system as a prerequisite for the satisfaction of all other development needs.
    e. In Malaysia, the Economic Planning Unit, which is the office overseeing the Malaysian Vision 2020, is involved in the determination of the details of annual development budgets. This is to ensure the effectiveness of the medium and long-term plans. The NDPC of Malaysia is responsible for formulating and reviewing all plans for national development and making recommendations on the allocation of resources. It also oversees the implementation of the national development pillars.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

199. The Commission recommends that:
    a. The NDPC should be an independent constitutional body subject only to the Constitution.
    b. Every President and government should be bound to comply with the terms of the long-term national development plan developed by the NDPC and approved by Parliament.

c. The NDPC should be mandated to develop a binding, comprehensive, strategic, multi-year, long-term national development plan, with short- and medium-term plans built into it, from which programmes, projects, activities and budgets may be drawn.
d. The NDPC should not be burdened with the implementation of the Plan. Implementation should be left to the appropriate MMDAs and MDAs.
e. The NDPC must be empowered to monitor and evaluate the implementation of the Plan and to institute corrective action.
f. The NDPC should propose amendments to the Plan to Parliament.
g. The NDPC should present annual Monitoring and Evaluation reports to Parliament.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

200. The Commission further recommends that Parliament be given the power, under the Constitution, to supplement the functions of the NDPC by legislation, after ensuring inputs from relevant stakeholders.

ISSUE SEVEN: HOW SHOULD THE NATIONAL DEVELOPMENT PLANNING COMMISSION BE FUNDED?

A. DIMENSIONS OF THE ISSUE

201. The experience of the independent constitutional bodies under the 1992 Constitution is that financial dependence on the Executive and Legislature diminishes their functional and operational independence. The concern is, therefore, how to improve the functional and operational independence of the Commission, that is, how to secure and maintain its financial independence.

B. CURRENT STATE OF THE LAW ON THE ISSUE

202. Currently, the NDPC is funded operationally and administratively by fiscal allocations from Parliament, normally in the annual appropriations. The NDPC may also receive funds from other sources approved by the Minister for Finance.[67]

C. SUBMISSIONS RECEIVED

203. There were two main sets of submissions on the issue of funding the NDPC. The first set of submissions proposed that the current funding arrangements detailed immediately above be maintained.

[67] Section 17 of the National Development Commission Act, 1994 (Act 479).

204. The second set of submissions was to the effect that a separate fund be established to fund the work of the NDPC in order to guarantee its financial independence, and, by extension, its functional and operational independence.

D. FINDINGS AND OBSERVATIONS

205. The Commission finds that financial dependence of an independent constitutional body easily leads to functional and operational dependence of that body. An almost complete reliance on the Executive and Parliament for funding carries the risk of being starved of funds to the point of debilitation, as is the case with a significant number of MDAs. The NDPC can only be truly independent, functional, and effective not only because the Constitution provides for its institutional independence, but also when it is financially independent and not suffering from the chronic budgetary shortfalls which are the bane of the MDAs.

206. The Commission observes that the National Constitution Review Conference recommended that the NDPC should have dedicated funding so that it can be independent in its operations. This may be done by establishing a special fund for all independent constitutional bodies. This, the Conference noted, is essential to sustain the activities of the NDPC. This must not, however, be done through a dedicated tax.

207. The Commission observes that in almost all other jurisdictions, the body tasked with national development planning is funded from the general budget, like other agencies of state.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

208. The Commission recommends that a fund for all independent constitutional bodies should be established by the Constitution and part of this fund be utilised to provide the resources needed by the NDPC to execute its huge mandate.

ISSUE EIGHT: CONDITIONS OF SERVICE OF MEMBERS AND STAFF OF THE NDPC

A. DIMENSIONS OF THE ISSUE

209. The first peculiar dimension of this issue was whether or not the radical change in the character and mandate of the NDPC should engender similarly radical changes in the conditions of service of the members and the staff of the NDPC. The second was: whether the President and the Minister for Finance should determine the conditions of service of an independent constitutional body or whether these should be determined otherwise.

B. CURRENT STATE OF THE LAW ON THE ISSUE

210. The Constitution does not directly provide for the conditions of service of members of the NDPC. However, relevant legislation provides that the members shall be paid allowances as determined by the Minister for Finance in consultation with the President.[68]

C. SUBMISSIONS RECEIVED

211. No submissions were received on the remuneration of members and the staff of the NDPC.

D. FINDINGS AND OBSERVATIONS

212. This Commission finds that it is critical to ensure that members of the NDPC are financially independent from the government and not subject to manipulation through the power of the purse.

213. The Commission finds that giving the President and the Minister for Finance the power to determine the conditions of service of the members of the NDPC could detract from the independence of the NDPC.

214. The Commission observes that:
    a. In Uganda, the members of the National Planning Authority are paid sitting and other allowances as determined by the sector Minister with prior approval from Parliament.
    b. In Namibia, every member of the National Planning Commission, who is not in full-time employment of the State, is paid such remuneration and allowances, with funds appropriated by Parliament for the purpose, as the President may determine. The remuneration and allowances determined may differ according to the office held by the member concerned or the functions performed by that member.
    c. In Nigeria, the salaries and allowances payable to members and staff of the National Planning Commission are determined by the Federal Government as part of the annual budget.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

215. In line with the principle to establish an independent NDPC, the Commission recommends that the members of the NDPC should be treated like members of independent constitutional bodies, and their conditions of service determined by an Independent Emoluments Commission proposed to be established by the Constitution.

[68] Section 8 of the National Development Commission Act, 1994 (Act 479).

CHAPTER FOUR - THE EXECUTIVE[69]

4.1. INTRODUCTION

1. During the consultative exercise, many Ghanaians were eager to discuss the Executive arm of State (the Executive). There was broad agreement that the Executive has always been the most visible and most powerful agency in Ghana. This is due mainly to its historical construction during colonialism and during the various repressive regimes Ghana has had since independence. It is also due to the historical incapacity of Parliament to act as a counterweight to the executive.

2. There was a similarly broad agreement that a more functional Executive is necessary in Ghana today in order to enhance good governance in the country. This can be achieved by further streamlining, pruning, and redefining the powers of the Executive, guarding against illicit relationships between the Executive on the one hand and the Legislature, Judiciary and the Media on the other.

3. These illicit relationships have resulted in a net accumulation of additional powers to the Executive. This translates into the need to bolster up the other arms of State in the country's constitutional design (the Legislature, the Judiciary, the Independent Constitutional Bodies, the Media, and the People) as counterweights to the Executive; and investing in further elaboration and automatic operation of the human rights provisions of the 1992 Constitution and in our various laws.

4. This chapter outlines the historical evolution of the Executive arm of government. It also details the submissions received from the people and the resulting findings, observations and recommendations of the Commission on a broad range of issues that relate to the executive powers of State. These issues affect the Presidency; the Vice Presidency; Ministers and Deputy Ministers of State; the Attorney General; and the Council of State. Although our current constitutional design incorporates the National Development Planning Commission and the National Security Council in the chapter on the Executive, these are treated in two other chapters of this part of the report.

[69] This covers the Presidency, the Vice Presidency, Ministers and Deputy Ministers of State, the Attorney- General and the Council of State. The Executive as constituted under Chapter 8 of the 1992 Constitution also covers the National Security Council and the National Development Planning Commission. The two are, however, treated in two separate chapters and in this report.

4.2. HISTORICAL BACKGROUND

4.2.1 THE EXECUTIVE IN PRE-COLONIAL TIMES

5. The executive authority of Ghana has over the years been vested in and exercised by different institutional forms. These institutions have evolved or have been consciously designed differently over time to meet various needs of those times.

6. In pre-colonial Ghana, executive power was exercised by the various ethnic groupings that occupied the geographical space now called Ghana. Each of the prominent ethnic groups had its particular political formation. They varied from the closely-knit and specialised administrative structures of the large states like Ashanti and Dagbon, to what appeared to be loose, rudimentary and often ill-defined structures associated with the extended family and kinship groups. Similarly, the political structure and kinship organisation appeared to be completely bundled together in some traditional systems. The indigenous political systems, though varied, shared many similarities. In most of them, the Chief assisted by his council of elders, exercised all powers of government: executive, legislative and judicial.

4.2.2 THE EXECUTIVE UNDER COLONIAL CONSTITUTIONS

7. Under colonial rule, virtually all powers were vested in the monarch, who acted through various representatives, particularly the Secretary of State for the Colonies and the Governors of the then Gold Coast. The Governor was assisted in his work by Executive and Legislative Councils, although these bodies in their composition and mandate did not possess any real powers and could, therefore, not act as counterweights to the Governor. This was the case under the 1850, 1866, 1874, 1901, 1916, 1925, 1946, and to a lesser extent, the 1951 Constitutions. The 1951 Constitution retained the Governor as the head of the Executive Council with 11 other members. Of the 11, 3 were *ex officio* members with responsibility for Defence and External Affairs, Justice, and Finance. The other 8 were Ghanaians appointed by the Governor from within the Legislative Assembly.

8. Under the 1954 Constitution, which was the last and ninth colonial constitution, there was a Cabinet consisting of a Prime Minister and 8 other Ministers, all of whom were members of the Legislative Assembly. The Ministers were collectively responsible to the legislature and not the Governor. A clear departure from the previous constitutions was the abolition of ex officio members under this Constitution.

4.2.3 EXECUTIVE POWERS UNDER INDEPENDENCE CONSTITUTIONS

9. In 1957, the Ghana (Constitution) Order in Council was adopted by the British Parliament. The Order, which is popularly referred to as the 1957 Constitution, enabled Ghana to recover its

sovereignty and to join the ranks of other sovereign states within the community of nations. Also, the Constitution vested all executive power in the British Monarch, which was to be exercised on her behalf by the Governor-General. The Order in Council, also provided for a Cabinet of Ministers of not less than 8 persons, appointed by the Governor-General from amongst Members of Parliament chaired by a Prime Minister, who was known as the leader of government business.[70] The Governor-General retained the power to remove, aside from the Prime Minister, all other Ministers from office. There was also an Attorney-General, appointed by the Governor-General as a public officer and was vested with the responsibility for the initiation, conduct and discontinuance of prosecutions of criminal offences. The Attorney-General could be removed by the Governor-General acting on the advice of the Prime Minister.

10. Under the First Republican Constitution of 1960, the President of Ghana was described as Head of State and was responsible to the people. The Constitution made no provision for the office of Vice President. The President was assisted by a Cabinet of at least 8 Ministers. Article 55 conferred certain special powers on the President which enabled him to give directions by Legislative Instrument, whenever he considered it to be in the national interest to do so. Such an instrument could be employed to alter any law passed by Parliament. The real effect was that the President could exercise legislative authority to override laws made by Parliament. The 1964 amendments to the 1960 Constitution turned Ghana into a one -party state and dispensed with the need to subject constitutional amendments to a referendum. The same amendment allowed the President to "at any time" and "for reasons which to him appear sufficient" remove a judge from office.

11. Under the 1969 Second Republican Constitution, an attempt was made by the framers to resolve effectively the problem of executive dominance which was particularly felt during the Nkrumah Administration. The bicephalous executive model was thus adopted. Aside from a President, there was a Prime Minister who, together with his ministers, formed the Cabinet. The leader of the Party with the majority in Parliament was appointed by the President as Prime Minister and invited to form his government. Ministers of State were appointed from among members of the National Assembly by the President acting in accordance with the advice of the Prime Minister. The Constitution also provided for an Attorney-General who was also a Minister of State and the principal legal adviser to the government. The Attorney-General, being a Minister of State, was appointed by the President acting on the advice of the Prime Minister. The 1969 Constitution provided for a Council of State tasked with aiding and counselling the President and also provided for a National Security Council.

12. The 1979 Constitution abolished the bicephalous executive model introduced by the 1969 Constitution and a popularly elected President assumed the functions of Head of State, Head of Government and Commander-in-Chief of the Armed Forces of Ghana. The President exercised

[70]Section 7 of the 1957 Ghana (Constitution) Order-in–Council.

extensive power of appointment to a host of public offices. These appointments were to be mostly made in consultation with or on the advice of the Council of State. He also had power to determine the emoluments of certain public officers, including the Speaker of Parliament, on the recommendation of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State. The 1979 Constitution also established for the first time the office of the Vice President. Cabinet consisted of the President, the Vice President and between 10 and 19 Ministers of State. Ministers of State were all to be appointed by the President from without Parliament and a Member of Parliament who was appointed Minister had to vacate his seat in Parliament. The Attorney- General, who was also a Minister of State and the principal legal adviser to the government, was appointed by the President. Other institutions created as part of the Executive under the 1979 Constitution were the National Security Council[71] and the National Development Planning Commission[72].

4.2.4 EXECUTIVE POWERS UNDER MILITARY REGIMES

13. Between 1966 and 1993, Ghana experienced many military interventions in its governance. These interventions introduced the National Liberation Council (NLC) (1966-1969); the National Redemption Council (NRC) (1972-1975); the Supreme Military Council (SMC) (1975-1978); the Supreme Military Council II (SMCII) (1978-1979); the Armed Forces Revolutionary Council (AFRC) (1979); and the Provisional National Defence Council (PNDC) (1981-1993). The most significant feature in the organisation of the Executive arm of government under these military regimes was that they fused Executive and Legislative authority in one body, although the judiciary was kept separate. The last military regime, the PNDC, returned Ghana to constitutional rule on 7th January 1993.

4.2.5 EXECUTIVE POWERS UNDER THE 1992 CONSTITUTION

14. Chapter 8 of the 1992 Constitution titled "The Executive" spans Articles 57 to 88. It covers the Presidency, the Vice Presidency, Cabinet, Ministers and Deputy Ministers of State, the National Security Council, the National Development Planning Commission, and the Attorney-General.

15. The Council of State, which is contained in Chapter 9 of the Constitution, is also considered a part of the Executive because of its role in generally aiding and counselling the principal organs of State in the discharge of their constitutional functions.

[71] Article 70 of the 1979 Constitution of the Republic of Ghana.
[72] Article 73 of the 1979 Constitution of the Republic of Ghana.

4.2.5.1 THE PRESIDENCY

16. Article 58(1) of the 1992 Constitution of Ghana vests executive authority in the President of Ghana. The President under this regime is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces of Ghana. The President is the foremost citizen of the country and takes precedence over all other persons in Ghana. Next to the President, in descending order, are the Vice President, the Speaker of Parliament and the Chief Justice. Before assuming office, the President is required to take and subscribe to two oaths, the Oath of Allegiance and the Presidential Oath, before Parliament.

17. The executive authority vested in the President extends to the execution and maintenance of the 1992 Constitution and all laws made under or continued in force by the Constitution. The President can exercise this authority either directly or through his subordinate officers.

18. Under Article 57(4), the President of Ghana is personally exempted from criminal or civil liability for acts or omissions committed in the performance of his functions as a President. He is, however, amenable to civil suits relating to the enforcement of the 1992 Constitution and those relating to the operation of the prerogative writs. Civil or criminal proceedings may be instituted against the President arising from his personal acts or omissions within three years of his leaving office.

19. The personal emoluments of the President are exempted from tax.

4.2.5.2 THE VICE PRESIDENCY

20. Prior to the election of the President, he is required to designate a candidate for the office of the Vice President. Article 60 of the 1992 Constitution provides for two sets of functions for the Vice President: functions assigned him under the Constitution and those assigned him by the President. Under the original 1992 Constitution, the Vice President was constitutionally assigned to chair the Police Council (Article 201), the Prisons Service Council (Article 206) and the Armed Forces Council (Article 211). When the 1992 Constitution was amended in 1996, the Vice President was removed as automatic Chairperson of the three councils[73]. The Vice President, however, remains a member of Cabinet and of the National Security Council.

21. By the provisions of Article 60 of the Constitution, where the President dies, resigns or is removed from office, the Vice President assumes office as President for the unexpired term of office of the President. Where the unexpired term served by the Vice President as President exceeds half of the term of a President, the Vice President is subsequently eligible

[73] Sections 7, 8 and 9 of The Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).

to serve only one full term as President. But where the unexpired term served by the Vice President as President is less than half of the term of a President, the Vice President is subsequently eligible to serve two full terms as President upon being so elected. In the event of a vacancy in the Presidency, the Vice President as President must nominate a person to the office of the Vice President to be approved by Parliament. The Constitution is silent on what should happen where the Vice President is unable to perform the functions of that office due to death or some disability.

22. Article 60 also provides that whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office, the Vice President shall perform the functions of the President until the President returns or is able to perform his functions. Where the President and the Vice President are both unable to perform the functions of the President, the Speaker of Parliament is mandated to perform those functions until the President or the Vice President is able to perform those functions, or a new President assumes office, as the case may be. Where the Speaker assumes the office of the President in the event of the death, resignation or removal from office of the President and the Vice President, fresh presidential elections have to be conducted within three months. According to the Supreme Court,[74] and in constitutional practice under the 1992 Constitution, where the President, Vice President, and Speaker of Parliament are all unavailable to perform the functions of President, the Chief Justice acts as President. This is consistent with the fact that the Chief Justice is the fourth in terms of precedence in Ghana according to Article 57 of the Constitution.

4.2.5.3 CABINET AND MINISTERS OF STATE

23. Subject to the approval of Parliament, the President is empowered to appoint as many Ministers as he thinks fit for the efficient running of the State. Article 78(1), however, provides that the President must appoint the majority of Ministers of State from among Members of Parliament. The Cabinet must also comprise the President, the Vice President and not less than 10 and not more than 19 Ministers of State. The Cabinet assists the President in determining the general policy of the government.[75]

4.2.5.4 THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE

24. Article 88 of the 1992 Constitution provides that the Attorney-General of Ghana shall be a Minister of State and the principal legal adviser to the government. The Attorney-General

[74] *Asare* v. *Attorney-General* [2003-2004] SCGLR 82.
[75] Articles 76-79 of the 1992 Constitution of the Republic of Ghana.

also performs other duties of a legal nature assigned by the President or imposed by the Constitution. He is responsible for the initiation and conduct of all prosecutions of criminal offences. He is also responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State must be instituted against the Attorney-General as defendant. In practice, all Attorneys-General under the 1992 Constitution have occupied the portfolio of Minister of Justice and Attorney-General.

4.2.5.5 DEPUTY MINISTERS OF STATE

25. The President may also appoint Deputy Ministers of State in consultation with the relevant Ministers of State and subject to parliamentary approval.[76]

4.2.5.6 THE COUNCIL OF STATE

26. The Council of State under the 1992 Constitution is instituted to counsel the President in the performance of his functions. It also provides advice to other organs of state such as the Legislature on bills for the amendment of the Constitution.[77] The Council is made up of various appointees of the President and 10 persons elected from the 10 administrative regions of Ghana.

SUBTHEME ONE: THE PRESIDENCY

ISSUE ONE: APPROPRIATE AGE REQUIREMENT FOR THE PRESIDENT

A. DIMENSIONS OF THE ISSUE

27. There were three dimensions to this issue:
    a. Whether the eligibility age of 40 years for the President should be maintained,
    b. Whether the eligibility age for the President should be further reduced, and
    c. Whether there should a particular age, above which a person would be ineligible for the Presidency?

[76] Articles 79 and 256(2) of the 1992 Constitution of the Republic of Ghana.
[77] Articles 89, 290 and 291 of the 1992 Constitution of the Republic of Ghana.

B. CURRENT STATE OF THE LAW ON THE ISSUE

28. The Constitution specifies a minimum eligibility age for the Presidency: a person is not qualified to be elected as the President of Ghana unless that person is 40 years or above.[78]There is, however, no maximum eligibility age for the presidency.

C. SUBMISSIONS RECEIVED

29. A significant number of people suggested that the eligibility age for the presidency ought to be retained at age 40. This group of people buttressed their view with the following reasons:
    a. The existing constitutional arrangement has worked pretty well for nearly two decades and there is no compelling reason to change it.
    b. People are considered mature and experienced at age 40.

30. Some also suggested that the eligibility age should be fixed at age 35 or 30. They argued that:
    a. Electing of relatively young Presidents and Prime Ministers is an emerging trend globally. Ghana must, accordingly, follow that trend by lowering the age requirement in order to signal the readiness of Ghanaians for younger Presidents.
    b. Reducing the eligibility age will allow younger persons to inject fresh blood, new ideas and dynamism into the Presidency.
    c. Life expectancy in Ghana is relatively low. Lowering the minimum age qualification will acknowledge this reality.

31. A number of submissions also made calls for the eligibility age for presidential aspirants to be fixed at 18 years because in Ghana, a person who turns 18 years is for all purposes deemed an adult. Alternatively, it was proposed that the eligibility age for the Presidency should be the same as that for Parliament - 21 years.

32. There were also submissions that there should be a maximum age qualification for the presidency. The reasons cited were that:
    a. The rationale behind the prescription of a retiring age limit for public officers should equally apply to the Presidency.
    b. After a certain age, one gets quite weak mentally and physically and so it is critical to have an upper age limit for the Presidency.

D. FINDINGS AND OBSERVATIONS

33. The Commission observes that under the 1960 First Republican Constitution of Ghana, the minimum age of eligibility for the Presidency was age 35.[79]

[78] Article 62(b) of the 1992 Constitution of the Republic of Ghana.
[79] Article 11(2)(a) of the 1960 Constitution of the Republic of Ghana.

34. The Commission also observes that the 1968 Constitutional Commission which drafted the proposals for the 1969 Constitution recommended age 50 as the minimum age qualification of the President,[80] although the 1969 Constitution ultimately specified 40 years as the minimum age for the Presidency.

35. The Commission further observes that the Committee of Experts which drafted the Proposals for the 1992 Constitution endorsed the provisions of Article 49 of the 1979 Constitution to the effect that there should be a minimum age of 40 years for the Presidency.[81]

36. The Commission observes that the Consultative Assembly's Committee on Powers of Government, in proposing age 40 as the minimum age eligibility requirement for the Presidency, noted that a similar recommendation had been made by the National Commission for Democracy (NCD).[82]

37. The Commission finds that at the National Constitution Review Conference, participants proposed that the existing constitutional arrangement, which sets the minimum eligibility age for the President at age 40, be maintained.

38. The Commission further observes that:
    a. In countries such as Nigeria,[83] Albania,[84] Czech Republic,[85] and Chile,[86] the minimum age for the Presidency is 40, although the age in China is 45.[87]
    b. In Angola,[88] India,[89] the United States of America,[90] Russia,[91] Brazil[92] and Cyprus,[93] the minimum age requirement for qualification to be President is age 35.
    c. In Argentina,[94] Botswana,[95] and Costa Rica,[96] the age requirement for the Presidency is 30.

[80] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968. Paragraph 344.
[81] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), Paragraph 29.
[82] Official Report of the Proceedings of the Consultative Assembly, (Tuesday January 14, 1992, Col. 1384).
[83] Section 131 of the 1999 Constitution of the Federal Republic of Nigeria.
[84] Article 86(2) of the 1998 Constitution of Albania.
[85] Articles 19(2) and 57 of the 1992 Constitution of the Czech Republic.
[86] Article 25 of the 1980 Constitution of the Republic of Chile.
[87] Article 79 of the 1982 Constitution of the Peoples Republic of China.
[88] Article 58 of the 1992 Constitution of the Republic of Angola.
[89] Article 58 of the 1949 Constitution of India.
[90] U.S. CONST. Art. 2, § 1.
[91] Article 81 of the 1993 Constitution of the Russian Federation.
[92] Article 14, § 3 of the 1988 Constitution of Brazil.
[93] Article 40(b) of the 1960 Constitution of Cyprus.
[94] Sections 55 and 89 of the 1853 Constitution of Argentina.
[95] Section 33(1)(b) of the 1966 Constitution of Botswana.
[96] Article 131(3) of the 1949 Constitution of Costa Rica.

d. In the South African Constitution, the age requirement for the Presidency is linked to the age qualification of a Member of Parliament, which is age 18. In Canada, the Prime Minister must be at least age 18, and is generally elected as a Member of Parliament. In Congo-Brazzaville, no age is given. However one is expected to have practised as a professional for at least 15 years.[97]
e. Most countries do not prescribe a maximum age requirement for the Presidency.

39. The Commission finds that different countries have different minimum age requirements for the Presidency and that Ghana must choose an age requirement that accord with its needs.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

40. The Commission recommends that the existing minimum age requirement of 40 for the Presidency be maintained.

41. The Commission also recommends that there should be no maximum age requirement for the Presidency.

ISSUE TWO: VOTE REQUIREMENT FOR ELECTION TO THE PRESIDENCY

A. DIMENSIONS OF THE ISSUE

42. The various dimensions of this issue were as follows:
    a. Should the current law, whereby a presidential candidate is required to secure more than 50% of the valid votes cast (50% plus 1) to be President, be retained?
    b. Should the Constitution be amended to allow a presidential candidate who attains a simple majority of the valid votes cast to become President?
    c. Should the Constitution be amended to require that a presidential candidate must win the popular vote in at least half of the administrative regions in order to become President?

B. CURRENT STATE OF THE LAW ON THE ISSUE

43. Under the Constitution a person is considered elected as President of Ghana only where he obtains more than 50% of the total number of valid votes cast at the presidential election. [98] The phrase "more than fifty percent" is understood to mean at least 50% plus 1 of the total valid votes cast.

[97] Article 68(2) of the 1992 Constitution of the Republic of Congo (Brazzaville).
[98] Article 63(3) of the 1992 Constitution of the Republic of Ghana.

C. SUBMISSIONS RECEIVED

44. The Commission received three main proposals on this issue. These were a call for the retention of the current constitutional provisions; a call for the institution of a system of simple majority; and a call for the institution of a requirement for regional balance in the votes attained by a would-be President.

45. The majority of proposals received on this issue called for the retention of the existing constitutional provisions. According to those who held this view, the existing arrangement has worked very well and should not be disturbed. Again, the provisions have an underlying utility. A President who commands more than half of the votes is assured of legitimacy.

46. Some Ghanaians have suggested that the Constitution be amended to institute a requirement of a simple majority of valid votes cast to be elected President. They argued that previous presidential elections have led to run-offs because no one candidate was able to obtain the '50% plus 1' votes needed to get elected in the first round. Run-off elections had to be conducted at great cost to the nation attended by tension and anxieties that are potentially disruptive and could lead to electoral violence. To avoid all these, they argued, whoever obtains a simple majority of the vote should be declared President.

47. Another view expressed in the submissions was that there is the possibility of a former President being elected as Vice President and then becoming President in the absence of the President.

48. A number of submissions proposed that a successful presidential candidate must win the popular votes from a specified minimum number of administrative regions in Ghana. They argued that this will ensure that the President enjoys support across the entire country and not in a few administrative regions which may be densely populated. Concerns were raised as to how the current arrangement makes it possible for a successful presidential candidate to satisfy the majority vote requirement by winning the popular votes from only 3 out of the 10 administrative regions in Ghana that is Greater Accra, Ashanti and Eastern Regions where the urban population concentration is dense. They contended that this would not be in the best interest of the nation.

D. FINDINGS AND OBSERVATIONS

49. The Commission observes that there are several electoral systems of the world which are traditionally grouped into three main families: the plurality/majority; proportional representation; and mixed systems.

50. The Commission finds that Ghana's current electoral system can be identified with the plurality/majority system,[99] something the nation shares with 91 other countries.[100] There are five varieties of the plurality/majority system (first past the post; block vote; party block vote; alternative vote; and the two-round system) and Ghana practises the two-round system variety. This variety, as practised in Ghana, takes the form of a majority run-off, where only the top two candidates in the first round contest the second round. Other countries which use the two-round system for their presidential elections are Azerbaijan, Côte d'Ivoire, Gambia, Kenya, Liberia, Madagascar, Maldives, Nigeria, Palau, Sierra Leone, Tanzania, Uganda, Yemen, and Zimbabwe.[101]

51. The Commission also observes that the Ghanaian presidential electoral experience has evolved under the various Republican Constitutions. Under the 1960 Constitution, the President was elected by Members of Parliament by obtaining more than one-half of the valid votes cast by the Members of Parliament.[102] Under the 1969 Constitution, the President was elected by obtaining at least one-half of the total number of votes of the Presidential Electoral College established under that Constitution.[103] The 1979 Constitution of Ghana was the first attempt at direct presidential elections in the country. The President was elected after obtaining more than 50% of the total number of valid votes cast at the presidential elections.[104] This arrangement was adopted by the Committee of Experts which drafted proposals for the 1992 Constitution.[105] The Consultative Assembly's Committee on Powers of Government stated thus: "the election of the holder of such high office should be on the terms of universal adult suffrage at every stage. Such a person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than 50% of the total number of valid votes cast at the election. And even if there should be only one presidential candidate resulting from any withdrawal, the Committee decided that there shall still be a presidential election and the presidential candidate shall be declared elected if he obtains more than 50% of the votes cast."[106]

52. The Commission also notes that during the debates of the Consultative Assembly, an amendment of the '50% +1 formula' was proposed with the aim of ensuring regional balance. It was suggested by the proponents of the proposed amendment that the President

[99] International Institute for Democracy and Electoral Assistance (IDEA), http://www.idea.int/esd/world.cfm (last visited July 04, 2011).
[100] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd?toc (last visited July 04, 2011).
[101] International Institute for Democracy and Electoral Assistance (IDEA), http://www.idea.int/esd/type.cfm?electoralSystem=FPTP (last visited July 04, 2011).
[102] Article 11(2) of the 1960 Constitution of the Republic of Ghana.
[103] Article 41(6) of the 1969 Constitution of the Republic of Ghana.
[104] Article 50(3) of the 1979 Constitution of the Republic of Ghana.
[105] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 31.
[106] Official Report of the Proceedings of the Consultative Assembly, (Tuesday 14th January 1992, Col. 1385-1386).

must win at least 5% of the valid votes cast in each region and the sum of all votes cast in his favour must be more than 40% of the total valid votes cast.[107] It was argued that such a mechanism will ensure that political parties are national in character.[108] In one of the arguments supporting this view, it was suggested that: "not less than thirty three per centum of the total votes cast in each of at least six regions of the country and more than fifty per centum of the total votes cast at the election."[109] The proposed amendment was however lost by an overwhelming consensus to the contrary.[110]

53. The Commission observes that the requirement to obtain a certain minimum of regional votes has been incorporated into the Constitution of Kenya. That Constitution provides that the candidate for State President who receives (a) more than half of all the votes cast in the election; and (b) at least 25% of the votes cast in a majority of the regions, shall be declared elected as State President.[111]

54. The Commission observes that some members of the Consultative Assembly emphasised the national, and not regional, character of the Presidential elections and the need to promote the unity of the nation by deemphasizing regional differences. It was reasoned thus: "We are in for a unitary form of government and, therefore, to create a situation where you have the President gaining majority in the Regions would exacerbate the feeling of regionalism and ethnicity."[112] Other members who opposed the amendment cited similar reasons and added that the proposed amendment would unnecessarily complicate the electoral system.[113]

55. The Commission finds that a minimum regional vote requirement for election to the Presidency is not consistent with the overriding principle of the Commission to make recommendations that promote the unity and cohesion of the nation.

56. The Commission finds that the issue of a minimum regional vote requirement was not only popular, but very thoroughly discussed at the Consultative Assembly in 1992, with the Assembly deciding by an overwhelming majority not to endorse the requirement in order to preserve and promote national unity and cohesion and eschew tendencies to regionalism and ethnicity.

57. The Commission also observes that the current electoral requirements for the Presidency have served the nation well for two decades and can be maintained for the following reasons:

[107] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1517).
[108] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col 1515-1516).
[109] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col 1518).
[110] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1524-1525).
[111] Article 138(4)(a) of the 2010 Constitution of Kenya.
[112] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1522).
[113] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1523-24).

a. Where the President of Ghana is elected by more than 50% of the valid votes cast in his favour, he would command sufficient legitimacy to govern.
b. The simple majority system could result in a person becoming President with less than 50% of the vote.
c. As a non-federated, unitary state, Ghana should not regionalise its presidential elections as a measure to promote the unity and cohesion of the nation.
d. Again, the large cities that record a huge number of registered voters are very cosmopolitan, drawing from virtually all parts of Ghana, and there is no reason why a person who generates all votes from such places should not be President.
e. It should also be noted that the various political parties have mechanisms within their constitutions for ensuring that a presidential candidate has support from across the country.
f. Political parties are also required by the laws regulating political parties to be national in character and to maintain regional balance in their operations. For example, to qualify as a presidential candidate, a person must be nominated by at least two registered voters resident in the area of authority of each District Assembly.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

58. The Commission recommends that the current arrangement which requires a presidential candidate to obtain more than 50% of all valid votes cast to become President should be maintained.

ISSUE THREE: THE TERM OF OFFICE OF THE PRESIDENT

A. DIMENSIONS OF THE ISSUE

59. The main dimensions of the issue of the term of office of the President can be summarised as follows: whether the tenure of the President should be (a) retained (b) reduced or (c) increased. Also, whether a person who has previously served as President for one term should be permitted to stand for another presidential election if his mandate is not immediately renewed after his first Presidency?

60. There is yet another dimension which is: should a Vice President who has served a little over two years of the unexpired term of the President be permitted another four-year term after an interval?

B. CURRENT STATE OF THE LAW ON THE ISSUE

61. Article 66(1) and (2) provide that a person elected as President shall hold office for a term of 4 years beginning from the date on which he is sworn in as President, and may run for office renewed for a further term. This constitutional provision is an entrenched provision.

C. SUBMISSIONS RECEIVED

62. The broad majority of Ghanaians who made submissions on this issue held the view that the current tenure of the President has worked well and should be retained. It has been suggested that 4 years is adequate as it allow the electorate to not be unduly saddled by an ineffective President and an effective President finds approbation in having his mandate renewed. It was suggested that an increase in the tenure may encourage the resort to unconstitutional means to remove an ineffective President.

63. A significant number of Ghanaians suggested that the 4 year term of the President should be extended to 5, 6, 7, 8, 9 or 10 years. In the case of tenure above 6 years, all those in this category called for a single term Presidency. Some of those who called for a 6 year term also preferred a single term Presidency. Their main argument was that 4 years is too short a time to execute any real policies, programmes and projects. This is especially so as the first year is spent forming a government and getting settled and the last year on campaigning for re-election, leaving effectively 2 years for implementation of policies, programmes and projects.

64. Those who called for a single-term Presidency argued that elections are very expensive to conduct and so the country should save resources and emotions by increasing the period within which elections are conducted. Additionally, they argued that a convention has been established under the 1992 Constitution where both Presidents under that Constitution ruled for 8 years, making the intervening elections a complete waste of resources. Those who argued for a two- term Presidency counter that the intervening elections are important as a review mechanism for assessing the performance of the President. They argued that an opportunity must always exist for the removal of an-ineffective President.

65. A few persons called for a single term of 5 years and fewer still called for the removal of the cap on the number of terms a person may be President.

66. A small number of Ghanaians called for the term of office of the President to be reduced from 4 years to 3 years. According to this group, Ghanaians must insist that a President delivers on his mandate within the shortest possible time or be voted out of office.

D. FINDINGS AND OBSERVATIONS

67. The Commission observes that the Committee of Experts mandated to draw up proposals for the 1992 Constitution, recommended a limitation of the Presidential term to two terms, each term being 4 years.[114] This proposal was rejected by the Committee on Powers of Government of the Consultative Assembly, which proposed a 5-year term of office for the President.[115] During the consideration of that Committee's report by the Consultative Assembly, the 5-year term was rejected and in its place, the 4-year term was reinstated by a majority vote.[116] It appears that the Consultative Assembly was very much divided on this issue. A head count showed 128 'yes' votes, as against 85 'no' votes, with 13 abstentions.[117] It was argued by some members then, as is argued by some Ghanaians now, that 5 years was too long a time for the country to run the risk of having an inept President. The idea that an in-coming government would need time to prepare to govern was criticised as untenable. The in-coming government is expected to have formulated its policies and programmes and made them available to the electorate as a basis for seeking their mandate to govern. It was also argued that the art of governance must be a continuous process, and that there should be no radical break, even with a change in government. Some members thought, that from an examination of the political history of this country, a long period of tenure has the tendency of making political leaders perpetuate themselves in power.

68. The Commission observes that:
    a. Most Francophone African countries have a 5-year term of office for their Presidents, with re-election eligibility for another term only. The same applies in India. In Kenya, the presidential term is also 5 years, with re-election eligibility for one more term of 5 years.[118] Similarly in South Africa, the President has a 5-year term with the option for re-election once only.[119] In Mali, the President is elected for a five year term and is not eligible for re-election.[120] The French President is elected directly for a term of five years and is eligible for re-election for another term of 5 years.[121] Similarly, the German President has a maximum of two terms, with each term lasting for 5 years.[122]
    b. In the United Kingdom, the statutory period of Parliament, and therefore of the Prime Minister, as prescribed by the Parliament Act of 1911, is 5 years. There is, however, the possibility of dissolution of Parliament by the Queen at the request of the Prime

[114] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana (July 31, 1991), paragraph. 32.
[115] Official Report of the Proceedings of the Consultative Assembly, (Tuesday 14th January 1992, Col. 1384).
[116] Official Report of the Proceedings of the Consultative Assembly, (Tuesday 21st January 1992, Col. 1533-1546).
[117] Official Report of the Proceedings of the Consultative Assembly, (Tuesday 21st January 1992, Col. 1546).
[118] Articles 136(2)(a) of the 2010 Constitution of Kenya.
[119] Sections 49 and 86-88 of the 1996 Constitution of the Republic of South Africa.
[120] Article 30 of the 1992 Constitution of the Republic of Mali.
[121] Article 6 of 1958 Constitution of the Republic of France.
[122] Article 54(2) of the 1949 Basic Law (Constitution) of the Federal Republic of Germany.

Minister before the statutory life of a Parliament has run its course.[123] In Canada, the Governor-General has a 5-year term, although the length of the term may be extended by the Queen of England who is also the Queen of Canada on the advice of the Prime Minister.[124] The term of office of the Governor-General of Australia is also 5 years.[125] The Chinese President is elected for a 5-year term and is eligible for re-election for another 5-year term.[126]

c. In Nigeria, the Presidential term is 4 years, with re-election eligibility for another term. In recent times, there have been calls for the extension of the 4-year term in Nigeria. The 4-year term with re-election eligibility for another term also applies in Brazil,[127] and Israel (for the Prime Minister) [128] among other states.

d. In Mexico, the President is elected for 6 years and cannot seek re-election. The Constitution provides that "a citizen who has held the office of President of the Republic, by popular election or by appointment as ad interim, provisional, or substitute President, can in no case and for no reason again hold that office."[129]

e. Egypt's Constitution under President Mubarak did not have a cap on the number of times one could be President.[130] Media reports suggest that the post-Mubarak era would institute a 4-year term, renewable for another 4 years.[131]

69. The Commission finds that the 4- year term, with re-election eligibility for another term, has worked well for the nation and should not be disturbed. Political parties are to be ever ready to govern and should not be allowed one long year to prepare to govern. Additionally, with the institution of a national development plan, there should not be so radical a change in the course of our development as to necessitate a long period of preparation to govern.

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[123] A. W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 188 and 249-250 (London, Pearson; 14th Ed, 2007).

[124] The British Monarchy, http://www.royal.gov.uk/MonarchAndCommonwealth/Canada/GovGenCan.aspx (last visited July 04, 2011).

[125] The Constitution does not set a term of office, so a Governor-General may continue to hold office for any agreed length of time, however a typical term of office is five years. At the end of this period, a commission is occasionally extended by a short period.

[126] Articles 79 and 60 of the 1982 Constitution of the Peoples Republic of China.

[127] Articles 14(5) and 82 of the 1988 Constitution of Brazil.

[128] Paragraph 7 of the Basic Law: The Government (1992) (Constitution) of Israel; Paragraph 8 of the Basic Law: Knesset (1958) of Israel.

[129] Article 83 of the 1917 Political Constitution of the United Mexican States.

[131] Romeo Braceros Jr., *To avoid repeat of Mubarak dictatorship, Egypt wants term limits for presidency,* Maxi News (July 04, 2011, 2:35 PM) http://maxinews.co.uk/general/top-news/to-avoid-repeat-of-mubarak-dictatorship-egypt-wants-term-limits-for-presidency/.

70. The Commission also finds that the term of the Presidency was one of the most popular issues during the review exercise and the majority of Ghanaians who made submissions were of the opinion that the current state of the law should not be changed.

71. The Commission finds that in the evolution of our constitutional history, there can be discerned a desire of the people of this nation to establish a framework of government which will secure for its people the blessings of liberty, prosperity and equality of opportunity. The history of Africa is replete with examples of Constitutions being amended to increase the tenure of Presidents, leading to many governance disasters. This must not happen in Ghana.

72. The Commission finds that the Twenty-Second Amendment to the United States Constitution states that "No person shall be elected to the office of the President more than twice." This Amendment was ratified in 1951. Since that time, 5 presidents have been elected to a second term and none of these Presidents attempted a third term. It is on record that President Franklin Roosevelt's third and fourth terms spurred the adoption of the Twenty-Second Amendment. However, the American Constitution does not debar a former President from holding another high office such as Vice President and this has led academics to argue that there is the possibility for a President nearing the end of his second term to run as Vice President. When this happens, it would appear that should he get elected as Vice President and should the President-elect resign, is removed from office or dies, he gets the chance to serve as President for a third time.[132]

73. The Commission also observes that under the current 1992 Constitution, there is the possibility for a person to serve as President for more than eight years. As noted earlier, where the unexpired term served by the Vice President as President exceeds half of the term of a President, the Vice President is subsequently eligible to serve only one full term as President. But where the unexpired term served by the Vice President as President is less than half of the term of a President, the Vice President is subsequently eligible for election to serve two full terms as President upon being so elected.

74. The Commission also observes that under Article 68(2) of the 1992 Constitution, a former President cannot hold any office of profit or emolument either directly or indirectly in any establishment. To do so, he needs the permission of Parliament. This provision, however, excepts establishments of the State. Thus, the restriction here is targeting establishments in the private sector. This means that a former President is eligible to hold any high public offices including being a Vice President, Speaker of Parliament or Member of Parliament since these offices are State establishments. There is the real likelihood of a former President to return as President after serving two full terms. This is possible where such a former

[132] Bruce G. Peabody & Scott E Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 Minn. L. Rev. 565, (February 1999).

President contests elections and gets elected as Vice President then as President where the President resigns, is removed from office or dies.

75. The Commission observes that at the National Constitution Review Conference there were two strong and opposing views on the term of the Presidency. One view supported the retention of the current 4-year, 2-term presidency. The other view called for an increase to a 5-year, 2-term presidency. At the close of conference, it was agreed that the former be retained.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

76. The Commission recommends that the current term of 4 years with re-election eligibility for another 4 years.

77. The Commission also recommends that the Constitution be amended to make it clear that a person who has been President for two terms of four years shall not qualify to stand for re-election as President.

78. The Commission further recommends that where the President serves for only one term of 4 years, he should be allowed to contest for another 4-year term after an interval, but he may not serve for more than 8 years in total.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

79. The Commission recommends that transitional arrangements be instituted so that the transition from one government to the other is smoother and faster than is the case at present.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

80. The Commission also recommends that political parties should take appropriate steps to ensure that they are sufficiently prepared to take over the reins of government so that they do not spend too much time settling into office as in the case with previous presidential transitions.

ISSUE FOUR: IMPLICATIONS OF A SITTING PRESIDENT LEAVING THE PARTY ON WHOSE TICKET HE IS ELECTED AS PRESIDENT

A. DIMENSIONS OF THE ISSUE

81. The dimensions to this issue were the following:

a. Should the Constitution be amendment by inserting a new provision to regulate a situation where an incumbent President leaves the party on whose ticket he was voted into power?
b. Should an incumbent President who leaves his party resign or continue in office as President?

B. CURRENT STATE OF THE LAW ON THE ISSUE

82. The Constitution does not contain any provisions for what action could or should be taken if a sitting President leaves the party on whose ticket he ascended to the presidency.[133]

C. SUBMISSIONS RECEIVED

83. A good number of Ghanaians submitted that the existing law should be maintained because it has worked quite well, and conventions should be allowed to evolve to fill any gaps. Another reason was that on being elected, the President represents the wishes of all Ghanaians as President of the entire nation. He is not the President of the party on whose ticket he got elected into office. He should, therefore, continue in office in such an eventuality. Moreover, the President's allegiance as President is to the Constitution and the laws of Ghana and not to any one political party.

84. There were also contrary submissions suggesting that a President or Vice President who 'crosses carpets' should resign his office because the election of a President or Vice President is based on the manifesto promises of the political party on whose ticket he runs for office. Thus, if he leaves that party and joins another party or stays independent, he places himself in a position where he cannot implement the policies of the party on whose ticket he was elected. They also argued that it is disingenuous for such a high ranking official to 'cross-carpet' and the appropriate penalty in such an eventuality should be removal from office. They mentioned the example in the run-up to the 1996 presidential elections where the sitting Vice President defected from the ruling coalition and joined the main opposition party, becoming the Vice-presidential candidate of that party. This created governance complications that for the ruling government as the Vice President continued to act as a member of the Cabinet, the National Security Council and Chairperson of the Armed Forces, Police and Prison Service Councils. They argued that 'carpet-crossing' can indeed disrupt the governance of the nation.

[133] Article 97(1) (g) & (h) of the 1992 Constitution of the Republic of Ghana provides that a member of Parliament shall vacate his seat in Parliament if he leaves the party of which he was a member at the time of her election to Parliament to join another party or seeks to remain in Parliament as an independent member; or if he was elected a member of Parliament as an independent candidate and joins a political party. This means that a member of Parliament may not cross-carpet and remain in Parliament.

D. FINDINGS AND OBSERVATIONS

85. The Commission observes that the 1992 Constitution does not make any provision for what action could or should be taken if a sitting President leaves the party on whose ticket he ascended to the Presidency. Moreover, this issue has also not received any judicial pronouncement yet. In the circumstances, it is safe to argue that what is not expressly prohibited by law, be it constitutional, statutory or judicial, may be permitted.

86. The Commission further observes that the idea of an incumbent President leaving his political party is a matter that was not considered in any of the previous constitution making processes.

87. The Commission further finds that a lot of complications could arise if a sitting President or Vice President 'crosses carpet'. Even when polarisation has intensified to the point of violence and illegality, a stubborn incumbent may remain in office. By the time the cumbersome mechanisms provided to dislodge him in favour of a more able and conciliatory successor have done their work, it may be too late.[134]

88. The Commission notes that the National Constitution Review Conference was divided on this issue. There was a good number of people who held the view that the President on defecting from his political party should stay on as President of Ghana because he is President of the entire nation and not just of a political party. On the other hand, there were those who held the view that the President's ascendency to office was based on the agenda of the political party as expressed in its manifesto. Leaving the party puts him in a position where he may not be able to implement that agenda.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

89. The Commission recommends that the option to 'cross carpet' should not be available to an incumbent President or Vice President and the Constitution should be amended accordingly to reflect this. An incumbent President or Vice President should not be permitted to defect from the party on whose ticket he runs for office. Again a President or Vice President who is elected as an independent candidate should remain as such until the expiration of his term of office.

[134] Juan J. Linz (Juan José), *The Perils of Presidentialism*, Volume 1, Number 1 Journal of Democracy. 51, 64-65 (Winter 1990).

ISSUE FIVE: CONDITIONS OF SERVICE OF THE PRESIDENT

A. DIMENSIONS OF THE ISSUE

90. The issue involved the following dimensions:
    a. Should the current practice whereby the President determines the conditions of service of Members of Parliament and *vice versa* be continued?
    b. Should the Fair Wages and Salaries Commission determine the salary and emoluments of the President?
    c. Should an independent body be established by the Constitution to determine the salary and emoluments of the President?
    d. Should the payment of *ex gratia* to former Presidents be abolished or in the alternative, should there be a cap on the amount payable?

B. CURRENT STATE OF THE LAW ON THE ISSUE

91. The current law is contained in Article 68 of the 1992 Constitution. There are three clear constitutional values woven into the design of this article. First is the creation of the Presidency as a full- time job, with conditions of service that mostly survive incumbency. Next is the payment of salary, allowances and facilities to the President in keeping with the dignity of that office. The third value is to provide an incentive for the handing over of power from one President to another by constitutionally guaranteeing end-of-service benefits or retirement packages ("*ex gratia* awards") for the President.

92. The Constitution absolutely forbids the President from holding any other office of profit or emolument while he continues in office as President. On leaving office as President, he is also not allowed to hold any private office of profit or emolument in any establishment either directly or indirectly. This prohibition is, however, not absolute. This is because Parliament may give the President permission to hold an office of profit or emolument.

93. Given that the President's job is full-time, his right to receive commensurate salary, allowances and facilities has also been firmly guaranteed by the Constitution. Indeed, so secured is this right that clause (8) of Article 68 fortifies the President's salary, allowances, facilities and privileges against possible disadvantageous variations when he leaves office. He is to be paid a pension even where he resigns or is removed from office, and the pension payable to the President cannot be varied to his disadvantage on leaving office. The determination of the President's salary, allowances, facilities and privileges is the responsibility of Parliament on the recommendation of a Committee of 5 appointed under Article 71 by the President.

C. SUBMISSIONS RECEIVED

94. The views expressed on the emoluments of the President included the retention of the current state of the law where a 5-member *ad hoc* committee appointed by the President makes the determination subject to the approval of Parliament; the creation of an independent body to make the determination; and retrofitting the Fair Wages and Salaries Commission and charging it with a mandate that includes making that determination.

95. Those who argued for the retention of the current state of the law reasoned that it has worked well and should not be changed. Again, the President is an Executive President and as such he should be allowed to appoint committees to make such determinations. Those who argued that the Constitution should be amended to allow for a body independent of the President and Parliament to determine the salary of the President reasoned that the current arrangement is too incestuous. To avoid this, there is the need to establish a body which is clearly independent of both organs of government for the purpose. Some others argued that the Fair Wages and Salaries Commission, which is already in existence and carries a mandate related to this function, should be constitutionally mandated to make the determination.

96. On *ex gratia* awards for exiting Presidents, a few submissions called for the retention of *ex gratia* awards, but called for either a reduction of the quantum or a calibration of the amount payable to the general economic conditions of the nation at every point in time. They argued that it is immoral, almost criminal, for a few persons to be paid over a hundred thousand dollars for service for a few years in the face of abject poverty. They further argued that the President should be paid a pension, just like his fellow retirees from the public services. Yet others called for the retention of *ex gratia* under different conditions. The mechanism for determining the quantum of *ex gratia* should be less dependent on the beneficiaries. It should be paid only once and not after every term in office and the quantum paid should reflect the state of the Ghanaian economy.

D. FINDINGS AND OBSERVATIONS

97. The Commission finds that the payment of *ex gratia* to exiting political office holders, especially Presidents, Vice Presidents, Ministers and Deputy Ministers of State and Parliamentarians, has become a matter for extensive debate in Ghana in recent years. Many Ghanaians are not worried so much about the fact that such awards are made, they are concerned about the quantum of the awards, relative to the period of public service and the manner of determining the quantum of the awards. Ghanaians believe that it is because such political office holders more or less determine their own awards that the quantum is that high.

98. The Commission finds that Ghanaians would be prepared to accept the payment of *ex gratia* to exiting political office holders if the awards are determined apolitically, independently and

with enough scientificity. This will assure Ghanaians that the nation's coffers are not being depleted in furtherance of the narrow interests of exiting politicians.

99. The Commission also finds as particularly worrisome the fact that the determination of these payments is *ad hoc* such that in less than 2 years, between 2008 and 2010, two different committees have been appointed by two different Presidents for the purpose. This underlines the need for greater consistency in such determinations.

100. The Commission observes that the National Constitution Review Conference proposed that the salaries and emoluments of the President should be charged on the Consolidated Fund. This is already the case by virtue of Article 68(7) of the Constitution. Participants at the Conference also suggested that an independent and permanent body should be established to determine the salary and other conditions of service of the President. It was agreed at the conference that the President be given an *ex gratia* payment, but the quantum should be regulated.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

101. The Commission recommends that end-of-service-benefits or *ex gratia* payments be made to exiting Presidents as determined by an Independent Emoluments Commission (IEC) to be established under the 1992 Constitution.

102. The Commission further recommends that the IEC be mandated to determine and review all the emoluments of all public officers to accord with job descriptions and prevailing economic conditions.

103. The Commission recommends that the existing Fair Wages and Salaries Commission and the Single Spine Salary Structure should form part of the institutional structure of the IEC.

104. The Commission further recommends that a former President should not ordinarily be eligible for appointment to another high public office, and that Article 68(2) of the 1992 Constitution should be amended with the deletion of the phrase "other than that of the State" appearing at the end of the Article.

ISSUE SIX: TAXATION OF THE PRESIDENT

A. DIMENSION OF THE ISSUE

105. The main dimension of this issue was whether the salaries, emoluments and other facilities paid to the President should remain untaxed or whether the President, as the first citizen of

the land, should pay taxes as an example to others in a nation that finds it very difficult to increase its tax net.

B. CURRENT STATE OF THE LAW ON THE ISSUE

106. According to Article 68(5) of the 1992 Constitution and section 10(1)(a) of the Internal Revenue Act, 2000 (Act 592), the salary, allowances, facilities, pensions and gratuity paid to the President are exempted from tax.

C. SUBMISSIONS RECEIVED

107. A good number of submissions called for the current legal regime, where the President's emoluments are not subject to tax, to be maintained. According to this view, the job of the President is really tasking and he must be motivated with tax reliefs. The President was also been likened to a traditional ruler or a king. In ancient times, kings exacted taxes from their subjects and did not pay taxes themselves. Therefore, the President should be exempted from paying taxes on his emoluments.

108. An almost equal number of submissions called for the emoluments of the President to be taxable. The reason given in support of this position is that the President, as the number one citizen in Ghana, must set a good example for others to follow. Where the President does not pay taxes on his emoluments, it gives others enough reason to evade or avoid taxes. It is argued that widening the tax net in Ghana has been very difficult and requiring the President to pay tax will encourage Ghanaians not to evade or avoid tax.

D. FINDINGS AND OBSERVATIONS

109. The Commission observes that the deliberations of the National Constitution Review Conference on this issue concluded that the President should pay taxes on his salary and emoluments as this would set a good example for the rest of the citizenry.

110. The Commission observes that the Committee of Experts which drafted the 1992 Constitution did not extend the requirement of taxation to the emoluments of the President.[135] Instead, it endorsed the remunerations of the President, including the salaries, allowances, pensions and retiring benefits contained in Article 44(3)-(8) of the 1979 Constitution. It further suggested that these benefits should not only be available to the President on his retirement from office, but they should also be available to him on resigning his office. The

[135] The Committee of Experts only suggested that the membership of Parliament should not be open to a person who is delinquent in paying his or her tax; Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 67.

reason, according to the Committee, was to induce the President to resign his office when it is in the public interest to do so.[136]

111. The Commission observes that the 1979 Constitution did not exempt the President from the payment of tax on his salary and other perquisites.[137] Thus, one would wonder why in adopting the model provisions of the 1979 Constitution, the Committee of Experts did not follow that Constitution's direction on the payment of tax by the President. Perhaps, the Committee of Experts also considered this as part of the idea of inducing the President to leave office, where it is in the interest of the nation. In the minds of the framers of the framers of the 1969 Constitution, the President represents the majesty of the State,[138] and there was the need to avoid pressure being brought on the President through control over his privileges and remunerations.[139]

112. The 1957 and 1969 Constitutions exempted the President from paying taxes on his emoluments. The 1960 and 1979 Constitutions did not exempt the President from paying taxes on his emoluments. It is possible therefore that the Committee of Experts drew inspiration from the 1957 and the 1969 Constitutions. This is because, as in the case of the 1979 Constitution, the 1960 Constitution did not exempt the President from the payment of tax,[140] and this position did not change with the 1964 amendment of the 1960 Constitution.[141] The 1969 Constitution however exempted the President from the payment of tax on his salaries, allowances and other emoluments.[142] Similarly, Section 5(4) of the 1957 Ghana (Constitution) Order in Council exempted the salary of the Governor-General from tax.[143] This Order in Council was made in connection with the country's attainment of full independent status under the 1957 Independence Constitution of Ghana which enabled the Queen of England to make an Order in Council under Section 5(2).

113. During the consideration of the Report on the Executive by the Committee on Powers of the Government by members of the Consultative Assembly, the issue of taxation of the President was raised tangentially in a proposed amendment.[144] In the end, when the proposed amendment was put, it was negatived by the Assembly.[145]

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[136] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 33.
[137] Articles 44 and 55 of the 1979 Constitution of the Republic of Ghana.
[138] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 326.
[139] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 327.
[140] Article 19 of the 1960 Constitution of the Republic of Ghana.
[141] The Constitution(Amendment) Act, 1964 (Act 224).
[142] Article 36(3) of the 1969 Constitution of the Republic of Ghana.
[143] The 1957 Ghana (Constitution) Order-in-Council.
[144] Official Report of the Proceedings of the Consultative Assembly, (Friday, January 17, 1992, Col. 1471).
[145] Official Report of the Proceedings of the Consultative Assembly, (Friday, 17th January 1992, Col. 1476).

114. At the time of considering the final draft Constitution, the Consultative Assembly considered the provisions of the Article 68 of the 1992 Constitution, but did not debate the specific provision of Article 68(5) of the 1992 Constitution.[146]

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGE

115. The Commission recommends that the President should pay tax on his salary and emoluments as an example to the rest of the citizenry.

ISSUE SEVEN: THE PRESIDENT'S POWERS OF APPOINTMENT

A. DIMENSIONS OF THE ISSUE

116. From the submissions, the main issue here is whether or not the President's powers of appointment should be reduced. If so, to what extent should they be reduced or appropriately qualified and who should assume the hived off powers of appointment of the President?

B. CURRENT STATE OF THE LAW ON THE ISSUE

117. The President has huge powers of appointment to public offices under the Constitution. Articles 70, 74, 86, 202, 207, 212, 232, 243, 183, 185, and 189 are a few examples of constitutional provisions which give the President such powers. Under the Constitution the President exercises these powers sometimes on the advice of, or in consultation with the Council of State, or with the approval of Parliament. The following are some of the public office appointments made by the President:
    a. Ministers of State;
    b. Deputy Ministers of State;
    c. The Commissioner for Human Rights and Administrative Justice and her Deputies;
    d. The Chairman, Deputies and other members of the National Commission for Civic Education;
    e. The Chairmen and other members of the Public Services Commission;
    f. The Chairmen and other members of the Lands Commission;
    g. The Chairmen and other members of the governing bodies of public corporations;
    h. The Chairmen and other members of the National Council for Higher Education described;
    i. The Chairman, Deputy Chairmen, and other members of the Electoral Commission;
    j. The Governor of the Bank of Ghana;
    k. The Government Statistician;

[146] Official Report of the Proceedings of the Consultative Assembly, (Wednesday, 18th March 1992, Col. 3363-3377).

l. The Auditor-General;
m. The Chairman and Members of the Audit Board;
n. The District Assemblies Common Fund Administrator;
o. The Inspector-General of Police;
p. The Director-General of the Ghana Prisons Service
q. The Chief of Defence Staff;
r. The Service Chiefs and Officers;
s. Metropolitan, Municipal, and District Chief Executives; and
t. The Chairman and members of the National Development Planning Commission.

118. The President also appoints the Chief Justice in consultation with the Council of State and with the approval of Parliament and appoints the other Supreme Court Justices, acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. The President is also empowered to appoint the Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals, acting on the advice of the Judicial Council.[147]

119. Article 195(1) vests in the President the power to appoint persons to hold or to act in an office in the public services, acting in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission. In practice this power is delegated to the governing councils concerned, as allowed by the Constitution.

120. In Article 297(a) the power to appoint a person to hold or to act in an office in the public service includes the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office.

C. SUBMISSIONS RECEIVED

121. Two distinct views are decipherable from the submissions on this topic. The first view was that the President's powers of appointment are too huge, especially as appointees might be inclined to act as extensions of the appointing authority and to do whatever that authority bids. This, according to them, has limited the independence of critical governance institutions. Those who hold this view, therefore, called for a curtailment of the powers of appointment of the President. They argued that the fact that the power to appoint is expressed to include the power to exercise disciplinary control over and to remove the appointee makes the scenario worse. They argued in particular that appointments to critical offices of independent governance institutions such as the CHRAJ should not be by the President. Others add the office of the Inspector General of Police and the office of the Governor of the Bank of Ghana to this list. Others suggested that the IGP should be promoted through the

[147] Article 144 of the 1992 Constitution of the Republic of Ghana.

ranks and not by political appointment. They argued that the degree of independence these officers need in order to execute their mandates is inconsistent with their current mode of appointment.

122. The other view was to the effect that the power of the President to make all of these appointments should be retained. According to this view, the President is an Executive President and should be given a free hand to constitute the team he needs to execute his mandate as President.

D. FINDINGS AND OBSERVATIONS

123. The Commission finds that the power of the President to make several appointments is a key feature of an Executive Presidency.

124. The Commission finds that many presidential appointees in Ghana function as extensions of the appointing authority and are not able to gain the autonomy and independence of thought and action that can make them effective and impartial public officers.

125. The Commission finds that appointments to offices prescribed by the Constitution may be improved by subjecting the appointing powers of the President to some greater scrutiny than is currently the case. Appointments to critical public offices should not be made by the President without the recommendation of a retrofitted Council of State and/or Parliament.

126. The Commission also finds that the Council of State, which is supposed to act as a "check" on the President, cannot be considered, in its present form, to be sufficiently credible in its composition or adequately independent of the President to perform this function. The Parliamentary Appointments Committee has also not been impartial and thorough enough in vetting presidential nominees for appointment.

127. The Commission further finds that some appointments to technical positions in the Public Services are coloured with party loyalty and other non-technical considerations.

128. The Commission observes that the National Constitution Review Conference concluded that the appointing powers of the President should not be unnecessarily curtailed, but efforts must be made to reduce political patronage in the choice of appointees.

129. The Commission finds that the power of the President to appoint so many members of the Council of State and the National Development Planning Commission compromises the required independence of those institutions. There is no reason in principle why the President

should have an exclusive role in selecting so many members of the Council of State and the entire membership of the National Development Planning Commission.

130. The Commission finds that there will be objection to proposals to reduce the powers of the President. It is also likely that opposition will not come only from the political Party or supporters of the current President, but will also be shared by the parties in opposition who aspire to gain the mandate to exercise executive power at some time. Indeed, there is the likelihood that many members of the electorate (possibly the majority) would not be in favour of a proposal to reduce the powers of the President. However, it is important to bring to the attention of all concerned that excessive power in the hands of the President or the government regardless of which Party is in power and irrespective of the person who happens to be the President at any time is a recipe and condition for the abuse of power.

131. The Commission observes that the whole idea behind our constitutional set up, as clearly set out in the Report of the 1969 Constitutional Commission, can be summed up in the following words: "Too much power should not be conferred upon one man or body of men; and there should be a check, an effective check, over one organ of government by another in order to prevent undue concentration of power in any one organ." That Commission quoted with approval the words of President Woodrow Wilson of the United States who declared that "Care has to be taken to minimise the possibility of abuse of power, for the abuse of the State Power is practically unavoidable regard being had to the fact that those that have power will not only strive to maintain their right to exercise it but also try to grab more power."[148]

132. The Commission finally finds that controlling or limiting the power of the President should not necessarily imply the wish to reduce (and need not result in a reduction of) the effectiveness of the Executive and the government. The Executive needs no more power than is necessary to direct the course of the government. It does not need more than what is necessary for this purpose. In the long run, granting or leaving more power to the Executive is neither in the interest of democracy nor even of the Executive itself. It is always important to bear in mind the warning that "power tends to corrupt, and absolute power corrupts absolutely." What Ghana needs is not a "strong government" but an "effective government." Our history in Ghana and the experience of other countries elsewhere have clearly shown that these are not always or even often the same.

133. The Commission considers that the arguments for limiting executive power are quite strong but is mindful not to make recommendations that stultify governance.

[148] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 310.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

134. The Commission recommends that the President's general power of appointment be maintained,[149] the following appointments being subject to Parliamentary approval:
    a. Ministers of State;
    b. Deputy Ministers of State;
    c. The Commissioner for Human Rights and Administrative Justice and her Deputies;
    d. The Chairman and members of the National Commission for Civic Education;
    e. The Chairman, Deputy Chairmen and other Members of the Electoral Commission;
    f. The Auditor-General;
    g. The District Assemblies Common Fund Administrator;
    h. The Members of the National Development Planning Commission;
    i. The Chairman and members of the Independent Emoluments Commission; and
    j. The Administrator and Deputies of the Independent Constitutional Bodies Fund.

135. The Commission recommends that for the avoidance of doubt and to enhance orderly transition of government, the following be classified as political appointees who should hold office at the pleasure of the President and whose tenure should end with that of each presidency.
    a. Persons holding office under the Presidential Office Act, 1993 (Act 463), other than those in the category who hold office under Article 195(1);
    b. Ministers and Deputy Ministers of State;
    c. Regional and Deputy Regional Ministers of State;
    d. Special Assistants and Special Aides to the President, the Vice President, and the Ministers of State, Deputy Ministers, Regional Ministers and Deputy Regional Ministers;
    e. Non-career Ambassadors and High Commissioners;
    f. Persons appointed by the President or a Minister of State as members of statutory boards and corporation;
    g. Chief of Defence Staff;
    h. Commanders of the Army, Navy and the Air Force;
    i. Inspector-General of Police;
    j. National Security Coordinator;
    k. Director of the Bureau of National Investigations;
    l. Director-General of the Prisons Service;
    m. Director-General of the Ghana Immigration Service;
    n. Chief Fire Officer;

[149] More specific proposals on these recommendations are contained under contained under the Commission's recommendations in the chapter on Public Services.

o. Executive Secretary of the Narcotic Control Board;
p. Such other persons as Parliament may by law prescribe.

136. The Commission further recommends that the various governing councils of public bodies should recommend persons to the President for appointment to offices in those public bodies in consultation with the Public Services Commission, and such recommendations should follow the conventional practice whereby the President accepts those recommendations as binding.

ISSUE EIGHT: DETERMINATION OF THE CONDITIONS OF SERVICE OF SOME PUBLIC OFFICERS BY THE PRESIDENT

A. DIMENSIONS OF THE ISSUE

137. The main dimension of this issue is whether the President should determine the conditions of service of some public officers listed in Article 71 of the Constitution, especially as virtually all those officers are supposed to be independent according to the design of the 1992 Constitution.

B. CURRENT STATE OF THE LAW ON THE ISSUE

138. The President is empowered under Article 71(1) of the Constitution to determine the salaries and allowances payable, and the facilities and privileges available, to a number of persons. The persons are:
    a. the Speaker and Deputy Speakers and members of Parliament;
    b. the Chief Justice and the other Justices of the Superior Court of Judicature;
    c. the Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and her Deputies and the District Assemblies Common Fund Administrator;
    d. the Chairman, Vice-Chairman and the other members of
        (i) the National Council for Higher Education,
        (ii) the Public Services Commission,
        (iii) the National Media Commission,
        (iv) the Lands Commission, and
        (v) the National Commission for Civic Education.

139. In performing this function, the President is required to act on the recommendations of a committee of not more than 5 persons. This committee is to be appointed by the President, acting in accordance with the advice of the Council of State. “Salaries”, as used in the Constitution, includes allowances, facilities and privileges and retiring benefits or awards. In

reverse, Parliament is empowered under Article 71(2) to determine the salaries and allowances payable, and the facilities available, to the President, the Vice President, the Chairman and the other members of the Council of State, Ministers and Deputy Ministers.

C. SUBMISSIONS RECEIVED

140. Virtually all the submissions received on this issue were to the effect that the method of determining the conditions of service of public officers under Article 71 is too incestuous and needs to be reviewed. The submissions also noted that the office holders whose conditions of service are determined by the President risk losing their independence of thought and action in relation to the President.

141. There was a small number of submissions arguing for the retention of the existing constitutional arrangement as a function of an executive Presidency. An Executive President must be capable of determining how resources of State should be distributed.

142. A good number of submissions proposed that an independent body be set up to determine the conditions of service of what has come to be called "Article 71 office holders." This is to avoid collusion by the Executive and the Legislature in determining one another's salaries and emoluments.

D. FINDINGS AND OBSERVATIONS

143. The Commission repeats its findings under the issue of *ex gratia* awards in this chapter.

144. The Commission observes that participants at the National Constitution Review Conference suggested the establishment of an independent and permanent body to determine the salary and other conditions of service of the President. The Conference did not say whether this should be extended to the other "Article 71 office holders."

145. The Commission finds it is neither necessary nor reasonable for the President to have the power to appoint the members of the committee on whose advice the President is to determine the salaries of the very important constitutional office holders listed in Article 71. Many of these officials are expected to operate independently of the Executive and the President, so their conditions of service should not be dependent on the President's discretion. It is particularly inappropriate for the President to appoint the members of the committee on whose advice the salaries and allowances paid to the President himself are to be determined.

146. The Commission observes that the possible reason why the issue has come up so poignantly now is that the 1992 Constitution is the one Constitution which, since the equivalent of the

Article 71 provision was made, has been operated long enough for the deficiencies to show up.

147. The Commission finds that an independent body established by the Constitution and charged with the responsibility for determining emoluments attached to all public offices will rationalise salary administration in the country, bring some equity into the remuneration regime and ensure the achievement of some level of relativity between the remuneration of public officers.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

148. The Commission reiterates its recommendation that an Independent Emoluments Commission be established to determine the salaries, allowances and emoluments of all public officers, from the President to the lowest ranking public officer.

ISSUE NINE: PRESIDENT'S POWER TO EXERCISE THE PREROGATIVE OF MERCY

A. DIMENSIONS OF THE ISSUE

149. The key dimension to the issue is whether the President's prerogative of mercy be exercised by the President in consultation with the Council of State, or should be further qualified. The concern arises especially as no one has been executed by the State since 1993 and persons on death row are ordinarily pardoned or receive reprieves after a number of years in jail. Eventually, they walk the streets as free men and women.

B. CURRENT STATE OF THE LAW ON THE ISSUE

150. He may also grant to a person respite, either indefinitely or for a specified period, from the execution of punishment imposed on him for an offence. Furthermore, he can substitute a less severe form of punishment for a punishment imposed on a person for an offence. Lastly, he may remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to the government on account of any offence. He may exercise any of these powers only in consultation with the Council of State.

C. SUBMISSIONS RECEIVED

151. Two clear matters were contained in the submissions received on this issue. A good number of people suggested that the death penalty should be abolished. They argued that the last execution in Ghana took place in 1993. Since then, no President has signed any death warrant. Instead, they have commuted the punishments of many persons sentenced to death

leading eventually to their release from prison. This practice, in their view, makes Ghana a *de facto* abolitionist country and so Ghana should move a step further and become *de jure* abolitionist as the death penalty has no practical usefulness on the statute books. They also argued that there is a worldwide move towards abolishing the death penalty and Ghana should follow suit.

152. An equal number of submissions strongly opposed any attempt to abolish the death penalty. They argued that anyone who attempts to overthrow the constitutional order, the basis of all of our liberties and aspirations, must be sentenced to death. Others argued for the death penalty for crimes such as murder, armed robbery and rape.

D. FINDINGS AND OBSERVATIONS

153. The Commission finds that the discussion on the issue of how the prerogative of mercy may be exercised was hijacked by the many impassioned persons who made submissions on the death penalty to argue their case, without adding much to the real issue.

154. The Commission finds from international best practice that the exercise of the Prerogative of Mercy is not restrained to any great degree.

155. The Commission finds that the prerogative of mercy is exercised in connection with offences other than those which carry the penalty of death. The Commission finds that the prerogative of mercy is often exercised in Ghana during anniversaries such as Republic Day on July 1 of each year and at the end of the tenure of a President.

156. The Commission finds that in practice, successive Presidents of Ghana have exercised the prerogative of mercy not only to commute death sentences but also to reduce or grant reprieve for other sentences.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

157. The Commission recommends that the current provisions of the Constitution regulating the exercise of the Prerogative of Mercy by the President be retained.

ISSUE TEN: PRESIDENTIAL TRANSITIONS

A. DIMENSIONS OF THE ISSUE

158. The key dimension of this issue is how to allow enough time between the election of a President and his assumption of office in order to ensure a smooth transition from one

government to another. In our history, this is especially important when the incoming President is from a different political party from that of the outgoing President.

B. CURRENT STATE OF THE LAW ON THE ISSUE

159. According to Article 63(2) of the Constitution, the election of the President shall not be earlier than four months or later than one month before the term of office of the sitting President expires.[150]

160. A related provision on the time for the election of members of Parliament, Article 112(4), provides that a general election of Members of Parliament shall be held within thirty days before the end of a session of Parliament.

161. In practice, the Electoral Commission has consistently fixed the presidential and parliamentary elections on the 7th of December in an election year to accord with both constitutional provisions, reduce the cost of elections and avoid the situation where the outcome of one election may prejudice the other if the elections are held on different days. This has meant that a new President has only a few days to prepare and assume office with his government, especially when there is a run-off election.

C. SUBMISSIONS RECEIVED

162. There were submissions that the presidential and parliamentary elections should be held on different days, to allow for the Presidential elections to be held earlier, allowing more time for a new President to prepare for office, especially as the Constitution itself envisages this.

163. Others argued that the Presidential elections should continue to be held on the 7th of December in the election year as a cost saving measure and to prevent a situation where the results of one election impact on the results of the other election.[151]

D. FINDINGS AND OBSERVATIONS

164. The Commission finds that the Constitution provides some strict timelines for the conduct of presidential and parliamentary elections. The earliest date for Presidential elections is 4 months to the expiration of the term of the incumbent President. The latest date is one month

[151] On the related issue of parliamentary elections, the majority of submissions called for the date for Parliamentary elections to be drawn backwards so that it may be held far earlier than is currently possible to do.

to the expiration of the term. Meanwhile, Parliamentary elections are to be held within one month to the expiration of the Parliamentary term.

165. The Commission finds that it is important to hold both the Presidential and Parliamentary elections on the same day in order to institute cost savings and ensure that the outcome of one election does not prejudice the other if they are held on different days.

166. The Commission also finds that the date for Presidential and Parliamentary elections should be dressed backwards in order to allow for run-off elections, elections in constituencies that are not served during an election and for transition of governments.

167. The Commission observes that the National Constitution Review Conference preferred that both Presidential and Parliamentary elections be held on the same day. The Conference also proposed that the elections should be held not earlier than 4 months before and not later than 2 months to the swearing into office of a new President or new members of Parliament. The Conference also proposed that an independent constitutional body be set up to manage post-election transitional processes.

168. The Commission observes that there is nothing in the Constitution itself that regulates the modalities of the transition from one administration to another. It is of course true that the timing of the Presidential elections can have an effect on the smooth and effective transition of power from the outgoing to the newly elected administration. But this can be managed without any revision to the relevant provisions of the Constitution.

169. The Commission observes that a Draft Presidential Transition Bill is currently being promoted by civil society in order to address the many challenges that occurred during the Presidential transitions of 2000/2001 and 2008/2009. It should be entirely within the power of Parliament to establish the modalities and guidelines to be followed in such transitions. Such guidelines could deal with how outgoing office holders should account for State property in their possession or under their control among many other issues that have been thorny during such transitions. This will ensure that any such principles and criteria will be applied across the board to all persons affected, without discrimination and regardless of the political affiliations or positions of the persons involved. The principles and guidelines in the legislation should apply both in cases where an administration is being formed by the same political party that ran the previous administration and also where there is a hand-over of power from one political party to another. What is essential is that there should be clear rules, principles and criteria (laid down beforehand) which are to be applied in all cases and regardless of the political relations between the outgoing and the in-coming administrations.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

170. The Commission recommends that the Presidential and Parliamentary elections should continue to be held on the same day in order to be cost-effective and in order not to have the results of one election bear on those of the other.

171. The Commission further recommends that Article 112(4) on the timing of parliamentary elections and Article 63(2)(a) on the timing of presidential elections be amended to ensure that both elections are held within 60 days of the installation of a new government.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

172. The Commission recommends that a retrofitted version of the Presidential Transition Bill be passed by Parliament without delay.

SUBTHEME TWO: THE VICE PRESIDENT

ISSUE ONE: ELECTION OF VICE PRESIDENT

A. DIMENSION OF THE ISSUE

173. Should the President continue to choose his running mate as Vice President or should the Vice President be elected by popular vote?

B. CURRENT STATE OF THE LAW

174. Article 60(2) states that a candidate for the office of Vice-President shall be designated by the candidate for the office of President before the election of the President. In terms of clause 4 of Article 60, a candidate is deemed to be duly elected as Vice-President if the candidate who designated him as candidate for election to the office of Vice-President has been duly elected as President in accordance with the provisions of Article 63 of the Constitution. Similarly, Article 60(3) extends the qualification of the President as contained in Article 62 to cover the Vice President.

C. SUBMISSIONS RECEIVED

175. The majority of submissions received may be summarised as saying that the Vice President should be elected together with the President, thus arguing for the retention of the current state of the law.

176. Another view from the submissions was that the Vice President should be directly and popularly elected.

D. FINDINGS AND OBSERVATIONS

177. At the National Constitution Review Conference, it was suggested that the existing arrangement should be maintained.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

178. The Commission recommends that the existing constitutional arrangement should be maintained.

ISSUE TWO: FUNCTIONS OF THE VICE PRESIDENT

A. DIMENSIONS OF THE ISSUE

179. The main thrust of this issue is whether the Vice President should function completely under the shadow of the President or whether he should have distinct and substantial functions allotted to him by the Constitution.

B. CURRENT STATE OF THE LAW ON THE ISSUE

180. The Vice President, under Article 60 of the 1992 Constitution, is to perform such functions as may be assigned to him by the Constitution or by the President.

181. Formerly, under Articles 201, 206, and 211 of the 1992 Constitution, the Vice President was the Chairperson of the Police Council, the Prisons Service Council and the Armed Forces Council. In 1996, this position of the law was changed with the introduction of sections 7, 8, and 9 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527). Under this Act, the President now appoints the Chairpersons of these three security establishments in consultation with the Council of State. In practice, successive Presidents have, since the amendment, appointed their Vice Presidents to those positions.

182. The Vice President is also a member of the Cabinet under Article 76, and of the National Security Council by virtue of Article 83 of the 1992 Constitution.

C. SUBMISSIONS RECEIVED

183. Many submissions called for the strengthening of the position of the Vice President by stipulating in the Constitution specific functions for him.

184. An equal number of submissions cautioned against the creation of a parallel Presidency in the Office of the Vice President. They preferred to maintain the current position of the law since it has served the country well.

D. FINDINGS AND OBSERVATIONS

185. The Commission finds that the role of Vice Presidents varies from country to country. In the majority of countries, however, they have very limited independent roles and are specifically mandated to assist the President in the discharge of his mandate and to act as President in the absence of the President.

186. The Commission also finds that the Vice President under the 1992 Constitution, and before the 1996 amendments to that Constitution, was given a significant role involving managing the governing councils of three key security agencies: the Armed Forces; the Police and the Prisons Service Councils. After the fallout between former President Rawlings and former Vice President Arkaah, the Constitution was amendment to remove the Vice President as automatic Chair of these three Councils. Yet, after the amendment, all successive Presidents have appointed the Vice President as Chair of these Councils.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

187. The Commission recommends that the current constitutional functions of the Vice President be retained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

188. The Commission recommends that various administrative mechanisms be instituted at the Office of the President in order to ensure that the Vice President is an effective Vice President. The current administrative arrangements that exist between the offices of the President and the Vice President do not allow for a seamless flow of information to the Vice Presidency and assumption of direct control of the country by the Vice President in the absence of the President.

ISSUE THREE: CIRCUMSTANCES WHERE THE VICE PRESIDENT ACTS AS PRESIDENT

A. DIMENSIONS OF THE ISSUE

189. In what circumstances should the Vice President act as President? In an electronic age, it is not convincing to say that a President who is outside of Ghana for the time being is incapable of performing the functions of President and should be replaced for all purposes by the Vice President, the Speaker of Parliament or the Chief Justice, as the case may be. Another dimension of this issue is that the President is popularly elected and many are uncomfortable for a Vice President, who merely tags along the President for the purposes of the elections, to assume the office of President where he dies, resigns or is otherwise unable to perform the functions of President.

B. CURRENT STATE OF THE LAW ON THE ISSUE

190. As previously noted at the beginning of this Chapter, the Vice President, the Speaker of Parliament and the Chief Justice, in that order, act as President in the absence of the President. Article 60(8), in particular, provides that whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office, the Vice-President shall perform the functions of the President until the President returns or is able to perform his functions.

191. Again and as previously noted, where the President is permanently unable to perform the functions of a President, the Vice President assumes office as President. The Vice President, now President, then nominates a person to fill the Vice Presidency with the prior approval of Parliament.

C. SUBMISSIONS RECEIVED

192. The majority of submissions received on this issue were to the effect that the current constitutional arrangements have worked well and should not be changed.

193. Some submissions received were to the effect that the Vice President should not succeed the President when the Presidency falls vacant**.** This view is in connection with situations where the President is permanently unable to perform his functions and not mere temporary absences. The proponents of this view argued that the Vice President is not elected in the same manner as the President. They proposed that in the event of a vacancy, the Vice President should act as President whilst a general election is held to elect a new President. According to them, since the President is directly elected by the electorate, the electorate should be given the chance to choose a new President in those circumstances.

194. A small body of submissions proposed that where the Presidency falls vacant, the ruling party should be allowed to appoint somebody to complete the unexpired term of the Presidency. According to this view, the President is often elected on the ticket of a political party whose agenda he is expected to execute. Therefore, if there is a vacancy in the Presidency, the party must be allowed to choose a replacement.

D. FINDINGS AND OBSERVATIONS

195. The Commission finds that international best practice allows for a Vice President to assume the office of President, at least in the temporary absence of the President. This is the case in Kenya, South Africa, Namibia, Nigeria, Uganda, Zambia, Malawi, Botswana, India, the United States of America and many other countries.

196. The Commission observes that this issue was thoroughly debated in the Consultative Assembly. The debate was informed by a number of basic principles. One of these principles was the need to ensure continuity in governance. The Assembly also noted that the issue of succession to the Presidency was clearly spelt out in the previous Constitutions, 1979 and 1969 and opted to do same.

197. The Commission further observes that in neighbouring Nigeria, the issue of succession to the Presidency in the case of an enduring vacancy is not constitutionally explicit and nearly landed the country in a constitutional crisis when the Presidency became vacant during the terminal illness and subsequent death of a sitting President in that country a few years ago.

198. The Commission finds that merely because the President travels abroad does not make him incapable of acting as President in today's electronic age. The country's recent history shows that Presidents of Ghana continue to act as President over domestic issues whilst they are outside of Ghana. They are in direct contact with their Ministers of State, issuing instructions and taking feedback. The Commission notes that the advances in communication technology have now outstripped the philosophy that a President needs to be 'present within the jurisdiction' to act as President.

199. The Commission observes that in the 1960 Constitution, the assumption of Presidential powers by the Presidential Commission when the President was absent from Ghana was qualified by the words "during which he cannot conveniently perform the functions of his office." This gives an indication of the fact that as far back as the 1960s, when there was less advancement in technology and communication, the mere physical absence of a President from Ghana did not in any way limit the President in the discharge of his duties under the Constitution.

200. The Commission also finds that a lot of issues have arisen in instances where both the President and the Vice President are due to leave the jurisdiction. One such issue is the appropriate time for the Speaker of Parliament to be sworn in as Acting President. Swearing the Speaker in before the departure of the Vice President would mean having two Acting Presidents at the same time. Doing so after the Vice President has left will create a vacuum, especially when the Vice President travels at night and Parliament convenes the following morning to swear in the Speaker as Acting President.

201. The Commission finds that in some countries, such as in Mozambique, the simultaneous absence from the country of the Head of State and his constitutional substitute is prohibited.[152]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

202. The Commission recommends that the current constitutional provisions which allow the Vice President to act in the absence of the President and to assume the Presidency where it becomes vacant be retained.

203. The Commission recommends that as far as is practicable the President and the Vice President should not both be outside of the jurisdiction at the same time. In situations where they are both unavoidably outside the jurisdiction, the Speaker of Parliament should be deemed to have been sworn into office as President.

204. The Commission recommends that a situation where the Speaker of Parliament and in turn the Chief Justice has to act as President be avoided as much as it is humanly possible to do.

205. The Commission recommends that the portion of Article 60(8) which requires the Vice President or the Speaker to act as President should be amended to remove the words "absent from Ghana." This would mean that a President or Vice President may be outside the Country and act as such.

206. The Commission recommends an amendment of the 1992 Constitution to insert a new clause in Article 60 to read as follows: "Where the office of the Vice President becomes vacant by the death, resignation or removal of the Vice President, the President shall within a period of 14 days and with the approval of the Parliament, appoint a person qualified to hold office as Vice President; except that no such appointment shall be made when there is a period of 30 days or less to the holding of a presidential election."

[152] Article 151 of the 1990 Constitution of Mozambique.

SUBTHEME THREE: MINISTERS AND DEPUTY MINISTERS OF STATE

ISSUE ONE: QUALIFICATION AND NOMINATION OF MINISTERS OF STATE

A. DIMENSIONS OF THE ISSUE

207. Should there be a minimum academic or other qualification to be appointed a Minister, or Deputy Minister of State?

B. CURRENT STATE OF THE LAW ON THE ISSUE

208. Article 78(1) of the 1992 Constitution provides that "Ministers of State shall be appointed by the President with the prior approval of Parliament from among members of Parliament or *persons qualified to be elected as members of Parliament…*." This means that for one to be qualified as a Minister of State, he must be qualified to be a Member of Parliament. Article 94(1)(a) of the 1992 Constitution states that a person shall be qualified to be a Member of Parliament if he is a citizen of Ghana, has attained the age of 21 years and is a registered voter.

209. A reading of Articles 79 and 256(2) shows that Deputy Ministers of State, including Deputy Regional Ministers, are nominated by the President in consultation with the relevant Minister of State. Thereafter, upon approval by Parliament they are appointed by the President.

C. SUBMISSIONS RECEIVED

210. Many submissions received on this issue were to the effect that there should be a minimum qualification for ministers of state in order to ensure that they are able to discharge their functions more efficiently. The qualification should demonstrate the competence of the minister for the job.

211. A smaller number of submissions called for retention of the current constitutional provisions, arguing that over the last two decades, and in the absence of an academic or other requirement for appointment to ministerial positions, the nation has generally had very good ministers. They caution that mere academic qualifications do not necessarily make good ministers.

D. FINDINGS AND OBSERVATIONS

212. The Commission finds that the majority of those who made submission on this issue called for ministers to be appointed based on competence.

213. The Commission further finds that an Executive President must be given a free hand to appoint Ministers who, in his estimation are capable of assisting him govern the nation.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

214. The Commission recommends that there should be no constitutional changes to the qualifications and mode of appointment of Ministers and Deputy Ministers of State.

ISSUE TWO: GENDER AND REGIONAL BALANCE IN THE APPOINTMENT OF MINISTERS AND DEPUTY MINISTERS

A. DIMENSIONS OF THE ISSUE

215. Should there be a gender quota in the appointment of Ministers and Deputy Ministers of State?

B. CURRENT STATE OF THE LAW ON THE ISSUE

216. The Constitution provides in Article 35(6) that the State shall take appropriate measures to achieve reasonable regional and gender balance in recruitment and appointment to public office. Articles 17 and 35(5) of the Constitution also disallow discrimination based on gender.

217. The Supreme Court has recently held that the entire Constitution, including the DPSP, where Articles 35(5) and (6) are found, is justiciable.[153] This was a departure from the previous position of the Supreme Court that the DPSP are generally not justiciable.[154]

C. SUBMISSIONS RECEIVED

218. There were very strong submissions to the effect that there should be a gender quota for appointments to public office, including to ministerial positions. This is meant to reverse decades of discrimination against women and more actively involve women in the governance of the country at the highest levels of government.

219. Other submissions opposed a gender quota for women in ministerial appointments and argued that such appointments should be based solely on competence. Others went as far as to say that a gender quota for women might engender complacency on the part of women.

[153] *Ghana Lotto Operators Association & Ors* v. *National Lottery Authority,* (Unreported) Supreme Court, July 23, 2008, Suit No. J6/1/2008.
[154] *NPP* v. *Attorney-General* [1993-94] 2 GLR 35.

D. FINDINGS AND OBSERVATIONS

220. The Commission makes the following findings and observations in addition to those that appear in the Chapter on Human Rights.

221. The Commission finds that the percentage of women in high ranking public offices is very low relative to their numbers and competence and this must be addressed.[155]

222. The Commission finds that the electoral promise of the current government to fill ministerial appointments with at least 40% women has not been realised, although serious efforts were made in this regard at the inception of this government's tenure of office.

223. The Commission observes that the National Constitution Review Conference concluded that appointments to ministerial positions should be based solely on competence.

224. The Commission finds that the anti-discrimination provisions in the 1992 Constitution have not been operationalised, and so the legitimate concerns of women relating to equitable appointments to public offices have been sub-optimally addressed.

225. The Commission finds that in order to be abreast with current international practices there is the need for the country to provide clear mechanisms for the equality of the genders and a minimum gender quota in public offices.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

226. The Commission recommends that subject to Paragraph 227 below the Constitution be amended to provide that all public institutions must be composed of at least 30% of each gender.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

227. The Commission recommends the operationalisation of the gender equity provisions of the Constitution by the passage and strategic implementation of an Affirmative Action Act. This Act should address the issue of gender quotas for public offices, including for ministerial appointments.

[155] Chapter 5 of the GHANA HUMAN DEVELOPMENT REPORT (2007).

ISSUE THREE: APPOINTMENT OF MAJORITY OF MINISTERS FROM PARLIAMENT

A. DIMENSION OF THE ISSUE

228. Should the majority of Ministers be appointed from Parliament? If not, what percentage of Ministers, if any, should come from Parliament?

B. CURRENT STATE OF THE LAW ON THE ISSUE

229. Article 78(1) of the 1992 Constitution provides that "Ministers of State shall be appointed by the President with the prior approval of Parliament from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament."

C. SUBMISSIONS RECEIVED

230. A good number of submissions called for a retention of the current state of the law. The main argument in support of this position is that the necessary working relationship that should exist between the Executive and the Parliament would thereby be maintained and this would ensure the smooth and quick processing of government business in Parliament.

231. Many Ghanaians proposed that Ministers should not be Members of Parliament as it was humanly impossible to effectively perform the demanding functions of both offices at the same time. They argued that Ministers who are Members of Parliament are often absent from Parliament attending to their Ministerial duties. Proponents of this view also argued that the practice conflates the parliamentary and presidential systems in an unacceptable manner and leads to a situation where Members of Parliament are beholden to the Executive for ministerial appointments instead of focusing on building a career in Parliament and advancing the interests of Parliament as an institution. This ultimately leads to a weakening of Parliament as an institution and also undermines the concept of separation of powers between the Executive and the Legislature.

232. A small number of submissions were to the effect that the minimum requirement should be removed from the Constitution so that the President would have a free hand to appoint Ministers from within or outside of Parliament.

D. FINDINGS AND OBSERVATIONS

233. The Commission observes that the Consultative Assembly of 1992 decided to establish a linkage between the Executive Presidency and the Legislature and, therefore, stipulated that

the President appoints the majority of Ministers of State from among Members of Parliament. The Consultative Assembly departed from the 1979 Constitution in this respect.

234. The Commission finds that the model under the 1979 Constitution required that Members of Parliament appointed as Ministers were to resign from Parliament. There is some evidence that the relationship between the Executive and the Legislature under the 1979 Constitution could have been better if the necessary linkage existed between the two institutions.

235. The Commission also observes that in countries such as Nigeria, where the Executive and the Legislature are completely separate, a liaison, usually a former Senator, is appointed to facilitate a smooth relationship between the two institutions.

236. The Commission observes that the National Constitution Review Conference produced two positions on this issue:
    a. The President should be given a free hand to appoint ministers from within and without Parliament, but the appointees from Parliament should vacate their seats in Parliament.
    b. The President should be given a free hand in appointing ministers from both within and without Parliament, but the appointees from Parliament should be no more than 30% and should be entitled to retain their seats in Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

237. The Commission recommends that the Constitution be amended to allow the President a free hand to appoint ministers from within or without Parliament. A person appointed a Minister from Parliament may retain his seat in Parliament.

ISSUE FOUR: DECOUPLING THE POSITIONS OF MINISTER FOR JUSTICE AND ATTORNEY-GENERAL

A. DIMENSIONS OF THE ISSUE

238. The issue is how to ensure that the prosecutorial discretion of the Attorney-General, who is constitutionally mandated to execute or oversight all criminal prosecutions, is not tainted by partisan considerations because he is appointed by the President. In other words, how do we provide for the independence of the prosecutorial function of the Attorney-General?

B. CURRENT STATE OF THE LAW ON THE ISSUE

239. Article 88 of the Constitution provides for an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government. He performs other duties of a legal nature assigned to him by the President or imposed on him by the Constitution. He is also responsible for the initiation and conduct of all prosecutions of criminal offences. Additionally, he is responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant.

240. Since the Second Republican Constitution, the Attorneys-General of Ghana have all combined the position of the Attorney-General with that of Minister for Justice. Hitherto, the offices of the Attorney-General and of the Minister for Justice were occupied by different persons.

C. SUBMISSIONS RECEIVED

241. Some of the submissions proposed retention of the current position. According to those who subscribe to this view, the existing arrangement has worked well and must be maintained. The fact that there could have been some politically motivated prosecutions by successive Attorneys-General is not enough reason to decouple the two positions.

242. The majority of submissions on this issue called for decoupling the two positions and for vesting the prosecutorial functions of the Attorney-General in an independent prosecutor. The proponents of this view argued that the many possible politically motivated prosecutions are borne out mainly by the fact that we have Attorneys-General who are politicians. The two positions should, therefore, be decoupled so that an independent public prosecutor can perform the prosecutorial functions of the Attorney-General.

D. FINDINGS AND OBSERVATIONS

243. The Commission finds that the proposal for decoupling the two offices is not well thought through by the proponents of that view. For example, they provide for vesting the prosecutorial functions of the Attorney-General in an independent prosecutor but say nothing of all the other functions of the Attorney-General. It is, therefore, unclear if the civil functions of the Attorney-General will be retained and if so the relevant question is whether those functions may not also be exercised in a partisan manner.

244. The Commission observes that the general consensus at the National Constitution Review Conference on this issue was that the Attorney-General's Office should be decoupled from that of the Ministry of Justice.

245. The Commission finds that central to the argument for the decoupling of the office of the Attorney-General from that of the Minister for Justice is the need to ensure the political neutrality of the Attorney-General in his prosecutorial function.

246. The Commission observes that all the former and current Attorneys-General that appeared before the Commission argued that the *status quo* be retained because decoupling the offices of the Minister of Justice and Attorney-General is not practicable.

247. The Commission further finds that an Office of the Independent Public Prosecutor is not only expensive to create and maintain, it could just become another layer of bureaucracy and there is no guarantee that the Office will be immune from the forces that have adversely affected successive Attorneys-General under the 1992 Constitution in their prosecutorial function.

248. The Commission finally finds that the calls for decoupling the two positions are based on a handful of prosecutions that may be said to be politically motivated and that the overwhelming majority of prosecutions do not have that coloration. In any event, the Commission has recommended the repeal or clarification of the nebulous law on causing financial loss to the state that has been used for those problematic prosecutions.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

249. The Commission recommends that the practice of combining the offices of Minister of Justice and Attorney-General may be continued at the discretion of the President.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

250. The Commission recommends that the office of the Attorney-General be re-structured to contain two semi-independent divisions headed by competent, professional and politically neutral Director of Public Prosecutions and Solicitor-General in charge of criminal and civil cases respectively. The two officers should be appointed by the President acting on the advice of the Legal Service Board in consultation with the Public Services Commission.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

251. Should the President opt to decouple the positions of Attorney-General and Minister for Justice the Commission recommends that the Minister of Justice, freed from the hassle of directly managing criminal and civil cases on behalf of government, should spend more time on developing the many other critical portfolio's under the ministry, such as the Law Reform Commission and the Legal Aid Board.

SUBTHEME FOUR: COUNCIL OF STATE

ISSUE ONE: COMPOSITION OF THE COUNCIL OF STATE

A. DIMENSIONS OF THE ISSUE

252. The dimensions of this issue are as follows:
    a. Should there be a minimum qualification for one to become a member of the Council of State?
    b. Should the President appoint all members of the Council of State?
    c. Should the President continue to appoint some members of the Council of State?
    d. Should all members of the Council of State be elected?
    e. Should there be a gender quota for the membership of the Council of State?

B. CURRENT STATE OF THE LAW ON THE ISSUE

253. Under Article 89 of the 1992 Constitution, the Council of State is created to counsel the President in the performance of his functions. The Council of State also considers bills at the request of the President.[156] It is made up of:
    a. A former Chief Justice;
    b. A former Chief of Defence Staff of the Armed Forces of Ghana;
    c. A former Inspector-General of Police;
    d. The President of the National House of Chiefs;
    e. 10 elected representatives from the 10 administrative regions of Ghana (elected by an electoral college comprising 2 representatives from each District Assembly in the Region); and
    f. Eleven (11) other members appointed by the President.

C. SUBMISSIONS RECEIVED

254. Some submissions strongly called for a minimum qualification for appointment or election to the Council of State. The proponents of this view argued that the mandate of the Council of State is the critical one of counselling the President and so it should be composed of persons of some minimum competence.

255. Some submissions called for the appointment of all members of the Council of State by the President. The argument is that the President should directly determine who should counsel him because it is difficult to seek, receive from, or act, on advice from persons one does not know or trust very well.

[156] Article 90(1) of the 1992 Constitution of the Republic of Ghana.

256. Yet others have called for all the members of the Council of State to be completely elected. This will ensure the autonomy of the Council so that it is able to provide counselling to the President without fear or favour and in the supreme national interest. Apart from being in a position to give unalloyed advice to the President, an elected Council would be more accountable to the people.

257. A number of submissions have noted that there have been very few women in the Council of State since 1993 and have called for a quota for women in the Council of State. This will ensure that women are represented in that critical national body.

D. FINDINGS AND OBSERVATIONS

258. The Commission finds that for the effective performance of its role, it is essential that the Council of State be composed in such a way that it enjoys political credibility and is generally seen as a body that can be relied upon to perform its functions efficiently and with the requisite degree of independence from both the Executive and Parliament.

259. The Commission observes that the Committee of Experts which drafted proposals for the 1992 Constitution recommended a 40 member Council of State. However, the Committee on Powers of Government of the Consultative Assembly reduced the figure to 25. The report of the Committee, however, agreed with the Committee of Experts' proposal to allow the President to appoint 11 members.[157]

260. The Commission observes that the National Constitution Review Conference proposed that the composition of the Council of State should reflect key sectors of the society, such as the private sector. It was also proposed that the qualification criteria for members of the Council of State should be the same as for members of Parliament.

261. The Commission finds that the number of the Presidents' appointees on the Council of State is too large. This apparently reduces the credibility and standing of the Council in the eyes of the people.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

262. The Commission recommends that the composition of the Council of State should be radically revised so that the number of members appointed by the President, out of a total of no more than 25 members, is reduced considerably from 11 to 5.

[157] Official Report of the Proceedings of the Consultative Assembly, (Thursday, 16th January 1992, Col. 1455).

263. The Commission also recommends that the number of institutional representatives on the Council of State be increased to take up the extra numbers previously appointed by the President. These should be drawn from the private sector, the religious group, organised labour, academia and the National Peace Council.

ISSUE TWO: NATURE, CHARACTER AND FUNCTIONS OF THE COUNCIL OF STATE

A. DIMENSIONS OF THE ISSUE

264. The dimensions of this issue include the following:
    a. Should the Council of State have the character of an Upper House of Parliament?
    b. Given its function of counselling the President as well as considering bills at the request of the President, is the Council of State necessary?
    c. Why is the advice given to the President by the Council of State not made public?

B. CURRENT STATE OF THE LAW ON THE ISSUE

265. Article 89(1) provides that the Council of State is to counsel the President in the performance of his functions. Also, Article 90 provides for the consideration of bills by the Council of State at the request of the President. This makes the Council of State principally an advisory body to the President. The Council is also given various functions by other parts of the Constitution, ranging from advising on Presidential appointments to advising Parliament on Bills for the amendment of the Constitution. There is no Act of Parliament which sets out the functions of the Council of State.

C. SUBMISSIONS RECEIVED

266. Some submissions called for the Council of State to be expanded into a Second House of Parliament. Such a House, they argued, would be capable of discussing Bills and other matters of national importance in a dispassionate and non-partisan manner in the supreme interest of the nation.

267. An equal number of submissions called for the abolishing of the Council of State. Those who held this view reason that the Council of State has outlived its usefulness. They say that it is not necessary to have an elaborate state apparatus for the sole purpose of counselling the President.

268. A third set of submissions took a middle course and called for the remodelling of the Council of State so that it is better able to perform its current constitutional functions.

D. FINDINGS AND OBSERVATIONS

269. The Commission finds that the Council of State has the human resources to function as an independent body that offers unalloyed advice to the President.

270. The Commission also finds that, in practice, the Council of State performs many critical functions that are not known to the public.

271. The Commission further finds that the role of the Council of State needs to be seriously and comprehensively reviewed. The original rationale for the Council of State was that it would be a constitutional organ composed of persons of proven merit and eminence who would perform well-defined functions in connection with specified important matters of government and State. It is certain that the Council of State is not seen in such a favourable light by the general public.

272. The Commission finds that, in particular, it was felt that the Council would play an essential advisory or approval role in appointments to certain key public offices where a certain degree of independence from the Executive and a measure of objective suitability are considered to be necessary. The idea was that, in respect of some of these offices, appointment by the President would be with the approval of the Council of State, while for others appointments by the President would be "in consultation" with the Council of State.

273. The Commission finds that subject to the requirement of confidentiality, there is a need for some measure of transparency in the workings of the Council of State.

274. The Commission observes that the National Constitution Review Conference agreed by consensus that the Council of State should remain an advisory body and not a second chamber of Parliament. Furthermore, the Council of State should be required to submit a report of its work to Parliament detailing the advice they have given to the President, but excluding advice that may be inappropriate to reveal.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

275. The Commission recommends that the Council of State should be maintained as an advisory body to the President, the Parliament, the Judiciary and other critical institutions of state on issues of national importance.

276. The Commission recommends that the Council of State should present annual reports to Parliament for review, discussion and debate.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

277. The Commission recommends that Parliament should enact legislation that provides for the functions, funding, accounting and annual reporting of the Council of State.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

278. The Commission recommends strongly that the members of the Council of State should maintain their independence and neutrality at all times and should not take part in active party politics.

279. The Commission finally recommends that the current practice by which the Chairman of the Council of State is proposed by the President and almost automatically endorsed by the Council of State be discontinued. Instead, the Council of State should independently select its own Chairperson.

CHAPTER FIVE-THE LEGISLATURE

5.1 INTRODUCTION

1. The legislative powers of Ghana are vested in Parliament, to be exercised in accordance with the Constitution. The 1992 constitution establishes a unicameral Legislature, consisting of not less than 140 members who are elected on the basis of universal adult suffrage. Currently, there are 230 members of Parliament.

2. The functions and powers of the Parliament of Ghana are mainly provided for in the Constitution and in the Standing Orders of Parliament. Apart from its primary legislative and representational functions, Parliament also has very important oversight responsibilities and enhanced governance roles. Under Article 103 of the Constitution, committees of parliament may be charged with functions, including investigations and inquiry into the activities and administration of ministries and departments as Parliament may determine. Through its Public Accounts Committee, Parliament deals with matters arising from the reports of the Auditor-General, including irregularities in audited public accounts. The appointment of key public functionaries, such as Ministers and Deputy Ministers of State and Justices of the Supreme Court, is also subject to the approval of Parliament.

3. The Constitution and the Standing Orders of Parliament are replete with provisions which can be used by Parliament to assert its autonomy and power. The Constitution recognises the Parliament of Ghana as the main law making branch of government with autonomy over its agenda and the power to authorise public expenditure, approve and waive taxes, and authorise the grant, and receipt loans. Also, Parliament has legal oversight authority for the budget. Notably, the President has no right to amend the laws of the country unilaterally, dissolve Parliament, or rule by decree. On the contrary, Parliament is empowered with constitutional oversight authority over the Executive, with the power to remove the President, Vice President, and Speaker of the House from office. Although it is recognised that the formal authority of Parliament is relatively strong, Parliament has in practice not developed into that autonomous, independent and vital institution capable of asserting its authority and discharging its constitutional functions. Its oversight functions, for example, have been asserted only in very minimal terms.

4. The relative weakness of Parliament has been further deepened by one of the most prominent features of the constitutional arrangements under the 1992 Constitution: executive dominance. For example, Parliament has virtually no real financial power. Under the current constitutional arrangement, Parliament is denied the power to influence its own institutional budget. Like a lot of state institutions, the budget of Parliament is made subject to the item-

by-item control of the Ministry of Finance and Economic Planning, and it has to appear occasionally before the Executive to ask for funds.

5. Secondly, Article 108, which prohibits Parliament from proceeding with a bill, including an amendment to a bill, the purpose or effect of which is to raise or increase taxes or which requires expenditure on the part of the state, unless the bill is one initiated by or on behalf of the President, virtually makes the President the real holder of the 'power of the purse' in Ghana.

6. Thirdly, the constitutional injunction on the President, under Article 78, to appoint the majority of his ministers from Parliament appears to render Parliament less effective in holding the Executive to account. It has been argued, for example, that members of Parliament are constantly beholden to the President for ministerial appointments, instead of putting their energies to working for the advancement of Parliament as an institution.

5.2. HISTORICAL BACKGROUND

7. Prior to colonial rule in Ghana, there existed well-structured systems of governance comparable in form and substance to those in a modern state. The Legislature before colonial rule was organised as a chief sitting in council.

8. The colonial government first introduced its version of the legislature in Ghana under the 1850 Constitution for forts and settlements after the Gold Coast ceased to be politically dependent on Sierra Leone. Under that Constitution, the Legislative Council was composed of the Governor and two other persons. The function of the Council was to make laws and ordinances subject to the will of the Crown.

9. The 1850 Constitution was surpassed first by the Constitution of 1866, and then later by the Charter of 1874, both of which were similar in composition to the 1850 Constitution. Under the Charter, the legislative Council had the power to make ordinances and establish institutions necessary for the administration of the people of the Gold Coast. This was subject to the rules and regulations made by order-in-council and the right of the Crown to disallow any such ordinances. The Governor was to preside over the legislative council, and no law was to be discussed or passed unless it was proposed by the Governor. He had veto powers and could refuse to assent to any ordinance which in his opinion was, *inter alia*, repugnant to any Act of the Parliament of England or the principles of equity.

10. After the Charter of 1874, the Clifford Constitution of 1916 came into force. The membership of the Legislative Council under the 1916 Clifford Constitution was increased to 22, made up of official and unofficial members. The composition of the Legislative Council

for the first time included 3 paramount chiefs, selected to represent the major ethnic groupings in the Gold Coast Colony, the peoples speaking Twi, Fanti, and Ewe respectively. Also, 2 unofficial members were added to the Assembly to speak for the political interests of the Central Province and the Western province respectively.[158]

11. The Clifford Constitution was followed by the Guggisberg Constitution of 1925, which, for the first time, provided for elected representatives to the Legislative Council, consisting of the Governor and 14 official and 15 unofficial members. The official members were divided into *ex officio* and nominated members. The *ex officio* members were 13 in number.

12. The legislative council saw another expansion, this time, under the Burns Constitution of 1946. The elected members were increased to 18, while the *ex officio* members were reduced from 13 to 6. The unofficial and elected members had a majority of 6 over the official (*ex officio* and nominated) members. Despite the unofficial and elected members having a majority, the Governor was given reserved powers which enabled him, if he considered it expedient to do so, to declare effective any bill or motion which had failed to pass through the Legislative Council[159].

13. The Legislative Council was replaced under the 1951 Constitution with a Legislative Assembly comprising almost entirely of elected Africans. The Legislative Assembly under the 1951 Constitution consisted of the speaker, 3 *ex officio* ministers, 3 representatives of the chamber of commerce, 3 representatives from the chamber of mines, and 75 elected members, comprising 37 representing the Gold Coast colony, 19 representing Ashanti, and 19 representing the Northern Territories.

14. The legislative features of the 1951 Constitution were repeated in the 1954 Constitution. The major difference was that, under the 1954 Constitution, the Assembly consisted of the Speaker and 104 members, all elected by universal adult suffrage. The Governor had the prerogative to introduce any bill to the assembly and retained his reserved power to declare a bill passed in cases where it failed to pass in the Assembly.

15. Under the 1957 independence Constitution, the legislative powers of Ghana were vested in Parliament, which consisted of the Queen and the National Assembly. The minimum number of members that could constitute Parliament remained unchanged at 104, elected by universal adult suffrage. Membership of Parliament was limited to Ghanaian citizens of 25 years and above, capable of speaking and reading the English language with a degree of proficiency

[158] FRANCIS BENNION, BENNION'S CONSTITUTIONAL LAW OF GHANA 199 (London, Butterworths African Law Series, 1962).
[159] FRANCIS BENNION, BENNION'S CONSTITUTIONAL LAW OF GHANA 199 (London, Butterworths African Law Series, 1962).

sufficient to enable them take active part in the proceedings of the Assembly. As a significant development, the legislative powers of Parliament were enlarged with the removal of the Governor's reserved powers.

16. Under the first Republican Constitution of 1960, Parliament consisted of the President and the National Assembly. The National Assembly comprised the Speaker and not less than 104 members directly elected by universal adult suffrage. The Speaker was to be elected by the members; however, there was no indication as to whether the speaker was to be elected from within or without Parliament. Pursuant to Article 21(2) of the 1960 Constitution which provided that "the members shall be elected in the manner provided by a law framed in accordance with the principle set out in Article 1 of the Constitution, and the Speaker shall be elected by the members", the Representation of the People (Women Members) Act was passed and in June 1960, 10 women were elected by the National Assembly to fill the specially created seats reserved for women**.** The Ministers of State were to be appointed from amongst members of Parliament.

17. The second Republican Constitution of 1969 returned the country to the Westminster system of government as practised under the 1957 Constitution. Formal executive power was vested in the President as Head of State. There was provision for a Prime Minister who was the leader of the majority party in Parliament to be appointed by the President. Parliament was made up of the President and a minimum of 140 members and a maximum of 150 members. Ministers of state were appointed from among members of Parliament. The Prime Minister was both head of government and the leader of the party in the majority in Parliament.

18. With the coming into force of the 1979 Constitution, Ghana returned to the presidential system of government. The executive was headed by a President assisted by his cabinet. The President was both the head of state and head of government. Ministers were to be appointed by the President with the prior approval of Parliament. Ministers were not to be members of the legislature. A Member of Parliament who was nominated as a minister was to vacate his seat in Parliament.

19. Today, under the 1992 Constitution, there is a hybrid system of government, modelled partly on the American and partly on the British systems of government. Article 78 of the Constitution provides that majority of the ministers appointed by the President must come from Parliament.

20. During the consultative process, the commission received thousands of submissions calling for constitutional reforms to ensure the institutional integrity of Parliament as well as to enhance its legislative functions. These submissions, the issues they raised, the

Commission's deliberations on the issues (discussed under subthemes) and the findings and the recommendations of the Commission are detailed below.

ISSUE ONE: TYPE OF GOVERNANCE SYSTEM

A. DIMENSIONS OF THE ISSUE

21. The main dimensions of the issue were whether Ghana should practise a presidential or parliamentary system, maintain the hybrid system, or adopt the traditional system of governance.

B. CURRENT POSITION OF THE LAW ON THE ISSUE

22. Ghana currently practices a hybrid system of government. This system reflects elements of both presidential and parliamentary systems. The features of this system are:

    a. The President of Ghana exercises executive authority in accordance with the provisions of the 1992 Constitution.[160]
    b. The Parliament of Ghana exercises legislative powers in accordance with the provisions of the 1992 Constitution.[161]
    c. The majority of Ministers of State are appointed by the President with the prior approval of Parliament from among members of Parliament.[162]

C. SUBMISSIONS RECEIVED

23. Four different systems of government were proposed from different submissions received on this issue. The different systems are the presidential, parliamentary, hybrid, and traditional systems of governance.
    a. Those who proposed the presidential system of governance submitted that, that system gives meaning and effect to the concept of separation of powers which ensures the effectiveness and efficiency of the checks and balances embodied in the 1992 Constitution. It was further argued that the presidential system of governance would be more participatory because it allows a large pool of human resources serving in the Legislature and the Executive to be drawn into national governance, since no one person would serve under more than one arm of government. The presidential system of governance would also reduce the burden of combining the work of a minister and that of a Member of Parliament which are both uniquely important and arduous.

[160] Article 58(1) of the 1992 Constitution of the Republic of Ghana.
[161] Article 93(2) of the 1992 Constitution of the Republic of Ghana.
[162] Article 78(1) of the 1992 Constitution of the Republic of Ghana.

b. The submissions that advocated for the Parliamentary system of governance noted that it is cost effective and would enable the nation avoid the costs that are inherent in keeping the executive arm of government distinct from the Legislature. The submissions also pointed out that with the parliamentary system, legislative processes are likely to be quicker and more likely to propel the government's policies due to the presence of the executive in Parliament.
c. Other submissions advocated for maintaining the *status quo*, that is, the current hybrid system of governance. The hybrid system of governance, it is argued, serves as a balance between the doctrine of separation of powers and the need to create a linkage between the two arms of government in order to promote government's policies, especially when such policies require parliamentary approval. Another merit of the hybrid system, it was pointed out, is that government's expenditure on the emoluments of ministers would be reduced as the majority of them would double as Parliamentarians.
d. The fourth system proposed is the traditional African system of governance. Proponents of this system argue that the current systems of governance are alien to Africa, and for that matter Ghana, making them unsuitable and difficult to practise. Before colonization, Ghana had in existence workable systems of government. The proponents of this position further argue that the merit of the traditional system of governance is that it is indigenous, and draws on the strength and resilience of long established native traditions. The responsiveness of the traditional African system of governance to innovation and creativity will enable the system to address the challenges we face as a nation. In other words, the traditional system of government provides home-grown and tested solutions to local governance problems.

D. FINDINGS AND OBSERVATIONS

24. The Commission finds that the 1992 Constitution has been openly described as creating a "presidential system" of government but with features that are not fully in accord with the presidential system. The question this generates is whether or not the hybrid system should be changed in order to bring it fully in line with the presidential system.

25. The Commission observes that the type of hybrid system of government currently practised, is an innovation of the 1992 Constitution and represents a break from the presidential system of government as established under the 1979 Constitution, as well as the parliamentary system of government as provided for under the 1969 Constitution. The inadequacies of either system of government probably led to the compromise.

26. The Commission observes that the framers of the 1992 Constitution, by entrenching Article 78(1), which requires at least half of Ministers of State to be appointed from Parliament,

sought to ensure a hybrid system of government. However, it is possible for a President under the current arrangement, to appoint all his ministers from Parliament, thereby drawing the system closer to a parliamentary system of government, although this would be effectively counter-balanced by the huge powers of the Executive President under the 1992 Constitution.

27. The Commission observes that the practice of seeking a middle ground between the presidential and the parliamentary systems of government is not uncommon worldwide. Some countries such as Australia, Sri Lanka, France and a considerable number of francophone African States with systems of government inspired by the French model have opted for hybrid systems of government.
    a. The French system of government is commonly referred to as semi-presidential, a hybrid that is neither presidential nor parliamentary. It is defined by two features: a President who is popularly elected, and has considerable constitutional authority; and a Prime Minister and Cabinet who retain office subject to the will of the majority in Parliament. These features define a dual Executive in that the elected President is not merely a Head of State who lacks political authority, but is also not clearly the Chief Executive, because of the existence of a Prime Minister who may not be strictly a subordinate of the President.
    b. The 'hybrid' nature of Australia's system of government is the result of a British-derived tradition of parliamentary government overlaid with an American-derived set of federal arrangements. The Australian hybrid system is more of a 'semi-parliamentary' system of governance, where the Westminster model suffers slight modifications to accommodate the federal features of the Australian system.

28. The Commission finds that there is a dominant perception that the constitutional provision which requires more than half the number of Ministers of State to be nominated from within Parliament has undermined the effectiveness of Parliament by taking away or compromising some of its best legislators.

29. The Commission observes that a consensus was reached at the National Constitution Review Conference to the effect that a presidential system of government should be adopted. The Conference favoured a complete separation between the Legislature and the Executive as a measure to ensure the individual autonomy and development of members of Parliament and of Parliament as an Institution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

30. The Commission recommends that the President be given a free hand to appoint ministers from within and without Parliament. A person appointed a Minister from Parliament may retain his seat in Parliament.

ISSUE ONE: RELATIVE LEGISLATIVE POWERS OF THE PRESIDENT AND PARLIAMENT

A. DIMENSIONS OF THE ISSUE

31. The dimensions of this issue were articulated as follows:
    a. Should private members' bills be allowed even if they have financial implications?
    b. Should the President have the power to veto bills?
    c. Who should sign bills into law?

B. CURRENT STATE OF THE LAW ON THE ISSUE

32. Under the 1992 Constitution, the President retains a number of legislative powers. Some of these are the initiation of bills, the vetoing of bills, and the signing of bills into law.[163] Under Article 108, the power to initiate bills with financial implications is an exclusive prerogative of the President. The President may also veto a Bill passed by Parliament, although that veto power may be overridden by a two-thirds majority of all members of Parliament can overrule the President's veto.

C. SUBMISSIONS RECEIVED

33. The following submissions were received on this issue:
    a. The President should not play any role in the initiation of bills. The contention here is that, law making is the prerogative of Parliament and so the President should have no business in the law making process.
    b. There were some submissions that proposed the contrary: that the President should be given the power to initiate bills. These submissions argue that the President's power to initiate bills is incidental to an Executive Presidency; it is well placed and should not in any way be eroded.
    c. Another category of submissions advocated a review of Article 108 to take away any fetters on the introduction of bills by a Member of Parliament. According to these

[163] Articles 75, 90(1), 106(7), 108(1) of the 1992 Constitution of the Republic of Ghana.

submissions, those fetters weaken the institution of Parliament and are inconsistent with well established democratic principles.

d. Yet others argued that the power to initiate private members bills should continue to be fettered so as to ensure that the Executive, which is elected into office to execute a particular agenda, is not constrained in the ways in which it applies scarce resources to the realisation of its agenda.

e. Another set of submissions called for the veto powers of the President to be removed from the Constitution, and for the signing of bills by either the Speaker or the Clerk to Parliament. They argue here that such a constitutional revision will make Parliament autonomous and independent.

D. FINDINGS AND OBSERVATIONS

34. The Commission observes that international practice on the various dimensions of this issue is varied. There are countries where parliamentarians cannot introduce financial legislation and only the Executive can initiate spending and revenue measures. Other countries constrain the powers of the Legislature to affect spending only as far as is necessary to protect the balance between revenues and expenditures. This requires that an increase of expenditures has to be counterbalanced with a corresponding cut elsewhere to maintain the aggregate total. A variant of this latter mechanism is where Parliament is allowed to reduce expenditures, but to increase them only with the permission of the Executive. In effect, this gives the government a veto over legislative amendments that increase the deficit. Versions of this arrangement are popular in francophone and Latin American countries.

35. The Commission equally observes that although the constitutions of some countries which adopt a "parliamentary system" (such as Canada) have provisions similar to Article 108, that Article has no parallel in the constitutions of countries which have a "presidential system." Thus, for example, the Constitutions of the United States, Liberia, Nigeria, Liberia and Argentina all exclusively reserve to the respective Legislatures the power to consider and take decisions on bills and proposals, whether or not the bills have "financial implications." The US Constitution, for example, establishes no legal limits on the budgetary powers of Congress, although the latter has self-imposed limits from time to time. Unfettered powers allow the Legislature, in theory, to introduce its own budget and to rewrite the entire budget proposed by the Executive. However, that Constitution provides for executive veto which the President may use to override the Legislature.

36. It is also noteworthy that the exclusive right of the Executive to introduce "money bills" does not exist in the United Kingdom. The right of members of the House of Commons to introduce "private members bills" is without restriction as to subject matter.

37. Article 77 of the Moroccan Constitution provides that: "Parliament and Government shall ensure the preservation of the balance of state finances. The government may oppose with stated reasons the inadmissibility of any proposal or amendment introduced by Members of Parliament when the adoption thereof might affect the proposed appropriation law by causing a decrease in public resources, an increase in a public expenditure or the creation of a new one."

38. The Commission also observes that Article 108 appears to undermine one of the basic principles of financial regulation in most constitutional systems, that is, the principle that the Legislature, representing the people, is the unique source of authority for taxation and the regulation of the finances of the nation. This general principle is clearly recognised in Chapter 13 of the Constitution.[164] Article 174 provides that "no taxation shall be imposed otherwise than by or under the authority of an Act of Parliament." Article 175 states that the public funds of Ghana shall be the Consolidated Fund, the Contingency Fund and such other public funds as may be established by or under the authority of Parliament; and Articles 177 and 178 stipulate that withdrawals from the Consolidated Fund, the Contingency Fund and other public funds shall be authorised only by or under the authority of Parliament.

39. The Commission observes that, the current provision clearly places an onerous and seemingly unjustified restriction on the power of Parliament and its members. The criterion for the application of the prohibition is not sufficiently precise and the determination that it applies in any particular case is left to the unchallenged discretion of the "person presiding." The Commission further observes that the discretion given the Speaker of Parliament to determine whether a bill has financial implications has led to a lot of inconsistencies and incoherence in the exercise of that discretionary power. There is, therefore, a need to clarify what is generally meant by bills with financial implications.

40. In the view of the Commission, a radical way to redress the current power balance in favour of Parliament would be to delete Article 108 altogether. A deletion would not necessarily permit members of Parliament to introduce any bills that they wish, nor will it permit Parliament to pass and bring such bills into law, even if the President objects to the proposed law or if the law could create difficult problems for the government. In the first place, there will always be the opportunity and right of the President (directly or through a Minister of State), to convey to Parliament any reservations on or objections to a bill prior to its discussion and approval by Parliament. Further, if Parliament does not take due account of the objections of the President, the President will have the power under Article 106 of the Constitution to propose changes to it or, if the changes are rejected, to withhold assent to the bill and thus prevent it from coming into force. It is, of course, possible for the President's

[164] Chapter 13 of the 1992 Constitution of the Republic of Ghana which deals with finances especially in its Articles 174, 175, 177, and 178.

refusal to assent to the law to be overridden by the votes of more than two-thirds of the members of Parliament; but in such a scenario, it would be hardly unreasonable that the views of Parliament should prevail.

41. The Commission finds that, another and perhaps more generally acceptable solution might be to maintain Article 108 but in a revised form. For example, the article could be replaced with a new provision which enables members of Parliament to propose any bills, but with a requirement that any private member's bill that the Speaker, or a committee set up for that purpose, considers to be a "money bill" must first be submitted to the President for consideration, within a certain time limit. When received, the views of the President shall be made available to Parliament and the member proposing the bill, to enable consideration to be given to whether the bill should be withdrawn, whether changes should be made to take account of the views of the President or whether the Bill should be retained in its original form. Such a procedure would entail some delay in the passage of the bills in question, but it would not wholly inhibit the right of members of Parliament to introduce legislation to the extent that the present provision does or is perceived to do. A revision of the article in this way would also have the advantage of facilitating constructive dialogue between the Executive and the Legislature in this important area. It will also serve to remind members of Parliament of the need to ensure that bills that they propose to introduce should be well considered, reasonable and capable of practical implementation.

42. The Commission observes that, there was a lack of unanimity when the issue of the inability of private members to initiate bills with financial implications was considered at the National Constitution Review Conference. Some of the participants were of the view that the Constitution should be reviewed to enable members of Parliament to introduce Bills or motions, even if the legislation or motion would have financial implications. The reason for this position was that the present constitutional provision has the effect of de-motivating members of Parliament from introducing bills. It was, therefore, argued that allowing members of Parliament to introduce bills would enhance their legislative authority and give them the opportunity to introduce bills which are in the best interest of the nation, but which are not being considered by the Executive for political reasons. There was however a more or less general consensus at the Conference that the current constitutional arrangements be maintained, the contention being that since the Executive is the national financial administrator it should be the only entity to introduce bills that would result in the expenditure of public funds. It was noted also that if private members' bills were to be introduced irrespective of any financial implication, such a provision could lead to financial burdens being heaped on the Government, a scenario that could hamper or frustrate the government in the implementation of its development agenda. Participants at the Conference expressed the fear that allowing the introduction of financial bills by Members of Parliament could create complications especially where the government does not have the majority in

Parliament. In such a situation, the opposition could pass bills against the wishes of the government and beyond the financial capability of the government. This would make the country ungovernable. It was, however, agreed that there was the need to clarify the category of bills that may not be presented by a private member.

43. With regard to the President's power to block legislation or to assent to them, otherwise known as the veto power, the Commission observes that legislative powers are in a lot of countries counterbalanced with executive veto powers. Such veto powers are more commonly found in presidential systems of government, although there are also a few parliamentary systems, such as New Zealand, that incorporate executive veto powers over financial legislation. Executive vetoes can take two forms. A package veto allows a President to veto a piece of legislation in its entirety. In the United States, Presidents have used their package veto power to block appropriations passed by Congress. A line item veto or partial veto on the other hand allows a President to delete individual items in a bill. This allows greater selectivity. The Chilean President, for example, has such a line item veto. In this way, legislative decisions can be significantly altered by striking down particular items in the bill that might be of high priority for legislators, but inconsistent with the Executive's developmental agenda.

44. The Commission finds that the present constitutional arrangement is in tune with international best practice. It is not uncommon for Presidents to be given legislative powers, exercised similarly as enshrined in the 1992 Constitution of Ghana. The veto power, the Commission contends, is favourably viewed as one of the tenets of effective checks and balances. To take away the veto powers of the President, would be to undermine a vital mechanism on which democracy thrives. The President in his capacity as the leader of government business should have some say on issues of national importance, particularly law making. The functioning of the Executive would be severely disrupted if legislative powers are entirely left in the hands of the Legislature: legislation must go in tandem with government policy.

45. The Commission also finds that the veto power of the President is not unfettered. It may be overridden by a two-thirds majority of Members of Parliament and this constitutes an acceptable compromise.

46. The Commissions further observes that the report of the Committee of Experts on the 1969 Constitution views the act of the President not as a veto but an act solely intended to afford the National Assembly time to reconsider its acts. Thus where, on second thoughts, the National Assembly accepts all the amendments proposed by the President or where it does

not accept any of them but by a vote of two-thirds of its members re-passes the bill, the President shall be bound to give his assent.[165]

47. The Commission finally observes that when the issue of the veto power of the President was considered at the National Constitution Review Conference, it was decided that it be retained as an appropriate additional mechanism for the President to influence legislation, and especially as the power may be in appropriate cases.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

48. The Commission recommends that the current limitation on the introduction of bills with financial implications by private members be maintained, but limited to "money bills", which terminology should be clearly defined in the Constitution or other law.

49. The Commission recommends that the determination of what constitutes a money bill should not be left to the discretion of the person presiding in Parliament at any one time, but shall be referred to the Finance Committee of Parliament for determination.

50. The Commission further recommends that the veto powers of the President should be maintained.

ISSUE THREE: MAKING SUBSIDIARY LEGISLATION

A. DIMENSIONS OF THE ISSUE

51. This issue has a number of dimensions to it:
    a. Should the powers of the President to make Constitutional Instruments of an executive character, without regard to Parliament, be maintained?
    b. Should the process of making subsidiary legislation be reviewed to introduce the requirement of parliamentary approval for all types of subsidiary legislation?
    c. What should be the vote requirement in Parliament for annulling a piece of subsidiary legislation laid before it?
    d. How may sufficient supervision of Parliament over the exercise of legislative powers by the District Assemblies, the Ministries, the Independent Constitutional Bodies, and others exercising delegated legislation be instituted?

[165] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 448.

B. CURRENT STATE OF THE LAW ON THE ISSUE

52. Examples of subsidiary legislation are Constitutional Instruments, Legislative Instruments, and Executive Instruments.

53. The current state of the law is that any Order, Rule or Regulation made by a person or authority under a power conferred by the Constitution or any other law shall be laid before Parliament, be published in the Gazette on the day it is laid before Parliament, and come into force at the expiration of 21 sitting days after being so laid, unless Parliament before the expiration of the 21 days, annuls the Order, Rule, or Regulation by the votes of not less than two-thirds of all the members of Parliament.[166]

54. In the case of Republic v Minister for the Interior; Ex. Parte Bombelli,[167] the Supreme Court sought to clarify the category of subsidiary legislation that is required to be laid before Parliament. The Court explained that the word "Orders" in Article 4 (7) (a) of the 1979 Constitution, (the equivalent of the 1992 Constitution) meant "orders" in the form of rules and regulations. Orders that are legislative in nature, not executive or administrative in character. Thus Executive Instruments are a category of statutory instruments that do not need parliamentary approval since they are not legislative in nature. The Court further held that legislative Acts deal with general enactments, that is, laws which affect the general public. Such laws or enactments are not generally controllable by the courts. Administrative acts, however, include the adoption of a policy, the making and issue of a specific direction or order or the application of the general rule to a particular case in accordance with the requirement of policy or expediency.

55. Subsidiary legislation that is laid before Parliament may not be altered by Parliament. It may only be nullified by a two-thirds majority of all members of Parliament. Where it is not so nullified, it automatically comes into effect on the expiration of 21 sitting days of Parliament. In practice, when Parliament is not satisfied with the provisions of a piece of subsidiary legislation, the Committee on Subsidiary Legislation recommends that it be silently withdrawn, corrected and laid before Parliament again.

C. SUBMISSIONS RECEIVED

56. There were three categories of submissions made on subsidiary legislation:
    a. There was a strong call for an amendment of the Constitution so as to ensure that every piece of subsidiary legislation is scrutinised by Parliament before it is approved. It is argued here that, since legislative powers reside in the Parliament of Ghana,

[166] Article 11(7) of the 1992 Constitution of the Republic of Ghana.
[167] [1984-86] 1 GLR 204 – 219.

parliamentary approval must be obtained for all legislation, including subsidiary legislation.

b. Other submissions advocated the retention of the current provisions, but called for an amendment of the requirement of a two-thirds vote of all Members of Parliament to annul subsidiary legislation. The reason for this proposal is that the requirement makes the annulment of subsidiary legislation more difficult to achieve than the passage of an Act of Parliament, which requires a simple majority of members of Parliament present and voting.

c. The final set of submissions on this issue argued that the current provisions on the supervisory power of Parliament over other legislative bodies be maintained, except that those exercised over legislative processes by the District Assemblies and Independent Constitutional Bodies need to be enhanced.

D. FINDINGS AND OBSERVATIONS

57. The Commission finds that the requirement of a vote of not less than two-thirds of all the members of Parliament to annul a piece of subsidiary legislation makes it strenuous and difficult for Parliament to play its role of exercising control over the performance of bodies exercising the powers of delegated legislation.

58. The Commission finds that the process by which subsidiary legislation has historically been made in Ghana has not afforded meaningful opportunity for prior public or stakeholder awareness, comment, or input. This problem is not relieved by the fact that Parliament has a standing committee on subsidiary legislation; the committee's role in the making or review of subsidiary legislation is primarily procedural, reactive, and time-constrained. As many of the public bodies and officials authorised to make subsidiary legislation are not themselves directly accountable to the people, the absence of transparency and inclusiveness in the current process of making subsidiary legislation represents a major democratic and governance deficit that calls for urgent reform.[168]

59. The Commission observes that, when this issue was considered at the National Constitution Review Conference, it was agreed that delegated legislation is unavoidable and so there must be shared legislative responsibility between Parliament and the relevant institutions vested with powers to make delegated legislation. They also called for the process of making subsidiary legislation to be re-examined to avoid unnecessary delays and for greater transparency and consultations, especially with civil society and the general public. Parliament should also strengthen its mechanisms for evaluating and monitoring the quality

[168] K Stanton, *The Subsidiary Legislation Process in Ghana: Review and Recommendations for Reform*. CDD GHANA (Oct.14, 2011 1:03 PM), http://www.cddghana.org/publications.aspx?pl=56.

and process of making subsidiary legislation. It was proposed by the Conference that Article 11(7) of 1992 Constitution be reviewed to give effect to the above proposals and in particular, to provide for the first reading only of a piece of subsidiary legislation in Parliament and for the passing of a resolution accepting it or rejecting it.

60. The Commission observes further that there is a distinction between rules and regulations that are of a legislative nature and those that are executive and administrative in character. Whilst the former need to be approved by Parliament, the latter do not need such approval.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

61. The Commission recommends that the current provision on subsidiary legislation be amended to clarify the type of Orders, Rules, and Regulations that are required to be approved by Parliament and those that do not need parliamentary approval.

62. The Commission recommends that, in particular, the Constitution should clarify that Orders, Rules and Regulations of a legislative nature (those that lay down the law) would need to be approved by Parliament, whilst those of an Executive and Administrative character do not need to be approved by Parliament.

63. The Commission recommends that Article 11 be amended to require that Orders, Rules and Regulations of a legislative nature must be laid before Parliament and published in the *Gazette* on the day it is laid before Parliament. The Order, Rules or Regulations thus laid, shall come into force at the expiration of 21 days unless Parliament, before the expiration of the 21 days annuls the Order, Rules and Regulations by a simple majority of members of Parliament present and voting.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

64. The Commission recommends that institutions exercising the power to make subsidiary legislation that lay down the law should develop mechanisms to improve the transparency of the process and allow greater involvement of civil society groups and the general public in the process of making such legislation.

65. The Commission also recommends that Parliament develops more detailed guidelines for monitoring and evaluating the process of making and ensuring the quality of subsidiary legislation.

ISSUE FOUR: TYPE OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

66. The dimensions of this issue are as follows:
    a. Whether the current unicameral Parliament should be substituted by a bicameral Legislature?
    b. Whether the National House of Chiefs should be transformed into an upper house of Parliament?
    c. Whether the Council of State should be converted into an upper house of Parliament?

B. CURRENT STATE OF THE LAW ON THE ISSUE

67. The 1992 Constitution creates a unicameral Parliament placing on it legislative powers to be exercised in accordance with the Constitution. However, the Constitution provides for the involvement of certain constitutionally established stakeholders in the legislative process. This, it has been argued, enables such institutions to play the role of *de facto* upper chambers, albeit in relation to well determined subject areas.

68. The National House of Chiefs though not an upper house of Parliament, has power under the Constitution to undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin.[169] The Constitution equally provides that "a bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of Chiefs."[170] Simply, the President may refer any bill to the Council of State for its consideration.[171] Again, the 1992 Constitution requires that every bill for the amendment of the Constitution must be referred by the Speaker to the Council of State for consideration and advice. [172]

C. SUBMISSION RECEIVED

69. There were calls for the Commission to recommend that the current unicameral Legislature be substituted with a bicameral Legislature for the following reasons:
    a. A bicameral Legislature will provide the requisite checks and balances on the actions of the Executive. So far, the Executive has effectively exercised undue control over Parliament and stultified the growth and autonomy of that institution. An upper house, comprising members who are not beholden to the Executive for favours and rewards would be an effective check on the Executive.

[169] Article 272(a) of the 1992 Constitution of the Republic of Ghana.
[170] Article 106(3) of the 1992 Constitution of the Republic of Ghana.
[171] Article 90(1) of the 1992 Constitution of the Republic of Ghana provides that "A bill which has been published in the *Gazette* or passed by Parliament shall be considered by the Council of State if the President so requests."
[172] Articles Article 290(2) and 291(2) and of the 1992 Constitution of the Republic of Ghana.

b. An upper house would be the preserve of persons of enormous experience, expertise, superior knowledge, maturity and independence who would consider issues objectively and in the nation's best interest.
c. An upper house would also act as a check against hasty and politically influenced legislation by the lower House, alongside playing supervisory role over the work of the lower House.

70. Other submissions have urged for the maintenance of the current unicameral Legislature. The following reasons were advanced for this recommendation:
    a. A unicameral Parliament will offer a very simple and straightforward mechanism for making laws in Ghana.
    b. The challenges of the current Legislature do not result from the type of Parliament, but rather members of Parliament who allow the Executive to ride roughshod over them.
    c. It is needless at this point of Ghana's development to adopt such an expensive and time consuming system of governance, especially taking into consideration the country's economic circumstances.
    d. The Council of State and a strengthened National House of Chiefs could play the role of an upper house by garnering public opinion against hasty and politically influenced legislation, without necessarily being instituted as branches of the Legislature.

D. FINDINGS AND OBSERVATIONS

71. The Commission observes that the majority of unitary states opt for unicameral Legislatures. Examples of such countries are Angola, Benin, Cameroon, Cote d'Ivoire, Israel, Kenya, Libya, Norway, Portugal and Uganda. On the other hand, the bicameral system is more common in federal states. The Commission observes that the Constitution Review Commission of Zambia[173] recommended that the unicameral system be maintained despite the series of petitions that called for a transformation to a bicameral system.

72. The Commission observes that in order to properly reflect the concept of universal adult suffrage and popular and inclusive democracy, vesting legislative power in, a popularly elected unicameral Legislature is necessary.

73. The Commission observes that at the National Constitution Review Conference, it was proposed that the current unicameral Legislature be maintained. It was argued that a unicameral Legislature is preferable to a bicameral one as it ensures that the entirety of the Legislature's membership is subject to electoral control and accountability. The participants at the Conference also re-emphasised the arguments made in some submissions that the problems of the legislative arm of government are not directly a making of unicameralism

[173] Report of the Constitution Review Commission, Republic of Zambia. (29 December 2005). p. 363.

and that there are no significant defects in the current unicameral arrangement to warrant a change. It would also be too expensive to introduce another chamber of Parliament. However, it was generally agreed that there was the need for Parliament to be strengthened to enable it effectively play its role as an independent institution.

74. The Commission finds that the principal advantage of a unicameral system is more efficient lawmaking, as the legislative process is much simpler and the possibility of legislative deadlock is minimal. It also reduces costs as there are fewer institutions to maintain and support.

75. The Commission finds that bicameral Legislatures are usually created to give separate voices to different sectors of society; accommodate key development stakeholders; or provide representation of different social, ethnic or regional interests as is the case in the United States, Australia, and Nigeria. An upper chamber if introduced, would accommodate diverse groups not currently represented in Parliament and would be the preserve of persons of high standing in the society. It would as well create the appropriate forum for issues to be considered from perspectives that are not distorted by narrow partisan interests. However, a bicameral Legislature appears to be more suited to federal states and states that are vast and densely populated.

76. The Commission observes that the current Legislature faces a number of problems. However, these problems are not necessarily because it is a one-house Legislature. A bicameral legislature would not automatically enhance the quality of legislation and other output from the Legislature. On the contrary, the institution of a second chamber could considerably delay legislative and other processes as well as result in additional and excessive financial burdens for a developing country.

77. The Commission finds that Ghana's present socio-political dynamics and cultural diversity do not present sufficient grounds for the establishment of a bicameral Legislature and is convinced that the issues that have been advanced as grounds for the creation of a second chamber could be accommodated in a unicameral Legislature with relative ease.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

78. The Commission recommends that the current unicameral Legislature be maintained.

ISSUE FIVE: COMPOSITION OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

79. There are four main dimensions to this issue:
    a. Should the current composition of Parliament be maintained?
    b. Should the current composition of Parliament be revised to include gender quotas?
    c. Should the current composition of Parliament be reviewed to include a quota for chiefs?
    d. Should the current composition of Parliament be revised to include a quota for Persons with Disability?
    e. Should the current composition of Parliament be revised to include a quota for the youth?

B. CURRENT STATE OF THE LAW ON THE ISSUE

80. The Constitution provides that there shall be a Parliament of Ghana which shall consist of not less than 140 elected members. An Electoral Commission is given the powers to demarcate electoral boundaries for both national and local elections including for elections to Parliament. Thus, the Constitution grants power to the Electoral Commission to divide the country into as many constituencies for the purpose of election of Members of Parliament as may be necessary, and to ensure that each constituency is represented by one Member of Parliament. The current composition of Parliament is 230 members,[174] all of whom are elected by universal adult suffrage. No provision is made for seats to be reserved for any group of persons or for the appointment of *ex officio* members to Parliament. The Constitution, however, provides that the Vice President, as well as any Minister or Deputy Minister of State, who is not an elected Member of Parliament, is entitled to participate in the proceedings of Parliament, except that he is not entitled to vote or hold office in Parliament.[175]

C. SUBMISSIONS RECEIVED

81. Several and differing submissions were received on what the composition of Parliament should be. A significant number of submissions called for specific representation in Parliament for women, chiefs, the youth, and persons with disability. In the case of women, the youth and persons with disability, the argument is that these segments of our society have been historically and consistently under-represented and so such representation would ensure that they have a voice in the main lawmaking body in the country. Quotas are necessary for these groups because there is a false but enduring mind-set of the Ghanaian electorate that they are incompetent and so not suited for Parliament.

[174] Representation of the People (Parliamentary Constituencies) Instrument, 2004 (C.I.46) Section 1; Article 47(5), 1992 Constitution of the Republic of Ghana.
[175] Article 111 of the 1992 Constitution of the Republic of Ghana.

82. Other submissions propose that the current composition of Parliament should be reviewed to include chiefs for the following reasons:
    a. The institution of Chieftaincy is a critical stakeholder in national development. Chiefs are mostly custodians of lands and the culture of their respective traditional areas. Part of the successes of national development is attributed to the dynamism of the institution of Chieftaincy. Totally ignoring such an institution in the lawmaking process of the State could prove detrimental to the developmental goals of the nation.
    b. The rich experience of chiefs, their nobility and their humaneness are important attributes that will advance the work of Parliament.

83. The majority of the submissions proposed that the current state of the law should be maintained for the following reasons:
    a. The current composition of Parliament has worked quite well and a change is needless.
    b. The provision of a lower limit on the membership of Parliament is an appropriate check against under-representation. This is complemented by the power of the Electoral Commission to review constituencies at intervals of not less than 7 years, or within 12 months after the publication of the enumeration figures following a census of the population of Ghana, whichever is earlier.

D. FINDINGS AND OBSERVATIONS

84. The Commission acknowledges the Electoral Commission's constitutional mandate to review the number of constituencies represented in Parliament. In practice, the reviews have led to an increase in the number of constituencies, translating into an increase in the number of members of Parliament. The Commission finds that there is strong support for the retention of the current constitutional provisions on the composition of Parliament. Whilst noting that in many unitary states where a unicameral Legislature is favoured, Parliament is filled by elections based on direct universal adult suffrage, leading to the under-representation of some segments of the society.

85. The Commission observes that there are various cultural and economic factors that have been shown to affect the level of representation of minorities and other marginalised groups in Parliaments worldwide. These factors range, in the case of women, from the length of time that women have had the vote, through rates of female participation in paid employment, to levels of state provision of childcare. However, other factors such as party ideology, candidate selection rules, and other forms of discrimination play a critical role in the under-representation of some groups in Parliament.

86. The Commission agrees with the principle that:
    "a democratic system requires meaningful participation and representation that integrates all societal groups – religious, ethnic, tribal, political, gender, socioeconomic, cultural and other minority groups – into the decision-making process. Members of Parliament

should ideally reflect the diverse communities from which they come; thus, minority groups should not be systematically excluded from being represented. Improving the representation of Parliament strengthens its ability to reach out to all sectors of society. Furthermore, when a representative parliament is able to develop multiple loyalties through political cooperation, it lays the foundation for the emergence of a constructive discourse culture, which is better able to be managed without resorting to violence." [176]

87. The Commission further agrees that Parliament must be institutionally designed to produce representational outcomes that facilitate broad-based participation and requisite capacities in the democratic process. Appropriate electoral designs can ensure that all groups have a voice in Parliament, thereby transforming Parliament from a collection of select members into an arena where differences can be dealt with and conflict managed. It is for these reasons that the Commission has recommended in this report that the Electoral Commission should study the system of proportional representation for deployment in the future.

88. The Commission observes that 10 women were elected by the National Assembly to fill specially created seats under the 1960 Constitution. This represented Ghana's unique attempt at balancing the societal deficits relating to the systemic gender representational imbalance at the parliamentary level.

89. The Commission further observes that an administrative instruction has over the years asked that 30% of the membership of District Assemblies in the country should comprise women and other minority groups.

90. The Commission observes in particular that women have continued to be under-represented even in Ghana's District Assemblies and, indeed, at all other levels of leadership in the country. In Parliament today, the number of women is anything but fair. With only 19 women out of 230 parliamentarians, Ghana is rated among the lowest on the continent as compared to countries such as Rwanda, with 45 out of 80. Rwanda achieved this by reserving seats for women in their Parliament. South Africa, through voluntary political party allocations, has 172 women out of 400, representing 45percent of parliamentarians. Senegal, without any particular legislation on the representation of women, had, in 2007, 40 women out of a total parliamentary representation of 100 members, representing 40%.

91. The Commission observes that in the past two decades gender quotas have been adopted by more than 100 countries globally. There are two main types of gender quota: party and legislative. Party quotas are measures that are adopted voluntarily by political parties to achieve a certain proportion of female candidates (usually 25–50%). These measures govern either the composition of party lists (in countries with proportional representation electoral systems) or the selection of candidates (in countries with plurality systems). Legislative

[176] PARLIAMENTARY STRENGTHENING, http://www.parliamentarystrengthening.org/conflictmodule/pdf/conflictunit2.pdf (last visited July 18, 2011).

quotas are mandatory provisions (enacted through reforms to electoral laws of constitutions) that apply to all parties. Party quotas were first adopted by social democratic parties in Western Europe in the 1970s whereas legislative quotas first appeared in the 1990s, largely in developing and post-conflict countries in Latin America and Africa. Although it is possible to achieve high levels of women's representation without quotas (as in Denmark and Finland), the adoption of quotas has led to dramatic increases in the percentage of women in Parliaments in countries as diverse as Rwanda, Sweden, Argentina and Nepal. The implementation of party quotas has helped to increase women's representation to 41% in the Netherlands and 40% in Norway, and the use of legislative quotas has increased women's representation to 39% in both Costa Rica and Argentina.[177] The Commission observes that the Rwandan Constitution provides that the Chamber of Deputies (their Legislature) which is composed of 80 persons, should have 55 members elected by universal adult suffrage, 24 reserved for women, 2 elected by the National Youth council and 1 by the Federation of Associations of the Disabled.[178]

92. The Commission equally observes that the Committee of Experts for the 1992 Constitution recommended that elections to Parliament should be based on universal adult suffrage. The Committee did not endorse the suggestion that a number of parliamentary seats be reserved for members of the District Assemblies.[179]

93. The Commission observes that under the 1969 Constitution Parliament consisted of the President and the National Assembly. This position changed with the inauguration of the presidential system under the 1979 Constitution. The Legislature then, did not include the Executive in reflection of the principle of separation of powers. The Committee of Experts' report for the 1992 Constitution proposed that the President should not be a member of the Legislature.[180] None of these constitutions contains any reserved seats for disadvantaged groups.

94. The Commission observes that at the National Constitution Review Conference, it was agreed that the current composition of Parliament should be maintained. However, the Conference cautioned that the frequent re-demarcation of electoral boundaries may lead to an unduly large Parliament with the attendant requirements of expanded logistics and resources. Some participants therefore proposed that, as a check on constituency enlargement, an upper limit of 250 should be set to the number of members of Parliament.

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[177] POLITICAL INSIGHT, http://www.politicalinsightmagazine.com/?p=488 (last visited July 18, 2011); INTER-PARLIAMENTARY UNION, http://www.ipu.org/wmn-e/classif.htm (last visited July 18, 2011).
[178] Article 76(2) of the 2003 Constitution of the Republic of Rwanda.
[179] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 58.
[180] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 56.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

95. The Commission recommends that the current provisions on the numerical composition of Parliament should be maintained.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

96. The Commission recommends that flowing from the anti-discrimination and affirmative action provisions of the Constitution, Parliament should enact an affirmative action law which, in part, provides for more inclusive representation in Parliament and in particular for at least 30% representation, each for women and men.

97. The Commission further recommends that the Affirmative Action law should require political parties, as a condition for their continued existence, to achieve certain levels of representation for marginalised groups within specific timeframes.

ISSUE SIX: QUALIFICATION AND ELIGIBILITY OF MEMBERS OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

98. The dimensions of this issue are as follows:
    a. Should there be a minimum educational qualification for becoming a Member of Parliament?
    b. Should persons who owe allegiance to another country qualify to become a Member of Parliament?
    c. Should residence qualification be a requirement for becoming a Member of Parliament?

B. CURRENT STATE OF THE LAW ON THE ISSUE

99. The 1992 Constitution provides that a person shall not be qualified to be appointed a Member of Parliament unless:
    a. He is a citizen of Ghana, has attained the age of 21 years and is a registered voter.
    b. He is resident in the constituency for which he stands as a candidate for election to Parliament or has resided there for a total period of not less than five years out of the ten years immediately preceding the election for which he stands, or he hails from that constituency; and
    c. He has paid all his taxes or made arrangements satisfactory to the appropriate authority for the payment of his taxes.

100. The Constitution adds that "A person shall not be qualified to be a Member of Parliament if he owes allegiance to a country other than Ghana."[181]

C. SUBMISSIONS RECEIVED

101. Some of the submissions received on this issue proposed a minimum education qualification for members of Parliament on the basis that some members of Parliament do not exhibit sufficient mastery of the English language and can therefore not meaningfully contribute to the proceedings of Parliament. Since such members of Parliament lack the confidence to engage in debates, they do not appreciate basic developmental issues discussed in Parliament and the toe the party line unquestioningly.

102. Other submissions called for the revision of the current state of the law as provided for in Article 94, to enable persons who owe allegiance to other countries to qualify to be elected members of Parliament. The argument advanced for this submission is that Ghana is missing out on exploiting the competence of its citizens who acquire the nationality of other countries, not because they owe allegiance to those countries, but because of economic reasons.

103. Some submissions noted that the corollary of the legislative attempts to allow Ghanaians abroad to vote is to allow them to be voted for, even if they owe allegiance to another country in addition to Ghana.

104. The last set of submissions on this issue called for the repeal of clause 1(b) of Article 94 which provides that a person shall not be qualified to be a Member of Parliament unless he is resident in the constituency for which he stands as a candidate for election or has resided there for a total period of not less than five years out of the ten years immediately preceding the election for which he stands, or he hails from that constituency before he can qualify to be a Member of Parliament. The argument put forward for this call is that being a resident of a constituency does not guarantee competency and that the clause places a restriction on the people's freedom to decide whom they want to represent them in Parliament.

D. FINDINGS AND OBSERVATIONS

105. The Commission observes that there is no uniformity with regards to international practice relating to the qualification requirements for becoming a Member of Parliament. The qualification requirements stipulated for candidates aspiring for election to Parliament in many countries relate to their citizenship, gender, status, age, educational background and many other criteria.

[181] Article 94 of the 1992 Constitution of the Republic of Ghana.

106. The Commission observes that:

a. The Ugandan Constitution provides that to qualify as a Member of Parliament a must have "completed a minimum formal education of Advanced level (A-level)[182] standard or its equivalent."[183]
b. Malawi requires that a member of Parliament be "able to speak and read the English Language well enough to take an active part in the proceedings of parliament." The Malawian Constitution, like Ghana's, has the same requirement concerning the disqualification of a Member of Parliament who owes allegiance to another country.[184]
c. The United States Constitution provides that to be eligible for the House of Representatives, a person must be 25 years of age at the time of the election, reside in the state that he or she intends to represent and must have been a citizen for 7 years. To be eligible for the Senate, a candidate must be 30 years or older at the time of election, must have been a citizen for 9 years, and reside in the state he or she intends to represent. The Constitution does not bar persons who owe allegiance to other countries from being elected to the Legislature.
d. In the United Kingdom, a person wishing to stand for election as Member of Parliament must be over 18 years of age; and be a British citizen, or citizen of a Commonwealth country or the Republic of Ireland. Candidates must be nominated by 10 parliamentary electors of the constituency they wish to stand in.

107. The Commission recalls that the Committee of Experts for the 1969 Constitution stated in its report that the qualification to be a Member of Parliament, like the franchise, should aim at universal application. The Committee made recommendations for citizenship, age, and residency as well as education qualification. The Committee, however, recommended that the education qualification be limited to the ability to speak and read English with a degree of intelligibility and comprehension sufficient to enable one to take an active part in the proceedings of Parliament. The Committee, therefore, rejected proposals to impose very high education qualifications, such as the school certificate and in some cases a university degree.[185]

108. The Commission observes that the Committee of Experts for the 1992 Constitution endorsed a residential requirement for membership of Parliament. The Committee stated in its report

[182] The Ugandan Education system follows a pattern fairly similar to that in Britain. Children are in primary school for 7 years (Primary 1- Primary 7), and then continue through secondary school for the next 6 years (Senior 1- Senior 6). The three most important school years for a child in Uganda are: Primary 7: All students must take leaving exams which will determine which secondary school they go to. Senior 4: O-Level year, Senior 6: A-Level year. (The Ghanaian equivalent of the Ugandan Senior 6 would be the West African Senior Secondary School Certificate Examination (WASSCE).
[183] Article 80(1) of the 1995 Constitution of the Republic of Uganda.
[184] Article 52(2) of the 1995 Constitution of Malawi.
[185] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 414.

that a prospective Member of Parliament should be ordinarily resident in the constituency he seeks to represent, and that such a requirement should be literally construed to include a person who actively identifies himself with the constituency by frequent visits or involvement in projects, notwithstanding the fact that he is physically resident in another area.[186]

109. The Commission finds that the residency requirements as established by Article 94(1)(b) in relation to the eligibility of Members of Parliament are salutary in the sense that they enable a mechanism for potential law and policy makers of the nation to establish strong ties with the people they are supposed to represent in Parliament. The retention of residency qualifications would encourage people with political ambitions to draw closer to the people they aspire to serve.

110. The Commission also observes that the Committee of Experts for the 1992 Constitution did not support an English language proficiency requirement for Parliament. The Committee was of the view that such a requirement will effectively debar the majority of Ghanaians from membership of Parliament. This, the Committee stated, had no place in the Constitution of modern Ghana.[187]

111. The Commission further observes that, it is only the 1969 and 1979 Constitutions that contained an English language proficiency requirement for Parliament, and yet there is no evidence that Parliament under the other constitutions was hampered in any way in the absence of such a provision.

112. The Commission further observes that formal education is not necessarily a reflection of the abilities of a person and education requirements in particular would be difficult to apply to categories of persons who are not formally schooled, but are educated.

113. The Commission observes that the Committee of Experts Report for the 1992 Constitution did not find any correlation between a good parliamentarian and academic qualification. The Committee, therefore, recommended that no minimum education requirement should be prescribed for members of Parliament.[188]

114. The Commission recognises that many Ghanaians outside the borders of this country take up other citizenships or secure residence permits for various personal reasons and feels compelled to balance the importance and sensitivity of matters deliberated and decided upon

[186] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 61.
[187] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 62.
[188] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 62.

in Parliament against the need to bring on board for national development the expertise of such Ghanaians.

115. The Commission observes that the Parliament of Ghana, in its submission to the Commission, advocated the retention of the constitutional provision that prevents a person owing allegiance to a country other than Ghana from being eligible for election to Parliament. The reason advanced by Parliament for its retention was that such a person could have divided loyalty.

116. The Commission observes that when the issue on qualification and eligibility of members of Parliament was considered at the National Constitution Review Conference, there were strong arguments in support of a minimum level of education qualification for members of Parliament. However, the general consensus was that the current constitutional provisions on the matter be maintained. The Conference noted that every Ghanaian, irrespective of his education qualification, has a fundamental human right to be voted for to Parliament. It was also pointed out that requiring educational qualifications for members of Parliament does not guarantee improvement in the quality of legislation. It was generally agreed that beyond the current constitutional requirements, the electorate should be left to decide for themselves who they wish to represent them.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

117. The Commission recommends that the current constitutional provisions on eligibility requirements for members of Parliament be maintained.

ISSUE SEVEN: APPOINTMENT OF THE SPEAKER AND DEPUTY SPEAKERS OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

118. There are three main dimensions to the issue of how to appoint the Speaker and Deputy Speakers of Parliament:
    a. Should the current system whereby the Speaker of Parliament is elected from among members of Parliament or persons qualified to be members of Parliament be maintained?
    b. Should the current provision on the election of the Speaker of Parliament be revised so that she is elected from among members of Parliament and still maintain her membership of Parliament?
    c. Should different mechanisms, other than the current constitutional provisions, be devised for the election of the Deputy Speakers of Parliament?

B. CURRENT STATE OF THE LAW ON THE ISSUE

119. The 1992 Constitution provides for the Speaker of Parliament to be elected by the members of Parliament from among persons who are members of Parliament or who are qualified to be elected as members of Parliament.[189] Where the Speaker is appointed from within Parliament, she has to resign her seat in Parliament.[190] The Speaker is also to vacate her office if she becomes a Minister of State or a Deputy Minister.[191] The Speaker may be removed from office by a resolution of Parliament supported by the votes of not less than three-quarters of all the members of Parliament.[192]

120. The Constitution also provides for two Deputy Speakers of Parliament to be elected by members of Parliament. Both Deputy Speakers may not be members of the same political party.

C. SUBMISSIONS RECEIVED

121. In a good number of the submissions received, the Commission has been urged to retain the *status quo*. According to this view the current provisions on the election of the Speaker of Parliament work well, assuring the neutrality of a Speaker who is not a Member of Parliament usually elected on the ticket of a political party.

122. Other submissions have called for a review of the current provisions so that the Speaker of Parliament is appointed from among members of Parliament and for the person so elected to retain her seat in Parliament. It is argued that Parliament will be more independent, with less external interferences in the discharge of its duties, if the Speaker is elected from among members of Parliament who are usually steadfast career politicians. To buttress this proposal, the proponents of this view cited international best practice indicating that Parliaments choose within themselves to fill the position of Speaker.

123. There were submissions calling for a change in the mode of election of the Deputy Speakers of Parliament. It has been submitted that these persons be chosen by the Speaker of Parliament, who will be in a better position to appoint persons she may be comfortable working with.

D. FINDINGS AND OBSERVATIONS

124. The Commission observes that, international practice does not reveal any uniformity in the mode of selection of Speakers of Parliament. The Commission notes that in parliamentary

[189] Article 95(1) of the 1992 Constitution of the Republic of Ghana.
[190] Article 97(1)(b) of the 1992 Constitution of the Republic of Ghana.
[191] Article 95(2) of the 1992 Constitution of the Republic of Ghana.
[192] Article 95(2)(d) of the 1992 Constitution of the Republic of Ghana.

systems of government, the Speaker is usually elected from within the House and retains his seat as the representative of a constituency. This is, however, not the case in most presidential systems of government.

a. The Constitution of the United States does not require that the Speaker of the House of Representatives be an elected Member of Congress, but no non-member has ever been elected Speaker. The Constitution does not spell out the political role of the Speaker. As the office has developed historically, however, it has taken on a clearly partisan cast, very different from the speakership of most Westminster-style Legislatures. While there is the position of the Majority Leader of the House of Representatives, the Speaker in the United States is, by tradition, viewed as the head of the majority party in the House of Representatives, outranking the Majority Leader. However, despite having the right to vote, the Speaker usually does not participate in debates and rarely votes on the floor.
b. The Speaker of the House of Commons in the United Kingdom is elected by Members of the House of Commons by secret ballot, and an absolute majority is required. Speakers must be politically impartial and scrupulously non-partisan. Therefore, on election, the Speaker must resign from his or her political party and remains separate from political issues even in retirement. However, the Speaker will deal with her constituents' problems like a normal Member of Parliament. A Speaker still stands in general elections. He or she is generally unopposed by the major political parties, who will not field a candidate in the Speaker's constituency. During a general election, a Speaker does not campaign on any political issues but simply stands as 'the Speaker seeking re-election'. The advantage of the UK system is that it enhances independence by removing the Speaker from party politics and election concerns.
c. In the Canadian Parliament, which is based on the Westminster model, the Speaker of the House operates under similar rules as in the United Kingdom. She is elected by the Members of the House in a secret ballot, does not participate in debates and casts only a deciding vote if there is a tie. While the Speaker is required to perform her office impartially, she does not resign from her party membership upon taking office.
d. The position of the Speaker of the House of Representatives in the Federal Parliament of Australia is held by a member of the House who is elected to Parliament in the usual way. Once elected, the Speaker is expected to detach herself from government activity, and to run the House impartially. Like other members, the Speaker will usually be a member of a political party but after her appointment, she does not take part in the debates of Parliament. The fact that the Speaker does not ordinarily vote in ordinary divisions of the House means that the political party to which she belongs, loses a vote on the floor in daily sittings.
e. In Nigeria, the President and Deputy President of the Senate, the Speaker and Deputy Speaker of the House of Representatives, are all elected from within their respective Houses. They are not constitutionally enjoined to resign their seats on their election. They, however, lose their office if they fail to retain their seats in Parliament.

f. The 1978 Constitution of the Solomon Islands provides for a Deputy Speaker who is elected by Parliament from among its members, whereas the Speaker may be elected from outside Parliament. The Speaker, if a Member of Parliament must vacate her seat upon election. The Deputy Speaker may retain his seat and must vacate the position of Deputy Speaker if he or she ceases to be a Member of Parliament. The leader of a political party in Parliament may not serve as Deputy Speaker.

125. The Commission observes that when this issue was considered at the National Constitution Review Conference, it was decided that the Speaker of Parliament should be elected from among members of Parliament. The participants indicated that international comparative practices favour the Speaker being elected from within Parliament. The consensus was that provisions in the Constitution should be revised accordingly. However, the provisions dealing with the election of the Deputy Speakers should be maintained. The Speakers should also retain their seats as members of Parliament after their election.

126. The Commission finally finds that a good balance is maintained by the current constitutional provisions that disallow a Speaker from representing a constituency but allow the two Deputy Speakers to do so.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

127. The Commission recommends that the current provisions on the election of the Speaker and Deputy Speakers be maintained.

ISSUE EIGHT: BY-ELECTIONS OF MEMBERS OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

128. The main dimension of this issue is whether or not by-elections should be retained as the means of filling vacancies in Parliament that result from reasons other than the expiration of the term of office of a Member.

B. CURRENT STATE OF THE LAW ON THE ISSUE

129. According to the 1992 Constitution, a by-election shall be held within 30 days after a parliamentary seat is declared vacant. The declaration is to be made by the Clerk to Parliament to the Electoral Commission in writing, 7 days after the seat has fallen vacant. Where the vacancy occurred through death, the Electoral Commission would have to hold the elections within 60 days after the occurrence of the vacancy.[193] The Constitution also

[193] Article 112 of the 1992 Constitution as amended by the Constitution of Ghana (Amendment) Act of 1996.

provides that a by-election shall not be held within 3 months before the holding of general elections.

C. SUBMISSIONS RECEIVED

130. Some submissions proposed various methods for filling a vacancy created in Parliament before general elections are due. It has been proposed to the Commission that the current provisions on by-elections be revised so that vacant seats in Parliament are filled by the political parties which held the seats before they fell became vacant. This proposal aims to save scarce resources and avoid the violence and acrimony that often accompany elections.

131. The Commission also received strong proposals in support of the retention of the current provisions of the Constitution on the issue. The main thrust of these arguments is that the people must popularly elect their representatives to Parliament all the time. They also argue that the proposed mechanism of having vacant seats filled by political parties would not work with seats that are occupied by independent candidates.

D. FINDINGS AND OBSERVATIONS

132. The Commission observes from international comparative experience that by-elections are viewed as an integral part of the electoral process and that the norm is to have recourse to the mechanism in order to fill vacancies in Parliament. What varies is the time frame within which by-elections are held.
    a. In Uganda, whenever a parliamentary seat is vacant, the parliamentary Clerk has 10 days to inform the Electoral Commission which in turn conducts a by-election within 60 days after the vacancy has occurred.[194]
    b. In Kenya, a by-election is held within 90 days after the occurrence of a vacancy in the office of the National Assembly or the Senate.[195]

133. A notable exception can be found in the Constitution of the United States[196] which allows the Governors of States with the approval of their Legislature, to appoint temporary Senators until either a special or regular election takes place.

134. The Commission finds that as a measure of participatory and accountable governance the involvement of the people in the election of a representative to Parliament is unavoidable. In our system of governance, parliamentary seats are ascribed to constituencies and not to political parties, although, specific political parties might have won them at elections. Allowing political parties to elect persons to fill up vacant seats in Parliament will represent a

[194] Article 81 (2) of the 1995 Constitution of the Republic of Uganda.
[195] Article 103 of the 2010 Constitution of Kenya.
[196] U.S. CONST. Amend. XVII.

distortion of an institutional framework for representational democracy that has been justified neither by the submissions calling for that change nor by independent evidence.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

135. The Commission recommends that the provisions in the Constitution on by-elections be maintained.

ISSUE NINE: EFFECT OF VOTE OF CENSURE PASSED BY PARLIAMENT

A. DIMENSIONS OF THE ISSUE

136. The primary dimension of this issue is whether or not a vote of censure passed on a Minister of State by Parliament should lead to the removal of the Minister by the President.

B. CURRENT STATE OF THE LAW ON THE ISSUE

137. The Constitution provides that Parliament may, by a resolution supported by the votes of not less than two-thirds of all the members of Parliament, pass a vote of censure on a Minister of State. A motion for the resolution to remove a Minister of State shall not be moved in Parliament unless seven days' notice has been given of the motion, and the notice for the motion has been signed by not less than one-third of all members of Parliament. When such a motion is moved, it may be debated in Parliament within 14 days after its receipt by the Speaker.[197]

138. A Minister of State in respect of whom a vote of censure is debated is entitled, during the debate, to be heard in his defence. Where a vote of censure is passed by Parliament under this article the President may, unless the Minister resigns his office, revoke his appointment as a Minister. This gives the President the power to retain a Minister even after a vote of censure has been passed by Parliament against such a Minister. These provisions apply to Deputy Ministers as well.[198]

C. SUBMISSIONS RECEIVED

139. The first set of submissions on this issue call for the current state of the law to be maintained as a measure to guard against the passing of unjustified votes of censure by Parliament against Ministers of State aimed at embarrassing or weakening the Executive.

[197] Article 82 of the 1992 Constitution of the Republic of Ghana.
[198] Article 82 (6) provides that this article applies to a Deputy Minister as it applies to a Minister of State.

140. On the other hand, it has been proposed that a vote of censure passed by Parliament against a Minister of State should result in the automatic removal from office of that Minister without the intervention of the President. It is argued that such a mechanism will strengthen Parliament's oversight over the Executive and ensure that the Executive does not foist incompetent and destructive Ministers on the nation.

D. FINDINGS AND OBSERVATIONS

141. The Commission observes that the power granted to Parliament to approve ministerial appointments and to censure Ministers of State is in tune with international best comparative practices. The mechanism is much more prevalent in countries which practise the parliamentary system of government although many presidential systems have adopted it.
    a. The Rwandan Constitution provides for the censure of the Cabinet or of a member of Cabinet by the Chamber of Deputies, after interpellation.[199]A member of the Cabinet against whom a vote of no confidence is passed is required to tender his resignation to the President of the Republic through the Prime Minister.[200]
    b. Under the Ugandan Constitution, when a vote of censure is passed on a Minister of State, the President is obliged to remove the Minister. [201]

142. The Commission finds that the Constitution vests Executive power in the Presidency, to be exercised in accordance with the Constitution and on behalf of the people of Ghana. One of the prescribed modes of exercising that power is the appointment of Ministers of State to assist the President deliver on his mandate. It is therefore critical that an Executive President retains the power to determine the team of Ministers who would assist him to govern.

143. The Commission equally finds that Parliament is constitutionally structured as a check on the Executive and approves all nominees for ministerial appointments, for example. The power to censure a Minister of State is a critical ingredient of that oversight role of Parliament.

144. The Commission finds that the prerequisites for censuring a Minister by Parliament are very stringent indeed and only a really incompetent or detestable Minister of State can be successfully censured. Only very compelling circumstances would garner enough signatures for the presentation of a motion for censure and enough votes for the motion to pass.

145. The Commission finds that there is no justification for the current provision in Article 82(5) which gives to the President the discretion to revoke the appointment or to retain a Minister

[199] Interpellation refers to the formal right of a parliament to submit questions to government. The respective sector Minister is then required to respond and justify government policy. Interpellation has become more or less synonymous with a motion of censure and allows parliament to supervise government's activity in this sense.
[200] Articles 130 and 131 of the 2003 Constitution of Rwanda.
[201] Article 118 of the 1995 Constitution of the Republic of Uganda.

of who has been censured by Parliament. Where a vote of censure has been passed according to the procedure laid down in the Constitution, the President should be obliged to revoke the appointment of the Minister concerned. The present provision negates the cardinal principle of the Constitution that Ministers hold their position with the approval of Parliament.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

146. The Commission recommends that the Constitution be amended to ensure that where a Minister of State has been censured by Parliament, it shall be mandatory for the President to remove the Minister from office.

ISSUE TEN: VOTING DURING PARLIAMENTARY PROCEEDINGS

A. DIMENSIONS OF THE ISSUE

147. The key dimensions of this issue are as follows:
    a. How do we design a system for voting in Parliament which ensures the independence of members of Parliament when they vote on issues?
    b. How may the electorate and posterity know and keep up with the voting trends of their members of Parliament on national issues when there are votes by acclamation, and records of voting patterns are not published?

B. CURRENT STATE OF THE LAW ON THE ISSUE

148. The current state of the law is that matters in Parliament are ordinarily determined by the votes of the majority of members present and voting, with at least half of all the members of Parliament present. There are specific instances in the Constitution where the requirements for both the number of members of President present and the margin of the vote are enhanced. For example, a vote of two-thirds of all members of Parliament is required for passing a bill for the amendment of a non-entrenched provision of the Constitution.

149. The Speaker has neither an original nor a casting vote. Where the votes on any motion are equal the motion is taken to be lost.

150. Where Parliament is considering a bill to amend the Constitution, or where voting is in relation to the election or removal of any person under the Constitution or under any other law, voting is secret.

151. A member who has an interest in a contract with the government is required to declare his interest and not vote on any question relating to the contract.

C. SUBMISSIONS RECEIVED

152. It has been proposed that the current provisions on voting in Parliament should be maintained. The argument here is that, except for two instances, voting in Parliament is not secret. This ensures transparency in the exercise of legislative powers. The two exceptions are where Parliament is considering a bill to amend the Constitution, and where the voting is in relation to the election or removal of any person under the Constitution or under any other law.

153. Another proposal on this issue is that voting in Parliament must be recorded and published and the option for secret balloting removed. The reasons for this proposal include ensuring that constituents have a record of the voting patterns of their members of Parliament to assess their performance, and for posterity to know the issues which various members of Parliament have supported, opposed or refrained from taking sides on.

D. FINDINGS AND OBSERVATIONS

154. The Commission finds that an institutional and administrative framework for recording and publishing the voting patterns of members of Parliament would promote objective and constructive debate for assessment of performance of the members of Parliament and their general accountability the electorate.

155. The Commission concedes that secret balloting may be necessary on matters that have the capacity to disrupt peace, security, social cohesion and harmony. Such instances must be few and narrowly circumscribed.

156. The Commission finds that the independence of Parliament is very much dependent on the autonomy of individual members of Parliament and recording voting patterns in Parliament will encourage individual autonomy and enhance responsibility in legislative processes.

157. The Commission observes that a consensus was reached at the National Constitution Review Conference that voting in Parliament should generally be open, and that the limited provisions for secret balloting be retained in the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

158. The Commission recommends that the current constitutional provisions on voting in Parliament be maintained.

RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGES

159. The Commission recommends that the Standing Orders of Parliament be amended to provide for the Clerk of Parliament to record and publish the voting patterns of MPs periodically, except for the instances that are constitutionally protected.

ISSUE ELEVEN: RECALL OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

160. The key dimensions of this issue are whether or not Parliament may be recalled outside of session; what requirements should be met for such a recall; and what timeframe should be allowed between the time of making the decision to recall and when members of Parliament are required to be back at post.

B. CURRENT STATE OF THE LAW ON THE ISSUE

161. The law is that the Speaker of Parliament determines by Constitutional Instrument the time and place for sessions of Parliament. The Constitution further provides that a session of Parliament shall be held at least once a year, so that the period between the last sitting of Parliament in one session and the first sitting of Parliament in the next session does not amount to twelve months. The above provision notwithstanding, 15 percent of members of Parliament may request a meeting of Parliament; and the Speaker shall, within 7 days after the receipt of the request, summon Parliament.

C. SUBMISSIONS RECEIVED

162. It was proposed that the current requirement for recalling Parliament should be maintained. This allows for the necessary flexibility in recalling Parliament to attend to urgent matters during a recess. If the current requirement of 15% of Parliament is increased, it may be impossible to recall Parliament.

163. Other submissions argued to the contrary and called for the institution of more stringent requirements for the recall of Parliament. The proponents of this view call for the Constitution to be amended so that at least one third of members of Parliament may request the Speaker to recall Parliament during recess. They submit that the existing requirement does not ensure that members of Parliament reach a genuine consensus before a recall is requested. Since the Speaker is under a duty to convene Parliament when a meeting is requisitioned, the process of requesting a meeting should be more stringent than is currently the case.

D. FINDINGS AND OBSERVATIONS

164. The Commission observes that reconvening Parliament in extraordinary sessions for matters of urgency is a long standing global practice, and is justified when there is a need for Parliament to promptly deal with matters of State.

165. The Commission observes that the National Constitution Review Conference concluded that the current constitutional requirements for the recall of Parliament be maintained.

166. The Commission finds that there is the need to create a balance between ease in reconvening Parliament in times of necessity and unnecessary recalls of Parliament.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

167. The Commission recommends that the Constitution be amended to require at least one-third of the membership of Parliament to endorse a decision to recall Parliament from recess.

ISSUE TWELVE: APPOINTING MINISTERS FROM PARLIAMENT

A. DIMENSION OF THE ISSUE

168. An overwhelming number of petitions appealed for a reconsideration of the appointment of the majority of Ministers of State from amongst MPs.

B. CURRENT STATE OF THE LAW ON THE ISSUE

169. It is provided under the 1992 Constitution that Ministers of State shall be appointed by the President with the prior approval of Parliament from among members of Parliament, or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament.[202]

C. SUBMISSIONS RECEIVED

170. There was a handful of submissions favouring the retention of the current provision so that Members of Parliament may be appointed as Ministers of State. The reasons advanced for this proposition include the need to have an overlap between the Executive and the Legislature in order to promote co-operation between the two arms of government, as well as the need for the government to have support in Parliament to promote its agenda and to propel its policies.

[202] Article 78(1) of the 1992 Constitution of the Republic of Ghana.

171. However, the dominant view was that Members of Parliament should not be appointed as Ministers of State for the following reasons:

a. The presence of Ministers in Parliament makes it possible for the Executive to unduly influence decisions in Parliament.
b. Where members of Parliament are beholden to the President for their appointment as Ministers of State, they may be unwilling or unable openly to oppose measures proposed by the President or his Ministers.
c. The possibility that members of Parliament may be appointed as ministers means that there are fewer incentives for them to assert their independence of the Executive or seek to strengthen the ability of Parliament to hold the Executive to account, and there will be fewer and fewer such members since they will find it more and more unattractive to maintain their position in the face of advancement by those who enjoy the favour of the President.
d. Parliament would be made more independent as members of Parliament would work to improve themselves as legislators and for the institutional development of Parliament rather than aspire to the Executive as Ministers of State.
e. Such a review will ensure that the President has a larger pool of human resources to choose his Ministers from while preventing the current situation where ministerial appointments are made from Parliament, not because they are necessary, but because a balance needs to be maintained with appointments made from outside Parliament.
f. It will reduce the burden of combining the work of a minister and that of a Member of Parliament which are both uniquely important and arduous.

172. A third category of the submissions on this issue proposed the re-introduction of a Ministry of Parliamentary Affairs which will be a permanent liaison between Parliament and the Executive so that there would be no need to appoint Members of Parliament as Ministers of State.

D. FINDINGS AND OBSERVATIONS

173. The Commission finds that the appointment of Ministers from among members of Parliament is a key tenet of our hybrid system of government. The practice provides a suitable compromise between the Parliamentary or Westminster model where the Executive is part and parcel of the Legislature and the Presidential system where the Executive remains distinct from the Legislature.

174. The Commission finds that the resolution of this hinges on whether or not it has tendered to weaken the institutional growth and stability of Parliament. Issues such as absenteeism from parliamentary proceedings and disregard for core legislative functions by members of

Parliament who are appointed ministers and the kowtowing of members of Parliament to the Executive in the hope of being appointed as ministers have plagued the hybrid experiment since 1993.

175. The Commission observes that the Committee of Experts Report on the 1992 Constitution, noted that the ability to select ministers from outside Parliament would offer the President "the flexibility to fill any gaps in expertise or redress any regional or gender imbalance." Although Article 78(1) of the 1992 Constitution affords a measure of flexibility to the President in appointing ministers, the requirement that no less than half of the Ministers should be appointed from Parliament significantly restricts the field of choice of the President.

176. The Commission observes that when this issue was considered by the Parliamentary *ad hoc* committee on Constitution Review, compelling arguments were advanced for and against the appointment of ministers from among Members of Parliament. The Committee concluded that the *status quo* be maintained for the following reasons:
    a. Retaining this provision in the Constitution would strengthen our democracy. If more ministers are appointed from Parliament, it would provide an incentive for more competent persons and other professionals to contest parliamentary seats.
    b. The main reason why former President Limann's budget of was defeated in Parliament was the apathy of members of Parliament from his party to the government's budget. None of the Ministers under the 1979 Constitution could be MP at the same time. They were resentful because they were constitutionally barred from holding ministerial positions although they spent their resources, time and energy to campaign for the victory of the party.
    c. Members of Parliament who are not Ministers also have a poor attendance record in Parliament and so scrapping the appointment of Ministers from within Parliament would not solve the problem of absenteeism. In the United Kingdom for example, all ministers are Members of Parliament, yet the business of the House is not affected thereby. In Ghana, poor time management by members of Parliament who are Ministers rather than the weak fact that they combine two portfolios is what leads to their limited participation in the business of the House. The appointment of ministers from among Members of Parliament could afford greater posture cooperation between the Executive and the Legislature.

177. The Commission observes the following arguments to the contrary in the report of Parliament's Committee on Constitution Review:
    a. The current provisions pave the way for the President to appoint all manner of MPs as Ministers as a sort of compensation for their efforts in getting him elected President and irrespective of their competencies and capacities.

b. Members of Parliament constantly kowtow to the Executive in the hope of being appointed Ministers of State, thus undermining the independence and autonomy of Parliament.

178. The Commission observes that there is an overwhelming view among Ghanaians that there should be total separation between the Legislature and the Executive.

179. The Commission finds that there are a number of typologies for resolving this issue, including the following:
    a. A complete separation between the Executive and the Legislature in that no person can be a Member of Parliament and a Minister of State at the same time.
    b. A complete separation of the Executive and the Legislature, but with the creation of a liaison between the Executive and the Legislature.
    c. An open system where appointments can be made either from Parliament or out of Parliament or both, without any percentage limitations.
    d. An open system where appointments can be made either from Parliament or out of Parliament but with limitations on the percentage that may be appointed from within and without Parliament.

180. The Commission finds that a complete separation between the Executive and the Legislature, could lead to a direct collision between the two institutions, each wanting to assert its authority and power. This could lead to an unprecedented rift between them, making the country difficult to govern.

181. The Commission finds that interdependence among state institutions is a key feature of good governance which ought to be reflected in the exercise of governmental powers. The Executive and the Legislature need to depend on and complement each other and our constitutional design must nurture a productive relationship between the two institutions.

182. The Commission observes that international best practice allows the involvement of the Executive arm in legislative processes. However, the level of involvement differs from country to country depending on the system of governance favoured. In a parliamentary system of government, the entire Executive is part of the Legislature, whereas in a strict presidential system of government, the executive arm of government is kept distinct from the legislative arm. Even in strict presidential systems, there is a degree of interaction between the two branches. In the United States of America, for example, the Vice President chairs the meetings of the Senate and has the casting vote. In Nigeria, a liaison is appointed to facilitate a productive relationship between the Executive and the Parliament.

183. The Commission finds that a separation of the Executive and the Legislature, with the possibility of an interface between the two institutions will constitute a good reflection of the principle of separation of powers and the concept of interdependence of institutions of government. This will both enable Parliament to discharge its constitutional mandate effectively and also aid the Executive to propel its policies in Parliament.

184. The Commission observes that the National Constitution Review Conference supported a complete separation between the Legislature and the Executive. This would ensure that members of Parliament are encouraged to make a career out of Parliament rather than become Ministers of State. It would also ensure that no one carries the arduous burden of being a Member of Parliament and a Minister of State at the same time. The Conference further proposed that MPs should not hold other public offices, such as Chairpersons of State Boards, which are directly under the Executive for the same reasons.

185. The Commission also finds that the tendency for abuse of institutional independence in furtherance of individual or partisan political ambitions is real indeed, and is particularly imminent where the party in government has a minority or a slim majority in Parliament. This tide could be stemmed by establishing a productive inter-relationship between the Executive and the Legislature.

186. The Commission further finds that a separation between the Executive and the Legislature, with the possibility of an interface, sits well with the overwhelming number of Ghanaians who favour the complete separation between the executive and legislative arms of government, and those who propose a separation but deem executive presence in Parliament critical to galvanise parliamentary support to propel governmental agendas.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

187. The Commission recommends that Article 78(1) be amended to allow the President a freehand to appoint Ministers from within and without Parliament. A person appointed a Minister from Parliament may retain his seat in Parliament.

ISSUE THIRTEEN: THE TENURE OF OFFICE OF A MEMBER OF PARLIAMENT

A. DIMENSIONS OF THE ISSUE

188. The main dimensions of this issue are whether there should be a cap on the number of times a person may be elected to Parliament and whether that cap should be absolute or allow a Member of Parliament to stand again for office after a period of absence from the House.

B. CURRENT STATE OF THE LAW ON THE ISSUE

189. Under the 1992 Constitution, there is no limit to the number of times a person may be elected as a Member of Parliament.

C. SUBMISSIONS RECEIVED

190. There were many submissions advocating that a person should be allowed to be a Member of Parliament for as long as he continues to be elected to Parliament by the electorate. This arrangement would ensure that the electorate ultimately decides who should represent them in Parliament. The substance of a related set of submissions was to the effect that the current arrangement works well enough and should not be changed.

191. Other submissions noted that the longer people stayed in Parliament, the more experienced they become and the stronger Parliament becomes.

192. The submissions that proposed a fixed number of terms for members of Parliament argued that some members of Parliament use the resources and trappings of their positions to retain their seats and by so doing they assume monopoly over particular parliamentary seats. It was, therefore, proposed that, to enhance the quality of the composition of Parliament, it is necessary to impose a term limit on members of Parliament. This restriction will ensure that persons with fresh ideas and perspectives get the opportunity to enter Parliament.

D. FINDINGS AND OBSERVATIONS

193. The Commission observes that it is in line with international best practice not to impose a limit on the number of terms a person can serve as a Member of Parliament. The Commission notes however that the practice of instituting term limits for legislators is gaining currency in some jurisdictions. Currently in the United States, 15 States have instituted term limits for entry into the state legislatures. In some cases, the, such term limits have been ruled unconstitutional by the courts.

194. The Commission finds that it is necessary for members of Parliament to be encouraged to make a career out of Parliament, gathering knowledge and experience over the years, bringing these to bear on the work of Parliament, thereby strengthening that institution. Long serving members of Parliament will potentially enrich the quality of Parliament with institutional memory and thereby strengthen that arm of government. Permitting members to remain in Parliament for as long as they are willing to serve and for so long as they are elected into office is the best way to achieve this superior goal.

195. The Commission also finds that a cardinal principle of representative democracy is for the electorate to determine who should represent them. Placing a cap on the number of times a person may be elected to Parliament hinders this principle. Constituents can always determine when a Member of Parliament may not represent them anymore. This will of the people depicts true representative democracy.

196. The Commission observes that the Committee of experts for the 1992 Constitution in considering this issue recommended that there should be no constitutional limitation of the tenure of office of members of Parliament beyond the expressed wishes of the electorate.

197. The Commission observes that the dominant view at the National Constitution Review Conference was that the fate of a Member of Parliament should be left to the judgment of the electorate. Participants at the Conference emphasised that re-electing members of Parliament will ensure institutional memory which is important for the effectiveness of Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

198. The Commission recommends that the current provisions on the tenure of members of Parliament should be retained.

ISSUE FOURTEEN: CONDITIONS OF SERVICE OF THE SPEAKER, DEPUTY SPEAKERS, AND MEMBERS OF PARLIAMENT.

A. DIMENSIONS OF THE ISSUE

199. The three main dimensions of this issue are the following:
    a. How should the conditions of service of the Speaker, Deputy Speakers and members of Parliament be determined?
    b. Should *ex gratia* awards be made to the Speaker, Deputy Speakers, Clerk and Members of Parliament and how should these awards be determined?

c. How do we ensure that the Speaker, Deputy Speakers, and Members of Parliament are not paid inordinately large sums of money as end of service benefits?

B. CURRENT STATE OF THE LAW ON THE ISSUE

200. The 1992 Constitution provides for the payment of gratuity to members of Parliament who serve for four years. The gratuity popularly called '*ex gratia'* awards is determined by the President acting in consultation with a Committee established for the purpose.[203]

C. SUBMISSIONS RECEIVED

201. A lot of submissions argued that the current provisions on conditions of service for members of Parliament should be maintained as the work of Parliament is arduous and the current conditions of service are just sufficient to motivate members of Parliament. It was further argued that the existing arrangement serves as a check on the Legislature in determining its own conditions of service.

202. Other submissions proposed that the conditions of service for the Speaker, Deputy Speakers, Clerk, and members of Parliament should be determined by an independent committee that is likely to check the abuse of state resources in this regard.

203. The Fair Wages and Salaries Commission (FWSC) was also proposed as a reputable institution that can properly determine the conditions of service for the legislative office holders. Other submissions argue that these office holders should fall under the Single Spine Salary Structure because it is very unfair to treat them differently from other public officers. The rest of the submissions called for the scrapping of the payment of *ex gratia* awards to the Speaker, Deputy Speakers, Clerk and Members of Parliament on the basis that the funds could be channelled into other areas of the economy in order to promote development.

D. FINDINGS AND OBSERVATIONS

204. The Commission observes that the overwhelming majority of Ghanaians have concerns about the payment of *ex gratia* awards to some categories of public officers and want it to be scrapped. There is the widespread perception that the resources of the nation are not being used judiciously for the benefit of Ghanaians in general and these payments are cited as an example of this.

205. The Commission observes that the report submitted to it by the Constitution Review Committee of Parliament argued for the retention of the current state of the law. In their view, it is routine to make such payments at the end of every public service engagement.

[203] Article 114 of the 1992 Constitution of the Republic of Ghana.

Again experience has shown that when members of Parliament leave Parliament they find it difficult to secure other jobs, due to their political coloration particularly in the public service and it is important that members of Parliament are adequately compensated for this.

206. The Commission observes that the Committee of Experts for the 1969 Constitution recommended that the allowances of members of Parliament be determined by an independent body to be appointed by the President in consultation with the Council of State. The Committee recommended further that members of Parliament be paid gratuity instead of pension after a period of ten year's service in Parliament.[204]

207. The Commission observes from the practice of some countries that independent institutions have been set up to determine the conditions of service for public office holders. In Nigeria, for instance, there is the Revenue Mobilization, Allocation and Fiscal Commission that is constitutionally tasked to determine remuneration for political officers and legislators. South-Africa also has the Commission on Remuneration of Representatives that is in charge of recommending appropriate remuneration for legislators. The Constitution Review Commission of Zambia recommended in 2005 that an Independent Commission be set up for the same purpose.

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

208. The Commission recommends that an Independent Emoluments Commission be established under the Constitution to determine the conditions of service of all public officers, including Members of Parliament.

ISSUE FIFTEEN: IMMUNITY FROM SERVICE OF PROCESS AND ARREST

A. DIMENSIONS OF THE ISSUES

209. The key dimension of this issue is whether the Speaker, Deputy Speakers, Members and Clerk of Parliament should have any immunity from the service of court processes, and, if they should, to what extent?

B. CURRENT STATE OF THE LAW ON THE ISSUE

210. The current state of the law on is that civil and criminal processes coming from any court or place out of Parliament shall not be served on, or executed in relation to, the Speaker or

[204] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 441.

Member or Clerk to Parliament while he is on his way to, attending at, or returning from, any proceedings of Parliament.

C. SUBMISSIONS RECEIVED

211. In order to ensure that the work of Parliament is not disrupted and the dignity of the Speaker, Deputy Speakers, and Members of Parliament is protected, it was proposed that the current immunity provisions regarding the service of court processes be maintained.

212. Some submissions proposed to the contrary that the current provisions be reviewed so that they are served with court processes without any restrictions. It is argued that all Ghanaians are equal and some should not be treated differently. Parliamentarians are the law makers and should lead by example. The law should apply to them just as it applies to everybody else.

213. It was also proposed that the current immunity provision should be reviewed so that the Clerk and members of Parliament could be served through the Speaker of Parliament, and the Speaker and Deputy Speakers could be served through the Clerk of Parliament. This, it is argued, will serve as a balance between maintaining decorum and respect for parliamentarians, and ensuring a fair and free-flowing judicial process. This arrangement will prevent the evasion of service of court proceedings by Parliamentarians.

D. FINDINGS AND OBSERVATIONS

214. The Commission observes that there exist two main systems of parliamentary immunity: the Westminster model, which is sometimes known as "parliamentary non-accountability" and the French model, which is sometimes termed "parliamentary inviolability." The Westminster model protects only speech made by members of parliament whiles they are in the House of Parliament and does not protect MPs from criminal acts. The French model on the other hand extends the protection beyond speech. Its effect is that a member of parliament cannot be served with a civil or criminal process or arrested without first obtaining the authorization of parliament.[205]

215. The Commission further observes that serving a process (whether criminal or civil) or arresting a Member of Parliament within the precinct of Parliament without first obtaining the authorization of Parliament amounts to contempt even under the two models mentioned above. Also, the Commission observes that members of Parliament in most countries are generally exempt from jury service under the two models.

[205] Also, in Bangladesh, Liberia, Sierra Leone and Zimbabwe, amongst others, Parliament must first be informed through the Speaker of the arrest and conviction of a member of parliament.

216. The Commission further observes that the privileges, protections and immunities granted to members of Parliament, are not absolute, but are subject to limitations. The limitations may be *ratione temporis* (relating to the duration of sessions of parliament)[206] or *ratione materiae* (relating to the nature of the offence and acts). For example in Liberia and Norway, the privilege does not operate to cover offences such as treason or breach of peace. In Iraq and Rwanda the *flagrante delicto* rule applies so that a member of Parliament may be arrested without the consent of parliament if he is caught in the commission of a felony. In Argentina, the rule applies if the parliamentarian is caught while committing a crime punishable by death, among others. In Liberia, Sierra Leone and Norway inviolability is designed only to prevent the arrest of a Member of Parliament attending Parliament and on his way to and from parliament so as to ensure the paramount right of Parliament to the attendance and service of its members.

217. In India, MPs enjoy immunity from arrest while the legislative houses are in session. However, this is limited to civil causes and has not been applied to arrest on criminal charges or to detention under the Preventive Detention Act. The Indian courts have held that, Parliament, its members and committees do not enjoy any special status as compared to an ordinary citizen in respect of valid orders of detention.

218. The Commission observes that when this issue was considered by the National Constitution Review Conference, it was held that the present immunity provisions be maintained. A civil or criminal process coming from any court or place out of Parliament shall not be served on, or executed in relation to, the Speaker or Member or Clerk to Parliament while he is on his way to, attending at, or returning from, any proceedings of Parliament.

219. The Commission observes that the Committee of Experts Report for the 1969 Constitution justified the need for parliamentary immunity from arrest and the service of court processes by maintaining that such immunity ensures members of Parliament are not distracted through arrest and detention while they are travelling to and from Parliament or while they are attending Parliament. The Committee noted that the immunity should not be made to cover serious offences such as treason, sedition and felony, or to apply to offences in *flagrante delicto*. The Committee proposed that civil or criminal processes issuing from the courts or place out of Parliament could be served on Members with the prior permission of the Speaker.

220. The Commission recognises that this immunity from the service of may be necessary to prevent the use of such processes to impede the work of Parliament. However, this could

[206] Article 62(6) of the 2007 Interim Constitution of Nepal: "No member of Parliament shall be arrested between the date of issuance of the summons for a session and the date on which that session closes: Provided that nothing in this clause shall be deemed to prevent the arrest under any law of any member on a criminal charge. If any member is so arrested, the official making such arrest shall forthwith inform the person chairing the concerned House."

contribute to a culture of impunity as it has in recent times been exploited by Members of Parliament to evade justice. An erroneous perception that members of Parliament cannot be arrested has been encouraged and is gradually gaining ground.

221. The Commission finds it untenable to argue that the mere service of Court or other places on members of Parliament will unduly interfere in the work of Parliament. This is because the law provides a reasonable time lag between when a process is served and when action is required on it.

222. The Commission observes that, the statement by the Arusha Resolution on Parliamentary Immunity of the Global Organisation of Parliamentarians against Corruption suggested that Parliamentary Immunity can only be effected in an environment in which there is respect for the rule of Law and Human Rights. The Arusha Resolution urges participating states to legislate to provide clear, balanced, transparent and enforceable procedures in waiving parliamentary immunities in cases of criminal acts or ethical violations. The Resolution declared that Parliaments should adopt functional systems of parliamentary immunity that provide protection from unwarranted and politically motivated prosecutions but also ensures that parliamentarians are held accountable before the law.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

223. The Commission recommends that Article 117 be amended to allow civil or criminal processes coming from outside of Parliament, to be served on the Speaker, Deputy Speakers or Members of Parliament through the Clerk of Parliament and on the Clerk through any Deputy Clerk of Parliament when Parliament is in session. Where Parliament is not in session, Members of Parliament may be served in the ordinary way.

224. The Commission recommends further that processes should be served on all other employees of Parliament personally.

ISSUE SIXTEEN: RESOURCES FOR PARLIAMENT

A. DIMENSIONS OF THE ISSUE

225. The main dimension of this issue is how Parliament can be provided with human, material and financial resources, so as to enable it discharge effectively its constitutional role.

B. CURRENT STATE OF THE LAW ON THE ISSUE

226. The financial resources of Parliament are drawn mainly from on the national annual budget and support from donors. Under the current constitutional arrangement, the power of the purse which is vested in Parliament is subject to considerable limitations. Notable among such limitations, is the inability of Parliament to proceed upon a bill introduced by, or on behalf of, the President which makes provision for the imposition of a charge on the Consolidated Fund or other public funds of Ghana or the alteration of any such charge otherwise by reduction.[207] The budgetary allocations to all public institutions including Parliament are made subject to the item-by-item control of the Ministry of Finance and Economic Planning, and Parliament like every other public institution has to appear occasionally before the Executive to request for the release of funds already allocated to it in the budget.

227. Under the Parliamentary Service Act, as amended, the administrative and operational expenses of the Parliamentary Service are charged on the Consolidated Fund.[208]

C. SUBMISSIONS RECEIVED

228. It has generally been proposed to the Commission that the Constitution provides expressly for the strengthening of Parliament so that Parliament can play its legislative, oversight and representational roles effectively as an arm of government. If Parliament is adequately resourced, more competent and qualified persons will aspire to become members of Parliament. This will enrich the legislature and enhance good governance and national development.

D. FINDINGS AND OBSERVATIONS

229. The Commission observes that oversight functions of Parliament which include subjecting executive plans, policies and actions to public debate, as well as vetting and approving key government ministers and other key national appointees is one of its most important functions and enables legislatures to monitor the activities of the government, and check the quality of governance. It is then proper for Parliament, which is a representation of the sovereign will of the nation to be well resourced so as to enable it re-affirm its role as the guardian of the nation's democracy and contribute to the elements of effective governance: state capability, accountability and responsiveness.

[207] Article 108 of the 1992 Constitution of the Republic of Ghana.
[208] Section 15 of the Parliamentary Service Act, 1993 (Act 460).

230. The Commission finds that when Parliament is under-resourced, rather than enhancing state capability, accountability and responsiveness, it is little more than a "rubber-stamp" Legislature approving the Executive's plans and doing little to deliver good governance or poverty reduction.

231. The Commission observes that, in its African Governance Report for 2005, the United Nations Economic Commission for Africa (UNECA) found that: "In terms of enacting laws, debating national issues, checking the activities of the government and in general promoting the welfare of the people, these duties and obligations are rarely performed with efficiency and effectiveness in many African parliaments."[209]

232. The Commission observes that the position of Parliament vis-à-vis the Executive is perceived generally as being traditionally weak. While the Constitution strives to give Parliament oversight and budgetary powers, such powers have not been exercised at all or exercised only to a limited extent. This, the Commission finds, is rooted in a political culture that tends to strengthen the Executive, and gives Parliament very limited capacity in terms of institutional resources and the resources at the disposal of members.

233. The Commission observes that parliamentary committee systems have emerged in recent years as vibrant and central institutions of democratic Parliaments and serve as the focal point for legislation and oversight. The Commission finds that, not only does the 1992 Constitution enable such a mechanism; it goes as far as according the committees the powers, rights and privileges of the High Court in some delimited matters. Such a provision, in the Commission's view is salutary and really seeks to empower Parliament. Effective committees have developed a degree of expertise in given policy areas, often through continuing involvement and stable memberships. They are both able to represent diversity and reconcile enough differences to sustain recommendations for action. Furthermore, they provide a means for a legislative body to consider a wide range of topics in-depth, and to identify politically and technically feasible alternatives. This expertise is both recognised and valued by the other organs of government. However, these Committees remain underfunded and incapable of realizing their full potential.

234. The Commissions observes that providing enough resources to Parliament to enable functioning Committees will ensure that Parliament is able to serve as a counter weight to Executive dominance, and serve as a means of generally strengthening Parliament.

[209] U.N. Economic Commission for Africa, African Governance Report, 2005, p.127.

235. The Commission observes that the Constitution Review Committee of Parliament proposed that the budget of Parliament, like that of the Judiciary, should be a charge on the Consolidated Fund not subject to control by the Executive or Parliament itself.

236. The Commission observes that when this issue was considered by the National Constitution Review Conference, it was decided that heads of parliamentary committees should enjoy conditions of service corresponding to that of Ministers of State.

237. The Commission finds that weaknesses of Parliament as have been highlighted are mostly due to the inability of Parliament to assert its political authority and autonomy. The Commission finds that no constitutional amendment to provide more resources to Parliament can be fruitful if Parliament continues to grovel at the feet of the Executive in exchange for political favours.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

238. The Commission does not recommend any constitutional reform on the issue.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

239. The Commission recommends that Chairpersons and Ranking Members of Parliamentary Committees have the same conditions of service as Ministers and Deputy Ministers of State.

240. The Commission further recommends that Parliament be provided with facilities such as offices and research resources.

ISSUE SEVENTEEN: SETTLEMENT OF PARLIAMENTARY ELECTION DISPUTES

A. DIMENSIONS OF THE ISSUE

241. There are two main dimensions to this issue: Within what timeframe should parliamentary electoral disputes be disposed of by the Courts of law and should the Court of Appeal be the final Court in electoral matters?

B. CURRENT STATE OF THE LAW ON THE ISSUE

242. The current state of the law is that the High Court has jurisdiction to hear and determine any question whether a person has been validly elected as a Member of Parliament or the seat of

a member has become vacant; or whether a person has been validly elected as a Speaker of Parliament or, having been so elected, has vacated the office of Speaker.

243. With regard to timing and the need for expediency in the disposition of parliamentary electoral disputes, section 18(1) of the Representation of the People Law (PNDCL 284) provides for an election petition to be presented within 21 days after the date of publication in the Gazette of the results of the election to which it relates.

244. Currently, the Constitution grants jurisdiction to the High Court to determine parliamentary electoral disputes, appealable to the Court of Appeal.[210] The Supreme Court has determined that an appeal to the Court of Appeal is final.

245. The Supreme Court has equally held that such deadlines set by the Representation of the People Law are not subject to any extension and that a petition filed before the publication of the electoral results and which did not allege any corrupt practices was premature and could not be upheld.[211]

C. SUBMISSIONS RECEIVED

246. The Commission received various submissions on the present issue as follows:
    a. Maintain the current state of the law as determined by the Supreme Court to make the Court of Appeal the final appellate court in parliamentary election disputes. In support of this position, many of the submissions indicated that this would encourage the speedy disposal of such cases, considering the overriding interest of the state which requires that the work of Parliament be not disrupted. Also, this would help reduce the workload of the Supreme Court and prevent an inundation of the Supreme Court with politically sensitive cases.
    b. Other submissions proposed that the Supreme Court should have a final appellate jurisdiction in all electoral disputes. The various reasons provided in support of this position were that:
        i. It will forestall the perception of discrimination as the current position unfairly limits the avenues of redress available to a plaintiff in a category of cases.
        ii. It will give full effect to Article 33(3) in the Fundamental Human Rights chapter which states that "a person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court."

[210] Article 99 of the 1992 Constitution of the Republic of Ghana.
[211] According to the Court, if the basis of an election petition was that of corrupt practice in which money or other award was alleged to have been paid, then the petition should be presented within 21 days after the date of the alleged payment. In all other situations, the election petition was to be filed within 21 days after the Gazette publication of the results of the disputed election.

iii. The current position of the law, as determined by a ruling of the Supreme Court, creates the impression that issues relating to Parliament are not so important as to merit an appeal to the highest court of the land.
iv. Allowing the Supreme Court to adjudicate on such matters will bring finality to the judicial decisions reached in such cases.
v. The Supreme Court being the final appellate Court should not have its jurisdiction whittled down under any circumstance.

c. It was also proposed that electoral disputes should be disposed of within 6 months after the elections. It is contended that electoral disputes are sensitive matters which can breed tension. The earlier they are settled, the better. Settling election disputes within 6 months will ensure that only persons who are legally qualified as MPs are in Parliament to represent Ghanaians.
d. There were also submissions advocating the institution of an Electoral Court with exclusive jurisdiction over election-related disputes. This arrangement, would allow such disputes to be considered by specialist Judges and, considering the sensitive nature of electoral disputes, it would facilitate the expeditious dispensation of justice in such matters.

D. FINDINGS AND OBSERVATIONS

247. The Commission observes that though the need to ensure the expeditious disposition of electoral disputes is recognised globally, the measures adopted to implement this requirement vary from jurisdiction to jurisdiction. While some jurisdictions give premium to the reform of administrative procedures during election periods so as to ensure the swift disposal of such cases, others enact legislation prescribing strict timelines to be observed in the disposition of such disputes. In some countries an electoral complaint adjudication mechanism, separate from the ordinary courts and procedures is put in place to handle electoral complaints.
    a. In Uganda, for instance, the Constitution enjoins the courts to suspend any other matter on their roll when seized with an electoral dispute to ensure the expeditious disposition of such disputes.
    b. In countries such as the United Kingdom, Germany, France and Italy, election related disputes and complaints are resolved through ordinary administrative and judicial bodies operating through special procedures set forth in election and administrative laws.
    c. In many other countries, notably the more recently developed democracies of Eastern and Central Europe, election complaints are resolved through shared jurisdiction between ordinary courts and permanent or temporary election commissions. In such countries, the adjudication process – often but not always – permits complaints and disputes arising from elections to be directed either to election commissions or to local courts.

d. Countries such as Mexico, Brazil and Nigeria, favour an election dispute adjudication system that is distinct from the traditional courts. In Mexico for instance, the Federal Electoral Tribunal oversees the entire election process, resolves disputes, and certifies the validity of election results. It is composed of a permanent 7-member Superior Chamber, and 5 temporary Regional Chambers.
e. In the aftermath of the 2008 elections in Pakistan, an Election Tribunal was established for disputes arising after election results had been announced.
f. In Greece and Indonesia, high state courts with other significant areas of jurisdiction are involved in the electoral process to decide disputed vote outcomes.[212]

248. The Commission, while acknowledging that it is difficult to balance the seriousness of election-related grievances with the pressure for election authorities and courts to act quickly, finds that reasonable deadlines and timetables for adjudicative procedures must be established within the law to make available a fair but speedy process.

249. The Commission finds that civic education can play an important role in improving the complaint process and encouraging citizens, civil society and electoral participants to do a better job of focusing their complaints.

250. The Commission observes that when this issue was considered, the National Constitution Review Conference concluded that there is an urgent need to fix a time frame for disposing of parliamentary electoral disputes. The timeframe for disposing of electoral disputes should be provided for by the Rules of Court Committee.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

251. The Commission recommends that there should be a specific constitutional provision making the Court of Appeal the final appellate court in parliamentary electoral disputes.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

252. The Commission recommends that deadlines for filing electoral complaints as set out in the current legislation should be repackaged to include short timeframes for the adjudication and resolution of such disputes within 6 months of filing them.

253. The Rules of Court Committee must, as mandated by the Constitution, urgently institute detailed rules, to include stringent timelines, for the adjudication of electoral disputes arising from public elections.[213]

[212] Robert Dahl, Legal Policy Advisor, International Foundation for Electoral Systems (IFES). Address at General Assembly of the Association of Asian Election Authorities: Electoral Complaint Adjudication and Dispute Resolution: Key Issues and Guiding Principles (July 22, 2008), 117.56.211.225/download/d_6/IFES.doc.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

254. The Commission recommends that the Chief Justice, in the long term, acting under Article 139(3) of the Constitution which empowers her to create divisions of the High Court, should create a division of the High Court to handle electoral disputes as an appropriate and productive measure for the effective and speedy resolution of electoral disputes. Such an electoral court could be an *ad hoc* division of the High Court, instituted during all election periods to ensure the effective and speedy adjudication of election-related disputes.

ISSUE EIGHTEEN: TIMING OF PARLIAMENTARY ELECTIONS

A. DIMENSIONS OF THE ISSUE

255. The dimensions of the issue are as follows:
    a. Should parliamentary elections be held concurrently with presidential elections?
    b. Should the time for holding parliamentary elections be earlier than the current time?

B. CURRENT STATE OF THE LAW ON THE ISSUE

256. The period for holding the parliamentary elections is specified in the non-entrenched provision of Article 112(4) of the Constitution. By its operation, parliamentary elections are to be held within 30 days before the expiration of the 4 year life span of a sitting Parliament. By implication, parliamentary elections can be held any time within 30 days of 7th January, the date for the expiration of Parliaments under the 1992 Constitution and the installation of a new one.

257. By the constitutional arrangement, presidential and parliamentary elections need not necessarily be held on the same day, even though that is possible and may be desirable. The power to fix the actual date for national elections is vested in the Electoral Commission.[214] Beginning with the 1996 elections, the Electoral Commission decided to hold the presidential and parliamentary elections together on the same day. It was so decided to save cost and to guard against the bandwagon effect – the tendency for people to vote on the winning side. The only date that made it possible for the two elections to be held together and satisfy the constitutional provisions on both elections was 7th December, 1996. Since then, the election date of 7th December of the election year has evolved as a constitutional convention.

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[213] Article 64(3) of the 1992 Constitution of the Republic of Ghana provides that "The Rules of Court Committee shall, by constitutional instrument make rules of court for the practice and procedure for petitions to the Supreme Court challenging the election of a President."; and Article 157(2) provides that "The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana.

[214] Article 51 of the Constitution of the 1992 Constitution of the Republic of Ghana.

C. SUBMISSIONS RECEIVED

258. There is a strong proposal for the current convention of holding parliamentary and presidential elections on the same day and on the 7th of December, to be maintained. Proponents of this argue that, holding the elections concurrently saves the nation resources as the same logistics will be employed for both elections. Again, with the current practice, politicians who are voted out of government will not have enough time to dispose of any evidence of wrongdoing which they might have engaged in and which could be used by a successive government to call past office holders to account.

259. There is another proposal advocating that elections be held two months before the 7th of December. The rationale for this proposal is that, holding elections two months before handing over will allow ample time for transitional arrangements, and for the settlement of electoral disputes before the commencement of a parliamentary session.

260. There is yet another proposal calling for parliamentary elections to be held three months prior to handing over for the same reason of giving ample time for transitional processes and the settlement of election disputes before the parliamentary session begins.

261. Few submissions advocated the holding of elections four months prior to the beginning of the parliamentary session. The reasons of ample time for transition and cost saving are again advanced for this position.

D. FINDINGS AND OBSERVATIONS

262. At the National Constitution Review Conference, it was concluded that there is no problem with holding both parliamentary and presidential elections on the same day. This arrangement saves cost. The conference relying on experience, intimated that it is useful that parliamentary and presidential elections are held concurrently. Holding one election before the other could lead to the situation in which the losing party might decide to boycott the other election if it felt that it had not been treated well in the preceding election. This is what happened in the 1992 elections, leading to a *de facto* one party Parliament.

263. It was agreed at the Conference that, it was desirable to shift the period for parliamentary elections backwards so that the general elections could be held in November. This it was stressed would give more time for transition.

264. The Commission observes that it is very common around the world to have just one Election Day for both presidential elections and elections of members of various legislatures. For instance:

a. In the United States, for instance, the election dates for the presidency[215] and Congressional elections[216] are set uniformly for all States[217] to coincide on the Tuesday after the first Monday in November. By this arrangement, elections for the US Congress can be conducted from 2nd November through to 8th November. This Federal Election Day is specified as a holiday by some States including New York and New Jersey, while for others like California, workers are simply allowed to take time off work to exercise their franchise without the loss of pay.
b. Similarly in Kenya, the general election of members of Parliament is held on the second Tuesday in August in every fifth year.[218] The election of the President of Kenya is held on the same day as the general election of Members of Parliament.[219]

E. RECOMMENDATIONS

RECOMMENDATION FOR CONSTITUTIONAL CHANGES

265. The Commission recommends that the period for conducting parliamentary elections should be coterminous with the period for presidential elections and not later than 60 days to the installation of a new President and Parliament.

ISSUE NINETEEN: COMPOSITION OF THE PARLIAMENTARY SERVICE BOARD

A. DIMENSIONS OF THE ISSUE

266. The main dimension of this issue is what the composition of the Parliamentary Service Board should be.

B. CURRENT STATE OF THE LAW ON THE ISSUE

267. The Constitution establishes a Parliamentary Service Board, consisting of the Speaker as Chairman, 4 other members appointed by the Speaker acting with the advice of a committee of Parliament, and the Clerk of Parliament.[220] In practice under the Fourth Republican

[215] 3 U.S.C.A. § 1: "The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President."
[216] The date for the election of United States representatives is established for all states by 2 USCS 7, which sets such date as the Tuesday after the first Monday in November of every even-numbered year. The same rule is set for the election of United States senators by 2 USCS 1, which provides that senators are to be elected at the same election that representatives are chosen. US Supreme Court Case of *Foster* v. *Love*, 522 U.S. 67.
[217] U.S. CONST. Art. II § 1, cl. 4 which provides that "Congress may determine the time of choosing the Electors, and the day on which they shall give their vote; which day shall be the same throughout the United States." *George W. Bush and Richard Cheney* v. *Albert Gore, Jr. and Joseph Lieberman*, 531 U.S. 98 (2000).
[218] Article 101(1) of the 2010 Constitution of Kenya.
[219] Article 136(2)(a) of the 2010 Constitution of Kenya.
[220] Article 124 of the 1992 Constitution; Section 5 of the Parliamentary Service Act, 1993, (Act 460).

Constitution, the 4 persons appointed to the Board by the Speaker are the Majority and Minority Leaders in Parliament, a former Member of Parliament who was representing the party currently in the majority in Parliament and a sitting female Member of Parliament chosen from the party with the majority in Parliament.

C. SUBMISSIONS RECEIVED

268. The main submission made in relation to the Parliamentary Service is a call for the re-composition of the Parliamentary Service Board to make it more functional.

D. FINDINGS AND OBSERVATIONS

269. The Commission finds that the functions of the Parliamentary Service Board are:
    a. to provide support services to Parliament and the committees or agencies of Parliament for the purpose of ensuring the full and effective exercise of the powers of Parliament, and
    b. to provide any other services that Parliament may by resolution determine or that are prescribed by Regulations made under the Parliamentary Service Act.

270. The Commission observes that as currently constituted, the Parliamentary Service Board does not benefit from the wisdom of critical stakeholding outside of Parliament.

271. The Commission finds that as a measure of transparency, the Parliamentary Service Board needs to be reconstituted to include members other than the leadership of Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

272. The Commission recommends that Article 124 be changed to make the Parliamentary Service Board less incestuous and more transparent.

273. The Commission recommends the inclusion of the leader of the majority, leader of the minority, organised labour, the Public Services Commission, and Civil Society Organisations, on the Parliamentary Service Board.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

274. The Commission recommends that section 5 of the Parliamentary Service Act on the composition of the Parliamentary Service Board, be amended to include the leader of the majority in Parliament, the leader of the minority in Parliament, a representative of organised labour, a representative of the Public Services Commission, and a representative of Civil Society Organisations.

CHAPTER SIX – THE JUDICIARY

6.1. INTRODUCTION

1. During the constitution review process, there was an overwhelming call made by Ghanaians to secure the institutional integrity and independence of the Judiciary.

2. The essence of an independent Judiciary has not only been recognised but also endorsed by the United Nations General Assembly by its adoption of the Basic Principles on the Independence of the Judiciary at its Seventh Congress in 1985.[221] By the terms of these Principles, each member state is expected to guarantee the independence of its Judiciary in its constitution or the laws of the country.

3. The importance of the Judiciary to Ghana's democracy cannot be underestimated as it is undeniably recognised as critical to the nation's democracy. It is thus not surprising that the 1992 Constitution equips the Judiciary to interpret and enforce the law. The right to bring complaints to and be heard by a competent and impartial adjudicatory body is without doubt the bedrock to the rule of law and democracy. So, too, are the facilities that ensure access to justice and the effective enforcement of judgments. This notion underlines the need for the independence and impartiality of institutions at the forefront of the administration of justice which must be insulated from any external influence.

4. In Ghana, the distinct identity of the Judiciary as a branch of government predates the 1992 Constitution and has been acknowledged in all previous Constitutions of Ghana since independence. It is worth noting, however, that the Judiciary under the 1960 Constitution came, in a lot of ways, to be stifled by a dominant Executive and this was one of the issues that all the post-Nkrumah Constitutions have sought to guard against. In this regard, the 1992 Constitution imposes a duty on the judicial system to provide the necessary mechanisms to deliver and assure justice. The elaboration of fundamental human rights and Directive Principles of State Policy (DPSP) and the constitutional role of the courts to protect these further show the commitment of the framers of the Constitution to making the judicial system an effective organ of State in which people can place their trust and hope for justice.

5. Despite constitutional guarantees, decades of political instability experienced since independence and intermittent periods of economic downturn have disrupted the effectiveness of the judicial system. The system has suffered significantly from neglect,

[221] Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 59 (1985).

inadequacies of resources and infrastructure, and the absence of creativity and innovation in meeting the increasing justice needs of the people of Ghana. There was also disregard for the rule of law as evidenced by civil inaction and inertia as well as military impunity.

6. It is against this unpleasant background that the courts of Ghana in this democratic era have sought to manage the increasing number of cases. This has been compounded by a politically polarised nation and the needs of a modern globalised world.

7. From the analysis of the submissions received by the Commission, a number of issues have been identified. The thrust of the issues was largely on the need to improve on the institutional integrity, efficiency and independence of the Judiciary. The issues addressed include:
   a. delays in the delivery of Justice;
   b. corruption in the Judiciary;
   c. whether or not the automatic right to appeal to the Supreme Court should be scrapped;
   d. whether or not there should be a ceiling for the number of Justices that may be appointed to the Supreme Court;
   e. whether disputes relating to the validity of parliamentary elections should terminate at the Court of Appeal or should be appealable to the Supreme Court;
   f. whether or not a *prima facie* case must be established before a petition for the removal of the Chief Justice is referred by the President to a committee for investigation;
   g. whether or not the Chief Justice's administrative function of empanelling the Supreme Court needs to be reviewed;
   h. whether or not a review panel of the Supreme Court should be the same as the panel that first heard the case;
   i. whether or not the Regional Tribunals should be expunged from the court structure of Ghana; and
   j. whether or not the financial autonomy granted the Judiciary in Article 127 is adequate to insulate it from executive control.

8. All these issues will be considered in detail and in the light of the key historical events that have shaped the judicial institution as it now stands.

6.2. HISTORICAL BACKGROUND

9. The political history of Ghana cannot be discussed without the role of the Judiciary. The Judiciary has played a significant part in the political organisation and governance of the nation since its inception. While it is undeniable that the judicial system and procedures are a part of the colonial legacy, the evolution of the Judiciary is also effectively clothed in the evolution of Ghana's political history. At various significant times, the Judiciary has both

added to and subtracted from the effort to build, nurture and sustain a free and prosperous nation across its various socio-political and even economic directions and oscillations.

10. During the pre-colonial era, judicial power resided in the chiefs and elders of the communities. Chiefs presided over cases, mostly in council, while elders and heads of families sometimes served as advocates or 'lawyers'. The British Settlement Act of 1843 which formalised British rule in the Gold Coast also authorised the making of Orders-in-Council for the adoption of formal laws.

11. The Bond of 1844 signed between the colonial government and the local Fanti chiefs was a document that acknowledged the power and jurisdiction of the Crown, which had been *de facto* exercised in the territories adjacent to the British forts and settlements. It was a declaration to the effect that the first object of the law was the protection of individuals and property and that human sacrifice, panyarring and other "barbarous" customs were abominations and contrary to law. It was further agreed that serious crimes should be tried by the judicial officers of the Crown sitting with the chiefs, thereby moulding the customs of the country to align, to some degree, with the general principles of British law.

12. Subsequently, in 1844, an Order-in-Council was made to enable judicial authorities in the Gold Coast to observe local customs that were compatible with the principles of the law of England when exercising jurisdiction among the indigenous inhabitants.

13. In 1853, a Supreme Court was established for the forts and settlements under the British realm. It had both criminal and civil jurisdiction and was presided over by a Chief Justice. The Supreme Court was however abolished in 1866 and replaced by "the Court of Civil and Criminal Justice" presided over by a Chief Magistrate.

14. In 1876, the Gold Coast Supreme Court was re-established under the Supreme (High) Court Ordinance to expand the jurisdiction of the British courts in the Gold Coast. The Court was composed of the Chief Justice and not more than four puisne Judges. The full court comprising the Chief Justice and one or two puisne Judges constituted a Court of Appeal with sittings in Accra and Lagos.[222] A Divisional Court of the Supreme Court was required to sit in the Central, Eastern and Western Provinces into which the area of jurisdiction was divided.[223] The Ordinance further provided that District Commissioners should be ex officio Commissioners of the Supreme Court exercising the powers of a Judge of the Supreme Court

[222] Originally governed as a Crown Colony, Lagos was part of the United.Kingdom's West African Settlements from 1866-1874, when it became a part of the Gold Coast Colony.
[223] FRANCIS BENNION, BENNION'S CONSTITUTIONAL LAW OF GHANA 199 (London, Butterworths African Law Series, 1962).

within their own districts. Provisions for appeals from the Supreme Court to the Privy Council were contained in an Order–in-Council made in 1877.

15. Under Governor Guggisberg's reform of the courts, the West Africa Court of Appeal (WACA) was established in 1928 and appeals from the Gold Coast Supreme Court were heard by the WACA in Sierra Leone, although the Privy Council still retained final judicial authority.

16. Resulting from the reports of the Watson Commission and the Coussey Committee, the 1954 (Constitution) Order-in-Council, was promulgated and for the first time, detailed provisions on the Judiciary were stated in the Constitution. There were provisions for the establishment of a Judicial Service Commission comprising the Chief Justice, two puisne Judges, the Attorney-General, and the Chairman of the Public Services Commission. The Chief Justice was to be appointed upon the advice of the Judicial Service Commission. Justices of the Supreme Court could only be removed for stated misbehaviour or infirmity and upon a two-thirds majority vote of the People's Assembly. Interference with the Judiciary was punishable by imprisonment.[224]

17. On attaining independence, Ghana adopted a new Constitution[225] pursuant to which the Court (Amendment) Ordinance of 1957[226] divided the Supreme Court into the High Court of Justice and the Court of Appeal with effect from 6th March, 1957. Appeals to the WACA were abolished, but the jurisdiction of the Privy Council continued. Under the 1957 Constitution, the Chief Justice was appointed by the Governor-General upon the advice of the Prime Minister.[227] Other Justices were appointed by the Governor-General on the advice of the Judicial Service Commission. The procedure for removing Justices was the same as was stipulated in the 1954 Constitution. It needs to be noted that the 1957 Constitution did not define the composition of the Supreme Court, and did not provide for the determination of the number of Justices necessary to form a quorum.

18. The Constitution of the First Republic (1960) vested the President with the power to appoint the members of the Judiciary. The Constitution provided for a Supreme Court and a High Court, which were the Superior courts of Ghana. Judicial power was conferred on these Superior courts and on such lower courts as provided for by law.[228] Article 40 of the Constitution created the lower courts consisting of the Circuit, District, Juvenile and Local

[224] FRANCIS BENNION, BENNION'S CONSTITUTIONAL LAW OF GHANA 199 (London, Butterworths African Law Series, 1962).
[225] The 1957 Ghana (Constitution) Order-in-Council.
[226] Court (Amendment) Ordinance,1957 (No.17 S.2).
[227] Section 54(1) of the 1957 Ghana (Constitution) Order-in-Council.
[228] Article 41 of the 1960 Constitution of the Republic of Ghana.

Courts. Article 42(1) declared the Supreme Court to be the final Court of Appeal, abolishing thereby, the appellate jurisdiction of the Judicial Committee of the Privy Council.

19. The Judges of the superior courts were appointed by the President.[229] They could not be removed from office "except by the President in pursuance of a resolution of the National Assembly supported by the votes of not less than two-thirds of the members of Parliament and passed on the grounds of stated misbehaviour or infirmity of body or mind."[230] The Constitution provided that the appointment of a Judge as Chief Justice could at any time be revoked by the President by instrument under the Presidential Seal.[231] A Chief Justice whose position of Chief Justice was revoked did not by virtue of such revocation lose her place as Justice of the Supreme Court. It is worthy to note that it was under the 1960 Constitution that President Kwame Nkrumah revoked the appointment of Chief Justice Arku Korsah.

20. By a proclamation dated 26th February, 1966, the 1960 Constitution was suspended and the National Liberation Council was established with powers to govern the country. Decrees replaced Acts but the ordinary laws in the country continued in operation as well as the public services and other institutions. The Courts Decree 1966 (NLCD 84) provided, among others, for a Superior Court of Judicature consisting of the Court of Appeal and the High Court as well as the Supreme Court. The Decree also established Juvenile Courts.

21. The 1969 Second Republican Constitution re-established the independence of the Judiciary, insulating it from political and Executive interference, and the judicial power of Ghana was vested in the Judiciary headed by the Chief Justice. Article 102(4) also provided for the establishment of traditional courts and other lower courts by Parliament. Only lawyers of not less than 15 years at the Bar were eligible to be appointed to the Supreme Court. Also only lawyers of not less than 12 years standing at the Bar were appointed to the Court of Appeal and lawyers of not less than 10 years appointed to the High Court of Justice.

22. In 1972, the National Redemption Council (NRC) suspended the 1969 Constitution, but maintained the court structure as it existed. During the Supreme Military Council (SMC) I and II regimes, between 1975 and 1979, the Supreme Court was abolished and the Full Bench of the Court of Appeal became the highest court of the land. This structure remained during the reign of the Armed Forces Revolutionary Council (AFRC) between June 1979 and September 1979.

23. With Ghana's return to constitutional rule in 1979, the new Constitution re-established the Judiciary as it existed under the 1969 Constitution, although with slight modifications. For

[229] Article 45(1) of the 1960 Constitution of the Republic of Ghana.
[230] Article 45(3) of the 1960 Constitution of the Republic of Ghana.
[231] Article 44(3) of the 1960 Constitution of the Republic of Ghana.

instance, the 1979 Constitution, unlike the 1969 Constitution,[232] did not enjoin the Supreme Court to sit in Accra. Also, the Court of Appeal under the 1979 Constitution was to be presided "over by the most senior justice of the Court of Appeal constituting the Court."[233] Under the 1969 Constitution, the Court of Appeal was presided over "by such justice of the Supreme Court or of the Court of Appeal as the Chief Justice may appoint as presiding judge."[234] The 1979 Constitution, as opposed to the 1969 Constitution, allowed the empanelling of Justices of the High Court and the Court of Appeal as additional Justices during the determination of cases by the Supreme Court.[235] Notably, however, while under the 1969 Constitution,[236] the puisne Justices of the Supreme Court were appointed by the President acting in accordance with the advice of the Chief Justice, under the 1979 Constitution such appointments were made by the President in accordance with the advice of the Judicial Council."[237]

24. From 1981 to 1993, the military government of the Provisional National Defence Council (PNDC) maintained the court structure as existed under the 1979 Constitution. The PNDC government, however, made fundamental changes in the court system with the introduction of the Public Tribunals in 1982.[238] The Public Tribunals were established as parallel courts to the traditional courts to dispense speedy justice by reducing the time for trials.

6.3. THE JUDICIARY UNDER THE 1992 CONSTITUTION

25. The 1992 Constitution came into force on the 7th of January, 1993. The independence of the Judiciary is enshrined in Article 125(1) of the Ghanaian Constitution which states that justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to the Constitution. Article 127(1) ensures that the Judiciary is not subject to the control or direction of any person or authority in the exercise of judicial power in terms of judicial function, administrative responsibilities and financial administration. Further, it is widely accepted all over the world that granting an external institution power over the finances of the Judiciary could be detrimental to the institution's integrity and compromise its independence. Article 179 of the Constitution as well gives the Judiciary autonomy in the preparation of its annual budget. In addition, to provide the judges with financial security, the salaries and emoluments of the judges are charged to the Consolidated Fund, and as enshrined in the Constitution.

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[232] Article 103(4) of the 1969 Constitution of the Republic of Ghana.
[233] Article 121(4)(c) of the 1979 Constitution of the Republic of Ghana.
[234] Article 109(4)(c) of the 1969 Constitution of the Republic of Ghana.
[235] Article 121(1)(c) of the 1979 Constitution of the Republic of Ghana.
[236] Article 115(2) of the 1969 Constitution of the Republic of Ghana.
[237] Article 127(1) of the 1969 Constitution of the Republic of Ghana.
[238] Public Tribunals Law, 1982 (PNDCL 24); Public Tribunals law, 1984 (PNDCL 78); Public Tribunals (Amendment) Law, 1985 (PNDCL 108); and the Public Tribunals (Amendment) Law, 1989 (PNDCL 213).

26. Indeed, the extent to which the Legislature and Executive can influence the Judiciary has been delimited in Article 127(2) of the 1992 Constitution which provides that "neither the President nor Parliament nor any person whosoever shall interfere with judges and judicial officers or other persons exercising judicial power in the exercise of their judicial functions."

27. The 1992 Constitution established the Supreme Court, the Court of Appeal and the High Court as the Superior Courts of Judicature, abolished all the public tribunals, but re-enacted the Regional Tribunals, whose Chairpersons are equated to High Court Judges, as part of the Superior Courts of Judicature. The major innovation of the 1992 Constitution was that it provided for the first time in Ghana that presidential appointees to the Supreme Court were subject to parliamentary approval.

28. Pursuant to the Constitution, the Courts Act, 1993 (Act 459) established the lower courts of Ghana. These were originally stated to include the Circuit Courts, the Circuit Tribunals, and the Community Tribunals. The Circuit Tribunals were vested with the entire criminal jurisdiction of the Circuit level. This meant that the Circuit Courts had only civil jurisdiction. The Courts Act was amended by the Courts (Amendment) Act, 1993 (Act464) which empowered the Circuit Court to have and exercise the jurisdiction of the Circuit Tribunals. The Courts Act also established the Community Tribunals to replace the District Courts Grades I and II. The subsequent amendment of the Courts Act in 2002 by the Courts (Amendment) Act (Act 620) abolished the Community and Circuit Tribunals and re-established the Circuit and the District Courts.

29. Currently, the structure of the courts of Ghana is as follows: Supreme Court, Court of Appeal, High Court and Regional Tribunals, forming the Superior Courts; the lower courts comprising the Circuit and District Courts and, such other courts as Parliament may establish such as the Juvenile Courts under the Juvenile Justice Act, 2003 (Act 653).

SUBTHEME ONE: ADMINISTRATION OF JUSTICE

ISSUE ONE: DELAYS IN JUSTICE DELIVERY

A. DIMENSIONS OF THE ISSUE

30. The thrust of the submissions received by the Commission on this issue centred on the need to address the delays associated with the determination of cases. Cases which should normally take a few months take years for their final disposal. Such delays result in huge costs and negate the accessibility of justice in real terms to the ordinary citizen.

B. CURRENT STATE OF THE LAW ON THE ISSUE

31. The main aim of the right to a fair trial, as safeguarded in Article 19 of the 1992 Constitution, is to encourage justice in the society by safeguarding the innocent from undue punishments. Article 19(1) of the Constitution, for example, states that "A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court." This is an entrenched provision of the Constitution.

32. The Courts Act[239] also encourages the disposal of cases within reasonable periods through recourse to Alternative Dispute Resolution (ADR) mechanisms. Section 73 of the Act extends this to criminal cases and provides that "a court with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of an offence not amounting to felony and not aggravated in degree, on payment of compensation or on any other terms approved by the court before which the case is tried, and may, during the pendency of the negotiations for a settlement, stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person."

C. SUBMISSIONS RECEIVED

33. The Commission received various submissions on the issue of delays in the administration of justice which focused on the following:
    a. That it was of primary importance to enact laws that will make a right to speedy trial a reality. According to the proponents of this position, the right to speedy trial is inconsistent with delays and the best way to remedy this is to institute a constitutional and legislative regime that defines a specific timeframe within which cases are to be disposed of. The proposed arrangement, it is argued, would considerably enhance Ghana's democratic credentials.
    b. There were also calls to institute an administrative mechanism that requires judges and magistrates to recuse themselves from a case if they cannot ensure its expeditious disposal. It was submitted that the delays in justice delivery could be eliminated by the institution of an administrative mechanism that requires a judge who adjourns a case over a maximum number of times, to recuse himself and have the case transferred to another judge. This mechanism would put judges and magistrates on their toes and could serve as a mirror of their performance.
    c. Some of the submissions made to the Commission also urged the introduction of an automatic right that accrues to suspects on remand to be released after the lapse of a specified period of time. It was argued that the regrettable practice of keeping suspects on remand for long and indefinite periods is out of tune with modern developments and infringes gravely on the rights of such persons.

[239] Section 73 of the Courts Act, 1993 (Act 459).

d. Finally, some of the submissions made to the Commission have urged the institution of a compulsory pre-trial ADR process at all levels of the trial. These alternative processes, it is argued, are typically less formal and adversarial and many use a problem-solving approach to help the parties reach agreement as well as increase access to justice for social groups that are not adequately or fairly served by the judicial system. The process will also reduce the cost and time for resolving disputes and complement the efforts of the regular courts.

D. FINDINGS AND OBSERVATIONS

34. The Commission observes that Article 19 guarantees the right to a fair trial within a reasonable time in both criminal and civil proceedings. The Constitution is thus not only concerned in the criminal being appropriately punished and the innocent being absolved from the inordinate ordeal of criminal proceedings but seeks equally to ensure that civil wrongs receive quick and effective redress.[240]

35. The Commission further observes that domestic and international human rights instruments recognise the fundamental right of everyone to due process of law, including the right to a quick, fair and public hearing by a competent and impartial tribunal established by law.

36. The Commission also observes that the global trend is to allow courts to determine how long a case may stay undecided. In this regard, the courts have the power to determine if the accused person's right to a trial within a reasonable time has been violated. In most of these jurisdictions the courts, though favouring a 'case by case approach', have identified and set some benchmarks as guides in arriving at such conclusions.
    a. The US Supreme Court[241] has set out a four-factor test for determining whether delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's right to a trial within a reasonable time. The balancing test as it is often referred to, requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay.
    b. The European Court of Human Rights has said that when assessing whether a length of time can be considered reasonable, the following factors should be taken into account: the complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant.[242]

[240] Article 19(13) of the 1992 Constitution of the Republic of Ghana provides that "An adjudicating authority for the determination of the existence of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial; and where proceedings for determination are instituted by a person before such an adjudicating authority, the case shall be given a fair hearing within a reasonable time."
[241] *Barker* v. *Wingo*, 407 U.S. 514 (1972).
[242] *Buchholz* v. *the Federal Republic of Germany*, Eur. Ct. H. R (May 6, 1981) http://www.echr.coe.int.

c. The Supreme Court of Canada has held that, for less serious cases tried in Provincial Courts, a time period of 8–10 months from arrest to trial is a reasonable time. For more serious cases where there is a preliminary hearing and trial in the Superior Court, an additional 6–8 months is reasonable.
d. Some countries have instituted legislation spelling out strict timelines on how long a case should be tried. One such example is the United States of America, which in 1974 enacted the Speedy Trial Act.[243] Unlike the balancing test created by the US Supreme Court to evaluate a claim of delay, the Speedy Trial Act establishes specific time limits between various stages of Federal criminal proceedings. The act requires Federal authorities to file an information or indictment within 30 days of a person's arrest. A prosecutor who knows that an accused is incarcerated at the time of indictment must take immediate steps to initiate prosecution. If a defendant enters a plea of not guilty, trial must commence within 70 days from the filing of the information or indictment or 70 days from the first appearance of the accused in court, whichever is later.
e. In the West African sub-region, Nigeria in its 1999 Constitution introduced strict and express provisions on what constitutes a reasonable trial time. The constitution of Nigeria states, "Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date." The Constitution defines "a reasonable time" as: in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.[244]

37. The Commission finds that while there is immense value in enshrining strict trial timelines in the Constitution as proof of the nation's commitment in stamping out delays in the delivery of justice, such reforms would only be cosmetic and pious declarations of intent and would have no impact on improving the administration of justice in Ghana if they are not supported by a comprehensive review of administrative procedures in the courts of law.

38. The Commission finds that the gravity of the problem of delays is exacerbated by the prevailing resource constraints faced by the courts and the law enforcement agencies, and notes that these financial, human and other institutional resource constraints make instituting

[243] 18 U.S.C.A. §§ 3161 et seq.
[244] Chapter IV, section 35(4) &(5) of the 1999 Constitution of the Federal Republic of Nigeria.

strict trial timelines by constitutional provision difficult to attain. In this regard, the Commission finds that the submission that a judge who cannot ensure a timely trial should recuse himself or herself will only exacerbate the problems of undue delays in both criminal and civil proceedings by increasing the workload of his colleagues.

39. The Commission observes however, that the Committee of Experts that developed Proposals for the 1992 Constitution of Ghana noted that "the inordinate delays in the disposal of cases, the prevalence of cumbersome procedures and the occasional lapses in public integrity cannot entirely be attributed to the failure of other governmental authorities to provide adequate resources and facilities. The judiciary itself should critically evaluate its own procedures and administrative practices to identify areas where it can initiate remedial action itself and then call upon other authorities to reinforce its endeavours with the necessary resources and facilities."[245]

40. The Commission finds that the constitutional mechanisms for the trial of offences within a reasonable time are adequate. Therefore, any reform must be aimed at actualising those provisions in legislation and administrative arrangements as well as long term institutional improvements.

41. The Commission finds that it would be wrong to consider the issue of the pendency of cases or the inordinate delay in the disposal of cases as resulting uniquely from incessant adjournments. The right to a fair and speedy trial encompasses all the stages of justice delivery including investigations, trial, sentencing, appeal processes and any other procedures prescribed under the legal framework. Any reformatory actions aimed at ensuring fair and speedy trial must, therefore, be comprehensive.

42. The Commission also observes that when this issue was considered by the National Constitution Review Conference, it was agreed that the constitutional provisions guaranteeing fair trial and in reasonable time are adequate and that efforts should be directed at legislative, administrative and institutional reforms.

43. The Commission finds that a lot has been gained in countries where well-defined sentencing guidelines have been rolled out by legislation and effectively implemented. Sentencing guidelines have been lauded for helping limit undesirable sentencing disparity as well as making sentencing more predictable and transparent, thereby enhancing public confidence in the judicial process.

[245] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. (July 31, 1991), paragraph 301.

44. The Commission observes that the National ADR Programme of the Judicial Service was put in place in 2001 by the office of the Chief Justice following recommendations tendered by an ADR Task Force set up to determine an appropriate and customized policy direction that incorporates ADR in the court adjudication process. It must equally be noted that following the recommendations of the Task Force, the Chief Justice issued a policy directive adopting and incorporating ADR as part of the adjudicating process of the Judicial Service of Ghana and an available option and opportunity to parties in disputes who file cases in the courts or whose cases are already pending in court.

45. The Commission equally observes that in 2009, the Judicial Service unveiled its intentions to extend the implementation of the (ADR) programme to all courts in Ghana by 2013. In pursuit of this vision, a new policy directive outlined in June that year, established a separate ADR Directorate to coordinate all ADR activities within the Judicial Service.

46. The Commission finally observes that with the passage of the ADR Act, 2010 (Act 798), ADR has been provided the needed impetus for making it attractive to parties to disputes in court. The success of the implementation of the provisions of the Act would, in the Commission's view, depend on the development of human capacity in the form of qualified arbitrators and mediators as well as the development of a new set of procedural rules.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

47. The Commission recommends that the current constitutional arrangement be retained.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

48. The Commission recommends that legislative reforms be instituted for the dual purpose of making operational the constitutional provisions on fair and speedy trial and providing an adequate legal spine on which any administrative measures can be rolled out. In particular:
    a. The fair and speedy trial and related human rights provisions of the Constitution should be elaborated on in Acts of Parliament. Parliament may do this under its residuary constitutional powers.[246]
    b. The Rules of Court should be innovatively reviewed by auditing them for their capacity or otherwise to enhance fair and speedy trial: such as by, limiting interlocutory appeals to the Court of Appeal, setting timelines for the delivery of judgements, and eliminating inordinate adjournments.
    c. Guidelines should be introduced urgently to incorporate Alternative Dispute Resolution mechanisms in criminal and civil trials.[247]

[246] Article 298 of the 1992 Constitution of the Republic of Ghana.

d. The current penal legislative framework should be reviewed and streamlined to incorporate well-studied and defined sentencing guidelines and procedures so as to ensure uniformity in sentencing, as well as to favour the progressive prescription of non-custodial sentences, especially for minor offences.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

49. The Judicial Council should ensure:
    a. That there are a sufficient number of judicial personnel across the country so as to facilitate the accessibility of justice for all.
    b. Investment in the continuous legal education and in the improvement of the personal competencies of judicial personnel, as well as in the respective institutional structures and systems they work with.
    c. The upgrading and refurbishing of court structures; equipping court registries; court automation; and the institution of proper and effective case documentation and record-keeping processes.
    d. The streamlining of procedures and the integration of technology into record keeping, data collection, and data reporting.
    e. The facilitation of ADR processes in dispute resolution to include:
        i. Support for ADR in the justice system;
        ii. Intensifying education and sensitization processes to ensure that the larger public appreciates the value of ADR;
        iii. Providing adequate resourcing for ADR activities;
        iv. Training adequate mediators and related personnel to manage ADR centres; and
        v. Ensuring decentralised coverage of ADR interventions in the regions and districts.

ISSUE TWO: CORRUPTION IN THE JUDICIARY

A. DIMENSIONS OF THE ISSUE

50. The main dimensions of this issue, as has emerged, focus largely on the need to eliminate corruption not only among judges but also among any other officers of the Judicial Service.

B. CURRENT STATE OF THE LAW ON THE ISSUE

51. There are no special or specific legal and regulatory provisions to deal with the issue of judicial corruption. The Criminal Offences Act, 1960 (Act 29) deals with corruption

[247] Raymond A Atuguba, *et al Ghana Court Users and Uses Study, Final Report*, World Bank Publications, (2010) A World Bank commissioned report on the efficacy of justice delivery in Ghana that found that mandatory attempts at pre-trial settlements as well as court-connected ADR avenues in the commercial court improved greatly the speed of justice delivery in that court and that such processes were gaining more and more the favour of litigants.

generally. Section 240 of the Act provides that "a public officer commits the crime of corruption in respect of his or her office if the public officer directly or indirectly agrees or offers to permit to be influenced by any other person." Other forms of corrupt behaviour such as bribery[248], extortion[249] and embezzlement[250] have also been criminalised by the Act.

52. Judges and judicial officers can thus be investigated for engaging in corrupt practices. Also, where the said conduct amounts to serious fraud as defined under the Economic and Organised Crime Office Act, 2010 (Act 804), the officer can be investigated and prosecuted under the Act.

53. The Judicial Service Act, 1960 (C.A.10) and the Judicial Service Regulations, 1963 contain a rather elaborate set of provisions on disciplinary measures to be taken where a judicial officer has been found to misconduct himself or herself or to have performed unsatisfactorily. The Judicial Service Regulations prohibits persons convicted of criminal offenses involving fraud or dishonesty from being employed in pensionable positions within the Service. In addition, persons against whom adverse findings have been made by Commissions of Inquiry cannot be employed as pensionable staff of the Judicial Service.

54. The 1992 Constitution does not only take steps to ensure the integrity of public office holders, but it also addresses the risk of conflict of interest that a public office holder could face. As such public office holders are enjoined under Chapter 24 of the 1992 Constitution not to put themselves in positions where personal interests are likely to conflict with the performance of the duties of their offices. The Constitution provides that certain categories of public officers declare their assets before assuming office. The Constitution enables the institution of Commissions of Inquiry[251] to investigate matters of public interest. Practice has shown that, successive governments have had recourse to such mechanisms to inquire into alleged corrupt practices committed by key public officials. In the enforcement of the provisions relating to the integrity and accountability of public officials as well as institutions, the 1992 Constitution also mandates the Commission on Human Rights and Administrative Justice (CHRAJ) to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations.[252]

55. From the foregoing, it is clear that there are adequate laws dealing with corruption generally. It is, also clear that there are no comprehensive provisions dealing specifically with

[248] Sections 244 and 245 of the Criminal Offences Act, 1960 (Act 29).
[249] Section 247 of the Criminal Offences Act, 1960 (Act 29).
[250] Section 260 of the Criminal Offences Act (Act 29).
[251] Article 278(1) of the 1992 Constitution of the Republic of Ghana.
[252] Article 218 of the 1992 Constitution of the Republic of Ghana.

corruption within the judiciary. This should, however, not pose a problem if the general laws on corruption are applied effectively to cases of corruption occurring within the judicial branch. The problem is that, so far, very few judges or judicial officers have been prosecuted for committing or attempting to commit any of the acts falling within the definition of corruption.

C. SUBMISSIONS RECEIVED

56. The various submissions received on the issue suggest that there is the need to curb corruption not only among judges but also among judicial officers[253] for the following reasons:
    a. All over the world there is increasing evidence of increase of corruption in all branches of government, especially in developing countries. Particularly insidious in this regard is judicial corruption, which Ghana must work hard to curb in order to ensure justice for all, including the poor and the less powerful.
    b. The mere perception of corruption, in the Judiciary undermines trust and confidence in the judicial process and has a corrosive influence on the maintenance of law and order. When the public loses faith in the judicial system it cannot wholly recover its credibility no matter how efficiently, fairly and effectively it functions thereafter.
    c. The lack of judicial independence induced by corruption creates an institutional environment in which corruption in other agencies and the private sector finds fertile ground.

D. FINDINGS AND OBSERVATIONS

57. The Commission observes that the 1992 Constitution recognises as fundamental the right of everyone to the due process of law, including a fair hearing. The importance of this right in the protection of human rights is underlined by the fact that the implementation of all other rights depends on the proper administration of justice.

58. The Commission also observes that the Judiciary Committee of Parliament, after conducting public hearings on judicial corruption in 8 regions in Ghana, concluded that judicial corruption is no longer a perception, but a reality in Ghana.[254]

[253] Article 161 of the 1992 Constitution of the Republic of Ghana provides that "judicial officer" means the holder of a judicial office" whereas "judicial office" means -(a) the office of a person presiding over a lower court or tribunal howsoever described; (b) the office of the Judicial Secretary or Registrar of the Superior Courts; (c) such other offices connected with any court as may be prescribed by constitutional instrument made by the Chief Justice acting in accordance with the advice of the Judicial Council and with the approval of the President."

[254] A Report on Public Hearings held by the Judiciary Committee of Parliament on Perceived Corruption in the Judiciary, 2003. May, 2003 (on file with the Constitution Review Commission).

59. The Commission finds that the Constitution contains anti-corruption provisions in general terms and the Criminal Offices Act also contains provisions dealing with the substantive offences that go under the name of corruption. Both statutes, however, lack a detailed framework for investigating corruption.

60. The Commission also finds that until recently, the statute that arguably contained a comprehensive procedure for investigating and punishing corruption was the Corrupt Practices (Prevention) Act, 1964 (Act 230). The Act was passed to meet a social need and as its object shows, to provide a better method of investigating and dealing with corrupt practices.[255] This Act was repealed after it was made redundant with the coming into force of the Constitution and the creation of the Commission on Human Rights and Administrative Justice (CHRAJ), which has been vested with constitutional jurisdiction to, among other things investigate complaints of corruption and abuse of office by public officials in the exercise of official duties.[256] Other legal and institutional developments, such as the establishment of the Serious Fraud Office (now the Economic and Organised Crime Office) may also form part of the explanatory factors accounting for the repeal of Act 230. Yet, in the absence of that Act, there is no statute which provides elaborate mechanisms for investigating all forms of corruption.

61. The Commission finds little evidence in international practice of anti-corruption legislation targeting only judicial officers or judges. The trend internationally is to give premium to administrative and precautionary reforms aimed at enhancing the credibility of judges as well as building public confidence in the Judiciary.

62. The Commission finds that the current constitutional framework meets the universal threshold of acceptability. Invariably, then, any real or perceived corruption in the Judiciary is a result of legislative and administrative failings. Therefore, any recommendation should primarily contemplate legislative and administrative reforms.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

63. The Commission recommends that the Judicial Council, which is the constitutionally mandated forum for the consideration of issues related to the administration of justice, must be strengthened, as detailed in this Chapter, to enable the Council play an effective role in not only curbing judicial corruption but also improving justice delivery in the country.

[255] *Akainyah* v. *The Republic* [1968] GLR 548, at 558.
[256] Article 218(a) of the 1992 Constitution of the Republic of Ghana.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

64. The Commission recommends the following measures for improving public confidence in the Judiciary as well as curbing judicial corruption:
    a. Improving transparency in the justice system through the development and enforcement of guidelines for matters including case management; for sentencing; and for the engagement, promotion, discipline, and removal of judges.
    b. The strengthening and enforcement of the Code of Conduct for judicial officers and lawyers, calibrated to meet the needs of Ghana as a developing nation as well as to conform to international best practice.
    c. The improvement and enforcement of transparent complaints procedures and disciplinary mechanisms for judges, judicial officers, officers of the Judicial Service and other officials who interface with the justice delivery system.
    d. The institution of conscious measures to make disciplinary proceedings against lawyers and judges effective and more transparent.
    e. Ensuring that cases of corruption are not unduly passed over or abandoned.
    f. The annual publication of cases of judicial misconduct investigated and/or prosecuted successfully.

ISSUE THREE: THE ADJUDICATION OF ELECTORAL DISPUTES

A. DIMENSIONS OF THE ISSUE

65. The Commission received submissions on which court should have final appellate authority over electoral disputes, and the need for a specialised court to exclusively handle electoral disputes as a measure to expedite the disposal of such cases.

B. CURRENT STATE OF THE LAW ON THE ISSUE

66. In the case of presidential election disputes, the Constitution provides that the declaration of the presidential election may be challenged by a petition presented to the Supreme Court.[257] The Constitution further stipulates that the Rules of Court Committee shall make rules to regulate the practice and procedure for petitions to the Supreme Court challenging the election of a President.[258] The Rules of Court Committee has accordingly drafted rules defining what constitutes a petition so far as challenging presidential elections is concerned. Thus the Rules of Court Committee is in the process of revising the Rules of Court that govern such petitions and has already come out with a preliminary draft for discussion, but the revised Rules are yet to come into force.[259]

[257] Article 64 (1) of the 1992 Constitution of the Republic of Ghana.
[258] Article 64(3) of the 1992 Constitution of the Republic of Ghana.
[259] Draft Supreme Court (Amendment) Rules, 2011(on file with the Constitution Review Commission).

67. In relation to parliamentary election disputes, Article 99(1) of the Constitution confers jurisdiction on the High Court to hear and determine any question concerning whether a person has been validly elected as a Member of Parliament or the seat of a member has become vacant.

68. In terms of the appellate jurisdiction of the Supreme Court in relation to parliamentary disputes, Article 99(2) of the 1992 Constitution provides that: a person aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal. This provision is non-entrenched. Article 131(1)(a) of the 1992 Constitution also provides as follows "an appeal shall lie from the judgment of the Court of Appeal to the Supreme Court as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or Regional Tribunal in the exercise of its original jurisdiction."[260] However, the Supreme Court has held that there was no right of further appeal from the Court of Appeal to the Supreme Court in respect of an appeal from an election petition determined by the High Court under Article 99(1) of the 1992 Constitution.[261] The Supreme Court, notwithstanding the general appellate jurisdiction of the Supreme Court enshrined by the Constitution,[262] held that Article 99(2) had provided that a person aggrieved by the determination of an election petition by the High Court under Article 99(1) might appeal to the Court of Appeal. According to the Court, that provision had the effect of ensuring that such appeals were not affected by the general provision in Article 131(1) that allowed a further appeal to the Supreme Court from the judgment of the Court of Appeal.

C. SUBMISSIONS RECEIVED

69. The Commission received various submissions on the present issue as follows:
    a. The Commission was urged to maintain the current state of the law as determined by the Supreme Court to make the Court of Appeal the final appellate court in parliamentary election disputes. In support of this position, many of the submissions indicated that this would encourage the speedy disposal of such cases, considering the overriding interest of the state which requires that the work of Parliament be not disrupted. Also, this would help reduce the workload of the Supreme Court and prevent an inundation of the Supreme Court with politically sensitive cases.
    b. Other submissions proposed that the Supreme Court should have a final appellate jurisdiction in all electoral disputes. The various reasons provided in support of this position were that:

[260] This is an entrenched provision.
[261] *In re Parliamentary Election for Wulensi Constituency; Zakaria* v. *Nyimakan* [2003-2004] 1 SCGLR 1.
[262] Article 131(1) of the 1992 Constitution of the Republic of Ghana.

i. It will forestall the perception of discrimination as the current position unfairly limits the avenues of redress available to a plaintiff in a category of cases.
ii. It will give full effect to Article 33(3) in the Fundamental Human Rights chapter which states that "a person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court."
iii. The current position of the law, as determined by a ruling of the Supreme Court, creates the impression that issues relating to Parliament are not so important as to merit an appeal to the highest court of the land.
iv. Allowing the Supreme Court to adjudicate on such matters will bring finality to the judicial decisions reached in such cases.
v. The Supreme Court being the final appellate Court should not have its jurisdiction whittled down under any circumstance.

c. There were also submissions advocating the institution of an Electoral Court with exclusive jurisdiction over election-related disputes. This arrangement, would allow such disputes to be considered by specialist Judges and, considering the sensitive nature of electoral disputes, it would facilitate the expeditious dispensation of justice in such matters.

D. FINDINGS AND OBSERVATIONS

70. The Commission finds that in the context of electoral dispute resolution, international obligations related to such disputes have not necessarily been tied explicitly to the electoral process. Public international law appears to provide only the highest level guidance regarding the resolution of disputes. The International Covenant on Civil and Political Rights (ICCPR) and regional treaties stipulate a number of obligations upon States Parties which provide a broad framework for the resolution of disputes. It is, therefore, necessary to formulate obligations for the resolution of electoral disputes from these more general obligations.

71. The Commission observes that because the legitimacy of an entire government may rest on the validity of election results, dispute proceedings must be expeditious. The importance of timing is widely recognised in international conventions and treaties. For example, the sensitive nature of dispute resolution requires the proceedings to take place "within a reasonable time" or "without undue delay."[263]

72. Flowing from the above, the Commission observes that the importance of a timely remedy in electoral disputes has been recognised by various states as linked to fair public participation.

[263] Article 14 § 1 of the International Covenant on Civil and Political Rights G.A. Res 2200A (XXI); Art. 8 of the American Convention on Human Rights (ACHR) (1969); Article 6 § 1 of the European Convention on Human Rights (ECHR).

The international practice in this regard is to institute adequate administrative measures to expedite the resolution of such disputes. The Ugandan Constitution for instance, enjoins the courts to suspend any other matter on their role when seized with an electoral dispute to ensure the expeditious disposal of such disputes. The European Court of Human Rights has acknowledged the legality of summary proceedings brought under local election laws, stating that proceedings of this type are conducted within very short time-limits and such a summary remedy during periods of (local and national) electoral campaigns serves the legitimate goal of ensuring the fairness of the electoral process and as such cannot be questioned from the Convention's standpoint.[264]

73. The Commission also observes that some countries have expressly provided for tribunals with exclusive jurisdiction to deal with electoral complaints. A notable example in the African sub-region is Nigeria, which has, by way of its 1999 Constitution, ensured that: "There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any other tribunal, have original jurisdiction to hear and determine petitions."[265] The Electoral Act 2010 of Nigeria further provides that election petitions arising from the conduct of a presidential election be handled by the Court of Appeal and all other election petitions by the Election Petition Tribunal. In Brazil, the Constitution specifically provides for the establishment of the electoral complaints adjudication mechanism. There is a Superior Electoral Court, a Regional Electoral Court in the capital of each state and one in the Federal District, municipal election judges in large cities, and local election boards in small towns. The Brazilian Constitution details the composition of the Electoral Courts and states that a supplementary law should be adopted to define the organisation and competence of the electoral courts, judges and boards.[266] Constitutional provisions and Parliamentary Acts that establish election dispute institutions help to protect the right to judicial review in electoral matters.

74. The Commission also finds that:
    a. Disputes relating to elections remain a natural component of the entire electoral process and the credibility of that process is to a large degree determined by the capacity of the State to settle these disputes effectively.
    b. The role of the judge within the electoral process is undeniably essential and even more so when it comes to the consideration of electoral petitions. The right of every eligible citizen to determine who will represent them in government without hindrance is vital to the viability of every democratic culture as well as being a pre-requisite for social cohesion and solidarity.

[264] *Kwiecień* v. *Poland* (App no. 51744/99) § 55 Eur. Ct. H. R (Jan. 9, 2007) http://www.echr.coe.int.
[265] Article 285(1) of the 1992 Constitution of the Republic of Ghana.
[266] Article 118 of the 1992 Constitution of the Republic of Ghana.

c. The establishment within the current court structure of novel and specialised courts with exclusive jurisdiction over electoral disputes offers many benefits, including the possibility of the timely resolution of electoral disputes, and adjudicators with vast experience and familiarity with the issues and law on elections.
d. Improving effectiveness and timeliness in the resolution of electoral disputes requires a two-step effort:
    i. Ensuring that the substantive and procedural laws provide for a timing requirement; and
    ii. Providing the bodies in charge of resolving electoral disputes with the resources to implement the time limits stated in the law.
e. An important safeguard of election integrity lies in the effective resolution of complaints and appeals with minimum delay. There is no doubt that the slow pace of adjudication of electoral disputes does not accord with the 1992 Constitution which mandates the smooth operation of the democratic processes in Ghana.
f. It is necessary to weigh the individual's right to access fair and effective justice against the interests of the society to ensure social cohesion, always bearing in mind that delays in adjudicating electoral complaints can impact on the public's confidence in government. Maintaining timely procedures requires a careful balance between the need to act swiftly and the need to assess carefully whether justice is being delivered. Like any legal standard, the importance of deadlines is subject to limitations. Expeditious decisions cannot be made to the detriment of the right to a fair trial.

75. The Commission observes that the consensus at the National Constitution Review Conference was that presidential and parliamentary electoral disputes should first go to the High Court and decisions reached by the High Court should be appealable to the Court of Appeal and subsequently to the Supreme Court. In addition, it was proposed that the time limit within which electoral disputes are to be completely adjudicated upon should be spelt out by an Act of Parliament.

76. The Commission finds that the main issue for consideration, is two-fold:
    a. Whether the current legislative and institutional arrangements allow for the expeditious disposition of electoral disputes; and
    b. Whether the quest to quicken the pace of the adjudication of electoral disputes justifies any restrictions on the legal avenues for remedy or redress available to citizens.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

77. The Commission recommends that the constitutional provision with regard to the Court of Appeal being the final appellate court over parliamentary electoral disputes should be maintained. Accordingly, the Commission further recommends that an appropriate

amendment to Article 99(2) be made to clarify the state of the law and expressly recognise the principles enunciated by the Supreme Court in the *Wulensi case*.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

78. The Commission recommends the amendment of the Rules of Court as they affect electoral disputes to limit interlocutory applications, adjournments, and delays in the delivery of judgments with a view to disposing of such cases within 6 months.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

79. The Commission recommends that administrative mechanisms be immediately instituted by the Chief Justice for courts to prioritise the hearing of disputes arising from presidential and parliamentary elections over court schedules.

80. The Commission recommends the creation, in the long run, by the Chief Justice acting under Article 139(3) of the Constitution, of a Division of the High Court to handle electoral disputes as an appropriate and productive measure for the effective and prompt resolution of electoral disputes. Such an electoral court could be an *ad hoc* division of the High Court, instituted during election periods to ensure the effective and timely adjudication of election-related disputes.

ISSUE FOUR: ADJUDICATION OF CONSTITUTIONAL DISPUTES

A. DIMENSIONS OF THE ISSUE

81. The thrust of the issues raised relate to whether a constitutional court with exclusive jurisdiction over constitutional disputes should be created; whether the Full Bench of the Supreme Court should be empanelled to hear constitutional matters or whether the current practice of empanelling 9 justices of the Supreme Court to hear constitutional matters should be maintained.

B. CURRENT STATE OF THE LAW ON THE ISSUE

82. Under Article 130(1)(a) of the 1992 Constitution, except for the enforcement of the Fundamental Human Rights and Freedoms as provided in Article 33, the Supreme Court has exclusive original jurisdiction over all matters relating to the interpretation or enforcement of the Constitution. Consequently, whenever, in determining a dispute, a Court other than the Supreme Court finds that an issue of the enforcement or interpretation of the Constitution arises, the Court must, under Article 130(2) of the Constitution, stay proceedings and refer the constitutional issue to the Supreme Court for determination.

83. On 10 January, 2001 acting Chief Justice E. K. Wiredu issued the following Practice Direction for Empanelling Justices of the Supreme Court:

> "In order to minimize the mounting criticisms and the persistent public outcry against the Judiciary in our justice delivery and to restore public confidence, it is my desire that where practicable and especially in constitutional matters, all available Justices of the Supreme Court have a constitutional right to sit or at least seven (7) justices of the court."[267]

84. When the constitutionality of the Chief Justice's directive was challenged, the Supreme Court held that the Chief Justice, or whoever was temporarily performing the duties or functions of the office of the Chief Justice, was vested with administrative discretion by Article 128(2) to empanel judges to sit on cases in the Supreme Court. Article 128(2) only required that in the exercise of that power the Chief Justice should not empanel less than 5 Justices for its work and not less than 7 Justices for review proceedings. According to the Supreme Court, the Practice Direction was an expression of intention only of the Acting Chief Justice as to how he was going to exercise the discretion vested in him under the Constitution. Accordingly, it did not fetter the discretion of the Chief Justice and was not binding on any judge. However, under Article 296 the exercise of that discretionary power had to be fair and candid and should not be arbitrary, capricious or biased by resentment, prejudice or personal dislike and should be in accordance with due process of the law. Also, the fact that additional or new judges were to be appointed to increase the panel for the determination of a case, be it original or on review, did not make any empanelling capricious or biased. Since the Practice Direction did not in any way infringe Articles 125(4) and 128(2), the Court held that it could not declare it null and void.[268]

85. The Supreme Court currently is made up of 14 Justices and the current practice is to empanel 9 Justices to sit on constitutional cases.

C. SUBMISSIONS RECEIVED

86. Various submissions were made to the Commission on this issue, which centred on the following proposals:
    a. There is the need to institute a constitutional court with exclusive jurisdiction over constitutional cases. This will facilitate the timely resolution of constitutional matters by specialist Judges. It is also argued that this arrangement will allow the development of a

[267] Practice Direction (Practice in Empanelling Justices of the Supreme Court) [2000] SCGLR 586.
[268] *Tsikata* v. *Chief Justice and Attorney-General* [2001-2002] 1 GLR 186.

rich jurisprudence in constitutional law, enhancing the rule of law and constitutionalism in Ghana.

b. There have been an equal number of calls for the Supreme Court to retain its exclusive and original jurisdiction over the adjudication of constitutional disputes; however, it is proposed that, a Full Bench of the Court should be constitutionally enjoined to consider such matters. This arrangement, it is argued, will bring finality and consistency to the decisions of the Court.

c. There have been submissions advocating the need to constitutionalise the current practice, which has developed administratively within the Supreme Court, where 9 Justices of the Court are empanelled to sit on constitutional cases. The submissions suggest that the paucity of constitutional litigation currently does not justify the creation of a Constitutional Court. It is equally argued that constitutionalising this practice would be a suitable compromise as it does not necessitate a complete overhaul of the *status quo*.

D. FINDINGS AND OBSERVATIONS

87. The Commission observes that there is a general international trend now in progressive Constitutions, and especially in developing nations with sketchy political legacies, to establish constitutional courts to deal specifically with constitutional matters, violations of human rights, and election petitions. In recent years, a number of countries have established constitutional courts or other organs vested with constitutional jurisdiction mainly to accelerate the process of democratization:

    a. In Asia, countries such as India, South Korea, Mongolia, Indonesia, Thailand, Cambodia, and the Philippines have established such courts.

    b. In Africa, the Constitutions of Uganda and South Africa are notable examples of Constitutions instituting constitutional courts.

        i. In the case of Uganda, the Court of Appeal sits as a constitutional court when determining matters such as the interpretation of its 1995 Constitution. The Court of Appeal has original jurisdiction in all constitutional matters. However, an individual aggrieved by the determination of the Court of Appeal in a constitutional matter can seek redress at the Supreme Court, which for the purposes of that case is enjoined to empanel a Full Bench.

        ii. In the case of South Africa, the Constitutional Court as established by the 1996 Constitution stands as a separate Court within the Judiciary. The Court is at par with the Supreme Court and is endowed with original, appellate and final jurisdiction in constitutional matters and issues which impact on decisions on constitutional matters.

    c. By contrast, in India, a constitutional bench is constituted by the Chief Justice from amongst 5 members of the Supreme Court to determine constitutional matters. This mechanism is nearer in practice to the current administrative arrangement in Ghana

where for the determination of constitutional matters, the Chief Justice empanels 9 justices of the Supreme Court to constitute a make-shift constitutional chamber.

88. The Commission observes that there was no consensus with regard to the position of the National Constitution Review Conference when this issue was considered. The majority of the participants proposed that the current constitutional arrangement be maintained. The Commission was advised against establishing a constitutional court independent of the Supreme Court and that, in lieu of that, priority must be given to fast-tracking the resolution of constitutional issues at the Supreme Court. A minority of the group, however, expressed support for a separate constitutional court to determine only constitutional cases.

89. While the Commission concedes that the establishment of an independent constitutional court will, no doubt, help to promote the specialised adjudication of constitutional issues as well as uniformity and efficiency in the application of constitutional norms, it holds the view that the establishment of such a body should be done with an eye on the democratic and historical legacy of the nation and the prospects for the future.

90. The Commission finds that the current paucity of constitutional disputes does not justify the immediate creation of a constitutional court, but appreciates that in reviewing a document of such importance as the Constitution, matters considered to be of relative importance, but which do not implicate an immediate amendment to the Constitution, should not be treated in a manner that will subsequently affect the nation negatively. When circumstances change, the Commission favours a well-considered attempt that balances contemporary realities against the obligation to make reasonable provisions for the future. While constitutional litigation may seem sparse now, it is necessary to contemplate a constitutional regime that would not prove ineffective when the tides turn in favour of more flourishing constitutional adjudication. In other words, the constitution should be a living organism responsive to the demands of modern societies.[269]

91. The Commission finds that:
    a. The current success of constitutional adjudication, coupled with the paucity of constitutional cases brought before the Supreme Court, does not provide enough grounds for the creation of a Constitutional Court separate from the Supreme Court.
    b. The experiences of jurisdictions which have opted for a constitutional court reveal that the creation of a separate Constitutional Court could lead to jurisdictional conflict and tussle between the Constitutional Court and the Supreme Court. This could make constitutional adjudication difficult in the country, thus reversing all the gains made since 1992.

[269] *Tuffour* v. *Attorney-General* [1980] GLR, 637, at pp. 647-648.

c. In creating a constitutional court, the rationale should be to enhance the justice delivery system and not to disrupt it. It is the view of the Commission that, given the well-established judicial practice in Ghana, introducing a constitutional court would have a hugely disruptive influence on the stability of the judicial institution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

92. The Commission recommends that the current constitutional provisions relating to the jurisdiction of the Supreme Court over constitutional disputes be maintained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

93. The Commission recommends that the current administrative arrangement which allows the Supreme Court to empanel no less than 9 Justices for the determination of constitutional disputes be by convention institutionalised.

SUBTHEME TWO: THE SUPREME COURT

ISSUE ONE: COMPOSITION OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

94. The submissions received on this issue relate mainly to the composition of the Supreme Court, and as to whether a cap should be placed on the number of Judges that may be appointed to the Court.

B. CURRENT STATE OF THE LAW ON THE ISSUE

95. The Constitution provides in Article 128(1) that the Supreme Court shall consist of the Chief Justice and not less than 9 other Justices of the Supreme Court. The law, however, in its current state does not prescribe a maximum number of Justices for the Supreme Court.

96. The Constitution also provides that the Supreme Court Justices shall be appointed by the President, acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.[270]

C. SUBMISSIONS RECEIVED

97. The submissions received on this issue can be put in two broad categories:

[270] Article 144(2) of the 1992 Constitution of the Republic of Ghana.

a. That the current arrangement be maintained: proponents consider that the imposition of a ceiling on the number of Justices is unnecessary as it will do little to reduce the perception of Executive influence over the Judiciary. They are also of the view that the imposition of a ceiling on the composition of the Supreme Court would tie the hands of the nation as it has a potential to overburden the Court in dealing with cases, a situation which would be a blow to the expedition of justice delivery. They consider that rather than imposing a ceiling on the composition of the court, it would be appropriate to allow a convention to develop with respect to its composition.
b. That the current arrangement be changed: this group advocates the placing of a ceiling on the number of Justices that may be appointed to the Supreme Court. Various numbers have been suggested – 9, 11, 13, 14, 15, 17, and 25. In support of this position, many of the submissions received indicated that this will help prevent the manipulation of the Court by the Executive through the packing of the Court to achieve a favourable judgment, and that the capping of the membership of the Supreme Court is in tune with international best practice and that Ghana should take a cue from the practices in well-established democracies.

D. FINDINGS AND OBSERVATIONS

98. In considering the evidence of international comparative and best practices, the Commission observes that there is ample evidence that the practice of States on the present issue is fairly balanced on both sides. In almost all jurisdictions where a cap on the Court is favoured, this is done by an Act, which is less difficult to amend.
    a. Notable in this regard is India, where the original Constitution of India (1950) provided for a Supreme Court with a Chief Justice and 7 other Judges, leaving it to Parliament to increase this number. In the early years, a Full Bench of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and cases began to accumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978, 26 in 1986 and 31 in 2008. As the number of the Judges has increased, they sit in smaller Benches of two and three (referred to as a Division Bench)—coming together in larger Benches of 5 and more (referred to as a Constitutional Bench) only when required to do so or to settle a difference of opinion or controversy. Any bench may refer the case to a larger bench if the need to do so arises.
    b. The Constitutions of Uganda, Kenya and Zambia, among others, do not place a cap on the composition of the Supreme Court. Their Constitutions find it adequate to provide for only a minimum number of Justices on the Court; the power to review the composition upwards is vested in Parliament. The Zambian 1991 Constitution, equally states in its Article 91(2) that the judges of the Supreme Court shall be: (a) the Chief Justice; (b) the Deputy Chief Justice; (c) three Supreme Court judges or such greater number as may be prescribed by an Act.

c. Under the 1997 Constitution of Gambia, the Supreme Court remains uncapped.
d. The Nigerian 1999 Constitution, caps the composition of the Supreme Court. The Constitution provides in section 230(1) that there shall be a Supreme Court of Nigeria. (2) The Supreme Court of Nigeria shall consist of - (a) the Chief Justice of Nigeria; and (b) such number of Justices of the Supreme Court, not exceeding twenty-one, as may be prescribed by an Act of the National Assembly. Currently, however, the Supreme Court is composed of a Chief Justice and 12 puisne Justices. What is of interest about the Nigerian Constitution is that the power it grants the Legislature to determine the composition of the Court of last resort is not without fetters. The Constitution enjoins the National Assembly not to exceed 21 in prescribing the number of Justices to fill the bench of the Court of last resort.
e. In the United States of America, Article 3 of the Constitution establishes the judicial branch of the federal government. The judicial branch comprises the Supreme Court of the United States and lower courts as created by Congress. Section 1 of the said article explicitly requires one Supreme Court, but does not fix the number of justices that must be appointed to it. Article I, Clause 6 does refer to a "Chief Justice" when it states "When the President of the United States is tried, the Chief Justice shall preside." The number of justices has, however, been fixed by statute. The Judiciary Act of 1789 called for the appointment of 6 justices, and as the nation's boundaries grew, Congress added justices to correspond with the growing number of judicial circuits: 7 in 1807, 9 in 1837, and 10 in 1863. In 1866, at the request of Chief Justice Chase, Congress passed an Act providing that the next 3 Justices to retire would not be replaced, which would reduce the bench to 7 Justices by attrition. Consequently, one seat was removed in 1866 and a second in 1867. In 1869, however, the Circuit Judges Act returned the number of justices to 9, where it has since remained.
f. The Supreme Court of the United Kingdom, established by Part 3 of the Constitutional Reform Act (2005), is composed of the President and Deputy President and 10 puisne Justices of the Supreme Court. The number of Judges may be increased by the Queen through an Order-in-Council under section 23(3). In addition to the twelve permanent Justices, the President of the Court may request other senior judges, drawn from two groups, to sit as "acting judges" of the Supreme Court:
    i. The first group is those judges who hold "office as a senior territorial Judge"; Judges of the Court of Appeal of England and Wales, Judges of the Court of Appeal of Northern Ireland and Judges of the First or Second Division of the Inner House of the Court of Session in Scotland;
    ii. The second group is known as the "supplementary panel." The President may approve in writing retired senior Judges' membership of a panel if they are under 75 years of age.
g. In Canada, Article 4 of the Supreme Court Act of Canada provides that the Court shall consist of a Chief Justice to be called the Chief Justice of Canada, and 8 Puisne Judges. It

should be noted that this cap is fixed by Parliament rather than the Constitution of Canada.[271]

99. The Commission finds that at the centre of the on-going debate over whether there should be a cap on the composition of the Supreme Court is the question of whether judicial independence suffers the risk of being impaired through the packing of the Court. This must, however, be weighed against the fact that imposing a ceiling on appointments to the Supreme Court could end up being disruptive to justice by limiting the ascension of seasoned Justices to the Court and lead to the Court being overburdened when there is a considerable increase in the cases brought before it.

100. The Commission consequently finds that the main issue for determination is whether placing a ceiling on the composition of the Supreme Court would be enough to secure the independence of the Court. In the Commission's view, placing a cap on the composition of the Supreme Court may only end up being an ineffective approach in ensuring judicial impartiality in an increasingly polarised society. Rather, efforts should be geared towards strengthening the position of certain key institutions to enable them counterweight any disruptive external influence on the Judiciary, including any attempts to pack the Court for that purpose.

101. The Commission finds that countries which favour placing ceilings on the composition of their Supreme Courts institute accompanying and relatively flexible mechanisms for reviewing the composition so as to ensure the Court does not risk inundation when its caseload significantly rises. Should a cap be placed on the number of Supreme Court Justices, as has been overwhelmingly urged on the Commission by Ghanaians, it will be necessary to ensure that the avenues of appointing Judges to the Supreme Court are not entirely closed or extremely rigid so as to allow the upper limit of the Court to be reviewed should the need arise. The ceiling set for the Supreme Court in Ghana should be sufficiently high to cope with situations where some Judges decide or are obliged, for one reason or another, to recuse themselves from particular cases brought before the Court. On the other hand, the upper ceiling should not be so high as to make the Court cumbersome to manage.

102. The Commission finds that an uncapped Supreme Court is objectionable because it provides an incentive and temptation for a government at any time to attempt to pack the Court when it wishes the Court to give decisions that it may need or want at that particular time. This is by no means a fanciful supposition. There have been such attempts in other countries, and there have in fact been claims that this has actually been done in this country. However, it is neither prudent nor advisable for the Constitution to make it possible for anyone in power to

[271] Canadian Supreme Court Act (R.S.C., 1985, c. S-26).

even contemplate the idea of changing or increasing the membership of the highest court of the land in order to obtain a judgment or ruling that they may desire.

103. The Commission, however, finds that the powers accorded the President to appoint Justices to the Supreme Court is not without fetters. On a strict application of the Constitution, the President cannot appoint a Justice of the Supreme Court unless the Judicial Council indicates that there is the need to appoint one. Again, Parliament may disapprove the appointment of a Supreme Court Judge. Flowing from the above, packing the Supreme Court, in defiance of the laid down constitutional requirements, is unconstitutional, and can only occur with the active connivance of the Judicial Council and Parliament.

104. The Commission finds that a comprehensive review and appreciation of the process of appointment of Justices of the Supreme Court makes apparent the need to ensure that the influence of the Executive on the Judicial Council is limited. A reduction in the number of presidential appointees to the Judicial Council would also mitigate any undue hold the Executive could have on the Judiciary.

105. The Commission finds that the current constitutional provision on the composition of the Supreme Court is unsatisfactory for a number of reasons. In the first place, the absence of a specified maximum number of members means that it is possible for the membership of the Court to be augmented at any time and, possibly, far beyond the present number. Apart from the financial implications of having an unduly large Supreme Court, there is always the issue of efficiency, not only in the operation of the Court but also in the organisation and administration of such a Court.

106. The Commission observes that on the issue of the composition of the Supreme Court, the National Constitution Review Conference agreed on the fact that the Supreme Court should consist of not less than 9 Justices including the Chief Justice but not more than 11 or 13 Justices. Additionally, it was proposed that where the need arises for an increase in the upper limit, Parliament should increase it by a two-thirds majority vote of members of Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

107. The Commission recommends that Article 128(1) be amended to provide for a maximum of 15 Justices of the Supreme Court. The clause in the Constitution that sets the maximum number of Justices should, however, remain a non-entrenched clause so that Parliament may, by a two-thirds majority, amend the Constitution to increase or reduce the number.

ISSUE TWO: QUORUM OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

108. The Commission received a number of submissions on what number of Justices should be necessary for the Court to be considered as duly constituted for the determination of a dispute before it. The main dimension of this issue concerns whether a Full Bench of the Supreme Court should at all times be empanelled. The issue also implicates the power of the Chief Justice to empanel the Supreme Court.

B. CURRENT STATE OF THE LAW ON THE ISSUE

109. The present law provides that a minimum of 5 Justices should be enough to constitute the Supreme Court for the performance of its duties.[272]

110. The Supreme Court must be constituted by a minimum of 7 justices when it exercises its review jurisdiction.

111. The Constitution also provides for instances where a single Justice of the Supreme Court may exercise the power vested in the Supreme Court. The extent to which that power is exercised is clearly articulated in Article 134, which limits the scope of the single Justice of the Supreme Court's action to orders, directions or decisions not involving the decision of the cause or matter before the Supreme Court. An action taken by a single Justice of the Supreme Court may, however, be subject to review by a panel composed of 3 Justices of the Supreme Court.

C. SUBMISSIONS RECEIVED

112. The Commission received various submissions on this issue which expressed the following views:
    a. The Supreme Court should, in the determination of all disputes, be enjoined to sit as a Full Bench. The arguments raised in support of this position are that such a practice will elevate popular adherence to the decisions of the Supreme Court; ensure finality to litigation; prevent conflicting decisions and ensure consistency in legal precedents. It will also prevent the Chief Justice from determining the outcome of cases by empanelling particular Justices to sit on them.
    b. Other submissions advocated the maintenance of the *status quo*. It is argued that constitutionally enjoining the court to empanel the full complement of its bench would prove cumbersome and could gravely affect the facility of the judicial process.

[272] Article 128 of the 1992 Constitution of the Republic of Ghana.

D. FINDINGS AND OBSERVATIONS

113. The Commission observes that in most advanced nations, the minimum number required for the constitution of a quorum at the Supreme Court is specified. There are a limited number of jurisdictions, however, where an express injunction requiring a Full Bench to be empanelled for the determination of cases is placed on the Supreme Court.
    a. The example of Uganda is notable in this regard. The Constitution of Uganda provides that when hearing appeals from decisions of the Court of Appeal sitting as a constitutional court, the Supreme Court shall consist of a Full Bench of all members of the Supreme Court; and where any of them is not able to attend, the President shall, for that purpose, appoint an acting Justice.
    b. In the United States of America, title 28 of the United States Code, provides that 6 members of the 9 member Court are necessary to constitute a quorum. The Court's business is suspended until the quorum is attained.[273]
    c. In Canada, a quorum of the Supreme Court consists of 5 members. In this regard, section 25 of the Supreme Court Act provides that any 5 of the judges of the Court shall constitute a quorum and may lawfully hold the Court. Uniquely in Canada, however, provision is made for a 4-member quorum subject to the consent of the parties before the Court.[274]
    d. In the United Kingdom, appeals brought before the Supreme Court are normally heard in open court before 5 Justices, although in cases which meet the criteria set out below, 7 or even 9 Justices sit. The criteria to be used when considering whether more than 5 Justices should sit on a panel as set out by Justices of the Court are:
        i. If the Court is being asked to depart, or may decide to depart from a previous decision.
        ii. A case of high constitutional importance.
        iii. A case of great public importance.
        iv. A case where a conflict between decisions in the House of Lords, Judicial Committee of the Privy Council and /or the Supreme Court has to be reconciled.
        v. A case raising an important point in relation to the European Convention on Human Rights.

114. The Commission finds in regard to Ghana's judicial practice that no law has ever prescribed the maximum number of Justices of the Supreme Court that should sit on a case brought before the Court, though it has been the practice to specify the quorum. This is a deliberate policy on the part of the law makers to allow the highest court a certain flexibility and freedom in deciding when to field a full complement of members depending on the gravity of the case and the need for a reconsideration of the law. This practice has helped ensure that in

[273] 28 U. S. C. §1.
[274] R.S.C., 1985, c. S-26.

the adjudication of matters of importance, as many judicial minds as possible would be involved in settling the law and making a definitive pronouncement. In this regard, the Commission finds that an emerging practice where 9 justices of the Supreme Court are empanelled to sit on constitutional cases is commendable.[275]

115. The Commission observes that when this issue was considered at the National Constitution Review Conference, it was held that not all Judges of the Supreme Court should be made to sit on all cases. The current flexibility of the Chief Justice empanelling a number of Justices should be maintained, save that, for Constitutional cases, the minimum number of Justices necessary to constitute the court should be 9.

116. The Commission finds that a constitutional injunction that requires all Justices of the Supreme Court to be empanelled for the determination of disputes brought before the Court has the potential to stifle the expediency with which cases are disposed of.

117. The Commission finds that the proposal to have a Full Bench of the Supreme Court empanelled for the determination of cases may not be in the best interest of justice as it may halt the wheels of justice should any of the Justices of the Court be indisposed. Convenience and prudence dictate that when the highest court is exercising even some of the most important and fundamental functions, embracing the whole of its appellate, interpretation and enforcement jurisdictions, it should not be enjoined to empanel a Full Bench.

118. The Commission finds that the current practice by which the Supreme Court is considered as duly constituted for its work by not less than 5 Justices of the Supreme Court has worked well. Hence, the Commission believes that flexibility and freedom in deciding when to field a full complement of members depending on the gravity of the case and the need for a reconsideration of the law, as currently provided for the Supreme Court, is to be complimented and preserved.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

119. The Commission recommends that the current state of the law, mandating a minimum of 5 Justices of the Supreme Court to form a quorum, be maintained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

120. The Commission recommends that the practice of empanelling 9 Justices for constitutional matters should become institutionalised by convention.

[275] *Bilson* v. *Apaloo* [1981] GLR 24 at p 44.

ISSUE THREE: THE AUTOMATIC RIGHT OF APPEAL TO THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

121. The submissions made to the Commission on this issue centred on whether the automatic right of appeal to the Supreme Court, granted in almost all cases, accounts for the enormous caseload at the court.

B. CURRENT STATE OF THE LAW ON THE ISSUE

122. Article 129(1) confers final appellate authority on the Supreme Court. However, in subsequent provisions, notably Article 131(1) and (2), an appeal to the Supreme Court from the Court of Appeal is as of right in matters where a High Court or a Regional Tribunal exercised its original jurisdiction. In cases initiated in the lower courts, however, there is no automatic right of further appeal to the Supreme Court. An appeal lies only where the Court of Appeal is satisfied that the case in question involves a substantial question of law or is in the public interest grants leave. The Supreme Court, however, in relation to cases initiated in the lower courts is granted the mandate to entertain applications for special leave to appeal to it without such cases going to the Court of Appeal.[276]

C. SUBMISSIONS RECEIVED

123. The Commission received various submissions on this issue.
    a. Some of the submissions advocated the maintenance of the current provisions relating to the automatic right of appeal in those instances where this right exists. It was argued by the proponents of this view that the perceived risk of frivolous litigation inundating the Supreme Court is unrealistic as the Court almost never hears a case *de novo* when its appellate jurisdiction is activated. Besides, the Court has jurisdiction to dismiss a frivolous case summarily.
    b. Other submissions urged the automatic right of appeal to the Supreme Court in some disputes to be scrapped. They argued for the institution of mechanisms that enable cases brought before the Supreme Court to be filtered so as not to inundate the Supreme Court with perky cases. The Supreme Court in this arrangement would be able to hear and determine cases quickly and have the space and opportunity to define the real development of the law as matters of grave public interest or those involving substantial questions of law are considered by the Court.

D. FINDINGS AND OBSERVATIONS

[276] Article 131(2) of the 1992 Constitution of the Republic of Ghana.

124. The Commission observes the absence of a uniform international practice on the present issue. In federal states, where the risk of the inundation of the Supreme Court is more pronounced, it is not unusual for access to the Supreme Court to be restricted. In these jurisdictions, the Supreme Court has a role more akin to that of a constitutional court and only issues of national importance or of grave constitutional implications are brought before the Court. The restrictions on the right to seek redress at the Supreme Court are often justified by arguments that the absence of such a mechanism could create the enabling environment for litigations, resulting in the inundation of the court.
    a. The United States Supreme Court currently receives over 10,000 petitions per year but hears on average only 100 of these.[277] Appeals to the Supreme Court are not as of right but rather subject to judicial discretion. The Supreme Court of the United States has authority to review by writ of *certiorari* federal court decisions. The Supreme Court also has authority to review by writ of *certiorari* the decisions of the highest State Courts. Four (4) of the 9 Justices must vote in favour of a grant of the petition for a writ of *certiorari* before the case is heard by the Supreme Court.
    b. Like those of the Supreme Court of the United States, appeals to the Supreme Court of Canada are not as of right. Section 40(1) of the Supreme Court Act, provides that the Court should grant leave to appeal where, with respect to the particular case sought to be appealed, the Court is of the opinion that any question raised by the appeal, by reason of its public importance or the importance of any issue of law or fact involved in that question is of such significance as to warrant the attention of the Supreme Court. This may relate to matters including a challenge to a statute, common law rule or government practice.
    c. In the United Kingdom, the right of appeal to the Supreme Court is regulated by statute and is subject to several restrictions. As an appeal court, the Supreme Court cannot consider a case unless a relevant order has been made in a lower court. The Supreme Court is the final court of appeal for all United Kingdom civil cases, and criminal cases from England, Wales and Northern Ireland, and only hears appeals on arguable points of law of general public importance, and concentrates on cases of the greatest public and constitutional importance.
    d. An exception can however be found in Nigeria, where the Nigerian Supreme Court, though established in a federal and populous State, still entertains a right to appeal in a host of matters, including such other cases as may be prescribed by an Act of the National Assembly.[278]

125. The Commission observes that in the practice of unitary states, the highest court acts more appropriately as the final appellate authority in almost all disputes. Rarely is the jurisdiction

[277] United States Supreme Court (June 29, 2011) http://www.supremecourt.gov/about/justicecaseload.pdf.
[278] Section 233 of the 1999 Constitution of the Federal Republic of Nigeria.

of the highest court ousted in matters or the right to appeal to the court overly restricted. Examples of such countries include the Gambia, Zambia, and Uganda.

126. The Commission finds that submissions made before it have sought to establish a link between the automatic right of appeal granted citizens to seek ultimate redress at the Supreme Court and the backlog of cases in the courts. At the level of the Supreme Court, it would appear that the availability of more resources to speed up adjudication would address any concerns about the right of appeal to that court possibly inundating the court. The Commission recognises, in this regard, the existence of a commendable practice where the Supreme Court has convened at short notice, delivered a judgment very quickly and reserved its full reasons for a later date.

127. The Commission finds that administrative reforms and the provision of innovative resources for the effective and speedy disposal of cases would have more stable and long-term dividends as opposed to introducing claw back clauses on citizen's right to seek redress. Up-to-date legal databases, top-notch research assistants and clerks for Supreme Court Justices, accurate and immediate transcription of court proceedings would greatly accelerate the pace at which cases are disposed of at the Supreme Court.

128. The Commission finds that notwithstanding the above considerations, the Supreme Court currently handles too many appeal cases to operate efficiently, and it may be necessary to introduce a mechanism that aids in filtering or screening cases that come to the Court, at the very least in the case of interlocutory appeals. The apprehension that allowing a case-sieving mechanism could negatively impact the individual's right of appeal and stifle access to justice is effectively counterbalanced by the fact that the Court of Appeal is also composed of Justices of repute. Another advantage is that such a mechanism would speed up the delivery of justice and reduce the cost of accessing justice.

129. The Commission observes that the Constitution Amendment Bill, 1999 which was laid before Parliament and subsequently withdrawn from the floor of Parliament contained provisions to provide palliatives to the issues raised here.[279] The memorandum accompanying the Bill notes that one of the sources of delay related to disposal of court cases can empirically be attributed to appeals made against decisions or orders of the High Court or Regional Tribunals which are not final decisions or orders of the those courts. Article 137(2) of the Constitution gives right of appeal, except otherwise provided in the Constitution, from a judgment, decree or order of the High Court or a Regional Tribunal to the Court of Appeal. The result of this is that every order, including interlocutory orders, given by the High Court or Regional Tribunal can be appealed against all the way to the Supreme Court whilst the

[279] Constitution Amendment Bill, 1999. Date of Gazette notification 16th July 1999.

substantive case still stays at the Court below pending the outcome of the appeal. The provision as it stands has been used to cause interminable delays that lead to protracted litigation and absolute frustration. The memorandum to the Bill further notes that the right to the courts for redress is guaranteed by the Constitution but this right, like all other rights in the Constitution, must be exercised within reason. It could certainly not have been intended by the Constitution that the exercise of the right of appeal should be used to cause delay in the prosecution of cases before the courts. The Amendment Bill proposed that Article 137(2) be amended to limit the right of appeal to final judgment, decree or order of the High Court or Regional Tribunal and appeals that challenge the jurisdiction of those Court. Any other appeal, the Bill noted, should be made only with the leave of the High Court or Regional Tribunal or, of the Court of Appeal.

130. The Commission observes that the National Constitution Review Conference was divided on this issue. Whilst some held that the automatic right of appeal to the Supreme Court should be modified, at the very least, to exclude interlocutory matters, others were swayed by different considerations and held that all appeals should end at the Supreme Court. According to those who favoured the retention of the *status quo*, it was argued that the Commission should favour the maintenance of the current arrangement because from the High Court there are only two avenues of appeal available, that is, the Court of Appeal and the Supreme Court.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

131. The Commission recommends that the current provisions of the 1992 Constitution on the automatic right of appeal to the Supreme Court be amended to exclude interlocutory appeals from being automatically appealable to the Supreme Court and for all interlocutory appeals to end at the Court of Appeal.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

132. The Commission recommends that administrative procedures and extensive institutional reforms be undertaken to speed up the effective and speedy disposal of appeals by the Courts of Appeal and the Supreme Court.

ISSUE FOUR: COMPOSITION OF THE REVIEW PANEL OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

133. The power to review its decisions, granted the Supreme Court under Article 133, came under serious consideration during the review exercise. The main dimensions of this issue as have

emerged relate to whether the review jurisdiction of the Supreme Court is relevant considering it provides the room for litigants to further "appeal" the Court's decisions, and also whether the Supreme Court when exercising this power should maintain the original panel that determined the case at first instance or be constituted differently.

B. CURRENT STATE OF THE LAW ON THE ISSUE

134. The Supreme Court is ordinarily constituted by at least 5 Justices. However, the law provides that when the review jurisdiction of the court is invoked it should be constituted by a minimum of 7 Justices.[280]

135. Before the authority of the Supreme Court to review its own decisions was enshrined in Article 133(1), the review jurisdiction of the Supreme Court was asserted by the court itself as deriving from its inherent jurisdiction as the Supreme Court of the land to correct its own errors by way of review and that application for review must be founded on exceptional circumstances dictated by the interest of justice.[281] This position of the Court was further re-echoed in other cases and later found expression in a Practice Direction issued by the Chief Justice in 1988.[282] The Practice Direction stated in its paragraph two that the only ground for review is that the circumstances are exceptional and that in the interest of justice there should be a review.

136. Currently, the Rules of procedure of the Supreme Court, indicate that the Supreme Court may review a decision made or given by it on the grounds of exceptional circumstances which have resulted in a miscarriage of justice; or the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by the applicant at the time when the decision was given.[283]

137. The Court has consistently held that there are no definitions as to what constitutes "exceptional circumstances" or sufficient grounds and that it was for the court to determine the matter on the facts and circumstances of each case and as dictated by the ends of justice.[284] For this purpose, the Court has identified certain factors that may be considered in determining the parameters of "exceptional circumstances." According to the Court, these include an error of law of exceptional character and which resulted in a miscarriage of justice

[280] Article 128(2) and Article 133 of the 1992 Constitution of the Republic of Ghana.
[281] *Fosuhene* v. *Pomaa* [1987-1988] 2 GLR 105; *Nasali* v. *Addy* [1987-88] 2 GLR 286; *Mechanical Lloyd Assembly Plant Ltd* v. *Nartey* [1987-88] 2 GLR 598.
[282] The "*Reviews in the Supreme Court"* Practice Direction, dated 4 August 1988 [1987-1988] 2 GLR 274.
[283] Supreme Court Rules, 1996. C.I 16 (as amended).
[284] *Penkro* v. *Kumnipah II* [1987-88] 1 GLR 558; *Bisi* v. *Kwayie* [1987-88] 2 GLR 295; *Agyekum* v. *Asakum* Engineering Construction Ltd [1992] 2 GLR 635.

or a decision given without considering a relevant statute, case law or fundamental principle of practice and procedure which if considered would have resulted in a different decision.

138. The Supreme Court has also held that the only fetters placed on the Chief Justice's administrative duty of empanelling the Court were under Article 296 of the Constitution which requires that the exercise of that discretionary power had to be fair and candid and should not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and should be in accordance with due process of law. According to the Supreme Court, however, the appointment of additional or new judges to swell the panel for the determination of a case, be it original or on review, did not make any empanelling capricious or biased.[285]

C. SUBMISSIONS RECEIVED

139. The main submissions on this issue expressed the following:
    a. The original panel that hears a case should be maintained when the Supreme Court is called to review its decisions. The current position of the law leaves room for abuse as this could lead to changes in the panel under the Executive's influence to reach a favourable verdict. Also, the current position of the law creates an avenue for an appeal of the decision of the Court rather than a review in the strict sense.
    b. On the other hand, it was argued that there is a potential for the judicial process to be stultified if the Supreme Court maintains the original panel that hears a case at first instance when the Court is called to exercise its review jurisdiction. The risk of stultification becomes palpable, it is argued, when a Justice who formed part of the original panel is indisposed and the court's business is stalled as a result.

D. FINDINGS AND OBSERVATIONS

140. The Commission finds that the express constitutional power of the Supreme Court to review its own decisions is an innovation of the 1992 Constitution.

141. The Commission observes that the Consultative Assembly of 1992 in considering the review powers of the Supreme Court noted that, whereas the final appellate authority of the Supreme Court is beyond dispute, "it may happen in a few cases that in order to do substantial justice, in order to remedy some mischief or in order to make certain the law or in order to decide a matter of great legal importance" it was necessary that the Supreme Court be given the opportunity to review a decision that it has previously given. However the Court was to be

[285] *Tsikata* v. *Chief Justice & Attorney-General* [2001-2002] 1 GLR 186.

enjoined to empanel no less than 7 Justices when its power to review its decisions is solicited.[286]

142. The Commission observes that a review mechanism was first enabled in Ghana, in a somewhat different fashion, for the Court of Appeal by the Courts Decree, 1966 (N.L.C.D. 84)[287] and the Courts (Amendment) Decree, 1972 (NRCD 101).[288] They enabled the Court of Appeal to exercise for the most part review jurisdiction in respect of decisions of the ordinary bench of 3 Justices in two stated cases involving questions of law and miscarriage of justice. Additionally, N.R.C.D. 101, which abolished the Supreme Court established under the Constitution, 1969, added jurisdiction in chieftaincy appeals from the National House of Chiefs and jurisdiction over pending appeals before the defunct Supreme Court to the review jurisdiction of the Full Bench of the Court of Appeal sitting with 5 members.

143. The Commission observes from the nature and scope of the review jurisdiction that the Full Bench of the Court of Appeal under both Decrees was intended to, and did, in fact, fill the vacuum created by the abolition of that Supreme Court. Since the same court of 3 could not properly be appointed to hear appeals from their own decisions, the device of conferring a limited right of review on aggrieved parties in glaring cases of miscarriage of justice and misdirection in law was adopted. Simply put, during the SMC I and II regimes between 1975 and June 1979 the Full Bench of the Court of Appeal became the highest court of the land, with the power to review its decisions in some cases by empanelling the full bench of that court.

144. The Commission observes that the power of the Supreme Court to review its decisions, as intended under Article 133 of the Constitution, is not a peculiarity of the Ghanaian judicial process and that the practice is well established in other jurisdictions.
    a. In Canada for instance, the Supreme Court Act states that "The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive."[289] However the Rules of the Supreme Court provides that **"**within 30 days after a judgment, a party may make a motion to a judge or, if all the parties affected have consented to amend the judgment, a request to the Registrar, if the judgment contains an error arising from an accidental slip or omission; does not accord with the judgment as delivered by the Court in open court; or overlooked or accidentally omitted a matter that should have been dealt with."[290]

[286] Official Report of the Proceedings of the Consultative Assembly, (26th of February 1992, Col. 2850)
[287] Courts Decree, 1966 (N.L.C.D 84) and the Courts (Amendment) Decree, 1972 (N.R.C.D. 101) paragraph. 6 (1).
[288] Section 3 of the Courts (Amendment) Decree, 1972 (NRCD 101).
[289] Section 52 of the Canada Supreme Court Act (R.S.C., 1985.)
[290] Section 81 of the Rules of the Supreme Court of Canada (SOR/2002-156).

b. Rule 44 of the Supreme Court Rules of the United States of America allows in extraordinary circumstances for petitions for the rehearing on the merits of any judgment or decision of the Court to be filed.[291]
c. The Supreme Court of India is granted a review jurisdiction by its Rules of Court and, by virtue of this, if the Court discovers that there are some new facts or evidence or if it is satisfied that some error took place in its previous decision, it has the power to review the case and alter its previous decisions. This is generally done when a review petition is filed. Normally, a review is done by a larger bench than the one that originally decided the case.[292]

145. The Commission observes that there was no unanimity when this matter was considered at the National Constitution Review Conference. While some participants favoured the retention of the *status quo*, others were of the view that the original panel of the Supreme Court that sits to hear and determine cases at first instance should be the same panel to sit and review its own decision. Anything else amounts to an appeal or rehearing and not a review.

146. The Commission reiterates an overriding philosophy guiding the entire review process, that is, in considering proposals for the review of or the departure from the constitutional *status quo*, the Commission must measure whether or not the current practice has proven deficient and as such justifies a remedy, and, especially in this context, that remedy can only be gained through an amendment of the Constitution.

147. The Commission finds that the constitutional provisions in their current state require that the Supreme Court, to be considered as duly constituted for its work, must have not less than 5 Justices empanelled for the case. The Constitution, however, imposes a stricter requirement on the Supreme Court to empanel not less than 7 Justices when it comes to the exercise of its review jurisdiction. Also, the practice of the Supreme Court in recent times has equally shown that when called to adjudicate constitutional matters, it empanels no less than 9 Justices to hear such matters. It is to be deduced from the above that, when a complaint brought before the Supreme Court raises a substantial question of law or is in the public interest, the Court, rather than fulfilling the minimum legal obligation by empanelling 5 Justices, makes a conscious effort to empanel a considerable number of Justices, way above the minimum required. It flows from the above that when more Justices are made to determine a case, this should be considered as being in the best interests of justice. Again, it can be argued that, the more Justices empanelled to hear a case, the more finality and authority that decision acquires.

[291] Rules of the Supreme Court of the United States, 2010.
[292] Supreme Court of India Rules, 1966.

148. The Commission finds that the Supreme Court has, through its rulings, defined and set strict parameters for what constitutes enough grounds to invoke the review jurisdiction of the Supreme Court. In other words, a decision of the Supreme Court can only be up for review if certain strict requirements, clearly spelt out by the Rules of Court of the Supreme Court and consistently upheld by the Court in its jurisprudence, are fulfilled. These requirements are meant to ensure that the review avenue is not used as an appeal or an opportunity for a re-hearing of the case. According to the Supreme Court, the mere fact that a judgement can be criticised is no ground for asking that it should be reviewed. The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where a fundamental and basic error must have occasioned a gross miscarriage of justice.[293]

149. The Commission also finds that, in any case, there is good reason for the view that the panel reviewing a decision of the Court should as far as practicable not exclude the judges who sat in the original case. Excluding the original judges could be perceived as transforming the review into an appeal, and thus undermines the principle that decisions of the Supreme Court are final and not subject to appeal.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

150. The Commission recommends that the current constitutional arrangement on the review panel of the Supreme Court be amended to ensure that the original panel that decided the case at first instance should, as far as practicable, be the same panel to constitute the review panel.

ISSUE FIVE: QUALIFICATION REQUIREMENTS FOR APPOINTMENT TO THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

151. The main dimension of the issue centred on whether the current constitutional arrangement with regard to the qualification requirements of Justices of the Supreme Court was deficient and as such in need of reform.

B. CURRENT STATE OF THE LAW ON THE ISSUE

[293] *Penkro* v. *Kumnipah II* [1987-88] 1 GLR 558, at pp 603-604.

152. The 1992 Constitution sets out the qualification requirements for appointment to the Supreme Court. The Constitution provides that a person shall not be qualified for appointment as a Justice of the Supreme Court unless he is of high moral character and proven integrity and is of not less than 15 years standing as a lawyer.[294]

C. SUBMISSIONS RECEIVED

153. The following submissions were made in relation to this issue:
    a. The eligibility criteria for Justices of the Supreme Court as established by the Constitution should be maintained. It was argued that the current provisions are sufficient and allow for Justices of high quality to be appointed to the Supreme Court.
    b. The eligibility criteria for Justices of the Supreme Court must be reviewed as the current provisions create the latitude for the appointment of persons without appropriate proven legal experience to the Supreme Court.

D. FINDINGS AND OBSERVATIONS

154. The Commission observes that the commonly accepted norm in many states is that the most effective way of ensuring that political considerations do not influence the appointment of judges, is to require that candidates for judicial offices possess the highest qualification and training in law and have established credible credentials as expert legal minds who possess the highest personal integrity.

155. The Commission further observes that, internationally, there is a dominant and general evolution towards guaranteeing, through constitutional and legislative provisions, the professional quality as well as the personal integrity of judges appointed to the highest court. However, even in jurisdictions where no express constitutional or legislative provisions can be readily found on the qualification requirements of Judges, the long established convention is that, the bench should indeed be the preserve of distinguished legal minds.
    a. In the United States of America, the Constitution provides that Justices of the Supreme Court shall hold their offices during good behaviour. It also empowers Congress to create legislation or make collective decisions that result in *de facto* requirements. Also, the Judiciary Committee of the Senate conducts hearings and votes on whether the nomination should go to the full Senate with a positive, negative or neutral report. The confirmation process in recent years has attracted considerable attention from the press and advocacy groups, which lobby senators to confirm or to reject a nominee depending on whether their track record aligns with the group's views. Such increased scrutiny of the President's nominees, generally ensures some level of censure and fetters on the appointing powers conferred on the President by the Constitution.

[294] Article 128(4) of the 1992 Constitution of the Republic of Ghana.

b. The Indian Constitution provides that a person shall not be qualified for appointment as a Judge of the Supreme Court unless that person is a citizen of India and has been for at least 5 years a Judge of a High Court or of two or more such Courts in succession, or has been for at least 10 years an advocate of a High Court or of two or more such Courts in succession or is, in the opinion of the President, a distinguished jurist.
c. The constitutional framework in the Gambia provides that a person cannot be appointed to the Supreme Court unless the person holds or has held office as a Judge of the Court of Appeal, or as a Judge of a court having similar jurisdiction in a common law country in each case for not less than 5 years, or if he has practised as a legal practitioner before a court having unlimited jurisdiction in civil and criminal matters in a common law country for not less than 12 years.

156. The Commission observes that the National Constitution Review Conference was divided when the issue of the appropriate qualification requirements to be defined for Justices of the Supreme Court was considered. Some participants in favour of a review of the current constitutional dispensation proposed that in addition to the requirement of "high moral character and proven integrity", the Justice should have relevant legal or judicial experience with the courts. However, there was no consensus amongst them on the number of years of standing the candidate should have at the Bar. Others, however, strongly advocated the retention of the current constitutional arrangement.

157. The Commission finds that there is the need to provide safeguards in the Constitution to ensure that the highest court of the land is truly the preserve of distinguished legal minds and is convinced that the current constitutional framework is not deficient in ensuring that this threshold of acceptability is met. Again, the current appointment procedure for Justices of the Supreme Court creates a vetting mechanism which engages 4 institutions of repute namely, the Judicial Council, the Presidency, the Council of State and Parliament. This process should provide assurance that only persons of the highest quality are appointed to the Supreme Court.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

158. The Commission recommends that the current constitutional provisions on the qualifications for the appointment of a Supreme Court Justice be maintained.

ISSUE SIX: PROCESS OF APPOINTMENT OF JUSTICES OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

159. The submissions received relate mainly to whether the President's involvement in the appointment of Justices of the Supreme Court should be abrogated and whether the Judicial Council should have the exclusive mandate of appointing Justices of the Supreme Court so as to mitigate any undue external influence on the Judiciary.

B. CURRENT STATE OF THE LAW ON THE ISSUE

160. The law provides that Supreme Court Justices shall be appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.[295]

C. SUBMISSIONS RECEIVED

161. The following submissions were received by the Commission on this issue:
    a. Some submissions advocated the need to maintain the current process of appointment of Justices of the Supreme Court. In support of this position, it was indicated that there is no apparent deficiency in the current arrangement that requires remedy, and that the *status quo* does not differ much from what is practised in established democracies. Other submissions stressed that the President being Head of State and first citizen should be involved in the process of appointment of Justices of the Supreme Court.
    b. Other submissions advocated the reform of the current appointment mechanism to allow the Judicial Council to have the exclusive authority to appoint Justices of the Supreme Court. This arrangement, it is argued, will reduce the perception of Executive manipulation of the Supreme Court. Other arguments offered in support of this position were that the Judicial Council with its first-hand knowledge of Judges is better placed to appoint the best Judges to the Supreme Court and that it will enable the Judiciary to be in charge of its own affairs, enhancing thereby its independence. It will also give meaning to the principle of separation of powers, as well as enhance the independence of the Judiciary. The arrangement will also prevent the Executive from being placed in a position *vis-a-vis* the Judiciary such as would enable it, or at least would offer it, the temptation to exert pressure, on the Judiciary.
    c. Some of the submissions calling for a reform of the *status quo* maintained that an independent or neutral appointing body should be created to appoint Justices of the Supreme Court. In support of this position, many of the submissions received by the Commission indicated that this will ensure impartiality in the appointing process as an

[295] Article 144(2) of the 1992 Constitution of the Republic of Ghana.

independent body is better placed to make objective recommendations. This will also ensure that appointments of Supreme Court Justices are not based on political criteria but rather on the professional and technical skills of the candidates.

d. There were other submissions that proposed that Justices of the Supreme Court be elected either by the citizenry or by Judges and be subject as well to periodic electoral accountability or that Judges should rise through the ranks. It was proposed that these options will guarantee a transparent process and will equally ensure that the judicial process by which Justices accede to the Supreme Court is free and fair.

D. FINDINGS AND OBSERVATIONS

162. The Commission observes that international practices of many nations indicate that Judges of the Supreme Court are appointed by the President. In most countries however, the President's power to appoint Justices to the highest court is not without fetters as the trend is also to involve both the Judiciary and the Legislature in the appointment process.

a. In Pakistan, for instance, the appointment of Justices of the Supreme Court is merely a ceremonial one. As per the country's constitutional framework, the President appoints Judges to the Supreme Court from amongst the persons recommended by the Chief Justice of Pakistan on the basis of their knowledge and expertise in the different fields of law. The recommendation of the Chief Justice is binding on the President and is normally accepted, although the President may oppose the recommendation for stated reasons and those reasons may themselves be challenged in court.

b. In the United States of America, the President's role in appointing Justices to the Supreme Court is more prominent. According to the Constitution, Justices of the Supreme Court are appointed by the President on the advice of the Senate and must be confirmed by a majority vote in the Senate. The practice has shown that the Senate's advice to the President in this respect is often not binding and in most cases not solicited. The role of the Senate is however, significant during the confirmation process.

c. Under the Constitutional Reform Act 2005, which sets out the conditions for appointment of Justices of the United Kingdom Supreme Court, Judges of the Supreme Court are appointed by the Queen on the advice of the Prime Minister, to whom a name is recommended by a special selection commission made up of the President and Deputy President of the Court, and a member each from the English Judicial Appointments Commission, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. The Prime Minister is required by the Constitutional Reform Act to recommend this name to the Queen and not permitted to nominate anyone else.

d. In the Gambia, Justices of the Supreme Court are appointed by the President acting on the recommendations of the Judicial Service Commission.

e. A similar practice as in the Gambia prevails in South Africa, where appointments to the highest court of the land are made by the President who is bound by the recommendations of the Judicial Service Commission.

163. The Commission observes that the National Constitution Conference proposed that all Justices of the Supreme Court should be appointed by the President acting in consultation with the Council of State, the Judicial Council and with the approval of a two-thirds majority of Parliament.

164. The Commission observes that judicial appointments, and in particular the system by which Supreme Court Justices are appointed, play a critical role in determining whether a judiciary is independent or not. Thus, a judicial appointment system free of undue political control by the executive or legislative branches will contribute significantly to ensuring an impartial and honest justice system. By contrast, in a politically-driven system of selecting or appointing members of the Supreme Court subject to partisan politics, nepotism, or patronage these superior judicial officials owe their positions to the authorities who appointed them. This, the Commission finds, accords the authorities considerable sway over the courts. Without question, this has a negative impact on the administration of justice and can give way to judicial outcomes that are without merit.

165. Drawing from the experiences and lessons learnt from other jurisdictions, the Commission finds that the judicial appointment system, especially for Supreme Court Justices, creates a link between the justice system and the political system and that, in practice, this mechanism has often been exploited to impact negatively on the independence of Judges, thereby contributing to the phenomenon of judicial corruption.

166. The Commission finds that it is important for judicial independence that no single institution should have unfettered control over the appointment procedures of Judges and strengthening the Judicial Council to better perform its gate-keeping role in this regard is one sure way of ensuring long-term judicial integrity and independence.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

167. The Commission recommends that the current constitutional provisions on the process of appointment of Justices of the Supreme Court should be maintained.

ISSUE SEVEN: TENURE OF JUSTICES OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

168. The main dimension of this issue was whether or not the tenure of office of Justices of the Supreme Court is inseparable from their independence and impartiality as judicial officers.

B. CURRENT STATE OF THE LAW ON THE ISSUE

169. The 1992 Constitution provides that Justices of the Supreme Court can elect to go on voluntary retirement after 60 years. Justices of the Supreme Court are, however, compelled to retire from office on attaining 70 years.[296]

C. SUBMISSIONS RECEIVED:

170. The main concerns of the submissions are set out below:
    a. The *status quo* should be maintained as the current provisions allow Justices of the Supreme Court not only to have a secure tenure but also to retire at an age when their experience and legal knowledge gained over the years would have been effectively utilised.
    b. Justices of the Supreme Court should be accorded tenure for life. This arrangement, it is argued, is in tune with the practices of some well-established democracies and will equally provide the maximum security of tenure for Justices.
    c. The Constitution should ensure uniformity in the treatment of all public office holders by pegging the mandatory retiring age of Justices of the Supreme Court at 60 years.

D. FINDINGS AND OBSERVATIONS

171. The Commission finds that it is commonly held in international practice that providing a secure tenure for judges helps ensure the reality of judicial independence. The practice of states has established that to grant an independent identity to the Judiciary and insulate it from interference from the other arms of government, particularly, the Executive, the Judiciary must be granted some level of financial autonomy; security of tenure of Judges; protection of judges from legal suit in the exercise of judicial power; and security of salaries, pension, and other conditions of service for Judges.
    a. The European Court of Human Rights has decided that when determining whether a judicial organ can be considered to be independent, it is important to take into account the manner in which its members are appointed and the length of their tenure, the existence of safeguards against external influence, and the question of whether it presents an appearance of independence.

[296] Article 145 of the 1992 Constitution of the Republic of Ghana.

b. The Constitution of the United States provides that Justices of the Supreme Court shall hold their offices during good behaviour. The term "good behaviour" is well understood to mean Justices may serve for the remainder of their lives, although they can voluntarily resign or retire. A justice can also be removed by congressional impeachment and by conviction by the Senate.
c. In Canada, a Justice of the Supreme Court holds office during good behaviour, until he or she retires or attains the age of 75 years, but is removable for incapacity or misconduct in office before that time by the Governor-General on address of the Senate and House of Commons.
d. The Indian Constitution seeks to ensure the independence of Supreme Court Judges in various ways. The Chief Justice of India and other judges of the Supreme Court hold office till they attain the age of 65 years. A Judge may voluntarily resign before the expiration of his term. In exceptional cases, a Supreme Court Judge may be removed before the age of retirement, according to the procedure laid down in the Constitution.
e. The Nigeria Constitution of 1999 provides that a Judge appointed to the Supreme Court has an option to voluntarily retire from the service on attaining the age of 65 years, or be compelled to retire on attaining the age of 70 years.
f. The Gambian Constitution retains similar requirements to the Nigerian Constitution.

172. The Commission observes that when the issue of the retiring age and removal of superior court Judges was discussed at the National Constitution Review Conference, the group was divided. One side proposed that there should be a uniform retiring age of 70 for all Justices of the Superior Courts (rather than have High Court Judges retire at 65 years and Court of Appeal and Supreme Court Judges retire at 70 years), whilst the other side maintained that the current arrangement in the Constitution should be maintained.

173. The Commission finds that in considering the tenure of Judges especially that of Justices of the Supreme Court, it is necessary to consider the extent to which that tenure of office limits the influence the appointing authority could have on the appointees. It is universally recognised that a move geared towards guaranteeing the tenure of Justices of the Supreme Court is in tune with international best practice and is favoured in a bid to further insulate Judges from external influence.

174. The Commission further finds that the current tenure provides Justices of the Supreme Court with a remarkable level of job security and this is because the current arrangement shields Justices of the Court from having to seek political favour to stay in office.

175. The Commission finally observes that a life tenure for Judges further protects Judges from undue external influence, it also considers that the current constitutional arrangement not only serves an equal purpose in maintaining judicial independence, it also averts some of the

problems inherent in granting Justices a life tenure by not allowing, for instance, Judges to remain on the bench indefinitely even as their productivity and effectiveness dwindle.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

176. The Commission recommends that the current constitutional provisions on the tenure of Justices of the Supreme Court be retained.

ISSUE EIGHT: REMOVAL FROM OFFICE OF JUSTICES OF THE SUPREME COURT

A. DIMENSIONS OF THE ISSUE

177. The Commission had to consider submissions on whether the provisions on the removal of Justices of the Supreme Court as enshrined under the current constitutional dispensation compromises the security of tenure of the justices of the Supreme Court.

B. CURRENT STATE OF THE LAW ON THE ISSUE

178. The 1992 Constitution provides that a Justice of the Supreme Court cannot be removed from office except for stated misbehaviour or on grounds of inability to perform the functions of his or her office arising from infirmity of body or mind.[297]

179. As to the procedure by which a Justice of the Supreme Court can be removed from office, the constitutional framework provides that the President upon receiving a petition for the removal of a Justice of a Superior Court except the Chief Justice, shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case.[298] Where the Chief Justice decides that there is a *prima facie* case, she is mandated to set up a committee consisting of 3 Justices of the Superior Courts or Chairmen of the Regional Tribunals or both, appointed by the Judicial council and two other persons who are not members of the Council of State, or members of Parliament, or lawyers, and who are appointed by the Chief Justice on the advice of the Council of State.[299]

180. The President is required to act in accordance with the recommendations of the committee.

C. SUBMISSIONS RECEIVED

[297] Article 146(1) of the 1992 Constitution of the Republic of Ghana.
[298] The Supreme has held that the right to petition the President for the removal of any Justice of the Superior Courts is guaranteed for every citizen. *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732.
[299] Article 146 of the 1992 Constitution of the Republic of Ghana.

181. On the issue under consideration, a number of submissions expressed the following:
    a. It has been argued that, the *status quo* provides enough security of tenure to Justices of the Court and as such should be maintained.
    b. Other submissions proposed that the President being the first citizen should have a free hand in determining which public officers he can work with in order not to hinder his development agenda. As such, the President should have the free-hand to dismiss any Justice who in his estimation is ineffective to his development agenda.
    c. Other submissions called for the Judicial Council to be the only body mandated to remove Justices of the Supreme Court from office. It has been strongly urged upon the Commission to narrow down the influence of the Executive on the Judiciary by eliminating the President from the processes of removing a Justice of the Supreme Court. Also, it has been argued that the judiciary should be in charge of its own destiny and as such the Judicial Council should be the only body mandated to remove Justices of the Supreme Court.
    d. There were a number of submissions which requested that an independent body should be constituted to handle the removal of Justices of the Supreme Court. It is suggested that such a body could be better placed to make objective and uninfluenced decisions on such matters.

D. FINDINGS AND OBSERVATIONS

182. The Commission observes that, the overriding viewpoint in deciding the framework within which Judges, especially Justices of the Supreme Court, are removed is to establish whether the adopted process allows Judges to be insulated from unjustified political influence and pressure. This overriding viewpoint is evidenced in the practice of most nations.
    a. In the United States of America, for instance, Justices of the Supreme Court serve lifetime appointments. However, under the US Constitution, they can be removed from the court by first being impeached by a majority vote of the US House of Representatives and then convicted by a two-thirds vote of the Senate. It is interesting to note that there is no precise standard for determining whether a justice has committed an impeachable offence, though the consensus is that removal should be for criminal or ethical lapses, not for partisan political reasons.
    b. The procedure as laid out by the United States Constitution is similar in practice to that enshrined by the Constitutional Reform Act of 2005 that established the United Kingdom Supreme Court. The Act provides that a Judge of the Supreme Court holds that office during "good behaviour" and can only be removed from it on the address of both Houses of Parliament.
    c. The Indian Constitution also ensures the independence of Supreme Court Judges. "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the

members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."[300]

183. The Commission finds that the current constitutional arrangement not only clearly provides the procedure by which a Justice of the Superior Courts can be removed, but also delineates the situations which can provide grounds for a petition requiring the removal of a Justice of the Superior Courts. The Commission is convinced that the situations that can constitute grounds for a petition for the removal of a Justice of the Supreme Court in Ghana today do not unnecessarily put Justices at risk of persecution or political manipulation.

184. The Commission finds that in matters such as this, where the credibility of a Justice of the Supreme Court is at stake, the determination of whether a petition discloses a *prima facie* case should not be left to the sole discretion of the Chief Justice.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

185. The Commission recommends that the Chief Justice, in determining whether a petition for the removal of a Justice of the Supreme Court discloses a *prima facie* case, should do so in consultation with the Council of State.

SUBTHEME THREE: THE CHIEF JUSTICE

ISSUE ONE: APPOINTMENT TO THE OFFICE OF THE CHIEF JUSTICE

A. DIMENSIONS OF THE ISSUE

186. The thrust of the submissions received relates to whether the current mode of appointing the Chief Justice creates room for the Executive to manipulate the holder of that office.

B. CURRENT STATE OF THE LAW ON THE ISSUE

187. The 1992 Constitution provides that the Chief Justice shall be appointed by the President acting in consultation with the Council of State and with the approval of Parliament.[301]

C. SUBMISSIONS RECEIVED

188. The various submissions received indicate the following:
    a. The current provisions should be maintained as they have not proved deficient.

[300] Article 124(4) of 1992 Constitution of the Republic of Ghana.
[301] Article 144(1) of the 1992 Constitution of the Republic of Ghana.

b. There is the need to review the mode of appointment of the Chief Justice to ensure that the Chief Justice will be less susceptible to political pressure and to increase public confidence in the office and in the Judiciary. Some of the submissions proposed that the Chief Justice should be subjected to electoral accountability.

D. FINDINGS AND OBSERVATIONS

189. It emerges from the established practice of most states that the appointment of the Chief Justice is often the prerogative of the President and that the current practice in Ghana is in line with international best practice.
    a. Article 124 of the Indian Constitution provides for the appointment of Judges to the Supreme Court. However, there is no specific provision as to the appointment of the Chief Justice. Therefore, the same provision is followed for the appointment of the Chief Justice. This, in practice, means that the most senior judge and the one with most experience in the Supreme Court would be proposed by the government led by the Prime minister to the President for appointment. This convention was breached on a number of occasions until the Supreme Court, in a series of decisions, held that the Government of India would be bound to nominate only the most senior judge of the Supreme Court for the position of Chief Justice, thereby ruling out any possible abuse by the Prime minister or his ability to influence the Judiciary.
    b. The appointment of a person to the office of Chief Justice of Nigeria is made by the President on the recommendation of the National Judicial Council subject to confirmation of the Senate. A similar procedure of appointment is favoured in a considerable number of countries such as Uganda, where the Chief Justice is appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

190. The Commission observes that instituting a constitutional injunction on the President to nominate a person to the office of the Chief Justice strictly on the basis of the person's seniority at the bench of the Supreme Court, as is the case in India, could be averse to selecting a Chief Justice based on talent and the recognition of leadership abilities.

191. The Commission observes that when the issue of the appointment of the Chief Justice was considered at the National Constitution Review Conference, the general consensus was that the current constitutional arrangement should be maintained but the consultations be expanded to include the Judicial Council subject to two-thirds majority approval by Parliament. It was the consensus that Article 144(1) should be amended to read as follows: "The Chief Justice shall be appointed by the President acting in consultation with the Judicial Council and the Council of State and with the approval of two-thirds majority of Parliament."

192. The Commission observes that the current constitutional framework which requires that the nomination of the Chief Justice by the President be done in consultation with the Council of State and the nominee subsequently subjected to parliamentary approval allows for adequate checks on the President's power to appoint the Chief Justice and conforms in that regard with best international practices.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

193. The Commission recommends that the provisions relating to the procedure for appointing the Chief Justice be maintained.

ISSUE TWO: THE EMPANELLING POWERS OF THE CHIEF JUSTICE

A. DIMENSIONS OF THE ISSUE

194. The main point of contention here is whether the Chief Justice in exercising her administrative functioning of empanelling the Courts flaunts, especially in matters in which she has a personal interest, the principles of natural justice which enjoin her from being a judge in his or her own case, and whether the power of the Chief Justice to empanel the court could be used by a partial Chief Justice to determine the outcomes of cases.

B. CURRENT STATE OF THE LAW ON THE ISSUE

195. The Constitution does not explicitly make provision for the procedure of empanelling courts, however, the Chief Justice's power to empanel the courts derives implicitly from her role as administrative head of the Judiciary. This position is endorsed by the Supreme Court when it held that, for as long as the Chief Justice is in office, the right to constitute panels of the Supreme Court is exercisable by her as one of the administrative incidents of her office under Article 125(4) of the 1992 Constitution.[302] Article 125(4) states that the Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary.

196. The Supreme Court has consistently held that the principles of natural justice are not relevant to the administrative duty of the Chief Justice to empanel the Supreme Court. In the view of the Court, it cannot be said that when the Chief Justice empanels a court, she thereby becomes a judge in his or her own cause; on the contrary, she merely exercises her administrative powers under the Constitution. Also, the court considered that, the Chief Justice is under a mandatory duty to empanel the court and that the exercise of an

[302] *Agyei Twum* v.*Attorney-General & Akwetey* [2005-2006] SCGLR 732 esp. at 746.

administrative function, *per se*, cannot amount to the perversion of Justice. The disqualifying factor, if any, must arise from an adjudicating function.[303]

C. SUBMISSIONS RECEIVED

197. A strong case was made for the Chief Justice to retain her administrative mandate to empanel the courts. It has been argued in support of this that the Chief Justice's empanelling of the Courts does not necessary mean that she will influence the outcome of a particular case. It was also suggested that the human element in the empanelling of courts enables cases to be assigned to Justices on the basis of their knowledge and expertise in the different fields of law, a key component of the administration of justice.

198. Other submissions urged that the power of the Chief Justice to empanel courts should be hived off in favour of the Judicial Council. This arrangement, some have argued, will reduce the enormous power of discretion of an individual in favour of an institution and that this will strengthen the Judicial Council and make it more effective in ensuring an impartial judicial process.

199. The Commission was also urged to consider restricting the Chief Justice's power to empanel the Court especially in situations where the Chief Justice has a "personal interest' in the case under consideration. It was proposed that the most senior Justice be made to empanel the Court in such situations. This is what happens when the Chief Justice is absent from Ghana or otherwise unavailable. This proposal has the merit of not necessitating a process of constitutional amendment, or a complete overhaul of the *status quo*. It enjoins the Supreme Court to maintain its current empanelling practice while incorporating respect for the principles of natural Justice. Also it is urged that this arrangement constitutes an adequate compromise between calls to have the Chief Justice lose altogether her empanelling powers and calls to have the Chief Justice still empanel the courts even in instances where there is a clear case of conflict of interest.

D. FINDINGS AND OBSERVATIONS

200. The Commission observes that the Chief Justice has an executive role as the head of the Supreme Court as well as the head of the Judiciary in the State. It is from this role that the Chief Justice has the ultimate authority to determine the distribution of judicial workload taking into account individual Judges' interests and abilities.

[303] *Akufo Addo* v. *Quarshie-Idun* [1968] GLR 667; *Bilson* v. *Apaloo* [1981] GLR 24; *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732.

201. The Commission also observes that the Supreme Court has held in its case law that the only fetters placed on the Chief Justice's administrative role of empanelling the court is under Article 296 which requires that the exercise of discretionary power has to be fair and candid, should not be arbitrary or biased and should be in accordance with due process of the law. According to the Supreme Court, however, the appointment of additional or new Judges to swell the panel for the determination of a case, be it original or on review did not make any empanelling capricious or biased.[304] While the Commission appreciates the pertinence of these arguments, it remains convinced that the current constitutional arrangement creates room for the accumulation of powers in the office of the Chief Justice with all its attendant implications.

202. The Commission finds that the Chief Justice's empanelling of the courts introduces a personal element to empanelling which allows cases to be assigned to Justices in due consideration of their areas of expertise and specialisation. This arrangement could enhance the quality of Justice delivered by the Court. Conversely, it could be used by a partial Chief Justice illegitimately to pre-determine the outcome of cases by empanelling particular Judges for particular cases according to her assessment of how they would decide issues in the case.

203. The Commission observes that when this issue was considered at the National Constitution Review Conference, no evident consensus emerged among the participants. While the majority held that the Chief Justice's office should retain its empanelling powers, others favoured a different approach and called for an automated system for the selection and assignment of cases to Judges. The merit of the automated system allows minimal human handling and attendant manipulation of the process.

204. Whilst acknowledging that the empanelling of the courts by the Chief Justice enables to preside effectively over the courts in her right as head of the Judiciary, the Commission finds that the current arrangement for empanelling the Supreme Court leaves much to be desired. The Commission finds that, the procedure by which a Chief Justice is empowered to select panels to deal with specific cases before the Court is far from satisfactory as it leaves room for the possibility that a Chief Justice will seek to influence the outcome of a case by selecting judges to the panel that the Chief Justice believes will decide the case in a particular way. This possibility will be factual when a Chief Justice has worked with the other Judges for a sufficiently long period to be able to know their personal judicial attitudes and is able to predict with some certainty the position that different Judges will take on a question to be determined by the court.

[304] *Tsatsu Tsikata* v. *Chief Justice and Attorney-General* [2001-2002] 1 GLR 186 at 198.

205. The Commission finds that it is advisable to organise the Supreme Court such that it reduces as much as possible the occasions on which the Chief Justice will have a significant role in the choice of Judges to sit on particular cases. For this purpose, provision could be made for a Supreme Court in which the Judges to sit on particular cases are to some extent predetermined. Thus, for example, there could be a panel or chamber of the court, established in advance, that would be given the mandate to exercise the original jurisdiction of the court in matters relating to the enforcement or interpretation of the Constitution under Article 130(1) of the Constitution. There could be provision for the Chief Justice to designate another judge to fill a vacancy if this becomes necessary for a particular case and it is not possible or convenient to reconstitute the panel or chamber.

206. The Commission observes that the Judiciary has introduced electronic assignment of cases to judges in the High Court and is planning to roll this out for the other superior courts. When the empanelling of judges is done electronically in such a way that it reduces significantly the impact of the personal wishes and opinions of the person selecting the panel of judges, confidence in judicial outcomes will be greatly enhanced.

207. The Commission further observes that, considering that the empanelling of the courts is an administrative responsibility which only derives from the Chief Justice's role as head of the Judiciary, it would be imprudent to introduce any constitutional amendments on the matter, and finds that the current practice of the courts on the issue of empanelling would be better served if the *status quo* is preserved and allowed to evolve.

208. The Commission recognises that the changes being proposed could be seen by some as undermining the position of the Chief Justice in some way. This is not the objective. The objective is to streamline and strengthen the system of justice and make it more credible in the eyes of the public. By isolating the Chief Justice from any accusations or suspicions of undue influence, the change will strengthen the perception that the Supreme Court is a truly independent body that is not susceptible to manipulation from within or without. The Supreme Court is entrusted with crucial constitutional functions, and it is important that it should not just deliver justice effectively, but also that it is perceived and generally seen to deliver justice without fear or favour or any undue influence. In fact, the changes will not make the Supreme Court in Ghana that very different from similar courts in other countries.
    a. The German Constitutional Court consists of two Senates, each of which has 8 members, headed by a Senate Chairman. The members of each Senate are appointed as such and allocated to 3 Chambers for hearings in Constitutional Complaint and Single Regulation Control cases. One Senate may not overrule a standing precedent of another Senate. Where such an issue arises it has to be submitted to a plenary meeting of all 16 Judges.[305]

[305] The Jurisdiction of the Federal Constitutional Court is laid out in article 93 of the 1949 Basic Law for the Federal Republic of Germany (*Grundgesetz*, commonly referred to as the German Constitution). This constitutional norm is

b. In South Africa, the Constitution states that a matter before the Constitutional Court must be heard by at least 8 Judges. However, in practice, cases are routinely heard by all 11 Judges of the Constitutional Court. If a judge is absent for a long period or a vacancy arises, an acting judge is appointed by the President on the recommendation of the Minister of Justice and with the concurrence of the Chief Justice.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

209. The Commission recommends that the current constitutional provisions be maintained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

210. The Commission recommends that where the Chief Justice has a personal interest in a case, she should cede the task of composing a panel to decide the case to the most senior justice of the Supreme Court, as happens when she is absent from the jurisdiction or is otherwise unable to perform her functions as Chief Justice.

211. The Commission also recommends that the Chief Justice should adopt guidelines, elaborating mechanisms, including the use of electronic methods of empanelling the Superior Courts, to ensure transparency in that regard.

ISSUE THREE: REMOVAL OF THE CHIEF JUSTICE FROM OFFICE

A. DIMENSIONS OF THE ISSUE

212. The main dimension of this issue is whether a *prima facie* case need be established before the procedure for removing the Chief Justice from office is triggered.

B. CURRENT STATE OF THE LAW ON THE ISSUE

213. The 1992 Constitution provides the following grounds for the removal from office of the Chief Justice: stated misbehaviour, incompetence or an inability to perform the functions of her office arising from infirmity of body or mind.

214. The President on the receipt of a petition requesting the removal from office of the Chief Justice is bound to appoint, in consultation with the Council of State, a Committee which shall determine the merits of the petition raised against the Chief Justice. The findings and recommendations of the Committee are binding on the President.

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further expatiated by a Federal law, the Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG) as published on 11 August 1993 (*Federal Law Gazette* I p. 1473), as last amended by the Act of 16 July 1998 (*Federal Law Gazette* I p. 1823).

215. The Supreme Court has held that before the consultation by the President with the Council of State in respect of the appointment of a Committee to inquire into a petition for the removal of the Chief Justice is initiated, there should first be a determination whether the said petition discloses a *prima facie* case.[306]

C. SUBMISSIONS RECEIVED

216. The Commission has received a number of submissions on this issue, the thrusts of which are the following:
    a. Some submissions urged maintaining the current provisions because amending the Constitution just to insert that a *prima facie* case should be established before the removal of the Chief Justice is initiated was unnecessary. The arguments offered in support of this position were that the Constitution in its present state already implicitly requires the establishment of a *prima facie* case as the President is required to consult with the Council of State before setting up the fact finding committee.
    b. Other submissions were to be the effect that not requiring the establishment of a *prima facie* before a petition for the removal of the Chief Justice is entertained will ensure that the Chief Justice, in her capacity as Head of the Judiciary is held to a higher standard than other judges of the Supreme Court.
    c. Other submissions suggested that the Constitution should be amended to explicitly reflect the principle recognised by the jurisprudence[307] that the establishment of a *prima facie* case is implicitly written into the language of the Constitution. The argument is that the amendment will bring the Constitution in explicit alignment with the current state of the law as laid down by the Supreme Court. It was also suggested that not only will this insulate the Chief Justice from undue pressures, it will also ensure uniformity in the removal procedures applied to all Justices of the Supreme Court.
    d. A number of the submissions suggested that the President being the Head of State should not have his hands tied when determining which public servants should serve or should not serve with him in pursuance of his developmental agenda and so the President should be empowered to dismiss the Chief Justice at will.
    e. Some submissions also proposed that the Chief Justice should be removed from office exclusively by the Judicial Council. It was considered that, not only will this further consolidate the independence of the Judiciary but will also ensure that the fate of the Chief Justice is decided on objective grounds by technical persons and not guided by biased political and ideological persuasions.

[306] *Frank Agyei Twum* v. *Attorney-General and Bright Akwetey* [2005-2006] SCGLR 732.
[307] *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732.

D. FINDINGS AND OBSERVATIONS

217. The Commission observes that in the Report of the Committee of Experts that developed proposals for the 1992 Constitution, it was proposed that:

> "... where the petition is against the Chief Justice, the President should refer the matter to the Judicial Committee of the Council of State. After satisfying itself that there is a *prima facie* case, the Judicial Committee should empanel a tribunal of five, three of whom should be members of the Judicial Committee of the Council of State, and the other two appointed by Parliament to examine the issue and report on it to the President."[308]

218. The Commission finds that the spirit and letter of the Constitution, properly and objectively construed, seeks to insulate effectively the Judiciary from any undue influence that could compromise its constitutionally imposed mandate to administer justice. With this in mind, the Commission is convinced that the decision of the Supreme Court in *Agyei Twum* v *Attorney-General & Akwetey*[309] does not introduce a *prima facie* requirement for a petition against the Chief Justice to be entertained; it only leverages what is implicitly provided for. In other words, the Supreme Court only restated the obvious. The Commission considers it prudent, however, that the requirement of the establishment of a *prima facie* case before a petition for the removal of the Chief Justice is entertained should be expressly provided for in the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

219. The Commission recommends that the Constitution be amended to explicitly require the establishment of a *prima facie* case by the President acting in consultation with the Council of State as a prerequisite for the commencement of the process of removal of the Chief Justice.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

220. The Commission recommends that the Rules of Court Committee should, within 6 months of the coming into force of the amended Constitution, make Rules regulating the practice and procedure of a committee set up under Article 146 to investigate a petition for the removal of the Chief Justice, other Justices of the Superior Courts, and the members of the ICBs.

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[308] Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana (July 31, 1991), paragraph 286(c).
[309] *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732.

SUBTHEME FOUR: THE OTHER SUPERIOR COURTS (THE COURT OF APPEAL, HIGH COURT, REGIONAL TRIBUNALS)

ISSUE ONE: APPOINTMENT TO OFFICE OF JUSTICES OF THE COURT OF APPEAL AND THE HIGH COURT

A. DIMENSIONS OF THE ISSUE

221. The thrust of the submissions received on this issue is whether or not Judges appointed to the Court of Appeal and to the High Court should be subjected to Parliamentary approval.

B. CURRENT STATE OF THE LAW ON THE ISSUE

222. In contrast to the appointment of Justices of the Supreme Court, Article 144(3) provides that Justices of the Court of Appeal, the High Court and Chairmen of Regional Tribunals shall be appointed by the President acting on the advice of the Judicial Council.

C. SUBMISSIONS RECEIVED

223. The following proposals were received:
    a. Subjecting the appointment of Justices of the Court of Appeal, the High Court and Chairpersons of the Regional Tribunals to parliamentary approval would not only ensure that all Justices of the Superior Courts go through the same appointment process, but also vouch for the quality of persons appointed to the bench of all superior courts.
    b. Other submissions proposed that all judges must rise through the ranks administratively from the District Courts until they reach the Court of Appeal. This arrangement will enhance transparency in the appointment process. It was suggested that appointments in the Judiciary in recent times have been characterised by political, tribal and other considerations, to the neglect of experience.

D. FINDINGS AND OBSERVATIONS

224. The Commission observes that it is common in most countries to subject Justices nominated for appointment to the Supreme Court to parliamentary approval, with regards to the appointment of Justices of other courts below the Supreme Court, a similar requirement is hardly the norm.

225. The Commission observes that when the issue of the appointment of Justices of the Court of Appeal, High Court and Chairpersons of the Regional Tribunals was considered at the National Constitution Review Conference, the general consensus among the participants was that it was unnecessary to submit them to Parliamentary vetting and subsequent approval and that the *status quo* should be maintained.

226. The Commission finds that the current constitutional arrangement has not proved deficient and is of the view that such a proposal if entertained has the potential to make the entire appointment process of Justices of the Superior courts unnecessarily cumbersome and lengthy.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

227. The Commission does not recommend any constitutional reforms to the mode of appointment of the justices of the Court of Appeal and the High Court.

ISSUE TWO: THE ESTABLISHMENT OF THE POSITION OF PRESIDENT OF THE COURT OF APPEAL

A. DIMENSIONS OF THE ISSUE

228. The critical matter for decision here is whether there should be a designated President of the Court of the Appeal.

B. CURRENT STATE OF THE LAW ON THE ISSUE

229. The law does not provide for a President of the Court of Appeal. The 1992 Constitution makes the Chief Justice the head of all the courts including the Court of Appeal. With respect to the Chief Justice's constitutional mandate as head of the Judiciary, the Chief Justice is made a member of each level of the Courts and presides over their sessions when she sits.[310]

C. SUBMISSIONS RECEIVED

230. The various submissions received on this issue expressed the following:
    a. It is argued that instituting a President of the Court of Appeal would grant the Court of Appeal some level of autonomy and independence. It was also proposed that, the Court of appeal should be better administered and should be allowed to manage administrative issues independently, such as empanelling the Court by itself without reference to the Chief Justice. This will enable the Court dispose of appeals quickly.
    b. Counter submissions have expressed uneasiness with the call for the creation of the position of President of the Court of Appeal, the main contention being that this could most probably lead to conflicts between the Chief Justice and the President of the Court of Appeal. Such a scenario could be detrimental to the administration of justice in the country.

[310] Articles 128(1), 136(1), 139(1), 142(1) of the 1992 Constitution of the Republic of Ghana.

D. FINDINGS AND OBSERVATIONS

231. The Commission observes that in a considerable number of jurisdictions where a Court of Appeal, similar in nature and jurisdiction to the Court of Appeal in Ghana, is in existence, the common practice is to have the Court headed by a different person other than the Chief Justice. In a number of such jurisdictions, such as Fiji Islands, the Gambia and Nigeria, the Court of Appeal is chaired by the President of the Court of Appeal, while in other jurisdictions such as Uganda the Court of Appeal is chaired by the Deputy Chief Justice. The draft bill for a Constitution presented by the Zambian Constitution Review Commission in 2005 envisages establishing a Court of Appeal between the High Court and the Supreme Court. The draft bill makes the Deputy Chief Justice of Zambia a member of the Court of Appeal; the Chief Justice is not permitted to hold this position. The Court of Appeal is the only court from which the Chief Justice is constitutionally barred from membership. This is to give the Court of Appeal a measure of independence from the other courts.

232. The Commission equally observes that, in all the Constitutions of Ghana since independence, there has been no position of Deputy Chief Justice properly so called, neither has the idea of a President of the Court of Appeal been institutionalised. There is, therefore, no local experience upon which to assess whether or not instituting a position of President of the Court of Appeal could result in unsettling the established judicial structure. The Commission is reluctant to propose the institution of a practice of which the benefits are not readily palpable.

233. The Commission observes that when the issue of the composition of the Court of Appeal was considered, the National Constitution Review Conference unanimously agreed that there should be no President of the Court of Appeal.

234. The Commission appreciates the drive to accord the Court of Appeal some level of autonomy and independence *vis-a-vis* the Chief Justice. The Commission considers that a less radical alternative, such as allowing the practice where the most senior justice of the Court of Appeal acts as a *de facto* head of the Court to evolve, leading to the ceding of some of the administrative functions of the Chief Justice in relation to the Court of Appeal to that Office, could be far more practicable.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

235. The Commission recommends that the current constitutional arrangement which does not provide for a President of the Court of Appeal, be maintained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

236. The Commission recommends that the Judiciary should consider, in the development of Administrative Guidelines for the judiciary, provisions allowing the practice where the most senior Justice of the Court of Appeal acts as the *de facto* head of the Court and the ceding of some of the administrative functions of the Chief Justice, such as the empanelling of the Court of Appeal, to the Office of the *de facto* President of the Court of Appeal.

ISSUE THREE: MAINTENANCE OF REGIONAL TRIBUNALS IN THE COURT STRUCTURE

A. DIMENSIONS OF THE ISSUE

237. The submissions received by the Commission focused on the relevance of the Regional Tribunals to the administration of justice in the country and whether the integration of the tribunals in the orthodox court structure has been successful.

B. CURRENT STATE OF THE LAW ON THE ISSUE

238. The PNDC government made fundamental charges in the court system with the introduction of the Public Tribunals into the country in 1982.[311] PNDC Law 42 established the Public Tribunals as parallel courts to the traditional courts to dispense speedy justice by truncating the time for the trial of mainly economic crimes.

239. The 1992 Constitution abolished all the public Tribunals and established the Regional Tribunals, with an equal status to the High Court. However, they do not enjoy widespread jurisdiction like the High Court. Their jurisdiction is limited to concurrent original jurisdiction with the High Court in criminal matters especially in matters relating to economic crimes.

C. SUBMISSIONS RECEIVED

240. The Commission received various submissions on the present issue which focused on the following:
    a. The Commission was urged to ensure that the Regional Tribunals were retained in the court structure of Ghana to complement the traditional courts. Maintaining the Regional Tribunals, it was argued, could be instrumental in tackling the backlog of cases and the deficiencies enumerated, and ensure expeditious delivery of justice. Also, it was suggested that the work of the Regional Tribunals has not been brought into disrepute and so they should be retained.

[311] The Public Tribunals law, 1982 (PNDCL 24), Public Tribunals Law 1984 (PNDCL 78) as amended by the Public Tribunals (Amendment) Law 1985 (PNDCL108) and the Public Tribunals (Amendment) Law 1989 (PNDCL 213).

b. There were submissions running counter to the above arguments. According to the submissions received, the Regional Tribunals are already almost defunct and have outlived their usefulness. Others suggested that the Regional Tribunals reek of a military past and are incompatible with the principles of due process enunciated and enshrined in the Constitution. It was also argued that the citizens of Ghana should not be subjected to two parallel systems of administration of justice. The citizen should not find him or herself in jeopardy by reason that the authorities choose to prosecute him or her in one forum instead of the other.

D. FINDINGS AND OBSERVATIONS

241. The Commission finds that the United Nations Declaration on the Independence of the Judiciary recognises that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or Judicial Tribunals.

242. The Commission observes that in preparing the stage for Ghana's return to constitutional rule, the Committee of Experts that developed proposals for the 1992 Constitution had to beat the tortuous path of reconciling the public tribunals as enabled by PNDC Law 42 with the constitutional principles. It was necessary to ensure that the Public Tribunals did not lay claim to any immunity from the constraints imposed by the Constitution. The Committee of Experts opted to integrate the Public Tribunals fully into the existing traditional court structure.

243. The Commission further observes that, pursuant to the Courts Act, the Regional Tribunals are enjoined to apply the Rules of Court and any other rules of evidence and procedure applicable to the High Court in criminal trials.

244. The Commission notes that on the issue of the removal of Regional Tribunals from the court structure, the participants at the National Constitution Review Conference unanimously decided that Regional Tribunals should be removed from the Court structure with immediate effect. In furtherance of this, all sitting Chairmen should be absorbed as High Court Judges.

245. The Commission considers that, with the grave institutional deficits registered in our efforts to inject pace in justice delivery and to treat the backlog of cases that bog down the traditional courts, Regional Tribunals could be very instrumental, if revitalised, in helping complement the efforts of the traditional courts to ensure effective and efficient justice delivery.

246. The Commission finds that the integration of the Regional Tribunals into the mainstream court system has largely not been successful. The Tribunals have buckled and suffered from stigmatisation, the lack of adequate and qualified personnel, trial proceedings sometimes being held in the absence of the Chairmen of the Tribunals[312], among other grave institutional deficits. The Commission is of the view that, the notion that the Tribunals do not administer credible justice, if left unchecked, would taint the image of the Judiciary and frustrate the efforts of the Justice institution to gain and foster public confidence in the administration of Justice in Ghana.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

247. The Commission recommends that Regional Tribunals be abolished and matters handled by them incorporated into the regular courts' schedules.

SUBTHEME FIVE: THE LOWER COURTS

ISSUE ONE: CONSTITUTIONAL EXPRESSION OF LOWER COURTS

A. DIMENSIONS OF THE ISSUE

248. The main dimension of this issue relates to whether the lower courts must be given more detailed expression in the Constitution, as is the case with the Superior Courts of Judicature.

B. CURRENT STATE OF THE LAW ON THE ISSUE

249. The 1992 Constitution recognises lower courts as part of the Judiciary of Ghana. The Constitution, however, vests expressly the power to create and determine such courts in the Parliament of Ghana.

250. The Courts Act, 1993 (Act 459) as amended establishes as lower courts the Circuit Courts, District Courts, Juvenile Courts, the National House of Chiefs, Regional Houses of Chiefs and Traditional Councils[313] and such as other lower courts as Parliament may by law establish.[314]

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[312] It should be noted that, with regards to Article 142 of the Constitution, only the Chairman of the Tribunal is required to be a lawyer. All other members may or may not have any legal training whatsoever.

[313] Section 22-30 of the Chieftaincy Act, 2008, (Act 759) further expatiates on the jurisdiction, institutional and adjudicatory processes and mandate of the various Houses of Chiefs and Traditional Councils.

[314] Courts Act (Amendment) Act, 2002 (Act 620).

251. The Chief Justice is empowered to ensure the effective presence of the lower courts established by the Courts Act in all the administrative districts in Ghana.[315]

C. SUBMISSIONS RECEIVED

252. The Commission received various submissions on the present issue which focused on the following:
    a. That the current legal framework and arrangement under which lower courts are statutory creations should be maintained. It has been advanced that the current flexibility in amending legislation setting up lower courts should not be sacrificed by constitutionalising such institutions.
    b. Other submissions upheld the relevance of having the lower courts created by the Constitution and their Judges and Magistrates provided for in the Constitution. This proposal, it is suggested, will secure the office of the Judges and Magistrates of the lower courts and would result in an amelioration of their conditions of service.

D. FINDINGS AND OBSERVATIONS

253. The Commission observes that there is a dominant trend globally as well as at the African regional level of vesting Parliament with the mandate to create as many lower courts as may be necessary to ensure the effective accessibility and disposal of justice.

254. The Commission is of the view that the current arrangement which makes lower courts statutory creations is salutary as the process of amending an Act of Parliament is undeniably more flexible than amending the Constitution. This ensures that when the need arises for the establishment of additional lower courts, the nation would not have to undergo a cumbersome process of constitutional amendment. If the creation of additional lower courts should entail a constitutional amendment, accessibility to justice would be hindered.

255. The Commission observes that the consensus reached when this issue was considered at the National Constitution Review Conference was that it is not necessary to spell out the lower courts and tribunals in the Constitution. The *status quo* as provided in Article 126(1)(b) should be retained. However, the conditions of service of judges and magistrates of the lower courts, like their superior counterparts, should also be secured under Article 71 of the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

256. The Commission recommends that the current constitutional arrangement should be retained.

[315] Courts Act, 1993 (Act 459) sections 40(1), 45(1).

ISSUE TWO: THE TENURE OF OFFICE AND CONDITIONS OF SERVICE OF JUDGES AND MAGISTRATES OF THE LOWER COURTS

A. DIMENSIONS OF THE ISSUE

257. The submissions received on this issue focus largely on the conditions under which Judges and magistrates of the lower courts serve and the need to review the country's commitment to the institutional growth of the lower courts as well as improve the conditions of service of Judges and Magistrates of the lower courts, thereby insulating the judicial officers from the appeal of corruption.

B. CURRENT STATE OF THE LAW ON THE ISSUE

258. With regard to the tenure of office of Judges and Magistrates of the lower courts, the Constitution provides that such officers of the Court have the option of voluntary retirement from age 45 but must retire at the age of 60 years. The Constitution mandates the President to determine their conditions of service, notably their salaries, allowances, facilities and privileges, acting on the advice of the Judicial Council.[316]

C. SUBMISSIONS RECEIVED

259. Various submissions received on the present issue focused on the following:
    a. With regard to the tenure of office of Judges and Magistrates of the lower courts, some of the submissions received urged the Commission to ensure that Articles 145 and 146 are expanded to cover procedures for the removal of Judges and Magistrates of the lower courts as well as to raise their retiring age.
    b. On the issue of the conditions of service of Judges and Magistrates of the lower courts, it has been proposed that they should become Article 71 office holders in the same manner as Justices of the Superior Courts. It is argued that this would ensure uniformity in the treatment of all Judges and Magistrates and would also be considered as an expression of the nation's acknowledgment of the value of the work of Judges and Magistrates of the lower courts. It has equally been suggested that this will attract high quality personnel from the Bar to the Bench at the lower level to deliver qualitative justice.

D. FINDINGS AND OBSERVATIONS

260. The Commission observes that when this issue was considered at the National Constitution Review Conference, some participants proposed that the retiring age for lower court judges and Magistrates should be pegged at 65 years. Others agreed with the 65 years proposed but argued further that there should be an option for voluntary or early retirement at 60 years or

[316] Article 149 of the 1992 Constitution of the Republic of Ghana.

continuous service till 70 years as the case may be, provided the Judge or Magistrate has the energy to continue. In the end, the consensus was that the *status quo* should be retained and that after 60 years, the limited opportunities for contracts or engagement till age 65 years, which the Constitution provides, should be allowed to Judges and magistrates of the lower courts. However, the consensus reached at the conference was that the conditions of service of Judges and Magistrates of the lower courts should be secured under Article 71 of the Constitution.

261. The Commission finds that the debate over whether Judges and Magistrates should be made Article 71 office holders is intrinsically linked to the question as to whether the financial and material commitments towards the lower courts are adequate. The Commission is convinced that making the Judges and magistrates of the lower courts Article 71 office holders will go a long way to address the discrepancies in their conditions of service of Judges and Magistrates of the lower courts and would serve as a catalyst to enhance the quality of the Bench at such levels. The Commission equally finds that well calculated administrative and legislative reforms could go a long way to give the lower courts the due recognition and valorisation necessary for their work.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

262. The Commission recommends that the conditions of service of Judges and Magistrates of the lower courts should be determined by an Independent Emoluments Commission.

SUBTHEME SIX: THE JUDICIAL COUNCIL

ISSUE ONE: COMPOSITION OF THE JUDICIAL COUNCIL

A. DIMENSIONS OF THE ISSUE

263. The dominant view in the submissions, focus on whether there is a need to streamline the composition of the judicial council so as to ensure that only technical persons vital to the realisation of the Council's mandate are maintained and whether trimming the composition of the Judicial Council would help mitigate the influence of the Executive.

B. CURRENT STATE OF THE LAW ON THE ISSUE

264. The Judicial Council is vested with oversight responsibility for the functioning of the judiciary and the judicial system. The Council's core mandate is to assist the Chief Justice in improving the administration of Justice and efficiency in the Judiciary.[317]

[317] Article 154 of the 1992 Constitution of the Republic of Ghana.

265. The Judicial Council, comprises the following persons: the Chief Justice who is Chairperson; the Minister for Justice and Attorney-General; a Justice of the Supreme Court nominated by the Justices of the Supreme Court; a Justice of the Court of Appeal nominated by the Justices of the Court of Appeal; a Justice of the High court nominated by the Justices of the High Court; two representatives of the Ghana Bar Association one of whom shall be a person of not less than twelve years' standing as a lawyer; a representative of the Chairmen of Regional Tribunals nominated by the Chairmen; a representative of the lower courts or tribunals; the Judge Advocate-General of the Ghana Armed Forces;[318] the Head of the Legal Directorate of the Police Service; the Editor of the Ghana Law Reports; a representative of the Judicial Service Staff Association nominated by the Association; a chief nominated by the National House of Chiefs; and four other persons who are not lawyers appointed by the President.[319]

C. SUBMISSIONS RECEIVED

266. The submissions received by the Commission with regards to how the Judicial Council should be composed, proposed the following:
    a. That Article 153 be amended to include a representative of the Association of Judges and Magistrates of Ghana on the Judicial Council of Ghana. This proposal is made in the hope that the Association, which apparently represents the interests of the judges and magistrates, would be equally represented on the Council like the Judicial Service Staff Association and the Ghana Bar Association represents the interests of staff of the Judicial Service and lawyers.
    b. Some submissions have urged the Commission to review the membership of the Judicial Council to remove the membership of some persons or institutions whose presence on the Council is not essential for its mandate. Notable in this regard is the call for the reduction of the number of presidential appointees, to enhance the independence of the Council.
    c. A number of submissions made a case for the number of Ghana Bar Association representatives on the Council to be increased.

D. FINDINGS AND OBSERVATIONS

267. The Commission finds that the rational underpinning of the 1992 Constitution aims to install a Judiciary which is independent from other arms of government, as well as from partisan or private interests. To reinforce and render the independence of the Judiciary and to ensure that it is insulated from interference, the Constitution creates the Judicial Council. The Council's

[318] With regards to the Armed Forces Act, 1962, the Judge Advocate-General who is appointed by the Commander-in-Chief after consultation with the Chief Justice, performs key judicial functions in the military structure. Because then of the inter-linkages between the military and civilian court structures, the presence of the Judge Advocate-General on the Judicial Council is important.
[319] Article 152 of the 1992 Constitution of the Republic of Ghana.

responsibility includes the assessment and recommendation of officers to be appointed to judicial posts. Judicial appointments, although made by the President, can only be made on the recommendation of the Judicial Council, except, as it currently stands, the appointment of the Chief Justice.

268. The Commission also finds that any envisaged reforms should be primarily geared towards ensuring that the Judicial Council is able to play its role effectively as the guardian of the independence of the Judiciary and offset any disruptive influence of other arms of government on the Judiciary. This is particularly necessary because the Constitution empowers the Judicial Council to initiate the process of appointing Justices of the Supreme Court. It follows that the Judicial Council has the power to disallow the initiation of the process of appointment from without the Council.

269. The Commission observes that, there is an overwhelming and compelling call to strengthen the Judicial Council and to mitigate the overreaching influence of other arms of government on the Council so as to render it less susceptible to manipulation.

270. The Commission observes that, the evolution of the composition of the Judicial Council throughout the constitutional history of the country has been far from static. The proposals of the Constitutional Commission for a Constitution for Ghana, 1968, envisaged a Judicial Council composed of the Chief Justice, a Judge of the Supreme Court, a Judge of the Appeal Court, a Judge of the High Court and the Attorney-General. The role of the Council as proposed was to aid and counsel the Chief Justice in the discharge of her administrative functions. The proposal states that in effect it will be to the Chief Justice what the Council of State will be to the President." Also, the 1979 Constitution of Ghana provides that the Judicial Council shall consist of :

    a. the Chief Justice who shall be Chairman;
    b. the most senior Justice of the Supreme Court, the most senior Justice of the Court of Appeal and the most senior Justice of the High Court of Justice;
    c. the Attorney General;
    d. three persons of not less than ten years standing at the Bar, appointed by the Ghana Bar Association;
    e. a representative of the inferior bench; and
    f. three other persons appointed by the President acting in consultation with the Council of State.

271. The Commission observes that when this issue was considered at the National Constitution Review Conference, the group reached a consensus and proposed that the number of nominees of the President on the Council be reduced from 4 to 2 to prevent "backdoor" Executive interference in the affairs of the Council. The group equally proposed that the

membership of the Council be expanded to include a representative of the Prisons Service Directorate and a representative of the Association of Magistrates and Judges of Ghana (AMJG).

272. The Commission finds that the inclusion of a representative of the Ghana Prisons Service on the Judicial Service Council is vital given the elaborate interface between the Judiciary and the Prisons Service.

273. The Commission finds that with the presence of representatives of the various levels of the judiciary on the Judicial Council nothing much will be lost if the AMJG is not represented on the Council.

274. The Commission also finds in this regard that constitutionalising mere associations could provoke a constitutional crisis when they cease to exist or there is an increase in the numbers of such voluntary associations as the Ghana Bar Association, the Ghana Medical Association, the Judicial Service Staff Association and the Association of Judges and Magistrates of Ghana.

275. The Commission further notes that in the evolution of the justice system, it is desirable that the Council is composed of persons other than those who operate the justice system and include the consumers of the services of the justice system.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

276. The Commission recommends an amendment to Article 153(g) such that the "representative of the Chairmen of Regional Tribunals" on the council would be substituted with a "representative of the Ghana Prisons Service."

277. The Commission also recommends that a representative of the religious bodies nominated by the various identifiable religious groups (the National Catholic Secretariat, the Christian Council, the Ghana Pentecostal Council, and the Federation of Muslim Council and Ahmadiyya Mission) as well as a representative of the private sector be added to the Council.

278. The Commission recommends that Article 153(j) which reads "the Head of the Legal Directorate of the Police Service" should be amended to read "a representative of the Ghana Police Service."

279. The Commission recommends that rather than use the names of particular Associations in the Constitution, same be replaced with more neutral expressions, such as “a representative of staff of the Judicial Service.”

CHAPTER SEVEN – PUBLIC SERVICES

7.1 INTRODUCTION

1. The Public Services of Ghana altogether constitute a very important component of governance of this nation and of the architecture of the 1992 Constitution. "[T]he list of the organisations forming the Public Service is a long one and includes the Civil Service and other government services, non-commercial public corporations and any other public corporation established by the Constitution, 1992 or by Parliament."[320] The Constitution devotes two chapters and several other provisions to matters relating to the public services and public administration. [321] In particular, the constitutional framework contains provisions that list some Public Services of Ghana and protect the tenure of public officers. Other provisions seek to ensure administrative justice and establish a Public Services Commission to exercise such supervisory, regulatory and consultative functions as Parliament may by an Act assign to it.

2. The Constitution also sets up a Commission on Human Rights and Administrative Justice (CHRAJ) with a mandate which includes that of an Ombudsman to investigate complaints of abuse of power and unfair treatment of any person by a public officer in the exercise of official duties. The CHRAJ may also investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as such complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to recruitment into those services, or fair administration in relation to those services.

3. The Constitution also contains a Code of Conduct for Public Officers.[322] The Code prohibits public officers from placing themselves in conflict of interest situations; names categories of persons who must declare their assets and liabilities to the Auditor-General; and provides the time frame for making such declarations. Parliament is empowered to add to the list of public officers required to make the declarations. The failure to declare assets and liabilities constitutes a breach of the Code, and in effect the Constitution. The Constitution has also provided for the manner in which breaches of the Code of Conduct may be investigated.

4. There are other provisions of the Constitution which give Parliament oversight responsibility for the administrative state. Under these provisions, Parliament is empowered to investigate

[320] *National Media Commission* v. *Attorney-General* [1999-2000]2 GLR 577 at 577.
[321] Chapters 14 and 24 of the 1992 Constitution of the Republic of Ghana.
[322] Chapter 24 of the 1992 Constitution of the Republic of Ghana.

and inquire into the activities and administration of ministries and departments as it may determine.[323] These ministries and departments are manned by public officers.

5. The consultations held by the Commission raised issues concerning the Public Services. These issues outlined not only the successes, but also the huge challenges that have faced the Public Services for many decades.

6. The submissions received raised issues on the composition of the Public Services of Ghana, recruitment and appointment to the Public Service, gender balance in appointments to public office, the conditions of service of public officers (including their retiring age, retirement benefits, pensions and gratuities), the removal of public officers from office, the code of conduct for public officers, public officers and party politics and the effect of findings of Commissions of Inquiry under the 1992 Constitution. These issues will be discussed in detail after a historical overview of the Public Services of Ghana.

7.2.HISTORICAL BACKGROUND

7. The issues and challenges confronting the Public Services of Ghana today are very much rooted in history. This history can be traced from the colonial period, during which the dominant vision was the establishment of a service charged with the maintenance of law and order while providing the necessary framework for the opening up of the Gold Coast.

8. Soon after independence, there were persistent attacks on the independence of public institutions including the Public Services Commission. This continued and reached its peak when the 1960 Republican Constitution abolished the Public Services Commission and replaced it with a Civil Service Commission which, under the Civil Service Act and Regulations, exercised powers of appointment, promotion and discipline only in respect of the lower ranks of the Service.[324] With regard to appointments to the higher grades of the Civil Service, the Civil Service Commission merely made recommendations to the President who made the appointments. The recommendations were said to be "a matter of prosaic routine."[325] The President also had absolute power to make appointments to the Principal Secretary grade or other grades analogous to it or higher, without consulting the Civil Service Commission.[326]

9. Against this backdrop, the successive waves of dismissal of public servants and the growing, excessive and unlimited political interference under the Nkrumah regime, the Akuffo Addo

[323] Article 103 of the 1992 Constitution of the Republic of Ghana.
[324] Civil Service Act, 1960 (C.A. 5).
[325] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 607.
[326] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 607- 609.

Commission proposed that the Public Services Commission be an independent body "established to exercise powers of appointment, promotion and discipline in the Public Services, serving at the same time as an advisory body to the Head of State in appointments to certain top posts in all the Public Services."[327]

10. Ultimately, the draft proposals by the Akuffo Addo Commission on the Public Services Commission were accepted by the Constituent Assembly of 1968 and the people of Ghana, but with some modifications. The resulting Constitution (the 1969 Constitution) established the Public Services Commission. The power to appoint persons to hold or act in any office in the Public Services was vested in the President, acting in accordance with the advice of the Public Services Commission. The President could, however, delegate that power to the Public Services Commission or to a Committee of that Commission, or to any of its members or to any public officer, subject to such conditions as the President deemed fit.

11. The 1969 Constitution also gave public officers tenured office by providing that no member of the Public Services should be victimised or discriminated against for having discharged his or her duties faithfully in accordance with the Constitution without regard to party considerations; dismissed or removed from office or reduced in rank or otherwise punished without just cause.[328]

12. The provisions of the 1979 Constitution in relation to the public services were to a large extent a replication of those in the 1969 Constitution. Public officers still enjoyed tenured office and were protected from victimization in the performance of their duties under the Constitution. The Public Services Commission performed the same functions as under the 1969 Constitution. It is this constitutional design under the 1969 and 1979 Constitutions which has evolved into the current framework of the Public Services of Ghana under the 1992 Constitution.

13. Socio-economically, the undoing of the socialist political and economic agenda of the first President of Ghana, Osagyefo Dr. Kwame Nkrumah, culminating in the re-ordering of political and economic institutions of governance during the decade of the Economic Recovery Programme and Structural Adjustment Programme since the mid-1980s, has also affected the Public Services. For example, under the regime of the first President, state institutions were established and mostly given monopolies to provide services such as telecommunication, film production, transportation and food production. These institutions were, during the socio-economic changes, parcelled up and either sold or leased out to investors. Over time, the State has set-up regulatory agencies to police the conflicts that arise between citizens and these privatised companies on everything from access, through pricing,

[327] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 616.
[328] Article 138 of the 1969 Constitution of the Republic of Ghana.

to the quality of service. These and other moves have re-configured the role of the administrative state significantly and the composition of the Public Services of Ghana. The National Petroleum Authority (NPA) which sets prices for petroleum products in a deregulated environment and the Securities and Exchange Commission (SEC) which monitors the public offerings of shares, among other things, are just two examples of how the administrative machinery in Ghana has changed its role in the last two decades. In the last two decades, the administrative state has diminished its role as a market player, now interposing itself between the market and the citizenry as regulator, working through new Public Service institutions.

ISSUE ONE: COMPOSITION OF THE PUBLIC SERVICES OF GHANA

A. DIMENSIONS OF THE ISSUE

14. The Commission received numerous submissions on how the Constitution should address the composition of the Public Services. The main dimensions of the issues are as follows:
    a. Should the Constitution list all the public services of Ghana?
    b. Should the Constitution provide for broad categorizations of the Public Services?
    c. Should the major categories of the Public Services be provided for in specific chapters of the Constitution?
    d. Should the Customs Excise and Preventive Service (CEPS) remain listed as part of the Public Services considering it has now been subsumed under the Ghana Revenue Authority?[329]

B. CURRENT STATE OF THE LAW ON THE ISSUE

15. Article 190 of the Constitution sets out the various organs that constitute the Public Service of Ghana. The list is not exhaustive; however, Parliament has power to provide for other institutions that should be classified as part of the Public Services of Ghana. From the list provided in Article 190, the Public Services of Ghana can be categorised into several groupings. There is the Civil Service which constitutes arguably the largest part of the Public Service, with its Head appointed by the President under Article 193 of the Constitution. There are other public services which are hived off the Civil Service; they include the Education Service, the Audit Service, the Prisons Service, the Parliamentary Service, the

[329] In December 2009, the three tax revenue agencies, the Customs, Excise and Preventive Service (CEPS), the Internal Revenue Service (IRS), the Value Added Tax Service (VATS) and the Revenue Agencies Governing Board (RAGB) Secretariat were merged in accordance with Ghana Revenue Authority Act 2009, (Act 791). The Ghana Revenue Authority (GRA) thus replaced the revenue agencies in the administration of taxes and customs duties in the country.

Health Service, and the Police Service amongst others. These Public Services have their own governing bodies established in their constitutive Acts.[330]

16. Independent constitutional bodies such as the CHRAJ, the National Commission for Civic Education (NCCE) and the Electoral Commission are also a category of the Public Services under Article 190(1)(c). The heads of these bodies are appointed by the President under Articles 70. These bodies are designed to enhance the responsiveness, transparency, and accountability of the administrative state. There are also public corporations which are not set up as commercial ventures and which form part of the Public Services of Ghana. They include bodies such as the various public universities.

17. Chapter 14 of the Constitution of which Article 190 is part, also generally provides for the mode of appointment of public officers, their terms and conditions of service, including their retiring age among others. All the provisions under Chapter 14 are non-entrenched.

18. Besides the general provisions on the public services in Chapter 14, the Constitution, in other chapters and by particular provisions, specifically deals with certain public services. These include:
    a. Parliamentary Service, Article 124;
    b. Statistical Service, Articles 185 and 186;
    c. Audit Service, Articles 188 and 189;
    d. Police Service, Chapter 15; and
    e. Prisons Service, Chapter 16.

19. Beyond these general and specific constitutional provisions, the bulk of the law regulating the Public Services of Ghana is contained in individual Acts of Parliament and Statutory Instruments on the respective institutions making up the Public Services of Ghana.

20. The definition of who is a public officer is not clear. Article 288 provides that a "public officer" is one who holds a public office. Article 295(1) defines public office to include an office the emoluments attached to which are paid directly from the Consolidated Fund or directly from moneys provided by Parliament. However, Article 295(5) is to the effect that a

[330] Section 4 of the Ghana Education Service Act, 1995 (Act 506) establishes the Education Service Council for the Education Service; section 3 of the Audit Service Act, 200 (Act 584) provides for the governing body of the Audit Service; Article 206 of the 1992 Constitution of the Republic of Ghana and section 9 of the Prisons Service Act, 1972 (NRCD 46) provides for the Prisons Council; the Board of the Parliamentary Service is provided for under Article 124 of the 1992 Constitution and section 4 of the Parliamentary Service Act, 1993 (Act 460); the governing board of the Ghana Health Services is provided for in section 4 of the Ghana Health Service and Teaching Hospitals Act, 1996 (Act 525); and Article 201 of the 1992 Constitution and section 10 of the Police Service Act, 1970 (Act 350) provides for the Police Council.

person is not considered to be a holder of a public office merely because "he is in receipt of a pension or other similar allowance in respect of service under the government of Ghana."

C. SUBMISSIONS RECEIVED

21. Various submissions were made to the Commission in relation to the composition of the Public Services as provided in Article 190. Some submissions recommended that Article 190 should be retained because the provision is adequate and appropriate. There may be the need to establish new institutions which may not have been contemplated at the time the Constitution came into force but which may become necessary with time. Article 190 caters for such situations by virtue of clause 1(d) which allows Parliament to address the need for more public services.

22. There were proposals that Article 190 should be amended to provide an exhaustive list of all public services. The reasons advanced for this position include that having an exhaustive list would afford the Constitution the opportunity to cater for all new public institutions created after the coming into force of the Constitution. Another argument was that the public service institutions which are not listed in Article 190 do not have a sense of belonging and hence are marginalised. Also, providing an exhaustive list of all public service institutions would serve as a disincentive to any attempt simply to collapse existing ones or establish new ones for narrow political reasons.

23. The alternative to the above submissions was that there should be a broad categorization of the public services, and these categories listed and elaborated on, in the Constitution. The advantage of this mechanism is to allow changes in the composition of the various categories of the public service according to the needs of the time. Another advantage of this proposal is that categorizing the various public services would clearly indicate which of them were security agencies and therefore legally enjoined not to unionise. [331] The capacity of a number of public services to unionise has become a matter of some controversy in recent times.

24. Related to the calls for the review of the composition of the Public Services were the submissions for the creation of specific chapters in the Constitution for specific public services. The calls related to the Ghana Immigration Service and the National Fire Service. The reason for these submissions was that the other security services such as the Police Service and the Prisons Service are catered for by specific chapters in the Constitution.

25. In addition, there were proposals for the creation of a chapter in the Constitution to cover all security services because very important quasi-security agencies such as the CEPS, the

[331] *Customs, Excise and Preventive Service* v. *National Labour Commission & Attorney-General (Public Services Workers Union of TUC Interested Party) (the CEPS case*) [2009] SCGLR 530.

Immigration Service, and the National Fire Service are not specifically catered for under the Constitution beyond their being listed as part of the Public Services of Ghana. Creating a chapter to cater for all security and quasi-security agencies would remedy this defect and allow for a constitutional regime, in the context of that chapter, which deals with the peculiarities of the security services.

D. FINDINGS AND OBSERVATIONS

26. The Commission observes that previous Constitutions of Ghana have attempted to provide a listing of the public services, although the list has never been characterised as exhaustive.

27. The Commission finds that it is neither practicable nor wise to attempt to provide an up-to-date and exhaustive list of all the Public Services in Ghana in the Constitution. The dynamics of national development naturally require the periodic creation of new institutions which re-define the character of the Public Services of Ghana. Attempting to list all the institutions that make up the Public Services in the Constitution would mean that the list will be outmoded at birth, for any list made will become continually distorted as public services are on occasion created, merged or disbanded. The recent changes to the Internal Revenue Service (IRS) and the CEPS provide an appropriate example. These institutions, which are listed under Article 190(1)(a) as part of the Public Services of Ghana have now been merged with the Value Added Tax (VAT) Service to form the Ghana Revenue Authority under the Ghana Revenue Authority Act, 2009 (Act 791). The Constitution is a near-sacred document which should not be tampered with lightly. This would be the case if the Commission were to recommend the provision of an updated list of the public services in the Constitution any time public services are created, merged or disbanded.

28. The Commission finds that providing for categories of public services allows for the necessary flexibility so that the Constitution does not need to be amended any time there are changes in the public services within those categories. The implementation of recent government policy which necessitated the merging of the IRS, CEPS, and VAT Service into the Ghana Revenue Authority as one public service by statute, without amending the Constitution, clearly shows the difficulty that can occur with the listing in the Constitution. The proposed categorization would also facilitate the streamlining of institutional structuring, operations and collaboration between institutions belonging to the same category.

29. The Commission observes that the issue as to whether the CEPS, now the Customs Division of the Ghana Revenue Authority, should still be classified as a security agency does not lend itself to easy resolution. In this regard, some public institutions have been categorised as security agencies and by implication, the provisions of the Labour Act, including the right to

unionise, do not apply to these institutions.[332] The CEPS has been treated as a security agency for the purposes of unionization by the Supreme Court.[333] This decision was delivered before the coming into force of the Ghana Revenue Authority Act, 2009 (Act 791). That Act now merges IRS, CEPS and the VAT Service under one umbrella body, the Ghana Revenue Authority, with the main function of generating revenue for Ghana. Act 791, however, does not repeal PNDCL 330; the CEPS is "continued in existence" as a Department (Division) of the Ghana Revenue Authority with PNDCL 330 undergoing the necessary amendments to reflect the changes introduced by Act 791. For instance, all the functions of the Commissioner of the CEPS are transferred to the Commissioner-General of the Authority.

30. The Commission finds that fidelity to the new revenue law and the Supreme Court decision evokes at least two difficulties. The Commissioner-General of the Ghana Revenue Authority, who does not necessarily have to have security experience, replaces the Commissioner of the CEPS as a member of the National Security Council. The desirability of this is questionable, given that military personnel are often appointed to the headship of CEPS, mainly because of the security dimensions of the functions of the CEPS. Besides, while employees of the Customs Division of the Ghana Revenue Authority would not be entitled to unionise, the other two Divisions of the Authority, namely, the Domestic Tax Revenue Division and the Support Services Division may be allowed to. Such a huge difference in the treatment of personnel of divisions in the same organisation may not augur well for the effective management of the Authority.

31. The Commission observes that:
    a. An exhaustive list of institutions that make up the Public Service is not generally provided in Constitutions. The Ugandan, Rwandan and South African Constitutions, for example, merely establish or acknowledge the existence of the public services. There are, however, a few examples to the contrary, such as the Malaysian Constitution.
    b. In Article 175 of the Constitution of Uganda a public officer is defined as "any person holding or acting in office in the public service" and public service is said to mean service in any civil capacity in the Government the emoluments for which are payable

[332] Section 1 of the Labour Act, 2003 (Act 651).

[333] *Customs, Excise and Preventive Service* v. *National Labour Commission & Attorney-General (Public Services Workers Union of TUC Interested Party) (the CEPS case)* [2009] SCGLR 530. The Supreme Court held that if one considered the statutory functions that the CEPS performed and the broad and extensive powers that have been granted their officials, the only logical, prudent and practical approach was to consider the CEPS as a security set-up. They had the same powers, authority and privileges given by law to police officers in the course of executing their functions: the power to stop ships, aircraft and vehicles; the power to board and search ships or aircraft; the power to search persons and premises; and the power to patrol freely any part of Ghana, among others. Officials of the CEPS also served as members of the National, Regional, and District Security Councils under the Security and Intelligence Agencies Act, 1996 (Act 526).

directly from the Consolidated Fund or directly out of moneys provided by Parliament. Section 127 of the Constitution of Botswana and Article 113 of the Constitution of Zimbabwe define a public officer as a person holding or acting in any public office. On the other hand, section 2 of the Service Commissions Act of Kenya, defines a public officer as a person holding a public office otherwise than as a part-time officer.

32. The Commission further observes that the National Constitution Review Conference advocated a broad categorization of public services in the Constitution with a definition of the terms "public services" to accommodate every public service. The Conference also agreed that the list of all the Public Services of Ghana should be attached as a schedule to the Constitution with a provision which allows Parliament to modify the list when the need arises.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

33. The Commission recommends a review of the Constitution to provide a broad, inclusive and futuristic categorization of the Public Services of Ghana. The categories of the Public Service should include the following:
    a. the public services specified in a Schedule;
    b. public services established under the Constitution;
    c. public services established by or under an Act of Parliament;
    d. public corporations other than those set up as commercial ventures; and
    e. such other public services as Parliament may by law provide.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

34. The Commission recommends that Parliament should, by an Act, make the Ghana Immigration Service and the Customs Division of the Ghana Revenue Authority special quasi-security agencies.

35. The Commission recommends that the Ghana Revenue Authority Act be reviewed specifically to integrate the CEPS into the Authority in a manner that takes due account of its security functions.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

36. The Commission recommends that broad policies be developed by the government to guide the structure, mandate, operations, conditions of service and related matters of the various categories of the Public Services. These policies should include protocols for collaboration between these institutions.

ISSUE TWO: RECRUITMENT AND APPOINTMENT TO PUBLIC OFFICE

A. DIMENSIONS OF THE ISSUE

37. The dimensions of this issue includes:
    a. Who should be responsible for the appointment of public officers?
    b. What should be the procedure for appointing public officers?
    c. Should an elected President be given an unfettered right to appoint a number of persons to certain offices in the public services?

B. CURRENT STATE OF THE LAW ON THE ISSUE

38. In terms of their appointment to office, public officers may be broadly categorised into three, namely:
    a. Those appointed under Article 70 of the Constitution;
    b. Those appointed under Article 195 of the Constitution; and
    c. Those who do not fall under either of the two categories above, and are appointed under other provisions of the Constitution.

39. With a few exceptions, all three categories of public officers have a common feature; the President is their appointing authority. For the public officers who derive their appointment from Article 70 of the Constitution, the President exercises his appointing powers either in consultation with or on the advice of the Council of State. They include the Commissioner for Human Rights and Administrative Justice and his Deputies; the Auditor-General; the District Assemblies Common Fund Administrator; the Chairman, Deputy Chairmen, and other members of the Electoral Commission; the Chairmen and other members of the Public Services Commission, the Lands Commission, the governing bodies of public corporations, the National Council for Higher Education; and the holders of such other offices as are prescribed by the Constitution or by any other law. Their remuneration is charged on the Consolidated Fund and is determined by the President based on the recommendations of a committee appointed by the President.[334]

40. Public officers appointed under Article 195 of the Constitution are the preponderant majority of public officers in Ghana. Generally, the President exercises the power to appoint these officers in accordance with the advice, given in consultation with the Public Services Commission, of the governing councils or boards of the various services. The President may, and in practice does, delegate almost all of this power to the governing councils or boards of the services, although he may delegate those powers to a committee or member of the council or board or to any public officer on conditions that the President may consider appropriate.

[334] Article 71 of the 1992 Constitution of the Republic of Ghana.

There are only a few cases where the President actually retains his power to appoint public officers in this category. These include instances of the appointment of Chief Executive Officers and the senior management of some public services. There is a small class of public officers who derive their appointment from Article 195 of the Constitution, but are not appointed by the President. These are persons who hold or act in offices in public institutions of higher education, research or professional training. The governing councils of these institutions are the sole appointing authorities.

41. There is a last category of public officers who are not appointed under Articles 70 and 195 of the Constitution. There are other specific provisions in the Constitution detailing the procedures for their appointment.
    a. The President appoints the Chief Justice in consultation with the Council of State and with the approval of Parliament.[335]
    b. The President also appoints the other Supreme Court Justices, acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.[336]
    c. The President is further empowered to appoint the Justices of the Court of Appeal and of the High Court and the Chairmen of Regional Tribunals, acting on the advice of the Judicial Council.[337]
    d. The President appoints the Inspector-General of Police[338] and the Director-General of the Prisons Service[339] in consultation with the Council of State.
    e. The President appoints the Chairman, the two Deputy Chairmen and the four other members of the National Commission for Civic Education acting on the advice of the Council of State.
    f. Officers of the Independent Constitutional Bodies (ICBs) that is the Electoral Commission, National Media Commission, Commission on Human Rights and Administrative Justice, and National Commission on Civic Education are appointed by the relevant constitutional body in consultation with the Public Services Commission.[340]
    g. Persons serving in the Audit Service, other than the Auditor-General, are appointed by the Audit Service Board in consultation with the Public Services Commission.[341]
    h. Persons other than the Governor and his two Deputies serving with the Bank of Ghana are appointed by the Board of the Bank.[342]

[335] Article 144(1) of the 1992 Constitution of the Republic of Ghana.
[336] Article 144(2) of the 1992 Constitution of the Republic of Ghana.
[337] Article 144(3) of the 1992 Constitution of the Republic of Ghana.
[338] Article 202(1) of the 1992 Constitution of the Republic of Ghana.
[339] Article 207(1) of the 1992 Constitution of the Republic of Ghana.
[340] Articles 53, 226 and 238 of the 1992 Constitution of the Republic of Ghana.
[341] Article 189(2) of the 1992 Constitution of the Republic of Ghana.
[342] Section 23 of the Bank of Ghana Act, 2002 (Act 612).

i. Chief Executive officers of state-owned media are appointed by the National Media Commission.[343]
j. Editors of state-owned media are appointed by the governing bodies of the respective corporations in consultation with the Public Services Commission.[344]

42. The Supreme Court in the case of *National Media Commission* v *Attorney-General,*[345] in interpreting Articles 168 and 195(1) of the Constitution decided that:
    a. The Chairpersons and members of the governing councils of state-owned media corporations should be appointed by the National Media Commission.
    b. The Chief Executive Officers and Editors of state-owned media should be appointed by the governing board of the state-owned media in consultation with the Public Services Commission.

43. Article 70 is an entrenched provision whilst Article 195 is non-entrenched.

C. SUBMISSIONS RECEIVED

44. During the consultations, Ghanaians clearly articulated their conflicting inclinations as far as the appointment of public officers is concerned. There were submissions calling for the retention of the *status quo*, where virtually all appointments to the public services are made by the President, either directly or by delegation. The reasons proffered in support of this position are as follows:
    a. The current state of the law is appropriate, has served Ghana well for two decades and should not be changed.
    b. The fact that the President exercised the power of appointment in consultation with or with the approval of other institutions ensures that the power is not abused.
    c. The President is ultimately responsible for delivery on his mandate and so he should be able to determine the public officers he should work with.
    d. An Executive President should be given enough room to appoint persons the President will be comfortable to work with and who share his vision. Any further restrictions on the appointing powers of the President would defeat this purpose.
    e. The President needs to have very loyal people occupying very sensitive public offices. If the President loses the appointing powers, the President may be saddled with saboteurs of government policies holding sensitive public offices.

[343] Article 168 of the Constitution and *National Media Commission* v. *Attorney-General* [2000] SCGLR 1.
[344] Article 169 of 1992 Constitution of the Republic of Ghana.
[345] *National Media Commission* v. *Attorney-General* [2000] SCGLR 1.

45. There were submissions which expressed a contrary view: there should be more limitations on the President's powers of appointment. It was suggested that this could be realised via any of the options below:
    a. By subjecting public appointments to parliamentary approval.
    b. By providing for heads of institutions to rise through the ranks.
    c. By providing for heads of institutions to be elected by or appointed from among the officials of the relevant institutions.
    d. By providing for appointments, including the appointment of Chief Executive Officers, to be made by the governing councils or boards of public institutions.
    e. By providing for appointments to be made by the Public Services Commission.
    f. By setting up an independent body to make all public appointments.
    g. By providing for the President to maintain some of his powers of appointment and cede others.

46. Proponents of the set of views immediately above ascribed various reasons for their positions:
    a. The appointing powers of the President made the President excessively powerful and he exercised too much control over the appointees.
    b. When the President appointed public officers, they tend not to be independent-minded.
    c. The President's control over the appointees affected their professionalism; they readily complied with executive directives, even if those directives were not in the interest of the nation. Reducing political influence on the process of public service appointment, thus, would enhance professionalism in public office.
    d. Presidential appointees tended to engage in all manner of unacceptable conduct in order to please the President and retain their offices; thus, their loyalty is to the President and not the nation.

D. FINDINGS AND OBSERVATIONS

47. The Commission finds that one of the greatest manifestations of Executive dominance under the current constitutional dispensation is in the area of appointments to public office.

48. The Commission finds that the discontent expressed about the appointment powers of the President stems from previous experiences where appointments to public office were not always determined by objective criteria but made on the basis of political support. There have been instances where appointments have been made based on party loyalty at the expense of competence and the ability to deliver. Such situations have led to quite a number of public institutions becoming appendages of the ruling party, executing policies not necessarily in the interest of the nation but in the interest of the party in power. These public servants who are appointed as appendages to the ruling party also tend to be far less

professional, neutral and independent-minded than apolitical public servants. The appointment of officers of dubious competence detracts from the professional ethos of the public service.

49. The Commission finds that despite the dissatisfaction of many with the immense powers of appointment of the President there could be sufficient constitutional and institutional safeguards against abuse in the exercise of those powers by the President. These include having appointments approved by a strengthened and more independent Parliament; acting in accordance with the advice of another institution in making an appointment; and consulting another institution in making an appointment. Besides, the constitutional independence of some of the officers once appointed is a guarantee against the power of the President.

50. The Commission also finds that:
    a. The current mode of appointment under Article 195(1) lends itself to abuse and appears to perpetuate the Executive dominance of the public sector. This does not augur well for an independent and professional public service.
    b. If the role of the President is limited to the appointment of the Chairman and other members of the relevant governing bodies of public institutions, the President should be mindful of ensuring that the right, competent and capable persons are appointed by him to occupy these important positions so that the governing council or board will in turn appoint officers who are sufficiently competent to man those institutions.
    c. If, as is recommended in this report, the foremost function of the Public Services henceforth is to implement the national development plan, the mode of appointment to public office should be devoid of political party patronage.
    d. All the public offices the appointment to which is subject to parliamentary approval perform very critical constitutional functions that regulate, control and give meaning to the current constitutional dispensation in Ghana. Subjecting more of such appointments to the approval of Parliament may be the best approach to ensure that Presidents appoint to these offices, professionals who have a reputation for competence, fair-mindedness, impartiality, political detachment and independence; and are thus likely to receive the endorsement of a multi-partisan Parliament.
    e. The rigorousness and the competitive nature of the procedure for appointing persons to hold or act in offices in public institutions of higher education, research or professional training is enough justification for the retention of that procedure.

51. The Commission observes that:
    a. Under the Constitution of the Federal Republic of Nigeria, the President plays a significant role in appointments into the Public Service of the Federation and other

public offices either as the appointing authority or the approving authority[346]. A similar arrangement is contained in the Constitution of Uganda.[347]

b. The American Congress passed the Civil Service Act of 1883 culminating in the creation of the Civil Service Commission that advocated a merit system for selection for government employment. Statistics shows that by 1980, 90% of all federal positions in the US had become part of the civil service system. Further legislation, including the Hatch Act of 1939, have also curtailed or restricted significantly most partisan political activities of federal employees.

52. The Commission also observes that the experts at the National Constitution Review Conference made the following recommendations with respect to appointments to the public services:
    a. Public officers who are appointed under Article 70(1)(a), (b), (c) and (2) must be subject to parliamentary approval. Thus, the Commissioner for Human Rights and Administrative Justice and the two Deputy Commissioners, the Auditor-General, the District Assemblies Common Fund Administrator and the Chairman and Deputy Chairmen of the Electoral Commission should all be appointed by the President, acting on the advice of the Council of State and with the prior approval of two-thirds majority of Parliament;
    b. Public officers who are appointed under Article 70(1)(d) and (e) should be appointed by the President without the requirement of parliamentary approval. The relevant officers are the Chairman and other members of the Public Services Commission, the Lands Commission, the governing bodies of public corporations, and the National Council of Higher Education; and the holders of such other offices as may be prescribed by the Constitution or by any other law not inconsistent with the Constitution; and
    c. Public Officers appointed under Article 195 should be appointed by the governing council of their respective institutions in consultation with the Public Services Commission. The President should not play any role in such appointments.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

53. The Commission recommends that:
    a. Appointments by the President should be restricted to only political appointments. The following may be classified as political appointees:
        i. Persons holding office under the Presidential Office Act, 1993 (Act 463), other than officers who hold office under Article 195(1);

[346] Sections 154 and 171 of the 1999 Constitution of the Federal Republic of Nigeria.
[347] Article 167, 169 and 172 of the 1995 Constitution of the Republic of Uganda.

ii. Ministers and Deputy Ministers of State;
iii. Regional and Deputy Regional Ministers of State;
iv. Special Assistants and Special Aides to the President, to the Vice President and to the Ministers of State, Deputy Ministers, Regional Ministers and Deputy Regional Ministers;
v. Non-career Ambassadors and High Commissioners;
vi. Persons appointed by the President or a Minister of State as members of Statutory Boards and Corporations;
vii. The Chief of Defence Staff;
viii. Commanders of the Army, the Navy and the Air Force;
ix. The Inspector General of Police;
x. The National Security Coordinator;
xi. The Director of the Bureau of National Investigations;
xii. The Director-General of the Prisons Service;
xiii. The Director-General of the Ghana Immigration Service;
xiv. The Chief Fire Officer.
xv. The Executive Secretary of the Narcotics Control Board.
xvi. Such other persons as Parliament may by law prescribe.

The terms of office of these persons should terminate with that of the President.

54. Further, the Commission recommends the following modes of appointment for specific public officers:
    a. The appointments of Chairpersons and membership of the governing councils or boards of all public corporations, except those established for commercial purposes, and state-owned media corporations, should be designated political appointments and be made by the President in consultation with the Council of State.
    b. The Chairpersons and members of the governing councils of state-owned media corporations should be appointed by the National Media Commission.
    c. The Chief Executive Officers of state-owned media should be appointed by the National Media Commission.
    d. All public officers who are appointed under Article 195(1) should be appointed by the President, acting in accordance with the advice of the governing councils or boards of their respective institutions in consultation with the Public Services Commission, except that persons who hold or act in offices in public institutions of higher education, research or professional training should continue to be appointed by the governing councils of those institutions exclusively.

ISSUE THREE: GENDER BALANCE IN APPOINTMENTS TO PUBLIC OFFICE

A. DIMENSIONS OF THE ISSUE

55. The dimension of this issue are:
    a. Should there be express provisions in the Constitution for the institution of a gender quota for appointments to public office?
    b. Should financial, logistical or other support be made available to women to campaign or lobby for appointment to public office?

B. CURRENT STATE OF THE LAW ON THE ISSUE

56. Article 35 of the Constitution sets out a number of political objectives for the State, including a duty to promote actively the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs. Towards the achievement of these political objectives, the State is required under Article 35(6)(b) to take appropriate measures to achieve reasonable regional and gender balance in recruitment and appointment to public offices. Article 35(6)(b) is non-entrenched.

57. The Constitution further provides in Article 36(6) that the State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development of Ghana. Article 36(6) is non-entrenched.

58. Under Article 17(4) (a) of the Constitution, Parliament is not barred from enacting laws that are reasonably necessary to provide for the implementation of policies and programmes aimed at redressing social imbalance in the Ghanaian society, including redressing gender imbalance. Article 17(4) is non-entrenched.

C. SUBMISSIONS RECEIVED

59. Submissions in support of the institution of a gender quota for appointments to public office have suggested various percentages to be allotted for women appointees. The options range from 20% to over 70%. Others have pushed for reserving a number of seats in Parliament for women. The proponents of the quota argument provided the following reasons in support of their argument:
    a. Reserving a quota for women in public appointments would ensure gender balance in public appointments.
    b. Women constitute the majority of the nation's population and yet are not proportionally represented in public office appointments; reserving a quota for

women or otherwise supporting them to take up public office would ensure that women are well-represented in public life.

c. Women are better managers of resources and their expertise and experience should be utilised in public office.
d. Reserving a quota of public appointments for women would compensate women for the many economic and sociological barriers that prevent them from taking up public office.

60. On the other hand, there were submissions that strongly argued against a quota for women in public office. Their reasons were as follows:
    a. Appointment to public office should be based on competence and merit only.
    b. Rather than institute a quota for women, the State should provide them with the necessary skills and competences to be able to compete on an equal footing with their male counterparts.
    c. Gender imbalance could be rectified if women are supported and empowered to compete for public office.
    d. Reserving a quota for women is discriminatory and should not be encouraged.
    e. Reserving a quota for women implied that women are appointed solely on gender grounds, not because of their competence and qualification. The implication is to deny qualified male candidates access to those positions.
    f. If a quota is reserved for women, the country may be unable to find competent and willing women to occupy the reserved positions.
    g. Some women want to be appointed to public office not merely because they are women, but because they are competent. Reserving a quota for women would undermine this expectation.

D. FINDINGS AND OBSERVATIONS

61. The Commission finds that the Constitution adequately provides for a broad framework within which to achieve gender balance in recruitments and appointments to public office and that there is already a constitutional duty on the State to take appropriate measures to achieve reasonable gender balance in recruitments and appointments to public office and to ensure the full integration of women into the mainstream of national life.

62. The Commission finds that the Public Services of Ghana, especially the higher echelons, are dominated by men.

63. The Commission observes that women make up more than 50% of the national population, yet they constitute 8% of political and public office appointments.[348] This 'exclusion' of women in political and public appointments is to some extent grounded in the socio-cultural context rather than the absence of adequate gender-related statutes. Thus

> "[a] number of structural, cultural and institutional factors tend to limit the rights of women relative to men when it comes to access to resources and social goods. Societal attitudes, customary practices and beliefs, traditional roles of women, gender relations within the family, limited access of women to education and training and inadequate representation of women on decision making bodies, among others, operate together to place Ghanaian women in a disadvantaged position in society. These silent and subtle forms of discrimination and limitations tend to be reinforced through the process of socialization. For example, certain traditional notions which advocate a preference for the education of male children effectively limit the access of female children to formal education and thus reduce their opportunities for any training, employment and consequently their financial independence in the future. This in turn affects their capacities and opportunities to participate in decision-making and other political processes."[349]

64. The Commission further observes that the Supreme Court has held that the Directive Principles of State Policy, including the provisions in those Principles which call for redressing gender imbalances, are presumed to be justiciable.[350] This means that any question regarding the failure of any appointing authority to ensure reasonable gender balance in recruitments and appointments to any public office should be actionable in court. What constitutes "reasonable gender balance in recruitment and appointment to public offices" may vary from case to case, but it is a question that can be safely left to the courts to determine.

65. The Commission observes that Articles 35(6)(b) and 36(6) and Article 17(4)(a) of the Constitution permit Parliament to enact laws that are reasonably necessary to provide for the implementation of policies and programmes aimed at redressing any social imbalance, such as gender imbalance in public appointments. This could be done in the context of an affirmative action law.

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[348] Raymond A. Atuguba, Christine Dowuona-Hammond and Julius N. Fobil, "*Social Exclusion: The Political and Legal Dimension*", in Ghana Human Development Report 2007: Towards a More Inclusive Society, (UNDP, 2007), p. 113.

[349] Raymond A. Atuguba, Christine Dowuona-Hammond and Julius N. Fobil, "*Social Exclusion: The Political and Legal Dimension*", in Ghana Human Development Report 2007: Towards a More Inclusive Society, (UNDP, 2007), p. 112.

[350] *Ghana Lotto Operators Association* v. *National Lottery Authority* [2007-2008] 2 SCGLR 1088.

66. The Commission finds that in the light of the broad and fairly adequate constitutional provisions outlined above, and as buttressed by the Supreme Court, the question whether or not to adopt a gender quota to address gender imbalances in appointments to public office may be resolved by means other than by a constitutional amendment.

67. The Commission observes that in giving effect to gender equality as a fundamental human right, many jurisdictions around the world are fashioning policies and laws that would reduce the gender gap in the public sector. Increasingly, many countries are introducing various types of gender quotas for public offices. In some countries, gender quotas are mandated by the national Constitution itself, while in others the quota provision is stipulated in other legislation. Yet in others, the quota provision is mandated for political parties when they present candidates for election into office.
    a. South Africa, in its quest to address the issue of gender balance in its Public Service is proposing to adopt "a process that moves away from treating gender issues as 'business as usual', and towards locating it at the centre of the transformation process in the Public Sector. Achieving the goal of gender equality is, therefore, premised on the fundamental integration of women and gender issues within all structures, institutions, policies, procedures, practice, programmes and projects of government."[351] In addition, the South African Cabinet has given support to the development of a Gender and Governance Plan of Action that would ensure substantial progress is made on women's empowerment and gender equality in the Public Service. The country in March 2006 achieved a 30% women representation in Senior Management Service in the Public Service and by March 2009, the South African Cabinet approved a 50% target for women at all levels of the Senior Management Service.[352]
    b. The Civil Service of Nigeria can boast of widespread female presence, yet women senior public administrators are relatively rare. The national government of Nigeria established a Ministry of Women Affairs with a mandate to review substantive and procedural laws that affect women.[353]
    c. Argentina is ranked as one of the top 10 countries worldwide with a high percentage of women representation in the legislative arm of government.[354] The country adopted a 1991 quota law that required that women should account for at least 30% of candidates

[351] PUBLIC SERVICE AND ADMINISTRATION, REPUBLIC OF SOUTH AFRICA, A STRATEGIC FRAMEWORKFOR GENDER EQUALITY WITHIN THE PUBLIC SERVICE (2006-2015) CONSULTATION DOCUMENT (2006), http://www.info.gov.za/view/DownloadFileAction?id=126557.
[352] PUBLIC SERVICE AND ADMINISTRATION, REPUBLIC OF SOUTH AFRICA, A STRATEGIC FRAMEWORKFOR GENDER EQUALITY WITHIN THE PUBLIC SERVICE (2006-2015) CONSULTATION DOCUMENT (2006), http://www.info.gov.za/view/DownloadFileAction?id=126557.
[353] Comm. On the Status of Women, 49th Sess. Feb. 28- Mar. 11, Integration of gender perspectives in macroeconomics, written statement submitted by Nigeria.
[354] LESLIE A. SCHWINDT-BAYER, Female Legislators and the Promotion of Women, Children, and Family Policies, Manuscript prepared as a background paper for UNICEF's State of the World's Children Report 2007. Final Draft – May 1, 2006.

for public office.[355] This law has had a positive effect on the proportion of women holding elected office. In 1991 women's representation was 5%. This figure increased dramatically to 35% in 2005 after the implementation of a national gender quota law for legislative elections in 1991.[356]

d. Bolivia adopted similar legislation in 1996 which resulted in an increase in the number of women representatives in Congress to 22%.[357]

68. The Commission observes that the National Constitution Review Conference expressed the view that, to address the issue of gender imbalance in public office, neither men nor women should constitute more than 60% of all public officers, elective or otherwise. Beyond this, the Conference did not recommend that the Constitution should reserve a specific quota of public office appointments for women and emphasised that appointments must also be based on competence.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

69. The Commission recommends that the Constitution be amended to require that an Affirmative Action Act be enacted by Parliament within 12 months of the coming into force of the amendments to the Constitution.

70. The Commission further recommends that the Affirmative Action Act should include a provision to the effect that each gender should have at least 30% of representation in all public institutions and offices.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

71. The Commission recommends that the Political Parties Act, 2000 (Act 574) be amended to accord with the Affirmative Action Act as it pertains to creating gender balance in public offices.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

72. The Commission recommends that all public institutions should adopt gender policies, including recruitment policies aimed at achieving a balanced structuring of those institutions in terms of gender.

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[355] Michal Toiba, *Women Make Strides in Latin American Politics*, Americas Society website (July 27, 2011, 11:35 AM) http://www.as-coa.org/article.php?id=2207.

[356] LESLIE A. SCHWINDT-BAYER, Female Legislators and the Promotion of Women, Children, and Family Policies, Manuscript prepared as a background paper for UNICEF's State of the World's Children Report 2007. Final Draft – May 1, 2006.

[357] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Considerations Regarding The Compatibility Of Affirmative Action Measures Designed To Promote The Political Participation Of Women With The Principles Of Equality And Non-Discrimination* (July 27, 2011, 12:25 PM) http://www.cidh.oas.org/annualrep/99eng/Chapter6.htm.

73. The Commission recommends that the Electoral Commission should have regard to the Affirmative Action Act in the performance of its functions.

74. The Commission recommends that political parties be encouraged by all public agencies to adopt voluntary political party quotas. Here, political parties may voluntarily include in their constitutions percentages of women to be presented as candidates for elections or set and implement targets to include a certain percentage of women as candidates for elections, beyond what is mandated in the Affirmative Action Law. The Electoral Commission may consider taking this up at the level of the Inter-Party Advisory Committee (IPAC).

ISSUE FOUR: CONDITIONS OF SERVICE OF PUBLIC OFFICERS

A. DIMENSIONS OF THE ISSUE

75. The two main dimensions of this issue are: how to mitigate the disparity between the salaries of public service workers and what "end-of-service benefit" should be paid to public service workers.

B. CURRENT STATE OF THE LAW ON THE ISSUE

76. In terms of their remuneration, the Constitution generally places public officers into two categories: the Article 71 office holders and all other public officers. Article 71 is an entrenched provision.

77. The salaries and allowances payable to Article 71 office holders are determined by the President or Parliament, as the case may be, acting on the advice of a Committee appointed by the President in accordance with the advice of the Council of State. Parliament determines the salaries and allowance payable to the President, the Vice President, the Chairman and the other members of the Council of State; Ministers and Deputy Ministers of State. The President in turn determines the salaries and allowance payable to:
    a. The Speaker, Deputy Speakers and members of Parliament.
    b. The Chief Justice and the other Justices of the Superior Court of Judicature.
    c. The Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and his Deputies and the District Assemblies Common Fund Administrator.
    d. The Chairman, Vice Chairman and the other members of the National Council for Higher Education, the Public Services Commission, the National Media Commission, the Lands Commission, and the National Commission for Civic Education.

78. With only a few exceptions, the salaries and allowances payable to other public officers are determined by the Fair Wages and Salaries Commission pursuant to the Fair Wages and Salaries Commission Act, 2007 (Act 737).

79. The few exceptions include the salaries and allowances payable to persons serving with the Audit Service. Under Articles 187(14) and 189(3)(a) of the Constitution, these constitute a charge on the Consolidated Fund and are part of conditions of service determined by the Audit Service Board, in consultation with the Council of State. The Supreme Court has held that it is unconstitutional for any authority, including the Minister of Finance, to review the salaries and allowances as determined by the Audit Service Board. [358] The only exception relates to very limited cases where Parliament under Article 179(2)(b) has the power to reject "fundamentally unreasonable estimates" laid in Parliament by the Audit Service Board. By necessary implication, the above applies to the salaries and allowances payable to persons serving with the Parliamentary Service. Under Article 124(5), those emoluments are prescribed by the Parliamentary Service Board, with the approval of Parliament.

80. It is not very clear whether the decision of the Supreme Court applies to persons serving with the ICBs: the Commission for Human Rights and Administrative Justice, National Media Commission, National Commission for Civic Education, and the Electoral Commission. Their salaries and allowances are part of the administrative expenses of the Commissions, which are expressed to be charges on the Consolidated Fund.[359] Unlike the cases of the Audit and Parliamentary Services, the power to determine the conditions of service of persons serving with these Commissions has not been expressly stated in the Constitution. By inference from the decision, and to safeguard the independence of those institutions, no authority other than these ICBs themselves may determine the estimates of their own administrative expenses.

81. The principle deducible from the Supreme Court's decision is that, where expenditure is expressed to be a charge on the Consolidated Fund, it falls to be a debt to be paid once estimates in that regard are made by the relevant authority and remains unquestioned by Parliament.

82. Also, the officers and other employees of the Bank of Ghana hold their appointments on terms and conditions specified in their engagement letters and determined by the Board of the Bank. Their salaries and other emoluments are, however, not computed by reference to the net or any other profits of the Bank.

[358] *Brown* v. *Attorney-General* [2010] SCGLR 183.
[359] Articles 54, 171, 227 and 239 of the 1992 Constitution of the Republic of Ghana.

83. Articles 71 and 187 are entrenched provisions whilst Articles 124, 179 and 189 are non-entrenched provisions.

C. SUBMISSIONS RECEIVED

84. Diverse submissions were received on this issue. A sizeable number of people called for the retention of the current regime for the determination of the conditions of service of public officers. They specifically called for the retention of the role of the President and Parliament in determining the emoluments of Article 71 office holders. This is because:
    a. The President and Parliament are the managers and supervisors of national finances and are, therefore, in the best position to assess the country's financial capacities.
    b. Setting up an independent commission or body to perform this function would entail spending scare resources on yet another institution.
    c. There are adequate checks and balances to ensure that the Executive and the Legislature do not abuse their power to make those determinations.
    d. Article 71 office holders perform duties that required that they be remunerated more favourably than other public officers. The *ex gratia* awards granted to them should not, therefore, be abolished.

85. In contrast, it was submitted by others that Article 71 should be amended. There were several proposals on what the amendment should entail. The suggestions were as follows:
    a. All public office holders including members of the Executive, the Legislature and the Judiciary should be remunerated under the Single Spine Salary Structure.
    b. The Fair Wages Commission should determine the salaries, allowances, facilities and privileges of all Article 71 office holders and of all other public officers.
    c. A permanent and independent body should determine the salaries, allowances, facilities and privileges of all public officers including those of Article 71 office holders.

    The reasons for the above proposals were articulated as follows:
    a. Adopting any of the above options would streamline the inequities between the emoluments of Article 71 office holders and other public officers and thereby bridge the immense gap between them.
    b. These options are more transparent than the quite incestuous processes that pertain today.
    c. The existing practice which allows different bodies to determine the emoluments of Article 71 office holders and other public officers is discriminatory and unfair.
    d. The committee set up under Article 71 to make recommendations to the President or Parliament respecting what emoluments to pay to officers listed in that Article is *ad hoc*. This creates a situation where the salaries of other public officers are reviewed

annually, while those of Article 71 office holders are reviewed only when the government sets up such a committee.

e. The President will not have to set up a committee to review the salaries and emoluments of Article 71 office holders any time there is a change of government if there is a permanent mechanism for the purpose. This will also ensure greater certainty in the emoluments of those officers.
f. Allowing the President and Parliament to determine each other's emoluments under Article 71 could potentially drain the country's limited resources, especially where the Executive and the Legislature connive to provide huge emoluments for each other.

86. Beyond the above positions, there was general unanimity that the huge *ex gratia* awards currently paid to Article 71 office holders be drastically reduced or scrapped and that the conditions of service of other public officers be improved given the current levels of those conditions.

D. FINDINGS AND OBSERVATIONS

87. The Commission finds that there is no constitutional or other justification for the powers of appointment given to the President under Article 71 of the Constitution. It is neither necessary nor reasonable for the President to have the power to appoint the members of the committee on whose advice the President is to determine the salaries of the persons listed in Article 71. Many of these officials are expected to operate independently of the Executive, so their conditions of service should not be dependent on the President's discretion. And it is particularly inappropriate for the President to appoint the members of the committee on whose advice the salaries and allowances paid to the President himself are to be determined.

88. The Commission equally finds that Article 71 can operate to the disadvantage of those office holders or the government where *ad hoc* committees are not set up as required to match the determination of emoluments with changes in the environment.

89. The Commission finds that a critical assessment of the Article 71 arrangement would reveal that, relative to the salaries and allowances paid to other public officers (particularly officers at senior management level) the quantum of monies paid as salaries and allowances to Article 71 office holders does justify the agitations for better conditions of service by the other public servants.[360]

[360] Chapter 3 of the *Review of Facilities and Privileges for Article 71 Constitutional Office Holders: Final Report*, December 2008. Presidential Committee on Emoluments (Chinery-Hesse Committee).

90. The Commission finds that in practice, the regularity of setting up such committees has been low. Since the coming into force of the 1992 Constitution, Ghana has operated only two committee recommendations, the Miranda Greenstreet Report and the Chinery-Hesse I Report. In 2009, a third committee's recommendations, the Chinery-Hesse II Report sparked off strong protests from the public regarding the propriety of paying huge gratuities to politicians leaving office. The government rejected those recommendations and has since set up another committee to advise it on the matter.

91. The Commission further finds that the real issue regarding Article 71, as contained in the submissions, relates to the aspects of the emoluments that are paid as gratuities (*ex gratia*) and in some cases, what is given out as privileges (car loans to Members of Parliament, for example).

92. The Commission finds that establishing an independent body charged with determining the emoluments of all public officers will rationalise salary administration in Ghana, bring some equity into that system and ensure that the right relativities between the salaries of Article 71 office holders and other public servants are established.

93. The Commission finds that charging an independent body with the task of determining the emoluments of public officers would also be a more transparent mechanism and would end the public perception that the President patronises Parliament, and vice versa, in the determination of each other's salary, and that the process is most undesirably incestuous.

94. The Commission observes that:
    a. In Nigeria, the emoluments of public office holders are generally determined either by the National Assembly,[361] the House of Assembly of a State, or the Revenue Mobilization Allocation and Fiscal Commission which is mandated, *inter alia*, to determine the emoluments of the members of the National Assembly and the House of Assembly, and other political office holders. Particularly, the National Assembly of Nigeria prescribes the remuneration of the President,[362] whilst the Revenue Mobilization Allocation and Fiscal Commission determines the remuneration for members of the National Assembly.[363]
    b. In Uganda, however, Parliament determines the emoluments of public officers, including those of the President.[364]
    c. In the Unites States, Congress determines the salaries of members of Congress; however, the Twenty-Seventh Amendment to the Constitution prohibits any law that

[361] The country's bicameral legislature and the highest elective law-making body.
[362] Section 84 of the 1999 Constitution of the Federal Republic of Nigeria.
[363] Section 70 of the 1999 Constitution of the Federal Republic of Nigeria.
[364] Article 85 and 106 of the 1995 Constitution of the Republic of Uganda.

increases or decreases the salary of members of the Congress from taking effect until the start of the next term of office of Representatives.

95. The Commission also observes that the National Constitution Review Conference proposed to the Commission that an Independent Emoluments Commission should be established and authorised to determine the salaries and other emoluments of all public officers, including the President and other Article 71 office holders.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

96. The Commission recommends the establishment of an Independent Emoluments Commission (IEC) as an independent constitutional body to determine the emoluments of all public officers.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

97. The Commission recommends that the Fair Wages and Salaries Commission Act, 2007 (Act 737) be amended to accord with the proposed constitutional changes.

ISSUE FIVE: RETIRING AGE OF PUBLIC OFFICERS

A. DIMENSIONS OF THE ISSUE

98. The Commission received numerous submissions that raised various concerns regarding the retiring age for public officers. The issue presents four dimensions:
    a. Whether the retiring age should be increased, maintained or decreased?
    b. Whether the retiring age should be expressly stated in the Constitution?
    c. Whether the practice of engaging retirees on contract should be terminated?
    d. Whether the retiring age should be made industry specific?

B. CURRENT STATE OF THE LAW ON THE ISSUE

99. Article 199 as amended by section 6 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) pegs the compulsory retiring age of public officers at 60 years, with the opportunity of further engagement for a period not exceeding 5 years, in instalments of 2 years, a further 2 years and a final 1 year. Article 199 is a non-entrenched provision.

100. This provision does not apply to Justices of the Superior Courts. Justices of the Supreme Court and the Court of Appeal retire at 70 years. Justices of the High Court retire at 65 years. The retiring age of the Chairman and Vice Chairman of the Public Services Commission, the

Commissioners of CHRAJ, EC, NCCE and their Deputies is equated to that of the Justices of the Superior Courts. The Chairmen of these bodies retire at 70 years, and their Deputies retire at 65 years. The relevant provisions are Articles 44, 145[365], 194, 223 and 235 of the Constitution. Article 145 is an entrenched provision whilst Articles 44, 194, 223 and 235 are non-entrenched provisions.

101. The age for voluntary retirement for the Public Services is from 45 years while the age for voluntary retirement for Justices of the Superior Courts is from 60 years.

C. SUBMISSIONS RECEIVED

102. Some Ghanaians recommended the retention of the current retiring age for the following reasons:
    a. The present retiring age is appropriate because it will create vacancies in the public services for the teeming unemployed youth who are being churned out of our institutions of learning.
    b. At 60 years, most people are weak and unable to perform at their optimum, so it is best to retire at that point.
    c. Retiring at 60 years gives the pensioners ample time to enjoy their retirement.

103. On the amendment of the retiring age, there were proposals that the retiring age be removed from the Constitution and one of the following options instituted:
    a. The Constitution should provide that public officers should work as long as they are capable. This is based on a person's fitness and ability to work in a particular position. This would ensure that persons who were over 60 years but were still capable of working effectively would be retained at post.
    b. The Constitution should simply state the number of years every public officer is entitled to work as a public officer. This would offer every public officer an equal working duration.

104. There were also submissions that the Constitution should be amended to increase or decrease the retiring age. On increasing the retiring age, the reasons were that:
    a. An increase would enable the nation benefit from the wealth of experience of public servants who would otherwise have had to retire at 60 years. Ghana needs them to train the youth.
    b. Many people who retire at 60 years are still employable and are productive when re-engaged.
    c. If a person above the age of 60 could serve as President, the retiring age should be increased.

[365] Article 145 of the 1992 Constitution of the Republic of Ghana.

d. Further, considering that retirement benefits are insufficient and there is no public welfare scheme for the aged, people should be allowed to work beyond 60 years.
e. Some industries do not have adequate human resource to replace its ageing population. Examples are doctors and university lecturers. The retirement in such industries should therefore not be pegged at 60.

105. In support of the calls for a decrease in the retiring age to various ages between 45 and 59 years, the submissions furnished the following reasons:
    a. Reducing the retiring age would create employment opportunities for the youth.
    b. The short life expectancy of Ghanaians necessitated a reduction in the retiring age.
    c. When people retire early, they could venture into private enterprise and offer employment opportunity to others.

106. There were some proposals for the removal of the retiring age for public officers from the Constitution and for it to be made industry-specific and dealt with in the Acts of Parliament that regulate particular Public Services. Proponents of this view reinforced their point by stating that different institutions have different circumstances that are peculiar to those institutions. Generalizing the retiring age is, thus, not very effective or prudent. For instance, some classes of professionals (including lecturers, teachers, and medical doctors) acquire more knowledge and become more experienced and better at what they do with age. Also, with the shortage of such professionals, it is important that their retiring ages be pegged at 65 or 70 years.

107. In addition, the Commission received submissions to the effect that all public servants should retire at the same age. This was because it was discriminatory for Justices of the Superior Courts and other public servants with analogous conditions of service to retire at 65 or 70 years when the majority of public servants retire at 60 years.

108. It was also proposed by some that men and women should retire at different ages, women at 50 years and men at 55 years, because women generally aged faster than men and men were physically stronger than women.

109. There were also submissions arguing that the practice of engaging retired public servants on contracts should be scrapped. The practice tended to benefit only a certain small class of privileged retirees. More often than not, the same persons who headed public institutions and might have mismanaged them were asked to stay on. Also, many institutions were exploiting this avenue to allow public officers to remain in office when they were well over 65 years old.

110. There were a few submissions requesting either an increase or a decrease in the voluntary retiring age of 45 years.

D. FINDINGS AND OBSERVATIONS

111. The Commission finds that the issue of what age to peg compulsory retirement at has serious socio-economic implications. There will, for instance, be a drastic increase in the number of retirees to be paid pension if the proposal to reduce the retiring age is accepted.

112. The Commission finds that increasing the retiring age to 65 years will save the country, in the short run, some significant amount of money through increased income tax receipts and increased contributions to the pension funds from persons who would have otherwise retired at 60 years. This, however, has its own demerits. Ghana does not have an ageing population. Late-retiring measures, such as have been recently put in place in France or is envisaged in the U.K., are more appropriate in countries with an ageing population. In such countries, it makes economic sense to have people work and pay tax for longer periods.

113. The Commission finds that for a developing country like Ghana with a youthful population and a high unemployment rate, late retiring measures may not be particularly appropriate. Conversely, the argument for decreasing the retiring age does not find favour with the Commission. This argument is premised on the grounds that government employs the bulk of the labour force. This would only be accurate in relation to the formal sector. Altogether, the private and the informal sectors actually employ the biggest proportion of the labour force in Ghana. Thus, considering that the compulsory retiring age does not apply to these sectors, reducing the retiring age in the public sector will not be significant in addressing the problem of unemployment in Ghana.

114. The Commission also finds that it is important to allow the retiring age to be increased for particular public officers especially in those public services where there is a dearth of human resources or particular expertise. In this regard, the constitutional amendment to allow of the engagement of particular officers till age 65 should be lauded, although the practice of extending the tenure of officers beyond the constitutionally mandated age limit is to be rejected.

115. The Commission observes that the trend in Europe leans towards increasing the retiring age of its work force. The reasons include an increasingly ageing population coupled with low birth rates. In Africa, the retiring age for some countries like Zambia, Niger, Rwanda and Togo is 55 years, while others like Tanzania, Mauritius and Nigeria peg it at 60 years.
116. The Commission observes that the justification for pegging the retiring ages of the Chairman and Deputy Chairmen of some ICBs to those of judges stems from the desire by

the framers of the Constitution to give those persons adequate security of tenure. This is best summed up by the Supreme Court as follows:[366]

> "... it is clear that virtually all the office holders mentioned in article 70 perform such delicate governance functions that regulate, control and give meaning to the democratic dispensation that Ghana has been enjoying since 7 January, 1993. It is in pursuit of the above that the said office holders need to be protected first from early retirement as other public office holders do at 60 years. The rationale for this is to ensure that the state benefits from the rich experience that they will gather on the job by their long stay in office up to 70 or 65 as the case might be. Secondly, there will also be the need to insulate the said office holders from the ravages and spoils of politics and change of governments as has happened in 2001 and in 2009… Even though Judges are not article 70 office holders, it is their terms of conditions of service which have been made applicable to the said article 70 office holders. Judges of the Superior Courts therefore also have security of tenure up to 70 or 65 years as the case might be"[367]

117. The Commission observes that on the issue of the retiring age of public officers, the National Constitution Review Conference recommended the retention of the *status quo* with some modification; the retiring age should be retained at 60 years with the possibility of re-engaging public officers for a maximum of 5 years. In addition, Article 199 should be amended to allow Parliament to make legislation to reflect the specific needs of individual public services.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

118. The Commission recommends that the current retiring age be maintained, however, Parliament should be empowered to increase the retiring age of certain categories of public servants to reflect the specific needs of individual public services.

ISSUE SIX: RETIREMENT BENEFITS, PENSIONS AND GRATUITIES OF PUBLIC OFFICERS

A. DIMENSIONS OF THE ISSUE

119. The dimension of this issue is how the retirement package of public officers could be improved.

[366] *Appiah-Ofori* v. *Attorney-General* [2010] SCGLR 484.
[367] *Appiah-Ofori* v. *Attorney-General* [2010] SCGLR 484 at 543 to 544.

B. CURRENT STATE OF THE LAW ON THE ISSUE

120. Article 199 provides that a person's pension is not taxable. A new pension law, the National Pension Act, 2008 (Act 766), has been enacted to provide for pension reform in the country by the introduction of a contributory three-tier pension scheme, namely:
    a. A mandatory basic social security scheme to be managed by the Social Security and National Insurance Trust (SSNIT). The worker contributes 5.5% of his or her basic salary and the employer contributes 13% of the worker's basic salary;
    b. A mandatory fully-funded and privately managed occupational scheme; and
    c. A voluntary fully-funded and privately managed provident fund and personal pension scheme.

121. Section 58 of the National Pension Act makes the scheme applicable to every employer and to each worker employed by an establishment. Section 76 sets out the conditions for one to qualify for pension benefit under the basic national social security scheme.[368] One must make contributions to the fund for a minimum of 180 months or attained the age of 65 years or 55 years[369] or opt for voluntary retirement and apply for superannuation benefit.[370]

122. Section 77 of the National Pension Act sets out the formula for computing the retirement benefits of public officers. It provides that the minimum payment is based on 50% of the average annual salary for the best 3 years of a contributor's working life. Where a contributor has worked beyond the minimum contribution period, the amount of pension payable shall be increased by one and half percent for every additional 12 months worked up to a maximum of 80%.

123. Under section 80 of Act 766, the pension payment made to contributors is reviewed annually.

124. For the mandatory occupational pension scheme which is a work-based scheme, an employer of an establishment shall remit a mandatory contribution of 5% to approved trustees of occupational pension schemes, out of the total contribution of 18.5% made on behalf of the worker. Benefits here are paid in the form of a lump sum, on the termination of service, death or retirement of the employee.

125. Article 68(4) to (7) of the 1992 Constitution and section 4 of Act 527 are also relevant to this issue. Article 68(4) to (7) provides that the President is entitled to a gratuity in addition to

[368] The employer (in the case of public officers, the State,) is mandated to make a monthly contribution of a total of 18.5% of each employee's monthly salary (5.5% is deducted from the employee's monthly salary and the employer contributes the remaining 13.5%).
[369] In the case of an underground mine worker or a worker in a quarry or in steel works or in any other employment who is likely to contract industrial diseases as defined in section 12 (2) of the Factories, Offices and Shops Act, 1971 (Act 328).
[370] In addition, section 59 of the National Pension Act, 2008 (Act 766) provides the minimum entry age as 15 and 45 years as the maximum entry age.

pension which shall be equivalent to his salary and other allowances and facilities prescribed by Parliament in accordance with the recommendations made by a Committee set-up under Article 71. The said salary, allowances, facilities, pension and gratuity are exempted from tax. Article 68(6) empowers Parliament to determine the pension and other retiring awards and facilities due the President in a situation where the President resigns or is removed from office due to the President's inability to perform his duties. This should be based on the recommendation of the Committee referred to in Article 71 of the Constitution. The salary, allowances, pension or any gratuity paid the President on leaving office is a charge on the Consolidated Fund.

126. Section 4 of Act 527 relates to Members of Parliament. It is to the effect that a Member of Parliament who has served in that office for any period of time shall, on his death or on ceasing to be a member of Parliament in any circumstance, other than where he becomes disqualified as a member of Parliament or where he vacates his office under Article 97 (1)(c) or (d), be eligible for the payment to his personal representative or to him of such gratuity proportionate to his period of service as shall be determined by the President, acting in consultation with the Committee referred to in Article 71 of the Constitution.

C. SUBMISSIONS RECEIVED

127. There were submissions which pushed for the retention of the *ex gratia* awards, on the condition that the quantum should be reduced because:
    a. The country cannot afford the largesse showered on Article 71 office holders.
    b. The excess resources generated from such reductions could be channelled into developmental projects.

128. Closely related to the above submissions were proposals that the Constitution should specify the quantum of *ex gratia* to be paid to Article 71 office holders. Specifying exactly what should be given as *ex gratia* to the deserving officials in the Constitution would prevent the situation where the Executive and the Legislature allocate so much money to each other at the expense of the public.[371]

129. Others recommended that MPs should be paid *ex gratia* awards only once and not repeatedly when they are re-elected. The payment of *ex-gratia* to serving MPs is not consistent with the concept of gratuities; gratuity connotes a voluntary additional payment made for services rendered and is usually paid at the end of the service. For a serving MP, all terms served must be considered as continuous. The current arrangement is a waste of resources, they argued.

[371] Chapter 3 of the *Review of Facilities and Privileges for Article 71 Constitutional Office Holders: Final Report*, December 2008. Presidential Committee on Emoluments (Chinery-Hesse Committee).

130. Those who advocated the abolishing of *ex gratia* share the view that:
    a. The payment of *ex gratia* was a drain on the State's limited resources and must be stopped.
    b. It was discriminatory and unfair to other public officers who did not benefit.
    c. The payment of *ex gratia* was inequitable and afforded the executive and the legislature the opportunity to connive and pay themselves huge gratuities.

131. Other recommendations were that Article 71 office holders should simply contribute to the pension scheme, just as their counterparts, and be paid pension on exiting office to ensure transparency and fairness, and that the payment of *ex gratia*, if determined as part of pension, should be extended to all public officers to ensure fairness.

132. On the issue of retirement benefits and the procedure for accessing benefits, the submissions proposed increasing pensions paid to retirees because the retirement benefits were insufficient, and decentralising SSNIT to ease the pressure of the processes involved in accessing retirement benefits. This would, in particular, ease the difficulties pensioners in remote districts encounter in accessing their pension. It was further suggested that organisations should orient their employees on preparation for retirement early enough so that they were prepared for the shocks of life in retirement. Additionally, it was submitted that public officers should be able to access their pension a few years prior to retirement.

D. FINDINGS AND OBSERVATIONS

133. The Commission observes that the National Constitution Review Conference proposed the establishment of an Independent Emoluments Commission authorised to determine the salaries and other emoluments, including retirement benefits, of all public officers including the President and other Article 71 office holders.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

134. The Commission recommends the establishment of an Independent Emoluments Commission (IEC) as an independent constitutional body to determine the emoluments of all public officers, including retirement benefits, pensions and gratuities.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

135. The Commission recommends the decentralisation of the operations of the SSNIT and Comptroller and Accountant-General pension processing and payment points to ease the accessibility of pension benefits by pensioners.

ISSUE SEVEN: REMOVAL OF PUBLIC OFFICERS FROM OFFICE

A. DIMENSIONS OF THE ISSUE

136. The key dimension of this issue is how to protect the tenure of public office holders against political interference.

B. CURRENT STATE OF THE LAW ON THE ISSUE

137. The Constitution in Article 297, a non-entrenched provision, provides that implied in the power to appoint a person to act or hold office in the public service is the power to remove the person from office.

138. To ensure that public officers are not arbitrarily removed from office, Article 191 protects the tenure of public officers by providing that a member of the public services shall not be victimised or discriminated against for having discharged his duties faithfully in accordance with this Constitution; nor should a public officer be dismissed or removed from office or reduced in rank or otherwise punished without just cause.

139. For certain public offices, such as Justices of the Superior Courts, the Commissioners of the CHRAJ, and the Chairman of the EC and his deputies, the Constitution specifically provides different grounds and processes for their removal from office.[372]

C. SUBMISSIONS RECEIVED

140. Some submissions received were to the effect that the position of some public officers should be designated political offices and the tenure of those officers should be coterminous with that of the President. This would ensure that the relevant public officers are clear about the duration of their tenure and do not feel victimised when successive governments removed them from office. The retention in political positions of persons who do not share the vision and ideology of a new government was likely to lead to ideological conflicts and an indifferent approach to work. In extreme cases it could lead to sabotage.

141. Conversely, it was submitted that public officers should not be removed from office whenever there is a change of government. The practice of dismissing public officers or directing them to proceed on leave any time there was a change of government hinders the development of the country. It also costs money to replace officers removed from office when government changed hands, for the officers who were removed may well be competent and effective officers that the nation needs, although they may not be sympathetic to the ideology or philosophy of an incoming government. Desisting from the practice would also

[372] Article 146 of the 1992 Constitution of the Republic of Ghana.

promote neutrality, professionalism and continuity in the public service and reduce the tension that accompanies the removal or transfer of public officers with the advent of each new government.

142. Other submissions called for the Public Services Commission to be empowered to enforce Article 191 because, in practice, the constitutional requirement of "just cause" is not being adhered to, and the courts, apart from being expensive, are slow in dispensing justice in cases of officers seeking redress for dismissals for no reason or for reasons that do not constitute "just cause."

D. FINDINGS AND OBSERVATIONS

143. The Commission finds that Article 191 which provides that a member of the public services shall not be victimised or discriminated against for having discharged his duties faithfully in accordance with this Constitution; or dismissed or removed from office or reduced in rank or otherwise punished without just cause is adequate.

144. The Commission finds that if appointments to public offices are merit- and value-based as proposed and heads of institutions are engaged and given clear employment contract standards against which they are evaluated, it will be easy for governing boards and councils to determine when to dispense with their services on the basis of non-performance or under-performance. This would enhance good governance.

145. The Commission observes that a cardinal principle in public administration is to ensure stability so that programmes and projects run their full course. Stability also commands loyalty. Stability is, however, thwarted by arbitrary and summary removal of public officers with every change of government.

146. The Commission observes that, it is to protect the tenures of public officers that Article 191 and other provisions such as Article 23 on administrative justice, and Article 296 on the parameters for the exercise of discretionary power, were written into the Constitution. These and several other administrative and judicial remedies are available to an aggrieved public officer and confer on the officer a great deal of security of tenure.

147. The Commission further observes that this security of tenure is further enhanced by the proposal in this report to limit the powers of appointment of the President, and, by necessary implication, his power to discipline public officers and to remove them from office or direct them to proceed on leave.

148. The Commission is of the opinion that, theoretically, there are adequate provisions in the Constitution to secure the tenure of public officers against interference.

149. The Commission observes that the National Constitution Review Conference arrived at the following conclusions on this issue:
    a. Article 191 adequately provides protection for public officers, even though, in practice, the provision is not being adhered to.
    b. The Constitution should clearly specify what is meant by "just cause" under Article 191 in order to improve clarity and facilitate enforcement.
    c. The Public Services Commission is under-delivering on its responsibility with regards to protecting public officers.
    d. Article 197 should be amended to make it mandatory for the Public Services Commission to make regulations for the protection of public servants.
    e. The requirement for the Public Services Commission to seek the approval of the President before making Regulations under Article 197 should be expunged. This is to ensure that the Public Services Commission independently makes Regulations for enforcing Article 191.

150. However the Commission further observes that the current relationship between the Public Service Commission and the President enables the President as the Chief Executive of the Country to be involved in the administration of the public service which constitutes the major means for running the country. In that vein he should have a role in ensuring that the regulations governing the Public Services are suitable for achieving an efficient administration.

151. The Commission finds that the adoption and implementation of performance measurements or indicators into the public service system would be very useful in assessing public officers. It would be most appropriate to have an annual performance appraisal of every public officer by their managers. This appraisal could form the basis for promotion, ascertaining training needs as well as providing reasons for not retaining the services of public officers. The aggregate performance of all officers in a particular institution would be a function of the competence of the head of that institution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

152. The Commission recommends that Article 197 of the Constitution be amended to make it mandatory for the Public Services Commission to make Regulations in consultation with the President for governing the entirety of the public services, although particular services may make more detailed Regulations to address specificities in their services.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

153. The Commission recommends that the Public Services Commission Act, 1994 (Act 482) be amended to empower the Public Services Commission to incorporate performance contracts for all public officers and that those contracts be the main bases for determining whether or not such appointments should be renewed.

154. The Commission recommends that the Public Services Commission makes Regulations to, among others, provide for procedures for dispute resolution; codes of conduct for public officers; and performance contract standards for all public officers, which shall form the main basis for determining whether or not their appointments should be renewed.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

155. The Commission recommends the implementation of strict annual appraisal for all public officers.

156. The Commission further recommends that the Public Services Commission should be actively involved in the annual appraisals for public officers.

ISSUE EIGHT: CODE OF CONDUCT FOR PUBLIC OFFICERS

A. DIMENSIONS OF THE ISSUE

157. The following dimensions of the issue were apparent:
    a. Should all public officers be required to declare their assets?
    b. How can the declarations made by public officers be verified?
    c. Should the declared assets of public officers be published?

B. CURRENT STATE OF THE LAW ON THE ISSUE

158. Chapter 24 of the Constitution sets out in broad terms the Code of Conduct for Public Officers. First, it prohibits public officers from putting themselves in conflict of interest situations.[373] Besides Article 286, all other provisions contained in Chapter 24 are non-entrenched.

159. Chapter 24 of the Constitution also names categories of public officers who must submit a written declaration of their assets and liabilities to the Auditor-General. This must be done before taking office, after each four-year period, and at the end of the public officers' tenure of office.

[373] Article 284 of the 1992 Constitution of the Republic of Ghana.

160. Parliament has by the Public Office Holders (Declaration of Assets and Disqualification) Act, 1998 (Act 550) extended the list of public officers required to declare their assets and liabilities to cover the generality of public office holders. Act 550 has also specified the details of the assets to be declared and the form in which the declaration list should be made. The failure of any public officer to make a declaration constitutes a breach of the Code of Conduct. It is also a breach of the Code if an officer knowingly makes a false declaration.

161. After the initial declaration, any property or other asset acquired by a public officer, which cannot reasonably be attributable to income, gift, loan, inheritance, or any other reasonable source will be regarded as an illegal acquisition.[374]

162. The Commission on Human Rights and Administrative Justice (CHRAJ) is mandated to investigate allegations that a public officer has contravened the Code of Conduct for Public Officers. The Commission is empowered to take appropriate action to give effect to its findings.

163. Besides these, there are specific provisions (constitutional, legislative and administrative) that constitute codes of conduct for various public institutions. For instance, Article 98(2)(b) forbids parliamentarians from holding a private office of emolument if there is the likelihood of a conflict with the legislative duties of a member of Parliament. Pursuant to the same provision, the Standing Orders of Parliament set up a committee on members holding offices of profit which monitors likely conflicts of interest arising from members' private activities.

164. Article 104(5) of the Constitution requires a Member of Parliament who is a party to or a partner in a firm which is a party to a contract with the government to declare his or her interest and to refrain from voting on any question relating to the contract.

C. SUBMISSIONS RECEIVED

165. Some of the submissions received on this issue proposed that the declaration of assets by public officers should be published to promote transparency and offer the public an opportunity to attest to the veracity of the assets declared.

166. An opposing view was that any publication of the assets declared might be detrimental to the privacy of public officers who declare their assets and liabilities and attract undue attention to them; therefore, the declaration made should not be published.

167. A number of submissions stated that the Constitution should expressly provide a mechanism for verifying the authenticity of the declaration made. This would ensure that the country is

[374] Article 286(4) of the 1992 Constitution of the Republic of Ghana.

not saddled with a situation where public officers, in anticipation of assets to be accrued illegally from office, exaggerate the assets they declare.

168. It was also proposed that each public institution should administratively deal with its own code of conduct. The Code of Conduct for Public Officers should not be addressed expressly in the Constitution.

D. FINDINGS AND OBSERVATIONS

169. The Commission finds that the list of persons required to declare their assets under the Constitution and Act 550 is adequate.

170. The Commission finds that there is the need for a more elaborate constitutional mechanism for detecting non-compliance with and contravention of the Code of Conduct for public officers. A more transparent asset declaration regime that has very strong provisions for the verification of the assets declared and strong punitive measures against persons who default could prove a very potent weapon for fighting corruption.

171. The Commission further finds that the monitoring and verification machinery under the current arrangement is very deficient. While the Auditor-General is the custodian of the declarations, there is no elaborate administrative procedure for verification beyond investigations triggered by a complaint made to the CHRAJ, or investigations carried out by a Commission of Inquiry. Access may also be obtained through judicial action in court. The fight against corruption is not enhanced by this arrangement.

172. The Commission finds that there is clearly the need for legislation to define in detail the situations that constitute conflict of interest and which serve as the legal framework within which the CHRAJ can determine complaints made against public officers for breaches of the Code. Such a law should also provide for the manner in which public officers should treat gifts that are offered to them. The absence of enabling legislation setting out the parameters of conflict of interest makes Article 284 considerably vague in terms of definition, procedure and sanctions. The lack of clarity in matters of conflict of interest and the lack of an extensive code of conduct for public officers only helps to lower the trust that people have in the assets declaration regime.

173. The Commission also observes that the CHRAJ has published the Conflict of Interest Guidelines and Code of Conduct for Public Officers to flesh out the provisions of Chapter 24 of the Constitution. These, however, remain soft law and are largely unenforceable.
174. The Commission observes from international comparative experience that:

a. Many countries around the world have adopted ethics and anti-corruption legislation requiring public officials to declare not only their assets and income but also those of their spouses and in some cases, their dependent children. The category of public officials who are required to make such declarations, vary depending on the country. While the requirement to declare income and assets generally is imposed by anti-corruption laws, these laws do not always require that all of the declared information, if any at all be made public. In some countries, legislation on access to information is invoked by interested citizens and NGOs to obtain such information. Such income and asset disclosure mechanisms are put in place to not only combat corruption but also foster public confidence in government and in some cases encourage foreign investments. Studies have shown that "several countries with detailed disclosure requirements have experienced a decline in corruption. Among other benefits, asset disclosure programmes enhance the legitimacy of government in the eyes of the public and stimulate foreign direct investment."[375]

b. Most continental European countries require public officials to make some form of financial disclosure. "The Group of States Against Corruption (GRECO) of the Council of Europe adopted a Model Code of Conduct for Public Officials that includes a requirement for declaration of private interest and a broad definition of conflict of interest, including apparent and potential conflicts of interest."[376]

c. The United States Congress enacted not only in reaction to the Watergate and other public scandals but also to avert the weakening of public's trust in the government, the Ethics in Government Act of 1978 ("Ethics Act"). The Act requires detailed financial disclosure by high-level government employees in all three branches of the federal government. This federal legislation is complemented by a host of financial disclosure laws at both the state and local levels. The Ethics Act requires the annual disclosure of financial information by the President, Vice-President, members of Congress, federal judges, presidential appointees, and other officials and employees earning at or above a specified pay-scale or with policymaking responsibilities.[377]

d. In Africa, South Africa has put in place an all-embracing conflict of interest policy, and has enacted codes on conflict of interest which require public officials to disclose their financial interests. Elected officials and senior managers in the civil service, as well as their spouses and dependent children, must publicly disclose nearly all financial interests, including shares and interests in companies, land and property owned, paid outside employment, directorships and partnerships, consultancies, and gifts received from sources other than friends and family. Although limited portions

[375] RIGHT 2 INFORMATION, http://right2info.org/information-of-high-public-interest/asset-declarations/asset-declarations#_ftn8, (last visited July 6, 2011).
[376] RIGHT 2 INFORMATION, http://right2info.org/information-of-high-public-interest/asset-declarations/asset-declarations#_ftn8, (last visited July 6, 2011).
[377] RIGHT 2 INFORMATION, http://right2info.org/information-of-high-public-interest/asset-declarations/asset-declarations#_ftn8, (last visited July 6, 2011).

of this information, such as the value of interests in companies and pensions, amounts of remuneration, and details of private residences and family financial interests are kept confidential, the presumption in South Africa favours the disclosure of assets.[378]

e. A few other African countries, including Kenya and Malawi, have passed conflict of interest legislation, but such efforts have not been as comprehensive or as successfully implemented as South Africa's.[379]

f. A survey conducted in 2006 of 148 countries eligible to receive World Bank support found that, "in Africa, 28 countries require disclosure of income and assets by public officials. Of these 28 countries, 23 require officials to declare assets to an anti-corruption body or other government entity, while only 5 (Cape Verde, Republic of Central Africa, Liberia, Sao Tome and Principe and South Africa) request publication of the declarations. Some 20 of the African World Bank client countries do not require income and asset disclosure by public officials."[380]

g. In Cameroon, although asset declaration is mandatory for all public officials, reports are not verified effectively and mis-declarations are not penalised, leading to the unsatisfactory enforcement of asset disclosure regulations.

h. In Tanzania, declarations must be made to the Ethics Commissioner, who is given the formal responsibility for checking their accuracy and maintaining the record. However, the law does not give him powers to take steps to punish violations or impose penalties for breach of the code.

i. Uganda is one of the countries whose asset declaration regimes provide for the verification of public officials' submissions. The Inspector General of Government (IGG) is responsible for verifying asset declarations and has the discretionary power to question public office holders. Public officials have 30 days to answer the Inspector General's questions. In March 2005, for example, the IGG was reported to have asked all public officers to file their declaration by the 31st of March or be dismissed.[381]

175. Despite the fact that asset declaration schemes have great potential for decreasing abuse of power and looting of public resources, their effect may be obstructed by the shortfalls in the regulatory framework. Some of these include "the lack of clarity about what assets, liabilities and interests that public officials are to disclose; the absence of a legal requirement for the verification of asset declarations; the lack of effective sanctions and clarity over the

[378] RIGHT 2 INFORMATION, http://right2info.org/information-of-high-public-interest/asset-declarations/asset-declarations#_ftn8, (last visited July 6, 2011).
[379] RIGHT 2 INFORMATION, http://right2info.org/information-of-high-public-interest/asset-declarations/asset-declarations#_ftn8, (last visited July 6, 2011).
[380] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.
[381] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.

prosecution of offences; and the lack of public access to officials' asset declarations. The effectiveness of the asset disclosure regime may be further affected by lack of resources such as manpower, technical and financial, allocated to implement the scheme, especially with regard to the verification of submitted declarations."[382]

176. Successful enforcement requires an effective asset declaration monitoring body, with clear mandate, powers, capacity and resources. There is the need for the regulatory framework to place an obligation on the "relevant authority to receive and process public officials' asset declarations, as well as assess their authenticity, completeness, inaccuracies and inconsistencies. Ideally, this body must be empowered to remind public officials of their obligations and ask them to rectify and redress discrepancies or irregularities."[383]

177. Sufficient resources need to be allocated to ensure adequate record management, investigation and enforcement through a disciplinary body. The absence of a legal requirement for the verification of asset declarations renders the process a formal exercise that does not serve its anti-corruption purpose.[384]

178. It has been suggested that creating a single body to handle the review, inspection and verification of wealth declarations and giving the press and the public access to asset declaration data are some of the options that may be adopted to ensure an effective assets declaration regime.[385]

179. The Commission observes that the National Constitution Review Conference did not arrive at a consensus on the issue of whether assets declared by public officers should be verified upon declaration. One view was that the *status quo* should remain. This implies that assets declared by public officers should be investigated for verification only when there is a complaint. The other position was that assets declared by public officers must be verified by a body such as the CHRAJ in collaboration with the intelligence agencies.

180. The Commission finds, on this issue of declaration of assets and liabilities of public officials, two competing positions neither of which is considered desirable. On the one hand is the position that declared assets and liabilities should be made public to ensure transparency in

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[382] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.
[383] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.
[384] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.
[385] *African Experience in Asset Declaration*, Anti-Corruption Resource centre. (July 6, 2011), http://www.u4.no/publications/african-experience-of-asset-declarations/.

governance. The other position cites the possibility of theft and armed robbery as a reason to propose that declared assets and liabilities should not be made public.

181. The Commission takes a middle ground, that assets and liabilities declared should be verifiable, however, this should be undertaken without posing a threat to the security and safety of the public official and his property.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

182. The Commission recommends the amendment of Chapter 24 of the Constitution to effect the following changes:
    a. That a person who holds a public office shall submit to the Auditor-General a written declaration of all property, assets, and liabilities owned by him either directly or indirectly. The Auditor-General shall within 14 days of receipt of the declaration submit it to the Commissioner for Human Rights and Administrative Justice who shall within 6 months of receipt of the submission verify the contents of the declaration.
    b. Failure to declare and the making of deliberately false declarations should be criminalised and severely punished.
    c. Public officers must declare their assets and liabilities within 30 days after taking office, renew the declaration yearly on or before the 31st January of every year until they leave office, and make a final declaration within 30 days after exiting office.
    d. A declaration made by a public officer should not be published. However, a person may exercise his or her right to information to access the declaration for a specified purpose upon a written request to the Auditor-General who shall exercise his discretion to grant or refuse the request.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

183. The Commission recommends extensive amendments to the Public Office Holders (Declaration of Assets and Disqualification) Act, 1998 (Act 550) to accord with the findings on this issue and the recommendations for constitutional change made by the Commission.

184. The Commission recommends the enactment of detailed Regulations specifying how assets declared will be verified and how the public may access any declarations.

185. The Commission recommends that Cabinet and Parliament should expedite the passage of the Public Officers' Liability Bill into law within 6 months of the coming into force of the constitutional amendments recommended.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

186. The Commission recommends that the Auditor-General and the Commission on Human Rights and Administrative Justice must create a platform and develop protocols for collaborating to execute their roles in relation to the declaration of assets by public officers.

187. The Commission recommends that all public institutions should develop codes of conduct for their internal use. In this regard, the Public Services Commission should ensure that all public institutions have developed such codes of conduct.

ISSUE NINE: PUBLIC OFFICERS AND PARTY POLITICS

A. DIMENSIONS OF THE ISSUE

188. There were two main dimensions to the issue of public office and party politics. The dimensions were:
    a. Should public officers be barred from taking part in active party politics?
    b. Should public officers who resign from the Public Services to engage in active politics be re-engaged in the service when they quit politics?

B. CURRENT STATE OF THE LAW ON THE ISSUE

189. The Constitution does not specify what "active party politics" is, even though that phrase is used in Article 276(1) of the Constitution. There, chiefs are not to "take part in active party politics; and any chief wishing to do so and seeking election to Parliament shall abdicate his stool or skin."

190. There is no express provision barring public officers from taking part in active party politics. It is clear from Article 276(1) that a person seeking election to Parliament can be said to be taking part in active party politics. Thus, Article 94(3)(b) of the Constitution makes some public officers ineligible for Parliament. They are members of the Police Service, the Prisons Service, the Judicial Service, the Legal Service, the Civil Service, the Audit Service, the Parliamentary Service, the Statistical Service, the Fire Service, the Immigration Service, the Customs, Excise and Preventive Service, or the Internal Revenue Service (the last two have now been merged with the Value Added Tax Service to form the Ghana Revenue Authority). Also, persons who are barred by law from standing election because they hold or act in an office whose functions involve the "responsibility for or are connected with the conduct of,

an election or responsibility for, the compilation or revision of an electoral register" are ineligible to be Members of Parliament.[386]

191. Under section 26(1) of the Political Parties Act, 2000 (Act 574), the public officers identified under Article 94(3) do not qualify to be founding members, leaders or members of the executive of a political party, or hold office in a political party. Section 26(2) further provides that "… a public officer shall not engage in canvassing in support of or against a political party or a candidate standing for a public election."

C. SUBMISSIONS RECEIVED

192. A number of submissions were to the effect that public officers should not be allowed to take part in active party politics. The main reasons given for proposing this injunction was that public officers are supposed to be unprejudiced and engaging in active partisan politics could corrupt their neutrality.

D. FINDINGS AND OBSERVATIONS

193. The Commission finds that it is very desirable for public officers to refrain from partaking in active party politics to ensure professionalism, neutrality, and independence of the public services.

194. The Commission observes that the consensus from the National Constitution Review Conference was that:
    a. The political neutrality of public servants should be maintained by prohibiting all public servants from taking part in active party politics. In furtherance of this recommendation, the Public Services Commission should by Regulations define "active party politics."
    b. On the issue of whether public servants who resign from the public services to engage in active party politics should be re-engaged in the public service after quitting politics, there was no consensus. One group took the view that such officers should be re-engaged. The other group thought that public servants who engage in active party politics in that manner should not be allowed to return to the public service, since they will return with jaundiced political views.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

195. The Commission recommends that the Public Services Commission should, by a constitutional instrument, define what is meant by "active party politics" having regard to the

[386] Article 94 (3)(a) of the 1992 Constitution of the Republic of Ghana.

recommendation on Chiefs and Party Politics in paragraph 122 of Chapter ten of this report and the category of public officers who may not engage in active party politics.

ISSUE TEN: THE EFFECT OF FINDINGS OF COMMISSIONS OF INQUIRY UNDER THE 1992 CONSTITUTION

A. DIMENSIONS OF THE ISSUE

196. The main dimension of this issue is whether or not criminal proceedings may be founded on the adverse findings of a Commission of Inquiry set up under the 1992 Constitution?

B. CURRENT STATE OF THE LAW ON THE ISSUE

197. Chapter 23 of the Constitution provides for the appointment, by the President, of a Commission of Inquiry to look into any matter of public interest where the President is satisfied that a commission of inquiry should be appointed; or the Council of State advises that it is in the public interest to do so; or Parliament, by a resolution, requests that a commission of inquiry be appointed to inquire into any matter specified in the resolution as being a matter of public importance. Chapter 23 further sets out the powers and functions and the inquiry procedure to be adopted by the Commission and the immunities and privileges of witnesses appearing before a Commission of Inquiry.

198. The functions of such a Commission as set out under Article 280 are as follows:

> "280 (1) A Commission of Inquiry shall
>
> (a) Make a full, faithful and impartial inquiry into any matter specified in the instrument of appointment;
>
> (b) Report in writing the results of the inquiry and conclusions stated in the report.
>
> (c) Furnish in the report the reasons leading to the conclusions stated in the report.
>
> (2) Where a Commission of Inquiry makes an adverse finding against any person, the report of the Commission of Inquiry shall, for the purposes of this constitution, be deemed to be the judgment of the High Court; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal.
>
> (3) The President shall, subject to clause (4) of this article cause to be published the report of a Commission of Inquiry together with the White Paper on it

within six months after the date of the submission of the report by the commission.

(4) Where the report of a Commission of Inquiry is not to be published, the President shall issue a statement to that effect giving reasons why the report is not to be published.

(5) A finding of a Commission of Inquiry shall not have the effect of a judgment of the High Court as provided under Clause (2) of this article unless:

(a) Six months have passed after the finding is made and announced to the public; or

(b) The Government issues a statement in the *Gazette* and in the national media that it does not intend to issue a White Paper on the report of the commission, whichever is the earlier.

(6) The right of appeal conferred by clause (2) of this article on a person against whom a finding has been made, shall be exercisable within three months after the occurrence of either of the events described in clause (5) of this article or such other time as the High Court or the Court of Appeal may, by special leave and on such conditions as it may consider, just allow."

199. Additionally, Rules 13 and 14 of the Commissions of Inquiry (Practice and Procedure) Rules, 2010 (C.I. 65) provide as follows;

"13. A witness appearing before a Commission is entitled to the same privileges to which a witness before the High Court is entitled.

14. (1) Subject to sub-rule (2), in proceedings before a Commission, a person called as a non-target witness or as an expert witness shall be compelled to produce a document or an article and to answer a question with regard to the subject matter of the inquiry although the document, article or answer may incriminate that person.

(2) Where a person gives incriminatory evidence under subrule (1), the evidence shall not be used in criminal or civil proceedings against that person."

200. The courts in Ghana have decided that,[387] "the constitutional arrangements under Article 280 of the 1992 constitution … does [sic] not allow the Attorney-General to initiate prosecution against persons affected adversely by the findings of a Commission of Inquiry established under Article 278 of the Constitution", and that the findings of Commissions of Inquiry should never develop into criminal trials. The court reasoned that any prosecution mounted on adverse findings of a Commission of Inquiry will undermine the provisions of Chapter 23 of the 1992 Constitution, particularly Article 280(2) and (5). The adverse findings are deemed to be a judgment of the High Court, against which aggrieved persons have a right of

[387] *The Republic* v. *Charles Wereko-Brobbey and Kwadwo Okyere Mpiani (the Ghana @ 50 Case)* (Unreported), High Court, 10th August, 2010, Suit No. ACC 39/ 2010.

appeal. To mount criminal proceedings against such persons to whom the Constitution has granted this right of appeal and to allow such a prosecution to continue would be undermining the efficacy and the solemn provisions in the Constitution. In that regard, the court observed that from Ghana's constitutional history, the wisdom behind the establishment of Presidential Commissions of Inquiry is to enable the President appoint citizens of the required expertise to investigate impartially and independently matters of national importance, and to evaluate the performance of public institutions with a view to ensuring and maintaining efficiency and high standards in our public administration. If Government's intention is to prosecute public officers who are alleged to have conducted themselves in a manner prejudicial to the interest of the state, in their public duties, the way to go is not the use of Commissions of Inquiry under Article 278 of the Constitution, because of the constitutional history behind the establishment of such Presidential Commissions under our Constitution. Such an intention requires Government to use the traditional investigative agencies under our laws so that the Attorney-General could resort to the powers granted him or her under Article 88 of the 1992 Constitution to mount the appropriate criminal prosecutions where necessary.

C. SUBMISSIONS RECEIVED

201. Some submissions received stated that the effects of adverse findings of Commissions of Inquiry should be further defined to enhance clarity.

202. Other submissions advocated that Commissions of Inquiry appointed by the President should be given sufficient time to complete their mandate. According to proponents of this view the time allotted for the work of most Commissions of Inquiry is too short. In most cases, the Commissions were unable to complete their work effectively or rush to complete their work in order to forestall the revocation of their mandate with the advent of a new government.

203. It was also submitted that a Presidential Commission of Inquiry should have the powers of a High Court to question and punish the misappropriation of funds by public officers.

D. FINDINGS AND OBSERVATIONS

204. The Commission observes that, Commissions of Inquiry have served as useful tools for unearthing the truth about how certain public affairs have been conducted. They have over the years served as a participatory and transparent platform by which means the citizenry has exacted accountability from public officeholders.

205. The Commission observes that the concept of a Commission of Inquiry has for a long time been a prominent feature of Ghana's administrative machinery. In post-independent Ghana, the concept can be traced to the Commission of Enquiry Act, 1964 (Act 250). Under section

1 of the Act, the President was empowered to "appoint a Commission consisting of one or more members … to enquire into any matter affecting the public welfare …." The President could exercise this power by an Executive Instrument.

206. The Commission observes that the salient provisions of Act 250 were given constitutional force by Chapter 18 of the 1969 Constitution. Under Article 165 of the 1969 Constitution, the President was vested with the power to appoint a Commission of Inquiry on the advice of the Prime Minister or on a resolution passed by the National Assembly. The Commission could consist of a sole Commissioner or two or more persons one of whom served as the Chairman of the Commission.[388] A Commission so appointed was given the powers, rights and privileges as were vested in the High Court in respect of enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise, compelling the production of documents, and the issue of a commission or request to examine witnesses abroad.[389] A Commission of Inquiry under the 1969 Constitution was tasked to make full, faithful and impartial inquiry into any matter specified in the commission of appointment, report in writing the result of the inquiry, and furnish in the report the reasons leading to the conclusions arrived at or reported.[390]

207. The Commission observes that the provisions of Chapter 18 of the 1969 Constitution were reproduced in Chapter 23 of the 1979 Constitution with two major changes. First, the 1979 Constitution provided for a person adversely affected by the findings or recommendations of Commissions of Inquiry to be able to appeal against such findings and recommendations.[391] The second change related to the publication of the reports of Commissions of Inquiry. The 1979 Constitution placed a mandatory duty on the President to cause the publication of the report and the White Paper thereon within six months of the date of the submission of the report of the Commission. Where the report was not to be published, the President was mandated to issue a statement giving reasons why it would not be published.

208. The Commission observes that the provisions of Chapter 23 of the 1992 Constitution are virtually a reproduction of Chapter 23 of the 1979 Constitution.

209. The Commission finds that the true position of the law is that the adverse findings of a Commission of Inquiry will crystallise into a judgment of a High Court if 6 months have elapsed since the publication of that Commission's report or if the government issues a statement (not a White paper) in the *Gazette* to the effect that it does not intend to issue a White Paper on the report of the Commission, whichever is earlier.

[388] Article 165(2) of the 1969 Constitution of the Republic of Ghana.
[389] Article 166(1) of the 1969 Constitution of the Republic of Ghana.
[390] Article 167 of the 1969 Constitution of the Republic of Ghana.
[391] Article 198(2) of the 1979 Constitution of the Republic of Ghana.

210. The Commission observes that:

a. There is controversy as to the interpretation of Article 280 on the effect of the findings of a Commission of Inquiry, particularly on whether the adverse findings can constitute grounds for criminal prosecutions. The High Court has held that the constitutional arrangements under Article 280 of the 1992 Constitution do not allow the Attorney-General to initiate prosecution against persons affected adversely by the findings of a Commission of Inquiry established under Article 278 of the Constitution.[392] This is because it will amount to a High Court evaluating its own judgment, a duty reserved for the Court of Appeal under Articles 280(2) and (6), 281 and 137(1) of the Constitution. Under Article 137(1) of the 1992 Constitution, it is only the Court of Appeal that has the jurisdiction to re-evaluate the findings and decision of the High Court.[393]

b. Article 280 which allows a person aggrieved by the findings of a Commission of Inquiry to appeal to the Court of Appeal does not expressly endorse or prohibit the initiation of criminal proceedings based on the findings.

c. Rules 13 and 14 of the Commissions of Inquiry (Practice and Procedure) Rules, 2010 (C.I. 65) seek to protect persons appearing before Commissions of Inquiry by granting them immunity from civil and criminal proceedings even when such persons in their evidence incriminate themselves.

211. The Commission finds that public interest will be best served if the adverse findings of a Commission of Inquiry can be used as grounds to initiate prosecutions. However, this should be subject to the outcome of an appeal process initiated by the person aggrieved from the findings of such a Commission.

212. The Commission finds that it will not be proper for an appeal process to run concurrently with criminal prosecution. It will be proper that the appeal processes for persons aggrieved by the findings of a Commission of Inquiry and criminal proceedings based on such findings are run sequentially such that an aggrieved person can exhaust the appeal process before criminal prosecution based on the findings of a Commission of Inquiry are mounted.

213. The Commission finds that it will be appropriate to remove all procedures and processes associated with Commissions of Inquiry and their investigations which are incompatible with a possible criminal prosecution resulting from the inquiry.

[392] *The Republic* v. *Charles Wereko-Brobbey and Kwadwo Okyere Mpiani (*the *Ghana @ 50 Case)* (Unreported), High Court, 10th August, 2010, Suit No. ACC 39/ 2010.

[393] Under Order 42 Rule 1 of C.I. 47, a High Court may review its judgment.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

214. The Commission recommends that the finding of Commissions of Inquiry should be declaratory in their effect.

215. The Commission recommends that the Chapter on Commissions of Inquiry be rewritten to indicate the exact follow-up actions that may attend the findings of such Commissions and the sequencing of such actions.

CHAPTER EIGHT – INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

8.1 INTRODUCTION

1. Ghana's transition from military rule to multi-party democracy in 1993 came with the declaration and affirmation of the commitment of the people of Ghana to: Freedom, Justice, Probity and Accountability; the principle that all powers of government spring from the sovereign will of the people of Ghana; the principle of Universal Adult Suffrage; the Rule of Law; the preservation of Fundamental Human Rights and Freedoms, and the unity and stability of the nation. As a way of securing these values and principles, Ghanaians instituted a number of oversight institutions, independent of the executive, legislative or judicial arms of government. These are the National Commission for Civic Education (NCCE); the Electoral Commission (EC); the Commission on Human Rights and Administrative Justice (CHRAJ); the National Media Commission (NMC); the Office of the Auditor-General (and the Audit Service); and the Public Services Commission (PSC). Apart from these, there are other institutions of governance, which, while not expressly listed as independent, may yet require a high degree of autonomy to execute their respective constitutional mandates. These are the Bank of Ghana and the Office of the Government Statistician (and the Statistical Service).

2. Independent oversight institutions have, in the past few decades, been promoted in new democracies as institutions that can effectively address the accountability deficits of the administrative State. In the case of Ghana, the concept of independent oversight institutions became part of the country's constitutional evolution at a very early stage. It was derived from the desire of Ghanaians to guard against unrestrained executive power. This desire was well emphasised by the framers of the 1969 Constitution when they acknowledged the need to minimise the possibility of abuse of power by dividing political power and vesting it in the hands of diverse persons so that there is effective check on power.[394]

3. In pursuit of this, the 1969 Constitution established, or provided for the establishment of, certain specialised governance institutions to afford Ghanaians different ways of exerting control over the administrative state, as well as holding all three conventional organs of government accountable. These institutions included the Electoral Commission charged with the organisation and running of elections;[395] the Office of the Ombudsman to guard against administrative injustices in the public sector;[396] the Office of the Auditor-General to audit the

[394] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 310.
[395] Article 30 of the 1969 Constitution of the Republic of Ghana.
[396] Article 100 of the 1969 Constitution of the Republic of Ghana.

public accounts of Ghana and the accounts of all public offices,[397] and the Public Services Commission to have oversight responsibility for the public services of Ghana.[398]

4. The constitutions that followed the 1969 Constitution did not depart from this concept of oversight institutions. For instance, the 1979 Constitution had provisions on the Electoral Commission,[399] the Ombudsman,[400] the Bank of Ghana,[401] the Government Statistician,[402] the Auditor-General,[403] the Public Services Commission,[404] and the Press Commission.[405] These institutions were empowered to perform vital roles aimed at ensuring that too much power would not be vested in any individual or institution and that there were adequate and effective checks on all organs of government.

5. These provisions were generally re-enacted in the 1992 Constitution with some modifications. The result of the re-enactments are the Independent Constitutional and other Bodies (ICBs) discussed in this Chapter of the Report. While the history of most ICBs could be traced to one institution or the other in the constitutional evolution of Ghana, there are a couple of them that are innovations of the 1992 Constitution. The CHRAJ, for instance, is novel in the sense that it is the first body to be established in the constitutional history of Ghana by combining the functions of three distinct institutions namely: a national human rights commission; an ombudsman; and an anti-corruption agency. The National Commission for Civic Education is, similarly, the first constitutional independent national and central body put in charge of civic education.

6. The mandate, powers and operations of the ICBs engaged the attention of many Ghanaians during the various consultations conducted by the Commission. The issues outlined below emerged as some of the prominent topics:
    a. streamlining the compositions of the ICBs.
    b. reinforcing the independence, political neutrality and security of tenure of the heads and members of the ICBs.
    c. streamlining the mandates of the ICBs.
    d. strengthening and resourcing the ICBs adequately so as to enable them perform their specialised roles more efficiently and effectively.

[397] Article 135 of the 1969 Constitution of the Republic of Ghana.
[398] Article 139 of the 1969 Constitution of the Republic of Ghana; Chapter 7 of this report on the Public Services of Ghana including the Public Services Commission.
[399] Article 37 of the 1979 Constitution of the Republic of Ghana.
[400] Article 110 of the 1979 Constitution of the Republic of Ghana.
[401] Article 146 of the 1979 Constitution of the Republic of Ghana.
[402] Article 149(2) of the 1979 Constitution of the Republic of Ghana.
[403] Article 151 of the 1979 Constitution of the Republic of Ghana.
[404] Article 154 of the 1979 Constitution of the Republic of Ghana.
[405] Article 192 of the 1979 Constitution of the Republic of Ghana.

7. Another issue that generated interest was the need to institute a procedural mechanism for the appointment of the heads and members of the ICBs to:
    a. ensure that vacancies that occur in their membership are not filled by persons on short-term contract, or in acting capacities, for indefinite periods;
    b. give Parliament a role in the appointing process; and
    c. scale down the powers of the President as the appointing authority—to remove any perception of executive interference in the functions of the ICBs.

8. The submissions on the ICBs also focused on the merits of establishing a fund, exclusively for the operations of the ICBs.

9. Specifically relating to the individual ICBs, the submissions received, specified various proposals addressing various issues including the need to:
    a. determine whether to hive off any of the mandates of the CHRAJ into separate institutions;
    b. clarify the status of CHRAJ's decisions;
    c. determine whether or not the CHRAJ should have prosecutorial powers; and
    d. determine whether the CHRAJ should have the mandate to initiate investigations, at its own instance, into allegations of human rights violations and administrative injustices without a formal complaint.[406]

10. Relating to the Electoral Commission and national elections, there were proposals as to the kind of electoral system Ghana should adopt; and whether the Constitution should prescribe any restrictions on the principle of universal adult suffrage. Other submissions suggested, with varying options, the need to adopt a more flexible electoral calendar that allows for a smooth transition between successive governments, and also the adoption of expeditious conflict resolution mechanisms for electoral disputes. Ghanaians also made proposals on the need to ensure that public elections are devoid of undue tension and violence.

11. Many Ghanaians also expressed concerns about the operations of the National Commission for Civic Education (NCCE). These concerns as manifested in the submissions, called for: the improvement in the efforts to educate Ghanaians on their civic rights and responsibilities; the incorporation of courses on the Constitution in the curricula at all levels of education; and the translation of the Constitution into various Ghanaian languages.

12. Concerns have equally been expressed by a cross section of the Ghanaian public regarding the National Media Commission's role in the proper management of radio and television call-in programmes as well as the lack of mechanisms to guard against abusive language on

[406] *Republic* v. *Fast Track High Court Ex Parte Commission on Human Rights and Administrative Justice, Dr. Richard Anane (Interested Party)* [2007-08] SCGLR 213.

these programmes, which according to some people are flagrant reflections of falling journalistic standards.

8.2 BRIEF HISTORY OF THE ICBS

8.2.1 THE NATIONAL COMMISSION FOR CIVIC EDUCATION

13. In the pre-colonial era, civic education was mainly informal, given mainly by religious missions, which, through their outreach programmes, played an important role in educating their members and the general public on civic issues.[407]

14. In the aftermath of independence, civic education in Ghana was enhanced by the introduction of "Civics for Self-Government" (Civics) as an examinable subject in first cycle schools. This was to "produce men and women with a clear understanding of their rights and responsibilities and appreciation of the challenges of an emerging independent nation."[408] Institutions such as the Young Pioneers and the Youth League established by the First Republican Government also engaged in different forms of political education in line with the government's policy to put civic education on the national agenda after independence.[409] Some critics of Kwame Nkrumah, Ghana's first President, however, contend that institutions such the Young Pioneers were nothing more than Nkrumah's propaganda tools which served other inimical purposes.[410]

15. After the overthrow of the First Republic, the first military administration established the Centre for Civic Education (CCE). It had the objective of educating the Ghanaian populace on political, economic, and social subjects, including integrity, tolerance and other social values[411] but it ended up not operating in the non-partisan fashion that was expected of it.[412]

16. Even though no national and formal body for civic education was included in the 1969 Constitution, the Second Republican Government continued the operation of the Centre for Civic Education until it was overthrown by the National Redemption Council. The National Redemption Council did not set up a national body, similar to the CCE.

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[407] NATIONAL COMMISSION ON CIVIC EDUCATION, http://ashanti.gh.com/ncce/docs/history.htm (last visited Aug. 22, 2011).
[408] NATIONAL COMMISSION ON CIVIC EDUCATION, http://ashanti.gh.com/ncce/docs/history.htm (last visited Aug. 22, 2011).
[409] NATIONAL COMMISSION ON CIVIC EDUCATION, http://ashanti.gh.com/ncce/docs/history.htm (last visited Aug. 22, 2011).
[410] THOMPSON PETER OMARI, KWAME NKRUMAH: ANATOMY OF AN AFRICAN DICTATORSHIP (London, C. Hurst and Company, 1970)
[411] B. D. G., FOLSON, AN EXPERIMENT IN CIVIC EDUCATION IN GHANA (Lusaka Zambia, African Adult Education Association, 1971).
[412] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 118 to 120.

17. A constitutional body for civic education was considered but rejected by the 1978 Constitutional Commission.[413] That Commission was satisfied that the objectives of civic education could be effectively achieved by the provision of well-directed financial and material assistance to, and improved collaboration between existing institutions such as: the public universities; Institutes of Public Education; District Councils; as well as private literary and self-help organisations.[414] It was also important to the 1978 Constitutional Commission to guard against the creation of a central body that would promulgate a national ideology for all citizens and deny them the right to maintain and express their own views where such views are not compatible with the so-called "national ideology."[415]

18. Under the military regime of the Provisional National Defence Council (PNDC), the responsibility of public and political education was entrusted to the Committees for the Defence of the Revolution (CDRs) and the National Commission for Democracy (NCD). The NCD was, for instance, tasked to, among others, disseminate political awareness within the society in the interest of democracy and to formulate a programme for the realization of democracy, for the consideration by government.[416]

19. The NCCE was established as a neutral and independent Commission under the 1992 Constitution to take over the civic education functions of the NCD,[417] but with the necessary modifications to make those functions conform to constitutional rule.[418]

8.2.2 THE ELECTORAL COMMISSION

20. The considerations for the current constitutional framework of the Electoral Commission were well set out by the Committee of Experts that drafted proposals for the 1992 Constitution.[419]

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[413] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 119.
[414] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 119.
[415] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 119.
[416] National Commission for Democracy Law, 1988 (PNDCL 208).
[417] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 221 to 232, particularly, 225 to 227 and 232; Official Report of the Proceedings of the Consultative Assembly, (Tuesday, 11th February, 1992, Col. 2166 - 2168).
[418] Official Report of the Proceedings of the Consultative Assembly, (Tuesday, 11th February, 1992, Col. 2166-2168).
[419] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 221 to 232.

21. In addition to its civic education functions, the NCD was also entrusted with the performance of functions relating to public elections. In this regard the NCD was tasked to: conduct and supervise all public registration of voters; conduct and supervise all public elections and referenda; and demarcate electoral boundaries.[420] The Committee of Experts was confronted with a choice as to whether the Electoral Commission should maintain this dual mandate of the NCD or not. This was however left to the Consultative Assembly to determine.[421] In the light of the enormity of the task at hand, the Consultative Assembly opted to have the Electoral Commission concentrate on elections and leave the civic education aspects to another independent body, the NCCE.

22. Beyond the consideration of its functions, the Committee of Experts also deliberated extensively on the issue of whether the Electoral Commission should be a sole-member Commission (as was the case under the 1969 and 1979 Constitutions) or a multi-member Commission along the model of the NCD.[422] Both types of Commissions functioned to organise public elections.[423]

23. The Committee of Experts considered a sole Commissioner to be more prone to manipulation than an Electoral Commission made up of more than an individual. Besides, the pressures and the stress of general and other elections could be borne better by a corporate body than by a single person. On the other hand, the Committee considered the fact that a sole Commissioner would arrive at decisions more quickly than a body of Commissioners. Besides, a sole Commissioner would have a personal stake in the electoral processes as the entire nation would look up to him for honest, impartial and fair elections. The result would be an irresistible urge, on the part of a sole Commissioner, to meet such great expectation. To the contrary, the corporate nature of a multi-member Commission deprives it of such "crucial personal element."[424]

24. With these considerations in mind, the Committee of Experts again left it to the Consultative Assembly to choose between the two models.[425] This Consultative Assembly, after a comprehensive deliberation on the two models, opted for a multi-member Commission.[426]

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[420] Section 2 of the National Commission for Democracy Law, 1988 (PNDCL 208).
[421] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 221 to 232.
[422] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 221.
[423] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 224 and 226.
[424] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 230 and 231.
[425] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 221.
[426] Official Report of the Proceedings of the Consultative Assembly, (Wednesday 9th October, 1991, Col. 428).

8.2.3 THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (CHRAJ)

25. Following a general perception of gross human rights abuses in the latter days of the First Republic, and after the Supreme Court decision that the 1960 Constitution was devoid of effective and enforceable human rights provisions, every Constitution in Ghana has recited, in an elaborate bill of rights, a deep desire of the people of Ghana not to thread that path again.[427] Besides the bill of rights, the 1968 Constitutional Commission recommended the establishment of a classical Scandinavian parliamentary Ombudsman to provide citizens with a machinery to address grievances against maladministration in the public sector.[428] The relevant legislation was passed to set up the Office of the Ombudsman. However, no substantive appointment was made to that Office before the Second Republic was overthrown.

26. Drawing lessons from the non-appointment of the Ombudsman under the Second Republican Constitution, the 1978 Constitutional Commission specified the timeframe within which to appoint the ombudsman as within 6 months after the coming into force of the Constitution, 1979. The Ombudsman was appointed within the specified timeframe as an independent public authority through whom the citizens could hold the officials of State to account for any illegal or improper exercise of State power.[429]

27. The establishment of the Office of the Ombudsman was thus perceived more as fulfilling an administrative justice mandate rather than a broader human rights education, protection and promotion mandate. It was one of the few institutions from the 1979 Constitution that were retained under the regime of the PNDC after that Constitution was overthrown. Despite its retention, allegations of human rights abuses under the PNDC military regime persisted; underscoring the criticism of the Office as an irrelevant institution and a toothless bulldog.[430]

28. The decision to create the CHRAJ was borne out of the perceived weakness and limited effectiveness of the Ombudsman. The Committee of Experts that drafted Proposals for the 1992 Constitution proposed the establishment of a Commission on Human Rights and Administrative Justice, "which would sensitise people of their constitutional rights, investigate violations of rights, and assist individuals in prosecuting them" and "incorporate

[427] *In re Akoto* [1961] 2 GLR 523.
[428] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 472 to 497; Articles 100 and 101 of the 1969 Constitution of the Republic of Ghana.
[429] Chapter 11 of the 1979 Constitution of the Republic of Ghana; the Ombudsman Act, 1980, (Act 400).
[430] Geoffrey Cameron, National Human Rights and Government Accountability: A Comparative Study of Ghana and Nigeria, Thesis submitted in partial fulfillment of the requirement for the Degree of Master of Philosophy in Politics (Comparative Government), Department of Politics and the International Relations, University of Oxford (April 2008); Fui S. Tsikata, "The Commission for Human Rights and Administrative Justice: Mission And Prospects" in *Journal of Management Studies* (Legon) Third Series, Vol. II, January-December 1994.

the office of the Ombudsman."[431] The CHRAJ was, accordingly, instituted and given a wider mandate of human rights education, protection and promotion. It was also mandated to perform the functions of the Ombudsman and an anti-corruption agency.

8.2.4 THE NATIONAL MEDIA COMMISSION

29. The Press Commission, set up under Chapter 22 of the Third Republican Constitution of 1979, was the predecessor of the National Media Commission and the first of its kind in Ghana. The rationale for the establishment of the Press Commission was derived from the "general wish of Ghanaians that the press should have the necessary independence and protection under the Constitution to enable it to serve its essential function as the watch-dog of the people's rights and liberties against infringement by the government and its agencies."[432] In its deliberations on this matter, the 1978 Constitutional Commission observed that political repression and administrative incompetence in Ghana was partly attributable to the "failure of journalists to perform their duties with the requisite degree of integrity, courage and dedication."[433] The 1978 Constitutional Commission further noted that successive governments made use of State ownership and control of the press "to undermine the independence of the press, either by assuming the power to dictate to the management and editorial staff, or by arbitrarily dismissing those who refuse to accept such dictation."[434] The Press Commission was, accordingly, proposed as an effective means of fulfilling the desire of Ghanaians to abate governmental control and guarantee the freedom and independence of the State-owned press and media for mass communication and information.[435]

30. The Press Commission was to arrange for the independent management and operation of State-owned press by appointing and supervising the operation of the governing boards of these institutions. The governing boards were, in turn, to appoint the editorial and other staff of the State-owned press.[436]

31. The Committee of Experts that drafted the 1992 Constitution did not depart from these recommendations. They similarly acknowledged that journalists were greatly constrained in

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[447.] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 358.

[432] Proposal of the Constitutional Commission for the a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 187 to 196, in particular, paragraph 285.

[433] Proposal of the Constitutional Commission for the a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 187 to 196, in particular, paragraph 285.

[434] Proposal of the Constitutional Commission for the a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 187 to 196, in particular, paragraph 286.

[435] Proposal of the Constitutional Commission for the a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 187 to 196, in particular, paragraph 287.

[436] The proposals by the 1978 Constitutional Commission found expression in Chapter 22 of the Third Republican Constitution, 1979.

carrying out their professional functions in line with the highest professional standards because of direct governmental control of, and interference in, the operations of State-owned media. To address this and other challenges inimical to democratic governance, the Committee of Experts recommended the establishment of the National Media Commission along similar lines as the Press Commission to "ensure the growth and strengthening of press and media freedom and independence in the Fourth Republic."[437]

8.2.5 THE OFFICE OF THE AUDITOR-GENERAL

32. As recounted by the 1968 Constitutional Commission, the personnel of the Audit Department was, prior to independence, recruited by the Colonial Office in London. This ensured the creation of an independent Audit Service as the Service's report was submitted directly to the Colonial Office through the Director-General of Audit.[438]

33. At independence, however, there were some significant developments relating to the independence of the Auditor-General's Department. The 1968 Constitutional Commission noted that, in practice, there were political interferences and control by the Ministry of Finance, among others, although in theory, the Auditor-General's Department was not supposed to be under any Ministry. Besides, the practice was for the Auditor-General's report to be debated by a Public Accounts Committee of Parliament, chaired by a prominent member of the opposition. This practice was, however, discontinued as "the Chairman and members of the Public Accounts Committee became exclusively government members" in the absence of an opposition party in the National Assembly.[439] The public lost confidence in the reports of the Public Accounts Committee, and there was usually no "effective follow-up action on the reports."[440]

34. As a way of removing the Auditor-General's Department from political and governmental control, the 1968 Constitutional Commission recommended the appointment of an independent Auditor-General who was not subjected to the control or direction of any person or authority. The Auditor-General was given the power to audit all public accounts without exception and given free access to all books, records, returns, and other documents relating to those accounts.[441] The Auditor-General was given further power to disallow any item of expenditure which was contrary to law and surcharge any persons responsible for such items of expenditure.[442] Further, to insulate the Auditor-General from excessive executive control,

[437] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs179 to 191.
[438] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 592 to 603.
[439] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 592 and 593.
[440] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 592.
[441] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 595 to 601.
[442] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 595 to 601.

an Audit Service with a Board was also established. The chief function of the Board was to undertake an impartial examination of the service conditions of the officers and employees of the Audit Service and to ensure the effective and efficient administration of the Audit Service.[443]

35. These recommendations by the 1968 Constitutional Commission became Articles 135 to 137 of the 1969 Constitution. The functions and powers of the Auditor-General, the Audit Service, and the Board under the 1979 and 1992 Constitutional arrangements did not depart drastically from the arrangements that existed under the 1969 Constitution.[444]

8.2.6 THE BANK OF GHANA

34 The Bank of Ghana traces its roots to the Bank of the Gold Coast. With political independence in sight in the mid 1950's, the agitation for a central bank became prominent. It was argued that a central bank was one institution which would give true meaning to political independence.[445]

36. Proposals for a central bank were accepted, and in early 1955, a Select Committee was set up by the Government to prepare the grounds for the establishment of a central bank in Ghana. On the 4th of March, 1957, just two days before the declaration of political independence, the Bank of Ghana was formally established by the Bank of Ghana Ordinance (No. 34) of 1957 which was passed by the British Parliament. The principal objectives of the new central bank were: "to issue and redeem bank notes and coins; to keep and use reserves and to influence the credit situation with a view to maintaining monetary stability in Ghana and the external value of the Ghana Pound; and to act as banker and financial adviser to the Government." [446]

37. The Bank of Ghana has since 1957 seen its mandate, mission and regulations undergo various legislative changes. The Bank of Ghana Ordinance (No.34) of 1957 was repealed and replaced by the Bank of Ghana Act of 1963.[447] This Act was subsequently amended by the Bank of Ghana (Amendment Act) of 1965.[448] These two laws were repealed and replaced by the Bank of Ghana Law of 1992.[449] The current law under which the Bank operates is the Bank of Ghana Act of 2002.[450] This law gives the Bank the objects of maintaining stability in the general level of prices in the country; supporting the general economic policy of the

[443] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 595, 602 and 603.
[444] Articles 151 to 153 of the 1979 Constitution of the Republic of Ghana; Articles 187 to 189 of the 1992 Constitution of the Republic of Ghana.
[445] BANK OF GHANA, http://www.bog.gov.gh/index1.php?linkid=268, (last visited Feb. 21, 2011).
[446] BANK OF GHANA, http://www.bog.gov.gh/index1.php?linkid=268, (last visited Feb. 21, 2011).
[447] Bank of Ghana Act, 1963 (Act 182).
[448] Bank of Ghana (Amendment Act), 1965, (Act 282).
[449] Bank of Ghana Act, 1992, (PNDCL 291).
[450] Bank of Ghana Act, 2002 (Act 612).

Government; and promoting economic growth and the effective and efficient operation of banking and credit systems in the country, independent of instructions from the Government or any other authority.

8.2.7 THE STATISTICAL SERVICE

38. "The Office of the Government Statistician was established in 1948 and its functions, powers and responsibilities were formally incorporated in the Statistics Ordinance of 1950. As the services rendered by the Office increased, it became necessary to reorganise the statistical system and adopt a structure that would give adequate scope to the expansion of its responsibilities. In 1961, therefore, the Statistics Act of that year[451] established the Central Bureau of Statistics (CBS) as a Department under the Ministry of Finance and Economic Planning. In 1985, the Statistical Service Law[452] established the Statistical Service. This instrument had the effect of raising the status of the Central Bureau of Statistics from a Government Department under a Ministry to that of an autonomous, independent public service. The Law also established the Statistical Service Board as the governing body that reports to the presidency."[453]

SUBTHEME ONE: GENERAL MATTERS RELATING TO THE INDEPENDENT AND OTHER CONSTITUTIONAL BODIES (ICBs)

ISSUE ONE: APPOINTMENT OF THE HEADS AND MEMBERS OF THE INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

A. DIMENSIONS OF THE ISSUE

39. The submissions received sought to address four dimensions of this issue, namely:
    a. Who should be the appointing authority for the heads and members of the ICBs?
    b. What should be the procedure for the appointment of the heads and members of the ICBs?
    c. What measures should be put in place to ensure that the appointing authority does not abuse the appointing power or process? and
    d. how long vacancies in the membership of the ICBs should remain open or how long appointment to fill vacancies should remain interim?

[451] Statistics Act, 1961, (Act 37).
[452] Statistical Service Act, 1985 (PNDC Law 135).
[453] STATISTICAL SERVICE, http://www.statsghana.gov.gh/AboutUs.html (last visited February 21, 2011).

B. CURRENT STATE OF THE LAW ON THE ISSUE

40. With the exception of the Chairman and members of the National Media Commission (NMC), the modes of appointment of the heads and members of the ICBs have similar features. The President is the appointing authority; he exercises his appointing powers in consultation with, or acting in accordance with the advice of the Council of State.[454]

41. The members of the NMC are either appointed by the President,[455] or nominated by various institutions including major stakeholders in the media landscape, some labour unions, and religious groupings.[456]

C. SUBMISSIONS RECEIVED

42. The various submissions received by the Commission on this issue suggested the following:
    a. A cross-section of Ghanaians held the view that the current state of the law is appropriate in the sense that there are adequate measures to guard against abuse of the President's appointing powers. They maintained that the current obligation on the President to consult, or act on the advice of the Council of State effectively addresses any possible issue of abuse of power.
    b. On the other hand, there were submissions to the contrary, advocating restrictions to be placed on the President's powers to appoint the heads and members of the ICBs. It was proposed that these powers should be limited by any or a combination of the following:
        i. Subjecting appointments made by the President to parliamentary approval;
        ii. Providing for the heads and members of ICBs to rise through the ranks of the relevant instructional structures;
        iii. Providing for the heads and members of the relevant ICB to be elected by or appointed from among the officials of their institutions; or
        iv. Setting up an independent body to take charge of all public appointments, including the appointment of the heads and members of the ICBs.
    c. It was reasoned that limiting the appointing powers of the President in relation to the heads and members of the ICBs will safeguard the independence of the ICBs and ensure that the appointment of heads and members of the ICBs is based on merit and not primarily influenced by partisan and political considerations. It was also argued that enabling such limitations on the President's appointing powers can help address

[454] Entrenched provisions of Articles 43(2) and 70, and the Non-Entrenched provisions of Articles 184(4)(a), 185(3), 217 and 232(2) of the 1992 Constitution of the Republic of Ghana.
[455] Article 166(1)(c) of the 1992 Constitution of the Republic Ghana.
[456] Article 166 (non-entrenched) of the 1992 Constitution of the Republic of Ghana as amended by section 5 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).

concerns relating to the risk of executive dominance which the current constitutional dispensation allows.

D. FINDINGS AND OBSERVATIONS

43. The Commission finds that the main thrust of this issue deducible from the submissions was the perception by some Ghanaians that the current constitutional arrangement could lead and has led to situations where appointments are made based on party loyalty or fidelity to the President, to the detriment of values such as competence, professionalism and political neutrality. That practice, if unchecked, has the potential to compromise the independence of the ICBs and undermine the very essence of their establishment.

44. The Commission observes that a lot of countries have created institutions, such as autonomous regulatory agencies, central banks, supreme audit bodies, ombudsmen, electoral commissions, population agencies, civic education institutions, and anti-corruption bodies in the furtherance of their developmental goals. These institutions are often established to serve as accountability and transparency watchdogs, with the mandate to check on the conventional arms of government, particularly the executive.[457] In most instances, the independence of these institutions finds expression in their national constitutions.[458] The Commission finds that Ghana's ICBs rightly belong to this category of institutions. Their establishment is very much rooted in history. They reflect the desire of Ghanaians to see such buffer institutions counter-balance the excesses of executive dominance, which dominance has been a major feature of Ghana's constitutional evolution.

45. The Commission observes from international comparative studies that generally in presidential systems of government the President acts as the appointing authority for the head and members of these bodies subject to some form of legislative control.
    a. The Constitution of Nigeria vests the authority to appoint the members of such institutions as the Independent National Electoral Commission, the National Judicial Council, the Federal Judicial Service Commission, and the National Population Commission, in the President. The President makes these appointments in

[457] Section 181 of the 1996 Constitution of the Republic of South Africa for instance provide for the establishment of the following state institutions to strengthen constitutional democracy in the Republic: the South African Human Public Protector, the South African Human Rights Commission, the South African Human Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the South African Human Commission for Gender Equality, the Auditor-General, and the South African Human Electoral Commission.

[458] Article 249 of the 2010 Constitution of Kenya provides that the commissions and the holders of independent offices are subject only to the Constitution and the law; and are independent and not subject to direction or control by any person or authority. Similar provisions are captured in Section 158 and Section 181 of the Constitutions of Nigeria and South Africa respectively.

consultation with the Council of State and the appointments are subject to Senate approval.[459]

b. In South Africa, the members of similar institutions, referred to as "State institutions supporting constitutional democracy,"[460] are appointed by the President on the recommendation of the National Assembly.[461]

c. The Kenyan Constitution subjects the appointment by the President of the Chairperson and members of certain Commissions and Independent Offices to approval by the National Assembly.[462] These Commissions and Offices include the Auditor-General, the Controller of Budget, the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission and the Public Service Commission.[463]

d. In the Philippines, Article IX of that country's Constitution provides for the creation of three independent constitutional commissions, namely: the Civil Service Commission, the Commission on Elections, and the Commission on Audit. Each of these commissions is composed of commissioners appointed by the President with the consent of the Commission on Appointments.[464]

46. The Commission observes that in many presidential systems, elected Presidents and other political authorities make efforts to directly or subtly circumvent legal constraints to enhance their powers and flexibility. To this end, the powers vested in such authorities as the Presidency to make appointments to independent oversight bodies can be, particularly, prone to abuse. These appointing powers could be exploited to manipulate and undermine the independence and effectiveness of independent oversight bodies, especially in situations where inadequate checks and balances exist. Institutional and structural flaws in the appointing processes, including weaknesses in the bodies that confirm high-level appointments, for instance, provide openings for executive control of independent bodies. Provisions that make it possible to leave empty appointments to such bodies and those that allow appointing authorities to make interim appointments pending confirmation also leave room for executive manipulation. Presidents also tend to appoint their allies to the membership of important governance institutions.[465]

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[459] Section 158 of the 1999 Constitution of the Federal Republic of Nigeria.

[460] Chapter 9 of the 1996 Constitution of the Republic of South Africa, in particular Section 181(1) where some of them are listed as the Public Protector, the South African Human Rights Commission, the Commission for the promotion and protection of the rights of cultural, religious and linguistic communities, the Commission for gender equality, the Auditor General, the Electoral Commission.

[461] Section 193 of the 1996 Constitution of the Republic of South Africa.

[462] Article 250 of the 2010 Constitution of Kenya.

[463] Article 248 of the 2010 Constitution of Kenya.

[464] Commission on Appointment (CA) of the Philippines is a 25 member body of the Filipino Congress, set up under Article VI, section 18 of the Constitution 1987. The CA reviews and confirms thigh-level appointments by the Filipino President, including heads of executive departments, ambassadors and top military officials.

[465] Susan Rose-Ackerman, Diane A. Desierto and Natalia Volosin, "*Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*" 29 Berkeley J. Int'l L. 246.

47. The Commission recognises that in Ghana, the avenues for manipulating appointments to the ICBs may be less pronounced than for the generality of appointments to other public offices. This is because members of the ICBs have relatively more secured tenures and cannot be so easily removed from office.[466]

48. The Commission, nevertheless, finds that the effectiveness with which institutions, which are constitutionally mandated to act as a check on the President's appointing powers, have discharged their mandate remains a grave concern to many Ghanaians. First, the Council of State is perceived to have not operated as a strong check on the President's powers to appoint persons to public office, including members of the ICBs. The Council of State is also considered, in its present form and composition, not to be adequately independent of the President to perform its function effectively.

49. The Commission observes that in Ghana ICBs perform very important functions that enable them regulate, control and give meaning to the current constitutional dispensation. The performance of these functions requires partisan detachment and impartiality.

50. The Commission, accordingly, finds that subjecting the appointments of some of the heads and members of the ICBs by the President to the approval of Parliament would help ensure that Presidents appoint to these offices only persons who have a reputation for fair-mindedness, impartiality, political detachment and independence; and are thus likely to receive multi-partisan support from Parliament. Parliamentary approval will complement the role of the Council of State in the appointing process and serve as an effective check on the power of the President.

51. The Commission further observes that the practice of engaging the heads and members of the ICBs on contracts after they have retired is problematic. The appointment of interim heads of the ICBs for unusually long periods of time without confirmation is similarly knotty. In some situations, no substantive appointments have been made to these offices for periods in excess of five years.

52. The Commission finds that the state of uncertainty surrounding the appointments of substantive heads of these governance watchdog institutions is simply unsatisfactory. For such important independent oversight bodies mandated to provide checks and balances on presidential powers and the administrative organs of government, such a state of uncertainty can easily be abused by a determined President to enhance his authority and undermine the independence of the ICBs. There is, for instance, a significantly high tendency for heads and

[466] *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732.

members of ICBs appointed in acting capacities to be politically beholden to the President for confirmation; leaving room for presidential manipulation. Any perception of direct and indirect manipulation of the ICBs through this practice could in turn degenerate into public distrust in the ICBs. It would be appropriate for the Constitution to specify the period within which vacancies in the headships of the ICBs ought to be filled.

53. The Commission observes that appointments to the Boards of the ICBs, that is, the Audit Service Board, the Statistical Service Board, and the Board of Directors of the Bank of Ghana, have their own peculiarities. The Commission observes that, invariably, these Boards are dissolved after a change in Government without taking into account the term of office of the members. The debate on this matter brings to the fore the need to strike an appropriate balance between ensuring that the President is given the freehand to appoint persons who are not totally opposed to the government policies and would not cause dislocations to those policies, and ensuring that appointments are not made uniquely on partisan political basis to the detriment of merit and competence.

54. The Commission observes that, since the Boards of the Audit Service, Statistical Service and of the Bank of Ghana function mainly to give policy directives and do not necessarily control the day-to-day operations of the institutions they govern, it would be important to afford the President the necessary room and discretion to appoint persons who share similar views with the government in a broader framework of a National Development Plan for the country.[467] This should, however, in no way depart from the principle that only persons who have a reputation for fair-mindedness, impartiality, political detachment and independence should be appointed to the boards of public institutions. The two principles are not mutually exclusive.

55. The Commission further observes that the evolving character of the media industry in Ghana presents its own special and unique dynamics as to how appointments to the National Media Commission should be treated. Ghana has over the years evolved from a state-controlled and politically harassed media environment to a free, liberal and deregulated media landscape. Bearing in mind the history of governmental control and harassment of the media, the Committee of Experts that drafted the 1992 Constitution recommended a mode of appointment that would represent a broad spectrum of political opinion, as well as represent new identifiable groups and interests.[468] In accepting this, Ghanaians adopted a form of

[467] *Brown* v. *Attorney-General (*the *Audit Service Case)* [2010] SCGLR 183 for instance where it was suggested in a dissenting opinion at page 252 that the power of the President to appoint virtually all the members of the Audit Service Board is to afford him the opportunity to appoint such "competent and capable persons" to ensure that the Board does not cause any serious dislocations to Government's fiscal policy by the annual estimates of administrative expenses it approves for the Auditor-General.

[468] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 189(4).

appointment to the National Media Commission which sought to exclude political involvement and influence from the appointment process or limit such involvement and influence to the barest minimum.[469] This explains the representative nature of the National Media Commission: the members are mainly nominees of various interest groups on the Ghanaian media landscape.[470] This mode of appointment is found in other jurisdictions. It is typically the form of appointment adopted for self-regulation by Press Councils, Media Councils, and Media Ombudsmen, however described.[471] Whatever model of self-regulation may be in place in various *c*ountries, whether legislated or not, the best practices show that there is very minimal political involvement in the appointing procedure.[472] In this sense, press/media self-regulation bodies are generally creatures of the media themselves. Appointments are generally made from among the public or audience of media services and media industry players such as publishers, owners of media houses, editors and other journalists, communication and journalism training institutions, public relation professionals and advertisers. In some jurisdictions, the expertise of lawyers and judges[473] is explored. In others, the majority of the members are appointed from the public.[474]

56. The Commission also observes that the mode of appointment for press/ self-regulation bodies sharply differs from appointment of bodies that regulate broadcast media. The power to appoint persons to public institutions that exercise oversight responsibilities in areas of broadcast and telecommunications is usually exercised by the President or some other political authority, including Parliament. The Federal Communications Commission (FCC) of the United States of America is illustrative of this mode of appointment. The FCC is directed by five commissioners who are appointed by the President of the United States, by

[469] Article 166(1) of the 1992 Constitution provides for the President to appoint 2 members to the 18 member Commission, whiles Parliament's nomination to the Commission is limited 3.

[470]Article 166 of the 1992 Constitution as amended by section 5 the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).

[471]Self-regulation, as opposed to state-controlled-regulation, is the most prominent mechanism employed in most democracies to procure media accountability and journalistic standards, particularly for the print media. It provides a platform, independent of political power, for media professionals to set up voluntary editorial guidelines and abide by them. By doing so, the independent media accept their share of responsibility for the quality of public discourse, while fully preserving their editorial autonomy in shaping it. It has been the preferred choice of the African Commission on Human and Peoples' Rights, which has firmly declared among others that "[e]ffective self-regulation is the best system for promoting high standards in the media (Article IX, clause 3 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia).

[472] Franz Kruger, "Media Courts of Honour: Self-regulatory Councils in Southern Africa and Elsewhere", FES Media Africa Series, Windhoek, (November, 2009), sourced from http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/Krueger_MediaCourtsofHonour_2009.pdf, last visited on 6th July, 2011; the website of The Donald W. Reynolds Journalism Institute at http://www.rjionline.org/MAS-Press-Councils, last visited on 5th June, 2011; the website of the UNESCO at http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/, last visited on 6th June, 2011.

[473]The Indian Press Council typically illustrates this. Conventionally, the Chairman is always a retired judge.

[474]The UK Press Complaints Commission for instance includes a majority of 10 "lay" or public members (including the Chairman), appointed by a Nominations Committee.

and with the advice and consent of the U.S. Senate. The President also selects one of the commissioners to serve as chairman.[475] The appointment process for members of such regulatory bodies is required to be open and transparent. It should involve the participation of civil society and not be controlled by any particular political party.[476] Thus, in the case of the FCC of the US, only 3 commissioners can be of the same political party at any given time and none can have a financial interest in any commission-related business. All commissioners, including the chairman, have five-year terms, except when filling an unexpired term.[477]

57. The Commission observes, against this background that, the independence of the media is one of the fundamental principles underpinning the Constitution. Given the chance, any government would like to restrict this freedom and independence and control the media. The Commission is, accordingly mindful not to make any recommendation that will enhance the tendency of governments to interfere with the freedom and independence of the media.

58. The Commission, on the other hand, recognises that with the emergence of a free, deregulated, robust and independent media since the return to constitutional rule, a much more responsible media landscape has become very critical to the sustenance of Ghana's democracy. This calls for an appropriate balance to be struck between the two modes of appointment just described in order to make the NMC more efficient in ensuring the highest journalistic standards and exacting the appropriate media accountability. The Commission finds, as a general rule, that in situations where minimal government interference and less restrictive processes satisfy the accepted threshold for media regulation, a more restrictive method, if adopted, would invariably undermine the accepted standards that protect pluralism, free expression, and the freedom and independence of the media.

59. The Commission observes that the NMC requires the level of independence as the other ICBs; the NMC does not require more independence than the CHRAJ or the EC for the matter. The Commission finds no compelling reason why the independence of the media should form the basis for a significantly different mode of appointment for members of the NMC. In the light of all the factors necessary for consideration for the reform of the NMC,

[475] 47 USCS § 154. The Federal Communications Commission of the United States of America (June 6, 2011) http://www.fcc.gov/what-we-do.
[476] Article VII, clause 2 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia. Similarly, on 18th December, 2003, the three special rapporteurs for the protection of freedom of expression at the United Nations, Organization of American States and Organization for Security and Cooperation in Europe jointly declared that "all public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party."
[477] 47 USCS § 154. The Federal Communications Commission of the United States of America (June 6, 2011) http://www.fcc.gov/what-we-do.

and in further consideration of the additional mandate of the NMC that this Report envisages and given the recommendation to strengthen the NMC and make it more effective and efficient, it would be appropriate that the mode of appointment of the members of the NMC should be the same as that for the other ICBs, except that here, there must be the active involvement of the players in the media industry.

60. The Commission observes that at the National Constitution Review Conference (NCRC), participants at the syndicate group discussion on the NCCE proposed the retention of the current state of the law on the appointment of the members of the NCCE – the President should remain as the appointing authority of the NCCE without parliamentary approval. Those at the sessions on the Electoral Commission, the CHRAJ, the Office of the Auditor-General, the Bank of Ghana, and the Office of the Government Statistician concluded that heads and members of those ICBs should be appointed by the President subject to parliamentary approval. The participants at the Conference further proposed that membership of all boards of public institutions, including the Audit Service, the Bank of Ghana, and the Statistical Service, should be designated political appointments, all to be made by the President. The participants who discussed the NMC were opposed to making the President the appointing authority for members of the NMC. While some participants advocated that the NMC should remain a representative body with minimal presidential appointees, others argued that the President should play no role at all in even making some appointments to the NMC.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

61. The Commission recommends the following:
    a. The heads and members of the ICBs should be appointed by the President, in consultation with the Council of State, and in the case of the following with the prior approval of Parliament.
        i. The Chairman, Deputy Chairmen and other members of the Electoral Commission;
        ii. The Chairman and members of the National Commission for Civic Education;
        iii. The Commissioner for Human Rights and Administrative Justice and Deputies; and
        iv. The Auditor-General

    b. The mode of appointment of members of the boards of the Audit Service, Statistical Service and the Bank of Ghana should be retained.

c. The staff of the ICBs should generally be appointed by the relevant ICB, in consultation with the Public Service Commission.
d. Where a vacancy occurs in the membership of the ICBs, that vacancy must be filled within 6 months of the occurrence of the vacancy.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

62. The Commission recommends that the constitutive Acts of the various ICBs be amended to accord with the constitutional changes proposed.

ISSUE TWO: COMPOSITION OF THE INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

A. DIMENSIONS OF THE ISSUE

63. The dimensions of this issue relate to the number of persons that may compose the ICBs and whether the ICBs should all be composed of only full-time executive members.

B. CURRENT STATE OF THE LAW ON THE ISSUE

64. The composition of the NCCE as provided for under the non-entrenched provision of Article 232 of the Constitution consists of a Chairman, 2 Deputy Chairmen and 4 members who are appointed by the President on the advice of the Council of State. The Chairman and his 2 Deputies are full-time executive members; the 4 other members are part-time non-executive members. The Electoral Commission has a similar composition; 1 executive full-time Chairman with 2 Deputies, also executive and full-time. Like the NCCE, the Electoral Commission has 4 other part-time non-executive members.[478] In both cases, the executive members are responsible for the day-to-day administration of the respective Commissions.

65. The composition of the CHRAJ is slightly different. It is made up of only full-time executive members: 1 Commissioner, and 2 Deputy Commissioners.[479]

66. There is also a significant variation in the composition of the Public Services Commission (PSC). It is made of 9 members; 1 Chairman, 1 Vice Chairman, and 3 other full-time members, the Chairperson of the National Council for Tertiary Education and 3 other persons with extensive experience in the operation of the Public Service.[480] The PSC is supported by a Secretary, who is responsible for the day-to-day administration of that Commission.[481]

[478] Article 43 of the 1992 Constitution of the Republic of Ghana.
[479] Article 218 of the 1992 Constitution of the Republic of Ghana.
[480] Article 194(2) of the Constitution as fleshed out in section 6 of the Public Service Commission Act, 1994 (Act 482).
[481] Section 9 of the Public Service Commission Act, 1994 (Act 482).

67. The National Media Commission is an 18–member representative body with representatives nominated by the President; Parliament; the Ghana Bar Association; the publishers and owners of the private press; the Ghana Association of Writers and the Ghana Library Association; Christian groupings; the Federation of Muslim Council and Ahmadiyya Mission; institutions for training journalists and communicators; the Ghana Advertising Association and the Institute of Public Relations of Ghana; the Ghana National Association of Teachers; the Ghana Journalists Association; the National Council on Women and Development; the Trades Union Congress; and the Association of Private Broadcasters. The Commission elects its own Chairman.[482] The members of the NMC are all part-time, non-executive members. They are required to meet at least once every two months.[483] The Executive Secretary is the administrative head of the Commission and is responsible for the day-to-day management of the Commission. He works under the general supervision and direction of the Commission.[484]

68. The Statistical Service Board is composed of a maximum of 7 members: a Chairman and not more than 5 other members, and the Government Statistician.[485] The Government Statistician is supported by 2 Deputy Government Statisticians and other staff of the Service.[486] Similarly, the Audit Service Board is made up of 7 members: a Chairman and 4 other members; the Auditor-General; and the Head of the Civil Service.[487] Even though it is not expressly provided for by law, in practice, the Auditor-General is also assisted by two Deputy Auditors-General.

C. SUBMISSIONS RECEIVED

69. Most of the submissions relating to the CHRAJ expressed the following.
    a. Some Ghanaians maintained that the current membership of the CHRAJ should be retained. In particular, it was proposed that the CHRAJ should be made up of only lawyers because non-lawyers will find the legal aspects of the CHRAJ's mandate very challenging. This is particularly so because the bulk of CHRAJ's work requires an in-depth understanding of the law.
    b. On the other hand, there were those who contended that non-lawyers should qualify to be appointed to the CHRAJ because some non-lawyers have rich experience in human rights, criminology, psychology and other fields which can enrich the work of

[482] Article 166 of the Constitution as amended by section 5 of the Constitution of the Republic of Ghana (Amendment) Act, 1996.
[483] Section 9(1) of the National Media Commission Act, 1993 (Act 449).
[484] Section 17(2) of the National Media Commission Act, 1993 (Act 449).
[485] Article 186(1) of the 1992 Constitution of the Republic of Ghana.
[486] Section 10 of the Statistical Service Act, 1985 (PNDCL 135).
[487] Article 189(1) of the 1992 Constitution of the Republic of Ghana.

the CHRAJ. It was also argued that the membership of the CHRAJ must reflect the plurality of society. Accordingly, the membership should not be limited to lawyers.

c. There were also calls to increase the membership of CHRAJ. It was particularly argued that the three-fold mandate of the CHRAJ and the diversity of its functions are too daunting for only 3 members.

70. In respect of the NCCE, there were some proposals calling for the 7-member composition to be retained. It was argued that the relatively large membership brings on board their varied views, expertise and experience necessary in a democratic setting. On the other hand, it was proposed that the membership should be reduced to 3 full-time executive members to make the NCCE members more hands-on and effective.

71. There were also submissions that called for the reconstitution and the possible increase in the membership of the Statistical Service Board from 7 to 9 members to ensure representation from the Ministry of Finance; the Bank of Ghana; the Universities; Research Institutions; Organised Labour; the National Development Planning Commission; and Civil Society. The basis of the submission was that the representatives would bring on board sufficient and varied expertise.

72. The composition of the National Media Commission was also the subject of many submissions.

a. There were submissions advocating the current membership of the NMC to be retained because the current arrangement had ensured the neutrality and non-partisanship character of the Commission. It permits the consideration of all stakeholder interests and allows for practitioners to bring their experience to bear on the NMC. It is also adequate for realizing the mandate of the NMC.

b. There were other submissions advocating the reduction of the membership of the NMC because the 18-member composition of the NMC was too large and unwieldy, and does not augur well for quick decision making.

c. It was also proposed that active media practitioners should not be members of the NMC because their membership raised issues of conflict of interest.

D. FINDINGS AND OBSERVATIONS

73. The Commission observes that an important question for consideration in determining the composition of ICBs is whether to opt for a single-member institution or a multi-member body.[488]

[488] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 221 to 232.

74. The Commission finds that the number of members of the ICBs *per se* is not necessarily the most important factor in determining the independence of the ICBs. The transparency of the selection process is, for instance, absolutely important; that process must be transparent, fair, documented and devoid of caprice. The composition of the ICBs can be considered pluralistic as long as members are not selected merely as tokens. The supporting staff should be competent and, preferably, knowledgeable about the matters the ICBs deal with. The members of the ICBs must be independent minded, capable of making the best use of limited resources and willing to stand up to the government on the principles the ICBs stand for.[489]

75. The Commission observes that once these principles are applied, a single member ICB would be as independent as a multi-member ICB. In striking a fair balance between the two options, it would be adequate to generally have relatively small multi-member ICBs, considering that they would be supported by a secretariat or departments/divisions staffed with officers and employees with sufficiently diverse expertise as may be required for the effective discharge of the mandates.[490]

76. The Commission observes that for the CHRAJ, the membership must particularly reflect the plurality of the society and represent a broad spectrum of interests in conformity with international practice.[491] The Commission is particularly concerned about projecting the image of a caring and compassionate Ghanaian society. Thus, it would not only be desirable for the membership of the CHRAJ to include women; it would be equally imperative for the Constitution to create the Office of the "Special Commissioner" for Children, Persons with Disability, and the Aged within the CHRAJ.

77. The Commission accordingly finds that it would be desirable for the CHRAJ to comprise 5 full-time members, among whom shall be women and non-lawyers. On the inclusion of non-lawyers, the Commission observes that there are too many legal issues involved in the mandate of the CHRAJ. It would not be enough to simply employ lawyers to provide the legal expertise required to effectively discharge the mandate of the CHRAJ; it is necessary for the membership of CHRAJ itself to include competent lawyers to discharge its mandate.

78. The Commission, however, recognises that lawyers are not necessarily endowed with all the expertise and skills for the protection and promotion of human rights, or to unravel all the administrative justice and corruption matters that may come up before the CHRAJ. There

[489] Official Report of the Proceedings of the Consultative Assembly, (Wednesday 9th October, 1991, Col. 426) for the debate by the Consultative Assembly on the composition of the Electoral Commission.
[490] *Ampiah Ampofo* v. *Commission on Human Rights and Administrative Justice* [2005-2006] SCGLR 227.
[491] Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 134, UN GAOR, 48th Sess., 85th Mtg., U.N. DOC. A/RES/48/134 (1993); Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002, Banjul.

abound a wealth of expertise and skills from others fields of endeavour, like auditing and social work, that could greatly complement the legal expertise at the CHRAJ's disposal to yield the desired output.[492]

79. The Commission further finds that it would similarly be imperative for the National Media Commission to be composed in a way that reflects the diversity of views and interests that define the Ghanaian society.

80. The Commission finds that the mandate of the NCCE, the EC and the PSC requires all of their members to be hands-on, full-time executive members in order to execute their respective mandates dutifully and efficiently. It would, therefore, be desirable to have the membership of the NCCE and the EC reduced to 3 full-time executive members who actually run the Commission. Similarly, it would be appropriate to reduce the membership of the PSC to 5 full time members, the Chairman and his Vice inclusive.

81. The Commission finally finds that it would be appropriate to retain the composition of the ICBs with board structures, except that the 5 members appointed by the President to the Statistical Service Board should include the Director-General of the National Development Planning Commission because of the complementary nature of the functions of these two institutions.

82. The Commission observes that the participants at the National Constitution Review Conference expressed varied opinions on the composition of the different ICBs:
    a. For the NCCE, the participants gave two options – either the retention of the current membership or the reduction of the number to a 3-member executive composition to make it effective.
    b. In the case of the CHRAJ there was unanimity that the membership of CHRAJ should be increased to 5. At least one of the Commissioners (not necessarily the Chairperson) must be a lawyer who is qualified to be appointed as a Justice of the Superior Court of Judicature. There should at all times be at least 2 males and 2 females in the Commission. It reasoned that the increase in the membership would be consistent with international best practice relating to National Human Rights Commissions.
    c. Participants at the Conference called for the retention of the current composition of the NMC. They argued that the current composition has worked well to ensure the neutrality of the Commission.

E. RECOMMENDATIONS

[492] *Ampiah Ampofo* v. *Commission on Human Rights and Administrative Justice* [2005-2006] SCGLR 227 at 236.

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

83. The Commission recommends that the Constitution be amended to allow the NCCE to be composed of 3 full-time executive members, one of whom would be the chairman.

84. The Commission also recommends that the Constitution be amended to allow for the EC to be composed of 3 full-time executive members, one of whom would be the chairman.

85. The Commission further recommends that the Constitution be amended to allow for the CHRAJ to be composed of 5 members: a Commissioner and 4 Deputy Commissioners.

86. The Commission recommends that the 4 Deputy Commissioners should include a "Special Commissioner" for Children, Persons with Disability, and the Aged, who will be partly responsible for the protection, implementation and monitoring of the rights of children, persons with disability and the aged.

87. The Commission recommends that each of the remaining 3 Deputy Commissioners should respectively be in charge of the human rights; ombudsman, and anti-corruption mandates of the CHRAJ.

88. The Commission further recommends that non-lawyers should qualify to be appointed to the CHRAJ.

89. The Commission, however, recommends that the Chairman of the CHRAJ should be a person qualified to be appointed as a Justice of the Supreme Court.

90. The Commission recommends that the National Media Commission should be made up of 11 members as follows:
    a. 1 representative each nominated by Lawyers, Christian groups, Moslem groups, and institutions for training journalists and communicators; and
    b. 2 representatives each nominated by the President, the Journalists, Organised Labour, and women's groups.

91. The Commission also recommends that, as far as is practicable, the print media; electronic media; telecommunications industry; and internet service providers, must be represented on the NMC.

92. The Commission further recommends that the Constitution be amended to allow for the Public Services Commission to be composed of 3 full-time executive members, one of whom would be the chairman.

93. The Commission finally recommends that the membership of the Statistical Service Board should include the Director-General of the National Development Planning Commission.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

94. The Commission recommends that the constitutive Acts of the ICBs be audited and amended to reflect the new compositions implicated by the proposed constitutional amendments.

ISSUE THREE: CONDITIONS OF SERVICE – EMOLUMENTS OF THE HEADS AND MEMBERS OF THE INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

A. DIMENSIONS OF THE ISSUE

95. The dimensions of this issue related to delinking the salaries and allowances of some members of certain ICBs from the salaries and allowances payable to Justices of the Superior Courts and to determine how to improve the conditions of service of all the heads and members of the ICBs.[493]

B. CURRENT STATE OF THE LAW ON THE ISSUE

96. The heads and members of most of the ICBs are similarly remunerated. The Auditor-General, the Chairman and Deputy Chairmen of the EC, the PSC and the NCCE; the Commissioner and Deputy Commissioners of CHRAJ; and the Chairman and other members of the NMC are all remunerated under entrenched provision of Article 71 of the Constitution. The salaries and allowances payable to these persons are expressed as expenditure charged on the Consolidated Fund and are determined by the President, upon the recommendations of a committee of not more than 5, appointed by the President. Since the coming into force of the Constitution, Ghana has operated only two committee's recommendations under Article 71: the Miranda Greenstreet Report and the Chinery-Hesse I Report. In 2009, a third set of recommendations, the Chinery-Hesse II Report, sparked off strong protests from the public regarding the propriety of paying huge gratuities to politicians exiting office. The government rejected those recommendations and has since set up another committee to advice it.

97. Under the non-entrenched provisions of Articles 194, 223 and 235 of the Constitution, the Chairman of the EC, the Chairman of the PSC, the Commissioner for CHRAJ, and the Chairman of the NCCE have parity of terms and conditions of service with the Justices of the Court of Appeal. The same provisions of the Constitution put their Deputies at par with the terms and conditions of service of Justices of the High Court. Thus, the Constitution equates

[493] Chapter on Public Service for the submissions as to how to determine emoluments of Article 71.

the salaries and allowances of these heads and members of the ICBs to the salaries and allowances of the Justices of the Court of Appeal or High Court as the case may be. As measures of protection, the salaries of all these persons cannot be varied to their disadvantage while they hold office and they retire on their salaries provided they serve for a certain number of years.[494] The Auditor-General does not have the same parity of terms with judges even though he is similarly remunerated under Article 71.[495] The salaries of the Auditor-General cannot also be varied to his disadvantage during his tenure of office.[496]

98. The other members of the Electoral Commission and the National Commission for Civic Education hold office on the terms and conditions approved by Parliament. Neither the Constitution nor the enabling Acts of these bodies specify what the conditions of service of the others members should be. In practice, however, they hold office on terms equivalent to judges of the Circuit Court. The other members of the PSC are be remunerated under Article 71 of the Constitution.[497]

99. The Governor and Deputy Governors of the Bank of Ghana are paid salaries and allowances as determined by the Board of Directors of the Bank.[498] The Government Statistician and persons serving with the Statistical Service are paid salaries and allowances like all other public officers; they are determined by the Fair Wages and Salaries Commission.

C. SUBMISSIONS RECEIVED

100. There was consensus on the issue concerning the remuneration of the members of the ICBs; all persons (including members of ICBs) who spoke on this issue proposed that the salaries and allowances payable to the Chairman of the EC, the Commissioner for CHRAJ, and the Chairman of the NCCE should be delinked from those of the Justices of the Superior Court. The various reasons given were as follows:
    a. The current practice gives no room for progression in terms of remuneration.
    b. The rationale for the parity of terms and conditions is to ensure the security of tenure, and not to regulate the salaries and career progression of the affected persons.
    c. The new proposal will have the advantage of putting in place some system of notional promotion, which could serve as a good incentive for the affected persons.
    d. The effect of the current practice is that it creates a virtual ceiling on the level of remuneration of the staff of the affected ICBs as it is unlikely that they would be remunerated above the maximum level of the chairpersons and members of the

[494] Article 127(5) and Article 155 of the 1992 Constitution of the Republic of Ghana.
[495] *Appiah Ofori* v. *Attorney-General* [2010] SCGLR 484.
[496] Article 187(12) of the 1992 Constitution of the Republic of Ghana.
[497] Section 3(1) of the Public Services Commission Act, 1994 (Act 482).
[498] Section 10(1) of the Bank of Ghana Act, 2002 (Act 612).

Commissions under whom they work. As a result, staff is generally poorly remunerated.

D. FINDINGS AND OBSERVATIONS

101. The Commission observes from the practice of most states that the emoluments of the heads and members of the ICBs are put in place with the primary aim to secure the independence of such institutions. Thus, in some countries, provisions are made to proscribe any alteration of the service conditions of the members of independent oversight bodies to the disadvantage of their beneficiaries while they hold office.[499]

102. The Commission observes that by way of constitutional history, this practice can be traced to some of Ghana's previous Constitutions. In the 1969 Constitution for instance, the Chairman and Vice Chairman of the Public Services Commission were placed at par with a Justice of the Court of Appeal in terms of conditions of service.[500] Similarly, the 1979 Constitution expressly put the Electoral Commissioner, the Ombudsman, and the Chairman of the Public Services Commission at par with the terms of service of a Justice of the Court of Appeal.[501]

103. The Commission further observes that, in the case of the Auditor-General, who is excluded from the parity of terms of service with the Court of Appeal, it has conventionally been provided, that his salary and allowances, and his rights in respect of leave of absence would not be varied to his disadvantage after his appointment.[502]

104. The Commission observes that this state of affairs has been retained under the 1992 Constitution. The reason for this is not farfetched; it is to secure the objectivity and independence of the heads and members of the ICBs.

105. The Commission observes that the phrase "terms and conditions of service" may have been loosely used in the Constitution in relation to the Chairman and Deputy Chairmen of the EC and the NCCE, and the Commissioner and Deputy Commissioners of CHRAJ. While in one breath the Constitution expresses the terms and conditions of service of these persons generally to be at par with those of the Justices of the Superior Courts, in another breath the

[499] Article IX(A)(3) of the 1987 Constitution of the Republic of the Philippines provides for all Independent Constitutional Bodies that "The salary of the Chairman and the Commissioners shall be fixed by law and shall not be decreased during their tenure"; Chapter II Section 3(1) of the Chief Election Commissioner and Other Election Commissioners (Conditions Of Service) Act, 1991, provides that "There shall be paid to the Chief Election Commissioner a salary which is equal to the salary of a Judge of the Supreme Court."

[500] Article 139 (4) of 1969 Constitution of the Republic of Ghana provided that "… the terms of service of the Justice of the Court of Appeal shall apply to the Chairman and the Vice Chairman of the Public Services Commission."

[501] Articles 37(4) and (5), 113(2) and 15(5) and (6) of the 1979 Constitution of the Republic of Ghana; *Appiah Ofori* v. *Attorney-General* [2010] SCGLR 484, at 515 to 517.

[502] Article 135(11) of the 1969 Constitution of the Republic of Ghana; Article 151(12) of the 1979 Constitution of the Republic of Ghana; *Appiah Ofori* v. *Attorney-General* [2010] SCGLR 484, at pp. 515 to 517.

Constitution expressly and differently lists all these officials as persons whose salaries, allowances, facilities, and privileges are determined under Article 71. Significantly, the Justices of the Superior Courts are also differently listed under Article 71. This brings to the fore the principle on presumption against surplusage, namely, that it is to be presumed that the Constitution will not pointlessly repeat itself. If the salaries, allowances, facilities, and privileges of the Chairman and Deputy Chairmen of the EC and the NCCE and the Commissioner and Deputy Commissioners of CHRAJ were intended to be exactly the same as those of the Justices of the Superior Courts there would have been no need to differently list them under Article 71, since the Constitution also expresses their terms and conditions of service to be at par with those of the Justices of the Superior Courts. Again, it would appear that in practice, there are some differences, particularly in relation to the allowances, facilities, and privileges of the two sets of officials.

106. The Commission, accordingly, finds it appropriate to give clarity of meaning to the phrase "terms and conditions of service" as used in Articles 44(2) and (3), 223(1) and 235(1). Quite obviously, the phrase as used therein means something different from salaries and allowances payable, and the facilities and privileges available to the Chairman and Deputy Chairmen of the EC and the NCCE, and the Commissioner and Deputy Commissioners of CHRAJ determined under Article 71. In the light of the Commission's recommendation for the establishment of an Independent Emolument Commission to determine the terms and conditions of service of all public office holders, and considering the recommendation to limit their tenure to a 10-year non-renewable term, it would be desirable to limit "terms and conditions of service" (as differently used) to the manner in which the affected official may be removed from office, and to their retiring awards.

107. The Commission observes on the broader debate of the propriety of the emoluments paid under Article 71 that, the discussions have overly focused on the conditions of the President and Members of Parliament to the detriment of the holders of other Article 71 public offices. The Commission observes that there is an underlying principle of the Constitution that the heads, members, of the three arms of government and the very important institutions of governance should be treated differently and not subjected to undue ordinariness in return for the high standards and output required of them.[503] Where relevant, such differential treatment is also to safeguard their independence. The salaries and allowances of this class of public servants are expenditures expressed in the Constitution as charges on the Consolidated Fund.[504]

[503] *Review of Facilities and Privileges for Article 71 Constitutional Office Holders: Final Report*, December 2008. Presidential Committee on Emoluments (Chinery-Hesse Committee) where a quote is made at page 11 to 12 from the "Venner Report on Office Emoluments for similar Public Office Holders of St. Vincent and the Grenadines", December 1999 expressing the same sentiments.

[504] Articles 54, 70, 171, 227, and 239 of the 1992 Constitution of the Republic of Ghana.

108. The Commission observes, however, that Article 71, in its operation, has been very problematic. First, it groups together political/elected office holders with non-political office holders. In this sense, the arrangement under Article 71 is rather a disincentive mechanism for determining the salaries of the members of the ICBs and of the other non-elected and non-political Article 71 office holders. They receive no gratuities at the end of the 4-year cycle of the Presidency because they generally have unlimited terms. Besides, in practice, except for in-built incremental jumps, when emoluments are determined under Article 71, they remain static until another committee is set up.

109. The Commission accordingly finds that the practice enabled under Article 71 for determining the emoluments of members of ICBs requires a critical assessment. This is due to the fact that, relative to the salaries and allowances paid to other public officers (particularly officers at very senior management level), the quantum of monies paid as salaries and allowances to Article 71 office holders portrays significant disparities in salary administration in Ghana. Such salary disparities justify a categorisation and standardisation of all public service salaries and allowances. It would be appropriate to have one salary structure for all public servants and establish one independent body to administer that salary structure. This will rationalise salary administration in Ghana, bring some equity into the system and ensure that the right relativities between the salaries of heads, members and staff of the ICBs are established.

110. The Commission also observes that at the National Constitution Review Conference, participants were unanimous in proposing that the current constitutional arrangement for remunerating the Commissioner and the two Deputy Commissioners of the NCCE, the members of the CHRAJ, the Auditor-General, and the Governor and Deputy Governor of the Bank of Ghana be maintained. Participants also advocated that the gap between the Auditor-General and his deputies with respect to their salaries should be narrowed. They gave the following options in the case of the Government Statistician:
    a. Where the person is appointed under a contract, negotiated conditions of service may be reached.
    b. Where the person is not appointed under a contract, she should be placed under Article 71 of the Constitution to benefit from the emoluments given to similar Article 71 holders.
    c. Where the person is treated like all other public servants, then the conditions of service of other similar senior public officers should apply.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

111. The Commission recommends that the Constitution be amended to establish an Independent Emoluments Commission (IEC) as an independent constitutional body, to determine the emoluments of all public officers including the heads and members of the ICBs.

112. The Commission recommends that the members of the IEC be appointed by the President, in consultation with the Council of State, and with the prior approval of Parliament.

113. The Commission further recommends that the IEC should be composed of 5 members with professional backgrounds in areas including wages and salary administration, finance and human resource management.

114. The Commission recommends that the functions of the IEC must include the functions of the constitutional committee set up under Article 71 of the Constitution as well as the functions of the Fair Wages and Salaries Commission.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

115. The Commission recommends amendments to the constitutive Acts of the various ICBs as they relate to the terms and conditions of service of members of the ICBs, to conform to the proposed constitutional amendments.

ISSUE FOUR: CONDITIONS OF SERVICE – TENURE OF OFFICE OF THE HEADS AND MEMBERS OF THE INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

A. DIMENSIONS OF THE ISSUE

116. The Commission was urged to consider whether the heads and members of the ICBs should generally have a fixed tenure – be in office for a specified number of years —or continue in office till their respective retiring ages. Embedded in this issue was how the heads and members of the ICBs should be removed from office.

B. CURRENT STATE OF THE LAW ON THE ISSUE

117. The Chairmen of the EC, the NCCE, and the PSC and the Commissioner of CHRAJ enjoy the same tenure of office as Justices of the Court of Appeal. They retire at 70 years. The Vice

Chairmen and the Deputy Commissioners enjoy the same tenure of office as Justices of the High Court. Their retiring age is fixed at 65 years.[505]

118. The other members of the NCCE hold office on the terms and conditions approved by Parliament. In practice they hold office on terms equivalent to judges of the Circuit Court and thus retire at 60 years. The other members of the EC and the PSC also hold office on terms equivalent to judges of the Circuit Court and retire at 60 years.[506]

119. The members of the NMC hold office for a term of 3 years and are eligible for re-appointment or re-nomination, while the Governor and Deputy Governors of the Bank of Ghana hold office for a term of 4 years and are eligible for another term. The Government Statistician compulsorily retires at 60 years like all other public officers.

120. The Chairmen of the EC, the NCCE, and the PSC and the CHRAJ and the Vice Chairmen and the Deputy Commissioners as well as the Auditor-General and the Governor and the Deputy Governors of the Bank of Ghana are all removed from office in the same manner as Justices of the Superior Court are removed from office. In this regard, Article 146 of the Constitution affords members of the ICBs a very stringent and rigid procedural protection.[507]

C. SUBMISSIONS RECEIVED

121. Ghanaians were divided on what should be the tenure of office of the members of the ICBs. There were submission differently advocating fixed terms of two 4-year terms; two 5-year terms; and one term of between 6 and 12 years. Advocates for a fixed term mainly reasoned that it will invigorate the ICBs as new heads and members appointed will bring on board fresh ideas to build on the efforts of their predecessors.

122. On the other hand, there were submissions calling for the retention of the indefinite terms for the heads of the members of the ICBs. Proponents of the retention of indefinite terms argued that it is a better approach to guard against political interference and control of the ICBs. They also reasoned that an indefinite tenure will afford the necessary space for the stability and long-term development of the institutional profile of the ICBs.

123. There were a few specific submissions calling for the Auditor-General to retire at 65 years in order to end the practice of engaging retired Auditors-General on contract.

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[505] Articles 44, 194, 223, 235 of the 1992 Constitution of the Republic of Ghana.
[506] *Appiah Ofori* v. *Attorney-General* [2010] SCGLR 484, where the Supreme Court rejected arguments that the Auditor-General should also retire at 70 years because the manner in which he is appointed, remunerated and removed from office is the same as for the Chairman of the EC and the NCCE, and the CHRAJ. The Supreme Court by a majority decision of 6:3 held that it was the intention of the framers of the Constitution that the Auditor-General should retire at 60 like all other public officers.
[507] *Agyei Twum* v. *Attorney-General & Akwetey* [2005-2006] SCGLR 732 at pp 798 to 801.

D. FINDINGS AND OBSERVATIONS

124. The Commission observes that it is not an uncommon practice to have members of independent oversight bodies around the world serving for a fixed term. For instance, in South Africa, the Public Protector serves for a non-renewable period of 7 years,[508] while the Auditor-General is appointed for a fixed, non-renewable term of between 5 and 10 years.[509] The Chief Ombudsman of Rwanda has a 4-year tenure renewable only once. The deputies have a 3-year tenure which is also renewable once only.[510]

125. The Commission also observes that it is similarly not uncommon to find very stringent procedures for the removal of the members of independent oversight bodies in other jurisdictions. Section 191 of the South African Constitution, for instance, requires that the South African Public Protector, Auditor-General or members of Commissions established under Chapter 9 of that Constitution to support constitutional democracy may be removed from office only on grounds of misconduct, incapacity or incompetence; there must be a finding to that effect by a committee of the National Assembly, and the adoption by the Assembly of a resolution calling for that person's removal from office.[511] A resolution of the National Assembly concerning the removal from office of the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two-thirds of the members of the Assembly. A resolution for the removal of a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.[512]

126. The Commission finds that a resolution of the issue of the tenure of office of members of the ICBs involves making a choice between two different options. On the one hand, the members of the ICBs generally do not retire early as other public officers in order for the State to benefit from the rich experience that they will gather on the job by their long stay in office up to 70 or 65 years as the case may be. It is also to insulate them "from the ravages and spoils of politics and change of governments."[513] If they are appointed to hold office for a fixed term of 4 or 5 years with eligibility for another term, serious implications could follow. As a country, Ghana may run the risk of having on her hands inefficient ICBs the members of which are beholden to the President, and dancing to the President's tune in anticipation of re-appointment. This could in turn undermine their independence. Besides the kind of stability associated with the longevity of tenure that provides the scope for institutional development will be missing. The development of the EC and the CHRAJ into very robust institutions of

[508] Sections 183 of the 1996 Constitution of the Republic of South Africa.
[509] Sections 189 of the 1996 Constitution of the Republic of South Africa.
[510] RWANDA OMBUDSMAN, http://www.ombudsman.gov.rw/en/about_us.php (last visited July 12, 2011).
[511] The Commissions are the Electoral Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality and the South African Human Rights Commission.
[512] Sections 194 of the 1996 Constitution of the Republic of South Africa.
[513] *Appiah-Ofori* v. *Attorney-General* [2010] SCGLR 484 at pp 543 to 544.

governance would suggest that an indefinite term may be a better option. On the other hand, there are some key disadvantages of the option of an indefinite term. Ghana runs the risk of being saddled with ineffective heads and members of the ICBs in office for unnecessarily long periods of time.[514] Some of them may also experience lethargy and run out of new ideas for growing their institutions and may grow indifferent to the cause of the institutions they run. This will be so especially as there may be no opportunities for career progression within the ICBs for the members.

127. The Commission finds that the participants at the National Constitution Review Conference gave a wide range of options on the tenure of office for members of the ICBs.
    a. For members of the NCCE, it was proposed that the 3 executive members should remain in office until retirement. The other 4 non-executive members must be appointed for a fixed term of 5 years renewable for another term of 5 years to allow of continuity and efficiency in the work of the Commission and also to prevent political interference.
    b. The participants were unanimous in opting for a long fixed non-renewable term for members of the Commission on Human Rights and Administrative Justice. There were, however, two opinions on how long the fixed term should be. Some proposed 7 years while others advocated 10 years.
    c. The syndicate group for the Auditor-General similarly concluded that the Auditor-General should be appointed for a fixed term of 5 years, and be eligible for another term. It was further mooted that the retiring age of the Auditor-General should be pegged at 65 years to enable Ghana to tap into his expertise and rich experience gathered over a long period of service. The participants agreed that the practice of engaging retired Auditors-Generals on contract should be discontinued.
    d. Participants at the Conference further agreed that the tenure of office of members of the National Media Commission and the Governor and the Deputy Governors of the Bank of Ghana should be retained. Some participants further advocated that the tenure of office of the members of the board of the Bank of Ghana should end with that of the President's tenure of office. Others proposed that the tenure of the Board of Directors should not be so pegged.
    e. The tenure of office of the Chairman and Deputy Chairmen of the Electoral Commission and the Government Statistician was not considered at the conference.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

128. The Commission recommends that the tenure of office of the Chairman and members of the National Commission for Civic Education should be for a 10 year non-renewable period.

[514] *Appiah-Ofori* v. *Attorney-General* [2010] SCGLR 484 at pp 522 to 523.

129. The Commission recommends that the tenure of office of the Chairman and members of the Electoral Commission should be for a 10 year non-renewable period.

130. The Commission recommends that the tenure of office of the Commissioner for Human Rights and Administrative Justice and Deputies should be for a 10 year non-renewable period.

131. The Commission recommends that the tenure of office of the members of the National Media Commission be retained.

132. The Commission recommends that the tenure of office of the Auditor-General be retained.

133. The Commission recommends that the tenure of office of the Government Statistician be retained.

134. The Commission recommends that the tenure of office of the Governor of the Bank of Ghana should end with that of the President who appoints him.

135. The Commission recommends that the mode of removal from office of the members of the ICBs be retained.

ISSUE FIVE: FUNDING OF THE INDEPENDENT CONSTITUTIONAL AND OTHER BODIES

A. DIMENSIONS OF THE ISSUE

136. Concerns about the inadequacy of funding and delays in the release of budgetary allocations to the ICBs were raised during this review. This issue manifested itself in the following terms:
    a. Whether a separate and special fund should be established for the ICBs?
    b. Whether the budgets of the ICBs should be subject to review by the Ministry of Finance?

B. CURRENT STATE OF THE LAW ON THE ISSUE

137. Except the Bank of Ghana and the PSC, the administrative expenses of the ICBs, including salaries, allowances and pension payable to persons serving with the ICBs, are expressed as charges on the Consolidated Fund.[515] In the case of the PSC, Parliament annually

[515] Articles 54, 171, 227, and 239 of the 1992 Constitution of the Republic of Ghana; section 21 of the Statistical Service Act, (PNDCL 135)

appropriates the money it considers necessary to meet the expenditure of the Commission.[516] The operational expenses of the Bank of Ghana are catered for by internally generated income.[517]

138. The Constitution prohibits the withdrawal of monies from the Consolidated Fund unless the withdrawal is to meet expenditure that is charged on that Fund by the Constitution or by an Act of Parliament; or where the issue of those monies has been authorised by an Appropriation Act; or by a supplementary estimate approved by a resolution of Parliament passed for that purpose; or by an Act of Parliament enacted under Article 179 of the Constitution; or by rules or regulations made under an Act of Parliament in respect of trust monies paid into the Consolidated Fund.[518]

139. Similarly, no monies can be withdrawn from any public fund, other than the Consolidated Fund and the Contingency Fund, unless the issue of those monies has been authorised by or under the authority of an Act of Parliament.[519] The Constitution further requires that the estimates of the expenditure of all public offices and public corporations be classified under programmes or activities. These estimates are required to be included in an Appropriation Bill which is introduced into Parliament. Parliament is thus empowered to authorise withdrawals of monies, from the Consolidated Fund or such other appropriate fund, that are necessary to meet that expenditure and the appropriation of those sums for the purposes specified in that Bill. In respect of payments charged on the Consolidated Fund, the Constitution requires that such payments should be laid before Parliament for the information of Members of Parliament.[520]

140. In practice, the manner in which this has been operated is that the annual estimates of administrative expenses of the ICBs (which are generally charges on the Consolidated Fund) are subjected to the policy directives of the Executive like all other public offices and public corporations.[521] The respective budget ceilings of the ICBs are, thus, dictated every year by the Ministry of Finance through budget hearings by the Ministry before the Ministry submits them to Parliament for approval.

141. In the specific case of the Auditor-General and the Audit Service, it has been decided by the Supreme Court that, the administrative expenses of that ICB, including salaries, allowances, pensions and gratuities of its staff are not subject to budget policy directives of the Executive

[516] Section 14 of the Public Services Commission Act, 1994 (Act 482).
[517] Section 6(2) of the Bank of Ghana Act, 2002 (Act 612).
[518] Article 178(1) of the 1992 Constitution of the Republic of Ghana.
[519] Article 178(2) of the 1992 Constitution of the Republic of Ghana.
[520] Article 179 of the 1992 Constitution of the Republic of Ghana.
[521] The only exceptions to this are the public corporations set up as commercial ventures. Article 179(2) expressly exempts them from this procedure. Like the Bank of Ghana, their expenses are catered for by internally generated income.

(budget ceilings and hearings at the Ministry of Finance), or reduction by the Ministry of Finance before submission to Parliament. Only Parliament has the authority in certain circumstances to reject the administrative estimates or to ask questions or seek clarifications on the estimates. These circumstances would include situations where the estimates contain fundamental errors in relation to information laid before Parliament; and where they are fundamentally unreasonable estimates.[522] It is not clear whether this decision applies to all the ICBs.

C. SUBMISSIONS RECEIVED

142. There was no consensus on the issue of how the ICBs should be funded.
    a. Some submission called for the retention of the current mode of funding; to the proponents of retention, subjecting the estimates of the ICBs to the Ministry of Finance for review is necessary to ensure that the ICBs remain accountable.
    b. There were other submissions on the other hand that proposed that the budgets estimates of the ICBs should not be submitted to the Ministry so as to guarantee the financial independence of the ICBs. They, therefore, advocated that the decision of the Supreme Court in the case of *Brown* v *Attorney-General*[523] should be concretised. This they believed would resolve the problems associated with budgetary cuts by the Ministry of Finance and enable the ICBs to undertake their activities (operational and investment) fully.
    c. Other Ghanaians took the view that the best and simplest way to guarantee the financial independence of the ICBs, to enable them undertake all their activities and ensure the effective discharge of their mandate was to establish a special and separate fund for their operations. This, they advocated, would best address the concerns of the many Ghanaians who simply called for the ICBs to be adequately resourced and equipped and also for the capacity of the staff to be improved. It would also resolve the perennial underfunding of the ICBs and obviate delays in the release of their budgetary allocations.

D. FINDINGS AND OBSERVATIONS

143. The Commission observes from the submissions, particularly, those made at the National Mini Consultations with the ICBs, that most of the challenges and difficulties confronting the ICBs could be framed as a resource or funding problem. The ICBs do not receive the funding necessary for the adequate discharge of their mandates. Aside from chronic under-funding, government allocations often arrive late from the Ministry of Finance, and are frequently less than what was originally agreed at budget hearing at the Ministry as well as what was

[522] *Brown* v. *Attorney-General* [2010] SCGLR 183.
[523] *Brown* v. *Attorney-General* [2010] SCGLR 183.

approved by Parliament. Consequently, the ICBs often rely on donor partners and aid agencies to compensate partly for their deficits by providing staff training, computers, and infrastructural needs. Poor remuneration of staff further complicates the problem as the ICBs are unable to retain the staff they sometimes expend scarce resources training and improving.

144. The Commission observes that while the power of the purse may serve as a means of exacting accountability from the ICBs, it may be useful to temper that requirement for accountability with considerations that giving the ICBs greater control over their funding would equip them for efficient performance and further insulate them from political pressure, however subtle, thus enhance their independence.[524] The following options could be adopted to limit political control through budgetary oversight of ICBs:
    a. Allowing the ICBs to submit budget proposals directly to Parliament without having to subject it to ministerial approval.
    b. Allowing the ICBs to submit their budget requests concurrently to the Ministry of Finance and Parliament, as this eliminates the Executive's ability to make fundamental changes to the proposals before Parliament sees them.
    c. Providing the ICBs with an independent funding source, such as setting aside a percentage of the total national revenue to cater for the resource needs of the ICBs.

145. The Commission further observes that, of the three options, the provision of an independent funding source has been identified as the most powerful as it bypasses two potential political control points: the Presidency and Parliament. While the other two options bypass the President, they may still allow political influence to operate through Parliament's budgetary control and run the risk of exposing the ICBs to partisan pressure in Parliament. This would not afford the ICBs stable policy making space that does not change as majorities change in Parliament.[525]

146. The Commission further observes that the approach by the Supreme Court was to bypass executive control and limit Parliament's role to the barest minimum – to the rejection of "fundamentally unreasonable estimates."[526]

147. The Commission observes that when Parliament had the opportunity to consider a similar issue of funding at the micro level of the EC (in relation to local level elections), the choice of the Members of Parliament was an independent source of funding, in the form of an

[524] Rachel E. Barkow, "*Insulating Agencies: Avoiding Capture Through Institutional Design*", 89 Tex. L. Rev. 15, page 42 to 43.
[525] Rachel E. Barkow, "*Insulating Agencies: Avoiding Capture Through Institutional Design*", 89 Tex. L. Rev. 15, page 43 to 45.
[526] *Brown* v. *Attorney-General* [2010] SCGLR 183.

Election Fund for the EC.[527] Parliament identified delays in the release of funds to the EC by the Ministry of Finance and a resultant disruption of the activities of the EC as some of the issues an Election Fund for the EC could address.[528] It was reasoned that when established, the Fund would enable the Commission have enough resources at least 6 months before elections to execute its electoral programmes. Parliament pointed to countries like South Africa, Kenya, Nigeria and others which have established similar Election Funds.[529] The Commission finds wisdom in the principle underlying Parliament's recommendation and notes that it would be appropriate to give the ICBs financial independence; limited only by some form of parliamentary oversight accountability mechanism. The best way is to give the ICBs an independent source of funding, while allowing for parliamentary pre-budget hearing so as to ensure the vibrancy of the principles of separation of powers; promote values and systems that would check excessive abuse of State resources; and further ensure that estimates presented by the ICBs for accessing the fund are determined in accordance with the laid down constitutional procedures, and appear reasonable in the light of other information available to Parliament, particularly in terms of national revenue.[530]

148. The Commission finds that the issue of the adequate funding of the ICBs particularly engaged the attention of participants at the National Constitution Review Conference. Different opinions emerged when the issue was tabled for discussion.
    a. The participants were generally agreed that some special fund should be set up for the operations of the ICBs and to ensure their independence. Some mooted the idea that the fund should be 5% of the Gross Domestic Product.
    b. Participants were also agreed that the ICBs should submit their administrative estimates directly to Parliament. In this regard, it was proposed that Parliament should set up some special finance committee to scrutinise and approve the budget estimates of the ICBs.
    c. It was further proposed that parliamentary appropriation should be made directly to the ICBs without passing through any Ministry, Department or Agency. It was reasoned that this would cut down on the unnecessary bureaucratic processes and the delays in the release of funds that attend the current system. It would further enhance the independence of the ICBs.

[527] Report of the Parliamentary Committee to Investigate the Issues Surrounding the Apparent Difficulties of the Electoral Commission (EC) in Conducting the Originally Announced 28th December, 2010 District Assembly and Unit Committee Elections, 24th March, 2010.
[528] Report of the Parliamentary Committee to Investigate the Issues Surrounding the Apparent Difficulties of the Electoral Commission (EC) in Conducting the Originally Announced 28th December, 2010 District Assembly and Unit Committee Elections, 24th March, 2010.
[529] Report of the Parliamentary Committee to Investigate the Issues Surrounding the Apparent Difficulties of the Electoral Commission (EC) in Conducting the Originally Announced 28th December, 2010 District Assembly and Unit Committee Elections, 24th March, 2010.
[530] *Brown* v. *Attorney-General* [2010] SCGLR 183, per Wood CJ at pp 206 and 207.

d. With regard to particular ICBs, the participants expressed deep concern about the administrative under-enforcement of Article 167(c) of the Constitution, which mandates the NMC to insulate the state-owned media from governmental control. The participants explained that this administrative under-enforcement is manifested in the practice of routing appropriation of monies to meet the expenses of the state-owned media through the Ministry of Information. To give meaning to Article 167(c), the participants proposed that such appropriation should rather be routed through the NMC. In relation to the Audit Service, the participants suggested that the Audit Service should charge professional fees for the work it undertakes for Ministries, Departments and Agencies and other public institutions. In relation to the Bank of Ghana, the participants advocated the retention of the system by which the Bank finances its operations from internally generated funds.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

149. The Commission recommends the establishment of an Independent Constitutional Bodies Fund to finance the operations of all the ICBs.

150. The Commission further recommends that the budget estimates of the ICBs should be submitted through the administrator of the Democracy Fund directly to Parliament without ministerial clearance or approval.

151. The Commission also recommends that the decision of the Supreme Court, in *Brown* v *Attorney-General*, on the mode of funding of the Auditor-General should, as far as practicable, be applied to all ICBs.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

152. The Commission recommends that consequential amendments to the constitutive Acts of the various ICBs be effected.

153. The Commission further recommends that Parliament should, within 6 months of the coming into force of the amended Constitution, pass an Act to provide for the establishment of the Independent Constitutional Bodies Fund and to provide for its management.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

154. The Commission recommends that Parliament and the ICBs work out the mechanics of pre-parliamentary budget hearings.

SUBTHEME TWO: SPECIFIC MATTERS RELATING TO THE NATIONAL COMMISSION FOR CIVIC EDUCATION (NCCE)

ISSUE ONE: THE OVERLAPPING FUNCTIONS OF THE NATIONAL COMMISSION FOR CIVIC EDUCATION AND THE FUNCTIONS OF OTHER ICBS

A. DIMENSIONS OF THE ISSUE

155. The Commission received submissions that pointed to some perceived overlapping of the functions of the NCCE with those of other ICBs. In these submissions, some Ghanaians expressed a general concern about the demerits of the duplication of functions and the establishment of multiple bureaucracies to execute the same mandate.

B. CURRENT STATE OF THE LAW ON THE ISSUE

156. The NCCE is mandated, among others, to create public awareness of the principles of the Constitution, to educate and encourage the public to defend the Constitution, to assess and inform the government on the limitations to Ghana's achievement of true democracy and to formulate programmes aimed at inculcating the awareness of civil responsibility in citizens.[531]

157. Besides the NCCE, other ICBs have functions that may be generally described as civic education in nature. For instance, the EC has been charged to educate the public on the Ghanaian electoral process and its purposes.[532] Similarly, incidental to its mandate to promote and protect human rights in Ghana, the CHRAJ is required to educate the public on their human rights and freedoms.[533]

C. SUBMISSIONS RECEIVED

158. The various submissions received by the Commission expressed the following:
    a. The NCCE should be solely responsible for educating the public on all constitutional matters, including human rights and voter education, as in addition to duplication, the other ICBs have limited human resources to educate the public. Besides, the NCCE has a relatively higher visibility across the country and has better capacity to promulgate programmes of civic education. All these factors would lead to efficiency and optimisation of scarce resources.
    b. The contrary views called for the retention of the respective educational functions of the other ICBs, on the basis that no single organisation would have the capacity to,

[531] Article 233 of the 1992 Constitution of the Republic of Ghana; section 2 of the National Commission for Civic Education Act, 1993 (Act 452).
[532] Article 45(d) of the 1992 Constitution of the Republic of Ghana.
[533] Article 218(f) of the 1992 Constitution of the Republic of Ghana.

single-handedly, educate the public on all constitutional matters. Besides, some aspects of the education required by the Constitution (such as voter education) were usually technical in nature and required the technical expertise of particular ICBs. They, therefore, called for the ICBs to collaborate to discharge their respective functions effectively.

c. On the broader picture of generally improving civic education in Ghana, there were calls to simplify the language of the Constitution to make it less technical and easier for Ghanaians to understand. There were other calls to incorporate the Constitution into the curricula at all levels of Ghana's educational system. It was reasoned that this would inculcate patriotism into Ghanaians early enough, improve awareness of civic responsibilities, human rights, and generally increase public knowledge about the Constitution. As an effective mechanism for achieving these, it was widely proposed that the Constitution should be freely distributed or sold at a subsidised price to all Ghanaians. Translating the Constitution into the local languages was also strongly suggested. On this, many people were generally concerned that the majority of Ghanaians are not able to read English and consequently do not understand the Constitution. There were also a couple of submissions that simply called for the establishment of a body to educate people on the Constitution.

D. FINDINGS AND OBSERVATIONS

159. The Commission finds that civic education should be a multi-agency function. The concern resulting from the apparent overlap of functions among the ICBs is a funding problem; it does not seem too clear which institution should be allocated the bulk of the funds meant for "civic education" (used here to include voter and human rights education). The problem is especially pronounced because relative to other ICBs, the NCCE is too under-resourced to undertake the full complement of its activities. With the recommendation for the establishment of a special and independent fund to finance all operations of the ICBs, however, that problem should be resolved. All the ICBs should now be able to execute all their programmes to complement one another.

160. The Commission observes that the technicalities associated with some forms of education on the Constitution, such as voter education, would require that they be performed by some particular ICBs. For instance, the EC is about to introduce the biometric system to register qualified Ghanaians entitled to vote. Logically, it is the EC and not the NCCE that would have a full appreciation of the processes involved in and the equipment required for this form of registration. While the two may collaborate and harness their respective resources and capacities to ensure the success of the registration, education on the processes involved should primarily remain the responsibility of the EC. It will, accordingly, be desirable for the EC to train other public institutions like the NCCE and the Information Service Department,

as well as likeminded Civil Society Organisations, in order to bring them to the same level of appreciation of the electoral process. Drawing on the rich and varying capacities of these establishments will broaden the coverage of voter education by the use of their combined nationwide network and presence.

161. The Commission, in this regard, observes that the total number of rejected ballots during the 2008 elections is illustrative of the need to make civic education a multi-agency function which requires all the ICBs to collaborate in discharging their respective mandates to educate the public. The high percentage of invalid votes (2.37%) reflected a low level of education preceding the 7th December, 2008 polls. This was very significant considering the fact that the winning margin between the 2 candidates in the second round of elections was only 0.46% of the valid votes cast.[534]

162. The Commission finds that the Constitution being the embodiment of the will of the people of Ghana, it is imperative that citizens are well schooled on the contents of the Constitution with special regard to their rights and civic matter. It would not be enough for any single institution in Ghana to assume the sole responsibility of educating Ghanaians on any matter relating to the Constitution or any other civic processes. It will definitely require the collaborative effort of as many institutions as possible.[535]

163. The Commission finds that participants at the National Constitution Review Conference were unanimous that all the ICBs should collaborate in discharging their respective mandates of educating the public.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

164. The Commission recommends that Article 234 of the Constitution on the independence of the NCCE should be expressed as an entrenched provision like all other provisions on the independence of the other ICBs.

RECOMMENDATION FOR LEGISLATIVE CHANGES

165. The Commission recommends that the enabling Acts of the NCCE, EC and CHRAJ should provide that they collaborate with one another in the discharge of their respective mandates to educate the public on their constitutional rights and responsibilities.

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[534] Friedrich-Ebert-Stiftung /Electoral Commission, "Ghana Elections 2008, Friedrich-Ebert-Stiftung, Ghana (2010), pages 44 & 45.

[535] *Ampiah Ampofo* v. *Commission on Human Rights and Administrative Justice* [2005-2006] SCGLR 227 at p. 237, where, regarding the education functions of the Commission on Human Rights and Administrative Justice, it was noted that educating the Ghanaian public on such matters as human rights and fundamental freedoms is so important a process in the quest for freedom and justice in our land that it requires more hands on deck; Ghana Center for Democratic Development (CDD-Ghana), "*Worrisome Developments in the 2008 Polls*" in Democracy Watch, Vol, 8 No. 2 May2009, (July 15, 2011) http://www.cddghana.org/documents/D-Watch%2027.pdf.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

166. The Commission further recommends that the NCCE should further strengthen its programmes aimed at ensuring that all Ghanaians (literate or otherwise) have access to the Constitution and also understand its contents.

167. The Commission finally recommends that the NCCE should strengthen its collaboration with the Ghana Education Service and tertiary institutions to formulate curricula and syllabi for the studying of the Constitution at all levels of Ghana's educational system.

SUBTHEME THREE: SPECIFIC MATTERS RELATED TO THE ELECTORAL COMMISSION (EC)

ISSUE ONE: FUNCTIONS AND POWERS OF THE ELECTORAL COMMISSION

A. DIMENSIONS OF THE ISSUE

168. Ghanaians made submission that reflected their discomfort with the widespread disregard for electoral laws by political parties, their agents, and others. These submissions brought to the fore the question whether the Electoral Commission should be empowered to enforce electoral laws and investigate and prosecute electoral crimes. Closely related to this was whether the conditions and requirements set out for registering political parties should remain the same for assessing their viability and continuous existence, and for that matter, whether to deregister them.

169. The function of the Electoral Commission to demarcate electoral boundaries for both national and local government elections was also the subject of some submissions. Here, the need to reconcile the respective roles of the Electoral Commission, the Minister for Local Government, and the Statistical Service emerged as an important dimension of the issue.

B. CURRENT STATE OF THE LAW ON THE ISSUE

170. The Electoral Commission is the authority mandated under the Constitution to ensure the exercise of the constitutional right to vote by every qualified citizen. To do this, the Electoral Commission is entrusted with the followings functions by the Constitution: the registration of voters; the initiation and conduct of public elections and referenda; and all other incidental duties including the demarcation of electoral boundaries for both national and local government elections; compilation and revision of the electoral register; execution of programmes for the expansion of voter registration; preparation of identity cards for registered voters; registration of political parties; the proper storage of electoral materials;

education of the public on the electoral process and its purposes; and the promulgation of regulations for the effective performance of its function.[536]

171. The duty of the EC to demarcate boundaries for local government elections is very linked to the power of the President to create districts[537] and the power of the Minister for Local Government and Rural Development to establish an Assembly for each district.[538] The interface between the EC and the two other authorities derives from the fact that the creation of districts and the establishment of District Assemblies necessarily involve the demarcation of local electoral areas and the conduct of elections for District Assembly and Unit Committee Members.[539] A conglomeration of electoral areas make up a District, Municipal, or Metropolitan Assembly; the manner in which the jurisdiction of each District, Municipal and Metropolitan Assembly is determined is to indicate which electoral areas fall under the particular Assembly.

172. Beyond its constitutional and statutory functions, the EC also performs other duties which have evolved by convention. The EC, for instance, convenes and chairs meetings of the Inter Party Advisory Committee (IPAC).[540] IPAC brings together representatives of all political parties, and donors (acting as observers), to join the EC to fashion consensus on the rules of electoral conduct and competition and to diffuse government-opposition tension and conflict. It also serves as a non-statutory voluntary means by which the EC exacts accountability from the political parties. In this regard, in 2004 and subsequently in 2008, the IPAC and the Institute of Economic Affairs formulated the Political Parties Code of Conduct. The Code served as a guide for enabling free and fair elections and to regulate the conduct of political parties during and between elections in a manner to safeguard the relative peace and tranquillity in Ghana.

173. Through the instrumentality of IPAC, the EC also shares its programmes and activities and elicits party inputs and views on these programmes and activities, in order to address the grievances of the parties, and to improve the efficiency of the EC.[541]

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[536] Articles 45, 51 and 55(7) of the 1992 Constitution of the Republic of Ghana; section 2 of the Electoral Commission Act, 1993 (Act 451), and section 4 of the Political Parties Act, 2000 (Act 574).
[537] Section 1 and 2 of the of the Local Government Act, 1993 (Act 462).
[538] Section 3 of the of the Local Government Act, 1993 (Act 462).
[539] As a result of this strong interface, the EC plays very significant roles in the creation of districts and establishments of District Assemblies. First, it is obligatory for the President to request the EC to make appropriate recommendations for the creation of districts. The EC may also, on the request of the President, make recommendations with respect to the President's exercise of his authority to declare and assign a name to a district area. Section 3 of the of the Local Government Act, 1993 (Act 462).
[540] IPAC was created in March 1994 by the EC and the political parties to serve as a practical political, public, and party confidence building mechanism.
[541] Alexander K. D. Frempong, "*Innovations in Electoral Politics in Ghana's Fourth Republic: An Analysis*", (July 15, 2011) http://bibliotecavirtual.clacso.org.ar/ar/libros/sursur/democratic/10fre.pdf; Emmanuel Debrah,

174. In the discharge of its functions, the EC is given powers: to refuse the registration of a political party if the conditions set out for registration are not met; [542] and to cancel the registration of a political party if the party refuses or neglects to declare its assets and expenditure upon registration,[543] or in relation to elections,[544] or submits a statement that is false.[545] The EC may also apply to the High Court to wind-up and dissolve a political party, and dispose of its property, assets, rights, and liabilities on the grounds that it is just and equitable to do so.

175. The EC may also make a complaint of the commission of an election offence to the police for prosecution[546] with the consent of the Attorney-General.[547]

C. SUBMISSIONS RECEIVED

176. The Commission received various submissions which expressed the following:

a. There were submissions which called for the Constitution to empower the EC to investigate and prosecute election crimes and enforce electoral laws. This, the proponents believe, will give the EC more "teeth to bite" when the electoral laws are contravened. It was argued that it would also enhance the effectiveness of the EC and enable the Commission to monitor political parties and ensure that they adhere to standard and accepted electoral practices. It was further reasoned that the nature of the mandate of the EC makes it the best institution to identify electoral offenders and prosecute them.

b. There were contrary submissions, however, to the effect that the Electoral Commission should not be empowered to investigate and prosecute election crimes and should have no enforcement powers because it had the potential of distracting the Electoral Commission from its core duties of registering voters and conducting elections. It was further argued that any such powers would make the Electoral Commission too powerful and that the government of the day could use the Electoral

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"Measuring Governance Institutions' Success in Ghana: The Case of the Electoral Commission, 1993 – 2008, African Studies, 70:1, 25-45, (July 15, 2011)http://www.tandfonline.com/doi/pdf/10.1080/00020184.2011.557573.

[542] Sections 8(4) and 12 of the Political Parties Act, 2000 (Act 574). The conditions for registration of political parties are set out under Article 55(7) and section 9 of Act 574.

[543] Section 13(6) of the Political Parties Act, 2000 (Act 574).

[544] Section 14(3) of the Political Parties Act, 2000 (Act 574).

[545] Section 13(6) and 14(3) of the Political Parties Act, 2000 (Act 574).

[546] In this sense, the electoral laws of Ghana contain several provisions for punishment with imprisonment, variously up to one or two years as the case may be, for various election offences. In extreme cases, and without prejudice to any penalty provided by the law, the High Court may empower the Commission to cancel the registration of a political party, where the political party is convicted of an election offence. Section 27(1) of the Political Parties Act, 2000 (Act 574).

[547] By section 42 of the Representation of the people Act, 1992 (PNDCL 284), a person cannot be prosecuted for an offence under the Act without the consent in writing of the Attorney-General.

Commission as a tool against its political opponents. This, it was said, could potentially undermine the quality of elections. Besides, the Attorney-General and the Police provided adequate mechanisms for the investigation and prosecution of electoral crimes.

c. It was further proposed that the Constitution should set out clear criteria for deregistration of political parties because to apply the conditions for registration would imply deregistering virtually all of the political parties since all political parties in Ghana do default in some of the important requirements for registration.
d. On the function of electoral boundary demarcation by the Electoral Commission, there were submissions calling for that function to be discharged in consultation with the Statistical Service. It was reasoned that the Statistical Service being the body that produces and keeps custody of the demographic information used by the Electoral Commission to determine the need or otherwise for boundary demarcation, it would be proper if the two institutions had a formal relationship in relation to boundary demarcation.
e. Also, on electoral boundary demarcation, it was proposed that the respective roles of the Electoral Commission and the Ministry of Local Government should be reconciled to avoid any confusion.

D. FINDINGS AND OBSERVATIONS

177. The Commission observes that the practice of vesting institutions overseeing elections with powers incidental to their core mandate of initiation and conduct of elections is not a rarity. In most countries, the Electoral Commissions, or such other bodies responsible for the direct control of elections, perform responsibilities such as the delineation of districts or constituencies, adjudication of electoral disputes, and development of electoral technology amongst others. For instance:
    a. In India, the Election Commission ensures a level playing field for the political parties in the election fray, through strict observance by the parties of a Model Code of Conduct developed with the consensus of political parties. The Indian Election Commission holds periodical consultations with the political parties on matters connected with the conduct of elections; compliance with the Model Code of Conduct and new measures proposed to be introduced by the Commission on election related matters. [548]
    b. The Constitution of Kenya gives the Interim Independent Electoral Commission the mandate, among others, to settle minor electoral disputes during an election.[549]

[548] ELECTORAL COMMISSION OF INDIA, http://eci.nic.in (last visited July 15, 2011).
[549] INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA, http://www.iiec.or.ke/index.php/I.I.E.C-Agenda/ (last visited July 15, 2011).

c. The Independent National Electoral Commission of Nigeria has the power among others to, monitor the organisation and operation of the political parties, including their finances; arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information; and monitor political campaigns and provide rules and regulations which shall govern the political parties.[550]
d. The primary duties of the National Election Commission of Liberia are stated to include the administration and enforcement of all laws which are related to the conduct of elections of Liberia.[551]

178. The Commission finds that the submissions received reflect a great deal of misgivings and discomfiture on the part of Ghanaians about the several negative acts or potentially negative acts that have attended recent elections in Ghana. These include the following:
    a. High perception of double registration and registration of minors (and others not qualified to vote) with the aid of political parties;
    b. Attempts by political parties (particularly, the two main parties – the National Democratic Congress and the New Patriotic Party) to delegitimise the electoral process through unsubstantiated accusations and counter accusations against each other and against the Electoral Commission;
    c. Acrimonious and unnecessarily long drawn out electioneering campaigns;
    d. High perception of ethnic-bloc voting;
    e. High perception of "monetisation" of the electioneering process;[552]
    f. Unregulated reportage and abusive use of parallel voting results by the media and political parties;
    g. Abusive use of opinion and exit polls to serve political propaganda;
    h. Abuse of incumbency during the electioneering process;
    i. Polarisation of the media to perpetuate partisan propaganda – sometimes extremely inflammatory and capable of undermining the very essence of democracy; and
    j. Sheer use of muscle power by political parties to intimidate voters, perpetuate violence, and disrupt elections. This is manifested generally through the activities of party foot soldiers and "macho men" and local vigilantes, purportedly engaged as alternate security agents and who by their activities usurp the powers of the security agencies to maintain law and order during elections.

179. The Commission observes a few incidents illustrative of the concerns of Ghanaians, deducible from the submissions:

[550] Section 15, Part I of the Third Schedule pursuant to section 153(2) of the Constitution of the 1999 Federal Republic of Nigeria.
[551] ELECTION COMMISSION OF LIBERIA, http://www.necliberia.org/ (last visited July 15, 2011).
[552] "Monetization" as used here is a term that has come to be associated with the excessive use of monies during the process, right from nomination of candidates through to announcement of election results.

a. The bussing, mass ferrying, by political parties, of party supporters to party strongholds for voter registration in 2008, and the associated tension and violence that characterised such mass transportation.[553]
b. Reported incidents of violence at Old Fadama and Agbogbloshie, both in Accra, during the period leading up to the 2008 elections.[554]
c. The bloating of the electoral register in 13 constituencies in the Ashanti Region for the 2008 elections. Even though investigation by the EC pointed to genuine human error on the part of a schedule officer at the IT Unit of the EC, perceptions of deliberate bloating by political parties still persisted.[555]
d. The violent and forcible tampering with and removal of ballot boxes and ballot papers during the 2008 elections from registration centres in various constituencies, including Akwatia in the Eastern Region and Asutifi South in the Brong Ahafo Region.[556] In Akwatia, for instance, the EC was compelled to re-run the parliamentary elections in the Atiwa Constituency because of the suspension of the December 2008 polls in 6 polling stations due to the violence. This made it impossible for the results of the elections in the constituency to be declared and led to a long drawn out litigation in court. The litigants were challenging, among others, the decision of the EC to re-run the elections in only the 6 polling stations, as opposed to all 89 polling stations. The matter ended, July, 2009, when the Supreme Court ultimately upheld the decision by the Electoral Commission.[557]
e. The usurpation of the power of the security agencies to maintain law and order by party functionaries and local vigilantes through the illegal mounting of barricades by individuals during the Atiwa Constituency parliamentary re-run in August, 2009.

[553] EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf; Commonwealth Secretariat, *"Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group"*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.
[554] EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf; Commonwealth Secretariat, *"Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group"*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.
[555] EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf.
[556] *Republic* v. *High Court, Sunyani; ex parte Collins Dauda (Boakye-Boateng interested party)* [2009] SCGLR 447.
[557] *Republic* v. *High Court, Koforidua; Ex Parte Asare (Baaba Jamal & Others Interested Parties)* [2009] SCGLR 460; Ghana Centre for Democratic Development (CDD-Ghana), *"The Akwatia and Chereponi Elections –The Unlearned Lessons"* in Democracy Watch, Vol, 8 No. January to June, 2010, (last visited July 15, 2011) http://76.12.238.52/documents/D-%20Watch%2029%20&%2030.pdf.

Ostensibly, this was to prohibit entry by so-called "foreigners" or "strangers", but it was greeted with a great deal of violence.[558]

f. Similar acts of violence that greeted the parliamentary by-election in Chereponi in September 2009.[559]

g. Reports of forcible and violent expulsion of party agents from polling centres in the Ashanti and Volta Regions.[560]

180. The Commission finds that except for a few areas, Ghana's electoral laws are robust and comprehensive, and are in tune with international best standards. In the words of the European Union Observer Mission for the 2008 elections, Ghana's "legal framework is comprehensive and in conformity with international standards and best practices addressing the majority of areas relating to the electoral process."[561]

181. The Commission however finds that one critical aspect of the problem has been the administrative under-enforcement of the laws. The blatant disregard for the laws is not a question of the lack of power by the EC to enforce the laws. Rather it is the inaction of the EC and other relevant authorities that seems to perpetuate the breaches of the laws.

182. The Commission finds that, given the problems associated with the conduct of elections in Ghana, it is imperative for the relevant authorities (the EC inclusive), to investigate thoroughly and punish severely the perpetrators of breaches of electoral laws which may be reported by electoral officers, observer missions (both domestic and international), political parties, the media and civil society organisations. The apparent inaction of the authorities (the Attorney-General's Department, the EC and the Police Service and other security agencies) can seriously undermine the electoral process and empty Ghana's democratic system of its gains.

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[558] Ghana Center for Democratic Development (CDD-Ghana) and the Coalition of Domestic Election Observers (CODEO), *"Statement on the Atiwa Constituency Parliamentary By-Election"*, 3rd September, 2010, (July 15, 2011) http://www.cddghana.org/news.aspx?news=21; Ghana Centre for Democratic Development (CDD-Ghana), *"The Akwatia and Chereponi Elections –The Unlearned Lessons"* in Democracy Watch, Vol, 8 No. January to June, 2010, (last visited July 15, 2011) http://76.12.238.52/documents/D-%20Watch%2029%20&%2030.pdf.

[559] Ghana Centre for Democratic Development (CDD-Ghana), *"The Akwatia and Chereponi Elections –The Unlearned Lessons"* in Democracy Watch, Vol, 8 No. January to June, 2010, (last visited July 15, 2011) http://76.12.238.52/documents/D-%20Watch%2029%20&%2030.pdf.

[560] EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf; Commonwealth Secretariat, *"Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group"*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.

[561] EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf.

183. The Commission finds that as a practical way of dealing with reports and incidents of electoral violence and other offences, the EC may explore mechanisms enabled by its own institutional structures. The District Registration Review Committee [562] or the Registration Revising Officer[563] or both of them may be further empowered to inquire into reports and incidents of electoral violence and other offences. Where a *prima facie* case is made, the report may be referred to the Attorney-General Department or the Police for further investigations and possible prosecution of any offender, regardless of the political party to which he or she may belong.

184. The Commission further finds that the inaction and apparent acceptance by the EC of the consistent failure of political parties to submit audited accounts of expenditure incurred for elections is a source of concern as it defeats the essence of political party accountability.[564] It is, accordingly, imperative for the EC to take steps to assert its authority in relation to the enforcement of electoral laws.

185. The Commission observes that, on the areas not regulated by statutes, like electoral campaigns, various degrees of success have been chalked by the EC through the IPAC mechanism. The 2004 and 2008 Political Parties Codes, for instance, while not statutorily binding, proved useful in at least raising awareness among the political parties to conduct themselves with decorum.

186. The Commission further observes that the EC, through the IPAC platform, has also succeeded in achieving compromise solutions to such contested and vexed matters as the setting aside of a single day for holding both parliamentary and presidential elections, photo identity cards (now biometric registration), and transparent ballot boxes. The EC has conventionally given serious attention to those decisions of IPAC and by that the IPAC has evolved into an indispensable partner of the Electoral Commission and as an important non-statutory framework for: raising issues; facilitating dialogue between parties and the Electoral Commission; building trust and confidence among the political parties; and for

[562] Regulation 13 and 14 of the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12). The District Registration Review Committee is established as a structure at the district level and given certain powers of the District Magistrate Court to examine a challenge to the registration of a voter and give persons whose registrations are challenged the opportunity to defend their voting eligibility. It is composed of registered political parties which are active in the district, the district officer of the EC, and 4 other persons as determined by the EC.

[563] Regulation 21 of the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12). The District Magistrate of each District is designated as the Registration Revising Officer, and is empowered to determine any challenge to the inclusion of the name of any person in the provisional register.

[564] Section 14 of the Political Parties Act, 2000 (Act 574) set out requirements for political parties to submit statements of the assets and liabilities within 21 days before a general election and also to submit a statement of their expenditure incurred within 6 months of a general or by- election. Parties are required to submit to the Electoral Commission statements of their assets and liabilities.

reaching consensus on curbing violence and tension attendant to elections and improving Ghana's electoral processes.[565]

187. The Commission, in this sense, finds wisdom in the recommendations of the Commonwealth Observer Group for the 2008 elections, and observes that it is desirable to strengthen the IPAC mechanism and maximise its use as a self-regulatory mechanism for political parties to manage intra-party and inter-party relationships and the behaviour of political parties before, during and after political contests.[566]

188. The Commission observes, in relation to campaign spending, that while the law requires political parties to publish annually their audited accounts,[567] and detailed statements of all expenditure incurred for elections,[568] and to submit these to the Electoral Commission, there are currently no limits on campaign expenditure. The Commission notes that, with the high cost of elections, politicians could be predisposed to corruption in order to either recoup funds spent on the elections, or protect the interests of their chief financiers who may expect a high return on their investment in an electioneering campaign.

189. The Commission, accordingly, associates itself with the United Nations Human Rights Committee[569] and finds that it would be desirable to put in place reasonable limitations on campaign expenditure to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.[570] This would give meaning to the statutory injunction on political parties to submit statements of elections expenditure and further enhance the accountability of political parties to the public.[571]

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[565] Alexander K. D. Frempong, "*Innovations in Electoral Politics in Ghana's Fourth Republic: An Analysis",* (last visited July 15, 2009) http://bibliotecavirtual.clacso.org.ar/ar/libros/sursur/democratic/10fre.pdf; Emmanuel Debrah, *"Measuring Governance Institutions' Success in Ghana: The Case of the Electoral Commission*, 1993 – 2008, African Studies, 70:1, 25-45, (last visited July 15, 2011) http://www.tandfonline.com/doi/pdf/10.1080/00020184.2011.557573.

[566] Commonwealth Secretariat, *"Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group",* page 38, (last visted July 15, 2009) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.

[567] Article 55(4) of the 1992 Constitution of the Republic of Ghana.

[568] Section14(2) of the Political Parties Act, 2000 (Act 574).

[569] The United Nations Human Rights Committee is the implementing mechanism for the International Covenant on Civil and Political Rights (ICCPR) ratified by Ghana on 7th September, 2000.

[570] Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add. 7 General Comment No. 25, 57th Sess. (July 12, 1996), paragraph 19.

[571] *The Republic* v. *Yebi and Avalifo* [2000] SCGLR 149 at 162 to 163 where the important role of political parties was highlighted. It was observed that because of their importance, the organisation, mode of operation, their finances and objectives of political parties are accordingly matters of widespread public interest; Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 401.

190. The Commission's attention was drawn to the fact that in practice, the Electoral Commission demarcates the boundaries for national elections,[572] whilst the Minister of Local Government demarcates the boundaries for local government elections.[573] The manner in which the jurisdiction of each District, Municipal and Metropolitan Assembly is determined is to indicate which electoral area falls under the particular Assembly.[574] In so determining, the Minister of Local Government also effectively determines the electoral boundaries in the district, municipality and metropolis contrary to Article 45(b) of the Constitution.

191. The Commission observes that Parliament's position on this matter was articulated by the Parliamentary *ad hoc* Committee set up to investigate the difficulties of the EC in conducting the 2010 District Assembly and Unit Committee Elections. That Parliamentary Committee took the view that to ensure an independent and objective assessment of each electoral area or constituency before demarcating its boundary, the EC should demarcate electoral boundaries as required by Article 45(b) of the Constitution.[575]

192. The Commission finds that the problem may be traced to the apparent conflict that a joint reading of Article 45(b) and Article 241(2) of the Constitution and sections 1, 2 and 3 of the Local Government Act, 1993 (Act 462) reveals. The Commission, however, finds that there should be no confusion upon a careful reading of the law. The processes involved in the creation of districts, demarcation of electoral areas for local government elections, and the establishment of District Assemblies are very well sequenced.
    a. First, the decision and power to create a district is reserved for the President. That stands to reason because that decision should always be an executive decision.[576]
    b. To guard against arbitrariness, however, the law requires the President to rely on the recommendation of the Electoral Commission. Again, this stands to reason because the creation of a district would have implications for local government elections in the district. There is an irrebuttable presumption that in making the appropriate recommendations, there will be consideration for and demarcation of electoral areas

[572] Article 45(b), of the 1992 Constitution of the Republic of Ghana.
[573] Article 241(2), of the 1992 Constitution of the Republic of Ghana; Section 3 of the Local Government Act, 1993 (Act 462), which empowers the Minister, by Legislative Instrument, to establish and constitute an Assembly for each district, municipality and metropolis, as the highest political authority for the district, municipality or metropolis. This may include re-drawing the boundaries of old districts and carving new ones out of them.
[574] The First Schedule to the Local Government (Kwahu South District Assembly)(Establishment) Instrument, 2007 (LI 1893), specifies the electoral areas constituting the area of authority of the Kwahu South District Assembly and the First Schedule to the Local Government (Offinso North District Assembly)(Establishment) Instrument, 2007 (LI 1856), specifying the electoral areas constituting the area of authority of the Offinso North District Assembly.
[575] Report of the Parliamentary Committee to Investigate the Issues Surrounding the Apparent Difficulties of the Electoral Commission (EC) in Conducting the Originally Announced 28th December, 2010 District Assembly and Unit Committee Elections, 24th March, 2010.
[576] Section 1(2) of the Local Government Act, 1993 (Act 462).

in the district. That is a function reserved exclusively for the Electoral Commission.[577]

c. After the district has been created by the President based on the recommendations of the Electoral Commission, which recommendations would include the Minister for Local Government taking his turn to establish the local government structures, The Minister will declare the creation with the prior approval in writing of the Cabinet,[578] which is chaired by the President, the beneficiary of the recommendation of the Electoral Commission in these processes.
d. After the establishment of the structures of local government, the Electoral Commission returns to conduct election for those institutions.

193. The Commission observes that while these processes are interdependent and would require the cooperation of all of the relevant authorities, the respective roles of each authority are well set out. The EC should be the sole body responsible for the demarcation of electoral boundaries for national and local government elections. It would make practical sense to involve the Government Statistician in these processes because of her critical role as the generator and custodian of demographic and socio-economic data that would be important variables throughout the process of boundary demarcation.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

194. The Commission recommends that the respective roles of the EC, President, and the Minister for Local Government and Rural Development, to demarcate electoral boundaries for local government elections as well as create districts and establish District Assemblies, should be further clarified to remove any apparent conflict of roles.

195. The Commission recommends that the Electoral Commission and its sub-structures should be empowered to investigate incidents of electoral violence and electoral offences within the shortest possible period. The Commission accordingly recommends amendments to Regulations 13, 14 and 21 of the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12). The Commission further recommends consequential amendments to sections 27 to 42 of the Representation of the People Law, 1992 (PNDCL 284) as amended.

196. The Commission recommends that the EC should make regulations by a C.I. (modelled on the Political Parties Code of Conduct) to govern electoral campaigns including provisions on:
    a. A ceiling on financial expenses during the electioneering campaign as well a regular revision of the ceiling before every general election to reflect increasing or reducing inflation.

[577] Section 1(3) and (4) and section 2 of the Local Government Act, 1993 (Act 462).
[578] Section 3 of the Local Government Act, 1993 (Act 462).

b. A transparent mechanism for holding political parties accountable for campaign expenditure including mechanism for routine crosschecking of the returns of the expenditure and for publicity in the media of the returns filed.
c. The conduct of political parties during the electioneering campaign.
d. The conduct of the media during the electioneering campaign. This should be done on the advice of the National Media Commission.
e. Length of the official campaign period.
f. A moratorium on campaigning for a determined period immediately after national elections.
g. Prescribing severe penalties for the infringement of electoral laws.

197. Where necessary, the Representation of the People Law, 1992 (PNDCL 284) as amended and the Political Parties Act, 2000 (Act 574), may be amended to allow for the Electoral Commission to make effective regulations to cover the above areas.

198. The Commission recommends that the Political Parties Act be amended to include the IPAC mechanism for the self-regulation of political parties.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

199. The Commission recommends that cases of electoral violence be referred to Attorney-General for swift action.

200. The Commission recommends that the IPAC should develop formal rules to regulate its affairs, including a more robust schedule of meetings.

201. The Commission finally recommends that the season for political campaigning be closed from one month after elections to one year before the next election.

ISSUE TWO: ELECTORAL SYSTEM

A. DIMENSIONS OF THE ISSUE

202. Ghanaians expressed various views about the current electoral system and how to improve it. These may be summed up in the following questions:
a. Whether the proportional representation system should be adopted in place of the current system of absolute majority?
b. Whether the simple majority or first past the post system should be adopted in place of the current system?

c. Whether a presidential candidate must win the popular votes from a specified number of regions in a national election in order to be elected the President of Ghana?
d. Whether by-elections (to fill a vacancy in Parliament) should be scrapped?

B. CURRENT STATE OF THE LAW ON THE ISSUE

203. Ghana's electoral system is characterised by the following:
    a. Universal adult suffrage for citizens.
    b. Official registration of voters.
    c. Non-compulsory registration or voting.
    d. Secret ballot.
    e. Use of identity cards to establish voters' identity and to prevent impersonation.
    f. Registration of political parties as corporate bodies.
    g. Depoliticised local government elections.
    h. National and local government elections alternate at two-year intervals.
    i. A presidential election on the basis of absolute majority (where the winner requires more than 50% of the valid votes cast).
    j. Parliamentary and local elections on the basis of simple majority (first-past-the-post).
    k. No minimum voter turn-out required for presidential or parliamentary elections.
    l. Use of indelible ink (electoral stain) to prevent multiple voting.
    m. A permanent, independent and non-partisan Electoral Commission.[579]

204. This section of the report focuses on a narrow aspect of Ghana's electoral system: how the Ghanaian system translates actual votes won into political power – executive and legislative – and the mode of filling vacancies in Parliament. For reasons of convenience and the structure of the report, other aspects of the electoral system that received attention from Ghanaians in the review exercise have been discussed in chapters four and five of the Report on the Executive and the Legislature respectively.

205. The President of Ghana is elected by absolute majority in a single national constituency. In the entrenched provision of Article 63, the Constitution sets out in details how the winner of the presidential election should be determined. It specifies that the candidate must obtain more than 50% of the total valid votes cast at the election. The phrase "more than fifty percent" is understood as at least 50% plus 1 of the total valid votes cast. Article 63 further provides the mechanism for determining the winner of the presidential election where no candidate obtains the absolute majority of more than 50% of the total valid votes cast. The

[579] Friedrich-Ebert-Stiftung /Electoral Commission, "Ghana Elections 2008, Friedrich-Ebert-Stiftung, Ghana (2010).

mechanism involves multiple run-off elections between the candidates with the two highest numbers of valid votes cast until a winner emerges with an absolute majority.[580]

206. Article 63 envisages that there can be more than two candidates with the highest number of valid votes cast. It also envisages situations where two candidates repeatedly obtain the same number of votes in run-offs. It, accordingly, provides for a 90-day period within which to hold presidential elections to cater for the possible run-offs.[581]

207. For the purposes of parliamentary elections, the Parliament of Ghana is unicameral, composed of 230 members, each elected in a single seat constituency demarcated by the EC, each of which has a Returning Officer, appointed by the EC.[582] Parliamentary elections in Ghana are conducted on the basis of a simple majority system (first-past-the-post); a candidate who obtains the highest number of the valid votes cast in an election is declared elected.[583]

208. Where in a particular constituency election, there is equality of votes between any two or more candidates such that a winner can emerge only after the addition of a vote; the returning officer is required to certify that fact by endorsing the writ and forwarding it to the Electoral Commission. The Electoral Commission is then mandated to conduct a second election in the constituency between the candidates who obtained equal votes in the previous election. The second election must be conducted within 30 days of receiving the writ from the returning officer. The candidates who obtains the most valid votes cast is declared elected.[584]

209. The Constitution prescribes the manner in which a vacancy may be filled in Parliament in the non-entrenched provision of Article 112(5). The Electoral Commission is mandated to conduct a by-election within 30 days after a vacancy occurs. The winner of the by-election is declared in the same manner as described above.

C. SUBMISSIONS RECEIVED

210. The Commission received widely varied submissions on the issue which expressed the following:

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[580] Presidential Elections Act, 1992 (PNDCL 285) as amended by the Presidential Elections Act, 1996 (Act 520); and the Public Elections Regulations, 1996 (CI 15).
[581] Presidential Elections Act, 1992 (PNDCL 285) as amended by the Presidential Elections Act, 1996 (Act 520); and the Public Elections Regulations, 1996 (CI 15).
[582] Articles 93(1), 45(b) and 47 of the 1992 Constitution of the Republic of Ghana; Representation of the People (Parliamentary Constituencies) Instrument, 2004 (CI 46); the Representation of the People Act, 1992 (PNDCL 284) as amended; and the Public Elections Regulations, 1996 (CI 15) as amended by the Presidential Elections Act, 1996 (Act 520).
[583] Article 50 of the Constitution; Representation of the People Act, 1992 (PNDCL 284) as amended; and the Public Elections Regulations, 1996 (CI 15) as amended by the Presidential Elections Act, 1996 (Act 520).
[584] Section 40 of the Presidential Elections Act, 1992 (PNDCL 285) as amended by the Presidential Elections Act, 1996 (Act 520).

a. Some Ghanaians advocated the retention of the current mode of determining the winner of the presidential election because it has worked well and requires no overhaul. They further reasoned that the current system has an underlying utility in the sense that run-off elections afford Ghanaians the opportunity to unambiguously determine the winner of the election. Besides, by the requirement of an absolute majority, a President who commands more than half of the valid votes cast is assured of legitimacy.
b. Other Ghanaians advocated the retention of the absolute majority system, but with further qualification. This category of Ghanaians proposed that a successful presidential candidate must win the popular votes from a specified minimum number of administrative regions in Ghana. They argued that this will ensure that the President enjoys support across the entire country and not just in a few administrative regions which may be highly populated. They were deeply concerned that it may be possible for a successful presidential candidate to satisfy the absolute majority requirement by winning the popular votes from only 2 or 3 out of the 10 administrative regions in Ghana. They mentioned Greater Accra, Ashanti and Eastern Regions as examples because of the urban concentration in these regions.
c. On the other hand, there were still some Ghanaians who totally rejected the absolute majority system. A section of this group of Ghanaians contended that the proportional representation system should be adopted to replace the absolute majority system. They argued that:
    i. It is a better way of ensuring the representation of smaller parties and vulnerable and minority groups, as well as advancing special and progressive interests such as social intervention policies and environmental policies.
    ii. By guaranteeing multiple winners in the elections the system facilitates the formation of an all-inclusive government and skirts the problems associated with the winner-takes-all absolute system including the tension, acrimony, and conflicts associated with the electioneering process.
    iii. The absolute majority system and its attendant run-offs are expensive.

d. The second group of Ghanaians who totally rejected the absolute majority system proposed that in its place, the simple majority system should be adopted. They gave similar reasons as those given by proponents of the proportional representation system, namely that:
    i. The simple majority system guards against the tension, anxiety and antagonism associated with run-offs. Their main concern was that these negative characteristics of the absolute majority system disrupt the economy and the society considerably.
    ii. The simple majority system is less prone to corruption, unlike run-off elections.

iii. It is cost saving to both the government and the electorate who have to travel back and forth between their polling stations (sometimes in their hometowns), and their places of residence in urban areas.

e. In relation to the by-election as a method of filling vacancies in Parliament, there were some Ghanaians who advocated that it should be scrapped as an electioneering process. They proposed that in place of by-elections, the party of the previous Member of Parliament should select a new person to replace the old one. They supported this submission with the following reasons:
   i. By-elections are expensive.
   ii. By-elections waste resources since the same party usually wins the seat.
   iii. By-elections create unnecessary tension in the constituency.
   iv. Ghana should avoid the violence associated with by-elections.

f. A few other Ghanaians took a compromise stance and proposed the retention of by-elections for only independent candidates. Their reasons for the rejection of by-elections for the generality of party-sponsored Members of Parliament were the same as the reasons advanced by those who totally rejected it. Proponents of this position recognised that in the case of independent candidates, vacancies could not be filled by the nomination of a candidate by a political party.

g. There were other submissions advocating the retention of the current mode of filling vacancies in Parliament in between elections. The reasons were generally that:
   i. In the case of independent candidates, vacancies cannot be filled by the nomination of a candidate by a political party.
   ii. Ghanaians vote for their Members of Parliament based on their competence, not necessarily because of the MPs' political affiliations.
   iii. By-elections facilitate development in the constituencies; during campaign periods for by-elections political parties, particularly the ruling party, focus more attention on the relevant constituency with the hope of winning more votes. They undertake more development projects in the communities than they would otherwise initiate if there were no by-elections.
   iv. A by-election allows the majority of the people in the constituency to determine who should be their Member of Parliament.

D. FINDINGS AND OBSERVATIONS

211. The Commission observes that in terms of how actual votes won are translated into political power around the world, there are several electoral system variations in the world. About 12

different variations have been identified and grouped into three main families: the Plurality/Majority System; Proportional Representation System; and Mixed Systems.[585]

212. The Commission observes the following description of the Plurality/Majority System given by the Committee of Experts that Drafted the 1992 Constitution: "[u]nder this system every adult citizen of sound mind has one vote, which he or she may cast for only one out of a number of competing candidates. And the candidate who receives the highest number of votes is declared the winner."[586]

213. The Commission observes that the manner in which the majority requirement is met varies widely across the world. Five different forms of the Plurality/Majority System have been delineated namely: the First Past The Post (FPTP); the Block Vote (BV); the Party Block Vote (PBV); the Alternative Vote (AV); and the Two-Round System (TRS). These have also been described as follows:

    a. "In an FPTP system (sometimes known as a plurality single-member district system) the winner is the candidate with the most votes but not necessarily an absolute majority of the votes. When this system is used in multi-member districts, it becomes the Block Vote. Voters have as many votes as there are seats to be filled, and the highest-polling candidates fill the positions regardless of the percentage of the vote they achieve. This system, with the change that voters vote for party lists instead of individual candidates, becomes the Party Block Vote.
    b. Majoritarian systems, such as the Alternative Vote and the Two-Round System, try to ensure that the winning candidate receives an absolute majority (i.e. over 50%). Each system in essence makes use of voters' second preferences to produce a winner with an absolute majority if one does not emerge from the first round of voting."[587]

214. The Commission observes that the Proportional Representation System is one that draws strong congruity between a party's share of the vote and its share of the seats in Parliament. Thus, the rationale underpinning all Proportional Representation systems is said to be "to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats." [588] Thus, "if a major party wins 40% of the votes, it should win approximately 40% of the seats, and a minor party with 10% of the votes should also gain 10% of the legislative seats."

[585] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd?toc, (last visited July 16, 2011).
[586] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, paragraph 195, (July 31, 1991).
[587] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).
[588] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).

215. The Commission further observes that illustrating this utility of the Proportional Representation system with the distribution of parliamentary seats in the 1979 general elections, the Committee of Experts that drafted the 1992 Constitution gave the following analysis:

> "If parliamentary seats had been distributed proportionally – i.e. in proportion to the votes cast, the final results of the 1979 general elections would have been: PNP – 53 instead of 71 seats; PFP – 45 instead of 42 seats; UNC – 25 instead of 13 seats; and ACP – 13 instead of 10 seats. No party could have formed a majority in parliament without a real coalition of the major parties."[589]

216. The Commission observes that the Proportional Representation system differs in its operation around the world. The Commission recalls in this regard, two types identified by the Committee of Experts that drafted the 1992 Constitution: the List System, by which parties nominate and present lists of candidates in multi-member districts. The voters cast their ballots for one party list or the other. Parliamentary seats are allocated to the party list in proportion to the number of votes they have received. The other type of Proportional Representation is the Single Transferable Vote (STV), which differs from the List PR in that the voters vote for individual candidates instead of the party lists by rank-ordering the candidates in multi-member districts.[590]

217. The Commission observes that the Mixed Electoral Systems combine the advantages of the Plurality/Majority and Proportional Representation electoral systems. As the name suggests, the Mixed System involves two electoral systems (with different formulae) running alongside each other. The votes are cast by the same voters and contribute to the election of representatives under both systems – the plurality/majority system (the first past the post system) and the List Proportional Representation system. The Commission observes that there are 2 forms of the Mixed System. There is the Mixed Member Proportional, which links the results of the plurality/majority system, and the List Proportional Representation system. The voters usually retain the ability to vote and elect a parliamentary candidate with the highest number of votes cast; the single-member district/constituency system is retained. The other parliamentary seats are then distributed among the parties by the Proportional Representation system to compensate for any disproportionality. The number of seats allocated each party depends on the proportion of the total number of votes cast in the

[589] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 207 to 208; In the 1979 Elections, Dr. Hilla Limann's People National Party (PNP) received 645,080 votes; Mr. Victor Owusu's Popular Front Party (PFP) won 541,659 votes; Mr. William Ofori-Atta's United National Convention (UNC) secured 310,062 votes; and Col. Bernasko's Action Congress Party obtained 156,484 votes.

[590] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 209 to 208; ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd02 (last visited July 16, 2011).

election that each party obtains. Where the plurality/majority system and the List Proportional Representation are not linked and dependent on each other for seat allocations, that system is referred to as a Mixed Member Parallel.[591]

218. The Commission further observes that the Plurality/Majority System is associated with the Anglo-American political tradition, while the Proportional Representation System is a continental European political tradition.[592] In this regard, the Commission further observes that there are about 91 countries in the world (including Canada, the United States of America, the United Kingdom, Côte d'Ivoire, Nigeria, Tanzania, and Uganda) operating the Plurality/Majority System in its variant forms, making it the most common electoral system internationally.[593] The Proportional Representation is practised in about 72 countries including Luxembourg, Netherlands, Sweden, and Switzerland, Malawi, South Africa, and Mauritius, while another 30 countries including Senegal, Germany, and Russia.[594]

219. The Commission finds that Ghana's electoral laws place the country squarely among the group of 91 countries operating the Plurality/Majority System. The Commission further finds that Ghana practises 2 variants of the Plurality/Majority System, namely: the Two/Multiple-Round Absolute Majority System for the presidential election,[595] and a Two-Round Single Member Constituency/First Past the Post system for parliamentary elections.[596]

220. The Commission observes that the Ghanaian presidential electoral experience has evolved under the various Republican Constitutions. Under the 1960 Constitution, the President was elected by Members of Parliament by obtaining more than one-half of the votes by Members of Parliament.[597] Under the 1969 Constitution, the President was elected by obtaining at least one-half of the total number of votes of the Presidential Electoral College established under that Constitution.[598] The 1979 Constitution of Ghana was the first attempt by Ghanaians at direct presidential elections in the country. The President was elected after obtaining more than 50% of the total number of valid votes cast at the election.[599] This arrangement was

[591] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 194.
[592] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 194, 207 and 209.
[593] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).
[594] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).
[595] Article 63 of the 1992 Constitution of the Republic of Ghana. Presidential Elections Act, 1992 (PNDCL 285) as amended by the Presidential Elections Act, 1996 (Act 520); and the Public Elections Regulations, 1996 (CI 15).
[596] Articles 50, 45(b), 47 and 93(1) of the 1992 Constitution of the Republic of Ghana. Representation of the People (Parliamentary Constituencies) Instrument, 2004 (CI 46); the Representation of the People Act, 1992 (PNDCL 284) as amended; and the Public Elections Regulations, 1996 (CI 15) as amended by the Presidential Elections Act, 1996 (Act 520); in particularly section 40 of the PNDCL 285 as amended.
[597] Article 11(2) of the 1960 Constitution of the Republic of Ghana.
[598] Article 41(6) of the 1969 Constitution of the Republic of Ghana.
[599] Article 50(3) of the 1979 Constitution of the Republic of Ghana.

adopted by the Committee of Experts which drafted proposals for the 1992 Constitution.[600] The Consultative Assembly's Committee on Powers of Government stated thus:

> "the election of the holder of such high office [i.e. President] ... should be on the terms of universal adult suffrage at every stage. Such a person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than 50% of the total number of valid votes cast at the election. [And even if there should be only one presidential candidate resulting from any withdrawal, the Committee decided that] there shall still be a presidential election and the presidential candidate shall be declared elected if he obtains more than 50% of the votes cast."[601]

221. The Commission observes proceedings of the Consultative Assembly, during which a member sought an amendment of the 'more than 50% formula' to ensure regional balance. He suggested that the President must win at least 5% of the valid votes cast in each region and the sum of all votes cast in his favour must be more than 40% of the total valid voters in Ghana.[602] He argued that such a mechanism will ensure that political parties are national in character.[603] The proposed amendment was not seconded and lapsed accordingly. Another member later proposed the following amendment: "not less than thirty three one third per centum of the total votes cast in each of at least six regions of the country and more than 50% of the total votes cast at the election."[604] The proposed amendment was to avert a situation where a President secures more than 50% of the votes cast without covering a majority of the regions. This amendment was lost by an overwhelming consensus to the contrary.[605]

222. The Commission further observes that in rejecting the proposed amendment, members of the Consultative Assembly generally emphasised the national, and not regional, character of the Presidential elections and the need to promote the unity of the nation by deemphasizing regional differences. The Assembly noted: "We are in for a unitary form of government and, therefore, to create a situation where you have the President gaining majority in the Regions would exacerbate the feeling of regionalism and ethnicity."[606] Other members who opposed the amendment cited similar reasons and added that the proposed amendment would unnecessarily complicate the electoral system.[607]

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[600] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 31.
[601] Official Report of the Proceedings of the Consultative Assembly, (Tuesday 14th January 1992, Col. 1385-1386).
[602] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1517).
[603] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1515-1516).
[604] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1518).
[605] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1524-1525).
[606] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992 ,Col. 1522).
[607] Official Report of the Proceedings of the Consultative Assembly, (Friday 17th January 1992, Col. 1523-1524); Article 138(4) of the 2010 Constitution of Kenya, however, requires that for a candidate to be declares elected as the President of Kenya, the candidate must receive (a) more than half of all the votes cast in the election; and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties. There are 47 administrative counties in Kenya; equivalent to Ghana's 270 districts.

223. The Commission similarly observes that in resolving the issue whether "Ghana should retain the plurality single-member district system of electing the members of Parliament or consider an alternative electoral system, namely, Proportional Representation";[608] the Committee of Experts that drafted the proposals for the 1992 Constitution observed at paragraph 203 that:

> "In the Ghanaian context, the real problem with retaining the plurality system is the tendency towards the concentration of executive powers in a cabinet composed primarily or exclusively of the members of the party which won most seats, but usually not on the basis of an overwhelming majority of the total votes cast. What the 4th Republic should avoid is a one-party, bare-majority executives, which contrast with the consensual pattern of the sharing of executive power among *all* the major parties represented in the legislature" (Emphasis is the Committee of Experts').

224. The Commission further observes that the Committee of Experts recognised that in a country like Ghana with a large illiterate population and limited resources, the Plurality/Majority System may have "a great deal to commend it"[609] However, after elaborately analysing the merits[610] and demerits[611] of the Plurality/Majority System vis-à-vis Proportional Representation and outlining some varieties of both systems; [612] the Committee of Experts mooted the idea of the possible adoption of a kind of the Mixed Electoral System, the Additional Member System (AMS), as practised in the former West Germany.[613] Under the system proposed, half of the Members of Parliament would have been elected from single member constituencies (as currently practised). The remaining half would have been elected based on Proportional Representation of votes cast for them as parties in the election.[614]

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[608] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 193.

[609] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 196.

[610] The merits included that: it provides for a stable and workable government; it provides in the waiting, an alternative government capable of being strong and stable; and it is simple and inexpensive; Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 195 to 208.

[611] The demerits of the Plurality/Majority identified included that: it leaves large minority parties unrepresented; the person elected might not necessarily represent the interest of a large body of persons in that constituency; minority interest is often not represented by such a system; and it tends to establish two major parties which wield power to the exclusion of smaller parties; Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 195 to 208.

[612] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 195 to 208.

[613] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 210 to 217.

[614] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 210 to 217.

225. The Commission also observes that the Committee of Experts which drafted the proposals for the 1992 Constitution pointed to the following advantages of the AMS: it combines the advantages of both the Plurality/Majority and Proportional Representation Systems; it encourages parties to select as possible additional members persons representing special skills or interests or groups, such as the academia, and farmers, whose presence in Parliament may be beneficial, but who may not be able to win elections as candidates; it ensures that party representation is spread equitably; it encourages an efficient grass root party organisation to ensure mobilising as many voters across as many district/constituencies as possible; and finally it encourages parties to focus on national unity.[615] The Committee of Experts, however, cautioned that while the AMS could provide a viable alternative to either a purely Plurality/Majority System or a purely Proportional Representation System, the AMS proposed "would require further study given its newness to the Ghanaian electorate."[616] The Committee of Experts concluded that Ghana "could profit from the expert advice from countries which have actually experienced ... the system."[617]

226. The Commission observes that as evident in the final Constitution – the 1992 Constitution[618] the members of the Consultative Assembly and the people of Ghana at the 1992 referendum opted to retain the plurality single-member district system of electing the Members of the Parliament (the first past the post system).

227. The Commission further observes that there exist different methods for filling a vacant parliamentary seat:[619]
    a. The List Proportional Representation Systems, for instance, would simply fill it with the next candidate on the list of the party of the former representative. This eliminates the need to hold another election.
    b. The Plurality/Majority Systems mostly have provisions for filling vacant seats through by-elections.
    c. Other electoral systems make use of one or the other of the two methods above. In the Republic of Ireland, for instance, where the Single Transferable Vote operates, by-elections are held for vacant seats in the Irish Parliament. Australia, however, does not do so for Senate vacancies.
    d. In Bolivia, by-elections are avoided by electing alternates at the same time as the substantive representatives.

[615] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 210 to 217.
[616] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 220.
[617] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 220.
[618] Articles 50, 45(b), 47 and 93(1) of the 1992 Constitution of the Republic of Ghana.
[619] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).

228. The Commission also observes that, while by-elections may be smaller in terms of coverage and therefore less expensive than general elections, they can "nevertheless put a significant burden on the budget",[620] for which reason "seats are sometimes left vacant for long periods because of a lack of capacity to arrange by-elections."[621] In the case of Ghana, the experiences of the Atiwa Constituency re-run election in August, 2009 and Chereponi by-election later in the same year show that the acrimony and tension associated with a by-election can have serious security implications and put considerable strain on the peace and tranquillity in the country.[622]

229. The Commission finds that in deciding which electoral system to recommend, the submissions and concerns of Ghanaians reveal the following 8 themes and competing factors:
    a. The accountability factor: that the electoral system is one which produces a government that can be held accountable to the electorate to the highest degree. Ghanaians are less desirous of a system which makes it difficult for them to change the ruling government when they desire change. Similarly, Ghanaians generally prefer a system which guarantees the opportunity to assess their representatives in Parliament effectively and vote them out for whatever reason they may deem fit.
    b. The cost factor: that the electoral system is suitably designed to be simple and cost effective. Ghanaians prefer a system that is financially and administratively sustainable.
    c. The legitimacy factor: that the electoral system must be one which should guarantee the legitimacy of political power by ensuring that a successful candidate has the support of as many qualified voters as possible from all parts of Ghana, and that the system enhances the unity of Ghana.
    d. The inclusiveness factor: that the electoral system should be one which fosters tolerance and compromise, by creating a fair political system/government which gives all parties and interest groups the opportunity to participate in decision making, reflective of their share of actual votes won. Ghanaians do not desire a system which gives a high perception that their vote makes no difference to the way the country is governed. Rather, they prefer a system that motivates them to participate in the electioneering process. They prefer an inclusive government, as opposed to a winner-take-all attitude, by which the government in power tends to ignore opposing views. The degree of inclusiveness required need not necessarily be met by the

[620] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esf/esf06?toc (last visited July 16, 2011).
[621] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esf/esf06?toc (last visited July 16, 2011).
[622] Ghana Centre for Democratic Development (CDD-Ghana), *"The Akwatia and Chereponi Elections –The Unlearned Lessons"* in *Democracy Watch*, Vol, 8 No. January to June, 2010, (July 15, 2011 11: AM) http://76.12.238.52/documents/D-%20Watch%2029%20&%2030.pdf.

appointment of opposition members into government, even though that may be desirable. The degree of inclusiveness is satisfied so long as the government has a listening ear and gives due regard to opposing views expressed by the minority in Parliament, Civil Society Organisations, and the general public.

e. The stability factor: that the electoral system should ensure a political system/government that is stable and less prone to dissolution. Ghanaians desire a system which produces a government capable of assembling a working majority in Parliament in order to avoid complexities in government business and in order to be able to make laws to govern. Ghanaians generally point to the closeness of results in the 2008 elections and the very high possibility of having a minority party in Parliament having executive power at the same time; the concept of "skirt and blouse voting"[623] under the current constitutional dispensation, and the rejection of government budget under the Third Republican Constitution.
f. The tension factor: that the electoral system must be one which is not divisive or prone to tension, conflict and acrimony. It should be one that serves as an effective conflict management mechanism, rather than exacerbating discord.
g. The political-party factor: that the electoral system be so framed as to make parties more national-oriented and not ethnically, regionally, linguistically exclusive. Ghanaians desire a system which will guarantee the development and growth of political parties based on broad values and principles rather than narrow ethnic, racial or regional considerations. Ghanaians want the programmes, activities and manifestos of political parties to lessen the threat of conflict and reflect national opinion rather than predominantly sectarian or regional interest or concerns.
h. The viable opposition factor: that the electoral system must be suitably designed to ensure a realistic alternative government capable of being strong and stable. Ghanaian prefer a system which ensures a viable opposition capable of commanding a sufficiently large working minority in Parliament to be able to reach consensus with other parties in Parliament (majority inclusive), so as to strengthen Parliament and increase its capacity to scrutinise government business and ensure that policies by the executive are in the national interest. In this regard, Ghanaians also desire a system that would enhance the growth of smaller parties, rather than dwarfing them; they desire a competitive party system.

230. The Commission further finds that no single electoral system will satisfy all of the factors listed, as some of them are mutually exclusive. In this sense the Commission recalls General Comments No. 25[57], by the Human Rights Committee of the United Nations and notes that there is no international legal stipulation that a particular kind of electoral system is preferable to another. What is of essence is that any operating system must guarantee and

[623] "Skirt and blouse voting" is a term commonly used in Ghana to refer to the practice of voting a presidential candidate belonging to one party and a parliamentary candidate belonging to a different party.

give effect to the free expression of the will of the electors and must ensure the principles of free, fair and periodic elections that guarantee universal adult suffrage, the secrecy of the ballot and freedom from coercion and a commitment to the principle of one person, one vote.[624]

231. The Commission finds, in the light of these factors and themes, that it would be undesirable to recommend the simple majority system for Ghana's presidential election. While that system may be less expensive because it eliminates the possibility of run-offs, it is not prudent because Ghana may be saddled with a situation where a presidential candidate who obtains only 30%, 20%, or even 10% of the valid votes cast, may become President. At all cost, the person elected as the President of Ghana must be assured of legitimacy and must command the support of the majority of Ghanaians who exercise their franchise.

232. The Commission, similarly, finds it undesirable to recommend that for a presidential candidate to be declared elected, he or she must win a specified percentage of the votes cast from a specified minimum number of administrative regions. The main concern of those advocating that requirement is to avoid situations where the success of the winning candidate is on account of votes from regions with particular ethnic concentrations or ethnic bloc voting. While the principle of preventing ethnic bloc voting is acceptable, the Commission observes that there are adequate constitutional and statutory provisions to address such concerns.[625] For instance, a political party that is adjudged to be ethnically oriented cannot be registered in Ghana and may arguably be de-registered.

233. The Commission, at any rate, observes that Ghana is a unitary state and is divided into regions purely for administrative convenience. Linguistic, cultural, and ethnic considerations are not necessary considerations for regional demarcation, which would otherwise justify the proposal. Ghana being a unitary state, one of the fundamental principles of this review is that every recommendation must promote the unity and cohesion of the nation by de-emphasising the ethnicity and polarisation of the State.

234. The Commission observes that the concern of some proponents of this requirement is that, it is currently possible for a successful presidential candidate to satisfy the absolute majority requirement by winning the popular votes from less than half of the 10 administrative regions in Ghana. Any attempt at subjecting the winning of a presidential election to winning the ballot in a number of regions irrespective of the number of votes that may be necessary to guarantee the candidate more than 50% of the valid votes cast would amount to weighing some votes more than others and defeat the principle of one person, one vote.

[624] Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add. 7 General Comment No. 25, 57th Sess. (July 12, 1996), paragraphs 20 and 21.
[625] Article 55(7) of the Constitution. Sections 8(4), 9, 12, and 31 of the Political Parties Act, 2000 (Act 574).

235. The Commission finds that scrapping by-elections could make addressing a situation where a vacancy in Parliament is created by the death or resignation or removal from office of an independent Member in Parliament tricky. It would also be improper and undemocratic, under a plurality single-member constituency system, to allow parties to impose their choice of parliamentarian on a constituency without resorting to the constituents. At all cost, all qualified persons in the constituency who wish to exercise their franchise in electing a new Member of Parliament must be allowed to do so.

236. The Commission finds wisdom in the position taken by the Committee of Experts that drafted proposals for the 1992 Constitution that the proportional representation system is underpinned by salutary and acceptable principles. It facilitates the growth of smaller political parties, grows issue-based parties and allows of the representation of minority and vulnerable groups. It guarantees the adoption of sets of consensual rules that ensure that leaders are chosen on regular, meaningful, free and truly competitive basis; which ultimately guarantee an all-inclusive government.[626] The Commission, while observing that these principles are acceptable, also finds that there have been no serious defects which would justify a total overhaul of the current system. The Commission finds that the plurality single-member constituency system currently practised in Ghana also satisfies the competing factors and themes informing the submissions and concerns of Ghanaians in acceptable proportions.

237. The Commission particularly finds that the Ghanaian plurality single-member 230-constituency system, albeit non-proportional, has evolved different aspects over the past 19 years, which makes it a unique variant of the Plurality/Majority System; adopting various elements of, and approximating towards the Proportional Representation System. In doing so, the Ghanaian system adopts different aspects of the advantages of the PR System, and also skirts some of the disadvantages of majoritarianism:[627]

    a. First, the Ghanaians plurality single-member 230-constituency system has tended to give relatively proportional overall results. To take the 2008 general elections for instance, the New Patriotic party won 46.93% (107) of the 228 parliamentary seats declared with 49.13% of the popular votes at the 7th December polls. The National Democratic Congress won 50% (114) of the seats with 47.92% of the popular votes. The People's National Convention won 0.88% (2) of the seats with 0.87% of the popular votes. The Convention People's Party won 0.44 (1) of the seats with 1.34% of the popular votes.[628]

[626] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 195 to 208.
[627] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 193 to 220.
[628] These are certified parliamentary election results for 228 constituencies as posted on the website of the Electoral Commission at http://www.ec.gov.gh/node/134, (last visited July 16, 2011).

b. No one single party has dominated the political landscape under the 1992 constitutional dispensation, which would otherwise justify the adoption of the proportional representation system. Two out of the 5 elections held under the Constitution (2000 and 2008) resulted in a political turnover, involving switches in positions of the sitting government and the largest opposition party (the National Democratic Congress and the New Patriotic Party). The exclusion of the members of one of these parties from the government of the other party has, accordingly, caused no serious problem requiring a dramatic overhaul of the electoral system. At any point in time, each of these two parties has a reasonable chance of winning the next election.[629] Besides a party in opposition is able to assemble a sufficiently large representation in Parliament to be able to influence the policies of government sufficiently. The results of the 2008 parliamentary elections illustrate this point.[630]

c. While the "two-party dominance" of the political landscape is admittedly a disadvantage of the Plurality/Majority System, it is noteworthy that since 1993, ruling parties have generally undertaken deliberate measures to minimise the effect the "two-party dominance" by the inclusion of the smaller parties in their governments.

    i. In 1993, the National Democratic Congress (NDC) formed the government with two smaller parties (Every Ghanaian Living Everywhere (EGLE), and the National Convention Party (NCP)) under the Progressive Alliance. The Vice President then (Ekow Nkensen Arkaah of blessed memory) was a member of the National Convention Party. The New Patriotic Party, withdrew from the December 1992 parliamentary elections.

    ii. In 2001, the New Patriotic Party included in its government (up to cabinet level) members of the Convention People's Party and the People's National Convention. This was sanctioned by the smaller parties.

    iii. In 2009, the National Democratic Congress also included members of other smaller political parties in its government.

    iv. Since 2001, the smaller political parties have generally sat with the majority in Parliament. Ostensibly in return, some members of the smaller parties have been appointed to hold various ministerial and other positions.

238. The Commission finds that these developments appear to disclose an evolving pattern and that it should be left to political expediency to work out a constitutional convention to deal with the issues envisaged rather than overhauling the Constitution to adopt the proportional

[629] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 197 where the Plurality/Majority System is criticised as perpetuating a principle of exclusion.
[630] ELECTORAL COMMISSION, http://www.ec.gov.gh/node/134 (last visited on 16th July, 2011).

representation system. Admittedly, this may, have the disadvantage of disabling the smaller parties from growing and developing their own institutional profile and from providing a formidable alternative to the two big parties, but it is still not a compelling factor to warrant an overhaul of the current system.

239. The Commission further finds that, whether in terms of legitimacy or public trust and confidence or such other considerations, there has been no crisis of such threatening proportions associated with the current plurality single-member 230-constituency system as to warrant major changes; the current system has generally served Ghana well.

240. The Commission once again finds wisdom in the stand of the Committee of Experts that drafted proposals for the 1992 Constitution that it may be desirable to conduct an elaborate study, for the purposes of future reform, to ascertain how the Mixed Electoral System – in particular, the Mixed Member Proportion – may be a viable alternative to the current plurality single-member 230-constituency system vis-à-vis Ghana's political and economic development and socio-cultural conditions.[631]

241. The Commission finds the following general statements noteworthy:[632]
    a. The trends show that where countries have changed electoral systems, they have done so in the direction of more proportionality, either by adding a Proportional Representation element to a plurality system – making it a Mixed Parallel System or Mixed Member Proportional System – or by completely replacing their old system with List Proportional Representation.
    b. The most common switch has been from a plurality/majority system to a mixed system.
    c. There is not one example of a change in the opposite direction.

242. The Commission finds wisdom in the position of the EC that if District Assembly elections were to be open to political party participation, then the most desirable electoral system would be the Mixed Member Proportional. The EC explained that, under this system:
    a. The plurality single-member electoral area system will be retained; assembly men and assembly women for these areas will still be elected on the basis of simple majority/ first past the post.
    b. The power of the President to appoint 30% of the members of the Assembly of each district will be scrapped.

[631] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 220.
[632] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esb/esb06?toc (last visited July 16, 2011).

c. In its place, the additional members will be distributed among the parties on the basis of the Proportional Representation System.
d. Any lists of candidates presented for the purposes of the Proportional Representation System could still be prepared in consultation with traditional authorities and various interest groups in a district and must necessarily include women placed highly on the lists.

243. The Commission observes that the participants at the National Constitution Review Conference recommended the retention of the Two/Multiple-Round Absolute Majority System for the presidential election: that a successful presidential candidate must obtain more than 50% of the valid votes cast and that there should be no further qualification requiring the successful candidate to win the popular votes in any specific number of administrative regions. The participants, however, recognised the utility of the Proportional Representation System, and were not averse to some form of hybrid between that system and the current plurality single-member constituency system of electing the members of Parliament. The participants called for the retention of by-elections as a method of filling a vacancy in Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

244. The Commission recommends that the Electoral Commission should take steps to undertake an elaborate study to ascertain how the Mixed Electoral System, a type of Proportional Representation, might be a viable alternative to the current plurality single-member 230-constituency system for parliament and for the system that is practiced in local level elections.

ISSUE THREE: TIMING OF NATIONAL ELECTIONS

A. DIMENSIONS OF THE ISSUE

245. Ghanaians expressed their concerns variously on the issue. These included the questions: whether the convention of holding presidential and parliamentary elections together on the same day should be continued or discontinued; whether the conventional 7th December date for national elections should be changed; whether the date for national elections should be made a holiday; and how to set election dates the better to manage the transition between two successive governments.

B. CURRENT STATE OF THE LAW ON THE ISSUE

246. The Constitution does not provide a specific date for holding presidential and parliamentary elections. The Constitution rather specifies the period within which the elections should be

held. The entrenched provision of Article 63(2)(a) provides that the presidential election should not be held earlier than 4 months prior to the expiration of the President's term of office and not later than 1 month before the expiration of that term. This implies a 3-month period – any time from 7th September to 7th December of the election year – within which to conduct the presidential election.

247. In any other case where the President is not in office, the entrenched provision of Article 63(2)(b) requires that the election of the President must be held within 3 months of the office becoming vacant. The circumstance envisaged here is explained in the entrenched provision of Article 60(13) as the situation where the Speaker of Parliament assumes the office of the President as a result of the death, resignation or removal from office of the President and the Vice President.

248. The period for holding the parliamentary elections is specified in the non-entrenched provision of Article 112(4) of the Constitution. By its operation, parliamentary elections are to be held within 30 days before the expiration of the 4-year life span of a sitting Parliament. By implication, parliamentary elections can be held any time from 7th December to 6th January.

249. Thus, by this constitutional arrangement, presidential and parliamentary elections need not necessarily be held on the same day, even though that is possible and may be desirable. The power to fix the actual date for national elections is vested in the Electoral Commission.[633] Beginning with the 1996 elections, the Electoral Commission decided to hold the presidential and parliamentary elections together on the same day. It was so decided to save cost and to guard against the bandwagon effect – the tendency for people to vote on the winning side. The only date that made it possible for the two elections to be held together and satisfy the constitutional provisions on both elections was 7th December, 1996. Since then, the election date of 7th December of the election year has evolved as a constitutional convention.

250. The law neither provides for a transition period between two successive governments, nor does it provide for a transitional process. In practice, serious issues relating to transition between governments have come up when there is a switch in government with respect to different political parties.

C. SUBMISSIONS RECEIVED

251. The Commission received a very wide range of submissions on the issue.
    a. First, there were those who called for the retention of 7th December as the date for presidential and parliamentary elections.

[633] Article 51 of the 1992 Constitution of the Republic of Ghana.

i. There were some proponents who simply did not find any problem with that date. There were others who reasoned that increasing the transition period would be problematic for unearthing the misdeeds of previous governments. Closely related to this reasoning was the contention that one month is long enough for any transition. Thus, for these Ghanaians, the 7th of December election and 7th January handing over dates are good enough.
ii. There was still another group of proponents who called for the retention of the 7th December date for national elections on the basis that it coincides with the period during which people usually travel to their home-towns/constituencies for the Christmas and the New Year festivities. Thus, for the very many Ghanaians who reside in urban areas but vote in their hometowns 7th December is most suitable and fits their travel itinerary.

252. While maintaining that December should remain the election month, a few people, advocated the changing of the actual date to some other day in December.

253. There were related submissions by which Ghanaians simply called for an increase in the transition period between the dates for national elections and handing over. These submission were virtually the same, in terms of reasoning, to other submissions advocating holding of the presidential and parliamentary elections together on the same day, but during some month earlier than December – November, October, September or earlier. The reasons given included the following: to afford adequate time for a smooth transition and to provide ample time for run-offs, should the need arise. It was also argued that the current date adversely affects the celebration of Christmas and New Year in the sense that people are unable to enjoy these festivities especially when there is a run-off. The tension and acrimony associated with elections in general and run-offs in particular were identified as the major factors.

254. The Commission still received a few submissions which suggested different means of arriving at a smooth transition and to providing ample time for possible run-offs. They proposed that the 7th of December general elections date should be maintained, but called for an extension of the date for handing over beyond 7th January.

255. On the other hand, there were submissions which simply opposed increasing the transition period on grounds similar to proposals for the retention of the 7th December election date – that politicians may cover up their corrupt activities if given more time.
256. There were other submissions which opposed the convention of holding presidential and parliamentary elections together on the same day. For some of the opponents of this convention, conducting parliamentary elections before the presidential election would be a good practice because it would give a strong indication as to which presidential candidate to vote for – the candidate whose party has the majority in Parliament as this will promote

development. Other opponents of the convention considered holding the two elections together as too cumbersome for the Electoral Commission.

257. The Commission also received different variations of submissions made with the aim of improving voter turnout. The first of these were submissions which specified the day of the week on which to conduct general elections. Except for weekends, each day of the week received some mention. It was argued that conducting elections on weekends disrupted religious and funeral activities. There were other submissions that called for an increase in the voting time to ensure that as many Ghanaians as possible are able to exercise their franchise. There were still other submissions calling for the election day to be made a holiday so as to improve voter turn-out and enable many Ghanaians to exercise their franchise.

258. Still on the day on which to conduct general elections, there were a few submissions that differed as to whether the law should specify a particular date (for example 7th December), or day (for example the first Tuesday of November). Some submitted that there should be specified a particular date. Others contended that the law should only specify a day, while a third group maintained that it would be enough to simply specify the period within which to hold elections.

259. The final category of submissions proposed the establishment of an effective mechanism for managing the transition between two successive governments. There were those who called for the establishment of an independent body, bi-partisan in nature, to deal with transitional matters and to: hold the out-going government accountable; ensure a comprehensive transition; and reduce the tensions associated with transition. It was also proposed that an Act of Parliament should be passed to deal with transitional matters as this would ensure an organised transition process.

D. FINDINGS AND OBSERVATIONS

260. The Commission observes that it is very common around the world to have just one election day for both presidential elections and elections of members of various legislatures. The Commission will cite two examples:
    a. In the United States, for instance, the election dates for the Presidency[634] and congressional elections[635] are set uniformly for all states[636] to coincide on the Tuesday after the first Monday in November. By this arrangement, elections for the US Congress can be conducted from 2nd November through to 8th November. This

[634] 3 U.S.C.A. § 1.
[635] 2 USCS 7, 2 USCS 1; US Supreme Court Case of *Foster* v. *Love*, 522 U.S. 67.
[636] Article II § 1, cl. 4 of the U.S. CONSTITUTION provides that "Congress may determine the time of choosing the Electors, and the day on which they shall give their vote; which day shall be the same throughout the United States." *George W. Bush and Richard Cheney* v. *Albert Gore, Jr. and Joseph Lieberman*, 531 U.S. 98 (2000).

Federal Election Day is specified as a holiday by some states including New York and New Jersey, while for others like California, workers are simply allowed to take time off work to exercise their franchise without the loss of pay.

b. Similarly in Kenya, the general election of Members of Parliament is held on the second Tuesday in August in every fifth year.[637] The election of the President of Kenya is held on the same day as a general election of Members of Parliament.[638]

261. The Commission also observes that for very populated democracies, elections are required to be held over a period of time. Indian elections, for instance, are held over a period of 4 weeks.[639] There are still others like Nigeria, which holds presidential and parliamentary elections on different days. A Nigerian presidential election is required to be held on a date determined by the Independent National Electoral Commission (INEC), except that an election to the office of the President must be held on a date not earlier than 60 days and not later than 30 days before the expiration of the term of office of the last holder of that office.[640] Elections to the House of the National Assembly[641] are held on a date determined by the Independent National Electoral Commission, not to be earlier than 60 days before and not later than the date on which the House stands dissolved, or where the election to fill a vacancy occurring more than three months before such date, not later than one month after the vacancy occurred.[642] Thus by this arrangement, considering that the Nigerian Senate and the House of Representatives dissolve on the same day as when the term of the President expires;[643] the period within which to hold elections to the National Assembly is longer than the period for a presidential election. Conventionally, the date for elections to the National Assembly has always been fixed for a date later than the date for presidential election.

262. The Commission further observes by way of considering international best practices that, Two-Round Electoral Absolute Majority Systems are more costly and difficult to administer because they often require the whole electoral process to be re-run a week or a fortnight after the first round to ensure that the person declared President obtains more than 50% of the total votes cast.[644]

263. The Commission also observes from the examples cited that, there are some countries, like the USA and Kenya, for which the Constitution specifies the day for elections. In this regard,

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[637] Article 101(1) of the 2010 Constitution of Kenya.
[638] Article 136(2)(a) of the 2010 Constitution of Kenya.
[639] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd01 (last visited July 16, 2011).
[640] Section 132 of the of the 1999 Constitution of the Federal Republic of Nigeria.
[641] Under section 47 of the 1999 Constitution of the Federal Republic of Nigeria, the National Assembly for the Federation consists of a Senate and a House of Representatives.
[642] Section 76 of the of the 1999 Constitution of the Federal Republic of Nigeria.
[643] Sections 64 and 135 of the 1999 Constitution of the Federal Republic of Nigeria.
[644] ACE Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esf/esf05?toc (last visited July 16, 2011).

only a minority of Western democracies hold general elections on a working day. These include the Netherlands, Denmark, Ireland, Canada, and the United Kingdom. Several other European countries like Germany, France, and Finland hold elections at the weekend or on a public holiday. There are other countries like Nigeria, for which the Constitution simply specifies a period within which to hold elections, and then leaves the determination of the actual date to the authority in charge of elections.[645]

264. The Commission further observes in terms of comparative consideration of international best practices that the United States presidential transition process stands out as a good example on which Ghana could model her transition process. In that country the Presidential Transition Act of 1963,[646] as variously amended, exists "to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President."[647] In passing this piece of legislation, the United States Congress acknowledged that "[t]he national interests requires that such transitions in the office of the President be accomplished so as to ensure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign."[648] The US Congress further acknowledged that "[a]ny disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and wellbeing of the United States and its people." In accordance with its objective to avoid or minimise any such disruption, the United States Congress, by the Presidential Transition Act, among others:

    a. Authorises the US Administrator of General Services to provide the President-elect and the Vice President-elect necessary services and facilities for use in connection with their preparations for the assumption of official. These include office space appropriately equipped with furniture, furnishings, office machines and equipment, and office supplies and remuneration of the members of office staff designated by the President-elect or Vice President-elect.[649]
    b. Authorises the US Administrator of General Services to provide the former President and the former Vice President, for a period not to exceed 6 months from the date of the expiration of their terms and for use in connection with winding up the affairs of his office, necessary services and facilities of the same general character as authorised to be provided to Presidents-elect and Vice Presidents-elect.[650]
    c. Provides for the training or orientation of individuals, during a presidential transition, who the President intends to appoint to certain key positions, to provide

[645] Sections 76 and 132 of the 1999 Constitution of the Federal Republic of Nigeria.
[646] 3 USCS § 102.
[647] 3 USCS § 102, section 2.
[648] 3 USCS § 102, section 2.
[649] 3 USCS § 102 , section 3
[650] 3 USCS § 102 , section 4

for a study and report on improving the financial disclosure process for certain presidential nominees, and for other purposes. [651]

d. Authorises increases in various appropriations made to provide for a more orderly transfer of executive power in connection with the expiration of the term of office of a President.
e. There is usually a Presidential Inaugural Committee to take charge of preparations and other arrangements for the inauguration of the President-elect on 20th January, the following year after elections. The Administrator of General Services also forms an Inaugural Support Team, which "provides a full suite of services to the Presidential Inaugural Committee" and other support, including space, communication system, IT support, and vehicles.

265. The Commission finds that the timing of elections in Ghana accord with international best practice. In specifying the 3-month period within which to hold presidential elections, for instance, the framers of the Constitution envisaged the possibility of multiple run-offs between the number of candidates with the two highest valid votes cast. The 3-month period, therefore, serves to afford adequate time to cater for the possible multiple rounds of voting to ensure that the candidate to be declared the President-elect in a presidential election obtains more than 50% of the votes.

266. The Commission observes that the wisdom in specifying such a long period was well illustrated during the 2008 presidential election. In that election, no candidate emerged with an absolute majority. The second round of voting could not also produce a winner after voting in 229 of the 230 constituencies in the countries. Voting could not take place in the Tain constituency in the Brong Ahafo Region because of logistical problems encountered by the Electoral Commission. A "third round" of voting was therefore held in Tain to determine the winner. Ultimately after that "third round", there was less than one percentage point difference (0.46%) between the winning candidate and his opponent. Besides, after that election on 2nd January, 2009, the country was left with a very brief period to prepare for handing over on the 7th of January 2009.[652] The "third round" of voting in the Tain Constituency 2008 shows that, in Ghana, the possibility of multiple run-offs envisaged in Article 63 is very real.

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[651] As amend by the Presidential Transition Act of 2000.

[652] Commonwealth Secretariat, *"Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group"*(July 15, 2011, 10 AM) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf; EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008",* Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), (July 15, 2011, 10 AM) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf.

267. The Commission also finds great wisdom underlying the convention of holding presidential and parliamentary elections together on 7th December, because it is cost effective. Besides, if presidential elections are held before parliamentary elections, the bandwagon effect[653] may operate to sway votes in favour of the winning party in the presidential elections and vice versa.

268. The Commission also finds it desirable to recommend the retention of the 3-month period within which the presidential election in Ghana must be conducted. Accordingly, it will be most appropriate to extend the 30-day period, within which it is required to conduct parliamentary elections, to 3 months to ensure that the two periods are coterminous. This will afford the EC the necessary flexibility in fixing the joint date for presidential and parliamentary elections earlier than 7th December to ensure that there is adequate time for a smooth transition from one government to the other. The experience from the 2008 general elections and the overwhelming support of Ghanaians for increasing the transition period makes this imperative. The EC should remain the authority to determine the actual election date within the period specified.

269. The Commission, in this regard, observes the inability of governments to make appointments quickly to critical public offices as one of the attendant challenges to the short transition period currently in place.[654] Increasing the transition period will have the added advantage of giving the President and the EC enough flexibility, for instance, to play their respective roles and quickly reconstitute the Council of State, whose advice is a pre-condition for many other public appointments.

270. The Commission observes the intense acrimony, accusations and counter-accusations that characterised the transitions of 2001 and 2009 involving switches in power between the New Patriotic Party (NPP) and the National Democratic Congress (NDC). The Commission recalls, that both transitions were marked by forced evictions of some out-going government official from their official residences, and arbitrary seizure of cars. There were also claims and counter-claims of illegal acquisition of state property by officials of the outgoing governments.[655]

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[653] The bandwagon effect is the phenomenon of a popular trend continuing to gain popularity. In very simple terms, it may be described as the tendency of people going along with what others do or think without considering their actions. In terms of elections, it refers to the tendency of voters to align themselves with the largest and most successful campaign. As more and more voters express support for a candidate or measure, the group grows exponentially larger. In countries of different times zone like the USA election results may be known in the east while polls are still taking place in the west. Such early results from the east may easily influence those voting in the west.

[654] *Amidu* v. *President Kufuor and Others* [2001-2002] SCGLR 86.

[655] *Samuel Okudzeto Ablakwa and Edward Omane Boamah* v. *Jake Obetsebi-Lamptey and Attorney-General, Suit* Number J. 1/4/2010, which has as an issue the constitutionality of the sale of an official residence of an outgoing Minister to that Minister.

271. The Commission observes and welcomes the consideration by Parliament of the Presidential (Transition) Bill, 2010 which seeks to provide the statutory framework for managing the political transition between two successive democratically elected governments. The Commission finds it imperative to recommend that all matters relating to presidential transition should be addressed by the Bill.

272. The Commission finds that when the issue was tabled for discussion at the National Constitution Review Conference, participants at the Conference recommended that the convention of holding presidential and parliamentary elections together on the same day should be continued. The participants, however, strongly recommended November as the new election month to afford enough time for a smooth transition. They recommended the retention of 7th January as the date for handing-over. They further recommended that a particular date (7th November, 7th December, etc) and not a day (the last Friday of October, the first Tuesday of November, etc) should be fixed for the elections. They proposed that the actual date should be determined by the Electoral Commission.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

273. The Commission recommends that the period for conducting parliamentary elections should coincide with the period for presidential elections.

274. The Commission recommends that the presidential and parliamentary elections should both be held within a period of 60 days before the inauguration of a new government.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

275. The Commission recommends that Parliament should enact legislation to provide for the orderly transfer of executive power from one regime to another at the expiration of the term of office of a President and the inauguration of a new President.

ISSUE FOUR: THE RIGHT TO VOTE

A. DIMENSIONS OF THE ISSUE

276. There were four main dimensions of this issue: the voting age; the right of prisoners to vote; voting rights of Ghanaians resident abroad; and the appropriate registration mechanism for qualified voters.

B. CURRENT STATE OF THE LAW ON THE ISSUE

277. The general principle governing elections in Ghana is that they are held on the basis of universal adult suffrage. This principle is embodied in Article 42, an entrenched provision of the Constitution, which makes the right to vote a fundamental human right conferred on every Ghanaian citizen of 18 years or above and of sound mind.[656] Section 7(1)(a) of the Representation of the People Act, 1992 (PNDCL 284) as amended and the Regulation 1(b) of the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12) also repeats the requirement of a person being of sound mind and that of 18 years as the minimum age that a person must attain to be eligible to register and vote in public elections and referenda.

278. Inextricably linked to the right to vote is the right to be registered to vote. Registration is a key precondition for persons desirous of exercising their franchise. It entitles a citizen to the right to vote freely as provided for under Article 42. Article 42 accordingly expresses registration as a right, and provides that any person who is qualified to vote "is entitled to be registered as a voter for the purposes of public elections and referenda."[657]

279. The law, thus, forbids a person from voting at national and district level elections unless the person is registered to vote. Besides this, there are also a number of onerous disqualifications attached to non-registration.[658] Under Article 94(1)(a), a non-entrenched provision, a person is ineligible for election to Parliament if he or she is not a registered voter. A person who is not qualified to be a Member of Parliament cannot become:
    a. A President or Vice President of Ghana (Article 62(c)).
    b. A Minister of State (Article 78(1).
    c. A member of the Electoral Commission (Article 44(1)).
    d. A member of the Public Services Commission (Article 194(1)).
    e. A member of the National Commission for Civic Education (Article 232(3)).

280. To enable it to discharge its function of compiling and revising the register of voters,[659] the EC is empowered by the Constitution, among others, to make regulations for the registration of voters.[660] The main legislative tool for voter registration is the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12). There are other relevant provisions of the

[656] *Ahumah-Ocansey* v. *Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidated)* [2010] SCGLR 575 per Dr. Date-Bah JSC at 614.
[657] *Tehn-Addy* v. *Attorney-General and Electoral Commission* [1997-98] 1 GLR 47; *Apaloo* v. *Electoral Commission* [2001-2002] SCGLR 1; *and Ahumah-Ocansey* v. *Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidate)* [2010] SCGLR 575.
[658] *Tehn-Addy* v. *Attorney-General and Electoral Commission* [1997-98] 1 GLR 47.
[659] Article 45(a) of the 1992 Constitution of the Republic of Ghana and section 2(a) of the Electoral Commission Act, 1993 (Act 451).
[660] Article 51 of the 1992 Constitution of the Republic of Ghana.

Representation of the People Act, 1992 (PNDCL 284) as amended by the Representation of the People (Amendment) Act, 2006 (Act 699).[661]

281. Since the coming into force of the 1992 Constitution, Ghana has operated a periodic voter registration regime under the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12). This has been the mode of voter registration by the EC even though the Supreme Court has previously upheld the right of a person to be registered outside a period of registration set by the EC.[662] Each periodic registration exercise is meant, among others, to capture new voters who have attained the voting age, those who have transferred from one constituency to another and to remove the names of those who have died.

282. Ghana currently uses photo identification cards as establishing the right of a person to vote in presidential and parliamentary elections. Effective 2012, Ghana will make use of biometric identification to eliminate and minimise incidents of multiple registration and voting.

283. In the performance of the functions of the Electoral Commission, Article 47 requires that the country be divided into constituencies for the purpose of the election of members of Parliament. Hitherto, to be eligible to register in a polling division or in a constituency, it was required for a person to have his place of residence in that polling division or constituency by the date of registration for a continuous period of 6 months.[663] In this regard, Ghanaians living abroad were treated as non-residents for the purposes of voter registration. However, in 2006, the Representation of the People (Amendment) Act, 2006, (Act 699) was passed to grant Ghanaians resident abroad exemption from the residency requirement.[664] Act 699 empowers the EC to appoint the Head of a Ghana Mission or Embassy abroad or any other person or institution designated in writing by the EC as a registration officer to register a

[661] Section 7 which specifies the qualification of a person wishing to register as a voter and section 8 on the registration of Ghanaians citizens abroad. The constitutionality of section 7(1) and (5) on the residency requirements of voters came up for determination in *Ahumah-Ocansey* v. *Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidate)* [2010] SCGLR 575. The Supreme Court in that case held that " *The section 7 (5) merely defines what constitutes residence for purposes of voter registration. But in doing so, prisoners find themselves in positions where they cannot meet the "resident in the polling division" voter qualification requirement, of s.7 (1) (c) of PNDCL 248. The impugned legislation thus effectively takes away prisoners' right to register or vote, in that it refused to recognise prisons as residence within the meaning of that specific law"* and that *"it bears emphasis that the Constitution did not set down the residency criteria; it (the residency criteria) is the product of the subordinate PNDCL 284. But the people of Ghana adopted and enacted for themselves a democratic regime of constitutionally guaranteed adult suffrage for all Ghanaians, save only persons under eighteen years of age and persons of unsound mind. We crafted for ourselves a Constitution that set out its own limitations on the right to vote and perhaps having regard to the value it places on the right in question, never ceded any of its authority to either the E C or some other authority to add further to the list of who shall not have the right to vote."*

[662] *Tehn-Addy* v. *Electoral Commission* [1997-98] 1 GLR 47.

[663] Section 7 of Representation of the People Act, 1992 (PNDCL 284) as amended.

[664] Section 8 of PNDCL 284 as substituted by section 1(b) of the Representation of the People (Amendment) Act, 2006 (Act 699).

Ghanaian resident abroad to be a voter in an election. Act 699 has since been declared to be a surplusage piece of legislation on the grounds that even without it, Ghanaians resident abroad already had the right to vote.[665]

284. The Supreme Court has upheld the right of prisoners to vote declaring that neither the EC nor any other authority could pass legislation to impose restrictions beyond what had been conferred on it by Article 42 of the Constitution.[666] Thus, a Ghanaian prisoner who is 18 years or above is entitled to be registered to vote.[667]

C. SUBMISSIONS RECEIVED

285. The Commission received a wide range of submissions on the right to vote. Beginning with the voting age, the Commission received 4 sets of submissions.
    a. There were calls to retain the voting age at 18 years. Proponents of the retention of the current voting age argued on the one hand that if it is reduced, many immature Ghanaians will be voting to influence matters they do not understand. On the other hand, if it is increased, a significant number of mature Ghanaians will be disenfranchised. To them, 18 years is just appropriate to qualify any Ghanaian to vote.
    b. There were those who variously advocated a reduction of the voting age to 17, 16, or 15 years for the following reasons:
        i. Ghanaian children are maturing early. They are increasing in knowledge; are able to think constructively; reason well; and make well informed choices. In this regard, there is no real difference between the 16-year-old Ghanaian and the 18-year-old Ghanaian. Keeping the voting age at 18 years unnecessarily keeps a large bracket of mature Ghanaians between 16 and 18 years disenfranchised.
        ii. Reducing the voting age will enable more Ghanaians to exercise their franchise very early.
        iii. Ghanaian children are now socialised, both at home and in school, to be aware of their rights and responsibilities at a very tender age. Formally, they take courses in civic education and others which were previously not taught at the basic level of education. At home, parents and guardians also

[665] *Centre for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidated)* [2010] SCGLR 575 at 688.
[666] *Centre for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidated)* [2010] SCGLR 575 at pages 598 and 601 and 676.
[667] *Tehn-Addy* v. *Electoral Commission* [1997-98] 1 GLR 47; *Apaloo* v. *Electoral Commission* [2001-2002] SCGLR 1, both of which emphasise the importance of universal adult suffrage as an underlying value and principle of the Constitution, and as a pre-eminent right without which the basic rights and freedoms in the Constitution would all be diminished.

now train and expose their children and wards to understand and appreciate weighty matters of politics, culture and national development, among others, at a very early stage in life. With increasing Internet technology, *inter alia*, Ghanaian children are well exposed to the world at large. Many of them have access to the Internet, connected cellular phones and computers; they tune in to various radio stations and watch many television programmes by which means they are very well informed on very weighty matters that should enable them to make informed choices if they are enfranchised earlier than 18 years.

iv. If the minimum age for child labour in Ghana is 15 years, then the Ghanaian child should also be permitted to vote at 15 years.

v. If the minimum age for consensual sex in Ghana is 16 years, then the Ghanaian child should also be enfranchised at 16 years.

c. The last set of submissions on the voting age involved calls for it to be increased to 21 or 22 years. Those who made these calls reasoned mainly that, at 18 years, most people are generally still dependent on others. They are not mature; not economically empowered; and not responsible for themselves. Other persons take decisions on their behalf and guide their actions in various aspects of life. It was contended that only persons who, on their own, take decisions which are, directly affected by the actions and inactions of government, should be able to influence the choice of government in Ghana. This category of Ghanaians generally excludes persons between 18 and 21 years. It will, therefore, be appropriate to increase the voting age to 21 years.

286. Other submissions on the right to vote related to the right of prisoners to vote.

a. Some submissions advocated that prisoners should be entitled to vote because the Constitution does not expressly bar them from voting. Besides, many prisoners are simply victims of circumstances and not at all hardened criminals. A significant proportion of prisoners does not benefit from a fair trial. These prisoners are not at all criminals. It would, therefore, be unfair to debar them from voting.

b. There were those, on the other hand, who vehemently opposed enfranchising prisoners for the following reasons:

i. As deviants in society, prisoners may not be of sound mind.

ii. By their own criminal acts and infidelity to the law, criminals deny themselves the right to vote on their own accord and by their own conduct.

iii. People convicted of various offences against the Constitution should not be allowed to benefit from the same Constitution they sinned against and sought to undermine.

iv. Prisoners are more likely to exercise their franchise in bad faith and vote on account of their conviction against the person/party under whose tenure they were incarcerated.
v. The corollary effect of the punishment of imprisonment is the restriction of the rights and liberties of convicts; this should include restrictions on the right of the convict to vote.
vi. Politicians are likely to abuse the rights of prisoners to vote; in return for their support and votes, undeserving prisoners may be pardoned and released.

c. There were a few others who stood midway between the two extremes. They advocated that there are provisions in the Constitution itself which proscribe people convicted of certain crimes from holding certain public offices. Prisoners with such records should not be given the right to vote. In addition others submitted that the Prisons Service should separate very hardened criminals from other criminals so that those convicted of petty crimes would be allowed to vote. This will be a fair compromise.

287. There were submissions on the issue relating to the right of Ghanaians living abroad to vote.

a. There were those who were totally opposed to enfranchising Ghanaians abroad. They reasoned that:
i. Aside from the operational and logistical difficulties, Ghana, and for that matter the EC, does not have the necessary funds to be able to finance the conduct of elections beyond the boundaries of Ghana.
ii. The EC does not have the necessary capacity to address the operational and logistical nightmare involved in the enforcement of any right of Ghanaians resident abroad to vote.
iii. Ghana should not spend its scarce resources to conduct elections abroad.
iv. Ghanaians abroad who are really desirous of voting could return home to exercise their franchise.

b. There were other submissions which opposed proposals to enfranchise all Ghanaians living abroad. They maintained that the right of persons living abroad to vote must be limited to Ghanaians who were born in Ghana; Ghanaians who have visited the country once within a specified number of years; and Ghanaians who are able to travel home to register for voting. They insisted that there must be a strong connection between those enfranchised and the nation. In their view, Ghanaians resident abroad are generally not abreast with the politics in the country, may not appreciate Ghana's problems and may consequently not be able to make the right voting choices.

c. There were those who contended that all Ghanaians resident abroad should be enfranchised and that the fact of their living outside Ghana is not enough reason to disenfranchise them. They variously reasoned that:
    i. Ghanaians living abroad contribute to the growth of the national economy through their remittances and by other means. Giving them the opportunity to vote would enable them further to have a stake in the country's development.
    ii. All Ghanaians, irrespective of their places of residence, should be able to influence how Ghana is governed on the basis of their Ghanaian citizenship.
    iii. Ghana stands to lose the loyalty and expertise of its citizen resident abroad if they are disenfranchised.
d. As an implementing mechanism, some proposed that the EC should make use of Ghana's Missions abroad as registration and voting centres. There were similar calls to employ the services of Ambassadors, High Commissioners and staff of Ghana's Foreign Missions as electoral officers. This was, however, strongly objected to by some other Ghanaians. Others, too, called for the registration online of Ghanaians living abroad.

288. The last set of submissions on the right to vote sought to improve the registration regime currently in practice.
    a. Some of these submissions advocated the registration of voters to be an all-year exercise, instead of the current periodic registration regime. Under the proposed arrangement, any Ghanaian who turns 18 years would be able to walk into any office of the EC to get registered. This would reduce the tension attendant to the current periodic voter registration mechanism. In this regard, it was proposed that the EC should employ enough permanent staff to implement an all-year registration regime.
    b. Another set of submissions related to measures employed by the EC to guard adequately against multiple registrations and voting; while ensuring that genuine Ghanaians, who turn 18 years, and other qualified Ghanaians who have not registered, are allowed to register to vote. There were calls for biometric registration and electronic voting. There were still other calls which pointed to the utility of additionally requiring Ghanaians desirous of exercising their franchise to present their birth certificates or other such documentation that could serve as sufficient evidence of their citizenship and age, whenever they present themselves to be registered or to vote. The EC was, however, cautioned to be mindful that a significant number of people may not have the necessary documentary evidence to prove their age or citizenship.

D. FINDINGS AND OBSERVATIONS

289. The Commission observes that today, 18 years is by far the most common voting age specified by countries around the world. More than 140 countries have 18 as their voting age.[668] Only a few countries differ in this respect. These include 15 years in Iran; 16 years in Brazil, Cuba and Germany (municipal elections in the states of Bremen and Lower Saxony); 17 years in Seychelles[669]; 20 years in Cameroon and Japan; and 21 years in the Central African Republic and Gabon.[670]

290. The Commission further observes an increasing campaign around the world for a further reduction in the voting age from 18 to 16 years.[671]
    a. In the 2000s, for instance, a number of legislative proposals for the reduction of the voting age to 16 in various U.S. States, including California, Florida, and Alaska were not successful.[672]
    b. Similar proposals in 2005 for a national reduction in Canada and a state reduction in New South Wales in Australia were also not successful.[673] On 9th March, 2011, in Canada, a Private Member's Bill was again put forward to lower the voting age from 18 to 16.[674]

291. The Commission observes that the campaign for the reduction of the voting age from 18 years to 16 years in the United Kingdom has been particularly sustained. In response to this campaign, the Electoral Commission of the U.K., while recommending the retention of the current voting age of 18, has observed that circumstances, such as citizenship teaching may improve the social awareness and responsibility of young people and could make it

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[668] INTERNATIONAL DEBATE EDUCATION ASSOCIATION (IDEA), http://www.idebate.org/debatabase/topic_details.php?topicID=588, (last visited July 21, 2011).
[669] In the United States of America, some States including Arizona, Delaware, Iowa, Kansas, Kentucky, Maryland, Mississippi, Nebraska, North Carolina, Ohio and Virginia all currently have the voting age for presidential primaries set at 17 years if the 17-year-old will be 18 on Election Day; National Youth Rights Association at http://youthrights.org/votestatus.php (last visited July 21, 2011).
[670] UK ELECTORAL COMMISSION, *"Age of Electoral Majority: Report and Recommendations"*, UK Electoral Commission (2004), pages 13 to 17, (July 21, 2011 11 : 20 AM) http://www.bibliotheque.assnat.qc.ca/01/mono/2005/10/826116.pdf; NATIONAL YOUTH RIGHTS ASSOCIATION, http://youthrights.org/votestatus.php, (last visited July 21, 2011); VOTES AT 16 Coalition, http://www.votesat16.org/about/, (last visited 21st July, 2011); INTERNATIONAL DEBATE EDUCATION ASSOCIATION (IDEA), http://www.idebate.org/debatabase/topic_details.php?topicID=588, (last visited July 21, 2011).
[671] Votes at 16 Coalition, http://www.votesat16.org/about/, (last visited 21st July, 2011); NATIONAL YOUTH RIGHTS ASSOCIATION, http://youthrights.org/votestatus.php, (last visited July 21, 2011).
[672] NATIONAL YOUTH RIGHTS ASSOCIATION, http://youthrights.org/votestatus.php, (last visited July 21, 2011).
[673] NATIONAL YOUTH RIGHTS ASSOCIATION, http://youthrights.org/votestatus.php, (last visited July 21, 2011).
[674] VOTES AT 16 COALITION, http://www.votesat16.org/about/, (last visited 21st July, 2011).

compelling to reduce the voting age.[675] That Commission, has previously proposed "further research on the social and political awareness of those around age 18 with a view to undertaking a further review of the minimum age for electoral participation in the future."[676]

292. The Commission finally observes, by way of comparative lessons, that the Bill that justified the adoption of 16 years voting age in Lower Saxony, Germany stated that:

> "[t]he reduction of voting age … should occur because empirical investigations have shown that young people between the ages of 16 and 18 are already mature enough politically, but also have a strong interest in politics. They should therefore be given, through the right to vote, the opportunity to share in political process and decision-making at the municipal level"[677]

293. The Commission finds that Ghana's voting age has followed a trend not significantly different from the trend elsewhere in the world. First, the voting age was 21 years under the 1957, 1960, and 1969.[678] The 1979 Constitution reduced the voting age to 18 years.[679] This was retained by the 1992 Constitution.

294. The Commission also finds that the reasons informing the question whether there should be a change to the voting age of 18 years do not show a marked deviation from the wisdom underlying the debate internationally. As disclosed from the submissions, the proponents for the retention, increase and decrease in the voting age all have one common feature. Fundamental to their submissions is the question of maturity; Ghanaians are deeply concerned that only persons who are sufficiently mature would be guaranteed the right to vote. The wisdom manifested in this concern is that only those who do not lack the capacity to decide independently on matters put to elections and referenda would be able to exercise

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[675] UK ELECTORAL COMMISSION, "*Age of Electoral Majority: Report and Recommendations"*, UK Electoral Commission (2004), pages 13 to 17, (July 21, 2011 11 : 20 AM) http://www.bibliotheque.assnat.qc.ca/01/mono/2005/10/826116.pdf; NATIONAL YOUTH RIGHTS ASSOCIATION, http://youthrights.org/votestatus.php, (last visited July 21, 2011); VOTES AT 16 Coalition, http://www.votesat16.org/about/, (last visited 21st July, 2011); INTERNATIONAL DEBATE EDUCATION ASSOCIATION (IDEA), http://www.idebate.org/debatabase/topic_details.php?topicID=588, (last visited July 21, 2011).

[676] UK ELECTORAL COMMISSION, *"Age of Electoral Majority: Report and Recommendations"*, UK Electoral Commission (2004), pages 13 to 17, (July 21, 2011 11 : 20 AM) http://www.bibliotheque.assnat.qc.ca/01/mono/2005/10/826116.pdf.

[677]" UK ELECTORAL COMMISSION, *"Age of Electoral Majority: Report and Recommendations"*, UK Electoral Commission (2004), page 15, (July 21, 2011 11 : 20 AM) http://www.bibliotheque.assnat.qc.ca/01/mono/2005/10/826116.pdf.

[678] Article 29 of the 1969 Constitution of the Republic of Ghana; Section 69(2)(a) of the Ghana 1957 (Constitution) Order in Council.

[679] Article 36 of the 1979 Constitution of the Republic of Ghana provided that "A citizen of Ghana not being less than eighteen years of age and of sound. mind shall have the right to vote; and accordingly he shall be entitled to be registered as a voter for the purposes of public elections and referenda."

reasonably the right of selecting persons to political or other public offices to address those matters.

295. The Commission further finds that there cannot be any one precise test for determining when a person is sufficiently mature. That determination is a task that can only be done in context. Culturally in some areas in Ghana, a person is said to be mature when he or she has performed the rites of passage. In some other context, maturity is closely associated with marriage. In practice, a significant percentage of persons aged 15 to 24 years in modern Ghanaian society, are likely to be enrolled in some vocational or technical institution, or an institution of higher learning, or may be engaged in some form of employment or business activity, having completed basic and/or secondary education. They may in that sense be said to be generally mature.[680]

296. The Commission also finds that there exist different constitutional and statutory provisions indicating different ages at which a Ghanaian child may be said to be sufficiently mature for different purposes. These include the following in the increasing order of ages: 12 years for criminal liability in Ghana;[681] 13 years as the minimum age for light work;[682] 15 years as the minimum age for child labour;[683] and 16 years as the minimum age for consensual sex.[684]

297. The Commission finds in this regard that 18 years is generally the minimum age for most weighty matters including marriage,[685] hazardous work,[686] the making of a valid will,[687] and holding or obtaining a valid licence to drive a motorcycle[688] or a motor vehicle (other than a commercial vehicle).[689] Similarly, 18 years is expressed as the cut-off age for parental duty of maintenance,[690] and at which if a person is detained for the purposes of her education or welfare, it will not amount to a violation of her personal liberty[691]. There are only a few activities that a Ghanaian at age 18 years cannot engage in. These include holding or

[680] Christine Dowuona-Hammond, "Towards a Uniform Age of Majority in Ghana: Rethinking the Contractual Capacity of Minors", Vol XX [1996-1999] UGLR 62.
[681] Section 26 of the Criminal Offences Act, 1960 (Act 29).
[682] Section 90 of the Children's Act, 1998 (Act 560). Light work refers to work which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or capacity of the child to benefit from school work.
[683] Section 89 of the Children's Act, 1998 (Act 560).
[684] Section 26, 98, 101, 104, 105 of the Criminal Offences Act, 1960 (Act 29).
[685] Section 14(2) of the Children's Act, 1998 (Act 560).
[686] According to section 91 of the Children's Act, 1998 (Act 560), hazardous work includes going to sea, mining and quarrying, porterage of heavy load, manufacturing industries where chemicals are produced or used, work in places where machines are used, and work in places such as bars, hotels and places of entertainment where a person may be exposed to immoral behaviour.
[687] Section 1 of the Wills Act, 1971 (Act 360).
[688] Section 65(1)(b) of the Road Traffic Act, 2004 (683).
[689] Section 65(1)(e) of the Road Traffic Act, 2004 (683).
[690] Sections 53 and 54 of the Children's Act, 1998 (Act 560).
[691] Article 14(1)(e) of the 1992 Constitution of the Republic of Ghana.

obtaining a license to drive a commercial vehicle or an agricultural tractor.[692] Persons below 21 years and 40 years are similarly ineligible to run for Parliament and the Presidency respectively.[693]

298. The Commission finds that one logical conclusion emerges from an examination of the provisions. The question whether a person is "sufficiently mature" can be answered only after giving due consideration to the purpose for which it is put. While for some purposes, a person is deemed to be sufficiently mature at a relatively early stage in life, for others, that presumption is made later in life.

299. The Commission finds that the right to vote is a right of enormous magnitude and significance. Accordingly, the persons to be given that right must have an equally enormous sense of social awareness of the meaning of that right and responsibility in order to exercise it reasonably. This was the reason why in the past the voting age was generally set at 21 years across the world. With an ever increasing sense of awareness and responsibility of persons aged from 18 to 21 years, it was generally reduced to 18 internationally. In today's technological world, where there is much focus and improvement in civic education, both through formal means and the media, there may be a strong case, founded mainly on increased civic awareness, for the further reduction of the voting age.

300. The Commission, accordingly, finds the calls for an increase in the current voting age in Ghana not to be supported by international trends. On the other hand, the Commission finds that Ghana has not reached the point where the civic awareness and responsibility of Ghanaians aged below 18 years would be so overwhelming as to justify a further reduction of the voting age. Certainly, education and an informed understanding of issues are important to political participation in a democracy.[694] It would be appropriate to uphold the presumption that adults are more likely to meet these criteria than children. Postponing the franchise of Ghanaians till they turn 18 years is definitely not a grave deprivation, considering the enormity and magnitude of the sense of civic awareness and responsibility required of them to exercise their franchise.

301. The Commission finds that in the absence of a well-researched survey and empirical evidence to that effect, it would be inappropriate to recommend a reduction of the voting age except to note that, it may be desirable to leave it up to Parliament to assess the practicality of reducing Ghana's voting age, upon the advice of the EC and following the necessary survey by that Commission for such purpose. The situation in the US, where Congress and the states may respectively set lower voting ages for federal, state and local elections may

[692] Section 65(1)(c) and (d) of the Road Traffic Act, 2004 (Act 683).
[693] Article 62(b) and 94(1)(a) of the 1992 Constitution of the Republic of Ghana.
[694] Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 547, at 562 to 563.

just be a better approach. This way, if circumstances change in the future, it would not be necessary to put the issue to a referendum.

302. The Commission finds that the deprivation of the to the right to vote, made on the basis of criminal convictions is not unique to Ghana, Canada,[695] South Africa,[696] Australia,[697] and Europe[698] have similar laws.

303. The Commission observes and sums up the international best practices as garnered from cases on prisoner enfranchisement or disenfranchisement in the followings terms[699]:

a. It is an exception rather than the norm to have a country imposing a blanket ban on prisoners' voting rights. The United Kingdom,[700] Armenia, Bulgaria, Estonia, Hungary, Romania, and other countries which impose blanket prisoner disenfranchisement are in the minority.
b. There are many more countries like South Africa, the Netherlands, Denmark, Sweden and Switzerland that place no such formal prohibition on the right of prisoners to vote.
c. Many other countries like Australia, France and Germany give convicted persons some determinate voting bans; the loss of voting rights in these countries is tailored to specific offences or categories of offences, and is expressly provided for in one form of legislation or the other, or the discretion is left to the sentencing court.
d. Whatever the case may be, franchise is considered fundamental to virtually all democratic systems and is not lightly withdrawn. The differentiation in the manner prisoner voting rights are protected is a question of the seriousness each country attaches to an offence. In some countries, the commission of some offences is considered to manifest such rejection of civic responsibility as to warrant the temporary withdrawal of the right to vote.[701]

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[695] *Sauvé* v. *The Attorney General of Canada* [2002] 3 SCR 519.
[696] *August and Another* v. *Electoral Commission and Others*, 1999 (4) BCLR 363 and *Minister for Home Affairs* v. *National Institute for Crime Prevention and the Reintegration of Offenders (*the *NICRO case)* 2004 (5) BCLR 445.
[697] *Roach* v. *Electoral Commissioner and Another*, 239 A.L.R. 1.
[698] *Hirst* v. *United Kingdom (No. 2)* [2005] ECHR 681.See both the Chamber of the Court decision at [2005] All ER (D) 59 and the Grand Chamber decision at [2004] All ER (D) 588.
[699]BBC NEWS, *Prisoner Voting: World Views*" (July 21, 2011, 10: 34 AM) http://news.bbc.co.uk/2/hi/uk_news/politics/vote_2005/frontpage/4490701.stm; INTERNATIONAL DEBATE EDUCATION ASSOCIATION (IDEA), http://www.idebate.org/debatabase/topic_details.php?topicid=515, (last visited July 21, 2011).
[700]Even though the Court in *Hirst* v. *United Kingdom (No 2)* [2004] All ER (D) 588 (Mar); App No 74025/01 at paragraph 82 considered reforms introduced in the UK under the Representation of the People Act 2000 to grant remand prisoners, court contempt prisoners, and fine defaulters the right to vote; it still described the voting ban provisions of the Representation of the People Act 1983 Act as amended, as a "blanket instrument" or a blanket ban. The Court noted that the provisions applied to all convicted prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.
[701] *Roach* v. *Electoral Commissioner and Another*, 239 A.L.R. 1 at paragraph 12; *August and another* v. *Electoral Commission and Others* 1999 (4) BCLR 363.

304. The Commission recognises a commitment on the part of Ghanaians (in the preamble of the Constitution) and pursuant to case law, to universal adult suffrage as a fundamental principle and value underpinning the very essence of the Constitution. This elevates the right to vote under Article 42 of the Constitution to a pre-eminent right, the very bedrock of Ghana's constitutional democracy without which all other rights could be emptied of their contents.[702]

305. The Commission observes that the sovereignty of Ghana resides in the people of Ghana from whom all arms of government and the independent constitutional and other bodies including, the EC, derive their respective powers and authority.[703] The exercise of franchise, through popular participation in elections and referenda, is the means by which the sovereign will of the people of Ghana is expressed. It is the means by which Ghanaians make their choices, whether for the Presidency, Parliament, or local government. It reflects notions of citizenship and membership of the Ghanaian body politic. Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Ghanaian community remain so even in incarceration. Without the right of Ghanaians to make choices there can be no functional democracy in Ghana and the system of representative democratic government set out in the Constitution would be emptied of content. Without a democratic representative system of government, constructed on the bedrock of universal adult suffrage, the likelihood would be that the rights enshrined in Chapter 5 would be ineffective.[704]

306. The Commission, accordingly, finds that the operationalisation by the EC of Ghana's electoral laws to exclude the franchise of prisoners does not reflect the values and ideals of Ghana's democracy as expressed in the commitment to universal adult suffrage as embodied in the Preamble of the Constitution. The Commission recognises that in a country like Ghana, where some people labour under the pain of the loss of their relatives to gruesome crimes like murder, or have themselves been victims of armed robbery, or rape, for instance, the idea of enfranchising criminals like murderers, rapists, and armed robbers may very well offend many Ghanaians. This found strong expression in some of the submissions the Commission received. This notwithstanding, it will be appropriate to presume, as a rule of thumb, that all prisoners have the right to vote, until that right is taken away by some authority, such as Parliament by an enactment, the EC by a Constitutional Instrument, or by a court of law.

307. The Commission similarly observes that, the citizenship of Ghanaians is not extinguished by the fact of their being resident outside Ghana. Many Ghanaians resident abroad maintain an inseparable link with Ghana through the relatives they have back home; their contributions in

[702] *Tehn-Addy* v. *Attorney-General and Electoral Commission* [1997-98] 1 GLR 47;
[703] Articles 1(1) and 35(1) of the 1992 Constitution of the Republic of Ghana.
[704] *Ahumah-Ocansey* v. *Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL)* v. *Attorney-General and Electoral Commission (Consolidated)* [2010] SCGLR 575 at 602 to 603 and 614.

the form of remittances; their ownership of property in Ghana; and business interests and other forms of investments, to mention a few. They maintain a connection, strong enough to desire also to influence the outcome of elections and the choice of government. Like their kindred back home in Ghana, it is only logical and natural for them to want to be involved in decision-making processes in Ghana at all levels of governance. The Commission accordingly finds that the under-enforcement of the voting rights of Ghanaians living abroad also deviates from values and ideals underpinning the Constitution.

308. The Commission acknowledges that there may be practical challenges in accommodating Ghanaians resident abroad and prisoners to vote. There could, for instance, be challenges in determining the constituencies to which Ghanaians abroad and prisoners would apply their votes. On the one hand, if prisoners are allowed to vote in the constituency in which the prisons are located, a concentrated prison electorate, like those at the Medium Security Prison at Nsawam prison, could exercise a disproportionate local influence and easily sway the results of parliamentary elections in the Aburi/Nsawam Constituency in a direction which the actual permanent constituents may not desire. Similarly, Ghanaians living abroad, if they are to apply their votes to constituencies of their previous abodes or their hometowns, the EC would be presented with immense logistical, financial and administrative nightmare in printing ballots papers for all 230 constituencies for as many polling centres as will be required to ensure that all qualified persons are able to exercise their franchise. Even more serious will be how to ensure that prisoners and Ghanaians abroad receive the campaign message of candidates for elections.

309. The Commission notes the genuine challenges confronting the EC in the discharge of its mandate but reaffirms that the pre-eminent status of the right to vote in Ghana places an extremely heavy responsibility on the EC to ensure that all Ghanaians who are 18 years and above and are of sound mind, whether resident in Ghana or abroad, free or incarcerated, are able to exercise their franchise. That responsibility is so heavy that it cannot be sacrificed on the altar of convenience, practicability, and the availability or otherwise of resources. Ghanaians on the one hand cannot commit themselves to certain ideals, principles and values, and later cite reasons why those ideals, principles and values cannot be effectuated. That is why in the conduct of electoral business, the EC is completely independent and not subject to control, direction, management, manipulation and interference of any individual or institution. To reinforce this independence, the Commission has proposed in this report the establishment of an independent fund for all the ICBs so as to resource the EC adequately to enable it discharge the extremely heavy responsibility placed on it.

310. The Commission observes that voter registration poses a major problem in Ghana's electoral system. All observers during the 2008 elections were agreed on this.[705] Voter registration is usually marked by postponements of registration schedule, inadequate registration materials, and more significantly, multiple registration.[706] The Commission reiterates that the right to vote is inextricably linked to the right to be registered. Voter registration marks the beginning of the entire electoral process. A clean voter register is critical to the integrity of the electoral system. A bloated or incomplete voter register is serious enough to undermine democratic governance just as much as disenfranchisement of any Ghanaian. The Commission welcomes the commencement of programmes and activities for biometric registration for the 2012 elections. The Commission recognises that such a registration regime has several advantages. It could, for instance, provide an almost foolproof means of avoiding multiple registration and voting and impersonation. If well done, nobody can replicate the unique pin number or bar-code of a voter. A voter with a unique bar-coded identity card and a unique pin number could also easily check her registration status on line.

311. The Commission, however, observes that biometric registration, like all other forms of electronic identification could present its own challenges. It would be appropriate to put in place the best possible measure to safeguard frequent network failure and breaking. The best security systems must be installed to guard against possible hacking. In this sense, the Commission notes that many institutions have established various electronic programmes from which lessons may be drawn: electronic identification for bank clients, online registration by students in tertiary institutions and automated payment systems of banks. The experience of the National Identification Authority could also prove useful.

312. The Commission finds that the importance of having a defect-free voter register finds expression in the calls both from Parliament and by the general public for an open and transparent registration process. To guard against all the problems and tension that the 2008 elections were met with, the Commission finds that it would be desirable for the EC to institutionalise an all-year registration scheme. It would accordingly be appropriate for the EC to include in its programmes and activities, measures to secure the infrastructural and institutional base for a continuous registration scheme all year round.

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[705] Centre for Democratic D-Ghana/CODEO, *Ghana 2008 Presidential and Parliamentary Elections*, (July 15, 2011) http://www.g-rap.org/rao_knowledge_base/pubs/9988-614-05-5/codeo_excerpt.pdf; EU EOM: *Ghana Final Report: Presidential and Parliamentary Elections 2008*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf; Commonwealth Secretariat, *Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.

[706] Commonwealth Secretariat, *Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf.

313. The Commission finally finds that it would be imperative for the EC to promulgate, by a Constitutional Instrument, regulations to govern biometric registration.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

314. The Commission recommends that Article 42 be amended to make the voting age provision a non-entrenched provision.

315. The Commission recommends that the Constitution be amended to allow Parliament to exclude from voting, a person who is convicted of any of the offences listed in Article 94(2)(c) such as high crime, high treason or treason or an offence involving the security of the State, fraud, dishonesty or moral turpitude; or any other offence punishable by death or by a sentence of not less than ten years; or an offence relating to, or connected with election under a law in force in Ghana at any time.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

316. The Commission recommends consequential amendments to the Representation of the People Act, 1992 (PNDCL 284) as amended; the Public Elections (Registration of Voter) Regulations, 1995 (C.I. 12); and the Public Elections Regulations, 1996 (CI 15).

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

317. The Commission recommends that the EC should, in consultation with relevant institutions, including the National Commission for Civic Education (NCCE), the Ghana Statistical Service and political parties, undertake research on the social and political awareness of Ghanaians aged around 16 years with a view to making recommendations to Parliament about the desirability of reviewing the voting age downwards.

318. The Commission finally recommends that the EC takes adequate administrative measures to ensure the actualisation of voting rights of prisoners and Ghanaians resident abroad.

ISSUE FIVE: THE ADJUDICATION OF ELECTORAL DISPUTES

A. DIMENSIONS OF THE ISSUE

319. The dimensions of this issue are: which court should have final appellate authority over electoral disputes; and whether there is the need for a specialised court to handle electoral disputes exclusively as a measure to expedite the disposition of such cases.

B. CURRENT STATE OF THE LAW ON THE ISSUE

320. In the case of presidential election disputes, the Constitution provides that the declaration of the presidential election may be challenged by a petition presented to the Supreme Court.[707] The Constitution further stipulates that the Rules of Court Committee shall make rules for regulating the practice and procedure for petitions to the Supreme Court challenging the election of a President.[708] The Rules of Court Committee has accordingly drafted rules defining what constitutes a petition so far as challenges to presidential elections are concerned. The Commission notes that the Rules of Court Committee is in the process of revising the Rules of Court that govern such petitions and has already come out with a preliminary draft for discussion, but they are yet to come into force.[709]

321. In relation to parliamentary election disputes, Article 99(1) of the Constitution confers jurisdiction on the High Court to hear and determine any question concerning whether a person has been validly elected as a Member of Parliament or the seat of a member has become vacant.

322. In terms of the appellate jurisdiction of the Supreme Court in relation to parliamentary disputes, Article 99(2) of the Constitution provides that: "A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal." This provision is non-entrenched. In this instance, it should be noted that it is provided in the entrenched provision of Article 131(1)(a) of the 1992 Constitution as follows: An appeal shall lie from the judgment of the Court of Appeal to the Supreme Court as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or Regional Tribunal in the exercise of its original jurisdiction.

323. However, the Supreme Court has held that there was no right of further appeal from the Court of Appeal to the Supreme Court in respect of an appeal from an election petition determined by the High Court under Article 99 (1) of the Constitution. Notwithstanding the general appellate jurisdiction of the Court of Appeal stated in Article 137(1) of the Constitution, the Supreme Court held that Article 99(2) had expressly provided that a person aggrieved by the determination of an election petition by the High Court under Article 99(1) might appeal to the Court of Appeal. According to the Supreme Court, that provision had the effect of ensuring that such appeals were not affected by the general provision in Article 131(1) that allowed a further appeal to the Supreme Court from the judgment of the Court of Appeal.[710]

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[707] Article 64 (1)of the 1992 Constitution of the Republic of Ghana.
[708] Article 64(2) of the 1992 Constitution of the Republic of Ghana.
[709] Draft Supreme Court (Amendment) Rules, 2011 (on file with the Constitution Review Commission).
[710] *Parliamentary Election for Wulensi Constituency; Zakaria* v. *Nyimakan* [2003-2004] 1 SCGLR 1.

C. SUBMISSIONS RECEIVED

324. The Commission received various submissions on the present issue.

a. The Commission was urged to maintain the current state of the law as determined in the *In Re Parliamentary Election for Wulensi Constituency; Zakari* v *Nyimakan*[711] case. In support of this position, many of the submissions indicated that this would encourage the speedy disposition of such cases, considering the overriding interest of the state which requires that the work of Parliament be not disrupted. Also, this would help reduce the workload of the Supreme Court and prevent an inundation of the Supreme Court with politically sensitive cases.

b. Other submissions proposed that the Supreme Court should have a final Appellate jurisdiction in all electoral disputes. The various reasons provided in support of this position were that:

i. It will forestall the perception of discrimination as the current position unfairly limits the avenues of redress available to a plaintiff in a number of cases.

ii. It will give full effect to Article 33(3) in the Fundamental Human Rights chapter which states that "A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court."

iii. The current position of the law, as determined by a ruling of the Supreme Court, creates the impression that issues relating to Parliament are not so important as to merit an appeal to the highest court of the land.

iv. Allowing the Supreme Court to adjudicate on such matters will bring finality to the judicial decisions reached in such cases.

v. The Supreme Court being the final appellate Court should not have its jurisdiction whittled down under any circumstance.

c. There were submissions advocating the institution of an electoral court with exclusive jurisdiction over election-related disputes. This arrangement, it is posited, would allow such disputes to be considered by specialist jurists and, considering the sensitive nature of electoral disputes, it would facilitate the expeditious dispensation of justice in such matters.

D. FINDINGS AND OBSERVATIONS

325. The Commission finds that in the context of electoral dispute resolution, international obligations related to such disputes have not necessarily been tied explicitly to the electoral process. Public international law appears to provide only the highest level guidance regarding the resolution of disputes. The International Covenant on Civil and Political Rights (ICCPR)

[711] *In Re Parliamentary Election for Wulensi Constituency; Zakari* v *Nyimakan* [2003-2004] 1 SCGLR 1.

and regional treaties stipulate a number of obligations upon state parties which provide a broad framework for the resolution of disputes. It is, therefore, necessary to extrapolate obligations for the resolution of electoral disputes from these more general obligations.

326. The Commission observes that because the legitimacy of an entire government may rest on the validity of election results, dispute proceedings must be expeditious. The importance of timing is widely recognised in international conventions and treaties, even though the language may vary. For example, the time-sensitive nature of dispute resolution requires the proceedings to take place "within a reasonable time" or "without undue delay."[712]

327. The Commission further observes that the importance of a timely remedy in electoral disputes has been recognised by various states as inextricably linked to fair public participation in government and elections. The practice internationally in that regard is to institute adequate administrative measures to expedite the resolution of such disputes. The Ugandan Constitution enjoins the courts to suspend any other matter on their role when seized with an electoral dispute to ensure the expeditious disposition of such disputes. In *Kwiecień* v *Poland*, the European Court of Human Rights acknowledged the legality of summary proceedings brought under local election law, stating that "proceedings of this type are conducted within very short time-limits... such a summary remedy during periods of (local and national) electoral campaigns serves the legitimate goal of ensuring the fairness of the electoral process and as such cannot be questioned from the Convention standpoint."[713]

328. The Commission also observes that some countries have expressly provided for tribunals with exclusive jurisdiction of dealing with electoral complaints. A notable example in the African sub-region is Nigeria, which has, by its 1999 Constitution, ensured that: "There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any other tribunal, have original jurisdiction to hear and determine petitions."[714] The Electoral Act 2010 of Nigeria further provides that election petitions arising from the conduct of a presidential election are handled by the Court of Appeal and all other election petitions by the Election Petition Tribunal.

329. In Brazil the Constitution specifically provides for the establishment of the electoral complaints adjudication mechanism. There is a Superior Electoral Court, a Regional Electoral Court in the capital of each state and one in the Federal District, municipal election

[712] Article 14 § 1 of the International Covenant on Civil and Political Rights G.A. Res 2200A (XXI); Art. 8 of the American Convention on Human Rights (ACHR) (1969); Article 6 § 1 of the European Convention on Human Rights (ECHR).
[713] *Kwiecień v. Poland (App no. 51744/99) § 55 Eur. Ct. H. R (Jan. 9, 2007)* http://www.echr.coe.int.
[714] Article 285(1) of the 1992 Constitution of the Republic of Ghana.

judges in large cities, and local election boards in small towns. The Brazilian Constitution details the composition of the Electoral Courts and states that a supplementary law should be adopted to define the "organization and competence of the electoral courts, judges and boards." [715] Constitutional provisions and Parliamentary Acts that establish election dispute institutions help to protect the right to judicial review in electoral matters.

330. The Commission also finds that:

a. Disputes relating to elections remain a natural component of the entire electoral process and the credibility of that process is to a large degree determined by the capacity of the state to settle these disputes effectively.
b. The role of the judge within the electoral process is undeniably essential and even acute when it comes to the consideration of electoral petitions. The right of all eligible citizens to determine who will represent them in government without hindrance is key to the viability of every democratic culture as well as a pre-requisite for social cohesion and solidarity.
c. The establishment within the current court structure of novel and specialised courts with exclusive jurisdiction over electoral disputes may offer many benefits, including the possibility of more timely resolution of the said disputes by adjudicators with vast experience and familiarity with the issues and law on elections, although these advantages may be achieved otherwise.
d. Improving effectiveness and speed in the resolution of electoral disputes requires a two-step effort:
    i. Ensuring that the substantive and procedural laws provide for a timing requirement; and
    ii. Providing the bodies in charge of resolving electoral disputes with the resources to implement the time limits stated in the law.
e. An important safeguard of election integrity lies in the effective resolution of complaints and appeals with minimum delay. There is no doubt that the slow pace of adjudication of electoral disputes is out of sync with the philosophical bedrock of the 1992 Constitution which mandates the smooth operation of the democratic processes in Ghana.
f. It is necessary to weight fairly the individual's right to access quick and effective justice against the interests of the society to ensure social cohesion, always bearing in mind that delays in adjudicating electoral complaints can hurt public confidence and delegitimise a government and elected officials. In other words, maintaining timely procedures requires a careful balance between the need to act swiftly and the need to assess carefully whether justice is being delivered. Like any legal standard,

[715] Article 118 of the 1992 Constitution of the Republic of Ghana.

the importance of deadlines is subject to limitations. Expeditious decisions cannot be made to the detriment of the right to a fair trial.

331. The Commission finds that the main issue for consideration then is two-fold:
    a. Whether the current legislative and institutional arrangements allow of the expeditious disposal of electoral disputes; and
    b. Whether the quest for quickening the pace of adjudication of electoral disputes justifies any restrictions on the legal avenues for remedy or redress available to citizens.

332. The Commission observes that the consensus at the National Constitution Review Conference was that presidential and parliamentary electoral disputes should first go to the High Court and decisions reached by the High Court should be appealable to the Court of Appeal and subsequently to the Supreme Court. In addition, it was proposed that the time limit within which electoral disputes are to be completely and effectually adjudicated upon should be spelt out by an Act of Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

333. The Commission recommends that the decision of the Supreme Court that the Court of Appeal is the final appellate court over parliamentary electoral disputes should be expressly stated in the Constitution.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

334. The Commission recommends the amendment of the Rules of Court as they affect electoral disputes, with a view to limiting interlocutory applications, adjournments, and delays in the delivery of judgments and to ensure the disposal of such cases within a period of 6 months.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

335. The Commission recommends that administrative measures be immediately instituted by the Chief Justice, especially in the aftermath of public elections, for courts hearing disputes arising from such elections to clear their schedule for the duration of such disputes and effectively prioritise election-related cases.

ISSUE SIX: ANNUAL REPORT OF THE ELECTORAL COMMISSION

A. DIMENSIONS OF THE ISSUE

336. The thrust of this issue was whether it should be required of the Electoral Commission to submit a report of its activities to Parliament vis-à-vis the need to insulate it totally from all

kinds of interference and the equally important need for some form of accountability from the EC.

B. CURRENT STATE OF THE LAW ON THE ISSUE

337. There is no constitutional or statutory requirement for the EC to submit a report to Parliament or any other body. This can be contrasted with other ICBs like the Commission on Human Rights and Administrative Justice,[716] the National Commission on Civic Education,[717] and the National Media Commission;[718] all of which are required to report to Parliament.

C. SUBMISSIONS RECEIVED

338. There were two sets of submissions on the issue: those proposing that the EC should submit an annual report to Parliament and those opposing that proposal. In the former set of submissions, Ghanaians argued that submitting an annual report to Parliament could promote transparency and ensure that the EC accounts for the tax payers' monies entrusted to them.

339. Those who opposed that view were concerned about possible interference by Parliament and contended that no such provision should be made in order to prevent any possible parliamentary control of the EC.

D. FINDINGS AND OBSERVATIONS

340. The Commission recalls two recent events which would bear on this issue. The more significant of the two concerns the parliamentary investigations into the difficulties of the EC in the conduct of the December 2010 District Assembly and Unit Committee elections, which resulted in those elections being staggered over a period of one week, instead of all the elections being held on one day. The EC originally scheduled to conduct those district level elections on 28th December, 2010. Due to some challenges, however, the elections were postponed and eventually conducted, not on the same day for all 170 districts, which would otherwise ordinarily have been the case. The elections were conducted in a very staggered

[716] Article 218(g) of the Constitution makes it a function of the Commission on Human Rights and Administrative Justice to report annually to Parliament on the performance of its activities.
[717] Section 20 of the National Commission for Civic Education Act, 1993 (Act 452) similarly requires the NCCE to submit an annual report to Parliament indicating the activities and operations of that Commission for the preceding year.
[718] The National Media Commission is also required under section 23 of its constitutive Act, the National Media Commission Act, 1993 (Act 449), to submit to Parliament an annual report indicating the activities and operations of the Commission in respect of the preceding year. The report is required to include a copy of the audited accounts together with the Auditor-General's report.

and somewhat unacceptable manner over a period of one week – 29th December, 2010 to 4th January, 2011.[719]

341. The Commission further observes that concerns have been expressed by Parliament about the integrity of the biometric voter registration process and its implications for elections, and it has been suggested to invite the Chairman of the EC to appear before the House to explain the kind of biometric registration the EC intends to undertake.

342. The Commission finds that as a measure of accountability, the EC should submit a report to Parliament like the other ICBs. However the EC should not be regularly interacting with, and made to explain itself to Parliament or any other organ of state.

343. The Commission further observes that the Constitution places on the EC a heavy and enormous responsibility to ensure that elections are totally free and fair. The enormity of this responsibility translates into the kind of independence given the EC by the Constitution. It makes every good sense to maintain this independence and not undermine it by such regular interaction with, and explanation to Parliament or any other body on the affairs of the EC. A relatively large majority in Parliament could, for instance, easily use such an arrangement as a tool to control and manipulate the EC to the detriment of other parties and to act purely on partisan considerations as opposed to the public interest.[720]

344. The Commission finds that the EC has through its own internal mechanisms, worked out effective innovations to build public confidence as well as holding itself accountable to the public. The Commission again points to the IPAC as a very good example. The Commission reiterates that, as severally recommended by different election observer groups,[721] the IPAC system should be developed as a more regular platform of dialogue between the EC and political parties. There should be more regular meetings and formal rules for those meeting. This initiative would have the dual effect of achieving consensus among political parties on the activities of the EC and other thorny issues relating to elections, while exacting the same level of accountability, fairness and transparency from the EC in relation to its activities. This will also have the same effect of building public confidence.

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[719] Report of the Parliamentary Committee to Investigate the Issues Surrounding the Apparent Difficulties of the Electoral Commission (EC) in Conducting the Originally Announced 28th December, 2010 District Assembly and Unit Committee Elections, 24th March, 2010.

[720] Rachel E. Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design", 89 Tex. L. Rev. 15.

[721] Commonwealth Secretariat, *Ghana Parliamentary and Presidential Elections, 7th December 2008 and Presidential Run-off Election: Report of the Commonwealth Observer Group*, (July 15, 2011) http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf; EU EOM: *"Ghana Final Report: Presidential and Parliamentary Elections 2008"*, Brussels, European Union Election Observation Mission (EU EOM)", (February 2009), page 10, (July 15, 2011) http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf.

345. The Commission accordingly finds that, as a fair compromise, and considering that Parliament, through its committee system, could as well facilitate the independence of the EC, it would be appropriate to require the EC to submit an annual report to Parliament like the other ICBs. Such a report would only serve to inform Parliament on the activities of the EC and should not serve to provide an opening for parliamentary inquiries into the activities of the EC. This way, Parliament may deliberate on the report but would be debarred from giving directives to the EC. Members of Parliament would still have the opportunity to relay their misgivings to the EC through the IPAC platform.

E. RECOMMENDATIONS

RECOMMENDATION FOR LEGISLATIVE CHANGES

346. The Commission recommends that the Electoral Commission Act, 1993 (Act 451) be amended to require the EC to submit annual reports to Parliament.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

347. The Commission recommends that the EC strengthens and develops the IPAC system into a more regular platform for dialogue between the EC and political parties.

ISSUE SEVEN: FUNDING OF POLITICAL PARTIES

A. DIMENSIONS OF THE ISSUE

348. The main dimension of this issue related to whether political parties should receive any form of financial assistance from State coffers.

B. CURRENT STATE OF THE LAW ON THE ISSUE

349. The only constitutional requirement for public support of political parties finds expression in Article 55(11) of the Constitution. In this provision, the state is required to support political parties in kind by providing fair opportunity to all parties to present their programmes to the public. The means of achieving this is to ensure equal access by all political parties to the State-owned media.

350. The Supreme Court has interpreted this provision as meaning equal access of all political parties to state-owned media for the purpose of presenting their political, economic and social programmes to the electorate and persuading them to vote for them at elections. This means that the same time or space has to be given to each political party, large or small, on

the same terms and the officers of the state-owned media have no discretion in the matter and that such access is not to be limited to the period when elections take place. [722]

351. Beyond this support in kind, there is no other legal requirement, constitutional or statutory, sanctioning public support for political parties. Aside from the disclosure requirements on the political parties, political party financing in Ghana is largely unregulated. [723] Political parties, in financing their activities and electioneering campaign, have to rely on self-generated funds. They generally resort to party membership dues, fund-raising and individual voluntary donations by party members and sympathizers. The law allows corporate donations to political parties provided that the organisation is Ghanaian or predominantly Ghanaian owned.[724]

352. Foreigners are, however, prohibited from making donations to political parties.[725] This prohibition, however, does not preclude the government of any other country or a non-governmental organisation from providing assistance in cash or in kind to the EC for use by that Commission for the collective benefit of registered political parties.[726]

C. SUBMISSIONS RECEIVED

353. The Commission received a number of submissions on the need for the State to fund political parties, at the very least, partly. They reasoned that being very important actors in the country, it should not be left to only a few individuals to finance the activities of the political parties. The main concern here was that the high cost of elections serves as a disincentive for parties and candidates with modest financial resources to be competitive in elections. In many instances, and in the particular case of women, it prevents otherwise competent Ghanaians from putting themselves up for political office.

D. FINDINGS AND OBSERVATIONS

354. The Commission observes, from comparative lessons from Africa, that there is no uniformity with regard to the practice of individual states relating to the regulation of political party financing.
    a. For instance, Mali, like Ghana, has provisions banning foreign donations, but there are no express provisions relating to other aspects of political party funding general disclosure provisions and campaign expenditure.

[722] *New Patriotic Party* v. *Ghana Broadcasting Corporation*. [1993-1994] 2 GLR 35.
[723] Section 13 and 14 of the Political Parties Act, 2000 (Act 574).
[724] Sections 24(1) of the Political Parties Act, 2000 (Act 574).
[725] Article 55(15) of the Constitution and sections 23 and 24 of the Political Parties Act, 2000 (Act 574).
[726] Section 25 of the Political Parties Act, 2000 (Act 574).

b. Benin, on the other hand, provides state funding for political parties, but also has no limits on campaign expenditure as is currently the case in Ghana.
c. In South Africa, there are neither provisions on general disclosure nor bans on foreign donations. There are, however, provisions for substantial public funding and accounting requirements with respect to the public funds.[727]

355. The Commission finds that altogether in Africa there is a sharp distinction between the sources of income of governing parties and those of opposition parties. Ruling parties, by far, outpace and outspend opposition parties. A ratio of 15:1 is given in the case of Ghana while 30:1 has been stated for Senegal. This obviously affects the fairness of the electioneering process, as parties in government generally abuse incumbency and use the power of the purse to dwarf opposition parties.[728]

356. The Commission associates itself with the Committee of Experts that drafted the proposals for the 1992 Constitution and notes that sustaining political parties involves a lot of resources.[729] The Commission finds wisdom in the recommendation by the Committee of Experts that the state offer some partial support to political parties, by ensuring that all candidates for the Presidency are given the same amount of time on radio and television, and the same amount of space in state-owned newspapers.[730] The Commission, however, finds that the kind of support contemplated by the Committee of Experts is, today, woefully inadequate. The liberalisation of the media alone points to the direction of some additional public support for political parties.

357. The Commission observes that it is not rare to find political parties in Ghana going dormant in between elections or being dominated by a few personalities because they are the chief financiers of the parties. To keep political parties competitive and to ensure that they effectively play their role as important actors in Ghana's democratic process, it would be desirable to adopt a mixture of public and private funding of political parties. Public funding would afford a level playing field and create more equitable conditions among the parties and also afford the EC the necessary basis to exact accountability from political parties. In this respect the Commission's attention was drawn to the existence of proposals by the EC for enhanced public support of political parties. It would be desirable for the EC to further

[727] Yaw Saffu, *The Funding of Political Parties and Election Campaigns in Africa*, in FUNDING OF POLITICAL PARTIES AND ELECTIONS CAMPAIGNS 22, (Reginald Austing, Maja Tjernström, ed. IDEA (2003).
[728] Yaw Saffu, *The Funding of Political Parties and Election Campaigns in Africa*, in FUNDING OF POLITICAL PARTIES AND ELECTIONS CAMPAIGNS 22, (Reginald Austing, Maja Tjernström, ed. IDEA (2003).
[729] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 241.
[730] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 243. This found expression in Article 55(11) of the 1992 Constitution of the Republic of Ghana.

develop the proposal, in consultation with political parties, to serve as the basis for a piece of legislation for the public support of political parties.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

358. The Commission recommends that the EC should continue to develop its proposals for enhanced public support of political parties to serve as the basis for future legislation.

SUBTHEME FOUR: SPECIFIC MATTERS RELATING TO THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE

ISSUE ONE: THE FUNCTIONS AND POWERS OF THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (CHRAJ)

A. DIMENSIONS OF THE ISSUE

359. The dimensions of this issue were as follows: should CHRAJ be broken up into different institutions along its three-fold mandate; should the CHRAJ be given power to enforce its decisions, should the CHRAJ vis-à-vis its three-fold mandate: should the CHRAJ have prosecutorial powers typical of anti-corruption agencies; and should the mandate of the CHRAJ extend to investigations on its initiative without an identifiable complainant.

B. CURRENT STATE OF THE LAW ON THE ISSUE

360. The CHRAJ is an institutional model combining the functions of three distinct institutions namely: a national human rights institution (NHRI), an Ombudsman, and a National Anti-Corruption Commission. As a national human rights institution, the CHRAJ has the mandate to protect and enforce all the rights and freedoms enshrined in the Constitution.[731] It also protects and enforces other fundamental rights and freedoms considered to be inherent in a democracy and intended to secure the freedom and dignity of a person[732] In doing so the CHRAJ functions to investigate complaints alleging violations of fundamental human rights and freedoms of a person by other individuals or institutions, whether privately[733] or in the performance of public functions.[734] The tools for the resolution of such complains are all encompassing; they include such fair, proper and effective means as negotiation and mediation; hearings complaints and reporting its findings; initiating contempt proceedings in

[731] All civil, political, economic, social and cultural rights under Chapters 5 and 6 of the 1992 Constitution of the Republic of Ghana.
[732] Article 33(5) of the 1992 Constitution of the Republic of Ghana.
[733] Article 218(c) of the 1992 Constitution; Section 7(1)(c) of the CHRAJ Act, 1993 (Act 456).
[734] Article 218(a) of the 1992 Constitution; Section 7(1)(a) of the CHRAJ Act, 1993 (Act 456).

court to secure the termination, abandonment, alteration of the offending action, conduct, or process; and initiating court actions to restrain the enforcement of legislation or regulation or to challenge the validity thereof, or simply to seek a remedy which is available in the court, including application for maintenance orders.[735]

361. The CHRAJ also promotes and prevents violations of human rights by educating the public on their rights and freedoms through such means as publications, lectures and symposia. The CHRAJ has also developed innovative ways of researching into systemic human rights abuses and the creation of public awareness around such issues. It also conducts inspection monitoring visits to detention facilities, hospitals, schools and communities, to ensure the respect for human rights in these institutions.

362. As an Ombudsman, the CHRAJ ensures that public administration is conducted legally and fairly. This way, the CHRAJ investigates complaints of abuse of office by public officers and complaints concerning the functioning of public institutions in relation to the failure to achieve a balanced structuring of those institutions or equal access by all to recruitment into those institutions or fair administration in relation to those institutions.[736] The tools for resolving such complaints are the same as those for resolving human rights complaints.[737]

363. Finally as a National Anti-Corruption Commission, the CHRAJ investigates all instances of alleged or suspected corruption and the misappropriation of public monies by officials and investigates allegations that a public officer has contravened or has not complied with a provision of the Code of Conduct for Public Officers.[738] In doing so, the CHRAJ promotes integrity and ethics in the public service. Additionally, and through various publications and training and public education programmes, CHRAJ sensitises public officials and the general public on corruption and conflict of interest matters. The CHRAJ also functions to investigate disclosures by whistleblowers of improprieties as well as complaints of the victimization of whistleblowers.[739]

364. The Constitution is not as expressive on the tools for the enforcement of the CHRAJ's corruptions cases as it is on cases relating to human rights and administrative justice. In corruption cases, the CHRAJ is simply required to take appropriate actions or steps as it may

[735] Articles 218(d) and 229 of the 1992 Constitution of the Republic of Ghana; Sections 7(1)(d) and 9 of the CHRAJ Act, 1993 (Act 456); Section 48(d) of the Children's Act 1998 (Act 560).
[736] Article 218(b) of the 1992 Constitution of the Republic of Ghana; Section 7(1)(b) of the CHRAJ Act, 1993 (Act 456).
[737] Articles 218(d) and 229 of the 1992 Constitution of the Republic of Ghana; Sections 7(1)(d) and 9 of the CHRAJ Act, 1993 (Act 456).
[738] Articles 218(a) and (e) and 287 of the 1992 Constitution of the Republic of Ghana; Section 7(1)(a) and (e) of the CHRAJ Act, 1993 (Act 456). The Code of Conduct for Public Officers is set out in Chapter 24 of the 1992 Constitution of the Republic of Ghana.
[739] Sections 3 and 13 of the Whistleblower Act, 2007 (Act 720).

deem fit, including making a report to the Attorney-General and the Auditor-General.[740] What is considered an appropriate action or step has not been defined. However, it would appear that nothing debars the CHRAJ from initiating a civil action to secure a civil remedy[741] such as the forfeiture of proceeds of corruption to the state.[742] The CHRAJ does not have the power to prosecute any person for corruption, because of Article 88 which makes the Attorney-General exclusively the authority to initiate criminal proceedings in Ghana.

365. In the performance of its functions, the CHRAJ is empowered to issue subpoenas; cause the prosecution of persons contemptuous of subpoenas; question persons in respect of any subject matter under investigation; and require any person to disclose truthfully and frankly any information within his knowledge relevant to any investigation.[743]

366. In gathering evidence, during its investigations, the CHRAJ may also summon before it and examine on oath or affirmation any person required by the CHRAJ to furnish it information within his knowledge or produce a document in his custody. The CHRAJ may also examine a complainant on oath or affirmation. Where a person is bound by law to maintain secrecy, the Commission may apply to the Supreme Court to determine whether the information or document required should be delivered to the CHRAJ.[744]

367. The functions and powers of the CHRAJ have been the subject of several judicial decisions.
    a. First, the Supreme Court has held that the functions of the CHRAJ are purely investigative and educative in nature; it has no self-enforcement powers. The CHRAJ is accordingly a purely investigative body; it is not a quasi-judicial body. Its findings/decisions are not binding in the sense of judicial adjudication. The CHRAJ makes recommendations and the thoroughness of its investigations will determine how the persons to whom the recommendations are addressed will act on them.[745]

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[740] Articles 218(e) and 287 of the 1992 Constitution of the Republic of Ghana; Section 7(1)(f) of the CHRAJ Act, 1993 (Act 456) and Section 10 of the Whistleblower Act, 2007 (Act 720).

[741] Article 229 of the 1992 Constitution of the Republic of Ghana; Section 9 of the CHRAJ Act, 1993 (Act 456), both of which mandate the Commissioner of the CHRAJ, for the purposes of performing his functions, to bring an action before any court in Ghana to seek any remedy available in that court.

[742] *Ghana Commercial Bank* v. *Commission on Human Rights and Administrative Justice* [2003-2004] SCGLR 91, where was it observed that, where the CHRAJ's recommendations after investigations are not complied with, the CHRAJ may, in terms of Article 229 of the Constitution, refer the decision or recommendation to the courts for enforcement. In such a case, the duty of the court is to order the enforcement of the decision subject to the remedy available in that court and that such remedy must be permissible by law.

[743] Articles 219(1) of the 1992 Constitution of the Republic of Ghana; Section 8(1)(a) of the CHRAJ Act, 1993 (Act 456).

[744] Section 15 of the CHRAJ Act, 1993 (Act 456).

[745] *Ghana Commercial Bank* v. *Commission on Human Rights and Administrative Justice* [2003-2004] SCGLR 91; *Ampiah Ampofo* v. *Commission on Human Rights and Administrative Justice* [2005-2006] SCGLR 227; *Republic* v. *Fast Track High Court Ex Parte Commission on Human Rights and Administrative Justice, Dr. Richard Anane (Interested Party)* [2007-08] SCGLR 213 at 318.

b. It has also been held that in the absence of an identifiable complainant, the CHRAJ, on its own accord, cannot initiate investigations into violations of human rights, abuse of office, unfair treatment by public officer and breaches of the Code of Conduct for Public Officers. The power of the CHRAJ to initiate investigations on its own is limited to instances of suggested corruption.[746] Hitherto, the Commission took a proactive stance to investigate media reports of serious human rights abuses (particularly relating to children and those which are systemic), as well as cases involving conflict of interest situations.
c. Finally, it has been held that the anti-corruption mandate of the CHRAJ extends to a private individual who is alleged to be involved or implicated in an act of alleged bribery or corruption involving public officials and which is under investigation by the Commission.[747]

C. SUBMISSIONS RECEIVED

368. There were submissions which proposed that the three-fold mandate of the CHRAJ should be maintained.
    a. They contended that the current CHRAJ model is cost-effective.
    b. Proponents of this position also reasoned that the independence of the CHRAJ makes it suitable to discharge its mandate effectively; hiving off the anti-corruption mandate, for instance, and giving it to a statutory institution like the Economic and Organised Crime Office (EOCO) could undermine the impartiality required in discharging that mandate.
    c. It was also argued that the effectiveness argument advanced by those advocating the break-up of the CHRAJ can be equally achieved if the CHRAJ, as currently composed, is efficiently restructured along the lines of this mandate.

369. On the other hand, there were other submissions which proposed that the CHRAJ should be broken up along its three mandates. These submissions had several variations.
    a. Some contended that the anti-corruption mandate should be hived off and given to a new constitutional independent anti-corruption institution.
    b. There were others who agreed that the anti-corruption mandate should be hived off, but stated that there is no need to establish a new bureaucracy. Rather, it should be given to existing institutions like the EOCO, the Bureau of National Investigations and the Police.
    c. There were still others which proposed that the ombudsman mandate should be hived off.

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[746] *Republic* v. *Fast Track High Court Ex Parte Commission on Human Rights and Administrative Justice, Dr. Richard Anane (Interested Party)* [2007-08] SCGLR 213 at 318.
[747] *Commission on Human Rights and Administrative Justice* v. *Attorney-General and Baba Kamara*, (Unreported) Supreme Court, Suit No. J 1/3/2010, 6th April, 2010.

d. Others proposed that the CHRAJ should focus on the human rights mandate and cede the anti-corruption and ombudsman mandates to others.

The reasons given for all these were similar. It was variously reasoned that:

a. The CHRAJ is currently overburdened with too many responsibilities.
b. Breaking up the CHRAJ will enable the new institutions taking up the different mandates to focus much more on the individual mandates and become more effective.
c. Hiving off the anti-corruption mandate and giving it to the EOCO will guard against the apparent confusion of roles between the two institutions. There were also some submissions which advocated that the CHRAJ should rather take over the functions of EOCO to avoid a duplication of functions.
d. The different enforcement mechanisms for the different mandates are not compatible with each other and within the current three-fold mandate model.
e. The CHRAJ as currently composed will always be under-resourced because it will always be considered as one institution instead of a three-in-one institution.

370. Concerning the powers of the CHRAJ, there were submissions on both sides of the debate:

a. There were those who proposed that the CHRAJ be empowered to prosecute persons against whom adverse findings have been made, as this will make the CHRAJ more effective and also enhance the fight against corruption. Related to this was the argument that the current arrangement by which the CHRAJ submits its report of corruption to the Attorney-General for possible prosecution is not only ineffective, it is time-wasting and has the added demerit of making the CHRAJ toothless and ineffectual.
b. Those who contended that the CHRAJ should not have any prosecutorial powers maintained that the current arrangement is effective. Besides, the CHRAJ cannot purport to, at the same time, investigate and determine cases in its formal hearing approach, and proceed to prosecute at the same time. Such an arrangement is contrary to the principles of natural justice.
c. Again, there were those who proposed that the decisions of the CHRAJ be binding to make them more effective.
d. Those who maintained that the CHRAJ's decisions should not be binding cited principles of natural justice as their main reason; they contended that any dual investigative and adjudicative role of the CHRAJ will not be compatible with the principles of the rules of natural justice.
e. On the question of whether the CHRAJ should be mandated to investigate human rights and administrative justice cases on its own initiative, there were those who reasoned that a positive answer to that question will strongly enhance the CHRAJ's oversight functions and serve as an effective check on public administration in

Ghana. They also argued that it would be in the public interest for the CHRAJ to be able to investigate all cases without a complainant. Besides, it will make the CHRAJ proactive; the requirement of a formal complainant would stifle the CHRAJ in the discharge of its mandate. Moreover, it was argued that some people are reluctant or lack the courage to make formal complaints for the fear of victimization. Insisting on a formal complaint will not be in the interest of such people and the nation as a whole.

f. On the other hand, there were submissions to the effect that the CHRAJ should not have the power to investigate cases without formal complaints. It was reasoned that this would enable the CHRAJ to focus on only the complaints which are of importance to Ghanaians. It was argued that only such complaints would be reported. This way, the CHRAJ would not go on a 'wild goose chase' when unsustained allegations are made without any evidence, bearing in mind that it is always difficult to redeem and repair the image of a person against whom false allegations have been made.

371. Finally on the functions of the Commission, it was submitted that some constitutional or statutory force should be given to the CHRAJ's monitoring functions. It was pointed out that the CHRAJ conducted inspection and monitoring visits without express constitutional or statutory backing, and that it would accord with international practice if such constitutional or statutory backing was given the CHRAJ in the conduct of its monitoring function.

D. FINDINGS AND OBSERVATIONS

372. The Commission observes that the justification for the introduction of the concept of an ombudsman was the search for a machinery to provide citizens with a better avenue of expressing their grievances, and to have a body capable of investigating complaints from citizens who feel that they have been unfairly dealt with by the government.[748]

373. The Commission observes that Sweden was the first country in the world to establish an institution of this nature.[749] The *Justitieombudsman*, the predecessor of the modern institution of the ombudsman was appointed by the Swedish Parliament in 1806 to supervise the conduct of the government administration and the judiciary.[750] It had the power not only to

[748] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 475 and 476.
[749] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 476.
[750] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 31 (2011); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1 (Spring 2000); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

prosecute public officials, but also to pursue investigations and make recommendations to the government.[751]

374. The Commission also observes that early in its history, the ombudsman's mandates diverged.
    a. In Sweden and Finland the ombudsman had the power to prosecute and had jurisdiction over the judiciary.[752] The Swedish ombudsman in particular functioned to supervise the conduct of the government administration and the judiciary
    b. The Danish ombudsman did not have prosecutorial powers or jurisdiction over the judiciary; its core function was to investigate administrative conduct impartially, based either on a complaint or the ombudsman's own motion, to make recommendations, to rectify any illegal or unfair conduct uncovered, and to issue annual and special reports.[753]
    c. The classical ombudsman is an institution that uses "soft powers" of persuasion and cooperation to control conduct rather than coercive or adjudicative means. [754]

375. The Commission further observes that it is the Danish ombudsman model that became popular around the world; and further finds that it is this model that informed the Ombudsman provisions under the Second Republican Constitution, 1969.[755] Even though the Ombudsman was never set up under the 1969 Constitution,[756] it was re-enacted in the Third Republican Constitution, 1979.[757] The Office of the Ombudsman was eventually to perform functions akin to the Danish model.[758]

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[751] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 31 (2011).

[752] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 31 (2011; LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[753] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 31 (2011); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[754] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 270 (2011).

[755]Articles 100 and 101 of the 1969 Constitution of the Republic of Ghana; " Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 477 – 478, where it was noted that the Akuffo Commission that drafted proposals for the 1969 Constitution sent a delegation to Denmark to learn about the Danish Ombudsman.

[756]"Though Articles 100 and 101 of the 1969 Constitution of the Republic of Ghana provided for the Ombudsman institution, the drafters of the Constitution failed to make it obligatory for the incoming civilian administration of the Progress Party (P.P.) to appoint somebody to the office. The P.P. Government merely passed the Ombudsman Act on 30th September 1970, one year after the coming into force of the Constitution, without appointing any person to the office"; Sam K. Asibuo, *The Role Of The Commission on Human Rights and Administrative Justice (CHRAJ) in Promoting Public Service Accountability under Ghana's Fourth Republic*, African Training and Research Centre in Administration for Development, (July 21, 2011, 3: 47 PM) http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN017693.pdf.

[757] Articles 110 to 113 of the 1979 Constitution of the Republic of Ghana.

[758] Articles 112 of the 1979 Constitution; Ombudsman Act, 1980 (Act 400). The functions included receiving complaints about injustice and maladministration against government agencies and officials from aggrieved persons or individuals.

376. The Commission further observes that since the 1970s, governments around the world have established hybrid versions of the ombudsman institution by giving one institution multiple mandates. These additional mandates include protecting human rights, fighting corruption, ensuring ethical conduct by elected public officials, and protecting the environment.[759] Papua New Guinea, Philippines, China (Macao), Taiwan, Indonesia, East Timor, South Africa, Namibia, Uganda, Mauritius, Lesotho, Seychelles, and Rwanda are all examples of countries with institutions performing some ombudsman and anti-corruption functions. [760]

377. The Commission accordingly finds that the three-in-one model of the CHRAJ was well informed, and has subsequently proved to be a good model as many more countries have adopted similar models. For instance, by 2003, about half of the approximately 110 national ombudsman institutions worldwide had human rights mandates.[761] Many more ombudsman institutions established since that time have also been given human rights-related duties. Classical ombudsman institutions are increasingly being transformed through the conferral of constitutional or legislative mandates to protect human rights.[762]

378. The Commission further observes the following:
    a. One reason why states combine different mandates under single agencies is to utilise limited financial resources effectively. Examples of states which combine these functions in some form or another are Albania, Argentina, Bosnia and Herzegovina, Belize, Bolivia, Croatia, Cyprus, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Hungary, Latvia, Macau, Mexico, Moldova, Namibia, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Romania, Russia, Seychelles, Slovenia, South Africa, Spain, and Uganda.[763]

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[759] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 271 (2011); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1 (Spring 2000); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[760] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 271 (2011); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1 (Spring 2000); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[761] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 271 (2011); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1 (Spring 2000); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[762] Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, 1 B.C. Third World L.J. 271 (2011); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1 (Spring 2000); LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

[763] Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", 13 Harv. Hum. Rts. J. 1 (Spring 2000).

b. It remains a concern that overlapping functions in more than one agency could hamper the efficiency of either one or the other of the acting agencies. In Ghana, however, it has been strongly recommended that the endemic nature of corruption makes it imperative to pursue the fight against corruption through multiple anti-corruption agencies.[764]
c. There are many differences in the breadth of power their mandates bestow on the various Human Rights Commissions. For example, the Mauritanian human rights commission is permitted only advisory and promotional activities while the Ugandan human rights commission has quasi-judicial powers to convene as a human rights court to adjudicate complaints.[765] Most Human Rights Commissions can touch on virtually any human rights issue in their country, but not all choose to move beyond promotion and education work to address issues that may engage them in a more confrontational stance with the government.[766] Many national human rights institutions, especially in civil law jurisdictions in Europe and Latin America, have been given additional powers including: bringing actions on constitutional matters involving human rights to a Constitutional or Supreme Court; becoming involved in administrative court proceedings; and prosecuting public officials.[767]
d. The Namibian Constitution provides the ombudsman the power to prosecute. Namibia's ombudsman has multiple mandates, including administrative oversight and human rights, anti-corruption, and environmental protection—and has extensive power to refer matters to other public officials for prosecution, bring court proceedings to halt government action and challenge the validity of laws, and provide legal assistance to persons engaged in constitutional human rights litigation.
e. The Uganda Human Rights Commission, "if satisfied that there has been a violation of human rights or freedom, may order: the release of a detained or restricted person, payment of compensation, or any other legal remedy or redress. However any person

[764] Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report) (1974); Henry Kwasi Prempeh, *Making the Policy of "Zero Tolerance for Corruption" a Reality in Ghana: A Focus on the Serious Fraud Office*, Ghana Centre for Democratic Development (CDD, Ghana), *Critical Perspective* No. 12 (2003).
[765] HUMAN RIGHTS WATCH, http://www.hrw.org/legacy/reports/2001/africa/overview/record.html, (last visited July 21, 2011).
[766] "In South Africa, the fact that its human rights commission can only make recommendations and not even demand a response from the government has hampered its work. Realizing this, some governments have built in operational ineffectiveness by denying their human rights commissions adequate powers." HUMAN RIGHTS WATCH, http://www.hrw.org/legacy/reports/2001/africa/overview/record.html, (last visited July 21, 2011).
[767] Linda C. Reif, *Transplantation and Adaptation: the Evolution of the Human Rights Ombudsman*, 31 B.C. Third World L.J. 304 (Spring 2011) where it is noted that "a survey of European ombudsmen provides the following information: four human rights ombudsmen can start criminal proceedings, while many can recommend that they be instituted; seven can initiate disciplinary proceedings, while many can recommend that they be instituted; eleven can make applications before administrative or other courts; and many have the right to bring actions before the nation's constitutional court."

or authority dissatisfied with an order made by the Commission has the right to appeal to the High Court." [768]

379. The Commission finds from all the observations made that, the CHRAJ three-in-one model is an efficient mechanism which must be preserved. The challenges of the CHRAJ are primarily a resource problem and is of the view that the funding mechanism being proposed for the ICBs in this report should resolve that problem.

380. The Commission also observes that the challenges of the CHRAJ relate equally to an internal structural problem. It would, therefore, be appropriate to restructure the CHRAJ into Divisions along its core mandates with each Division headed by a Deputy Commissioner. Such an arrangement will enable the CHRAJ to focus and give the maximum attention to all 3 mandates and all aspects of human rights. It would be desirable to give each Division or Department autonomy under the umbrella of the CHRAJ. In this sense the Commission's attention was drawn to a 5-year strategic plan by the CHRAJ which adopted a similar re-structuring programme.

381. The Commission further observes that some of the challenges that the CHRAJ faces are traceable to the lack of enforcement powers. The status of the CHRAJ's decisions as recommendations does not reflect the critical role of the CHRAJ in Ghana. While the CHRAJ has consistently been held to be a purely investigative body with no judicial or quasi-judicial or self-enforcement powers;[769] the CHRAJ in reality is a quasi-judicial body by the very nature of its functions. Subject to the supervisory jurisdiction of the High Court, it will not be appropriate to the subject-matter of the decisions of the CHRAJ reopened and re-litigated at the High Court.[770] In this regard, as a "constitutionally-independent and specialised quasi-adjudicatory body", the decisions of the CHRAJ "must be given substantial deference."[771] It will accordingly be prudent to make the decisions of the CHRAJ directly enforceable. Consequently, the CHRAJ must ensure that capable people are engaged at its district and regional offices; they must have competencies equivalent to lay magistrates and Justices of the Circuit Court respectively.

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[768] Uganda Human Rights Commission, *Order of Remedies*, http://www.uhrc.ug/index.php?option=com_content&view=article&id=162&Itemid=26.

[769] *Ghana Commercial Bank* v. *Commission on Human Rights and Administrative Justice* [2003-2004] SCGLR 91; *Ampiah Ampofo* v. *Commission on Human Rights and Administrative Justice* [2005-2006] SCGLR 227; and *Republic* v. *Fast Track High Court Ex Parte Commission on Human Rights and Administrative Justice, Dr. Richard Anane (Interested Party)* [2007-08] SCGLR 213.

[770] *Ghana Commercial Bank* v. *Commission on Human Rights and Administrative Justice* [2003-2004] SCGLR 91.

[771] Henry Kwasi Prempeh, *Framing a Constitution of Ghana for the Twenty-First Century: Averting the Peril of a Constitution without Constitutionalism*, a paper presented at a public lecture organized by the Centre for Democratic Development, UNECA and Joy FM, 26th November, 2009.

382. The Commission finally finds that it would be appropriate, in the interest of the public, for the CHRAJ to be able to initiate investigations without a formal complaint. In this regard, the convention of inspecting and monitoring adherence to established human rights in detention and other centres should be given constitutional or statutory force.

383. The Commission observes that the participants at the National Constitution Review Conference advocated that:
    a. The three-fold mandate of the CHRAJ in the Constitution should be retained.
    b. The CHRAJ should be given the express power to prosecute. It does not make much sense to empower some institutions (whose officials do not have the legal training that the officers of the CHRAJ have) to prosecute, while the CHRAJ has no such prosecutorial powers.
    c. Decisions of the CHRAJ should be binding and must be registerable at an appropriate court (decisions of District Offices of the CHRAJ should be registered in the District Magistrate Court; decisions of Regional Offices of the CHRAJ should be registered in the Circuit Court; and the decisions of the Head Office should be registered in the High Court). Once registered, the decision must be deemed to be the judgment of that court and enforceable at law.
    d. The CHRAJ should be expressly given the power to investigate cases on its own initiative. This is in line with international best practice.
    e. There should be a special Commissioner for the protection, implementation and monitoring of Children's rights.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

384. The Commission recommends that the current functions of the CHRAJ be maintained.

385. The Commission further recommends that the Constitution be amended to allow for the CHRAJ to be composed of 5 members: a Commissioner, and 4 Deputy Commissioners.

386. The Commission recommends that the 4 Deputy Commissioners should include a "Special Commissioner" for children, persons with disability, and the aged, who will be partly responsible for the protection, implementation and monitoring of the rights if children, persons with disabilities and the aged.

387. The Commission recommends that the CHRAJ should be empowered to initiate investigations without a formal complaint for all aspects of its mandates.

388. The Commission recommends that the CHRAJ should be empowered to have its decisions directly enforceable by the courts.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

389. The Commission recommends that the CHRAJ Act should be amended to make the decisions of the CHRAJ directly enforceable by registration in the court.

390. The Commission recommends that the decisions of the district offices of the CHRAJ be reviewed by the Regional Offices with expedition.

391. The Commission recommends that the CHRAJ Regulations should make provision for complaints and investigations procedure, the processing of decisions, and appeals from decisions.

392. The Commission further recommends that the findings and recommendations of the CHRAJ should become binding, subject to a right of appeal within one month.

393. The Commission also recommends that the findings and recommendation should be registered only after 3 months of the decisions containing those findings, if the CHRAJ is satisfied that the person to whom the recommendations are addressed has not taken adequate and appropriate measures in relation to the recommendations.

394. The Commission further recommends that the CHRAJ should be expressly empowered to inspect detention and other facilities, and to make such orders as would secure the rights of those detained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

395. The Commission recommends that the CHRAJ fully implements its 5-year strategic plan as amended by the preceding constitutional and legislative changes.

396. The Commission recommends that the CHRAJ should ensure that capable adjudicators are engaged at their district and regional offices equivalent to lay magistrates and Justices of the Circuit Court respectively.

SUBTHEME EIGHT: SPECIFIC MATTERS RELATING TO THE NATIONAL MEDIA COMMISSION

ISSUE: FUNCTIONS OF THE NATIONAL MEDIA COMMISSION

A. DIMENSIONS OF THE ISSUE

397. This issue manifested itself in mainly two variations;
    a. How to reconcile the respective regulatory roles of the National Media Commission and the National Communications Authority in the light of the constitutional mandate of the National Media Commission, and
    b. How the National Media Commission could efficiently regulate media practice in Ghana, while at the same time enhancing the freedom and independence of the media and freedom of speech and expression.

B. CURRENT STATE OF THE LAW ON THE ISSUE

398. The functions of the National Media Commission (NMC) as provided by the Constitution include promoting and ensuring the freedom and independence of the media for mass communication or information; taking the appropriate measures that ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media; and insulating the state-owned media from governmental control.

399. The NMC also has the authority to take measures that ensure that persons responsible for state-owned media afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions; to appoint, in consultation with the President, the Chairmen and the other members of the governing bodies of public corporations managing the state-owned media; and to make regulations by constitutional instrument for the registration of newspapers and other publications, which regulation shall not provide for the exercise of a direction or control over the professional functions of a person engaged in the production of newspapers or other means of mass communication. The NMC may also perform such other functions that may be prescribed by law not inconsistent with the Constitution.[772]

400. The National Media Commission is prohibited from making any regulations that would require a person to obtain or maintain a licence as a condition for the establishment of a newspaper, journal or any other written publication.[773]

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[772] Articles 162, 163, 167 of the 1992 Constitution; Section 2(1) of the National Media Commission Act, 1993 (Act 449).
[773] Articles 162 of the 1992 Constitution of the Republic of Ghana; Section 2(2) of the National Media Commission Act, 1993 (Act 449).

401. The law sets out a procedural mechanism for settling complaints of persons aggrieved by publications in the media. Act 449 establishes a complaints settlement committee of the NMC consisting of the Chairman, and 6 members, 3 of whom are persons not ordinarily employed or involved in the media industry.[774] A person aggrieved by a publication or by the act or omission of a journalist, newspaper proprietor, a publisher or any other person in respect of a publication in the media may lodge a complaint before the NMC against the editor, publisher, proprietor or that other person.[775] A complaint lodged with the NMC is referred to the settlement committee, which may investigate the complaint as it considers necessary, considering both documentary and oral evidence provided by the parties.[776] For the purposes of its ruling, the settlement committee has the power to order the publication of a correction and an apology with equal prominence as the original offensive material; order the publication of a rejoinder, or direct disciplinary action for breach of the code of ethics.[777]

402. Without prejudice to the complaints-resolution mechanism, the law makes it mandatory for any media house which publishes a statement about or against a person to publish a rejoinder from the person in respect of whom the publication was then made.[778] Where the media house fails to publish a rejoinder, the person aggrieved may apply to the NMC or the High Court for an order to compel the publication of the rejoinder.[779]

403. The NMC may by a legislative instrument, prescribe the procedure to be followed by the Complaint Settlement Committee and any other matter that is necessary for the efficient performance of its functions.[780]

404. To give meaning to its regulatory functions, the NMC has promulgated the National Media Commission (Complaints Settlement Procedure) Regulations, 1994 (LI 1587); the National Media Commission (Newspaper and Publication Registration) Instrument, 2002 (LI 1713); the National Media Commission (Rejoinder) Instrument, 2002 (LI 1714); and the National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).

405. Among others, LI 1714 sets out a reasonable time limitation for the publication of rejoinders[781] and makes it an offence, punishable by a fine of 50 penalty units, if a broadcast

[774] Section 12 of the National Media Commission Act, 1993 (Act 449).
[775] Section 13 of the National Media Commission Act, 1993 (Act 449).
[776] Section 14 of the National Media Commission Act, 1993 (Act 449).
[777] Section 15(1) of the National Media Commission Act, 1993 (Act 449).
[778] Section 16(1) of the National Media Commission Act, 1993 (Act 449).
[779] Section 16(2) of the National Media Commission Act, 1993 (Act 449).
[780] Section 24 of the National Media Commission Act, 1993 (Act 449).
[781] Regulation 3 of the National Media Commission (Rejoinder) Instrument, 2002 (LI 1714) requires a media house to publish a rejoinder within: the next three issues of a daily publications; or the next two issues of weekly publication or within three days in the case of a television or radio broadcast– after the receipt of a request for the publication of a rejoinder.

media house fails to publish a rejoinder as directed by the Commission or in refusal of a request by a person aggrieved by a publication.[782]

406. The National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715) similarly requires the operators of broadcast media to ensure that persons misrepresented are given the right of rejoinder. The content of every programme is required to be in consonance with the Constitution, any relevant enactment, and international treaty ratified by Ghana relating to Broadcasting standards. Broadcast media houses are also required to ensure that information given out is presented accurately, honestly and impartially.[783] The broadcast media is also obliged to avoid indecency, incitement to ethnic, religious or sectional hatred, obscenity or vulgarity except in a specifically relevant context; and programmes offensive to persons with disability.[784] The broadcast media is equally required to avoid language and programmes which glorify or incite crime and encourage disorder.[785] In terms of political broadcast, media houses are required to remain impartial to each political party; treat all parties with fairness; and present government activities during elections fairly to avoid giving the government unfair access to the medium. They are required to use decent language; avoid controversial or offensive reference to an opposition party; and grant identical conditions for the broadcast of the agenda of each political party and candidate.[786] An operator of a medium who fails to comply with any regulation is liable to a penalty including a pecuniary penalty determined by the NMC.[787]

407. The National Communications Authority (NCA) is the body that regulates the allocation of frequency spectrum in Ghana. In terms of its enabling Act and other relevant legislation, the NCA was established as the central body to license and regulate communications activities and services in the country[788] including providing for the regulation of communication, the regulation of broadcasting, and the use of the electro-magnetic spectrum.[789] By this arrangement, the NCA is another regulatory body for radio broadcast, television broadcast, telecommunications and other forms of new media including Internet services.

408. Apart from these statutory provisions, the general principles at common law on defamation and civil libel have been variously employed under the present constitutional dispensation to enforce the rights of persons aggrieved by stories published by various media houses.[790]

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[782] Regulation 6 of the National Media Commission (Rejoinder) Instrument, 2002 (LI 1714).
[783] Regulations 2 and 3 of National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).
[784] Regulation 4 of National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).
[785] Regulation 9 of National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).
[786] Regulation 17 of National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).
[787] Regulation 9 of National Media Commission (Broadcasting Standards) Regulations, 2002 (LI 1715).
[788] National Communications Authority Act, 2008 (Act 769)
[789] Electronic Communication Act, 2008 (Act 775)
[790] *Hon. Hackman Owusu-Agyeman* v. *Apisawu Peter Kojo and Others*, (unreported) HC, Suit No. AD 3/2005 where the High Court awarded the plaintiff the sum of ¢100 Million to compensate him for the injury caused him by a

409. Despite the repeal of the criminal libel law in Ghana, there are parts of the criminal law that may be used to restrict freedom of expression and of the media. An example is section 208 of the Criminal Offences Act, 1960 (Act 29) on the publication of false news. This section is occasionally employed by the police to harass social commentators who participate in various media programmes and make statements which politicians acting through the police find offensive.

C. SUBMISSIONS RECEIVED

410. A set of submissions advocated for the empowerment of the National Media Commission to regulate both the tools and the platform for communication. It was argued that it is constitutionally the mandate of the NMC (under Article 167(d)) to do so. However, the establishment of the National Communication Authority has hindered the development of the technical capacity of the NMC to discharge that aspect of its constitutional mandate. Besides, while the freedom and independence of the media is guaranteed by the Constitution, Ghana operates an arrangement by which a body whose chief executive and board members are solely determined by the President regulates aspects of the media.

411. It was contended that this is not consistent with the constitutional principle of the freedom and independence of the media. It was, accordingly submitted that the NMC and NCA should be merged into one institution, under the umbrella of an enhanced National Media Commission to regulate both the tools and platform for communication. It was further highlighted that such an arrangement accords with international trends on technology and media development. In this regard it was further submitted that the National Media Commission should also regulate telecommunications.

412. Other submissions made to the Commission proposed that the media should be strictly regulated in order to curb the abuse of freedom of speech and expression and freedom and independence of the media. Ghanaians expressed grave concern that the abuse of these rights and freedoms, if not checked, could undermine the current democratic dispensation. To guard against this, some proposed that freedom of speech and expression should be limited and that phone-in programmes on radio and political talk shows should be banned. Others called for the re-introduction of the criminal libel law.

413. There were others who simply called for the National Media Commission to fight efficiently against abuses in media practice. Others called for more enforceable laws against bad journalism and indecent language on the media.

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libellous publication by the defendants jointly and severally. The defendants were also ordered to publish twice in succession a retraction of the libellous story in a conspicuous portion of their paper.

D. FINDINGS AND OBSERVATIONS

414. The Commission observes that in contrast to the press and print media, the broadcast media houses have conventionally been subject to greater statutory regulation around the world. This is mainly because of the nature of frequency spectrum as a limited resource. Operators of broadcast media are, accordingly, licensed before commencing the business of broadcasting, and would ordinarily live in the fear of revocation of their operating licence for one reason or the other.

415. The Commission finds, in the particular case of Ghana, that the following principles make the regulation of the broadcast media imperative and must guide the Commission in its recommendation:
    a. The airwaves belong to the people of Ghana.
    b. Broadcasting is about the priorities, experiences and aspirations of Ghanaians.
    c. Broadcasting is a public trust held by the operators of a broadcasting frequency.
    d. The people of Ghana are best served by a pluriform system of broadcasting that, in line with international best practice, provides for three sectors, namely public service broadcasting, commercial broadcasting and community broadcasting.
    e. The people of Ghana by the adoption of the 1992 Constitution committed themselves to the principle of the freedom and independence of the media.
    f. Ghanaians cherish plurality, diversity and the balance of interests to preclude dominance by, or the neglect of, any one sector and avoiding replacing state monopoly with any other monopoly in broadcasting.
    g. The people need access, not only in terms of the consumption of the media, but also in terms of participation, ownership, management, production and distribution of the media.
    h. The promotion and growth of a vibrant national culture and national languages must be pursued.
    i. The promotion of technological competence and self-sufficiency should be the watchword.
    j. Support by the media for the national educational effort is expected.
    k. The growth of a vibrant media has with it the grave potential for the abuse of the freedom and independence of the media.
    l. Freedom of expression and freedom and independence of the media have an inseparable nexus with the right to information.[791]

416. The Commission observes that from the state of the law in Ghana there currently appears to be some ambiguity and tension in the legal framework as regards what state institution is the regulatory authority for broadcasting and other electronic media for communication.

[791] Memorandum to the Broadcasting Bill, 2007.

a. On the one hand, the Constitution mandates the National Media Commission as the primary body responsible for the promotion of the freedom and independence of the media for mass communication or information, as well as for the regulation of broadcasting.[792]
b. On the other hand, the National Communications Authority Act, 1996 (Act 542) and the Electronic Communication Act, 2008 (Act 775) seek to vest the National Communications Authority with the authority to license and regulate communications activities and services in the country,[793] including providing for the regulation of communication, the regulation of broadcasting, and the use of the electro-magnetic spectrum.[794]
c. The National Media Commission Act, 1993 (Act 449) and its Regulations do not provide for relevant structures and institutional capacity for the effective performance of the NMC's constitutional mandate to regulate broadcasting, especially in terms of the technical aspect of broadcasting.
d. A careful examination of the National Media Commission and its legislative tools shows that the NMC regulates the contents of broadcast media, while the National Communication Authority regulates the technical aspects of the broadcast media.

417. The Commission, accordingly, finds that there is the need to rationalise the existing arrangements to bring the legislation related to broadcasting into conformity with the Constitution.

418. The Commission notes the arguments which are often raised to support the continuous regulation of the allocation of the electro-magnetic spectrum by the NCA, which includes the argument that the spectrum is a national security asset which should not be controlled by a body outside the purview of Government. Also argued is the fact the NMC does not have the technical competence to regulate the allocation of the electro-magnetic spectrum. The Commission, however, disagrees with this argument. The NMC is the body tasked with the maintenance of the highest journalistic standards. It is also responsible for the settlement of complaints made against or by the media. Flowing from the decision of the Supreme Court in the *National Media Commission* v *Attorney-General*,[795] the NMC acting in consultation with the President, is also responsible for the appointment of chief executives of state-owned media houses.

419. The Commission finds that the power of the NMC to sanction journalists would be of no effect if it does not have the power to grant or withdraw broadcasting frequencies. The

[792] Articles 162, 163, 167 of the 1992 Constitution of the Republic of Ghana.
[793] National Communications Authority Act, 2008 (Act 769).
[794] Electronic Communication Act, 2008 (Act 775).
[795] *National Media Commission v Attorney-General* [1999-2000] 2 GLR 577.

exercise of this function would in no way affect the power of the NCA to regulate the frequencies for security communication. International best practice affirms that, for effective broadcasting regulation, content in broadcasting can hardly be separated from its technical aspects. Many scholars and politicians alike agree that there should be a techno-neutral approach to regulating the media.[796]

420. The Commission, in this regard, finds that, today, many of the frequency-dependent radio stations in Ghana broadcast live over the internet to a world-wide audience. A significant number of these radio stations also broadcast live on television owned by their mother companies. Newspaper contents are also available on the internet. Besides, one of the most prominent features in the Ghanaian media industry is the review of newspaper contents every morning on various radio and television stations.

421. The Commission accordingly finds that, the ever increasing convergence in information and communications technologies requires an even more unitary approach to regulation. It is; therefore, appropriate to have a policy which aims at providing a uniform legal regime for communications regulation.

422. The Commission further finds that in light of the above, the Constitution should empower the NMC to assume its constitutional mandate as the primary body with responsibility for the regulation of broadcasting. The NCA may continue to exercise its mandate over the setting up of technical parameters for broadcasting frequency assignment and other electro-magnetic spectrum, affecting the telecommunications and internet industry; to ensure that broadcasting signals do not interfere with one another as well as the negotiation of international frequency clearance for broadcasting frequency assignment, as with other radio frequency assignments.

423. The Commission finds that, contrary to international best practice, the NCA as a regulatory body for the broadcast media is not assured independence both in its decision making and in the composition of its members.[797] The mode of appointment of its chief executive and board members is a prerogative of the President.[798] The governing board is also mandated to comply with any directive given by the Minister responsible for Communications.[799]

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[796] Erik S. Knutsen, *Techno-neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada*, 8 UCLA Ent. L. Rev. 87.

[797] Article VII, clause 2 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia; where it required that appointment process for members of such regulatory bodies is required to be open and transparent, and must involve the participation of civil society and not be controlled by any particular political party.

[798] Section 6 National Communication Authority Act, 2008 (Act 769).

[799] Section 14 National Communication Authority Act, 2008 (Act 769).

424. The Commission further finds from the submission that the abuse of freedom of speech and expression and freedom and independence of the media could undermine the current constitutional dispensation. The use of intemperate and insulting language on the media, sometimes deliberately, only exacerbates the polarisation in the country.

425. The Commission observes that the framers of the 1992 Constitution recommended the removal of impediments to the establishment of private press and media and further encouraged government to grow privately-owned press.[800] In spite of these, the Committee of Experts that drafted the 1992 Constitution did not contemplate the kind of speedy liberation that followed the 1992 Constitution. In its own words:

> "*[in] Ghana, as in most countries of Africa, the government owned press and mass-media remain inevitably dominant. No privately owned media in the country has comparable volume widespread circulation, readership or audience to that of the public sector media. This imbalance is not likely to change in the foreseeable future, notwithstanding important proposals stating that there must be no impediments to the establishment of private press or media.*" [801]

Accordingly, the recommendation by the Committee of Experts for the establishment of the National Media Commission particularly focused on enabling:

> "*the public sector media financed by public taxes*"[802] to "*operate in such a way that truly reflect the diverse shades of public opinion existent in the country as a whole*"[803] and also focused on insulating "*the press from direct political control and interference so that public sector editors and reporters can discharge their democratic duty of objectively informing the people and acting as constructive critics of government policies and activities without fear of reprisal and victimization from the government in power.*"[804]

426. The Commission observes that the principles underlying the observations just outlined should still hold true today. The Commission, however, finds that there are various factors that have to be taken into account in reviewing anything concerning the National Media

[800] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 190.
[801] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 187.
[802] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 188.
[803] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 188.
[804] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 190.

Commission. First, the "imbalance" referred to by the Committee of Experts has been largely bridged if it has not virtually become non-existent. With the liberalization of the airwaves, the Ghanaian media industry has undergone radical transformation. There has been an unprecedented expansion in the size and power of the mass media, both print and electronic, including new internet-based – new media. Today, there are in excess of 140 radio and 19 television broadcasting stations in operation in Ghana.[805] A significant number of these radio stations broadcast nationwide through a network of partner stations in various communities.

427. The Commission observes that this development has introduced a refreshing pluralism into the nation's mass media landscape and opened up access to new and diverse voices, which have promoted democracy and participation in governance and development. In economic terms, the substantial financial and developmental gains from the liberalization have been well noted. New opportunities for entrepreneurship and employment on the media landscape cannot be easily quantified. The opportunities for market development and expansion for local industry and businesses through their engagement with the media are also very noticeable. The media itself is a very important driving force underpinning many developmental policies and debates. It is an important partner in the fight against corruption and provides a platform for citizen engagement with the administrative State.[806]

428. In this regard, the Commission finds that the work of the National Media Commission in ensuring a free and independent Ghanaian media is admirable. The NMC has, for instance, asserted its constitutional mandate as the appointing authority of the Chairman and other members of the governing bodies of public corporations managing state-owned media, including the chief executive. Thus, the NMC has successfully resisted political control of state-owned media.[807]

429. The Commission observes the successful advocacy drive by the National Media Commission and other players in the media industry (including the Ghana Journalists Association) for the repeal of the criminal laws on libel and sedition in 2001. These laws originally received the endorsement of the Committee of Experts that drafted the 1992 Constitution[808] and

[805] In all, 190 radio and 47 TV station had been licensed to operate in 2008. NATIONAL COMMUNICATION AUTHORITY, Annual Report, http://nca.org.gh/downloads/NCA_Annual_Report_2008.pdf, (last visited on 4th June, 2011).

[806] Henry Kwasi Prempeh, "Framing a Constitution of Ghana for the Twenty-First Century: Averting the Peril of a Constitution without Constitutionalism", a paper presented at a public lecture organized by the Centre for Democratic Development, UNECA and Joy FM, 26th November, 2009.

[807] *National Media Commission* v. *Attorney-General* [2000] SCGLR 1.

[808] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 186, where the Committee of Experts noted that "… Freedom of the press and expression also means that any citizen who has anything to say about national affairs should have access to the public sector mass-media, limited only by practical considerations of space and time, and by existing laws of sedition, criminal libel and those protecting privacy, etc."

subsequently, (under the 1992 Constitution), judicial blessing by the Supreme Court.[809] Ghana has since the repeal of these laws[810] moved from the formative years of the NMC during which some editors and journalists as well as owners of some private newspapers suffered the rigours of the laws through incarceration.[811] The increase and the wide variety of private newspapers and magazines in Ghana today bear testimony to the free speech that has resulted from the work of the NMC and other players in the media industry.

430. The Commission, nevertheless, finds from the submissions received that, while Ghanaians appreciate initiatives aimed at liberalising the media landscape for the public good, they have also cautioned against the excesses of such liberalisation. In this sense, Ghanaians are deeply concerned about the disregard for the ethics of the profession by many media practitioners. The Commission observes this to be a critical factor in reviewing the mandate of the NMC. Any reform of the NMC must now enhance its mandate in drawing up improved and binding media standards and increasing its capacity to ensure media accountability.

431. The Commission observes that media self-regulation, as opposed to state-controlled regulation, has previously been a prominent mechanism employed in a lot of countries to procure media accountability. It is the preferred choice of the African Commission on Human and Peoples' Rights. The Commission has firmly declared among others that "[e]ffective self-regulation is the best system for promoting high standards in the media."[812] The African Human Rights Commission has further declared, in terms of regulatory bodies for broadcast and telecommunications, "that any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature."[813] The appointments process for members of such regulatory bodies is required to be open and transparent; must involve the participation of civil society; and should not be controlled by any particular political party.[814]

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[809] *Republic* v. *Tommy Thompson Books Ltd and Others* [1997-98] 1 GLR 515.

[810] The whole of Chapter Seven of Part II (sections 112 to 119) of the Criminal Offences Act, 1960 (Act 29) was repealed by section1 of the Criminal Code (Repeal of the Criminal Libel and Seditious Laws)(Amendment) Act, 2001 (Act 602).

[811] The whole of Chapter Seven of Part II (sections 112 to 119) of the Criminal Offences Act, 1960 (Act 29) was Repeal of the Criminal Libel and Seditious Laws)(Amendment) Act, 2001 (Act 602).

[812] Article IX, clause 3 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia.

[813] Article VII, clause 1 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia.

[814] Article VII, clause 2 of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, adopted at the meeting of the 32nd Session, 17th to 23rd October, 2002: Banjul, The Gambia.

432. The Commission observes that media self-regulation has provided a platform, independent of political influence, for media professionals to set up voluntary editorial guidelines and abide by them. By doing so, the independent media accept their share of responsibility for the quality of public discourse, while fully preserving their editorial autonomy in shaping it.[815]

433. The Commission, however, observes that there are some countries that have not only provided for, but also established self-regulatory bodies through legislation.[816] There have been continuing debates around the world on the adoption or otherwise of strong and strict statutory media regulation mechanism to roll back the sphere covered by self-regulation. These have usually been in response to excesses by the media. There have, for instance, been periodic calls for stricter laws governing privacy in the United Kingdom. In Africa, the governments of Kenya,[817] South Africa,[818] Zambia,[819] and others have pushed with varying degrees of success for stricter statutory media regulation.

434. The Commission finds that the United Kingdom's example provides one of the most illustrative and useful guides. [820]

a. The British Press Council established in 1953 was widely criticised for its inability to curb excesses of the tabloid press. Agitations against the poor journalistic standards led the Home Secretary to establish, in 1989, the Calcutt Inquiry to look into "Privacy and Related Matters."

b. The result of the Inquiry was a recommendation to form the Press Complaints Commission to replace the Council. That Commission was given 18 months to prove itself; otherwise it would be turned into a statutory body. Publishers moved swiftly

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[815] Miklós Haraszti, *The Merits of Media Self-Regulation: Balancing Rights and Responsibilities* in The Media Self-Regulation Guidebook, OSCE (2008), (July 6, 2011 3:50 PM), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/the%20media%20selfreg%20guidebook.pdf.

[816] For instance, the Press Council of India functions under the Press Council Act of 1978. In Kenya, the 13-member Media Council of Kenya operates under the Kenyan Media Act of 2007 (CAP 3).

[817] Article 19, Global Campaign for Free Expression, "Statement on the Draft Media Council of Kenya Bill, 2006", London (March, 2006), (June 5, 2011 4:20 PM) http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/kenya-media-council-bill.pdf.

[818] Wisdom J. Tettey, *The Politics of Media Accountability in Africa: An Examination of Mechanisms and Institutions*, International Communication Gazette, Vol 68, No.3 pp. 229-248, (July 6, 2011 5:50 PM), http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/africa/other-media-accountability-documents/; Franz Kruger, *Media Courts of Honour: Self-regulatory Councils in Southern Africa and Elsewhere*, FES Media Africa Series, Windhoek (November, 2009), (July 6, 2011 5:50 PM) http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/Krueger__MediaCourtsofHonour__2009.pdf.

[819] In 2007, the High Court of Zambia, in the case of *Kasoma* v. *Attorney General*, 22 August 1997, 95/HP/29/59, struck down an attempt to establish a statutory body to regulate journalists. The Court stressed that statutory licensing of journalists, as proposed in the legislation, would breach the rights to freedom of expression and association.

[820] House of Commons: Culture, Media and Sport Committee, Self-Regulation of the Press: Seventh Report of Session 2006 – 2007, HC 375, London (2007), (June 4, 2011, 11:11 AM), http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcumeds/375/375.pdf.

to set up the Press Complaints Commission in 1991, and the editors developed the first Code of Practice.

c. In mid-2007, a House of Commons committee concluded yet another investigation into self-regulation. This time, the subject matter was the intrusive pictures involving a member of the Royal Family. The committee criticised the media and noted that the Press Complaints Commission should have acted more vigorously. The committee noted that the failures of the existing self-regulation mechanism:

> "to uphold standards should not, however, be seen as signifying that self-regulation cannot work. To dispense with the current form of self-regulation and to rely exclusively on the law would afford less protection rather than more, and any move towards a statutory regulator for the press would represent a very dangerous interference with the freedom of the press."

d. The Labour Government of Prime Minister Tony Blair, however, called for external regulation. He noted competition had turned the media into "a feral beast, just tearing people and reputations to bits, but no one dares miss out." He observed that "The reality is that the viewers or readers have no objective yardstick to measure what they are being told. In every other walk of life in our society that exercises power, there are external forms of accountability, not least through the media itself."

e. Recent phone hacking scandal by the now defunct News of the World tabloid has put the debate in an entirely different light.

f. At the time of drafting this report, two different inquiries (including a judicial inquiry) were under way among others to inspect different aspects of the hacking scandal.[821]

g. Prime Minister David Cameron called for the Press Complaints Commission to be replaced entirely.[822]

435. The Commission finds that Ghana stands to benefit from both statutory regulation and self-regulation. It would, accordingly, be imperative to empower the National Media Commission to address and sanction errant journalism adequately. The Ghana Journalists Association is also encouraged to establish a self-regulation body to augment the efforts of the National Media Commission.

436. The Commission finds that participants at the National Constitution Review Conference recommended that:

a. The National Communication Authority should cede its functions that are inconsistent with those of the National Media Commission to the National Media Commission.

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[821] "LEVESON INQUIRY: CULTURE, PRACTICE AND ETHICS OF THE PRESS", set up under the Inquires act, 2005.

[822] BBC NEWS, *Phone Hacking: Cameron and Miliband Demand New Watchdog*, (July 12, 2011, 8: 22 AM) http://www.bbc.co.uk/news/uk-politics-14073718.

b. The mandate of the National Media Commission should be extended to cover news and internet media.
c. The phrase "journalistic standards" in Article 167 (b) should be amended by its substitution with the phrase "media standards" so as to remove all doubts that the mandate of the NMC covers all media subsectors, such as advertising, which may not be journalistic in nature.
d. Article 167 (b) should be amended by the insertion of the phrase, "as well as impose sanctions", after "governmental control." By this, the NMC would be empowered to impose sanctions on erring media organisations and practitioners.
e. The contents of these sanctions and their corresponding consequences for non-compliance should be a matter for legislation and not for the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

437. The Commission recommends that the provisions on the National Media Commission be amended to clarify that it is the body responsible for the regulation of the media print, broadcast, new media.

438. The Commission recommends that the National Media Commission should have the responsibility for broadcast authorisation. In that regard the NMC should have the power to grant or refuse the granting of a broadcasting frequency as well as its suspension or withdrawal.

439. The Commission recommends that the National Media Commission be empowered to make compensation awards, to persons adversely affected by the activities of the media and sanction media practitioners who fail to adhere to well set out codes of conduct.

440. The Commission recommends that the National Media Commission be empowered to initiate actions in court to secure compliance with its decisions.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

441. The Commission recommends that the National Communication Authority be responsible for setting the technical parameters of communication activities in Ghana including numbered frequency allocation, and in the case of broadcast frequencies, with the authorisation of the National Media Commission. This should be part of the NCA's technical function to manage the entire electromagnetic spectrum.

442. The Commission recommends that the National Media Commission should, by a Constitutional Instrument, spell out sanctions against media houses or journalists who fail to live up to certain media standards.

SUBTHEME FIVE: SPECIFIC MATTERS RELATING TO THE OFFICE OF THE GOVERNMENT STATISTICIAN

ISSUE: FUNCTIONS AND INDEPENDENCE OF THE GOVERNMENT STATISTICIAN

A. DIMENSIONS OF THE ISSUE:

443. The thrust of this issue relates to the functions of the Government Statistician and the nature frequency and periodicity of the national population and housing survey.

B. CURRENT STATE OF THE LAW ON THE ISSUE

444. It is provided in the Constitution that the Government Statistician shall, under the supervision of the Statistical Service Board be responsible for the collection, compilation, analysis and publication of socio-economic data on Ghana and she shall perform such other functions as may be prescribed by or under an Act of Parliament.[823]

445. The Statistical Service Act, 1995 (PNDCL 135) provides the details of the Government Statistician's constitutional functions including the function to advise the government and the Statistical Service Board on matters relating to statistics and the organisation of a co-ordinated scheme of economic and social statistics relating to Ghana. The Government Statistician is for responsible for the day-to-day administration of the Statistical Service.[824]

446. Neither the Constitution nor any piece of legislation grants the Statistical Service independence in the performance of its functions. Practically the Statistical Service remains a department or agency under the umbrella of the Ministry of Finance and Economic Planning.

C. SUBMISSIONS RECEIVED

447. Relating to the Statistical Service, the Commission received a set of submissions advocating that the Constitution expressly states that population and housing census should be carried out every 10 years and that the state should be compelled to commit resources to the Service to enable it discharge this function.

448. It was also submitted that the Statistical Service should be empowered to coordinate all forms of national statistical data collection to ensure the certainty of procedure and methodology for collecting such data. In addition, it was submitted that the EC should be required to collaborate with the Statistical Service in exercising its power to create or demarcate

[823] Article 186(2) of the 1992 Constitution of the Republic of Ghana.
[824] Section 8 of the Statistical Service Act, 1985 (PNDCL 135).

electoral areas and constituencies since the Statistical Service is the appropriate national institution with relevant demographic data required to perform such functions.

449. It was finally submitted that it should be expressly stated that in the performance of its functions, the Statistical Service is independent.

D. FINDINGS AND OBSERVATIONS

450. The Commission finds that it is not unprecedented in the West African sub-Region for the authority in charge of national census to be granted some degree of independence in the performance of its functions. Section 158 of the Nigerian Constitution, for instance, provides among others that the National Population Commission shall not be subject to the direction or control of any other authority or person in carrying out the operation of conducting the census; and in compiling its report of a national census for publication.

451. The Commission also observes that the functions of statistical or population institutions are set out in very broad contours in constitutions and detailed out in legislation. The functions and powers of the National Population Commission of Nigeria for instance, are only broadly set out in the Nigerian Constitution to include the power to undertake periodical enumeration of population through sample surveys, censuses or otherwise and to publish and provide information and data on population for the purpose of facilitating economic and development planning.[825]

452. The Commission accordingly finds it adequate for the Constitution to provide only the broad contours of the functions of the Government Statistician. It is however adequate for the particular details of the functions to be set out in pieces of legislation.

453. The Commission further finds that the concern to expressly specify the frequency of population census in the Constitution brings to the fore the resource challenge of the Statistical Service. The mode of funding for all the ICBs recommended in this Report recommends should, in the Commission's opinion, go a long way to help overcome these difficulties.

454. The Commission also observes that in Ghana, it is common to have different regimes publish and manipulate their own socio-economic and national data to serve political and partisan ends and not the public interest. The Commission further observes that, of the 3 institutions mentioned under Chapter 13 of the Constitution on Finance, it is only the Statistical Service

[825] Section 24, Part I of the Third Schedule pursuant to section 153(2) of the 1999 Constitution of the Federal Republic of Nigeria.

which is not autonomous. The autonomy of the Bank of Ghana derives from its enabling Act,[826] while the independence of the Auditor General[827] derives from the Constitution itself.

455. The Commission finds the function of collecting, compiling, analysing, abstracting and publishing statistical information relating to the commercial, industrial, agricultural, social, financial, economic and any other activities and conditions of residents of Ghana is one which requires absolute political detachment and must as such be performed devoid of any partisan considerations and governmental control.

456. The Commission accordingly finds that it would be appropriate to grant the Government Statistician independence similar to the Auditor-General. To reflect this independence, it would be appropriate to change the name, "Government Statistician" to the "Statistician-General."

457. The Commission finds that the participants at the National Constitution Review Conference unanimously agreed as follows:

a. The participants at the conference recommended that the periodicity of the population and housing census should be expressly stated in the Constitution as 10 years. The participants also recommended that the functions of the Statistical Service should include conducting the Ghana of Living Standard Survey; the Population and Housing Census; the Labour Force Survey; the Industrial Census; and the Maternal Mortality Survey.
b. The participants also recommended that the Statistical Service should be given the power to coordinate all forms of statistical data collection undertaken by any Ministry, Department or Agency of the State. This would ensure certainty of procedure and methodology of collecting the data.
c. They also advocated that the EC should collaborate with the Statistical Service in exercising its power to create electoral areas for national and local government elections.
d. The participants finally recommended that the Statistical Service should be independent.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

458. The Commission recommends that the Statistical Service be insulated from governmental control and made independent.

[826] Section 3 of the Bank of Ghana Act, 2002 (Act 612).
[827] Article 187(7)(a) of the 1992 Constitution of the Republic of Ghana.

459. The Commission recommends that the name, "Government Statistician" be changed to "Statistician-General."

460. The Commission also recommends that the provision guaranteeing the independence of the Statistician-General be entrenched.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

461. The Commission recommends consequential amendments to the constitutive Act of the Statistical Service, the Statistical Service Act, 1985 (PNDCL 135).

SUBTHEME SIX: SPECIFIC MATTERS RELATING TO THE BANK OF GHANA

ISSUE: INDEPENDENCE OF THE BANK

A. DIMENSIONS OF THE ISSUE

462. The thrust of this issue relates to whether the independence and operational autonomy of the Bank of Ghana should find constitutional expression.

B. CURRENT STATE OF THE LAW ON THE ISSUE

463. The operational independence of the Bank of Ghana is statutory; it derives from section 3(2) of the Bank of Ghana Act, 2002 (Act 612), which requires the Bank to support the general economic policy of the Government and to promote economic growth and the effective and efficient operation of banking and credit systems in the country, independent of instructions from the Government or any other authority.

C. SUBMISSIONS RECEIVED

464. The Commission received a set of submissions which put forth the case that the independence of the Bank, *vis-à-vis* its functions, is too important to be simply statutory; it must be guaranteed by the Constitution.

D. FINDINGS AND OBSERVATIONS

465. The Commission observes that it is generally agreed that the independence of the Central Banks affords more credible management of monetary policy and enhances economic development. In Ghana, the importance of the independence of the Bank of Ghana is particularly highlighted upon a careful consideration of the Bank's functions. The Bank functions to among others, promote and maintain the stability of the currency of Ghana; direct and regulate the currency system in the interest of economic progress; and to promote

by monetary measures the stabilisation of the value of the currency within and outside the Republic.[828]

466. The Commission finds that the nature of these functions, like all other ICBs, requires absolute political detachment and must, as such, be devoid of any partisan considerations and governmental control. The independence of the Bank is, accordingly, important and of constitutional significance. It is for this reason that the Constitution affords the Governor of the Bank similar security of tenure as the other members of the ICBs.[829]

467. The Commission observes that the participants at the National Constitution Review Conference were unanimous that the independence of the Bank should be maintained and guaranteed under the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

468. The Commission recommends that the independence of the Bank of Ghana should be expressed in the Constitution.

SUBTHEME SEVEN: SPECIFIC MATTERS RELATING TO THE OFFICE OF THE AUDITOR-GENERAL AND THE AUDIT SERVICE.

ISSUE: INDEPENDENCE OF THE AUDITOR-GENERAL AND THE AUDIT SERVICE.

A. DIMENSIONS OF THE ISSUE

469. The main thrust of this issue relates to how the Auditor-General and persons serving with the Audit Service should be protected from unnecessary legal action while they perform their constitutional duties.

B. CURRENT STATE OF THE LAW ON THE ISSUE

470. There is no express constitutional or statutory provision which grants the Auditor-General and officers and employees of the Audit Service immunity from frivolous legal proceedings.

[828] Article 183 of the 1992 Constitution of the Republic of Ghana; Section 4 of the Bank of Ghana Act, 2002 (Act 612).
[829] Article 183(4)(d) of the 1992 Constitutionof the Republic of Ghana, provides for the Governor of the Bank to be removed from office the same manner as a Justice of the Superior Court of Judicature, other than the Chief Justice may be removed.

C. SUBMISSIONS RECEIVED

471. A number of submissions advocated that, to enable the Auditor-General and others employed in the Audit Service to discharge their functions efficiently without fear nor favour, the Auditor-General and his officers should be immune from civil and criminal action for anything done in the performance of their functions, provided they act in good faith.

D. FINDINGS AND OBSERVATIONS

472. The Commission observes that section 22 of the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) provides a good example of situations where the members and officers of an ICB have been granted privilege against legal proceedings. Under this provision, no legal action is permitted against the CHRAJ or against officers of the CHRAJ for anything done, reported or said by that person in the course of the performance or intended performance of functions of the CHRAJ, unless it is shown that, that person acted in bad faith. This privilege is subject to the supervisory jurisdiction of the Supreme Court. In addition, anything said, information supplied, or a document, paper or thing produced by a person in the course of an inquiry by or proceedings before the CHRAJ pursuant to the Constitution or under Act 456 is privileged as if the inquiry or proceedings were proceedings in a court. For the purposes of the rules of law relating to defamation, a report made by the Commission under Act 456 is privileged, and a fair and accurate report on it in a newspaper or a media broadcast is also privileged.

473. The Commission observes that in the *Republic* v *High Court; Ex-Parte Commission on Human Rights and Administrative Justice (Addo Interested Party)*,[830] the Supreme Court explained that this privilege does not block any matter for judicial review against an action to be taken by the CHRAJ. The Court highlighted that as far as the CHRAJ as a body was concerned, the privilege from suit relates to only matters of vicarious liability that may arise in respect of the individual acts of its officers and appointees of the CHRAJ.[831]

474. The Commission observes that the role of the Auditor-General in the fight against corruption is essential and critical. The nature of the functions of the Auditor-General exposes him and officers serving with the Audit Service to frivolous legal action. It is, therefore, important to afford the Auditor-General and officers of the Audit Service a privilege, within specified parameters, to be granted immunity from both civil and criminal actions resulting from the performance, in good faith, of their duties.

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[830] *Republic* v *High Court; Ex-Parte Commission on Human Rights and Administrative Justice (Addo Interested Party)* [2003-2004] 1 SCGLR 312.

[831] *Republic* v *High Court; Ex-Parte Commission on Human Rights and Administrative Justice (Addo Interested Party)* [2003-2004] 1 SCGLR 312.

475. The Commission observes that participants at the National Constitution Review Conference were unanimous in agreeing with the submissions made in this regard.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

476. The Commission recommends that the Audit Service Act, 2002 (Act 584) be amended to include a provision granting the Office of the Auditor-General and persons serving in the Audit Service immunity from suits arising from their work.

477. The Commission further recommends that the scope of this privilege should be that, subject to the supervisory jurisdiction of the Supreme Court, proceedings would not lie against the Office of the Auditor-General or against a person holding an office or appointment under the Audit Service for anything done, reported or said by that person in the course of the performance or intended performance of functions under the Audit Service Act, 2002 (Act 584), unless it is shown that, that person acted in bad faith.

478. The Commission finally recommends that for the purposes of the laws relating to defamation, a report made by the Auditor-General under Act 584 should be privileged, and a fair and accurate report on it in a newspaper or broadcast should also be privileged.

CHAPTER NINE - DECENTRALISATION AND LOCAL GOVERNMENT

9.1 INTRODUCTION

1. In terms of political organisation, local authorities in many parts of the world serve as the basic units of representative democracy, where citizens exercise their democratic right to elect their representatives to local authority bodies so that they coordinate the provision of local services for them. In the last couple of decades, decentralisation has been perceived worldwide as a tool for the implementation of sustainable development. Globally, local governments are being utilised as strategic institutions for the provision of basic socio-economic and environmental services. The peculiar positioning of local government units, that is their closeness to the people, makes them valuable and viable for providing effective and efficient services required by communities.

2. Subsidiarity, a unique feature of local governance, has a powerful appeal. There is also consensus amongst central governments, international development agencies and civil society organisations – the three critical players in decentralisation in Africa – that local governance is a desired path towards development. Additionally, the donor requirement that citizen-beneficiaries should participate in the development, implementation and monitoring of development projects is more conveniently effectuated in the context of local government where the people are first-hand evaluators of such polices. All these factors work together to ensure the appeal and effectiveness of decentralisation.

3. The 1992 Constitution emphasises decentralisation as one of the keys to realising the ideals of democracy as it enhances local democracy and accountability and can lead to more responsive government. Though decentralisation in Ghana has generally enhanced local level participation in governance and the strengthening of accountability mechanisms (with ripples to the national level), allowed communities more autonomy in deciding issues that affect their daily lives, and funnelled critical and substantial funds for development projects to the local level, the reality of decentralisation has been more nuanced.

4. Many studies on decentralisation have brought up several critical problems: the reluctance and lack of political will by central governments to cede power and authority to local governments; local level political participation has not been accompanied by accountability; and the poor or inadequate allocation of resources by central governments to local authorities.

5. Several reviews have revealed the serious democratic deficits of the decentralisation process in Ghana, some making detailed recommendations for corrective action. However, reforms

have not been implemented to any degree for a number of reasons. Key among these reasons is that there are in-built advantages to a ruling party in the current state of decentralisation where real and effective power is still centred in the capital. The politics of decentralization ensures that what are presented as decentralisation initiatives are actually attempts by central government to extend their power and influence to parts of the country and mobilise support for the ruling government. It is clear that only a brave and definitive reform of decentralisation in Ghana can free Ghana from the current political opportunism and inertia associated with the practice.

9.2 HISTORICAL BACKGROUND

6. The history of decentralisation in Ghana can be traced to the introduction of indirect rule by the British colonial authorities from 1878 to about 1951. During this period the colonial administration ruled indirectly through the native political institution of chieftaincy. The chief and elders in a given area were constituted into a local authority, with powers to establish treasuries, appoint staff and perform local government functions. The native authorities were not popularly elected, but were often hand-picked by the British to assist the colonial government to administer law and order in the localities.[832]

7. The era of the first native government led by Kwame Nkrumah was initially characterised by a two-tier local government structure consisting of 280 districts, municipal, urban and local councils. A Local Government Service Commission with the mandate to recruit, train, and dismiss local government employees was created in 1958. The multiplicity of local jurisdictions, each with relatively small inhabitants came to be viewed as a weakness, especially as it did little to avert the recentralisation of power, and this prompted a major reform in 1961.

8. The Local Government Act was passed to implement a new local government system.[833] This legislation finally removed the direct influence of traditional authorities on local government in Ghana and required the composition of local authorities to comprise members elected through electoral colleges. Some significant amendments were made to the law in 1962. The idea of having a small number of viable local units was discarded as the number of district councils was increased from 70 to 150. During the same period, district councils were constituted as parliamentary constituencies for purposes of electing representatives to the national legislature. There was no fundamental change in this structure of local government until the overthrow of the Nkrumah government by the military coup of the National

[832] "*From Centre to the Grassroots*" Excerpts from selected speeches on the PNDC's Decentralization Policy – Vol. I (on file with the Constitution Review Commission)
[833] Local Government Act, 1961 (Act 54); The Greenwood Report Plan A (on file with the Constitution Review Commission).

Liberation Council (NLC) in 1966. The NLC immediately disbanded all district councils, and all local government affairs were administered by the most senior civil servants in the districts.

9. Between 1967 and 1968, the Mills-Odoi and the Siriboe Commissions of Inquiry were appointed to study the problems associated with local government. The recommendations of these Commissions formed the substance of Chapter 16 of the 1969 Constitution and the then Local Government Act as subsequently amended.[834] The objective of these constitutional and legislative provisions was to make local government units, in essence, local agencies of central government. The district councils were the basic units of administration at the local level. Government nominated two-thirds of the district councils' membership from the locality and local authorities nominated one-third of the membership. There was no provision for either the direct or indirect election of members as was the case under the 1961 reforms. The Office of the District Chief Executive (DCE) was introduced at this point. Real power in the district resided in the DCE as he was head of the Civil Service in the district.

10. In spite of the far-reaching nature of the recommendations on decentralisation by the Greenwood Report[835], attempts at decentralisation could not materialise until 1974 due to the change in government in 1972.

11. In 1972, under the regime of the National Redemption Council headed by Lt. Col. Ignatius Kutu Acheampong, the model of decentralisation was described as "the Single Hierarchy" system. This model sought to merge Central and Local government functions. The country was re-demarcated into sixty five (65) District Councils for the purposes of governance. The focus during this period was on regional development with regional planning and implementation as the main strategy.

12. In 1983, the Provisional National Defence Council (PNDC) government announced a policy of administrative decentralisation of central government ministries and the creation of People's Defence Committees (PDCs) in each town and village. The PDCs effectively took over local government responsibilities, though they were often limited to mobilization for and implementation of local self-help projects, leaving the de-concentrated ministries to

[834] The Local Government Act, 1961 (Act 54) was subsequently amended by: the Local Government (Amendment) Act, 1972 (Act 359); Local Administration (Amendment) Decree, 1972, (NRCD 138); and Local Administration (Amendment) Decree, 1974 (NRCD 258). These amendments, like similar interventions in Ghanaian legislation, were to bring enactments in line with the philosophy of the military regime that had seized political power in 1972.

[835] Long before the attainment of independence in 1957 and sometime thereafter, commissions and committees of enquiry were appointed at various times to enquire into the administration of the country. The reports of these bodies made conclusive recommendations for the devolution of central administrative authority to the local levels. The most significant of these committees include: the Watson Committee (1949); Sir Coussey Committee (1951); Sir Sydney Philipson (1951); The Frederick Bourne (1955); The Greenwood Commission (1957); The Regional Constitutional Committee (1957). etc.

perform the other functions of local government. The PNDC's reforms in the area of decentralisation were primarily hinged on the dual policy packages of the Economic Recovery Programme (ERP) between 1983 and 1986 and the Structural Adjustment Programme (SAP) beginning in 1987. It was during one phase of the SAP, which emphasised the provision of social services and institutional reform that the current decentralisation programme evolved.

13. In 1988, the PNDC government introduced a major piece of legislative reform, the Local Government Law, 1988 (PNDC Law 207). This law created 110 districts within Ghana's 10 regions, with non-partisan District Assemblies. The stated aim of the 1988 Local Government Law was "to promote popular participation and ownership of the machinery of government…by devolving power, competence and resources/means at the district level."

9.3 DECENTRALIZATION IN GHANA TODAY

14. The object of Ghana's decentralisation and local government policy is unambiguously spelt out in the 1992 Constitution, although doubts may still exist as to how that object is to be operationalised.[836] The Constitution and the Local Government Act create a three-tier structure of sub-national government at the regional, district and sub-district levels.[837] The Constitution also mandates Parliament to prescribe guidelines for the demarcation of Metropolitan/Municipal/District Assemblies (MMDAs) and, together with the Local Government Act, sets out the composition and functions of the Regional Coordinating Councils (RCCs), the MMDAs, Urban, Zonal, Town and Areas Councils, and Unit Committees (TACUCs).[838]

15. The Constitution designates MMDAs as the highest political authority in the districts, vested with deliberative, legislative and executive powers.[839] The composition of the MMDAs is also provided for in the Constitution. [840] The total membership of the MMDAs ranges from a minimum of 54 members to a maximum of 130 members.[841] The basic functions of the MMDAs are also provided for in the Constitution.[842]

[836] Article 35(6)(d) and Chapter 20 of the 1992 Constitution of the Republic of Ghana.
[837] Section 3 and Part X of the Local Government Act, 1993 (Act 462); these comprise Regional Coordinating Councils, Metropolitan/Municipal/District Assemblies (MMDAs), Urban, Zonal, Town, Area Councils and Unit Committees.
[838]Article 241(2) of the 1992 Constitution of the Republic of Ghana, Section 141 and 142 of the Local Government Act, 1993 (Act 462).
[839] Article 241(3) of the 1992 Constitution of the Republic of Ghana.
[840] Article 242 (a)-(d) of the 1992 Constitution of the Republic of Ghana.
[841] GHANA DISTRICT, www.ghanadistricts.com, (last visited June 20, 2011).
[842] Article 245 of the 1992 Constitution of the Republic of Ghana.

16. The President is vested with the power to appoint Metropolitan/Municipal/District Chief Executives (MMDCEs) subject to approval by two-thirds of the membership of the MMDAs.[843] The President also appoints one-third of the membership of the MMDAs. The Constitution also provides the framework for the election and tenure of Presiding Members of the Assemblies.[844]

17. The Constitution makes provision for Parliament to create further levels of decentralisation.[845] These levels, which have been created by the Local Government Act, comprise of the Zonal, Urban, Town and Area Councils, and the Unit Committees. These Local Government units perform functions delegated to them by the MMDAs.[846]

18. Furthermore, the Constitution makes provision for the emoluments of MMDCEs, Presiding Members and Assembly Members and for the transfer of at least 5% of central government revenue to the MMDAs.[847]

19. Under the chapter on Decentralisation and Local Government in the 1992 Constitution, only two provisions are entrenched – the provisions on the establishment and objectives of the decentralisation and local government framework and those on the establishment of the District Assembly Common Fund.[848] All the other provisions in Chapter 20 are non-entrenched.

20. The constitutional provisions on decentralisation are supported by a number of laws meant to facilitate the implementation of the concept. These include the Local Government Act of 1993; the Local Government Service Act of 2003; the Civil Service Law of 1993; the National Development Planning Commission Act of 1994; the National Development Planning (Systems) Act of 1994; and the District Assembly Common Fund Act of 1993.[849]

21. In the recent past, pieces of legislation, both substantive and subsidiary, have been enacted in a bid to improve the implementation of the decentralisation concept. Notable are the following:
    a. The District Assembly Elections (Amendment) Act, 2010, (Act 801). This Act amends the parent District Assembly Elections Act, 1994, (Act 473) by making more

[843] Article 243(1) of the 1992 Constitution of the Republic of Ghana.
[844] Article 244 of the 1992 Constitution of the Republic of Ghana.
[845] Article 254 of the 1992 Constitution of the Republic of Ghana.
[846] Section 15 of the Local Government Act, 1993, (Act 462).
[847] Article 250 and 252 of the 1992 Constitution of the Republic of Ghana.
[848] Article 240 and 252 of the 1992 Constitution of the Republic of Ghana.
[849] Local Government Act, 1993 (Act 462); Local Government Service Act, 2003 (Act 656); Civil Service Act, 1993 (PNDCL 327); National Development Planning Commission Act, 1994 (Act 479); National Development Planning (Systems) Act, 1994 (Act 480) and District Assembly Common Fund Act, 1993 (Act 455).

flexible the provision on the mounting of platforms by candidates seeking election to the MMDAs. The principle underlying the introduction of this piece of legislation was the deepening of local level democracy.

b. The Local Government (Creation of New District Electoral Areas and Designation of Units) Instrument, 2010 (L.I. 1983) was made to achieve two major goals: firstly, it was to create new electoral areas in 164 out of the 170 Districts, thus increasing the number of electoral areas by about 1,000, and secondly, it was to make Unit Committees coterminous with electoral areas, thus reducing the number of Unit Committees from 16,000 to 6,000.
c. The focus of the Local Government (Urban, Zonal and Town Councils and Unit Committees) (Establishment) (Instrument), 2010 (L.I. 1967), included changing the notion of Unit Committees from a geographical to a functional concept. It was to reduce the membership of Unit Committees from 15 to 5 with all 5 members being elected; abolish the appointed membership of Unit Committees and ensure uniformity in the treatment of Zonal, Urban, Town and Area Councils.

22. Ghana is also a signatory to a number of international and sub-regional conventions agreements and Declarations which place obligations on her to devolve power and responsibilities progressively to the lower levels of government and generally to promote local democracy and good governance.[850]

23. The concept and the practice of decentralisation and local government in Ghana have raised various pertinent issues. These issues include the conceptual basis of decentralisation and local government; the mode of District Assembly elections; the mode of selecting Metropolitan, Municipal and District Chief Executives (MMDCEs); and issues of fiscal decentralisation. These issues were raised by Ghanaians during the consultations and are discussed in this chapter.

[850] These Conventions and Agreements include, Victoria Falls Declaration on an African Vision on Decentralization (1999); the Kigali Declaration on Leadership Capacity Building for Decentralized Governance and Poverty Reduction in Sub-Saharan Africa (2005); Commitments under the New Partnership for Africa's Development (NEPAD); Commitments under the Commonwealth Local Governance Forum; the Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance (2005), the African Charter for Popular Participation in Development and Commitments under the Millennium Development Goals (2000).

ISSUE ONE: CONCEPTUAL BASIS OF DECENTRALISATION AND LOCAL GOVERNMENT

A. DIMENSIONS OF THE ISSUE

24. The decentralisation of governance introduced under the 1992 Constitution has apparently functioned fairly well over the years without major disruptions. Nonetheless, submissions received indicate that the implementation of the decentralisation programme has, on the whole, been incoherent and incomplete due to the lack of clarity on the conceptual basis of the decentralisation policy.

B. CURRENT STATE OF THE LAW ON THE ISSUE

25. The term "decentralization" is used several times in the Constitution. However, a close examination of the term and its usage in the Constitution and in other legislation suggests that different meanings are conveyed depending on the level of local governance that is being described or discussed. The following are the various contexts in which the term "decentralization" has been used in the laws of Ghana:
    a. The Constitution, in Article 35(6)(d), makes a clear statement on national level decentralisation by providing that: "the state shall take appropriate measures to make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts…." Thus, what is meant by decentralisation at the national level is to restrict Ministries, Departments and Agencies (MDAs) of government to policy making and the planning, monitoring and evaluation of governmental projects.[851] In practice, this is not the case.
    b. Article 255 of the Constitution establishes Regional Coordinating Councils (RCC), which, as the name suggests, are merely to coordinate the projects and initiatives of the MMDAs. In practice, the RCCs hold a lot of power, take instructions from central government, and enforce the will of the central government on the MMDAs. A good example is the MDAs at the regional level, which are conceived as "decentralized ministries"[852] but nevertheless operate as departments of the national level MDAs, not of the RCCs, taking instructions from the national level, implementing national level decisions and providing feedback from the sub-national level to the national level MDAs.[853]
    c. At the level of the District Assembly the type of local governance envisaged is devolution. The District Assembly is set up as a body corporate; it has powers to

[851] K Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 5. (on file with the Constitution Review Commission).
[852] Article 255 of the 1992 Constitution of the Republic of Ghana.
[853] K Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 5. (on file with the Constitution Review Commission).

make and implement policies at the local level, as well as make legislation; it has powers of taxation; and it has the power to borrow money. District Assemblies are constitutionally charged to formulate and execute plans for the mobilization of resources for the overall development of the District.[854] They are also designated as the "highest political authority in the district, and shall have deliberative, legislative and executive powers."[855]

d. The Constitution signals the type of decentralisation envisaged at the sub-district level in the following words contained in Article 240(2)(e): "to ensure the accountability of local government authorities, people in particular local government areas shall, as far as practicable, be afforded the opportunity to participate effectively in their governance." The Constitution refrains from saying anything directly about the type of decentralisation envisaged at this level. The Local Government Act, however, provides that a Metropolitan or District Assembly may, as appropriate, delegate any of its functions to a Sub-metropolitan, Sub-district, Town, Area, Zonal or Urban Council or Unit Committee or any other body or person determined by the Assembly. [856] It is clear that the type of decentralisation envisaged at the sub-district level is delegation. The sub-district structures may only take and implement decisions on their own based on the functions and powers conferred on them by law or delegated to them by the District Assemblies. The District Assemblies, and not the sub-district structures, take responsibility for those decisions and actions.[857]

26. There are three core concepts embodied in "decentralization": the devolution of major political and administrative responsibilities from central government to District Assemblies; the administrative and technical de-concentration practised by Ministries, Departments and Agencies (MDAs) that plan and deliver specific services to communities – water and sanitation, health, education, agriculture, etc.; and the delegation of some functions of the MMDAs to sub-district structures such as Town Councils and Unit Committees.

C. SUBMISSIONS RECEIVED

27. The Commission received many submissions on the type of decentralisation that should be practised in Ghana and how the particular form of decentralisation may be effectively operationalised. These are summarised below.

[854] Article 245 of the 1992 Constitution of the Republic of Ghana.
[855] Article 241(3) of the 1992 Constitution of the Republic of Ghana.
[856] Section 15 of the Local Government Act, 1993 (Act 462).
[857] K Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 5. (on file with the Constitution Review Commission).

28. The first set of submissions argued that the current state of the law should be maintained. Under the current arrangement, "decentralization", as used in the Constitution and other laws on decentralisation is not defined. Proponents of this view argued that the context in which the term is used and policy implementation should be allowed to determine the exact parameters of the term. This they believed would allow the necessary flexibility in policy making and implementation.

29. Another set of submissions was to the effect that the Constitution should explicitly define the term "decentralization" to guide all governments in the implementation of the concept. A variant of the above proposal was that the term "decentralization" should be defined by an Act of Parliament or through Administrative Instructions so that the definition may be easily amended to accord with changes in the environment. Yet others called for the Constitution to define the type of decentralisation it envisages at each level of the local government structure. Proponents of this set of views supported their position with the following reasons:
    a. The absence of an explicit definition of the term "decentralization" in the Constitution has contributed to the implementation problems that decentralisation has faced over the years. It has, in particular, led to convenient policy and implementation switches from one form of decentralisation to another, leading to policy incoherence and distorted outcomes.
    b. The two political parties which have formed the five Governments of the Fourth Republic have clearly understood decentralisation differently and approached decentralisation and its implementation from different perspectives, with the result that contradictory and inconsistent legislation has been enacted, all in the pursuit of the implementation of decentralisation.

30. The last set of submissions on this issue called for the Constitution to state explicitly that the type of decentralisation to be practiced at the MMDA level is devolution. According to the proponents of this view, this will compel the central government to transfer the necessary powers and resources to the MMDAs.

D. FINDINGS AND OBSERVATIONS

31. The Commission finds that the institutional and legal framework[858] for implementing decentralisation in Ghana is admirable and significant progress has been made in the last two

[858] The Local Government Service Act, 2003 (Act 462); The Civil Service Law, 1993, (PNDC Law 327); The National Development Planning Commission Act, 1994, (Act 479); The National Development Planning (Systems) Act 1994, (Act 480); The Local Government (Urban, Zonal, Area and Town Councils and Unit Committees) Establishment Instrument, 1994 (L.I. 1589); The District Assemblies' Common Fund Act, 1993, (ct 455) and The Legislative Instruments establishing the various Assemblies.

and a half decades. Ghana remains a shining global example of how to devolve power to the people at the local level.

32. The Commission finds that the practice of decentralisation in Ghana involves an admixture of political devolution, deconcentration, enshrined in the Constitution; administrative institutions; and the delegation of functions to sub-district structures. These are mostly backed by law, although other forms of the phenomena are the outcome of institutional reforms or supported by convention.

33. The Commission also finds that the Constitution does not clearly indicate the type of decentralisation that it envisages and this partly accounts for the policy incoherence and implementation chaos involving several un-coordinated projects and divergent approaches to project implementation.[859]

34. The Commission observes that:
    a. Ghana, like many countries, has shown her commitment to good governance, which is essential to economic and social development. The essentials of good governance which include constitutional legitimacy, accountability, transparent decision-making procedures, participatory development, respect for human rights and adherence to the rule of law have motivated the state to join other members of the international community in taking steps to embrace and implement local government as part of their structure of governance.
    b. The International Union of Local Authorities (IULA) World Wide Declaration of Local Self Government of June 1993, provides, *inter alia*, that: "Considering that local government, as an integral part of the national structure, is the level of government closest to the citizens and, therefore, in the best position both to involve them in the making of decisions concerning their living conditions and to make use of their knowledge and capabilities in the promotion of development…local self-government shall be recognised in the constitution or in the basic legislation concerning the governmental structures of the country."
    c. The second United Nations Conference on Human Settlements (Habitat II) held in Istanbul in June 1996, demonstrated "that citizens are demanding to be seen and heard and to be given the power to take part in decisions affecting their living environment." These declarations and affirmations have ensured that almost all countries in the world practise some form of decentralisation and local government albeit with the necessary modification to suit country-specific needs.

[859] *National Decentralization Action Plan (NDAP): Towards a Sector-Wide Approach for Decentralization Implementation in Ghana* (2003 - 2005) Prepared by: Decentralization Secretariat Ministry of Local Government & Rural Development.

d. Unitary states such as Gambia,[860] Kenya,[861] South Africa and Uganda[862] have included in their Constitutions explicit definitions of the type of decentralisation or local government system they envisage. South Africa is a typical example of a country that has devolved power from central government to local authorities. Under the South African system, municipalities are the engines of social and economic development. They are vested with legislative authority and the right to govern on their own initiatives with little or no central government intervention. The Constitution of Uganda includes the principle of devolution of functions, powers and responsibilities from central government to local government units and the decentralisation of decision-making to the people at all levels.

35. The Commission further observes that the Committee of Experts which drafted the proposals for the 1992 Constitution, noted the problems of local government authorities, including a low development capacity; poor financial administration and corruption; the inexperience and poor calibre of local government personnel, attributable, in part, to the low prestige and remuneration attached to job positions in the local government sector; and concluded that the kind of local government practised since independence had not yielded the needed results.[863] The Committee of Experts which drafted the proposals for the 1992 Constitution, nevertheless, endorsed in principle the basic idea of decentralisation and local governance and requested the Consultative Assembly to put in place in the Constitution, the essential building blocks of the evolving institutions, along with provisions seeking to guarantee what is required for them to function as envisaged. However, both the Committee of Experts and the Consultative Assembly did not specifically consider the issue of the type of decentralisation to be practiced at each level of the decentralised local government units.[864]

36. The Commission observes that at the Consultative Assembly, the focus of the members was the establishment of a constitutional framework of Local Government that guaranteed popular citizen participation.

37. The Commission furthermore observes that a corollary to the issue of the concept of decentralisation envisaged by the Constitution, is the issue of the prescribed functions to be performed by these decentralised units. The 1992 Constitution and other supporting legislation on decentralisation and local governance create a local government structure that

[860] Section 193(1) of the 1997 Constitution of the Republic of Gambia states that: "Local government administration in The Gambia shall be based on a system of democratically government elected councils with a high degree of local autonomy."
[861] Chapter Eleven of the 2010 Constitution of Kenya is titled "Devolved Government."
[862] Article 176 and 177 of the 1995 Constitution of the Republic of Uganda.
[863] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. (July 31, 1991), paragraphs 319-323.
[864] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraphs 319-323.

prescribes uniform functions for the MMDAs.[865] The only distinguishing element between a District, Municipality and Metropolis is the mode of creating these local government units.[866] The Commission recognises that in South Africa[867] and in older democracies, local government units are distinguished not only by their mode of creation but also by the functions that they perform.

38. The Commission observes that when the issue was discussed at the National Constitution Review Conference, the general consensus was that the concept of decentralisation, as applicable at each level of government, should be defined by the Constitution. The participants argued that this will clearly set out the high level policy guidelines for the implementation of the concept and ensure that the practice of decentralisation does not continue to swing, like a pendulum, according to the vicissitudes of succeeding governments. The Conference also proposed that the Constitution should prescribe devolution as the type of decentralisation envisaged at the MMDA level, as the best framework to ensure that the concept yields its desired dividends.

39. The Commission finally finds that there are sound reasons for having the Constitution explicitly provide for decentralisation by devolution at the level of the MMDAs. These include the following:
    a. Explicitly opting for decentralisation by devolution would accelerate development at the local level by creating a framework for MMDAs to enjoy increased autonomy in directing resources to their local needs and wants.
    b. Devolution would vest the responsibility of delivering services for improving the lives of the broad majority of Ghanaians in the MMDAs and undergird the resultant accountability mechanisms that would ensure that they deliver on that mandate.
    c. Devolution would also encourage the participation and active engagement of communities in the affairs of the MMDAs. Citizens and their elected representatives would have the power and resources to change their lives through participatory and deliberative democracy and action, free from dysfunctional control of central government.

40. The Commission also finds that it also is appropriate for sub-structures of the MMDAs to continue to perform functions delegated to them by the MMDAs. This, the Commission finds will create the needed synergy between the MMDAs and work of the sub-structures.

[865] Article 254 of the 1992 Constitution of the Republic of Ghana; Section 15 of the Local Government Act 1993, (Act 462).
[866] Section 10 of the Local Government Act 1993, (Act 462); The First Schedule to the Local Government Act, 1993 (Act 462).
[867] Section 155 of the 1996 Constitution of the Republic of South Africa which provides that national legislation must define the different types of municipality that may be established. It creates category A – C Municipalities.

41. The Commission however observes that, there is a conflict between the 2010 Decentralization Policy, that advocates for the definition of the type of local government to be practiced at each of the levels of decentralised government when it comes to the regional level of decentralisation, and the Local Government Service Act, 2003 (Act 656) and parts of Local Government Act, 1993, (Act 462). Whereas the new policy defines decentralisation at the region to be deconcentration, the two laws define the membership of the local government service to include the regional coordination council. This apparent confusion in policy statement and legislative intent will have to be reconciled.

42. The Commission observes that political scientists may disagree on the number of types of decentralisation there are and may also differ as to the incidence of each type of decentralisation. It is therefore imperative to identify the type of decentralisation envisaged in the Constitution for each level of the decentralised structures of government and to clarify in the local government legislation and possibly in a national local government policy document what their incidence should be.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

43. The Commission recommends that Article 240 of the Constitution be amended to identify the type of decentralisation envisaged at the three levels of decentralisation in Ghana that is to say:
    a. De-concentration at the level of the Regional Coordination Council;
    b. Devolution at the level of the District Assembly; and
    c. Delegation at the level of the Sub-District.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

44. The Commission recommends that the Local Government Act, 1993 (Act 462) and all other legislation that affect decentralisation be amended to define in detail the incidence of the various levels of decentralisation identified in the Constitution.

45. The Commission further recommends that the Ministry of Local Government and Rural Development should, within 12 months of the recommended constitutional amendments, initiate the passage of subsidiary legislation to:
    a. Further elaborate the differential modes of functioning of the MMDAs according as they are Metropolitan, Municipal or District;
    b. Phase the implementation of near complete devolution of governmental powers to the MMDAs;
    c. Allow the alignment of institutional structures, the generation and development of local capacities and competencies, and facilitate the transmission of resources necessary for the districts to function.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

46. The Commission recommends that the Ministry of Local Government and Rural Development should develop concrete action plans, complete with timeframes and monitoring and evaluation mechanisms, for the complete devolution of power to the MMDAs within the shortest possible time.

ISSUE TWO: MODE OF DISTRICT ASSEMBLY ELECTIONS

A. DIMENSIONS OF THE ISSUE

47. One of the unique features of the decentralisation and local government structure in Ghana is the non-partisan nature of elections at the district and sub-district levels. During the consultations held by the Commission, a majority of Ghanaians called for the retention of the non-partisan character of those elections. However, an equally large number championed the introduction of partisan elections at the district and sub-district levels.

B. CURRENT STATE OF THE LAW ON THE ISSUE

48. The Constitution precludes candidates seeking election at the district and sub-district levels from presenting themselves as candidates on the ticket of a particular party and using the symbols associated with a political party.[868] The Constitution also provides that political parties shall not endorse, sponsor, offer a platform to, or in any way campaign for or against a candidate seeking election to a District Assembly or any lower local government unit.[869]

C. SUBMISSIONS RECEIVED

49. The Commission received substantial submissions that argued for the retention of the non-partisan nature of the District Assembly elections. They provided the following reasons in support of their position.
    a. The non-partisan nature of local level elections enabled the local government units to build effective partnerships with Civil Society Organisations (CSOs) to deepen democracy and accelerate district level development. This is because CSO are also expected to operate in a non-partisan manner.

[868] Article 248(1) of the 1992 Constitution of the Republic of Ghana provides that: "A candidate seeking election to a District Assembly or any lower local government unit shall present himself to the electorate as an individual, and shall not use any symbol associated with any political party."
[869] Article 248(2) of the 1992 Constitution of the Republic of Ghana states that: "A political party shall not endorse, sponsor, offer a platform to or in any way campaign for or against a candidate seeking election to a District Assembly or any lower local government unit."

b. Politics in Ghana is very ethnocentric. Non-partisan elections ensured that districts which are multi-ethnic are able to unite around one object of making social progress, rather than be divided along party and, hence, ethnic lines.
c. The non-partisan character of the elections facilitated the mobilization of the people, creates an environment that is conducive for building consensus, and removes the acrimony associated with partisan elections. These factors are crucial to the development efforts at the grassroots level only which can lift our communities out of the quagmire of poverty in the midst of plenty.

50. There were also a large number of persons that called for a review of the non-partisan character of district level elections. They backed their position with the following reasons.
    a. The implementation of decentralisation by devolution would be impracticable if political parties are not allowed to participate actively in elections at the district level. Since the main objective of political parties is winning political power, the decentralisation of power must involve political parties at the level where real power is located.
    b. The introduction of partisan politics at the district level would ensure that political parties that lose national elections can still maintain control of some districts and stay relevant to the business of governing the nation, and extract benefits for their followers. This partisan presence can ultimately ameliorate, in a sobering way, the polarisation caused by the monopoly of a ruling party over both the central and local government structures in a "winner-takes-all" system.
    c. Partisan local government elections would allow District Assemblies to be used as training grounds for national level party politics.
    d. There is no compelling reason for barring political parties from taking part in elections at the district level. The restriction stems from the fact that the current system of decentralisation was introduced at a time that political parties had been banned in Ghana. That system was then replicated in the Constitution without much debate.
    e. In practice, political parties clandestinely sponsored candidates for district level elections despite the constitutional ban. It is time to allow the law to conform to the practice.
    f. Local government elections are used to gauge the mid-term performance of incumbent governments and the best way to do this is to allow the district level elections to be run along partisan lines.

D. FINDINGS AND OBSERVATIONS

51. The Commission observes that, at the time of the introduction of the local government concept in 1988, political parties were seen as the major obstacle to the liberty of the

individual to participate freely in local government.[870] Over the years, the gains in the implementation of decentralisation in Ghana have been partly attributed to the non-partisan nature of elections at the district and sub-district levels.

52. The Commission finds that despite the constitutional injunction against partisan district level elections, in practice, the elections are clandestinely fought on party lines.[871] Indeed some political parties openly claim that some assembly men and assembly women are favourably disposed to their party.[872]

53. The Commission observes that one key institutional variation in local governments in both the developing and the developed world is the issue of whether political parties have a place in local elections. Some countries do not allow partisan elections in local elections while some do. Examples of countries in the former category are Uganda, [873] India, [874] Canada[875] (Provincial Governments) while those in the latter category are nearly all of the recently decentralising Latin American countries, including Bolivia and Mexico, Côte d'Ivoire, Kenya, Nigeria, Senegal, and South Africa.

54. The Commission finds that allowing parties to participate in local government develops a link between local government and national government, and could allow the District Assemblies to serve as a training ground for national leaders.

55. The Commission, however, observes that where local elections are held on partisan bases, nomination rules determined and deployed by national parties can serve as impediments to accountability. It also weakens local government systems.

56. The Commission observes that as a result of the corruption in Ghana's body politic, partisan politics in local elections may lead to the erosion of popular support for local assemblies.

57. The Commission observes with concern that, in jurisdictions where political parties play a role in the elections at the local level, without clear rules that stipulate the inclusion of certain

[870] M. Ocquaye, Democracy Without Political Parties: The Case of District Assemblies, in K.A NINSON (ED), GHANA: TRANSITION TO DEMOCRACY, 115 (Accra, Freedom Publications, 1988).
[871] A.K.D. Frempong, *The Non-Partisan District Assembly System: Myths and Reality*, in N. AMPOSAH & K. BOAFO-ARTHUR (EDS), LOCAL GOVERNMENT IN GHANA, 204 (Accra, Uniflow, 2003).
[872] At the National Delegates Congress of the NDC, the General Secretary of the party referred spoken of some elected members of MMDA's as "candidates favourably disposed to the NDC" NDC, http://ndcpropagandagh.com/2011/07/report-of-the-general-secretary-to-the-national-delegates-at-the-extra-ordinary-congress-of-the-national-democratic-congress-held-at-the-coronation-park-sunyani-from-8th-to-10th-july-2011/ (last visited July 26, 2011).
[873] Article 176(3) of the 1995 Constitution of the Republic of Uganda.
[874] Article 243C(2) of the 1949 Constitution of India.
[875] Subparagraph 52(1)1 ii of the Municipal Elections Act, 2010 (Canada).

disadvantaged or minority segments of society, the system may easily engender dominance by majority groups, more powerful social groups and persons who have enough money to spread around for the purpose of attracting votes.

58. The Commission observes that the Committee of Experts which drafted the proposals for the 1992 Constitution noted that the non-partisan nature of the District Assemblies has the potential to facilitate the mobilization of the people at the local level and is more conducive to consensus formation, factors that are crucial to development efforts at the grassroots level.[876]

59. The Commission further observes that at the Consultative Assembly, "the mode of elections at the local level" was one of the topical issues that engaged the minds of the members of the Public Services Committee of the Assembly, tasked to deliberate on the subject matter of Decentralisation and Local Government. The Assembly ultimately decided to retain a non-partisan local government system as first established in 1988.[877]

60. The Commission observes that the experts at the National Constitution Review Conference could not reach a consensus on this issue. There was a strong call for elections to remain non-partisan to foster national unity at the grass roots level. Proponents of the retention of non-partisan elections at the district level argued that the participation of political parties in local level elections would impede the fairness of the competition. They would make campaigns acrimonious and discourage well-meaning Ghanaians who would not contest in partisan politics from contributing their quota to local level development. Additionally, the nomination procedures of partisan elections would prevent members of the same party from running for election, further reducing the pool of qualified candidates available to the electorate for their choice.

61. The Commission finds that local government authorities encounter a myriad of problems and a non-partisan district assembly, at the very least formally insulated from the wrangling of partisan politics, provides a unifying platform and the necessary incentives for cohesion to effectively implement the concept of decentralisation envisaged by the Constitution.

62. There was, however, an equally strong view that the elections should be partisan to encourage competent candidates, who see local level elections as a stepping stone to national politics, to contest such elections.

[876] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 325.
[877] Official Report of the Proceeding of the Consultative Assembly, (Tuesday 14th January 1992, Col. 1391); Official Report of the Proceeding of the Consultative Assembly, (Thursday 19th March 1992; Col. 3627).

63. The Commission observes that it cannot but be progressive and forward looking to institute an electoral process at the local level that has the potential to encourage popular participation in the agenda towards effective decentralisation. Political parties being the main actors in ensuring popular participation of their following especially during elections will, in a partisan local government system, contribute to the development of our local governance system by directing attention, energies and resources towards politics that will ensure the provision of essential services for the accelerated development of our localities.

64. The Commission, however, holds the view that despite the value that may be gained from partisan politics at the local level, there is the need to ensure a total overhaul of the local governance structure, which hitherto was geared towards non-partisan elections before partisans elections are introduced at the local level.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

65. The Commission recommends the amendment of Article 248 to empower Parliament at anytime in the future to make provision for partisan elections at the district and sub-district levels.

ISSUE THREE: SELECTION, QUALIFICATION AND COMPOSITION OF METROPOLITAN, MUNICIPAL, AND DISTRICT ASSEMBLIES

A. DIMENSIONS OF THE ISSUE

66. The Commission received a considerable number of submissions calling for the realignment of the composition of MMDAs:
    a. The fact that some of the members are popularly elected and others appointed raises questions as to the democratic character of the assemblies.
    b. Also, the appointment of the 30% membership of the MMDAs is said to be fraught with many challenges.
    c. Further, there is some unease in certain quarters about the membership of Members of Parliament of the District Assemblies within which their constituencies fall.
    d. A final dimension of this issue is the concerns that there ought to be a minimum educational requirement for members of the MMDAs.

B. CURRENT STATE OF THE LAW ON THE ISSUE

67. The composition of the MMDAs is provided for by the Constitution.[878] The members are: elected members from the local government electoral areas in the district; the Members of

[878] Article 242 (a)-(d) of the 1992 Constitution of the Republic of Ghana.

Parliament for constituencies that fall within the district; and the District Chief Executive. 30% of the membership of the Assemblies is appointed by the President, in consultation with traditional authorities and other interest groups in the district.

68. The Constitution does not require any educational qualification for persons seeking election to the assemblies. The standing orders of the assemblies expressly permit the use of local languages in the proceedings of the assemblies.[879]

C. SUBMISSIONS RECEIVED

69. From the submissions received by the Commission, there was an overwhelming call for amendment of the provisions of the Constitution on the composition of the District Assemblies in order to ensure the effectiveness and viability of the local government system. A small number of persons were of the opinion that the current composition of 70% elected and 30% appointed members of the assemblies should be retained since it is too soon to judge its real strengths and weaknesses.

70. There were significant numbers of people who also called for the retention of the 30% government appointees to the assemblies. Some of those submissions, however, proposed that the power to appoint the 30% should be vested in the traditional authorities in the districts, to the exclusion of the President. Their reasons were that allowing traditional authorities to make the appointments would remove the politicization of the assemblies by the appointment of party faithful to those slots by the President. They further argued that the constitutional injunction against chiefs engaging in active party politics gives them enough independence to fill the slots with appointees who can further the achievement of the mandate of the assemblies.

71. Other submissions advocated the retention of the 30% government appointees to the assemblies, but called for a radical change in the manner in which those appointees are selected. They argued that the initial rationale for making appointments to the assemblies was to ensure that any capacity deficits in an assembly as elected were supplied by nominees. It was also meant to be used to ensure that minorities and categories of persons suffering discrimination are represented on the assemblies. These values have, however, been sacrificed for narrow political interests in the making of appointments to the assemblies. The proposal here is to reserve the slots for persons with disability, the youth, women, and traditional authorities.

[879] Chapter 20 of the 1992 Constitution of the Republic of Ghana; Part 6 of the Model Standing Orders for MMDAs.

72. An equally large number of the submissions proposed that the MMDAs be composed of only elected members from local government electoral areas. They argued that ridding the assemblies of the 30% of its membership appointed by government would remove the perceived political character of the MMDAs and further underline their role as key agents of local development. Also, such a move they opine would effectively insulate the MMDAs from the direct control of central government and thereby bolster their independence. Proponents of this position finally argued that the mechanism of appointments to the assemblies hinders the deployment of a strategy of overlapping tenure created between the MMDAs and the Presidential tenure, a strategy which could improve the independence of the MMDAs. The revocation of the 30% government appointee with the advent of each new government effectively truncates the full tenure of the MMDAs. This lack of security of tenure for the government appointees on the MMDAs is sometimes disruptive of the smooth operation of the MMDAs.

73. Some Ghanaians also called for a review of the membership of Members of Parliament in the assemblies. Some of them called for the practice to be abolished in order to underline the purely local character of the MMDAs. Other reasons for the abolition were:
    a. The presence of MPs on the assemblies appears to have contributed to the impression that they are local development agents and not national legislators, a perception that has ensured that MPs are harassed by their constituents to provide individualised assistance and to fund development projects in their constituencies, all to the detriment of their representational, oversight and legislative duties in Parliament.
    b. The presence of MPs in the assemblies deflects attention from the assemblies as agents of development, as officials of the assemblies and constituents look to MPs to use their links with central government to provide them with their development needs. Ultimately, MPs fall into competition with local government authorities for delivering on the aspirations of the local people.
    c. In many districts, open or silent conflicts have arisen between MPs and District Chief Executives, especially when they are from different political parties. In some cases the conflicts have disrupted the functioning of the assemblies.
    d. On the other hand, there were proponents for the retention of the membership members of Parliament on the assemblies, but without a right to vote. This will ensure that the MPs are aware of the issues confronting the localities they represent and at the same time prevent them from influencing local issues with their vote.

74. Some Ghanaians also advocated that the Constitution prescribe some educational qualifications for Assembly members. They argue that this would ensure that the MMDAs are composed of persons with the requisite knowledge to perform the functions of the MMDAs.

D. FINDINGS AND OBSERVATIONS

75. The Commission finds that the power to appoint 30% of the membership of the District Assemblies was initially vested in the Provisional National Defence Council (PNDC) under the local government law of 1988. In crafting the 1992 Constitution, it appears the PNDC was simply substituted with the President.

76. The Commission finds that the first assemblies after the district level elections in 1988/89 complied strictly with the conditions for those appointments – bringing complementary experience and expertise to the assemblies. Since then, and through the 1994, 1998, 2002, 2006 and 2011 district level elections held under the 1992 Constitution, those appointments have generally been reserved for party loyalists. The rationale for appointing 30% of the membership of the assemblies has, therefore, largely not been met.

77. The Commission finds that there is no uniform standard for composing local assemblies across the sub-region or in the developed world. The variations include fully elected assemblies on the one hand and Assemblies with a mixture of elected and appointed members on the other.

78. The Commission also finds that, there are no educational qualification requirements for local council members across these jurisdictions.
    a. The Kenyan local government system, for instance, is composed of directly elected members from local government wards and members nominated or appointed by political parties for specially reserved seats in the councils.[880]
    b. The Namibian Constitution provides that all the members of the municipal, town and village councils be elected on party lists at a general election.[881]
    c. In the UK, the composition of the local councils and boroughs appears somewhat complex. Councillors represent geographical Wards, called electoral divisions in County Councils. A ward may be represented by 1, 2 or 3 councillors. County Councils, London Boroughs, and Scottish and Welsh Unitaries elect all their councillors at once, every 4th year. Metropolitan Districts elect one-third of their councillors in each of the 3 years which are not County Election years.

79. The Commission observes that the composition of the districts councils in the 1979 Constitution included an arrangement for traditional authorities within the district to appoint 30% of the members of the district councils.[882]

[880] Article 177(1) and (4) of the 2010 Constitution of Kenya; The Kenyan Local Government Act section 12(1) provides that "for every municipality there will be a municipal council established under this Act and every municipal council shall consist of such number of councillors as may be elected, nominated or appointed."
[881] Chapter 12 of the 1992 Constitution of Namibia; Section 6(1)-(3) of the Namibian Local Authorities Act, 1992, No. 470.

80. The Commission finds that the mandatory membership of MPs of the assemblies reinforces the perception that they are primarily local development agents and fuels tensions between MPs and DCEs, especially where they belong to opposing political parties.

81. The Commission observes that the National Constitution Review Conference reached the following conclusions on the issue of composition of MMDAs.
    a. The system of appointing 30% of the membership of the assemblies should be maintained. However, the Constitution should explicitly reserve those slots for identifiable and underrepresented groups such as women and the youth and traditional authority. This will ensure that disadvantaged groups and traditional authority, being critical to local development, are given the chance to participate in the local government system. This also has the advantage of reducing the political coloration of those appointments.
    b. The power to appoint the 30% membership of the assemblies should be vested in an institution other than the Presidency, for example, traditional authority. The Conference reached this conclusion on the premise that the appointment of the 30% membership of the MMDAs has been abused by governments over the years and does not ensure the security of tenure of the assemblymen and assemblywomen since their appointments can be revoked at any time purely for party political reasons. Allowing traditional authority to determine the appointments would also reduce the political coloration of the appointments since chiefs are constitutionally barred from participating in partisan politics.
    c. The membership of MPs of the district assemblies should be maintained to create linkages between central government and the assemblies.
    d. The Conference did not discuss the issue of educational qualification for assembly membership.

82. The Commission agrees with the submissions calling for a retention of the mechanism of appointing 30% of the membership of the assemblies. However this should be based on some modifications:
    a. The President should appoint this number, acting in accordance with the advice of the traditional authority in the catchment area of the District.
    b. The appointments should be made for the sole purpose of improving the capacities of the assemblies and for providing representation to traditional authorities and underrepresented groups such as women, the youth, persons with disability and the economically disadvantaged.
    c. The representatives of traditional authorities appointed in accordance with the advice of the traditional authorities in the catchment area should, however, not exceed 30%

[882] Article 183(1)(b)(ii) of the 1979 Constitution of the Republic of Ghana provided that "one-third of whom shall be chosen by the traditional authorities in the district in accordance with traditional and customary usage".

of the number of appointees. This is to ensure that the traditional authorities do not recommend an inordinate number of chiefs for appointment to the assemblies.

83. The Commission further disagrees with the submissions that there should be an educational qualification requirement for members of the MMDAs. Such a requirement will defeat the strategy of ensuring active local participation in the decentralisation process.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

84. The Commission recommends the following:
    a. An amendment of Article 242(a) to abolish the mandatory membership of MPs on the Assemblies.
    b. An amendment of Article 242(d) to vest the power to appoint the 30% membership of the Assemblies in the President, acting in accordance with the advice of the traditional authorities in the catchment area of the District.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

85. The Commission recommends consequential amendments to the Local Government Act to give effect to the constitutional changes proposed, in particular, legislation, pursuant to the amendment of Article 242(d) of the Constitution, to provide an indicative list of identifiable groups to be appointed to the Assemblies.

86. The Commission recommends the amendment of the Local Government Act or the Standing Orders of the assemblies to provide for the district assemblies to be able to include MPs as co-opted members.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

87. The Commission recommends that the traditional authorities in the catchment area of the District Assemblies develop detailed criteria for the selection of the 30% appointees for appointment by the President.

ISSUE FOUR: MODE OF SELECTING METROPOLITAN, MUNICIPAL AND DISTRICT CHIEF EXECUTIVES (MMDCES)

A. DIMENSIONS OF THE ISSUE

88. Since the introduction of the 1992 Constitution, there have been incessant calls for a change in the manner of appointing MMDCEs to accord with the new democratic dispensation. Some have gone as far as to argue that a complete democratization of the local governance

system is an imperative and the election of MMDCEs is a critical component of that imperative. Thus, there are varying schools of thought on the issue:

a. Those who call for the retention of the current position, arguing that an Executive President must govern at the district level thorough his appointees
b. Those who call for election of the MMDCEs. There are, however, varying positions on how elections should be conducted.
c. Additionally, the appointment of Deputy MMDCEs to assist the MMDCEs in the discharge of their duties also came up as a dimension of this issue.

B. CURRENT STATE OF THE LAW ON THE ISSUE

89. Under the 1992 Constitution, the President nominates MMDCEs for appointment and they may only be appointed if they obtain a two-thirds majority vote from the Assembly.[883]

90. The law does not provide for the appointment of Deputy MMDCEs.

C. SUBMISSIONS RECEIVED

91. The Commission received a decent number of submissions that called for the retention of the current state of the law on the appointment of MMDCEs. Proponents of the view argued that the President should continue to nominate MMDCEs for confirmation by the Assembly, by a two-thirds majority vote. They supported their arguments with the following reasons:

a. Choosing an MMDCE for the decentralised units in a unitary state such as Ghana is critical. This is because the MMDCE is required to be accountable and responsible to both the local electorate and the central government, sometimes leading to a situation of divided loyalties. The current provisions of the Constitution strike a balance between the two forces and should be maintained.
b. Maintaining the *status quo* would ensure a healthy working relationship between the President and the MMDCEs he nominates for appointment. This is critical for the President's realization of his vision for the nation.
c. Maintaining the *status quo* would ensure that the President can dismiss non-performing MMDCEs without regard to the electorate. This is important in a system that does not allow for the recall of elected officials.
d. Appointing MMDCEs reduces the conflicts and acrimony associated with elections in Ghana, and.
e. Appointing MMDCEs is less expensive and time consuming than electing them.

92. Other submissions called for the election of MMDCEs by universal adult suffrage. They provided the following reasons for their position:

[883] Article 243(1) of the 1992 Constitution of the Republic of Ghana.

a. It is important that the Districts, which are responsible for the development of all our communities, be headed by persons who are legitimate and trusted by the people in those communities. This can only be achieved if the Constitution allows the popular election of MMDCEs.
b. An elected MMDCE will be more responsive and accountable to the people.
c. Popular election of MMDCEs would make for the total democratization of the local government system.
d. The functions of an MMDCE as enshrined in the Constitution make the position critical to local development. This means that the selection of a person to fill such a position should not be left to an electoral college. Although unelected by universal adult suffrage, the MMDCE performs functions, such as presiding at meetings of the Executive Committee of the MMDA, managing the day-to-day performance of the executive and administrative functions of the MMDA, and acting as the chief representative of the central government in the district. Additionally, the MMDCE is the Chairman of the District Security Committee, which makes him responsible to the National Security Coordinator. Only an elected official should perform all of these functions.
e. Elections will create the platform for competent persons to stand for elections as MMDCE.
f. An elected MMDCE would have the confidence and security of tenure necessary to insist on long-term local development when this is sought to be sacrificed by the centre for short-term and parochial interests.
g. Popular elections of MMDCEs would reduce the incidents of having very unpopular candidates selected as MMDCEs by the assemblies and remove, or at least, minimise the alleged corruption that accompanies the approval of nominees by assemblies.

93. The trend of the majority opinion in the submissions received was towards the proposal that the President should nominate 3 candidates for election by universal adult suffrage. The following reasons accompanied this proposal:
    a. This proposal is the best way to ensure both the central government and the electorate have a real chance of choosing their MMDCE.
    b. MMDCEs elected by this mechanism would ensure the retention of balance between loyalty to the centre and responsibility and accountability to the locale that is necessary for effectively running a district assembly in a unitary state.
    c. The MMDCEs would have more secure tenure if elected in this way.

94. There was a minority position in the submissions that advocated the election of MMDCEs from among elected members of the Assemblies. Proponents of this view argued that this would remove the assemblies from unwarranted control by central government and allow the MMDCEs to discharge their duties effectively without undue influence.

95. There were also a few submissions advocating the appointment of Deputy MMDCEs. Proponents of this view argued that the workload of MMDCEs makes it impossible for them to discharge all of their duties effectively. The Deputy MMDCEs would thus assist the MMDCEs in the performance of their duties.

D. FINDINGS AND OBSERVATIONS

96. The Commission observes that Ghanaian law has always empowered the Head of State to appoint MMDCEs. Under the Supreme Military Council (SMC) administration, however, Chairpersons of the District Councils were elected by the Councillors from among themselves, except for Accra, Kumasi and Sekondi-Takoradi where the SMC reserved the power to appoint the Executive Chairmen directly.[884]

97. The Commission further observes that international practice shows a wide variance in local laws and practices regarding how MMDCEs come into office.
    a. In Western Europe, the popular election of mayors over the years has become more and more common. In many Western European countries, the traditional selection procedure – election by the local council – has been replaced by direct mayoral elections. However, in the Netherlands, mayors are appointed by the central government instead of being directly elected.
    b. In India, the Mayor, who is generally a state-appointed officer, acts as the city bureaucrat. The Mayor in the Municipal Corporation is, however, chosen through direct vote for a term of five years. The Mayor generally lacks executive authority. The Municipal Commissioner serves as the Principal Executive Officer subject to the power and administration of the Mayor as the Chief Executive Officer.[885]
    c. Under Japan's Local Autonomy Law of 1947, which defines the structure of Japanese local governments, the mayor has strong executive powers and is elected every 4 years by direct popular votes, held separately from the Assembly elections. A mayor can be recalled by a popular initiative but the national government cannot remove a mayor from office.
    d. In the United States of America, there are several distinct types of mayors depending on the system of local government being practised in a particular state. The Council-Manager type considers the Mayor a type of Head of State, lacking any special legislative powers. The Mayor and City Council serve on a part-time basis, with the day-to-day administration of the state being in the hands of a professional City Manager. This system is most common among medium sized cities from around

[884] K. Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 9. (on file with the Constitution Review Commission).
[885] Article 243 of the 1949 Constitution of India.

25,000 to several hundred thousand persons, usually rural and suburban municipalities. The Mayor-Council system, which is the second system of local government, has the Mayoralty and City Council as separate offices. Under this system, also known as a strong mayor system, the Mayor acts as an elected executive of the City Council, with legislative powers. The Mayor may select a Chief Administrative Officer to oversee the different departments. This is the system used in most large cities of the United States, primarily because Mayors serve full time and have a wide range of services that they oversee. In a weak mayor or ceremonial mayor system, the Mayor, sharing both executive and legislative duties with the City Council, has the power for appointing department heads but is subject to checks by the City Council, This is common for smaller cities.[886]

e. The Constitutions of Uganda, Kenya, Namibia and the Gambia, create the framework for the direct election of mayors or Chairpersons of the local government council and vests the Mayor with executive powers over the service delivery mandates of the local government council.[887]

98. The Commission observes that the Committee of Experts which drafted proposals for the 1992 Constitution tried to ensure that central government has oversight over the activities of the local government units and, therefore, recommended that the District Secretary should continue to be appointed by the government, as its representative at the district level, but that he should be an *ex-officio* member of the Assembly.[888]

99. The Commission observes that, when the issue of the mode of selecting MMDCEs was discussed at the National Constitution Review Conference, no consensus was reached. Participants were evenly split along the lines of either maintaining the *status quo* or opting for the direct election of MMDCEs. The Conference, however, was unanimous that there is the need for some participation of the people in the district in determining who should be their MMDCE.

100. On the issue of the mode of selecting MMDCEs, the Commission also finds that:

a. There is an increasing demand for Mayors in Metropolitan areas to be directly accountable to the people for the management of our cities and this can be achieved by a mechanism for popularly electing Mayors. The resource base of the Metropolitan

[886] Alan G. Vanderberg, *Paper on the Michigan Local Government Structure*, Prepared as an Informational Resource for the Michigan Civics Institute Local Government, 2002. (on file with the Constitution Review Commission).

[887] Article 138(b) of the 1995 Constitution of the Republic of Uganda; Article 180(1)-(2) of the 2010 Constitution of Kenya; Article 111(2) of the 1992 Constitution of Namibia and Section 12 of the Namibian Local Authorities Act, 1992, No. 470; Section 194(c) of the 1997 Constitution of the Gambia.

[888] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 330.

areas would also ensure that Mayors are not so dependent on the centre for resources, as to be controlled by central government when directly elected into office.

b. The character and resource base of a Municipality requires greater interaction with central government than is needed in the case of a Metropolis. Thus, having a mechanism whereby the President nominates a certain number of persons for the electorate to vote would ensure that the right mix of central government control and local accountability and autonomy is created.
c. The relationships and interactions between Assembly Men and Women and the constituents they represent are generally stronger in Districts and so it is safe to allow them to approve the President's nomination on behalf of the electorate.

101. The Commission further observes that the number of districts that have found it difficult to get two-thirds of assembly members to approve the nomination of MMDCEs is on the increase.

102. The Commission finds that the practical implementation of the two-thirds vote requirement for electing MMDCEs is expensive and time consuming resulting in the delay in the approval of some MMDCEs in some areas. This calls for a review of the mode of selection that would be less difficult and less time consuming.

103. The Commission also finds, however, that a drastic change in the current *status quo* may have the potential of destabilising the exiting local government system therefore defeating the potential gains that a change in the existing system may present.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

104. The Commission recommends that Parliament should be empowered to determine specific mechanisms for choosing MMDCEs, which should vary according as Metropolis, a Municipality or a District.

105. The Commission recommends that in Metropolitan areas, the Mayor should be popularly elected.

106. The Commission recommends that in Municipalities, the President should nominate persons who would be vetted by the Public Services Commission (PSC) for competence, after which 3 nominees would contest in a public election in each Municipality.

107. The Commission recommends that in the case of District Assemblies, the President should nominate a candidate for approval by a simple majority of the Assembly as DCE.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

108. Consequential amendments to the Local Government Act will be required to give effect to the recommended constitutional changes.

ISSUE FIVE: TENURE OF OFFICE OF MMDCES AND ASSEMBLY MEMBERS

A. DIMENSIONS OF THE ISSUE

109. The tenurial relationship that should exist between the MMDAs/MMDCEs on the one hand and that of the President on the other was the main tenor of this issue. Additionally, how vacancies in the MMDAs arising from resignation or death of a member are to be filled was also raised as part of this issue.

B. CURRENT STATE OF THE LAW ON THE ISSUE

110. The Constitution provides for the elections at the MMDA level to be held at least six months after the holding of parliamentary elections.[889] This effectively ensures that the tenure of the MMDAs and the MMDCEs is not coterminous with that of Parliament, and invariably the President. The Constitution also provides that the tenure of an MMDCE be ordinarily for 4 years[890] and that a person cannot hold office as an MMDCE for more than two consecutive terms.[891] Currently, the Constitution and the Local Government Act have no provisions on how to fill vacancies on the MMDAs that arise from resignation or the death of a member.

C. SUBMISSIONS RECEIVED

111. The Commission received submissions to the effect that the MMDCEs and MMDAs should have a fixed tenure that overlaps with the tenure of an elected President. This would underline the non-partisan character and the autonomy and independence of the District Assemblies as they operate under governments of different political parties.

112. Other submissions called for the tenure of MMDCEs and MMDAs to be coterminous with that of the President since MMDCEs are nominated by the President and hold office at his pleasure. They also argued that an Executive President should not have to work with an MMDCE appointed by a different President, especially where that President is of a different political persuasion.

[889] Article 246(1) of the 1992 Constitution of the Republic of Ghana.
[890] Article 246(2) of the 1992 Constitution of the Republic of Ghana.
[891] Article 246(2) of the 1992 Constitution of the Republic of Ghana.

113. Yet other submissions called for the tenure of the MMDCEs to be coterminous with that of the President, but insisted that the tenure should be for an initial period of 2 years, so that ineffective MMDCEs are replaced after two years. This, they argue, would make MMDCEs more responsive to the needs of the people.

114. Some of the submissions advocated that the Constitution prescribe the mode for the replacement of a member of the MMDA who dies or resigns. Proponents of this view argued that the Constitution has no provision on this issue and this has sometimes left some electoral areas unrepresented on the MMDAs.

D. FINDINGS AND OBSERVATIONS

115. The Commission finds that the 1992 Constitution created overlapping tenure between the MMDCEs/MMDAs on the one hand and Parliament and the President on the other. This overlapping of tenure makes it possible for a newly elected President, whose tenure coincides with that of Parliament, to work with the MMDAs/MMDCEs for at least six months, even where the latter are appointed by a different party from that of the President.[892] This arrangement is one of the reasons why the MMDAs were made non-partisan.

116. The Commission further finds that in practice the overlapping tenure is not operational. In the first transition of power from one elected government to another elected government of a different party in 2001, one of the first acts of the new administration was to terminate the membership of all the members of the MMDAs who were appointed. In 2009, when power shifted from the NPP back to the NDC, the new President attempted to stay his hand and retain the appointed members in office. Intensive pressure from within his party, however, saw to it that this decision was reversed after about a month. The situation was exactly the same with regard to the MMDCEs. The new Government in the 2001 transition terminated their appointments soon after assuming office, whilst in 2009 their appointments were terminated after about three months. The net effect of all these developments is that in practice, the tenures of the President, Parliament, the District Assemblies and the MMDCEs have become virtually coterminous.

117. The Commission finds that not placing a ceiling on the number of terms an MMDCE may serve will allow for effective MMDCEs to stay on as long as the electorate would vote for them or as long as the President nominates them and they are approved by the Assembly, as the case may be.

[892] Article 246(1) of the 1992 Constitution of the Republic of Ghana; K. Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 10 (on file with the Constitution Review Commission).

118. The Commission observes that the tenure of office of local government council members and Mayors vary from country to country.
    a. In South Africa, the mayors and the local government councils have a fixed term. For instance, the term of a Municipal Council may be no more than five years, and this is determined by national legislation. If a Municipal Council is dissolved under the terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.[893]
    b. Similarly, in Uganda,[894] Kenya,[895] Namibia[896] and the Gambia,[897] local government councils and elected local council Chairpersons have a fixed tenure.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

119. The Commission recommends that Article 246(1) of the 1992 Constitution be amended to indicate specifically that the tenure of all the members of the MMDAs is 4 years.

120. The Commission recommends that the tenure of office of MMDCEs should be 4 years.

121. The Commission also recommends that the tenure of popularly elected Mayors of Metropolitan areas need not be coterminous with those of the President and Parliament.

122. The Commission, however, recommends that the tenure of Municipal and District Chief Executives should be coterminous with those of the President and of Parliament.

123. The Commission recommends that Parliament should determine the number of terms MMDCEs may be in office.

124. The Commission further recommends that the Constitution prescribes the holding of by-elections to replace an elected Assembly member who resigns or dies.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

125. The Electoral Commission should legislatively determine the timeframe and related matters for holding by-elections for District Assembly electoral areas.

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[893] Section 159 of the 1996 Constitution of the Republic of South Africa.
[894] Article 181(4)(5) and 183 of the 1995 Constitution of the Republic of Uganda.
[895] Articles 177(a) and 180(7) of the 2010 Constitution of Kenya.
[896] Articles 109(3) and 111(2) of the 1992 Constitution of Namibia.
[897] Section 194(a) and (c) of the 1997 Constitution of the Republic of the Gambia.

ISSUE SIX: REMOVAL AND SECURITY OF TENURE OF MMDCES

A. DIMENSIONS OF THE ISSUE

126. The power of the President to remove an MMDCE without recourse to the MMDAs calls into question the removal procedures, and security of office of MMDCEs. The expression of this issue seeks to find a balance of power between the President and the MMDAs in the removal of MMDCEs.

B. CURRENT STATE OF THE LAW ON THE ISSUE

127. The procedures for removing MMDCEs are provided for in the Constitution.[898] An MMDCE may be removed from office by the President or by a vote of no confidence passed by the Assembly.

C. SUBMISSION RECEIVED

128. The submissions received by the Commission on this issue largely called for a constitutional amendment to require that the MMDAs are consulted before MMDCEs are dismissed by the President. Proponents of this view argued that the absence of any limitations on the power of the President to dismiss MMDCEs made them very insecure and totally dependent on the central government. Such dependence was at the expense of accountability to the Assembly and the people of the District. They argued further that an ineffective and unpopular MMDCE, who is well connected to central government, could hold office for 8 years, whilst an effective MMDCE who does not have the right connections to central government could be out of office very early. Finally, they surmised that sudden dismissal of an MMDCE could be demoralizing for the Assembly.

D. FINDINGS AND OBSERVATIONS

129. The Commission finds that even though the Constitution provides for a 4-year tenure for MMDCEs,[899] the same Constitution empowers the President[900] or the District Assemblies[901] to terminate the appointment of MMDCEs. Over the years, the exercise of the presidential power to remove MMDCEs has been widely used. However, there have been very few instances where the power of the MMDAs to remove MMDCEs by passing a vote of no confidence has been utilised.

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[898] Article 243(3)(a) of 1992 Constitution of the Republic of Ghana.
[899] Article 246 (2) of the 1992 Constitution of the Republic of Ghana.
[900] Article 243(3) (b) of the 1992 Constitution of the Republic of Ghana.
[901] Article 243(3)(a) of 1992 Constitution of the Republic of Ghana.

130. The Commission finds that in the last couple of years, there have been many calls from various local groups in many districts for the removal of MMDCEs. These calls led the current government to set up a special committee to investigate allegations that were levelled against some MMDCEs.

131. The Commission also find that the dismissals of MMDCEs have caused a lot of anxiety and tension in various parts of the country.

132. The Commission believes that the surest way to secure the tenure of an elected Mayor is by vesting the power to remove the Mayor in the representatives of the people in the Assembly. In the case of Municipal and District Chief Executives, the process of removal should be such that the actors in their appointment process should be involved in and part of the removal processes.

133. The Commission observes that, internationally, the removal of Mayors is tied to the mode of their selection. Mayors who are directly elected have more secure tenure than those appointed by central government or elected by an electoral college of the local councils.
    a. In Kenya, for instance, a county governor may be removed from office for gross violation of the Constitution or any other law; where there are serious reasons for believing that the person has committed a crime under national or international law; because of abuse of office or gross misconduct; or due to physical or mental incapacity to perform the functions of the office. Parliament is vested with the power to enact legislation providing for the procedure of the removal of a county governor on any of the grounds mentioned.[902]
    b. Similarly, the Namibian Local Authorities Act provides that the Mayor or Deputy Mayor or Chairperson or Vice-chairperson shall vacate his or her office if he or she ceases to be a member of the local authority council or if the local authority council resolves by a majority of all its members that it has no confidence in that mayor or deputy mayor or chairperson or vice-chairperson. He or she may also leave office by resigning.[903]
    c. In Uganda, the Constitution allows the electorate to remove an elected member of the local council and the chairperson of the council. A novel inclusion is Article 182 of the Ugandan Constitution, which states "that the mandate of an elected member of a local authority may be revoked by the electorate in terms of an Act of Parliament." Also Article 183 of the Ugandan Constitution provides that the Chairperson can be removed from office by a council resolution supported by not less than two-thirds of the membership.

[902] Article 181(1) and (2) of the 2010 Constitution of Kenya.
[903] Section 11(4) (a) and (b) of the Namibian Local Authorities Act, 1992, No. 470.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

134. The Commission recommends that Articles 243 and 246 of the Constitution be amended to effect the following changes:
    a. For Metropolitan Assemblies, a popularly elected Metropolitan Chief Executive can only be removed by a resolution of the Assembly, supported by not less than two-thirds majority votes of all members of the Assembly. The petition for the removal of the Mayor should be signed by not less than one-third of all the members of the Assembly. The mayor should be given the opportunity to defend himself before the Assembly after which the Assembly will vote for the removal or otherwise of the Mayor.
    b. For Municipal Assemblies, an elected Municipal Chief Executive, nominated by the President and popularly elected, may be removed by the President with the approval of not less than two-thirds majority of all Assembly members. Similarly, the Assembly may also request the removal of a Municipal Chief Executive by a petition signed by two-thirds of all the members of the Assembly, and the President should endorse the removal.
    c. For District Assemblies, a District Chief Executive, nominated by the President and approved by the Assembly, can be removed either by the President or by a vote of no confidence supported by two-thirds majority of all Assembly members present and voting.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

135. The Commission recommend that the Local Government Act be amended to give effect to the Constitutional amendments proposed in this section.

ISSUE SEVEN: MODE OF ELECTION AND TENURE OF OFFICE OF PRESIDING MEMBERS (PMS)

A. DIMENSIONS OF THE ISSUE

136. The numerical difficulty associated with election of PMs using the current voting procedure has been raised by many of the submissions on this issue. This came up in virtually all the levels of the consultations held by the Commission. Additionally, the submission under this issue raised questions with the tenure of office of PMs as provided for in the Constitution.

B. CURRENT STATE OF THE LAW ON THE ISSUE

137. The PM is elected by at least a two-thirds majority of all the members of the Assembly. The nomination of an MMDCE on the other hand requires only two-thirds majority of members

of the Assembly present and voting.[904] Since the Model Standing Orders of the Assemblies require only one-third of all the members of the Assembly to transact business, the difference in the numerical strength required to approve the nomination of an MMDCE and to elect a PM could be vast.[905]

138. The Constitution provides that the PM has a 2 year term in office and is eligible for re-election.[906] It further provides that the PM shall cease to hold office when a majority of at least two-thirds of all members of the Assembly vote to remove him from office.[907]

C. SUBMISSIONS RECEIVED

139. The majority opinion in the submissions received by the Commission advocated the election of PMs by two-thirds majority of Assembly members present and voting at the meeting. Proponents of this view argued that considering the role of the PM in the MMDA, a less cumbersome mode of election will enable the MMDAs to elect PMs at the first sitting of the MMDA. They further argued that the election of PMs has taken several months to accomplish in many cases because of the number of persons required by the Constitution for the purpose. They finally argued that the election of a PM should not be more onerous than the approving of the nomination of an MMDCE, given the relative powers of the two functionaries.

140. The minority view was that the current state of the law should be maintained since the PM, unlike the MMDCE, is not nominated by the President for approval.

141. Some of the submissions also called for an increase in the tenure of office of PMs. They argue that, if all members of the MMDAs ordinarily have a 4-year tenure, PMs must also have the same tenure. The submissions also advocated the removal of the term limit on the tenure of PMs.

D. FINDINGS AND OBSERVATIONS

142. The Commission finds that, over the years, implementing the provisions on the election of PMs has stalled the operations of many Assemblies as no one candidate is able to obtain the requisite number of votes for the position. This is because it is difficult for the Assemblies to operate without a PM.

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[904] Article 243 (1) which states that: "There shall be a District Chief Executive for every district who shall be appointed by the President with the prior approval of not less than two-thirds majority of members of the Assembly present and voting at the meeting".
[905] Part 6 of the Model Standing Orders for MMDAs
[906] Article 244(4) of the 1992 Constitution of the Republic of Ghana.
[907] Article 244(5) of the 1992 Constitution of the Republic of Ghana.

143. In the Ugandan Constitution, the Speaker of the Local Government Council is elected by a vote of at least 50% of all members of the council.[908] There is no specific tenure or term limit for the speaker of the local council.[909] Similarly the Kenyan Constitution provides for the election of a speaker of the local assembly from among members of the assembly.[910] However, Parliament is vested with the power to enact legislation to regulate the election and removal of the speaker.[911]

144. The Commission observes that at the Consultative Assembly, the issue of the tenure of PMs generated a lot of debate during the consideration stage of the proposals on Decentralisation and Local Government. The debate was on whether or not PMs should also have a-4 year tenure as MMDCEs or the PMs should have a 2-year tenure. The issue was resolved by resort to the vote. The majority voted in favour of the retention of the 2-year tenure proposed.[912]

145. The Commission observes that when the issue was tabled for discussion at the National Constitution Review Conference, the participants were of the view that the tenure of PMs should be retained at 2 years and that the election of PMs should be by two-thirds majority of Assembly Members present and voting at the meeting. The participants argued that this will remove the unnecessary delays associated with the election of PMs.

146. The Commission is agreeable to the general principle that the election of the PM should be rid of undue delays and difficulties since the absence of a PM in MMDAs tends to stultify the growth of the assemblies.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

147. The Commission recommends that Article 244(2) be amended to allow for the elections of PMs by a majority of the members of the Assembly present and voting at the meeting.

148. The Commission also recommends the retention of the 2-year, two-term tenure of office for PMs.

[908] Article 184(1) of the 1995 Constitution of the Republic of Uganda.
[909] Article 184(1) and (2) of the 1995 Constitution of the Republic of Uganda; Chapter 11 of the 1995 Constitution of the Republic of Uganda.
[910] Article 178(1) of the 2010 Constitution of Kenya.
[911] Article 178(3) of the 2010 Constitution of Kenya.
[912] Official Report of the Proceeding of the Consultative Assembly, (Thursday 19th March 1992; Col. 3625-3626).

ISSUE EIGHT: CONDITIONS OF SERVICE FOR MMDCEs, PMs AND ASSEMBLY MEMBERS (AMs)

A. DIMENSIONS OF THE ISSUE

149. The conditions of service of MMDCEs, PMs and AMs was a very popular issue during the consultations, particularly during the district- and regional- level consultations. The main dimensions of the issue were as follows:
    a. Should they be paid from central government funds or from locally generated revenue?
    b. Should they be paid allowances or monthly salaries?
    c. Should the payments be uniform or should they vary from district to district?
    d. Should they be paid a pension?
    e. Should they be paid *ex gratia* awards?
    f. Should they be provided with facilities like official vehicles and office space?

B. CURRENT STATE OF THE LAW ON THE ISSUE

150. Article 250 of the Constitution provides that the emoluments of a District Chief Executive shall be determined by Parliament and shall be charged on the Consolidated Fund. For PMs and AMs, the provisions further state that the emoluments of a PM and other members of the Assembly shall be determined by the District Assembly and paid out of the Assembly's own resources.

C. SUBMISSIONS RECEIVED

151. The Commission received the following submissions on this issue:
    a. The salaries and End-of-Service Benefits (ESBs) of MMDCEs should be charged on the Consolidated Fund. Proponents of this view argued that the payment of these will ensure that MMDCEs are rewarded financially during and at the end of their service.
    b. The salaries and ESBs of MMDCEs should be charged on the internally generated funds of the MMDAs. Proponents of this view believe that this would give them an incentive to generate more financial resources for their district.
    c. PMs and AMs should be given some form of monthly remuneration charged on the Consolidated Fund for the following reasons:
        i. The nature of their mandate requires that they have operational funds.
        ii. Their being rewarded in this manner will serve as an incentive whereby high quality personnel will be attracted to work as PMs and AMs.
    d. PMs and AMs should have the same conditions of service throughout the country.
    e. The salaries, allowances and ESBs of PMs and AMs should be charged on the Consolidated Fund for the following reason:

i. It will serve as an incentive to persons who work as PMs and AMs since they are sure that the monies will be paid.
ii. Some Assemblies do not have sufficient financial resources from which to pay adequate allowances, significant salaries and ESBs.

f. AMs should be given logistical support such as motor bikes and office space to assist them in the performance of their duties.

D. FINDINGS AND OBSERVATIONS

152. The Commission observes that whilst the Constitution provides for the emoluments of MMDCEs, PMs and AMs, it does not define the term "emoluments."

153. The Commission further finds that this issue on the emoluments and conditions of services of MMDCEs, PMs, and AMs has gained prominence and public attention due to the level of disparity in the quantum paid to PMs and AMs from District to District and how low they appear relative to the conditions of service of members of Parliament.

154. The Commission finds that PMs and AMs are sometimes the first port of call for desperate people seeking socio-economic assistance in all forms and that addressing these needs has often taken precedence over their function as local legislators and policy makers.

155. The Commission finds that there was a strong nationwide call for PMs and AMs to be provided with the facilities and remuneration necessary for them to do their work effectively.

156. The Commission recognises that through policy interventions, the government may be able to provide logistical support to district assemblies that would facilitate the discharge of their duties of MMDCEs, PMs and AMs.

157. The Commission finally finds that the National Constitution Review Conference called for PMs and AMs to be provided with some remuneration and ESBs in order to attract qualified and good quality personnel to those positions.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

158. The Commission recommends that the Independent Emoluments Commission proposed to be set up under the Constitution should determine the emoluments and conditions of service of MMDCEs, PMs, and AMs.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

159. The Commission recommends that the law setting up the Independent Emoluments Commission should streamline all imbalances in the salary structures and scales of public officers, including those of MMDCEs, PMs and AMs.

ISSUE NINE: FISCAL DECENTRALISATION

A. DIMENSIONS OF THE ISSUE

160. This issue, as expressed by the submissions received, had many dimensions. They include the following:
    a. Should the office of the Administrator of the District Assemblies Common Fund (DACF) be made independent of central government so that it can manage the Fund more efficiently?
    b. Should there be an increase in the percentage allocation of the DACF to the MMDAs?
    c. Should the MPs share of the DACF be scrapped and replaced with a Constituency Fund?
    d. Should the Constitution prescribe procedures for accounting for the DACF?

B. CURRENT STATE OF THE LAW ON THE ISSUE

161. The District Assemblies Common Fund is Ghana's solution to the problem of fiscal decentralisation.[913] The Office of the District Assemblies Common Fund Administrator (the Administrator) is established by the Constitution to facilitate the transfer of funds to the MMDAs in a transparent, non-discriminatory, and accountable manner.[914]

162. The Constitution also provides that Parliament shall annually make provision for the allocation of not less than 5% of the total revenues of Ghana to the District Assemblies for development and the amount so allocated shall be paid into the District Assemblies' Common Fund in quarterly instalments.[915] Once Parliament approves the formula for the distribution of the DACF, the Administrator is required to release the allocated funds to the MMDAs.[916]

163. Under the Constitution, there are two separate provisions for the appointment of the Administrator. Whereas under Article 70, the Administrator is appointed by the President in consultation with the Council of State, under Article 252, he is appointed by the President

[913] Article 252 (1) of the 1992 Constitution of the Republic of Ghana.
[914] Article 252 (4) of the 1992 Constitution of the Republic of Ghana.
[915] In July 2007, Parliament approved an increase from 5 % to 7.5% effective 1st January 2008.
[916] Article 252 (2) of the 1992 Constitution of the Republic of Ghana.

with the prior approval of Parliament. This creates some level of confusion as to which institution is constitutionally placed to appoint the Administrator.[917] In practice, however, the two provisions have been combined so that the Administrator is currently appointed by the President in consultation with the Council of State and with the prior approval of Parliament.

164. Four pieces of legislation regulate the details of financial administration of the local government system in Ghana.[918] In terms of local government financial administration, both the Financial Memorandum and Local Government Act provide the latitudes within which the local governments can operate. While the Local Government Act seeks to provide general policy direction on finances, the Financial Memorandum provides the control mechanisms of revenue and expenditure.

C. SUBMISSIONS RECEIVED

165. The submissions received by the Commission on this issue are as follows:
    a. The Office of the Administrator should be made independent to ensure that fund allocations are made on the basis of technical considerations and not pursuant to instructions from central government.
    b. The funds should be allocated to the MMDAs without the usual deductions that are made from those funds by central government before they are transmitted to the MMDAs. This will ensure that the amounts of funds that arrive at the MMDAs are substantial.
    c. The MPs share of the DACF should be abolished because it imposes an unnecessary strain on the DACF. Also, MPs have traditionally used these funds without much accountability.
    d. A Constituency Development Fund should be created from the DACF.
    e. The Constitution should prescribe detailed procedures for accounting for the DACF. This would ensure that the funds are utilised judiciously.
    f. The proportion of national revenue that is paid to the DACF should be increased from the current 7.5%.

D. FINDINGS AND OBSERVATIONS

166. The Commission observes that there is variation, internationally, on the issue of financing local government structures.

[917] Article 70 and 252 of the 1992 Constitution of the Republic of Ghana.
[918] Financial Administration Decree (FAD), 1979, (SMCD 221), Financial Administration Regulations (FAR), 1979, (L.I. 1234); Financial Memorandum for Municipal and Urban Councils of 1961; Local Government Act, 1993, (Act 462).

a. In the South African Constitution there are elaborate fiscal arrangements for local government.[919] Municipalities are granted considerable taxation and borrowing powers, subject to national legislation and regulation. The South African Constitution also entitles the local government entities to an "equitable share" of nationally raised revenue in order for them to provide the basic services and perform functions allocated to them. Municipalities may also receive additional grants from national or provincial governments.[920]
b. In Uganda, local governments have been given the power to determine revenue and expenditure without reference to the centre. They set and charge fees, licenses, rates and property taxes and raise loans. Central government financial transfers are in the form of block grants. Councils determine the budgetary allocations between services. The centre has no power to direct a council to alter its appropriations. The Local Government Finance Commission's purpose is to ensure that transfers to local government are done in a transparent, predictable, fair, stable and objective manner. In the case of Uganda, it has been acknowledged, however, that the taxes mandated to local governments are direct and not buoyant and therefore expensive to collect, easy to avoid and to abuse and yet yield small sums of money. Central government transfers amount for 65 – 75% of council revenues.
c. In Malawi, the Constitution recognises the necessity of providing adequate funding to local government. However, this is undermined by giving central government the power to appropriate a proportion of the revenue collected by the local authority where such revenue is presumably in excess of its requirements.[921]

167. The Commission observes that the issue of funding was one of the critical matters that agitated the minds of members of the Consultative Assembly of 1992. Members of the Assembly advocated the establishment of a robust and independent funding mechanism for the purpose of ensuring the effective implementation of the decentralisation and local governance policy.[922]

168. The Commission observes that at the National Constitution Review Conference there was a general consensus that the *status quo* should be maintained in respect of the distribution of the DACF. The conference also agreed that the MPs share of the Common Fund should be scrapped and replaced with a Constituency Fund allocation to the sub-district structures, with strict measures for the accountable use of the Fund. The conference also agreed that PMs and AMs should not be given a portion of the DACF.

[919] Sections 229 and 230 of the 1996 Constitution of the Republic of South Africa.
[920] Section 227 of the 1996 Constitution of the Republic of South Africa.
[921] Article 150 of the 1995 Constitution of the Republic of Malawi.
[922] Official Report of the Proceeding of the Consultative Assembly, (Tuesday 14th January 1992, Col. 1393-1394).

169. The Commission finds that in Ghana, the introduction of the DACF was to deal with the problem in many parts of Sub-Saharan African countries where governments in power discriminate against districts where they receive fewer votes in elections, or on account of ethnicity, in disbursing funds.[923]

170. The Commission finds that there is a general policy direction that favours increasing, rather than decreasing, the percentage of national revenue allocated to the Districts through the mechanism of the DACF.[924]

171. The Commission observes that the clear spirit of the Constitution is for an independent Administrator of the DACF, who is non-partisan and accountable to the Constitution. The evidence for this is the fact that the Administrator is appointed by the President on the advice of the Council of State and with the approval of Parliament.

172. The Commission also finds that the following factors have weakened the independence of the Administrator:
    a. The inclusion of the provisions on the Office of the Administrator in the chapter of the Constitution on "Decentralization and Local Government", which has created the impression that the Office is part of the local government system and, therefore, under the jurisdiction of the Minister for Local Government.
    b. The fact that the Administrator cannot appear before Parliament, but presents the formula for the distribution of the DACF to Parliament through the Minister for Local Government.
    c. Section 9 of the District Assemblies Common Fund Act gives power to the Minister of Finance, in consultation with the Minister for Local Government, to determine what percentage of the DACF of a district can be used to execute the approved development plans of the Assembly in that district.

173. The Commission finds that the many restrictions on and deductions from the DACF, coupled with the late release of the quarterly-instalment allocations of the Fund, have meant that MMDAs are not adequately funded and are unable to plan and effectively execute their many programmes and projects.

174. The Commission finds that the Office of the Administrator needs to be created as an independent Constitutional body and as a corporate entity so that it can effectively administer

[923] K. Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 12. (on file with the Constitution Review Commission).
[924] Views expressed by a Local Government Expert, Prof. K. Ahwoi, at the National Constitution Review Conference (1st-5th March 2011).

the DACF to ensure that it is used for the developmental goals envisaged for it in the Constitution.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

175. The Commission recommends that the Office of the Administrator be established as an independent constitutional body by providing for its insulation from the direction or control of any external person or authority.

176. The Commission recommends that the Office of the Administrator should be filled by an Administrator, two Deputies and staff.

177. The Commission recommends that the Administrator should be assigned a function in the Constitution to make proposals to Parliament for determining which additional revenue generating functions need to be ceded to the MMDAs.

178. The Commission recommends that the contradictory provisions on the appointment of the Administrator, in Articles 70 and 252 be reconciled.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

179. The Commission also recommends that the Administrator institute detailed and clear-cut procedures by Constitutional Instrument for accounting for the use of the DACF.

RECOMMENDATIONS FOR ADMINISTRATIVE CHANGES

180. The Commission recommends that the Administrator develop a plan for increasing the percentage of the national revenue paid to the DACF in the medium- and long-term.

181. The Commission recommends the abolishing of the MPs share of the DACF, since the allocation is not mandated by any law, is not well accounted for, and is a drain on the scarce resources of the Assemblies.

182. The Commission recommends the establishment of a Constituency Development Fund to replace the MP’s share of the Common Fund.

ISSUE TEN: DEMARCATION OF THE BOUNDARIES OF MMDAs

A. DIMENSIONS OF THE ISSUE

183. The power to demarcate the boundaries of MMDAs or to upgrade them is the main concern of persons who made submissions on this issue. The issue is expressed in the following dimensions:
    a. In what circumstances and how frequently the boundaries of MMDAs should be reviewed or changed; and
    b. Who should be given the mandate to initiate the review and redrawing of the boundaries?

B. CURRENT STATE OF THE LAW ON THE ISSUE

184. The 1992 Constitution does not directly determine the various dimensions of this issue. The Constitution simply provides that Parliament may, by law, make provision for the redrawing of the boundaries of districts or for reconstituting districts. In exercise of this power under the Constitution, Parliament has in the Local Government Act, vested the power to demarcate district boundaries and the creation of districts in the President.[925] The Local Government Act provides that the President may by Executive Instrument declare any area within Ghana to be a district and assign a name to the district.[926]

C. SUBMISSIONS RECEIVED

185. The main submissions received on the demarcation of the boundaries of MMDAs were as follows:
    a. The boundaries of MMDAs should be demarcated by the Electoral Commission (EC), subject to parliamentary approval. Proponents of this view argue that it would effectively deal with the charge that sitting governments create districts to reward sections of the population which vote for them and in order to improve the fortunes of ethnic groups that are sympathetic to their government and party. Also, the EC is already vested with authority by the Constitution to create constituencies and so mandating the EC to perform this function as well ensures that like functions are performed efficiently by one institution of state.
    b. There should be fixed and scientific criteria for the creation of new districts, the upgrading of existing districts, or the collapsing of existing ones. Parliament must ensure that the criteria are met whenever a district is sought to be created or upgraded and then give approval for the Executive to proceed with creating or upgrading the district.

[925] Article 241(1) and (2) of the 1992 Constitution of the Republic of Ghana.
[926] Section 1(2) of the Local Government, 1993, (Act 462).

D. FINDINGS AND OBSERVATIONS

186. The Commission observes that the power to create and upgrade MMDAs has over the years been exercised more for political expediency than in accordance with the criteria for the creation of districts provided for in the Local Government Act.[927] For instance in 2003 and 2007, the President of the Third and Fourth Governments of the Fourth Republic created additional 60 districts and upgraded districts and municipalities. Of the three new Metropolitan areas that were created, two did not meet the minimum population criterion of 250,000. Of the 36 new Municipalities that were created, none met the criterion "that the geographical area consists of a single compact settlement" and of the 31 districts that were created, very few met the requirement of "economic viability."[928]

187. The Commission further observes that there is general consensus amongst observers of the decentralisation process in Ghana that the 2003, 2007 and 2011 upgrades and creations of districts were done largely for political convenience. These clear breaches of statutory requirements remain largely unchallenged because the power to create districts is vested in and exercised by the President. When these infractions occur, it is difficult for succeeding Presidents to reverse the situation because of the political price they may have to pay for doing so. In the end, local governance suffers and effective decentralisation is not achievable.

188. The Commission also finds that the proliferation of districts that do not meet the criteria for their creation poses a danger to local government and decentralisation, as such districts tend to depend completely on the central government, further strengthening the latter's hold over those districts.

189. The Commission observes that there is no uniform international practice on the demarcation or creation of local government assemblies. For instance, the Namibian Constitution[929] provides for the boundaries of local government authorities to be determined by a Delimitation Commission. Elsewhere, the Independent Electoral and Boundaries Commission and Parliament are the institutions vested with the power to create local government authorities using set criteria.[930]

190. The Commission observes that at National Constitution Review Conference, participants argued that the power to upgrade or demarcate MMDAs should be expressly provided for in the Constitution and should be vested in the EC and that such upgrades and demarcations

[927] Section 1(3) and (4) of the Local Government, 1993, (Act 462).
[928] K. Ahwoi, *Local Level Decentralization, the Nature of the Local Government System and Decentralization System*, 2010, IEA Constitutional Review Lectures series, p 6. (on file with the Constitution Review Commission).
[929] Article 106 of the 1992 Constitution of Namibia.
[930] Article 89 of the 2010 Constitution of Kenya and Article 179 of the 1995 Constitution of the Republic of Uganda.

should be based on the criteria of demography, economic viability and synchrony with traditional areas and be subject to parliamentary approval.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

191. The Commission recommends that the Constitution be amended to vest the power to upgrade and to create districts in the President and the Electoral Commission, subject to the approval of Parliament.

ISSUE ELEVEN: REGIONAL COORDINATING COUNCILS (RCCs) AND REGIONAL LEVEL GOVERNANCE

A. DIMENSIONS OF THE ISSUE

192. The relationship between the RCCs and the MMDAs and how they both fit into the decentralisation framework agitated the minds of many who made submissions. The issue in it barest dimensions assesses the functions of the RCCs in relation to those of the MMDAs and the question of the relationship between Regional Ministers and MMDCEs.

B. CURRENT STATE OF THE LAW ON THE ISSUE

193. The Constitution establishes Regional Coordinating Councils in each region comprising the Regional Minister, the PMs and DCEs from districts within the region, two chiefs from the Regional House of Chiefs and regional heads of the decentralised ministries in the region.[931] The Constitution further provides that their functions be prescribed by an Act of Parliament.[932]

194. The Local Government Act spells out the functions of the RCCs which include the functions to monitor, co-ordinate and evaluate the performance of the District Assemblies in the region; monitor the use of all monies allocated to the District Assemblies by any agency of the central Government and review and co-ordinate public services generally in the Region.[933]

C. SUBMISSIONS RECEIVED

195. The submissions received by the Commission in relation to this issue are as follows:

[931] Article 255(1) of the 1992 Constitution of the Republic of Ghana.
[932] Article 255(3) of the 1992 Constitution of the Republic of Ghana.
[933] Section 142 of the Local Government Act, 1992 (Act 462).

a. The RCC should only perform coordinating roles and not act as supervisors of the MMDAs; the system of decentralisation can dispense with the RCCs. The only reason they existed is merely to coordinate. The lack of fidelity to this principle has created many frictions between MMDCEs and Regional Ministers.
b. Regional Ministers should act as supervisors of the MMDCEs. This is because a centralised unitary state cannot allow for MMDCEs to skip the regional level and receive instructions direct from the national level.
c. MPs should not be appointed as Regional Ministers. Proponents of this view reasoned that MPs should be made to concentrate on their job of law making. Shuttling between Parliament and the Regional capitals reduces their effectiveness as law makers.

D. FINDINGS AND OBSERVATIONS

196. The Commission observes that Regional Coordinating Councils (RCCs) are not elected bodies; they are not policy making bodies; they do not have borrowing powers; they are not a legislative level; and they are not a taxation or rate-levying level in the national governance arrangements.

197. The Commission also finds that neither the Constitution nor legislation spells out the functions of the Regional Minister (RM), let alone the Regional Minister's relationship with MMDCEs. In a centralised system of administration, this does not pose any problem since the vertical hierarchical order of relationships establishes the RM as the "supervisor" of the MMDCE and the MMDCE would normally report to the central government through the RM.

198. The Commission further finds that in Ghana's decentralised system of administration, the MMDAs as the policy making body for the district determines policy which the MMDCE as the implementer of the MMDAs decisions is bound to implement. A problem arises when there is a conflict between a decision of the MMDA and a position taken by the RM. This situation occurs all too often especially in Accra, the capital, for instance, where the decongestion of the capital undertaken by the Accra Metropolitan Assembly has generated different responses from the RM.[934]

199. The Commission finds that the reasons for assigning only coordinating and harmonization roles to the RCCs are important. Democratic theory frowns on unelected bodies supervising or changing the decisions of democratically elected local authorities. The solution has been to

[934] *Decongestion Exercise In Limbo After Regional Minister's Directive*, JOY FM (Sep. 5, 2011, 8:35 AM) http://edition.myjoyonline.com/pages/news/200906/31493.php.

assign the RCCs monitoring, coordinating and harmonization functions only. The only reason they are perceived as part of the local government system is that their composition and functions are discussed in Chapter 20 of the Constitution on "Decentralization and Local Government" and also that, in the literature on governance, all sub-national governance structures are normally treated as part of local government.

200. The Commission observes that the Committee of Experts recommended that the RCCs should be agents for the coordination and not the supervision of the local government units. The Committee in its report stated that "The Committee considers the de-emphasis of the Regional level in the current set-up of the District Assemblies to be consistent with the grassroots orientation of the envisaged decentralisation; that is, the emphasis placed on the initiative and power of smaller local communities. However, it also considers some regional presence in the set-up to be necessary, if only for purposes of coordination. The Experts, therefore, recommended that the Regional Coordinating Councils be maintained, but that in their composition, central government-related personnel should not outnumber representatives of the District Assemblies, and that the membership should include two chiefs appointed by the Regional House.[935]

201. The Commission also observes that the National Constitution Review Conference agreed that the role of the RCCs and their relationship with MMDAs should be expressly clarified in the Constitution. The RCCs should be agents for monitoring and evaluating the work of MMDAs, without authority to direct the MMDAs on their operations.

E. RECOMMENDATIONS

RECOMMENDATION FOR LEGISLATIVE CHANGES

202. The Commission recommends that the RCCs be designated as part of central government placed in charge of coordinating the policy planning of the districts and monitoring and evaluating the performance of MMDAs.

203. The Commission also recommends that their monitoring reports should be forwarded to the President and the Minister for Local Government and the necessary feedback transmitted through the RCCs to the MMDAs.

[935] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 327.

ISSUE TWELVE: URBAN, ZONAL, TOWN AND AREA COUNCILS AND UNIT COMMITTEES (TACUCs)

A. DIMENSIONS OF THE OF ISSUE

204. The necessity, viability and functioning of the sub-district structures of the decentralisation system is the major focus of this issue. The dimensions of the issue expressed in the submissions cover the composition, functions and the conditions of service of personnel in these structures.

B. CURRENT STATE OF THE LAW ON THE ISSUE

205. The Constitution prescribes that Parliament shall enact laws and take steps necessary for further decentralisation of the administrative functions and projects of the central government beyond the MMDAs, but Parliament shall not exercise any control over the District Assemblies or the sub-structures so created that is incompatible with their decentralised status, or otherwise contrary to law.[936]

206. The Local Government Act and Regulations made under that constitutional provision have led to the establishment of Sub-Metropolitan District Councils, Urban/Town/Zonal/Area Councils, and Unit Committees. These being subordinate bodies of the MMDAs, they perform functions assigned to them by the instruments setting them up or delegated to them by the MMDAs.[937]

    a. The Sub-Metropolitan Councils are immediately below the Metropolitan Assemblies. This arrangement has been dictated by the complex and peculiar socio-economic, urbanisation and management problems which confront the metropolitan areas.
    b. The Urban Councils are peculiar to settlements of "ordinary" District Assemblies. They are created for settlements with populations above 15,000 and which are cosmopolitan in character, with urbanisation and management problems, though not of the scale associated with the metropolitan areas.
    c. The Zonal Councils on the other hand are in the "one-town" municipal assemblies. They are based on the electoral commission's criteria of commonality of interest, population of 3,000 and identifiable streets, land marks, etc. as boundaries.
    d. Town/Area Councils are found both in the Metropolitan Assemblies and District Assemblies. In the DAs, Town Councils are established for settlements with populations between 5,000 and 15,000. Area Councils exist for a number of settlements/villages which are grouped together but whose individual settlements have populations of less than 5,000. They cover areas with predominantly rural populations

[936] Article 254 of the 1992 Constitution of the Republic of Ghana.
[937] Section 15 of the Local Government Act, 1993, (Act 462); Local Government (Urban, Zonal, Town Councils and Units Committees) Establishment Instrument, 1991, (L.I. 1514).

and in some cases can be identified with spheres of influence of a particular traditional authority. They are essentially rallying points of local enthusiasm in support of a new local government system.

e. The Unit Committees are normally a settlement or a group of settlements with a population of between 500 and 1000 in the rural areas, and a higher population (1500) for the urban areas. Unit Committees, being in close touch with the people, play the important roles of education, organisation of communal labour, revenue generation and ensuring environmental cleanliness, registration of births and deaths, implementation and monitoring of self-help projects, among others.

C. SUBMISSIONS RECEIVED

207. The submissions received advocated that the creation, composition, functions and conditions of service of the sub-structures of the local government system be generally provided for in the Constitution. Proponents of this view argued that this will ensure that these sub-structures are given the needed legal backing. Providing for the creation, composition, functions and conditions of service of the sub-structure in the Constitution would set the framework for subsidiary legislation further to develop guidelines for these sub-structures. The submissions also indicated that the Unit Committees and Area Councils should be composed of a small number of elected persons so that it would be easy to provide some form of remuneration for them for their services.

D. FINDINGS AND OBSERVATIONS

208. The Commission observes that the Constitution and the Local Government Act reserve the creation and functions of the sub-district structures of the decentralisation and local government system for subsidiary legislation.[938] This has made the creation of these sub-units haphazard and their functions unclear.

209. The Commission also observes that the introduction of the Local Government (Urban, Zonal and Town Councils and Unit Committees) (Establishment) (Instrument), L.I. 1967 of 2010, has transformed the Unit Committees from a geographical to a functional concept, reduced the membership of Unit Committees from 15 to 5, abolished the positions of appointed members of Unit Committees and ensured uniformity in the treatment of Zonal Councils as the same as Urban, Town and Area Councils.

[938] Article 254 of the 1992 Constitution of the Republic of Ghana.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

210. The Commission recommends that the Ministry should take administrative actions to make the sub-district structures function effectively.

CHAPTER TEN – TRADITIONAL AUTHORITY

10.1 INTRODUCTION

1. Customarily, traditional authority in Ghana is responsible for leading the various traditional areas for the advancement of the people. This role includes the maintenance of peace and harmony among the people, and between the people and the ancestors. The belief is that the ancestors are guardians of the people and mediators between them and God. They are, therefore, capable of transmitting both the blessings and the wrath of God on the people. Traditional authority is central to this spirituality of Ghanaian communities and generally guards and protects it, together with the traditional norms, values and principles that all must adhere to and which serve to bind the communities together. Additionally, traditional authority performs many other functions, including protecting the sovereignty of the community and the lives and property of its inhabitants; determining and enforcing the criminal and civil laws of the community; resolving disputes between individuals and groups in the community; holding the natural resources of the community in trust for all the members of the community; and running a welfare system for the disadvantaged in the community. In times past, traditional authority also exercised the full gamut of Executive, Legislative and Judicial powers of State.

2. The customary roles of traditional authority appear vast, all-encompassing and unbridled, but they are full of in-built checks and balances. Traditionally, when decisions were taken by chiefs, they are normally taken democratically by Chiefs-in-Council. Although chiefs or other figures of authority came from designated families or clans, the interest of the common people was never ignored; choice of leadership figures relied essentially on the people's approval. The choice involved intense consultations and the examination of the track record of those eligible. The grounds for removing a chief from office were many and the process not too difficult. Women and the youth of the community were central to making and unmaking a chief. The validity of traditional authority, therefore, has usually been based on public consensus sanctioned by custom.[939]

3. In modern times, traditional authority, mostly represented by chiefs, and to a lesser extent women chiefs and queenmothers, performs a myriad of functions. A particular classification of these functions depends on one's discipline. To one judicial scholar, the functions may be classified as judicial or adjudicatory and administrative, under the 1992 Constitution, the Courts Act of 1993, and the Chieftaincy Act of 2008.[940] A sociologist also thinks that chiefs

[939] Foster S. Mijiga, *The Role of Traditional Leaders in a Democratic Dispensation-A Selection of International Experiences* (December 18, 1998) (Oct. 16, 2011, 10: 29 AM) http://www.ndi.org/files/027_ww_tradleaders.pdf.

[940] S.A BROBBEY, THE LAW OF CHIEFTAINCY IN GHANA, INCORPORATING CUSTOMARY ARBITRATION, CONTEMPT OF COURT AND JUDICIAL REVIEW 35-38(Accra, Advanced Legal Publication, 2008).

perform military, religious, judicial, administrative, legislative, economic and cultural functions.[941]

4. Throughout the consultative process, many Ghanaians talked passionately about the value and ills alike of traditional authority. There was general consensus that some reforms are urgently needed if the institution is to continue to be relevant to Ghanaians in the face of rapid social change.

10.2 HISTORICAL BACKGROUND

5. The institution of Chieftaincy is one of the most enduring institutions of Ghana and has consistently demonstrated remarkable resilience from the pre-colonial era through to the present.

6. Traditional authorities have been involved in local governance in various capacities, ranging from indigenous rule, through their role in the system of "indirect rule" adopted by the British colonial government, to their various roles in the decentralised system of local governance after independence.

10.2.1 PRE-COLONIAL ERA

7. This era was characterised by a concentration of power in the holders of traditional authority. Male chiefs, female chiefs, queenmothers, fetish priests and their elders, played critical roles in the governance set up of their communities. They exercised executive, legislative and judicial authorities of their States and powerfully guarding their customary laws and territorial boundaries.

8. Upon the arrival in the Gold Coast of the first European traders, it was the traditional authorities who initially served as their link with the locals, facilitating trade and including, the slave trade and 'legitimate trade'.

9. The pre-colonial era formally ended when the British entered into the Bond of 1844 with a number of Fante and other local Chiefs, legalising the imposition of the British legal system on the Gold Coast, acknowledging the power and jurisdiction that the British had exercised *de facto* in the territories adjacent to the British forts and settlements.

[941] Chris Abotchie, *Has the Position of the Chief Become Anachronistic in Contemporary Ghanaian Politics*?, in IRENE K. ODOTEI AND ALBERT K. AWEDOBA, (CHIEFTAINCY IN GHANA–CULTURE, GOVERNANCE AND DEVELOPMENT 169-181, 171 (Accra, Sub-Saharan Publishers, Eds., 2006).

10.2.2 COLONIAL ERA

10. In the colonial era, the power and influence of the traditional authorities experienced a gradual decline with the introduction of the concept of district administrators who assumed a lot of these powers.

11. The decline in the acknowledgement of the powers of the traditional authorities by the colonial masters led the traditional authorities to actively participate in the fight for independence.

10.2.3 TRADITIONAL AUTHORITY UNDER THE 1957 CONSTITUTION

12. Immediately after independence, the greatest challenge to chieftaincy was the attempts by the State to further reduce the power of the chieftaincy institution. The underlying justification for this was that two contending forces could not co-exist, so one had to overshadow the other in terms of power and influence. The critical challenge in this period was how to sustain the chieftaincy institution in the face of political assaults by the central government.

13. The 1957 Constitution gave constitutional recognition to the institution of Chieftaincy and guaranteed the office of Chief as existed under customary law and usage.[942]

14. The Constitution established the Regional Houses of Chiefs for each region and vested them with power to choose the Administrative head of each region.[943] The exception to the rule was the Asantehene who was constitutionally designated head of the Ashanti Region.[944] This provision, however was not implemented before the Constitution was abrogated.

15. The Constitution also assigned a specific role to the Houses of Chiefs in the amendment of the Constitution, such that under certain circumstances the Constitution could not be amended without the Bill for the amendment being first referred to the Houses of Chiefs.[945]

16. The Constitution provided for example that after a Bill affecting the traditional functions or privileges of a Chief is introduced into the National Assembly and read for the first time, it should be referred to the relevant House of Chiefs of the Region and no motion can be moved for the second reading of the Bill in the Assembly until three months after the day on which the Bill was introduced into the Assembly.[946]

[942] Section 66 of the Ghana (Constitution) Order in Council, 1957.
[943] Section 67(1) of the Ghana (Constitution) Order in Council, 1957.
[944] Section 63(2) of the Ghana (Constitution) Order in Council, 1957.
[945] Section 32 of the Ghana (Constitution) Order in Council, 1957.
[946] Section 35 of the Ghana (Constitution) Order-in-Council, 1957.

16. Under the 1957 Independence Constitution, the Houses of Chiefs Act, 1958 provided for the legal framework for chieftaincy in Ghana. Neither the Constitution nor this Act provided for a National House of Chiefs.

10.2.4 TRADITIONAL AUTHORITY UNDER THE 1960 CONSTITUTION

17. The 1960 Constitution guaranteed the continued existence of the Regional Houses of Chiefs and their performance of Customary Law functions.[947] The composition of the Regional Houses of Chiefs and their detailed functions was determined by legislation.[948] The proclivity of the then ruling government to enhance the influence of party power at the expense of traditional authority, led to the banning of chiefs from Local Government through the Local Government Act of 1961.[949]

18. On 29th June 1960, the Constitution (Consequential Provisions) Act, 1960 was passed by the Constituent Assembly entering into force on the same date the 1960 Constitution entered into effect. Section 9 of this Act continued the Houses of Chiefs established under the Houses of Chiefs Act, 1958 (as amended) and the Brong Ahafo Region Act, 1959. While envisaging future decoupling, the said Section 9 further grouped the Houses of Chiefs of the Western and Central Regions into one namely the Western Region House of Chiefs. Those of the Northern and Upper Regions were regulated under the Northern Region House of Chiefs. A subsequent legislation that touched on chieftaincy was the Chieftaincy Act of 1961[950] and the regulations under the Act. The purpose of which was to bring together under one Act all the existing enactments relating to chieftaincy which were scattered in the legislative and executive instruments. The Act also instituted the Traditional and Divisional Councils and endowed the Councils with the jurisdiction to hear and determine chieftaincy disputes among other adjudicatory functions. After these was the Chieftaincy (Amendment) Decree, 1966 (NLCD112). The main import of the decree was to reduce in status those chiefs who "contrary to customary" had been promoted to the status of paramountcy by the government of Kwame Nkrumah.[951]

10.2.5 TRADITIONAL AUTHORITY UNDER THE 1969 CONSTITUTION

19. In recognition of the pivotal role played by the Chiefs of Ghana in nation building, the Chiefs received distinct mention in the preamble to the 1969 Constitution.

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[947] Article 49 of the 1960 Constitution of the Republic of Ghana
[948] Article 50 of the 1960 Constitution of the Republic of Ghana.
[949] K. Boafo-Arthur, *Chieftaincy and Politics in Ghana Since 1982,* Vol.1. No. 1 West Africa Review 3 (2001).
[950] Chieftaincy Act, 1961 (Act 81).
[951] Paragraph 6 of the Chieftaincy (Amendment) Decree, 1966 (NLCD112).

20. Chapter 16 of the 1969 Constitution was devoted to the institutions of Chieftaincy and Local Government. The 1969 Constitution, as in the case of the previous Constitutions, guaranteed the establishment of the institution of Chieftaincy. It was the Constitution which sought to reverse the trend of sidestepping the Chiefs, perceivable in colonial times and under the 1957 and 1960 Constitution, by establishing the National House of Chiefs and reserving one-third of the membership of local councils for chiefs.[952] Additionally, a provision was made for the inclusion of not more than two chiefs from the Regional House of Chiefs in the Regional Councils.[953] This was a significant change in the powers of chiefs both at the local and national levels, from the situation that pertained under the two previous independence Constitutions.

21. The functions assigned the National House of Chiefs included the interpretation and codification of Customary Law with a view to evolving a unified systems of rules of Customary Law.[954] The Constitution vested original jurisdiction in all matters relating to a paramount stool or the occupant of the paramount stool in all Regional Houses of Chiefs.[955]

22. In September 1971, the Chieftaincy Act, 1971 (Act 370), modelled along the provisions of the 1969 Constitution, was passed. Even though Act 370 recognised traditional areas and their Councils, it did not clearly establish Traditional Councils but merely maintained institutions that were customary in form. Sections 15, 22 and 23 of the Act conferred important judicial functions on traditional authority.[956]

10.2.6 TRADITIONAL AUTHORITY UNDER THE 1979 CONSTITUTION

23. In the 1979 Constitution there was a visible omission of Chiefs in the preamble to the Constitution. Article 178(1) of the 1979 Constitution however, reaffirmed the establishment of the National House of Chiefs. The Constitution granted the National House of Chiefs appellate jurisdiction in any matter relating to Chieftaincy which had been determined by the Regional House of Chiefs in a region from which further appeals were to go to the Supreme Court with leave of the National House of Chiefs or the Supreme Court.[957]

24. The 1979 Constitution also established a regional chieftaincy tribunal to hear and determine appeals from the highest traditional council within the area of authority of the tribunal with respect to the nomination, election, institution or deposition of a person as a chief.[958]

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[952] Article 157(1) of the 1969 Constitution of the Republic of Ghana.
[953] Article 159(1) (b) of the 1969 Constitution of the Republic of Ghana.
[954] Article 154 of the 1969 Constitution of the Republic of Ghana.
[955] Article 155 of the 1969 Constitution of the Republic of Ghana
[956] Kumado, C.E.K,; *Chieftaincy And the Law In Modern Ghana* 18 UGLJ. 194 (1990-92).
[957] Article 179 of the 1979 Constitution of the Republic of Ghana.
[958] Article 179(2) of the 1979 Constitution of the Republic of Ghana.

10.2.7 TRADITIONAL AUTHORITY UNDER THE 1992 CONSTITUTION

25. The 1992 Constitution guarantees the institution of chieftaincy together with its Traditional Councils as established at custom, but distinctively bans the participation of chiefs in active party politics.[959]

26. It defines a Chief under Article 277 as "a person, who, hailing from the appropriate family and lineage has been validly nominated, elected or selected and enstooled, enskinned or installed as a Chief or queenmother in accordance with the relevant Customary Law and usage." The definition of a Chief is repeated in section 57(1) of the Chieftaincy Act, 2008 (Act 759).

27. The Constitution establishes Houses of Chiefs at three levels: the National House of Chiefs;[960] Regional Houses of Chiefs;[961] and Traditional Councils.[962] The Chieftaincy Act of 2008 repeats the establishment of the National and Regional Houses of Chiefs and the Traditional Councils and their exclusive judicial mandate in determining chieftaincy matters.

28. The definition of a Chief covers male Chiefs, female Chiefs and queenmothers. In practice, however, female Chiefs and queenmothers are not members of the national and regional houses of Chiefs. They are, however, represented at the various Traditional Councils.

29. The 1992 Constitution assigns the following roles to Chiefs: the President of the National House of Chiefs is a member of the Council of State;[963] a representative of the National House of Chiefs is be nominated for appointment to the Lands Commission; a representative of the National House of Chiefs sit on the Judicial Council;[964] and the Regional Houses of Chiefs nominate two of their members to serve as members of the Regional Coordinating Councils.[965]

30. The Constitution reserves the following judicial functions for Chiefs: The Regional Houses of Chiefs determine appeals from their respective Traditional Councils on causes or matters affecting chieftaincy.[966] The Regional Houses of Chiefs have power to reverse or vary decisions of their Traditional Councils and to remit the matter or a part of that matter to the Traditional Council for reconsideration. They may also impose conditions or give directions

[959] Article 276(1) of the 1992 Constitution of the Republic of Ghana.
[960] Article 271 of the 1992 Constitution of the Republic of Ghana.
[961] Article 274 of the 1992 Constitution of the Republic of Ghana.
[962] Article 270(1) of the 1992 Constitution of the Republic of Ghana.
[963] Article 89 of the 1992 Constitution of the Republic of Ghana.
[964] Article 153(m) of the 1992 Constitution of the Republic of Ghana.
[965] Article 255 of the 1992 Constitution of the Republic of Ghana.
[966] Section 27 of Chieftaincy Act, 2008 (Act 759).

to the said Traditional Council.[967] Appeals from decisions of the Regional Houses of Chiefs lie to the National House of Chiefs[968] but further appeals from the decision of the National House of Chiefs lie to the Supreme Court. The above notwithstanding, the National House of Chiefs has original jurisdiction in any cause or matter affecting chieftaincy which lies within the competence of two or more Regional Houses of Chiefs or which is not properly within the jurisdiction of a Regional House of Chiefs or which cannot otherwise be dealt with by a Regional House of Chiefs.[969] The jurisdiction of Regional Houses of Chiefs and the National House of Chiefs are exercised by their Judicial Committees.[970]

31. In terms of the relationship between the local government and chiefs, the 1992 Constitution does not make chiefs automatic members of District Assemblies. The Constitution however requires the President to consult Traditional Authority and other interest groups within the District when appointing not more than 30% of the members of the District Assemblies. This position is further emphasised in the Local Government Act.[971]

32. Today, there is a general consensus on the relevance of the chieftaincy institution and chiefs in society. The institution is, however, plagued with problems including the following:
    a. **The Many Chieftaincy Disputes across the Country:** These disputes pose some of the biggest threats to security in Ghana. Underpinning these are issues of succession to office and the race by feuding parties to control the vast areas of land and resources under their respective stools and skins. The issues of inheritance and succession are intrinsically linked to the disregard for, and contestation over, the governing principles for succession to each stool or skin. The Constitution in Article 272 (b) mandates the National House of Chiefs to undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin. This task has commenced, but is yet to produce useable results.
    b. **Capacity of Chiefs to Solve Chieftaincy Disputes:** There are also issues regarding the capacity of chieftaincy institutions to resolve their own conflicts. This is particularly the case in places where there is a dearth of functional Judicial Committees of the Regional Houses of chiefs.
    c. **Remuneration for Chiefs:** Many chiefs argue that they perform many governmental functions in areas that the government is unable to reach and yet are not remunerated for doing so. This has meant that chiefs are constantly seeking innovative ways of

[967] Section 27(2) of the Chieftaincy Act, 2008 (Act 759).
[968] Article 273(3) and (6) of the 1992 Constitution of the Republic of Ghana.
[969] Article 273 (5) of the 1992 Constitution of the Republic of Ghana.
[970] Article 274(4) and Article 273(2) of the 1992 Constitution; Section 28 of the Chieftaincy Act, 2008 (Act 759).
[971] Article 242(d) of the 1992 Constitution of the Republic of Ghana; Local Government Act, 1993, (Act 462).

footing the huge bills attendant to their roles. In some cases, this has damaged the traditional accountability mechanism at custom.

d. **Chiefs and Inimical Customs:** The institution of chieftaincy is guaranteed (as at custom) and chiefs are regarded as the principal custodians of the customs and traditions of the people. There are, therefore, many calls, including those made in the Constitution, for chiefs to take centre stage in banning many inimical customary practices that subsist in Ghana.

33. During the consultations held by the Commission, many Ghanaians underlined the importance of the chieftaincy institution. They, however, called for the streamlining of its functions; the involvement of women chiefs and queenmothers in the Regional and National Houses of Chiefs; the acceleration of its role in preventing and resolving chieftaincy disputes; greater accountability of chiefs; and a monitoring of some excessive powers of chiefs.

ISSUE ONE-DEFINITION OF A CHIEF

A. DIMENSION OF THE ISSUE

34. This issue had the following dimension:
    a. Is the definition of "chief" as adopted in the Constitution and the Chieftaincy Act adequate?

B. CURRENT STATE OF THE LAW ON THE ISSUE

35. The 1992 Constitution in a non-entrenched provision and section 57(1) of Chieftaincy Act,[972] define a chief as: "a person who hailing from the appropriate family and lineage has been validly nominated, elected or selected and enstooled, enskinned or installed as a Chief or Queenmother in accordance with the relevant Customary Law and usage." Section 57(5) of the Act further provides that a person shall not be considered a chief for the performance of a statutory function, unless that person has been registered for the performance of that function in the National Register of Chiefs and that person's name has been published in the *Chieftaincy Bulletin*. The Act also provides a non-exhaustive categorisation of chiefs which are; (a) the Asantehene and Paramount Chiefs, (b) Divisional Chiefs, (c) Sub-divisional Chiefs, (d) Adikrofo, and (e) other chiefs recognised by the National House. [973]

[972] Chieftaincy Act, 2008 (Act 759).
[973] Section 58 of Chieftaincy Act, 2008 (Act 759).

C. SUBMISSIONS RECEIVED

36. The majority of the submissions received on this issue called for the retention of the definition of a "chief" in the Constitution and the Chieftaincy Act. They argued that the current definition is expansive enough to cover all the heads of the various traditional areas, including Queenmothers and Women Chiefs. They added that any attempt at providing specific definitions for various categories of Traditional Authorities would complicate matters and may end up leaving out other critical Traditional Authorities.

37. Other submissions called for the present definition of a chief to be amended to specifically include Women Chiefs, *Tindanas,*[974] *Wulomei*[975] and other key Traditional Authorities in the major traditional areas of Ghana.

38. There were also submissions calling for the definition of a Chief in the Constitution to include a procedure for installing a person as head of a traditional area, so as to prevent the many disputes that arise from the procedure for installing chiefs and other Traditional Authorities.

D. FINDINGS AND OBSERVATIONS

39. The Commission finds it a strong proposal that the chieftaincy institution must be guaranteed in the Constitution to prevent government or any other authority from according recognition to or withdrawing it from a chief. [976] A chief is installed by his people and it is the people who should accord or withdraw that recognition and no other should have that power.

40. The Commission observes that the Committee of Experts that developed proposals for the 1969 Constitution recommended that the institution of chieftaincy be guaranteed in the Constitution, as it had been in the previous Constitution, and added that appropriate steps be taken to ensure the effective participation of Chiefs in the local government system. The proposals also considered the caution on Chieftaincy in Ghana by the 1949 Coussey Committee on Constitutional Reform as follows: "The whole institution of Chieftaincy is so closely bound up with the life of our communities that its disappearance would spell disaster. Chiefs and what they symbolise in society are so vital that the subject of their future must be

[974] The Tindana is a religious figure who serves as the intermediary between the gods of the land and the people of the community. In these communities,(mostly communities in the Northern region of Ghana) the Tindana's have in modern times added secular functions to their religious duties and play the role of "de-facto chiefs".
[975] The Wulomei which literally means "priests" in Ga are considered among the Ga's of Ghana as spokerspersons of particular divinities. They offer worship to the gods on behalf of the people and interpretes message that come to the people through other people.
[976] Official Report of the Proceedings of the Consultative Assembly (9th October 1991, Col. 382).

approached with the greatest caution…" and concluded that the institution of Chieftaincy should not only be guaranteed in the future Constitution but also be entrenched.

41. The Commission further observes that the Committee of Experts which made proposals for the 1992 Constitution considered and adopted the definition of a Chief in Article 181 of 1979 constitution which states:

> *"For the purposes of this Chapter, the expression 'Chief' means a person who, hailing from the appropriate family and lineage, has been validly nominated, elected, and enstooled, enskinned or installed as a chief or a queenmother in accordance with the requisite applicable customary law and usage."*

42. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution further recommended the inclusion of the following in the definition of a chief: "Chief includes a woman who has been properly installed as a Chief in her own right in accordance with the appropriate customary law and usage."

43. The Commission observes that in the 1991 Consultative Assembly Report, there was an initial opposition to the inclusion of queenmothers in the definition of a Chief saying that the traditional role of queenmothers is to nominate candidates to vacant stools yet some of them had turned themselves into chiefs at such places where there were vacant stools and were contributing to long standing chieftaincy problems on the country. [977] However it was later proposed that, in order not to undermine the ancient institution of chieftaincy the definition of a Chief as contained in Article 181 of 1979 Constitution should be maintained. The newly proposed definition of "Chief" which would allow people to make the choice of a Chief would create confusion and strife in our traditional areas.[978]

44. The Commission observes from the initial recommendations of the Constitutional Commission for a Constitution for the Establishment of a Transitional National Government for Ghana that, to guarantee effective traditional institutions, there should be a clear and easy-to- understand definition of a "chief", in order to prevent the manipulation of chieftaincy by governments.[979] To this end it was proposed for inclusion in the a definition of the Chief, the heads of certain well-defined communities in Ghana made up of persons who were originally not indigenous Ghanaians but are now fully Ghanaian in every way. They reasoned that these heads are chiefs because they are elected and installed according to the Customary Law and usages of their relevant communities even though they may not have

[977] Official Report of the Proceedings of the Consultative Assembly, (Friday, 4th October 1991, Col. 279).
[978] Official Report of the Proceedings of the Consultative Assembly, (Thursday 10th October 1991, Col. 446).
[979] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana. (Report submitted to the Supreme Military Council of Ghana, 1978), paragraph 254.

been enstooled or enskinned. By this definition, they sought to take away the ceremonial and publicity requirement for declaring someone a chief which is through enskinment or enstoolment.[980] They further agreed with the inclusion of queenmothers in the definition of chief, in appropriate contexts because even though some of them occupy paramountcies, they hardly receive any recognition in statutes.[981]

45. The Commission finds that the involvement of governments in chieftaincy affairs to serve their parochial interests is unsavoury. Therefore, there should be a constitutionally enshrined definition of a chief which neither Parliament nor the Executive can change. This would also prevent the degradation of the institution by those who are supposed to be its custodians and from persons with no valid links at all to stools but who are able to usurp the rights of lawful successors to the stool. There should be a law that a person can be validly nominated, elected or installed as a chief only when he or she hails from the family and lineage from which occupants of the stool in question should be selected in accordance with applicable customary law.

46. The Commission finds that the definition of "chief" in the Constitution and in the Chieftaincy Act is adequate as it covers all male chiefs, female chiefs, queenmothers and other positions of traditional authority. Any attempt at giving separate and specific definitions to the various levels of traditional authority as they exist in Ghana today would complicate the already protracted chieftaincy disputes that plague many traditional areas.

47. The Commission observes the following international and comparative experiences in the definition of a chief:
    a. The Ugandan Constitution defines a traditional leader or cultural leader to mean "a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with customs, traditions usage or consent of the people led by that traditional leader." [982]
    b. The Constitution of Zimbabwe provides that [t]here shall be Chiefs to preside over the tribes people in Zimbabwe who shall be appointed by the President in accordance with an Act of Parliament. The President, when appointing a person as a chief, is required to "give due consideration to the customary principles of succession of the tribes people over which the Chief will preside and may provide

[980] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana. (Report submitted to the Supreme Military Council of Ghana, 1978), paragraph 256.
[981] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana. (Report submitted to the Supreme Military Council of Ghana, 1978), paragraph 255.
[982] Article 246 (6) of 1995 Constitution of the Republic of Uganda.

for the appointment of deputy Chiefs and acting Chiefs."[983] Chiefs are then required to elect from among themselves such number of chiefs that will constitute the Council of Chiefs.

c. The Constitution of Botswana establishes and provides the legal regime for the House of Chiefs of Botswana. The Constitution itself does not define who a chief is – it refers the definition of "chief" to the Chieftainship Act. Section 2 of which defines "Chief" thus: "a Chief of one of the tribes and includes any regent thereof."[984]

48. The Commission observes that at the National Constitution Review Conference participants agreed that the definition of "chief" in the Constitution is adequate and should not be amended. They noted that the challenges with the law were not definitional, but bordered on implementation.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

49. The Commission recommends that the current Law on the definition of a Chief as contained in Article 277 of the Constitution be maintained.

ISSUE TWO: THE RELEVANCE OF CHIEFTAINCY, THE NATIONAL AND REGIONAL HOUSES OF CHIEFS, AND TRADITIONAL AND DIVISIONAL COUNCILS

A. DIMENSIONS OF THE ISSUE

50. The dimensions of the issue are as follows:
    a. Whether the chieftaincy institution should be abolished?
    b. Whether the National and Regional Houses of Chiefs should be abolished?
    c. Whether the Traditional and Divisional Councils should be abolished?
    d. Whether separate national, regional, divisional and traditional institutions should be established for queenmothers?
    e. Whether District Houses of Chiefs should be created in the Constitution?

B. CURRENT STATE OF THE LAW ON THE ISSUE

51. As previously noted, the 1992 Constitution guarantees the institution of chieftaincy together with its traditional councils, Regional House of Chiefs and the National House of Chiefs.[985]

[983] Sections 111 and 113 of the Constitution of Zimbabwe.
[984] Section 127(1) of the 1996 Constitution of Botswana.
[985] Articles 270, 271 and 274(1) of the 1992 Constitution of the Republic of Ghana.

52. Each of the 10 regions of Ghana is represented at the National House of Chiefs by 5 paramount chiefs elected by each Regional House of Chiefs.[986] This requirement is so important that where a region is unable to raise the required number of paramount chiefs for the National House of Chiefs, it must nominate divisional chiefs to add up to make the required number.[987] Article 272 lists the functions of the National House of Chiefs which may be summarised as advisory, research, evaluation of traditional customs and usages, and other omnibus functions. The house has both original and appellate jurisdiction in chieftaincy matters.

53. Article 274, of the 1992 Constitution confers on the Regional Houses of Chiefs a number of constitutional functions. The constitutional functions include advisory, judicial, research, and customary law compilation functions. The House exercises through its Judicial Committee an original jurisdiction in all matters relating to a paramountcy stool or skin or the occupant of a paramount stool or skin; and an appellate jurisdiction in respect of decisions of the traditional council within the region relating to the nomination, election, selection, installation or deposition of a person as a chief. [988]

54. Although Traditional Councils are established under the 1992 Constitution, details of its membership, meetings and functions are rather set out in the Chieftaincy Act, 2008.[989] The Act sets up Traditional Councils in each Traditional Area.[990] The names and membership of the Traditional Council are as contained in the National Register of Chiefs maintained by the National House of Chiefs.[991] A Traditional Council has exclusive jurisdiction to hear and determine a cause or matter affecting chieftaincy which arises within its area not being one to which the Asantehene or a paramount chief is a party.[992] The jurisdiction of a Traditional Council is exercised by a Judicial Committee comprising 3 or 5 members appointed by the Council from their members.[993]

55. The Act also provides for the establishment of Divisional Councils in each traditional area that the Regional House of Chiefs may determine. The names and members of the Divisional House of Chiefs are to be entered into the National Register of Chiefs maintained by the National House of Chiefs. The National House is empowered to assign certain functions to a

[986] Article 271(2) of the 1992 Constitution of the Republic of Ghana.
[987] Article 271(3) of the 1992 Constitution of the Republic of Ghana.
[988] Article 274(4) of the 1992 Constitution; Section 28 of the Chieftaincy Act, 2008 (Act 759).
[989] Article 270(1) of the 1992 Constitution of the Republic of Ghana; Sections 21, 29, 35, 40 of the Chieftaincy Act, 2008 (Act 759).
[990] Section 12 of Chieftaincy Act, 2008 (Act 759)
[991] Sections 12(2), 14(1) and 59 of Chieftaincy Act, 2008 (Act 759).
[992] Section 29(1) of Chieftaincy Act, 2008 (Act 759).
[993] Section 29(2) of Chieftaincy Act, 2008 (Act 759).

Divisional Council. The Divisional Council may also perform the function of a Traditional Council under certain circumstances.[994]

C. SUBMISSIONS RECEIVED

56. The chieftaincy institution should not be abolished but should be allowed to play a pivotal role in the governance of the nation.

57. The National and Regional Houses of Chiefs should be retained and where possible, they should be improved upon, for the following reasons:
    a. The Houses Chiefs are avenues where intercultural values and socioeconomic concerns of the people are discussed and addressed.
    b. That these are the only means through which traditional authority adds its voice to the governance of the nation.

58. The majority of the submissions called for the creation of separate National and Regional Houses of Chiefs for the queenmothers and women chiefs for the following reasons:
    a. Women Chiefs and queenmothers are not allowed to be part of the National and Regional Houses of Chiefs, a situation which is making their voices unheard on important issues, especially those affecting women and children. A creation of separate Houses for women would therefore effectively remedy the situation.
    b. By the cultural practices of most communities in the Northern part of Ghana, the people do not know and have queenmothers and women chiefs. Therefore any change of the present situation to create room for women in the National and Regional Houses of Chiefs and queenmothers would not inure to the benefit of the people in the North. It is only when National and Regional Houses of queenmothers and women chiefs are established that provision will be made for women from those communities to be catered for.

59. There were submissions advocating the retention of Traditional Councils and the institution of mechanisms to better resource and strengthen them with the expectation that Traditional Councils will serve as an interface between Regional House of Chiefs and District Assemblies.

60. Some submissions were received proposing the inclusion of queenmothers and women chiefs in the Traditional Councils.

[994] Section 17, 17(2), 18(1) and 21(1) and (2) of Chieftaincy Act, 2008 (Act 759).

61. Other submissions called for the creation by the Constitution of District Houses of Chiefs throughout Ghana for the following reasons:
    a. To offer a platform for those chiefs outside the National and Regional Houses of Chiefs to contribute to the development of the people and the district as Chiefs are not adequately represented at the District Assemblies.
    b. To serve as a forum for sub chiefs and divisional chiefs of each district to discuss and contribute to the development of the district,

D. FINDINGS AND OBSERVATIONS

62. The Commission observes that the Consultative Assembly that deliberated on the proposals for the 1992 Constitution recommended the retention of the institution of Chieftaincy and the keeping of the institution sacrosanct. It however cautioned against government interference especially in the process of the nomination, selection, or election, installation, upgrading or destoolment of a chief. To maintain the Chieftaincy institution and avoid the infiltration of non royals into it, the Assembly proposed the following:
    a. All authentic kingmakers and various gates in each traditional area should be identified and registered with the various Houses of Chiefs.
    b. Successors of stools and skins should be registered with the Houses of Chiefs to ensure the order of succession and preference.
    c. The Houses of Chiefs should be decentralised and chiefs should be nominated to the District Assemblies.[995]
    d. Chiefs should be remunerated for the performance of their traditional and customary duties.

63. The Commission also observes that the Consultative Assembly proposed that "Nothing contained in or done under the authority of any Law shall be held to be inconsistent or in contravention of the clause that sets up the Chieftaincy Institution."[996]

64. The Commission further observes that the Committee of Experts that developed proposals for the 1979 Constitution, was unable to recommend the abolition of National and Regional Houses of Chiefs, but reiterated their belief that the Houses perform useful and necessary functions and should be maintained as they were under the 1969 Constitution and the Chieftaincy Act of 1971. The experts further proposed that the Houses should be composed of paramount chiefs elected from the RHC, with each RHC electing 5 paramount chiefs

[995] Official Report of the Proceedings of the Consultative Assembly (10th October 1991, Col. 475).
[996] Official Report of the Proceedings of the Consultative Assembly (20th March 1992, Col.3677).

while in a region of less than 5 paramount chiefs, appropriate Divisional Chiefs may be elected to make up the required number.[997]

65. The Commission finds that although stripped of all formal powers, chiefs continue to command the traditional loyalty of most Ghanaians as their leaders who mobilise and inspire the communities in the execution of development projects or other socioeconomic ventures. They also serve as a stabilizing and unifying factor in their communities.

66. The Commission also finds that the proposals for ensuring that women chiefs, queenmothers and female elders (where there are no queenmothers) be represented in the National and Regional Houses of Chiefs are tenable. This would ensure that the rich experience and perspectives of queenmothers and women chiefs are tapped and utilised in the agenda of national development.

67. The Commission further finds that the proposal in favour of the creation of District Houses of Chiefs as a measure to further decentralise the functions of chiefs and enable the voices of Chiefs in the district be heard is salutary. [998]

68. The Commission observes the following international and Comparative experience:
    a. The Zambian Constitution only acknowledges the existence of the institution of chiefs and provides that it should be in accordance with the culture, custom and traditions or wishes and aspirations of the people to whom it applies. Their Constitution provides for the house of chiefs to serve as an advisory body to the government on traditional and cultural matters, and for their composition and the mode of election into the house.[999]
    b. The 1960 and 1963 Constitutions of Nigeria created a Council of Chiefs for chiefs in the regions, a policy making body whose decisions were binding on the government. The 1979 Constitution of Nigeria gave chiefs representation in the National Council of State and also in the Council of Chiefs in the States. The current 1999 Constitution of Nigeria, however, made no mention of the traditional institution and so at present, there is no constitutional role for traditional rulers in Nigeria.
    c. The Constitution of South Africa recognises "[t]he institution, status and role of traditional leadership, according to customary law."[1000] The South African Constitution provides that national or provincial legislation may prescribe roles for traditional leaders as an institution at local level on matters affecting local communities and may establish "houses of traditional leaders" to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of

[997] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana. (Report submitted to the Supreme Military Council of Ghana, 1978), paragraph 26.
[998] Official Report of the Proceedings of the Consultative Assembly (Friday 11th October 1991, Col. 518).
[999] Section 127 (1), 130 and 132 of the 1991 Constitution of Zambia (as amended by Act 18 of 1996).
[1000] Section 211(1) of the 1996 Constitution of the Republic of South Africa.

communities observing a system of customary law.[1001] These houses are however, yet to be established. As a result of this the approximately 800 traditional leaders in South Africa and their nearly 10,000 traditional councillors and over 16.5 million subjects do not have any specific constitutional role to play in the governance of the country.[1002]

69. The Commission further finds that the National House of Chiefs (Ghana), at its general meetings held on the 23rd March and 29th June, 2011 decided that 5 Paramount queenmothers or their equivalents should be elected to each Regional House of Chiefs and 2 Paramount queenmothers from each Region should be elected to represent their Regional Houses of Chiefs at the National House of Chiefs, making it a total of 20 queenmothers to be admitted in the National House. The decision of the National House of Chiefs was informed by the fact that it would not be possible to accommodate as many queenmothers as there are male chiefs in the Conference and Meeting Halls of the various Regional and National Houses of Chiefs in the country.

70. The Commission observes that at the National Constitution Review Conference (NCRC) it was proposed that the National and Regional Houses of Chiefs be maintained as they are. However, the necessary resources must be allocated to enable chieftaincy institutions fulfil their statutory roles. Also, administrative expenses including salaries, allowances and pensions payable to, or in respect of, committees and persons serving with the said Houses of Chiefs and Traditional Councils, should be charged on the Consolidated Fund.

71. The Commission also notes from the NCRC the proposal that the President of the National House of Chiefs be named among the eminent persons given precedence in Article 57(2) of the Constitution after the "Chief Justice. The Article should thus read:

> "The President shall take precedence over all other persons in Ghana; and in descending order, the Vice-President, the Speaker of Parliament, the Chief Justice and the President of the National House of Chiefs, shall take precedence over all other persons in Ghana."

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

72. The Commission recommends the continued existence of chieftaincy institutions as guaranteed in Article 270 of the Constitution.

[1001] Section 212 of the 1996 Constitution of the Republic of South Africa.

[1002] Houston and Somadoda, *Constitutional Development and the Issue of Traditional Leadership in Rural Local Government in South Africa* (Paper presented at the International Conference on the new South African Constitution at the Holiday Inn, Umtata, South Africa, 25-26 April 1996).

73. The Commission further recommends the retention of the National and Regional Houses of Chiefs, and the Traditional Councils.

74. The Commission does not recommend the creation of District Houses of Chiefs in the Constitution.

75. The Commission does not recommend the establishment of a separate stream of National and Regional Houses and Traditional Councils for queenmothers and women Chiefs.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

76. The Commission recommends that the process for the participation of queenmothers and Women Chiefs in the various Regional Houses of Chiefs and the National House of Chiefs be progressively developed in order to secure gender parity of representation in those Houses.

ISSUE THREE- FUNCTIONS OF CHIEFS

A. DIMENSIONS OF THE ISSUE

77. The main dimensions of this issue relate to clarity in the role of chiefs in governance, changes in the functions of chiefs to include some functions reserved for the state and written elaborations of their functions rather than leave them to unwritten customary conventions.

B. CURRENT STATE OF THE LAW ON THE ISSUE

78. Chiefs in Ghana perform a myriad of functions. These functions include their customary functions; their role as development agents in their communities; their role in setting, adapting and enforcing Customary Laws; and their dispute resolution roles. Additionally, chiefs have many functions deriving from the Constitution as well as from statute.

79. Article 272, which is a non entrenched provision of the Constitution provides for the functions of National House of Chiefs as follows:
    (a) advise any person or authority charged with any responsibility under this Constitution or any other law for any matter relating to or affecting chieftaincy;
    (b) undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin;
    (c) undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful; and

(d) perform such other functions, not being inconsistent with any function assigned to the House of Chiefs of a region, as Parliament may refer to it.

C. SUBMISSIONS RECEIVED

80. The majority of submissions on this issue called for the retention of the current functions of chiefs as provided for in the Constitution, the Chieftaincy Act and by custom. They argue that their current functions have not been proven to be deficient or limited in any way. On the contrary, their current functions allow chiefs the status, nobility and influence that make them unifiers; capable of solving inter-personal, community, ethnic and political disputes and generally enhancing the quality of governance in the country. A substantial number of these submissions, however, wanted some more emphasis on the role of chiefs in their communities and in local governance.

81. A handful of the submissions called for changes to the functions of chiefs, arguing that chiefs should assume some of the law enforcement and adjudicatory functions of the security agencies and the Courts as they are better suited to produce more acceptable outcomes in those domains. They also argued that Chiefs play a very active role in the District Assemblies, with a specific percentage of seats allocated to them in those Assemblies. This will ensure that chiefs take the lead in the development of their communities.

82. Some submissions bemoaned the fact that the Constitutional duties of the Houses of Chiefs are not being performed. They point in particular to the codification of Customary Laws; the determination of the lines of succession to various stools and skins; and the resolution of chieftaincy disputes. They argue that the reasons why the Houses of Chiefs have failed to do so include:
    a. They are poorly resourced and rely heavily on irregular and small financial resources from NGOs and donors for their work;
    b. Very little assistance is received from Government to assist them in the discharge their responsibilities and functions;
    c. They cannot properly perform their functions unless they are able to pay for the research experts and research expenses associated with executing their mandates; and
    d. The functions assigned the National House of Chiefs cannot be performed by it unless it receives appropriate data from the various Regional Houses of Chiefs.

83. There was an overwhelming number of submissions, especially from the National and Regional Houses of Chiefs, eminent chiefs, and other major stakeholders, that the codification of customary law project should be completed as quickly as possible so that the myriad customary practices in the country would be streamlined by sifting out obnoxious

ones like *trokosi*,[1003] female genital mutilation, and branding some women as witches and banishing them from their homes.

84. There was a relatively small number of submissions that suggested that the codification of customary laws would work more evil than good and so it should be repealed from the Constitution for the following reasons:
    a. Customary laws and practices are dynamic and have evolved over time and will keep changing. Depending on a particular given situation, one customary law or practice may be changed to suit that particular situation. This would be difficult to do when the customary laws are codified; and
    b. Flowing from the above, there is the danger that customary laws and practices would become static as people would religiously stick to the codified laws and will not depart from them. That would take the beauty of customary laws away.

D. FINDINGS AND OBSERVATIONS

85. The Commission observes that in 1968, the people of Ghana were divided on the status and role of chieftaincy in the democratic process in Ghana. As noted in the work of the Constitutional Commission of 1968, the various shades of opinion ranged from the most conservative demand for the restoration to chiefs their former pristine powers by which political, administrative, executive, judicial, military, cultural and spiritual functions were rolled into one in the hands of traditional rulers to the revolutionary view advocating the abolishing of chieftaincy.[1004]

86. The Commission further observes that the 1968 Commission, bearing in mind the wide divergence of views, decided to confine the chiefs to the jurisdictions of their local areas but hoped that the exceptional qualities of some chiefs would propel them to assignments at the national level.[1005] On the issue of the abolition of the chieftaincy institution, they feared, basing themselves on the 1949 Coussey Committee on Constitutional Reform, that a total effacement of the traditional authorities would spell doom for the country especially in the rural and less urbanised areas.[1006] They, therefore, proposed constitutional guarantee and entrenchment of the chieftaincy institution.[1007]

[1003] Trokosi is a religious custom which literally means "slave to the gods". The practice involves the giving of young virgins to shrines as atonement for a family member's crime. Trokosi is also practiced in certain parts of Benin, Togo and Southwestern Nigeria. In Togo and Benin, the practice is referred to as "voodoosi".
[1004] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 636.
[1005] Memorandum Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 637-639.
[1006] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 641-642.
[1007] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 645.

87. The commission observes that the Committee of Experts that developed proposals for the 1992 constitution, basing themselves on the 1968 proposals, recommended the integration of chieftaincy with the local government system, calling for steps to be taken to ensure the effective participation of chiefs in local governance. In addition, chiefs should be adequately resourced from stool land revenues to enable them play their legitimate roles as leaders and catalysts in development projects.[1008]

88. The Commission observes the following international and Comparative experiences:
    a. In the Zambian Constitution, the House of Chiefs may consider and discuss any Bill dealing with customs and traditions before it is introduced into the National Assembly. The House of Chiefs may initiate, discuss and decide on matters on customary law and practice for the approval by the President before they are subsequently laid before the National Assembly. [1009]
    b. The Botswana Constitution provides for the House of Chiefs of Botswana comprising 8 ex officio members, 4 elected members and 3 specially elected members.[1010] It further provides that, "the House of Chiefs shall consider a copy of any Bill referred to it and shall submit the resolution thereon before the National Assembly by the Clerk of the Assembly."[1011]

89. The Commission observes that the National Constitution Review Conference (NCRC) concluded that the traditional role of chiefs at custom should be recognised and integrated into local and national governance. However, there should be no Second Chamber of Parliament for chiefs, rather, 30% of the membership of the District Assemblies should be determined by the chiefs.

90. The NCRC also concluded that the Houses of Chiefs be provided with adequate resources from the consolidated fund to enable them execute their Constitutional and legislative functions.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

91. The Commission recommends that the customary and traditional functions of chiefs be maintained as provided for in the Constitution.

[1008] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 339-343.
[1009] Section 131 of the 1991 Constitution of Zambia (as amended by Act No. 18 of 1996).
[1010] Section 77 of the 1996 Constitution of Botswana.
[1011] Section 85 (1), (2) of the 1996 Constitution of Botswana.

92. The Commission does not recommend a change in the constitutional and statutory functions of the Houses of Chiefs.

93. The Commission recommends that chiefs should actively participate in local governance and that the composition of the 30% appointees to the District Assemblies be determined by the traditional authority in the catchment area of the Districts in accordance with such parameters as may be provided by law.

94. The Commission recommends that the National House of Chiefs draw funds from the proposed fund for independent constitutional bodies to be established under the Constitution.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

95. The Commission recommends that the Houses of Chiefs establish robust research and operations departments in order to execute the research and other mandates that are constitutionally imposed on them, especially those relating to the ascertainment and progressive development of customary law; the determination of lines of succession to the stools and skins; and the discovery and termination of cultural practices that are inimical to progress.

96. The Commission recommends that the Houses of Chiefs, in collaboration with state security agencies and the National Peace Council, should develop a strategy for stemming and resolving the numerous chieftaincy disputes in the country as soon as is practicable.

ISSUE FOUR - UTILITY AND ROLE OF STATE SPONSORED CHIEFTAINCY INSTITUTIONS

A. DIMENSIONS OF THE ISSUE

97. The dimensions of this issue relate to the extent and scope of state involvement in and sponsorship of chieftaincy institutions:
    a. Ministry of Chieftaincy and Culture;
    b. National Chieftaincy Secretariat; and
    c. Centre for National Culture.

B. CURRENT STATE OF THE LAW ON THE ISSUE

98. The current law on the issue is contained in Article 78(2) of the 1992 Constitution which is a non-entrenched provision. Article 78(2) provides that: The President shall appoint such number of Ministers of State as may be necessary for the efficient running of the State.

99. The Ministry of Chieftaincy and Culture was established in accordance with the Civil Service Act, 1993.[1012] The Chieftaincy Division used to be a Secretariat under the Office of the President. The Culture Sector was then under the National Commission on Culture (NCC), enjoying a separate autonomous existence. With the creation of the Ministry, policy formulation and other executive functions have been transferred to the Ministry.[1013]

100. The National Commission on Culture Act, 1990, establishes in each region, a Centre for National Culture (CNC) which is charged with the implementation and monitoring of Government policies relating to the development, promotion, preservation and appreciation of culture and the arts in the Region; identification, organising and mobilizing the artistic resources of the Region and developing the commercial potential of such resources; organising of systematic programmes to project regional peculiarities in the culture and the arts; pursuing activities aimed at contributing to the development of national culture and the arts; and the supervision the activities of the District Cultural Centres.[1014]

C. SUBMISSIONS RECEIVED

101. There were two main sets of submissions on this issue. The Chieftaincy Secretariat and the Centre for National Culture are institutions that focus on the two vital components of the mandate of Traditional Authorities; traditional governance and culture. The Ministry of Chieftaincy and Culture also ensures that chieftaincy matters have a formal avenue for expression at the highest level of government, including at the Presidency and in Parliament. These institutions should therefore be retained. They also called for more resources for the three institutions so that they can perform their functions better.

102. A minimal number of submissions were opposed to the creation of the Ministry of Chieftaincy and Culture and the National Chieftaincy Secretariat. They argue that the two institutions usurp the functions of the National House of Chiefs. Again, they tend to formalise the workings of chieftaincy and culture, which by their nature should not be attended by too much formality.

D. FINDINGS AND OBSERVATIONS

103. The Commission finds that there were proposals that the Chieftaincy Secretariat should be merged with the ministry responsible for Chieftaincy and Culture.[1015]

[1012] Civil Service Act, 1993 (PNDC Law 327).
[1013] GOVERNMENT OF GHANA, http://www.ghana.gov.gh/index.php/governance/ministries/339-ministry-of-culture-a-chieftaincy, (last visited 11th July 2011).
[1014] Sections 9 and 10 of the National Commission on Culture Act, 1990, (PNDCL 238).
[1015] Official Report of the Proceedings of the Consultative Assembly (Col. 403).

104. The Commission observes that the 1991 Committee of Experts' report expressed the view that the institution of chieftaincy could be further enhanced but stopped short of indicating the dimensions and status it could assume and so it is hard for one to presume whether the enhancement the Committee had in mind would have related to the creation of institutions such as a ministry for chieftaincy, the National Chieftaincy Secretariat and the Centre for National Culture.[1016]

105. The Constitution of Zambia provides that the institution of chiefs shall be a corporate body with perpetual succession with the capacity to sue and to be sued and to hold assets in trust for itself and the peoples concerned.[1017] This is to ensure and guarantee the perpetuity of the chieftaincy institutions and insulate the institution from any form of interference from the government.

106. The Commission observes that the National Constitution Review Conference concluded that the creation and existence of the Ministry of Chieftaincy and Culture should be maintained and it should be raised to cabinet status. The resolution of the conference was that the Ministry should be well resourced to serve as an interface between National and Regional Houses of Chiefs and the Government.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

107. The Commission recommends the retention of the Ministry of Chieftaincy and Culture.

108. The Commission recommends the retention of the National Chieftaincy Secretariat, which together with the National Commission on Culture, shall form the nucleus of the institutions under a Minister assigned responsibility for Chieftaincy and Culture.

ISSUE FIVE- CHIEFS AND ACTIVE PARTY POLITICS

A. DIMENSIONS OF THE ISSUE

109. There are three main dimensions to this issue:
    a. What constitutes "active party politics?
    b. Should chiefs take part in active partisan politics?

[1016] Official Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 348.
[1017] Section 128(a) of the 1991 Constitution of Zambia (as amended by Act No. 18 of 1996).

B. CURRENT STATE OF THE LAW ON THE ISSUE

110. The 1992 Constitution of Ghana bans chiefs from engaging in active party politics.[1018] This provision is non-entrenched. It further provides that any chief seeking election to become an MP must abdicate the stool or skin. The Constitution does not define "active party politics."

C. SUBMISSIONS RECEIVED

111. The ban on chiefs' engagement in active party politics was very topical among the bulk of the submissions received. The submissions reveal three trends. An overwhelming number of submissions at all levels of the consultations, including with chiefs, support the ban on chiefs' participation in active partisan politics. The reasons given in support of the ban are varied and include the following:
    a. Chiefs risk losing their respect and dignity in society if they take part in often rancorous partisan politics.
    b. A chief who would like to take part in active politics may do so as an independent candidate, as the chief would surely promote division among his people by open affiliation to a particular party.
    c. Chiefs would compromise their roles as fathers of everyone in their communities if they openly engage in partisan politics.
    d. Chiefs as the spiritual leaders and the rallying point for the unity of their communities should not engage in divisive partisan politics.
    e. A chief may lose the respect of his people if the party he supports loses power.

112. A marginal number of submissions were received calling for the ban on chiefs' participation in active partisan politics to be removed. They argue that chiefs, like other Ghanaians, have a constitutional right to join and take part in any political party activity of their choice and should not be restricted in the exercise of that freedom. Again, chiefs have a lot of expertise to contribute to national development and denying them the opportunity to participate in partisan politics deprives the nation of such expertise.

113. A large set of submissions requested that the term "active partisan politics" be defined so as to delimit clearly the boundaries of what chiefs may not part take in, in order to provide clarity. Some of the submissions attempted a definition of the term along the following lines: "a chief openly and personally joining or taking part in a political party's activities by wearing their paraphernalia and associating with that party's members and executives; mounting of party platforms to galvanise support for the party; being a card bearing member of a political party; and holding an executive position in the party at any level."

[1018] Article 276 (1) of 1992 Constitution of the Republic of Ghana.

D. FINDINGS AND OBSERVATIONS

114. The Commission finds that the 1992 Constitution does not expressly define the term "active party politics." However, some guidance on this may be derived from some of the constitutional provisions governing political parties. For example, Article 55(8)[1019] debars a person who is not qualified to be a Member of Parliament from holding a position as a founding member, a leader or an executive member of a political party. It may be inferred from this prohibition that the activities associated with these positions constitute "active party politics."

115. The Commission observes that Article 55(3) of the 1992 Constitution defines the essential role of a political party as participating in shaping the political will of the people, disseminating information on political ideas, social and economic programmes of a national character and sponsoring a candidate for election to any public office. It is arguable that active engagement in any of these activities constitutes participation in active party politics.

116. The Commission also observes that, the Legal and Drafting Committee of the Consultative Assembly attempted to define what constitutes participation in active party politics by chiefs as follows:

"...Article active party politics means-

a) being a member of a political party;
b) standing for election to any office to which a person may be elected as a representative of a political party;
c) holding office in or forming a political party;
d) speaking in public or publishing anything in writing to the public for or against any political party or the candidate of a political party in any election;
e) contributing in cash or in kind towards the funds of a political party or conducting oneself in public in a manner likely to suggest identification with or opposition to a political party."[1020]

117. The Commission observes that at the National Constitution Review Conference participants concluded that chiefs should not participate in active party politics in order not to disrupt their traditional roles as fathers, mothers, unifiers and judges.

118. The Commission further observes that the Conference adopted the following inferred definitions of *active party politics:* openly and personally joining or taking part in a political party's activities by wearing their paraphernalia and associating with that party's members and executives; mounting of party platforms to galvanise support for the party at their

[1019] Article 55(8) of 1992 Constitution of the Republic of Ghana.
[1020] Official Report of the Proceedings of the Consultative Assembly (Thursday 22nd March 192, Col. 3855).

meetings; a chief being a card bearing member of a political party and also holding an executive position in the party at any level.

119. The Commission observes that the Constitutions of some African countries contain provisions limiting the political activities of traditional institutions or cultural leaders:

a. The Botswana Constitution of 1966 reserves the position of Specially Elected Member of the Houses of Chiefs to persons who have not within the preceding 5 years actively engaged in politics. [1021] The Botswana Constitution does not explain what constitutes being actively engaged in politics in the section referred to.[1022]
b. The Ugandan Constitution of 1995 provides that a person shall not, while remaining a traditional leader or cultural leader, "join or participate in partisan politics." That Constitution also does not define "partisan politics."[1023]
c. The Zambian Constitution bars chiefs completely from politics and provides that, a person shall not, while remaining a Chief, join or participate in partisan politics. The Commission observes that there is no mention of *active* politics in this provision and more so participation in politics is not defined in that constitution. That notwithstanding, the provision may have the same effect as pertains in Ghana.[1024]
d. The South African Constitution is silent on whether a traditional ruler may or may not take part in active party politics.

120. The Commission finds that Chiefs play a fatherly and motherly role in their various communities; resolve many disputes and conflicts; must be capable of being perceived as nonpartisan when they intervene to resolve political stalemates and crises; must serve as unifying forces in their communities and the nation at large; and be generally impartial in administering their communities. These attributes do not sit well with engaging in active party politics.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

121. The Commission recommends that chiefs should continue to be constitutionally barred from participating in active party politics.

122. The Commission recommends that *active party politics* be defined in line with the definition proposed at the 1992 Consultative Assembly to include openly and personally joining or taking part in a political party's activities, by wearing their paraphernalia and associating

[1021] Section 79(2), (3) of the 1996 Constitution of Botswana.
[1022] Section 64 (4) (b) of the 1996 Constitution of Botswana.
[1023] Article 246 (3) (e) of 1995 Constitution of the Republic of Uganda.
[1024] Article 129 of the 1992 Constitution of the Republic of Ghana.

with that party's members and executives as well as mounting of party platforms to galvanise support for the party.

ISSUE SIX - CHIEFS AND LEGISLATIVE POWERS

A. DIMENSIONS OF THE ISSUE

123. There are two dimensions to this issue:
    a. Should Chiefs have seats reserved for them in Parliament?
    b. Should there be an Upper House of Parliament reserved for Chiefs?

B. CURRENT STATE OF THE LAW ON THE ISSUE

124. The current state of the law is that there are no reserved seats in Parliament and the entire Parliament is elective.[1025] Article 94 (3) of the 1992 Constitution which is a non entrenched provision also debars chiefs from standing for election to Parliament.

125. The Parliament of Ghana is unicameral, not bicameral.[1026]

C. SUBMISSIONS RECEIVED

126. Most of the submissions received on this issue called for the retention of the current state of the law. There should be no second chamber of Parliament, as that would be costly to maintain and is not warranted in a unitary state; and there should be no reserved seats for chiefs in Parliament. The reason assigned for these submissions are consistent with those assigned for barring chiefs from participating in partisan politics. Additionally, it was argued that chiefs have ample opportunity to make an input to the making of laws and the governance of the nation. They do not need to be in Parliament to do this.

127. A good amount of the submissions received on this issue would want chiefs to take part directly in the legislative process in Parliament. Chiefs should not contest to become MPs but should have reserved seats in Parliament to be filled by nominees from the Houses of chiefs. This would enable them contribute immensely to the legislative process by bringing socio cultural values and dimensions to the laws that are made for Ghana.

128. A specific submission from the National House of Chiefs called for the creation of a second chamber of Parliament (an Upper House) for chiefs. Other submissions received on this issue

[1025] Article 93(1) of the 1992 Constitution of the Republic of Ghana.
[1026] Article 93(1) of the 1992 Constitution of the Republic of Ghana.

called for the second chamber of Parliament to replace the Council of State for the following reasons:

a. The creation of the Upper House for chiefs would be a fair compensation for the ban on their participation in active party politics and their ineligibility to be voted for as MPs.
b. The second chamber would be non-partisan and would enable chiefs play an essential role in the legislative and development processes of the country, bringing their expertise and experience to bear on shaping our laws in line with our socio cultural values.
c. The upper house would play a supervisory role over bills passed by the lower house of Parliament to ensure that overly partisan policies and laws are controlled.
d. The upper house could also serve as a body that would advise the president on issues of national importance.
e. The upper house would be a functional replacement to an ineffective Council of State.

D. FINDINGS AND OBSERVATIONS

129. The Commission observes that the National Constitution Review Conference unanimously concluded that there should be no second House of Parliament. The inputs and expertise of chiefs to the legislative process can be made through the many existing mechanisms available for such input.

130. The Commission observes that some African countries provide a mechanism for direct input of their Houses of Chiefs into legislation without being part of the legislature:

a. The Botswana Constitution provides that, the House of Chiefs shall consider any Bill referred to it and shall be entitled to submit a resolution thereon to the National Assembly. The Minister responsible for the Bill referred to the House of Chiefs or his representative may attend the proceedings of the House when the Bill is being considered.[1027]
b. The Zambian Constitution provides that the House of Chiefs may consider and discuss any Bill dealing with or touching on custom or tradition before it is introduced to the National Assembly. The House of Chiefs may initiate, consider and decide on any matter on culture and tradition, or that are referred to it to the President correct and the President shall cause such resolutions to be laid before the National Assembly.[1028]

131. The Commission finds that Article 106(3) of the Constitution which is an entrenched provision requires that a bill affecting the institution of Chieftaincy be referred to the National House of Chiefs before they are introduced in Parliament.

[1027] Section 85 of the Constitution of Botswana of 1996.
[1028] Section 131 of the 1991 Constitution of Zambia (as amended by Act No. 18 of 1996).

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

132. The Commission recommends that the current all-elective unicameral legislature be maintained.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

133. The Commission recommends that, in addition to Chieftaincy Bills, Parliament should as a matter of administrative practice, furnish the National House of Chiefs with all Bills before Parliament and consider any comments from the National House of Chiefs in deliberating on the Bill.

ISSUE SEVEN – REMUNERATION OF CHIEFS

A. DIMENSIONS OF THE ISSUE

134. The two main dimensions to this issue are the following:
    a. Should the Constitution be reviewed to change the distribution of revenue accruing from stool lands so as to provide a greater share to chiefs?
    b. Should monthly allowances, charged on the Consolidated Fund, be paid to chiefs?

B. CURRENT STATE OF THE LAW ON THE ISSUE

135. Article 267 of the 1992 Constitution, a non-entrenched provision, covers stool and skin lands and property. It provides that 10% of the revenue accruing from stool lands shall be paid to the Office of the Administrator of Stool Lands to cover administrative expenses and the remaining revenue shall be distributed such that 25% would go to the stool for the maintenance of the stool in keeping with its status; 20% would go to the Traditional Authority; and 55% would go to the District Assembly within the area of authority of which the stool lands are situated.

C. SUBMISSIONS RECEIVED

136. A good number of submissions received from chiefs and also from the Houses of Chiefs shows clearly that the current distribution of the revenue accruing from stool lands is woefully inadequate and inequitable, and indeed, some chiefs receive no payments at all. A call for review was strongly supported by constitutional experts and eminent chiefs and lawyers, as follows:
    a. 2% to the Administrator of Stool Lands for administrative expenses;
    b. 38% to the Stool;

c. 30% to the Traditional Authority; and
d. 30% to the District Assembly.

137. The highest percentage of submissions on the remuneration of chiefs is to the effect that chiefs should be paid some allowances to cater for their administrative and sitting allowances for the Houses of Chiefs and Traditional Councils for the following reasons:
    a. This will supplement the meagre sums accruing from the Administrator of Stool Lands; and
    b. It will prevent chiefs from being influenced with money by politicians to act towards narrow political ends.

D. FINDINGS AND OBSERVATIONS

138. The Commission observes that the National Constitution Review Conference recommended that the following be charged to the Consolidated Fund:
    a. The administrative expenses involved in the work of various committees of the Houses of Chiefs and Traditional Councils;
    b. The salaries, allowances and pensions payable to, or in respect of, persons serving with the said Houses of Chiefs and Traditional Councils and;
    c. Travel and sitting allowances for chiefs who are members of the Houses of Chiefs or the Traditional Councils and committees of the Houses or Councils. These payments would ensure that chiefs are insulated from the monetary influences of politicians.

139. The Commission finds tenable proposals that there should be financial security for chieftaincy institution just like the judiciary.[1029] The chieftaincy institution is a noble one and chiefs should be given special allowances to enable them to be objective in the decisions they take when they exercise the mandates of their enskinment and enstoolment.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

140. The Commission recommends that the formula for the disbursement of the proceeds from stool land revenue be retained.

141. The Commission recommends that the National House of Chiefs and the Regional Houses of Chiefs draw funds from the proposed fund for all independent constitutional bodies to be established under the Constitution for the effective implementation of their functions and for the benefit of traditional authority.

[1029] Official Report of the Proceedings of the Consultative Assembly (Wednesday 9th October 1991, Col. 359)

ISSUE EIGHT – ACCOUNTABILITY OF CHIEFS

A. DIMENSIONS OF THE ISSUE

142. The main dimensions of this issue are whether or not chiefs should account for resources entrusted to them and, if so, in what manner.

B. CURRENT STATE OF THE LAW ON THE ISSUE

143. Section 69 of the Chieftaincy Act provides for the accountability of chiefs. It provides that the Houses of Chiefs and Traditional Councils are to keep proper records of their accounts in the form approved by the Auditor-General, and shall submit their accounts to the Auditor-General for audit within 3 months after the end of each financial year. The Auditor-General shall audit and forward a copy of the report to the Minister.

C. SUBMISSIONS RECEIVED

144. The preponderance of submissions received on this issue called for chiefs to be accountable for resources that are entrusted to them. The argument is that the resources are held by the chiefs in trust for the people and so they should account periodically to the people for their stewardship. Accountability for such resources will ensure that they are being put to good use and will improve the trust and confidence their subjects repose in them. The resources to be accounted for include royalties; compensation payments for lands compulsorily acquired; stool land revenue; and donations during festivals.

D. FINDINGS AND OBSERVATIONS

145. The Commission observes that the National Constitution Review Conference concluded that the current statutory provisions in the Chieftaincy Act are sufficient to ensure the accountability of chiefs.

146. The Commission observes that for many years, case law in Ghana has held that a chief was not accountable to his subjects. However, the law has undergone some transformation.[1030] In 1991, the Supreme Court of Ghana, in a case involving the interpretation of section 7(2) of Administration of Lands Act, 1962,[1031] held that moneys accruing from stool lands should be held in trust "to be paid into the appropriate account." Therefore, whoever held such trust funds could be held accountable.[1032]

[1030] There is also the Head of Family (Accountability) Law, 1985 (PNDCL 114) that made a head of family accountable to his family.
[1031] Administration of Lands Act, 1962, (Act 123).
[1032] *Owusu and others* v. *Agyei and others* [1991] 2 GLR 493 – 517.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

147. The Commission recommends that the National House of Chiefs institute mechanisms for ensuring that the provisions of section 69 of the Chieftaincy Act, 2008 (Act 759) on accountability of chiefs, are implemented.

ISSUE NINE -ADDITIONAL JUDICIAL POWER FOR CHIEFS

A. DIMENSIONS OF THE ISSUE

148. The main dimension to this issue is whether chiefs should be given additional powers to adjudicate cases at the community level that now fall outside their remit.

B. CURRENT STATE OF THE LAW ON THE ISSUE

149. Article 273(1) confers on the National House of Chiefs, appellate jurisdiction in all chieftaincy matters arising from a decision from the Regional Houses of Chiefs. This appellate jurisdiction is exercised by a 5-member Judicial Committee of the National House of Chiefs.[1033] In Article 274(3)(d), the Regional Houses of Chiefs have original jurisdiction in all matters relating to a paramount stool or skin, including a queenmother to a paramount stool or skin. The Regional Houses of Chiefs are also mandated by the 1992 Constitution in Article 274(3)(c) to hear and determine appeals from the traditional councils in the respective regions in respect of the nomination, election, selection, installation or deposition of a person as a chief. The original and appellate jurisdictions of the Regional Houses of Chiefs are exercised by 3-member Judicial Committees of the Regional Houses of Chiefs.[1034] Section 15(5) of the Chieftaincy Act[1035] establishes the judicial committees of the Traditional Councils. Section 16 of the Act, further divides each traditional area into Divisions. According to Section 21 of the Act, a Divisional Council may perform the judicial functions of the Traditional Council in areas where there is no Traditional Council and the National House of Chiefs has conferred such judicial functions on the Divisional Council concerned.

150. The adjudicatory functions of the Traditional Authorities are contained in Section 30 of the Chieftaincy Act which provides that "the power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the arbitration is guaranteed."

[1033] Article 273(2) of the 1992 Constitution of the Republic of Ghana.
[1034] Article 274(4) of the 1992 Constitution of the Republic of Ghana.
[1035] Chieftaincy Act, 2008, (Act 759).

C. SUBMISSIONS RECEIVED

151. Almost all the submissions on this issue came from traditional rulers and the Houses of Chiefs. Their submissions call for constitutional amendments to confer greater judicial power on chiefs. That will give them the power to intervene or settle some of the acute social conflicts when they start brewing and before they escalate into full conflicts. They provided the following reasons for their proposals.
    a. Chiefs who operate at the specific local levels are better able to prevent, mediate, or resolve conflicts at those levels than the court systems or the other heavy handed governmental interventions.
    b. It costs less for chiefs to use their existing institutional set ups to hold court and settle disputes. Again, the cost in terms of lives and property lost and resources deployed by security agencies to contain the situation when the conflicts escalate, are far greater than what may be spent to fund the pre-emptive interventions of the chiefs.
    c. The processes for dispute resolution adopted by the chiefs are far more flexible, yet more appropriate and effective in resolving the conflict, than the processes of the law courts.

D. FINDINGS AND OBSERVATIONS

152. The Commission finds that there is a strong proposal that pre-independence Local Administration Courts for all Paramount Chiefs should be restored. [1036] These courts shall deal with simple family squabbles, customary matters, juvenile delinquencies and so on. This will add to the dignity of the institution and help reduce the backlog of cases in the lower Law Courts.

153. The Commission observes that besides their near exclusive jurisdiction in the determination of chieftaincy cases, there is no clear or direct constitutional provision or legislation that empowers the Houses of Chiefs and Traditional Councils to settle disputes or conflicts emanating from deep-seated social and historical grievances amongst the various communities.

154. The Commission acknowledges that ethnic and other conflicts are disruptive of development and have far reaching implications for the lives of ordinary people in the communities.

155. The Commission observes that the National Constitution Conference fully agreed with the submissions made on this issue and concluded that chiefs be empowered to intervene in ethnic and other disputes before they become uncontrollable. The conference proposed that

[1036] Official Report of the Proceedings of the Consultative Assembly (11th October 1991, Col. 518).

the Regional Houses of Chiefs and Traditional Councils should be explicitly empowered in the Constitution to undertake the task of mediating and resolving such disputes.

156. The Commission finds that chiefs do not need to be granted any additional judicial powers in order to intervene in, and attempt to settle, the many ethnic and other disputes that confront the nation.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

157. The Commission recommends the retention of the existing judicial powers conferred on traditional authorities and does not recommend the grant to them of additional judicial powers.

CHAPTER ELEVEN - NATIONAL SECURITY

11.1 INTRODUCTION

1. The various national security agencies perform critical functions of State. Their primary mandate is to protect and safeguard the territorial integrity of Ghana, the security of its people and their property, and its strategic national security interests, all of which are done in accordance with the Constitution and international law.

2. There is national security when Ghanaians are able to pursue their lives in an open and democratic society, compatible with the needs and legitimate aspirations of others. National security includes freedom from undue fear of attack against persons, communities, sources of livelihood and prosperity, and Ghana's sovereignty. National Security also entails the preservation of political, economic and social values: just laws; respect for the rule of law; democracy; respect for human rights, including the right to live in a clean and healthy environment; an enabling environment for business; and all that is central to the quality of life in Ghana.[1037] In other words, the totality of all the factors that could adversely influence the livelihood, survival, safety, wellbeing and ultimately, the contentment of a people are relevant to national security.[1038]

3. Narrowly defined, the security sector encompasses institutions and organisations established to deal with external or internal threats to the security of the State and its citizens. At a minimum, therefore, it includes the military and paramilitary forces, the intelligence services, national and local Police services, and border and customs agencies. In its broader terms, it consolidates and coordinates the political, military, economic, policing, juridical, communications, financial, foreign policy and intelligence components of a country, all of which are interrelated.[1039]

4. Many established and growing democracies all over the world have enshrined national security in their constitutions and national development plans. These include Canada, Sierra Leone, Uganda, South Africa, India, the United Kingdom and the United States of America.

[1037] Nii Carl Coleman (Major-Gen.) (Rtd), *Towards A National Security Strategy* (April 2008). Paper presented to the African Securities and Dialogue Research. (on file with the Constitution Review Commission).

[1038] Kofi Bentum Quantson, (Commissioner of Police (Rtd) and Former National Security Coordinator). *The 1992 Constitution and the Nation's Security*. Research Paper presented to the Constitution Review Commission

[1039] Sussana Bearne, Olga Oliker, Kevin A. O'Brien and Andrew Rathmel *National Security Decision-Making and Security Sector Reform*, (2005), (Prepared for the United Kingdom's Security Sector Development Advisory Team) *available at* www.rand.org/pubs/technical_reports/**2005**/RAND_TR289.pdf.

11.2 NATIONAL SECURITY UNDER THE 1992 CONSTITUTION AND OTHER LAWS OF GHANA

5. The 1992 Constitution sets out the primary framework for the organisation and administration of the national security sector of the country. Following the return to democracy in 1993, Ghana has endeavoured to establish accountable and democratic controls over her security agencies as part of broader attempts at institutional reform. This paradigm shift has generally been aimed at improving security sector governance and identifying national security with the survival, safety, wellbeing and contentment of the people.

6. The current constitutional architecture on national security includes the National Security Council (NSC) as the primary institution and hub for all activities relating to the security of the nation. Article 83 of the Constitution establishes the NSC and tasks it with the primary responsibility of "considering and taking appropriate measures to safeguard the internal and external security of the country." The Constitution prohibits the establishment of any organisation concerned with national security unless the existence of such an institution is expressly provided for by the Constitution.[1040]

7. Furthermore, the Constitution has separate chapters establishing some security agencies and their governing councils and provides for their primary functions. Chapter 15 of the Constitution establishes the Police Service tasked with the traditional role of maintaining Law and order. Chapter 16 establishes the Prisons Service to ensure the safe custody and welfare of prisoners, and as far as practicable, undertake the reformation and rehabilitation of prisoners. Chapter 17 establishes the Armed Forces of Ghana, comprising the Army, the Navy and the Air Force, to perform their role of defence of Ghana as well as such other functions for the development of Ghana as the President may determine. Other security agencies such as the Ghana Immigration Service,[1041] the Ghana National Fire Service,[1042] and the Customs Division (formerly Customs Excise and Preventive Service (CEPS)) of the Ghana Revenue Authority, are established by Acts of Parliament which also provide for their governing councils and their primary functions. There are, however, references to these 3 security institutions in the 1992 Constitution. With the exception of the Ghana Armed Forces, Article 190(1) of the Constitution lists the Police Service, Prisons Service, the Immigration Service, the National Fire Service, and CEPS as part of the Public Services of Ghana. Finally, the National Disaster Management Organization (NADMO), established under the National Disaster Management Organization Act, 1996 (Act 517) performs functions that straddle security functions.

[1040] Article 85 of 1992 Constitution of the Republic of Ghana.
[1041] Immigration Service Act, 1989 (PNDCL 226)
[1042] Ghana National Fire Service Act, 1997 (Act 537).

8. In addition to these, and in the last two decades, there has been an expansion of private formal and informal security organisations in Ghana. The impetus for these has been an increase in crime and the incapacity of the public security agencies to meet the security needs of a teeming population. These private institutions have, therefore, provided complimentary security services to Ghanaian residents. Some of the private formal security organisations are licensed under the Police Service (Private Security Organizations) Regulations, 1992 (L.I. 1571). There are, however, many security organisations, mainly in the informal sector, which are self-regulating and are considered by the national security agencies as illegal institutions that should be disbanded.[1043]

9. In sum, the range of institutions which compose the National Security landscape of Ghana comprise:
    a. The National Security Council (NSC);
    b. The Ghana Armed Forces (Army, Navy and Air force);
    c. The Ghana Police Service;
    d. The Ghana Prisons Service;
    e. The Ghana Immigration Service (GIS);
    f. The Customs Division (formerly (CEPS)) of the Ghana Revenue Authority, responsible for border security;
    g. The Intelligence organisations: the Bureau of National Investigations (BNI) for domestic intelligence, the Research Bureau of the Ministry of Foreign Affairs and Regional Integration for External Intelligence, and the Defence Intelligence Agency for Military Intelligence – all governed by the National Security Council;
    h. The Economic and Organized Crime Office;
    i. The Parliamentary Select Committee on Defence and the Interior;
    j. Private Security Firms;[1044]
    k. Voluntary community anti-crime organisations;
    l. Tribal chiefs and other traditional actors, as well as community groups and vigilantes; and
    m. Civil Society Organisations working on security issues.

10. The Economic and Organized Crimes Office (EOCO), which is the country's response to the rising global menace of economic and white-collar crime, is the latest addition to this list. EOCO is a product of the metamorphosis of the National Investigations Committee which

[1043] Emmanuel Addo Sowatey, Raymond Atuguba, "Brawl, Brains and Bravery: Understanding the complexities and changing dynamics of how local notions of (in) security and (in) justice are being perceived and addressed." Paper presented at a DIIS Conference on Access to Justice and Security (on file with the Constitution Review Commission).

[1044] Police Service Act, 1970, (ACT 350) and Police Service (Private Security Organisations) Regulations, 1992 (LI 1571) and Police Service (Private Security Organisations) (Amendment) Regulations, 1994 (LI 1579) sought to regulate the registration and activities if private security companies in Ghana.

was established under the National Investigations Committee Law, 1982 (PNDCL 2), the Office of the Revenue Commission which was established by the Revenue Commissioners Law, 1984 (PNDCL 80) and the Serious Fraud Office (SFO) established by the Serious Fraud Office Act, 1993 (Act 466). The SFO apparatus, has since 7th September, 2010 has recently been transformed into the Economic and Organized Crimes Office, as a specialised law enforcement agency and given wide-ranging powers,[1045] including powers and immunities conferred by law on police officers, with the object of detecting and preventing organised crime and generally facilitating the confiscation of proceeds of such crimes.[1046]

11. The Constitution further vests the President with the power to exercise overall control over the security services. He is the Chairman of the National Security Council and Commander-in-Chief of the Ghana Armed Forces.[1047] His powers include, appointing the Service Chiefs and Senior Officers of the Armed Forces in consultation with the Council of State and the Service councils and making appointments to the National Security Council and to the Service Councils of the Armed Forces, the Police Service and the Prisons Service.[1048] However, the administration and operational command of the Services rest with the Chiefs of the individual services, subject to the control and direction of the Service Councils on matters of policy.[1049]

12. The current constitutional provisions on security are given further effect by a host of Acts of Parliament regulating the whole security sector and specific security agencies. These are discussed in some detail elsewhere in this Chapter.

11.3 HISTORICAL BACKGROUND TO NATIONAL SECURITY

13. Ghana has had a chequered political history by virtue of the convergence of politics and military interventions in the governance of the country. These interventions took the form of coups d'état that disrupted constitutional civilian regimes and became major sources of public insecurity, with the citizens of Ghana being subjected to brutal human rights abuses and general excesses at the hands of the Army. The cumulative effect of these military intrusions and the general insecurity generated thereby was the perpetuation of regime security at the expense of national security and the instilment of a preponderant role of the military in national security affairs. These brutal human rights abuses, and the general excesses due to security sector prerogatives that accompanied the assumption of power by the military must be mentioned and condemned in the strongest of terms. Military rule generally compromised State adherence to the principles of good governance, respect for

[1045] Sections 2, 3, 23, 24 and 25 of the Economic and Organized Crimes Office Act, 2010 (Act 804).
[1046] Section 26 of the Economic and Organized Crime Office Act, 2010 (Act 804).
[1047] Article 83(2) and Article 57(1) of the 1992 Constitution of the Republic of Ghana.).
[1048] Articles 212(1)(b), 212(2), 211(d), 201(h) and 206(k) of the 1992 Constitution of the Republic of Ghana.
[1049] Articles 202(2) and 207(2) of the 1992 Constitution of the Republic of Ghana.

human rights, administrative justice and the rule of law. The history of the various security sector agencies, as detailed below, both shaped and was shaped by these events.

14. The national security sector of the country has witnessed tremendous institutional metamorphosis since the pre-colonial era. In pre-colonial times, there were indigenous military organisations, but these were not standing armies.

15. Threats against British interests during the period of the slave trade and trading in general in the West African sub-region caused the British to establish a defence organisation which was called The Royal African Company. The operations of other trading companies of Dutch, Portuguese and French origin also necessitated the establishment of defence organisations to contain opposition and to stem the competitive aspirations of rival metropolitan powers.

16. Later, all these militias were amalgamated into a well organised standing military regiment called The Royal Niger Company. It was these forces that Sir Charles McCarthy, one of the earliest Governors of Gold Coast and Nigeria, later organised into a Regiment of 3 companies called the Royal African Colonial Corps of Light Infantry, with the primary aim of preventing Ashanti raids into his domain. From this point, the various security agencies took up a life of their own.

11.3.1 THE NATIONAL SECURITY COUNCIL

17. From 1957 and over the period of the rule of Dr. Kwame Nkrumah, the national security sector experienced a number of reorganisations. These reforms and reorganisations were accompanied by the expansion of the functions and duties of the security agencies.

18. The virtual silence of the 1957 Constitution on a national security component was broken in the 1960 Constitution of the First Republic. The 1960 Constitution touched (albeit tangentially) on the issue of national security by outlawing the formation of any Armed Force, except by the authority of an Act of Parliament, and further reserving the authority to alter this provision in the people.[1050] The 1960 Constitution vested the powers of the Commander-in-Chief of the Armed Forces in the President. These powers included the power to commission persons as officers in the said Forces, to order any of the said Forces to engage in operations for the defence of Ghana, for the preservation of public order, for relief in cases of emergency or for any other purposes appearing to him to be expedient.

19. In August 1962, after the unsuccessful attempt on the life of President Nkrumah at Kulungugu, he ordered that the presidential guard company, which was formed in 1961, be expanded to a regiment. In 1963, the name of the organisation was changed to the

[1050] Article 53(1) and (2) of the 1960 Constitution of the Republic of Ghana.

Presidential Detail Department tasked with the responsibility of ensuring the personal safety of President Nkrumah.

20. Soon after in 1963, and during the Nkrumah administration, the Security Service Act, 1963 (Act 202) was passed. This Act gave the President enormous powers to set up, discipline, dismiss and generally control the security services and use them to "defend the Republic from external and internal dangers arising from activities directed from within or without Ghana which are subversive of the Republic, and to perform any other functions relating to the Security of the State assigned to the Service by the President." Following the overthrow of the Nkrumah administration in 1966 by the National Liberation Council, steps were taken to return the country to constitutional rule. The proposals made by the Constitutional Commission of 1968, to return the country to civilian rule, were mainly aimed at putting mechanisms in place to curb the excesses of subsequent administrations. The proposals, culminating in the 1969 Constitution, provided for national security by subsuming it under The Executive.[1051] Specifically, the 1968 Constitutional proposals explicitly recommended a ban on the establishment of any organisation concerned with national security except by the authority of an Act of Parliament.[1052]

21. Under these proposals, the National Security Council (NSC) was to be composed of the Prime Minister; four other Ministers including the Ministers for the time being holding the portfolios of foreign affairs, defence and the interior; the Attorney-General; the General Officer Commanding the Ghana Armed Forces; the Head of the Police Service and 4 other persons as may be appointed by the National Security Council. The Army, Navy and Air Force Commanders could attend meetings of the NSC as advisers only at the invitation of the Prime Minister.[1053] Additionally, the Secretary to the Cabinet was to double as the Secretary to the NSC, and the Constitutional Commission proposed that the Prime Minister shall keep the President informed of the state of the security of the country and of the deliberations and decisions of the NSC.[1054]

22. The NSC established under the 1979 Constitution remained largely the same as that under the 1969 Constitution. However, under the 1979 Constitution, in addition to the membership of the President and Vice President, the Ministers for the time being holding the portfolios of foreign affairs, defence, the interior and finance and such other Ministers as the President may determine, the President had the power to appoint not more than 5 other persons as members of the NSC. Under the 1969 Constitution, he was limited in this regard to 3 other persons. The Secretaryship of the NSC, the functions of the NSC and the ban on the raising

[1051] Chapter 7 of the 1960 Constitution of the Republic of Ghana.
[1052] Article 56 of the 1969 Constitution of the Republic of Ghana.
[1053] Article 54 of the 1969 Constitution of the Republic of Ghana.
[1054] Article 55(2) of the 1969 Constitution of the Republic of Ghana.

of any Armed Force, except as provided for under the Constitution were the same as provided for under the 1969 Constitution.

23. The NSC of today is established both by the 1992 Constitution and the Security and Intelligence Agencies Act, 1996 (Act 526). The 1992 Constitution replicates the provisions of the 1979 Constitution banning any agency, establishment or other organisation being concerned with national security, except as provided for under the Constitution. The 1992 Constitution also provides for the functions of the NSC and makes the Secretary to Cabinet the Secretary to the NSC, as was the case under the 1969 and 1979 Constitutions.[1055]

24. The Security and Intelligence Agencies Act is very progressive and represents a major professional attempt to provide for a legal and institutional framework for the operation of the National Security sector. Additionally, the Act makes provision for the establishment of Regional and District Security councils[1056] and specifies some of the State agencies responsible for implementing Government policies on security.

25. It is worthy of note that between May 2006 and January 2008, a new Ministry of National Security was created to coordinate the activities of all institutions whose activities bore directly on National Security. The activities of the NSC and the security and intelligence agencies established or continued in force by the Security and Intelligence Agencies Act fell under the administrative purview of the new Ministry for National Security. Under the Act, the functions of the National Security Council include:
    a. Considering and taking appropriate measures to safeguard the internal and external security of Ghana;
    b. Ensuring the collection of information relating to the security of Ghana and the integration of the domestic, foreign and security policies relating to it, to enable the security services and other departments and agencies of government co-operate more effectively in matters relating to National Security;
    c. Assessing and appraising the objectives, commitments and risks of Ghana in relation to the actual and potential military power in the interest of National Security; and
    d. Taking appropriate measures regarding the consideration of policies on matters of common interest to the departments and agencies of the Government, concerned with National Security.[1057]

26. The National Security Council is originally set up under Article 83 of the 1992 Constitution and the functions stipulated for it in the Act are an exact reproduction of the functions of the NSC as contained in Article 84 of the Constitution.

[1055] Articles 85, 84 and 83(6) of the 1992 Constitution of the Republic of Ghana.
[1056] Section 5 of Security and Intelligence Agencies Act, 1996 (Act 526).
[1057] As provided for in section 4(a) to (d) of the Security and Intelligence Agencies Act, 1996 (Act 526) which is also in accordance with article 84 of the 1992 Constitution of the Republic of Ghana.

27. The Departments existing immediately before the coming into force of the Act, that is the Bureau of National Investigation and the Research Department, are respectively continued in existence under the Security and Intelligence Agencies Act as the Internal and External Intelligence Agencies of the State, and are jointly referred to as the "Intelligence Agencies." The governing body of the Intelligence Agencies is the National Security Council.

28. The Intelligence Agencies are to perform the following functions:
    a. Collect, analyse, retain and disseminate, as appropriate information and intelligence, respecting activities that may constitute threats to the security of the State and the Government of Ghana;
    b. Safeguard the economic wellbeing of the State against threats posed by the acts or omissions of persons or organisations both inside and outside the country;
    c. Protect the State against threats of espionage, sabotage, terrorism, hijacking, piracy, drug trafficking and similar offences; protect the State against the activities of persons, both nationals and non-nationals, intending to overthrow the Government of Ghana or undermine the constitutional order through illegal political, military, industrial or other means or through any other unconstitutional method; and
    d. Perform such other functions as may be directed by the President or the National Security Council.

29. The security and intelligence agencies are not a new phenomenon. As already noted, they existed at least from 1963. The new Security and Intelligence Agencies Act is less centred on the President, than was the case in 1963, although under the new Act, the President remains the Chairman of the Council and largely determines who should be a member of the Council. The Act establishes branches of the Security Council in every region and district of the country. It also contains limited safeguards against abuse of power by security agencies. Instances of alleged abuse of power are resolvable by written complaints that may be considered by an *ad hoc* Tribunal under the Act to be set up by the Chief Justice.[1058]

30. The National Security Council has also been made the controlling body for the three intelligence agencies (Internal, External and Military Intelligence). Its composition successfully creates and maintains a balance between military and civilian influence and also integrates effectively intelligence and security services to support decision-making. The NSC has a secretariat headed by a National Security Coordinator, whose functions, among others, are to co-ordinate, on a day-to-day basis, the activities of the national, regional and district security councils and the activities of the intelligence agencies.

[1058] Raymond A Atuguba, *The Constitutional and Legal Framework for Oversight of the Security Sector in Ghana: Outstanding Matters for the Ghana Police Service.*Vol. 24 UGLJ (2008-2009).

11.3.2. THE GHANA ARMED FORCES

31. Historically, the Armed Forces' role was limited to the requirement to "fight and win wars."[1059]

32. Prior to the constitution of a fully-fledged West African Frontier Force (WAFF) in the 1880s there was a series of makeshift organisations which were of minimal stature and were led by Europeans. They included the Royal African Corps, the West Indies Regiment, the Militia and Police, the Gold Coast Corps, the Armed Police, the Gold Coast Artillery, the Gold Coast Constabulary, the Lagos Constabulary and a Volunteer Force. The functions of these bodies ranged from the protection of the coastal forts to the patrolling of the colony's interior.[1060]

33. After the British established a protectorate, thousands of natives of the then Gold Coast served in the Royal West African Frontier Force (RWAFF) which fought in the two world wars.

34. At independence in 1957, Ghana's Armed Forces were among the best in Africa. The Ghana Navy and the Ghana Air Force were subsequently established by an Act of Parliament in 1959 and their role was to provide seaward and air defence of the territories of Ghana. Today, the Ghana Armed Forces is made up of the Ghana Army, Ghana Navy and Ghana Air Force all operating under a Joint Service General Headquarters.

11.3.2.1 THE GHANA ARMY

35. The history of the Ghana Army dates back to the pre-colonial era when there were indigenous military organisations called Asafo Companies. These organisations were not standing armies.

36. Threats against British interests during the period of the slave trade and trading by the Dutch, Portuguese and French in general, in the West African sub-region caused the British to establish the Royal African Company to contain opposition and stem the competitive aspirations of rival metropolitan powers.

37. Later, all these militias were amalgamated and organised into a Regiment of 3 companies called the Royal African Colonial Corps of Light Infantry with the primary aim of preventing Ashanti raids into British domain and incorporated into the West African Frontier Force

[1059] SAMUEL HUNTINGTON, MISUNDERSTOOD: THE SOLDIER AND THE STATE, THE THEORY AND PRACTICE OF CIVIL-MILITARY RELATIONS, (Cambridge, Massachusetts Harvard University Press 1957).
[1060] S K Ankama, *The Police and Maintenance of Law and Order in Ghana* (Unpublished Ph.D dissertation, University of London, 1967).

(WAFF) as an integral part of the British Army mainly for the maintenance of internal security and defence of the colonial territories. By 1906 the Gold Coast Regiment had been reorganised with stations in Kumasi, Accra, Mampong, Nkoranza and Odumasi. The Gold Coast Regiment as part of the 1st Division of WAFF settled down to peacetime duties, and in 1933 it was reorganised in anticipation of the 2nd World War.

38. At independence the Ghana Army consisted of a Brigade Group of 3 Infantry Battalions, a Field Battery and Field Engineer Squadron, a Recruit Training Centre and the Supporting Services.

11.3.2.2 THE GHANA NAVY

39. There existed no navy during the pre-colonial era and any seaward activities were conducted by coastal inhabitants whose preoccupation with the sea was for subsistence fishing.

40. The nucleus of the Ghana Navy is the Gold Coast Naval Volunteer Force which was formed during World War II. It was established by the colonial British administration to conduct seaward patrols to ensure that the coastal waters of the colony were free from mines. Following Ghana's attainment of independence on 6 March 1957, a new volunteer force was raised in June, 1959 with its headquarters at Takoradi in the Western Region of Ghana. The men were drawn from the existing Gold Coast Regiment of Infantry. They were under the command of British Royal Navy officers on secondment. On 29 July 1959, the Ghana Navy was established by an Act of Parliament and had two divisions based at Takoradi and Accra.

11.3.2.3 GHANA AIR FORCE

41. The Ghana Air Force was founded in 1959 with direction from Indian and Israeli officers. Later that year a headquarters was established in Accra. In 1960 Royal Air Force personnel took up the task of training the newly established Ghana Air Force and in 1961 they were joined by a small group of Royal Canadian Air Force personnel.

42. At its establishment, the Ghana Air Force was the first sub-Sahara air force, and for a time the largest.

11.3.3 THE GHANA POLICE SERVICE

43. Prior to the advent of colonialism, chiefs were the custodians of cultural values and guardians of lands in trust for their people. Most traditional security service providers were found within the households of traditional chiefs. Customary security personnel played traditional roles as well as security functions in the chieftaincy institution. This security system of the traditional authorities was made up of the ‘ahenfie’ police in the Akan language or “Royal Police.”

44. During the colonial period, the police were generally used to ensure regime security and bully the population to accept dictatorship.[1061] Professional colonial policing was introduced by the British Colonial Authorities to the Gold Coast in the late 1820s into the early 1830s when Captain George MacLean formed a body of 129 men to maintain and enforce the provisions of the "Treaty of Peace."[1062] The men recruited were trained and deployed to perform civil police duties until their activities were formalised in 1873 when 'an ordinance to provide for the better regulations and discipline of the armed police force' was enacted.[1063] In 1894, the institution of Police was formalised with the passage of the Police Ordinance which gave legal authority for the formation of a civil police force. Some of the new regulations enacted to enhance the work of the force and respond to the challenges that it faced were as follows:
    a. Police Regulations 1922, No. 7;
    b. Police Reward Fund Regulations, 1922, No. 8;
    c. Transport and Private Property (Police Escort) Regulations, 1922, No. 20;
    d. Police Force (Volunteer Police Reserve) Regulations 1939, No. 16; and the
    e. Unclaimed Property Disposal Regulations 1941, No. 37.

45. In 1948, the Police Reserves Unit was formed to combat riotous mobs, following the 1948 riots in the country.

46. The first major effort at dealing with internal developmental processes in the Police Service was a Report on the Gold Coast Police known as the *Young Report* of 1951 which sought to advise the Gold Coast government on the organisation, training and methods of policing in the colony.[1064]

47. As part of the developmental processes, 1952 saw the establishment, for the first time, of a specialised squad made up of 12 women to be responsible for juvenile crimes and offences committed by women. With the rising perception that men did not give cases dealing with women adequate and sufficient attention, and the subsequent lobbying and petitioning of the Inspector-General of Police, the Police Administration consented to the establishment of the Women and Juvenile Unit (WAJU) of the Police Service in October 1998. This unit is now called the Domestic Violence Support Unit, (DOVSU).

48. The first constitutional mention of the Police Service was made in the 1960 Constitution where it was listed as a part of the Public Services of Ghana. The powers of appointment, promotion, transfer, termination, dismissal and disciplinary control were vested in the

[1061] Mike Ocquaye, *Human Rights and the Transition to Democracy under the PNDC in Ghana,* Vol 17, No. 3 Human Rights Quarterly, 556-573, (August 1995)
[1062] TEKU, MICHAEL KWAME AGBEKO AN EVALUATION OF RECORDS MANAGEMENT PRACTICES IN THE POLICE HEADQUARTERS REGISTRY, (University of Ghana,1984).
[1063] S.K. ANKAMA, POLICE HISTORY – SOME ASPECTS IN ENGLAND AND GHANA (Essex, Silken, 1983).
[1064] J. B. POKOO-AIKINS, THE POLICE IN GHANA, 1939 – 2009, 78 (Highpoint Publications, 2009).

President.[1065] The first major post-independence Act to be promulgated was the Police Service Act, 1965 (Act 284) which provided for "The organization of the Police Service, the appointment, promotion and retirement of Police Officers and the conditions of service, disciplinary proceedings and other matters relating to the Police Service."

49. In 1970, the civilian government, which assumed the governance of the country after the National Liberation Council handed over the reins of power in 1969, enacted the Police Service Act (Act 350) which came into effect in 1971. This Act consolidated all Acts and Decrees relating to the Police Service.[1066] Section 1(1) provided that the duty of the Police Service was to "prevent and detect crime, apprehend offenders, and maintain public order and safety of persons and property."[1067]

50. The 1969 Constitution, apart from listing the Police Service as part of the Public Services of Ghana,[1068] singled it out under Chapter 14. Article 143 of the 1969 Constitution which fell under that chapter reiterated the Service's membership of the Public Services of Ghana and established the Police Council.

51. The Council was composed of the Head of the Police Service as chairman; the two most senior officers of the Police Service next to the Head of the Police Service; a member of the Public Services Commission; a representative of the Attorney-General; the official Head (Principal Secretary) of the Ministry responsible for internal affairs; and not more than three other members, one of whom shall be a legal practitioner, as the President may, acting in accordance with the advice of the Prime Minister, appoint. Under Act 350, the Police Council functioned as an advisory body on appointments, welfare and discipline, selection and training, police-public relations and the adjudication of disciplinary appeals from serving officers.[1069] Another novel attribute of the Act is that it is the first known law that provides for the operation of private security organisations in Ghana.[1070]

52. Subsequently, in 1974, the Police Force (Amendment) Decree (NRCD 303) amended sections of Act 350.[1071] The result was that the Police Service was institutionally removed from the administrative and bureaucratic control of the Public Services Commission and the Service was renamed the Ghana Police Force.

[1065] Article 51(1) and (2) of 1960 Constitution of the Republic of Ghana.
[1066] Police Service Act, 1970 (Act 350).
[1067] This conforms to some of the recommendations made and concerns raised in the paragraph 1 of the Young Report of 1951.
[1068] Article 139(1) of the 1969 Constitution of the Republic of Ghana.
[1069] Part III, Section 10 – 16 of the Police Service Act, 1970 (Act 350).
[1070] Section 38(1) of the Police Service Act, 1970 (Act 350).
[1071] By this time, the democratically elected government headed by Prime Minister Kofi Abrefa Busia had been overthrown, the recommendations of the Boyes Report unimplemented and a new government, the National Redemption Council (NRC) was established.

53. The 1979 Constitution expunged the Police Force from the list of Public Services mentioned in Article 154(1). Article 172(2) banned the raising of any Police Service except by or under the authority of an Act of Parliament. The Police Council established under the Constitution was different from the 1969 composition and consisted of the Vice President as Chairman; the Inspector-General of Police; the Minister responsible for internal affairs; a legal practitioner of not less than ten years' standing nominated by the Ghana Bar Association; and not more than 3 other members, one of whom shall be a person who shall have held office as a senior police officer, as the President may, acting in accordance with the advice of the Council of State, appoint.

54. The power to appoint the Inspector-General of Police (IGP) was vested in the President.[1072] Per Article 173(4), the IGP was, subject to the control and direction of the Police Council, responsible for the operational control and administration of the Police Service. The President's appointing powers (acting in accordance with the advice of the Police Council) also extended to the appointment of persons to hold or to act in an office in the Police Service.[1073]

55. The Constitution further provided for the delegation of the powers of the President under Article 173 through directions in writing to the Police Council or any committee or to a member of the Council.[1074] The Police Council was an advisory body that advised the President on all major matters of policy relating to internal security including the role of the Police Service, budgeting and finance, administration and the promotion of officers above the rank of Assistant Commissioner of Police or its equivalent.[1075] Article 174(2) mandated the Council, with the prior approval of the President and by constitutional instrument, to make regulations for the performance of its functions under the Constitution or any other Law and for the effective and efficient administration of the Police Service. The Constitution additionally provided for a regional Police committee in each region, whose duty it shall be to advise the Police Council on any matter relating to the administration of the Police Service in the Region.[1076]

56. At the dawn of constitutional rule in 1993, various structures were put in place to ensure both policy re-orientation and proper oversight of the Ghana Police Service.[1077] A Police Council (the Council), comprising 10 members, was set up with the mandate to advise the President on matters of policy relating to internal security including the role and functioning of the

[1072] Article 173(2) of the 1979 Constitution of the Republic of Ghana.
[1073] Article 173(4) of the 1979 Constitution of the Republic of Ghana.
[1074] Article 173(5) of the 1979 Constitution of the Republic of Ghana.
[1075] Article 174(1) of the 1979 Constitution of the Republic of Ghana.
[1076] Article 175(1) and (2) of the 1979 Constitution of the Republic of Ghana.
[1077] Dr. Kwesi Aning & Ernest Lartey, *Parliamentary Oversight of the Security Sector: Lessons from Ghana*. (January 10, 2011, 9 : 37 AM).

Police.[1078] The Council has broad powers and may, with the approval of the President, make regulations for the performance of its functions and for the effective and efficient administration of the Police Service. Matters that should be covered under such regulations include the control and administration of the Service, conditions of service, and powers and discipline of members of the Service.[1079]

57. The powers of IGP who is responsible for the operational control and administration of the Ghana Police Service were made subject to the powers of the Council.[1080]

58. The main piece of legislation governing the Ghana Police Service, aside from Chapter 15 of the 1992 Constitution, is the Ghana Police Service Act, 1970 (Act 350) and various Legislative Instruments containing disciplinary rules for members of the Service.

11.3.4 THE GHANA PRISONS SERVICE

59. The prison system is at the core of Ghana's penal organisation.

60. There was no formal prison system in traditional Ghanaian society. It was introduced as an appendage of British colonial rule.

61. In colonial times, particularly in the mid-nineteenth century, the British council of merchants established a network of harsh prisons in forts such as the Cape Coast Castle. The prisons of these early periods were mainly custodial institutions. The period 1842 to 1874, when the Colony of the Gold Coast was formally created, marked the development of the prisons from custodial institutions to the punitive instruments envisaged by the English Prisons Act, 1865, and their caretaker function was stabilised in the Prisons Ordinance of 1860.

62. In order to make the prisons punitive institutions of great deterrent power, agitation started in England in 1863 to transform them into institutions for the refined and systematic torture of prisoners. The Colonial Office took the lead in a series of circulars addressed to all the Colonial Governors, seeking to place the entire colonial prisons system on the same basis as that of England which had three principal pillars: the separate system, penal labour and a minimum diet. The ultimate objectives of this directive, and those of the colonial office, were finally achieved in the Gold Coast in the Prisons Ordinance of 1876 whose dead hand still moulds the Prisons Regulations of Ghana today.

[1078] Article 203(1) of the 1992 Constitution of the Republic of Ghana.
[1079] Article 203(2) & (3) of the 1992 Constitution of the Republic of Ghana.
[1080] Article 202(2) of the 1992 Constitution of the Republic of Ghana.

63. The report of the Gladstone Committee of 1895 urged deterrence and reformation as the objectives of punishment. The major effort of the prison system thus turned away from harsh punishment to teaching prisoners a trade.

64. Consequently, in the debate on the Prisons Bill of 1962, though the usual remarks by laymen was made to the effect that the prisons were too "soft", the government was resolute in its policy with respect to prisoners that it was "one of reform and not necessarily to wreak vengeance on people who sometimes through their unfortunate background and circumstances have found themselves behind bars."

11.3.5 THE GHANA IMMIGRATION SERVICE

65. The Ghana Immigration Service began as the Immigration and Passport Unit of the Gold Coast Colonial Police Force.

66. After the attainment of independence in 1957, a Cabinet decision in 1960 transferred the Immigration Unit to the Ministry of the Interior as a separate department, while the Ministry of Foreign Affairs took over the issuing of passports. Three years later, the Aliens Act 1963, (Act 160) was enacted to give legal backing to immigration operations.

67. In November 1989, by PNDC Law 226, the Immigration Department was converted into a paramilitary service.

68. The Ghana Immigration Service remains the sole institution with the statutory mandate to regulate and monitor the entry, residence, employment and the exit of foreigners in the country. The passage of the Immigration Act 2000, (Act 573) expanded the functions and roles of the Service. Prominent among these are the Indefinite Residence and Right of Abode facilities.

11.3.6 THE CUSTOMS EXCISE AND PREVENTIVE SERVICE

69. The pre-colonial history of the Service dates as far back as 1839 when it was known as the Department of Customs and headed by a Principal Collector who by 1850 also acted as the Colonial Treasurer.

70. In 1885, the Treasury and Customs Ordinance No. 4, abolished the office of the Collector of Customs and Treasurer. The duties were divided and discharged separately by the Comptroller of Customs and the Treasurer respectively. In 1897, the revenue protection

aspect of the Service, the Customs Preventive Service, a semi-military organisation was created under Cap. 92[1081].

71. The Customs and Excise Department was created in 1947 under Ordinance No. 40.[1082] In 1960 when Ghana became a Republic, the Customs Preventive Service (Reconstruction) Act, 1960, (Act 13) was passed to replace Cap 92 and the Customs Preventive Service became a civilian organisation once again. In 1962, Customs became the responsibility of the Ministry of the Interior replacing thereby the Ministry of Finance and Trade.

72. In October, 1964, the Border Guard Unit was formed as a Police unit with an Assistant Commissioner of Police as the head. This Unit, until 1986, operated side by side with the Customs and Excise Department at the country's ports and borders. After the re-organisation of the entire Civil Service in 1966, the Service once again reverted to the Ministry of Finance.

73. In September 1986, issuing from the restructuring of the Customs and Excise Department into a paramilitary service, the Customs, Excise and Preventive Service was created as a semi-autonomous institution outside the Civil Service under the Customs Excise and Preventive Service Law 1986, (PNDCL 144). The designation Comptroller was changed to Commissioner and the functions of the erstwhile Border Guards were transferred to the Preventive wing of CEPS. Additionally, by operation of law, all the assets of the Border Guards were handed over to CEPS.[1083] In 1993, these and other functions were consolidated into the Customs, Excise and Preventive (Management) Law, 1993, (PNDCL 330), with CEPS maintaining its police powers that enabled it to patrol freely, search vehicles and premises, aircraft and ships and effect arrests to ensure that smuggling is kept in check.[1084]

11.3.7 THE NATIONAL FIRE SERVICE

74. The responsibility of fire fighting used to be a duty of the Police Force. A national fire service was contemplated in 1955 when the colonial Government invited Mr. S.M. Charters of Her Majesty's Inspectorate of Fire Service into the country, among other things, to advise on the organisation and establishment of a Fire Service in Municipalities and in certain urban towns.

[1081] Customs Preventive Service Ordinance, (Cap 92).
[1082] Section 2 of Protectorate Courts Jurisdiction Ordinance, 1932 (No. 40).
[1083] Section 23 of Customs, Excise and Preventive (Management) Law, 1993 (PNDCL 330).
[1084] Sections 234 – 246 of Customs, Excise and Preventive Service (Management) Law, 1993 (PNDCL 330).

75. In 1963, by an Act of Parliament, the Ghana National Fire Service was established from the then fragmented Fire Brigades, which until then, had existed as separate entities under government departments or municipal councils.[1085]

76. The present structure of the National Fire Service is a creature of the Fire Service Act, 1997 (Act 537) which tasks the Service with the broad objective of preventing and managing undesired fires.

11.3.8 THE ECONOMIC AND ORGANISED CRIME OFFICE (EOCO)

77. In colonial Ghana, the menace of white-collar crime was the pre-occupation of traditional law enforcement institutions such as the Police.

78. The Economic and Organized Crime Office was set up by the Economic and Organized Crime Office Act, 2010 (Act 804) to supplement government's efforts at stemming the tide of corruption in the country.

79. EOCO is the product of the metamorphosis of the National Investigations Committee [1086] the Office of the Revenue Commission[1087] and the Serious Fraud Office (SFO)[1088]. From the 1980s through to the early 1990s, the National Investigations Committee and Office of the Revenue Commission unearthed many insurance malpractices, bank frauds, education service frauds, timber sub-sector manipulations, and huge financial losses recorded in customs and excise malpractices at the ports. The mechanisms of both agencies for monitoring economic crimes were less than satisfactory.

80. The SFO apparatus, has recently been transformed into the Economic and Organized Crimes Office, as a specialised law enforcement agency and given wide-ranging powers including powers and immunities conferred by Law on police officers, with the object of detecting and preventing organised crime and generally facilitating the confiscation of proceeds of such organised criminal activity.[1089]

[1085] Fire Service Act, 1963, (Act 219).
[1086] The National Investigations Committee was established under the National Investigations Committee Law, 1982 (PNDCL 2).
[1087] The Office of the Revenue Commission was established under the Revenue Commissioners Law, 1984 (PNDCL 80).
[1088] The Serious Fraud Office was established under the Serious Fraud Office Act, 1993 (Act 466).
[1089] Sections 2, 3, 23, 24, 25 and 26 of the Economic and Organized Crimes Office Act, 2010 (Act 804).

11.3.9 THE NARCOTICS CONTROL BOARD (NACOB)

81. The Narcotics Control Board is an institution of recent origin and is responsible for combating illicit trafficking of narcotic drugs and psychotropic substances in line with United Nations. Prior to this, traditional law enforcement agencies were in charge of the combating illicit trade.

82. The Narcotic Drug (Control, Enforcement and Sanctions) Act, 1990 (PNDCL 236) establishes the Narcotics Control Board as the lead and coordinating body for drug law enforcement in the country.[1090]

83. An additional legal instrument that governs the conduct of this sector is the Narcotic Drugs (Control) Board Instrument, 1990 (LI 1507).

ISSUE ONE: CONCEPTUALIZATION OF NATIONAL SECURITY

A. DIMENSIONS OF THE ISSUE

84. Many Ghanaians made submissions to the Commission to the effect that Ghana must agree on a concept of national security, from which all security policies, programmes, projects, practices and operations would take their ethos. The dimensions of this issue are:
    a. How may Ghana arrive at an agreed concept for addressing its national security concerns?
    b. Should National Security Objectives be included as part of the Directive Principles of State Policy under Chapter 6 of the Constitution?
    c. Should a National Security Strategy (NSS) or a National Security Policy Framework (NSPF) be developed from the National Security Objectives to be set out in the Constitution?
    d. Should there be an overall governing body, called the Public Security and Safety Services Commission or Authority to oversee the activities of the Police and their sister security agencies?
    e. Should there be some changes in the names of certain security agencies in order to show a certain orientation of those agencies?

B. CURRENT STATE OF THE LAW ON THE ISSUE

85. Nowhere in the 1992 Constitution or in any law is there a clear statement of the National Security objectives of Ghana. A combined reading of Articles 83 and 84 of the 1992 Constitution on the National Security Council and the Security and Intelligence Agencies

[1090] Section 55 of the Narcotic Drug (Control, Enforcement and Sanctions) Act, 1990 (PNDCL 236).

Act, 1996 (Act 526) reveals that the purpose of the National Security Council is to safeguard the internal and external security of Ghana and set policies for the security agencies.

86. The Directive Principles of State Policy, contained in Chapter 6 of the 1992 Constitution, lists the Political, Economic, Social, Cultural, Educational, and International Relations objectives of the nation, but say nothing about national security objectives.

87. Apart from the 1992 Constitution's dedication of Chapters 15, 16 and 17 exclusively to provisions on the Police Service, the Prison Service and the Armed Forces respectively, it also lists the Police Service and sister security agencies such as the Prison Service, National Fire Service, Customs Excise and Preventive Service and the Immigration Service as part of the public services of Ghana.

C. SUBMISSIONS RECEIVED

88. Submissions received on this issue were mainly from the national security agencies. The submissions were to the effect that the Constitution should explicitly provide for a set of national security objectives.

89. A significant number of those who called for the identification and articulation of a definite national security policy also stressed that those objectives should go beyond the hardcore matters of national security and incorporate issues of human security, food security, economic security and environmental security.

90. Many arguments were made in support of the submissions advocating for an explicit National Security Policy:
    a. The main argument is that in the absence of a national security policy, national security has been confused with and often replaced with or sacrificed for the security of a government or regime for the time being in power. They argue that such a fundamental confusion has led to a fixation of national security agencies on the security of governments, officialdom, and even apparatchiks – an awkward confusion to which past excesses and abuses of the security system can be traced.
    b. It was also argued that security is very fundamental for the survival and progress of the general citizenry and the stability and integrity of the nation. A national security policy that is people-centred and sensitive to the peculiar needs of Ghana is, therefore, needed without any further delay.
    c. Additionally, it was argued that human beings are the most important assets of any nation, hence the need to articulate a national security policy that puts them at the centre of the policy.

d. It was further argued that a national security policy would concretise the fundamental assumption that the nation is sufficiently homogenous and united for its citizens to have common interests that need to be protected and common objectives to be pursued.
e. Another argument was that a national security policy is necessary to forestall any future military interventions based on a skewed appreciation of the concept of national security.
f. The last major argument was that an explicit statement of the national security objectives of Ghana would provide a generally accepted radar for the various security agencies and prevent the propensity of a directionless national security apparatus to manipulation. It was noted that clearing the muddle surrounding the use of the term 'national security' would assist to arrest the practice whereby some elements of the ruling government employ this term to justify clandestine operations which in no way inure to the security of the state, but to the achievement of myopic and political interests.

91. Another dimension of the issue and on which a large number of submissions were received was the inclusion of national security objectives as part of the Directive Principles of State Policy provided for under Chapter 6 of the 1992 Constitution. This chapter lists several objectives of the State, but omits to mention any national security objectives. The submissions on this dimension of the issue stated that security is so fundamental for the survival, stability, development and progress of a nation that all the other objectives cannot be achieved in its absence. An atmosphere of instability and chaos can hardly be conducive for the realization of the political, economic, social, cultural, educational and international relations objectives provided for in the Constitution.[1091] There is, therefore, the need for the nation to enjoy basic security in order that all other stated objectives can be achieved; hence the need to include national security objectives in the Directive Principles of State Policy.

92. Many submissions called for the formulation and initiation of a National Security Strategy (NSS) or a National Security Policy Framework (NSPF) by the government. Under the current state of the law, the functions of the National Security Council include "taking appropriate measures regarding the consideration of policies on matters of common interest to the departments and agencies of the government concerned with national security."[1092] The submissions argued that this function entails the development of a coordinated national security strategy, to define the parameters within which the state will pursue its wider security objectives and from which a number of other policies, (defence, intelligence, policing and justice, immigration, prisons and border control) will be deduced.

93. Such a framework will articulate the goals that security service providers should work towards. It will also play a critical function of setting out an outline of the core interests of

[1091] Chapter 6 of the 1992 Constitution of the Republic of Ghana.
[1092] Article 84 of the 1992 Constitution of the Republic of Ghana.

the nation and set guidelines for addressing current and prospective threats and opportunities, thus ensuring that government addresses all security concerns in a comprehensive manner. An added advantage is that it will provide an over-arching structure to consolidate and coordinate various aspects of national security decision-making, effective security sector reform and the integration of a wide range of security-related policy, legislative, structural and oversight issues. In sum, the role of the NSPF will be to bring the disparate parts of the security agenda together. It is also essential in building domestic consensus and enhancing regional and international confidence and cooperation.

94. A number of submissions from across the different arms of the defence and security agencies proposed that an oversight body, to be called the Public Security and Safety Services Commission or Authority, be established and under which the Police and sister security agencies will be subsumed. Consequently, the Police, Fire Service, Immigration Service and Customs Excise and Preventive Service should be expunged from the list of the public services of Ghana provided for under Article 190(1) of the 1992 Constitution.

D. FINDINGS AND OBSERVATIONS

95. The Commission finds that there is an overwhelming call for the Constitution to contain express provisions on the national security objectives of the nation. The objectives must be comprehensive and broad and should centre on contemporary notions of security relating to human security. This would allow all security agencies to work towards achieving clearly identified objectives and obviate the muddle surrounding national security in Ghana today. It would also curtail the manipulation of a directionless security apparatus by any agency for narrow interests.

96. The Commission finds that the constitutions and national development plans of many countries, including the USA, the UK, Mozambique, Kenya and Canada contain national security objectives [1093]

97. The Commission finds that the Directive Principles of State Policy (DPSP) contain various broad objectives; political, economic, cultural, educational, international relations, but does not contain national security objectives. Since national security is critical for the attainment of all the other objectives, the DPSP should contain national security objectives.

98. The Commission finds that there is the need for the National Security Council to formulate a comprehensive National Security Policy Framework (NSPF), flowing from the national security objectives in the Constitution. The purpose of the NSPF will be to operationalise the

[1093] Article 280(1) of the 2010 Constitution of Kenya.

national security objectives. Such a public document would help demystify security issues that are unduly shrouded in mystery in this country. It would also explain clearly the nation's security interests, identify national security threats, and indicate in broad terms the policies, programmes and initiatives for attenuating or eliminating the threats. The public character of the document would allow for a continual public debate on national security priorities so that necessary adaptations may be made periodically.

99. The Commission observes that in some countries a NSPF is mandated by legislation. In the US the President is mandated to submit a national security strategy every year to Congress, though in practice this does not always occur annually. In Latvia, Parliament must approve an NSP written by the Cabinet and approved by the National Security Council every year. In the Russian Federation, the National Security Council produces security strategies that are approved by the Executive. In Kenya, Article 240(6)(a) of the Constitution obliges the National Security Council to develop a policy to integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to cooperate and function effectively. Clause (7) of the same article imposes a reporting obligation on the Council to report annually to Parliament on the state of security of Kenya. In Angola, these powers and function vest in the National Defence Council.[1094]

100. The Commission finds that there is a distinction between Security and Intelligence, and it is important for this to be clarified. Although the security and intelligence agencies may have overlapping functions, they nonetheless have distinct roles and functions. The major preoccupation of intelligence services is to predict, detect and analyse internal and external threats to the security of the country and inform and advise the Executive about the nature and causes of these threats. The prediction, detection and analyses provide the basis for any action by the security agencies in preventing, combating and overcoming any imminent and serious threat to the country and its people. One key attribute of the effective performance of the vital functions of intelligence services throughout the world is the ability to operate secretly and to have special powers to acquire confidential information through surveillance, the infiltration of organisations, the interception of communication and other methods that ordinarily infringe upon the right to privacy and decency of individuals, but within clearly, well-articulated and defined laws that allow such infringement. The security agencies, on the other hand, have a greater burden to respect the tenets of a democratic dispensation, including the requirement to be transparent and accountable. The clarification between the distinct terms and their corresponding prerogatives and operations would help reduce the tendency for politicians and security operatives to conflate the terms and thereby justify the application of intelligence prerogatives to all security operations.

[1094] Article 150(3) of the 1992 Constitution of Angola.

101. The Commission observes that the experts at the National Constitution Review Conference were agreed that the Constitution should clearly spell out the national security objectives of the nation, centred on human security, and that there should be a NSPF formulated by the National Security Council, from which all security agencies will draw their various goals.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

102. The Commission recommends that the Constitution be amended to include a set of broad national security objectives, centred on human security.

103. The Commission recommends the following as an indicative draft of the national security objectives of the State.
    a. The State and the security agencies shall take all necessary action to ensure the safety of every person in Ghana and the security of the State. The State shall, in particular, take all necessary steps to establish a sound and proactive national security apparatus whose underlying principles shall include:
        i. The recognition that the most secure democracy is the one that ensures the basic necessities of life for its people as a fundamental duty;
        ii. Guaranteeing a secure State where the liberty and freedoms of every person are protected; and
        iii. Ensuring that the security services and individuals bear their fair share of their national security responsibilities including the responsibility of contributing to the overall security of the country.
    b. The State shall take appropriate measures to promote the development of well-equipped security services.
    c. The State shall put in place mechanisms to ensure the speedy resolution of armed, chieftaincy, land and other conflicts.
    d. The State shall take appropriate measures to protect and safeguard the national security for posterity; and shall seek cooperation with other states and institutions for the purpose of protecting the wider security of the international community.

104. The Commission recommends that the Constitution should require the National Security Council to develop and operationalise a NSPF to address, among others, the following security concerns that were raised in the submissions:
    a. Treason and subversion;
    b. Ethnic disputes;
    c. Chieftaincy disputes;
    d. Land disputes;
    e. Electoral violence;

f. Migration into Ghana;
g. Technological crime (Internet fraud, telecommunications fraud);
h. Epidemics and pandemics (cholera, Severe Acute Respiratory Syndrome (SARS), etc.);
i. Civil emergencies (floods, earthquakes, etc.);
j. Instability in the West African sub-region;
k. Human trafficking;
l. Activities of itinerant herdsmen (destruction of farms, armed robbery, rape, highway robberies etc.);
m. Economic crimes;
n. The drug menace;
o. Terrorism;
p. Poor governance and the slow pace of providing services in the public sector;
q. Low wages and industrial actions;
r. Proliferation of small arms and light weapons;
s. Transnational organised crime;
t. Importation of unwholesome food, drug, cosmetic products and medical devices into the country;
u. Uncontrolled media operations likely to arouse insurrections;
v. Public and civil disorder;
w. Smuggling and lax security at the country's borders and ports of entry and exit;
x. Clandestine entry to and training of mercenaries in the country;
y. Election-related violence and conflict;
z. Piracy in the country's territorial waters;
aa. Illicit exploitation of natural resources;
bb. Destruction of livelihoods by oil, mining and timber operations;
cc. Environmental degradation; And
dd. Famine.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

105. The Commission recommends that after the constitutional changes have been effected and the NSPF approved, the various constitutive laws of all the security agencies be amended to accord with the Constitution and the NSPF.

ISSUE TWO: COMPOSITION OF THE NATIONAL SECURITY COUNCIL (NSC)

A. DIMENSIONS OF THE ISSUE

106. The peculiar dimensions of this issue are as follows:
a. Should the heads of all major security agencies be members of the NSC?

b. Should the heads of the Narcotics Control Board (NACOB) and the National Peace Council (NPC) be members of the NSC?
c. Should the Constitution limit the ministerial representation on the National Security Council?
d. Should all the Service Chiefs, that is, the Chiefs of Army Staff, Naval Staff and Air Staff be members of the NSC?
e. Should the Constitution provide for a Minister of National Security who should be of Cabinet status and a member of the NSC?
f. Should the Secretary to Cabinet double as the Secretary to the NSC?
g. Should some representatives of the Police Service on the National Security Council be removed?

B. CURRENT STATE OF THE LAW ON THE ISSUE

107. Article 83 of the Constitution and the Security and Intelligence Agencies Act establish the National Security Council (NSC), and provides for its structure, membership and functions. The National Security Council is composed of the President as Chairperson; the Vice President; the Ministers for the time being holding the portfolios of Foreign Affairs, Defence, the Interior, and Finance and such other Ministers as the President may determine; the Chief of Defence Staff and two other members of the Armed Forces; the Inspector-General of Police and two other members of the Police Service, one of whom shall be the Commissioner of Police responsible for Criminal Investigations Department; the Director-General of the Prisons Services; the Directors of External Intelligence, Internal Intelligence, Military Intelligence; the Commissioner of Customs Excise and Preventive Services; and three persons appointed by the President.

C. SUBMISSIONS RECEIVED

108. All the submissions received on this issue called for some change or other to the composition of the NSC. The following are the variants of these submissions:
    a. The NSC should be made up of only ministerial level representation, but should have a technical adjunct which will advise the NSC on policy decisions and monitor the implementation of decisions taken by the NSC. The technical adjunct should be composed of the heads of all the security services.
    b. The NSC should include the heads of all the security agencies, excluding the NACOB and the National Peace Council (NPC). A special variant of this submission was that the NSC should include the heads of all the security agencies, including the NACOB and the National Peace Council (NPC). This is because national security issues are complex and multi-dimensional. Including all the security services in the National Security Council would ensure that the approach to resolving security issues is holistic,

thorough and adequate, since each service will bring to bear its expertise and special knowledge as they relate to the dimensions of the issue. Again, a platform which includes all the heads of the security agencies is critical for information sharing for better intelligence and threat assessment, collaborative action, and the avoidance of operational duplication.

c. A set of submissions called for some specific and minor variations in the composition of the NSC. Some of these were to the effect that the two other members of the Armed Forces, who are additional to the Chief of Defence Staff (CDS) and the other member of the Ghana Police Service, additional to the Inspector General of Police (IGP) and the Commissioner of Police for the CID, should be dropped from the NSC. The main argument in support of this view was that the additional members would not provide any value addition to the NSC. They seem to have been because of the desire of the PNDC to satisfy the junior officers of the Army from which they drew their support. They also argued that for effective command and control, the CDS and the IGP should not be compromised by having persons under their command sit in the NSC with them. A special case was, however, made for the Commissioner of Police for the CID because of the broad remit of that office.
d. Some submissions called for the creation of a portfolio of Minister for National Security who should be of Cabinet status and a member of the NSC. The reason for this proposal is to ensure that the security and intelligence agencies under the Security and Intelligence Agencies Act have a Minister of their own. This way, the Minister for the Interior would be able to concentrate on the agencies traditionally manned by him: the Police, the Prisons, the Fire and Immigration services. Such an arrangement, it is further argued, would enhance the attention given to national security issues.
e. Some submissions were to the effect that the Secretary to Cabinet should double as the Secretary to the NSC, as provided for in the Constitution. Other submissions stressed that the National Security Coordinator should be the Secretary to the NSC. Those in support of the former position argued that the Secretary to Cabinet would thereby be in a position to brief Cabinet on national security issues. Those in favour of the latter position argued that the structure of the National Security and Intelligence Agencies Act makes the National Security Coordinator best suited as Secretary to the NSC. The only reason why this was not done is that the Act post-dated the Constitution. With the creation of the National Security Coordinator's office, the continued secondment of the Secretary to Cabinet to the NSC as Secretary appears to be misplaced. The most eligible person to serve as Secretary to the NSC is the National Security Coordinator whose office is the Secretariat of the NSC. It must also be noted that the Co-ordinator leads the Secretariat in the collation of information and opinions for subsequent transmission to the office of the President and to administer and coordinate the security system.

D. FINDINGS AND OBSERVATIONS

109. The Commission observes that the Committee of Experts which drafted proposals for the 1992 Constitution recommended that the sensitive and specialised functions of the NSC warrant its retention as a separate entity from the Council of State. It further proposed that the Council's membership, as contained in the 1979 Constitution, be enlarged to accommodate a higher representation of the senior officers of the security forces. The Committee listed the membership as follows:
    a. The Minister for Foreign Affairs;
    b. The Minister for Defence;
    c. The Minister for the Interior;
    d. The Minister for Finance;
    e. The Minister for Justice and Attorney-General;
    f. The Minister Responsible for National Security;
    g. The Chief of Defence Staff;
    h. The Army Commander;
    i. The Navy Commander;
    j. The Air Force Commander;
    k. The Most Senior Warrant Officer in the Armed Forces;
    l. The IGP and two of his deputies, one of whom shall be the Commissioner of the CID;
    m. The Director of External Intelligence;
    n. The Director of Internal Intelligence;
    o. The Director of Military Intelligence; and
    p. Three other persons appointed by the President, at least one of whom shall be a woman.

110. The Commission further observes that the general consensus reached by the experts at the National Constitution Review Conference was that the NSC should be composed of the heads of all the various security services; the Service Chiefs of the Army, Navy and Air Force; the head of NACOB, and the head of the National Peace Council. This is in consonance with the recommendations of the Committee of Experts.

111. The Commission finds that it is critical to retain the head of Customs on the NSC:
    a. The Customs Excise and Preventive Service (CEPS) is now the Customs Division of the Ghana Revenue Authority with the coming into force of the Ghana Revenue Authority Act, 2009 (Act 791). The Act subsumes the Internal Revenue Service (IRS), Value Added Tax Service (VAT) and the CEPS under one superintending body, which is the Ghana Revenue Authority. Additionally, under section 30 of the Act on "Repeals, Consequential amendments and Savings", it is provided that, "A reference in any enactment to the Commissioner of ... Customs, Excise and Preventive Service... shall be read as a reference to the Commissioner-General [of the Ghana Revenue Authority]."

This means that the reference to the Commissioner for CEPS in the Constitution would be read as the Commissioner-General of the Ghana Revenue Authority, effectively substituting the latter for the former on the NSC.

b. The Ghana Revenue Authority Act vests the non-revenue national security duties of the CEPS in the Preventive Wing of the CEPS. These duties include border security and management. Before 1986, the Customs and Excise Department (as it was then known) operated alongside the Border Guards at the nation's ports and borders. Whereas Customs personnel manned the approved entry points, the Border Guards were stationed at the unapproved routes to channel smuggled items to the approved entry points for the appropriate taxes to be levied. However, increasing malfeasance in the operations of the Border Guards, coupled with frequent confrontations with Customs officials led to the proscription of the Border Guards in 1986. In the same year, the Customs and Excise Department was restructured into a paramilitary service, the Customs Excise and Preventive Service (CEPS) under PNDCL 144 of 1986. The functions of the erstwhile Border Guards were then transferred to the Preventive Wing of CEPS and it has performed those duties to date.
c. It is not surprising that in the case of *Customs Excise & Preventive Service* v *National Labour Commission & Attorney-General (Public Services Workers Union of TUC Interested Party)*, the Supreme Court decided that CEPS was a security organisation.[1095]
d. It would, therefore, be appropriate to include the head of CEPS, and not the Head of the Ghana Revenue Authority, on the National Security Council. This is because the specialised security function of the CEPS is different from their general revenue function. The head of the Ghana Revenue Authority superintends the latter function and may not be able to report to or advice the NSC satisfactorily on the specialised security function of the CEPS. The best person to do this is the head of CEPS (now called the Customs Division of the Ghana Revenue Authority).
e. Additionally, at the district and regional levels and in accordance with the Security and Intelligence Agencies Act, the most senior Customs officers in the Regions and Districts are members of the Regional and District Security Councils respectively.[1096] It would, therefore, be practically untenable and completely out of synchrony to remove the Head of Customs from the NSC.
f. The President and the NSC should be guaranteed professional customs, border protection, and supply chain security expertise and advice during deliberations on national security issues. The head of Customs is better placed for this function than the Commissioner-General of the Ghana Revenue Authority.

[1095] *Customs Excise & Preventive Service* v. *National Labour Commission & Attorney-General (Public Services Workers Union of TUC Interested Party)* [2009] SCGLR 530.
[1096] Section 8(1)(e) and 6(1)(h) of the Security and Intelligence Agencies Act, 1996 (Act 526).

g. The revenue issues that impinge on National Security can be better handled by the Minister of Finance who is a member of the NSC and there is no value addition in making the Commissioner-General of the Ghana Revenue Authority a member of the NSC.

112. The Commission finds that ministerial representation on the NSC is progressive. This is in line with global processes of democratizing security institution, tilting the balance in favour civilians on National Security Councils. This, for example, has happened in Brazil and Turkey.

113. The Commission finds that the current composition of the NSC which gives greater control for the civilian political administration and includes the heads of the key security institutions is adequate in addressing the security concerns of the country.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

114. The Commission recommends that the Constitution be amended to include all the Service Chiefs of the Armed Forces as members of the NSC.

115. The Commission recommends that the Constitution be amended to make the National Security Coordinator the secretary to the NSC.

116. The Commission recommends that the head of Customs be retained as a member of the NSC to the exclusion of the head of the Ghana Revenue Authority.

ISSUE THREE: APPOINTMENT OF THE CHIEF OF DEFENCE STAFF (CDS), INSPECTOR-GENERAL OF POLICE (IGP), SERVICE CHIEFS OF THE ARMY, NAVY AND AIR FORCE AND HEADS OF THE SECURITY SERVICES.

A. DIMENSIONS OF THE ISSUE

117. The four dimensions of this issue are as follows:
   a. Should the President appoint these officers?
   b. Should Parliament play any role in the appointment of these officers?
   c. Should the rank and file of the security services play any role in the appointment of these officers?

d. Should a mechanism be instituted to allow the officers to rise through the ranks and for the most senior and eligible officer to be appointed to these offices, thus privileging seniority, merit and competence over other considerations?

B. CURRENT STATE OF THE LAW ON THE ISSUE

118. The 1992 Constitution provides for the appointment of all the heads of the security agencies implicated in this issue.
    a. Article 212(1)(a) and (b) provides for the appointment of the Chief of Defence Staff of the Armed Forces as well as the Service Chiefs by the President acting in consultation with the Council of State.
    b. By Article 202(1), the Inspector-General of Police is appointed by the President acting in consultation with the Council of State.
    c. Similarly, Article 207(1) vests the power of appointment the Director-General of the Prisons Service in the President, acting in consultation with the Council of State.
    d. Article 195(1) provides that the power to appoint persons to hold or to act in an office in the public services shall vest in the President, acting in accordance with the advice of the governing council of the service concerned and given in consultation with the Public Services Commission. It is in accordance with this provision that the heads of the National Fire Service, the Customs Division of the Ghana Revenue Authority and the Ghana Immigration Service are appointed.

C. SUBMISSIONS RECEIVED

119. A large number of submissions on this issue advocated that the President should appoint the CDS, IGP, Service Chiefs and heads of the various security services for a number of reasons.
    a. First, these are sensitive offices the holders of which see to the security of the nation and are privy to the most sensitive information in the business of the State. They sit on the National Security Council, which is charged with advising the President on matters of national security. It is critical that the President be allowed to appoint these officers so that they would have undivided loyalty to the President and so that the President is comfortable working with them on sensitive national security matters.
    b. Second, the President is the Chairman of the National Security Council and the Commander-in-Chief of the Ghana Armed Forces. It is, therefore, appropriate for him to have the power to appoint and dismiss the heads of the security service organisations.
    c. Ghana's history is replete with instances where security forces have overthrown governments. It is, therefore, important for the heads of all security agencies to be appointed by the President so that he can put only his trusted agents in charge of those agencies and reduce the likelihood of the security agencies toppling a government.

120. Other submissions urged the Commission to take away the power of the President to appoint the heads of the security agencies in order that they may operate independently and be accountable to the general citizenry. This would ensure that they work to provide broader national security and not just regime security. They also argued that withdrawing the power of the President to appoint the security chiefs would reduce the perception that the heads of those agencies are appointed on the basis of their political inclination, rather than on the basis of their competence. This will also stem the notion that the top hierarchy of the Security Sector is susceptible to governmental influence and control.

121. The Commission acknowledges the small number of submissions asked that the President should nominate Service Chiefs for vetting and subsequent approval by Parliament since such a procedure will provide an avenue for the eligibility and competence of the prospective Service Chiefs to be thoroughly investigated and assessed.

122. An even smaller number of submissions proposed that the CDS, IGP, Service Chiefs and Heads of the various security services should be voted for by the entire rank and file of the particular service. The rationale is to ensure that whoever becomes Service Chief draws broad support from the members of the Force or Service. This will also improve the morale of the security agencies.

123. Other submissions argued that Service Chiefs should rise through the ranks until they reach those positions. This would ensure that competence and seniority are the key determinants of who becomes a Service Chief. This would forestall the rancour, unhealthy rivalry, and discontent that is generated in the top brass of the security agencies when vacancies occur at the helm of these agencies since this leads to the politicization of the top hierarchy of the security sector rendering it susceptible to governmental influence and control.

124. The last set of submissions called for the governing councils of the security agencies to appoint the Directors-General of the security agencies. This is to ensure that they do not owe allegiance to any administration but to the Constitution and the people of Ghana.

D. FINDINGS AND OBSERVATIONS

125. The Commission finds that a large number of submissions called for Service Chiefs to be appointed by the President without the approval of Parliament.

126. The Commission observes that when this issue was discussed at the National Constitution Review Conference, the general consensus was that the President should still retain his powers of appointment of the CDS, IGP, and Service Chiefs of the Army, Navy and Air Force as well as the Directors-General of the various security services in order to guarantee

the allegiance and loyalty of these officers to him as the Commander-in-Chief of the Armed Forces.

127. The Commission also observes that it does not accord with international best practice for members of the disciplined forces and the intelligence and security agencies to vote for their leaders. This is generally thought to be too divisive for a security organisation and disruptive of its special operations.

128. The Commission finally observes that subjecting the heads of the security agencies to Parliamentary vetting and approval may lead to an unwarranted politicization of such sensitive appointments.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

129. The Commission recommends that the *status quo* for appointing the heads of the security services be maintained, and urges that this power of appointment be exercised after very thorough consultations by the appointing power with the various service councils based on the competencies of candidates for the positions.

ISSUE FOUR: MILITARY DISCIPLINE

A. DIMENSIONS OF THE ISSUE

130. There are two main dimensions to this issue. The first is whether the Constitution discriminates against military officers by subjecting them to double jeopardy in respect of crimes they may commit. The second is whether military officers may be detained without trial beyond the constitutionally mandated period of 48 hours.

B. CURRENT STATE OF THE LAW ON THE ISSUE

131. Article 19(7) and (16)(b) of the 1992 Constitution spell out the rule against double jeopardy. The two articles read:
    a. "19 (7) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."
    b. "(16) (b) Nothing in or done under the authority of any law shall be held to be inconsistent with, or in contravention of clause (7) of this article, to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal

offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of the force, except that any court which tries that member and convicts him shall, in sentencing him to any punishment, take into account any punishment imposed on him under that disciplinary law."

132. With respect to the period of pre-trial detention, Article 14(3)(a) and (b) of the 1992 Constitution which relates to the protection of personal liberty provides that, "a person who is arrested, restricted or detained for the purpose of bringing him before a court in execution of an order of a court; or upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within forty-eight hours after the arrest, restriction or detention." Conversely, section 61 of the Armed Forces Act provides that "Where a person triable under the Code is placed under arrest for a service offence and remains in custody for eight days without a summary trial having been held or a court-martial for that person's trial having been ordered to assemble, a report stating the necessity for further delay shall be made by that person's commanding officer to the authority who is empowered to convene a court-martial for the trial of that person, and a similar report shall be forwarded in the same manner every eighth day until a summary trial is held or a court-martial is ordered to assemble."[1097] After 28 days, the person in detention may petition in writing to the President or to a person designated by the President to be freed from custody or for the disposal of the case. In any event, such a person shall be freed after a period of 90 days continuous custody, unless a summary trial is held or a court-martial is ordered to assemble.[1098]

133. It must be noted that the length of time allowed for the detention of military personnel, or a member of the disciplined force before his trial, contrasts sharply with that prescribed by Article 14(3)(b) of the Constitution, which requires that a person be put before court within 48 hours of his arrest or be released.

134. There are conflicting decisions as to the constitutionality or otherwise of the 90-day rule in section 61 of the Armed Forces Act. In the case of *The Republic* v *The Chief of Defence Staff and Attorney-General* (Suit No. AP 44/07) the issue for determination was whether or not the applicant was entitled to be released following an application for a writ of *habeas corpus* to secure the release of persons under military discipline who had been detained. In refusing the application for *habeas corpus*, the high court, ruled that the application of the Armed Forces Act in this regard was an exception to the 48-hour rule in the Constitution. The detainee could always resort to the procedure in that law for impugning delays in trials and not resort to the issue of a writ of *habeas corpus*.

[1097] Code of Service Discipline contained in Parts Two, Three and Seven of the Armed Forces Act, 1962 (Act 105).
[1098] Section 61 of the Armed Forces Act, 1962.

135. Conversely, in the case of *Captain Daniel Nikyi* v *Attorney-General, Minister of Defence and Chief of Staff, Ghana Armed Forces* (Suit No. HRC/6/09), in which the applicant had been charged with 5 offences under the Armed Forces Act as well as the Armed Forces Regulations, the court held that the maximum period a person under military discipline may remain in custody without trial is 48 hours. In arriving at this decision, the Human Rights Division of the High Court, noted that Article 12(1) of the 1992 Constitution makes it categorically clear that the fundamental human rights and freedoms enshrined in the Constitution shall not be interfered with in any manner and shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, the military not exempted. He ruled that Section 61 of Act 105 was inconsistent with the Constitution, especially Article 14(1) and (3)(b), in that it permitted the military authorities to detain a service person suspected of having committed an offence for up to 90 days without trial. Section 61 of Act 105 was therefore void.

C. SUBMISSIONS RECEIVED

136. Submissions received on this issue are in two major categories. The first set of submissions argued that the exception to the rule against double jeopardy in the case of persons subject to military discipline is discriminatory and should be amended.

137. Other submissions argued for the retention of the current constitutional regime. This is because the rules relating to double jeopardy, as they currently apply to the military, are not discriminatory. There is a marked distinction between a 'criminal offence' and a 'disciplinary offence' or a 'service offence' and this distinction is clear in the constitutional provisions that some would want changed. It is inappropriate to argue that a person who is tried for a limited "disciplinary offence" or "service offence" and given a limited penalty in the exigencies of war time, for example, should be completely absolved of the broader implications of his actions when he comes to be tried in a civilian court, merely because of the previous proceedings. Again, the Constitution requires any civil court which tries him, to take into account any punishment imposed on him under that disciplinary law in sentencing him to any punishment. This ensures that the rule against double jeopardy is observed in the case of persons subject to military discipline.

138. On the second dimension of the issue, some submissions proposed that members subject to military discipline should not be exempted from the 48-hour rule for the release of a person restricted or detained without the order of a court. Anything else would be discriminatory, as the Constitution does not allow any such exception.

139. Other submissions argued for the retention of the practice of detaining persons subject to military discipline for up to 90 days. This is because the circumstances, with regard to time

and place, surrounding the commission of criminal and service offences by persons subject to military discipline, do not always allow the easy application of the 48-hour rule. Additionally, there are procedures in the Armed Forces Act and Regulations for reviewing the case of the detainee. In any case, the detention may not exceed 90 days.

D. FINDINGS AND OBSERVATIONS

140. The Commission observes that the general consensus reached at the National Constitution Review Conference was that the entrenched provisions on double jeopardy as they relate to persons subject to military discipline be retained in the Constitution as there are differences between a criminal offence, on the one hand, and a service or a disciplinary offence on the other. The exception lies in a situation where the offence is both a service offence and a criminal offence, in which case the proceedings will additionally take place in the regular courts. An understanding of the differences between 'criminal' offences and 'service' or 'disciplinary' offences establishes that the current provisions of the Constitution are not contradictory.

141. The Commission also observes that the National Constitution Review Conference did not arrive at any agreement on the dimension of the issue relating to the application of the 48-hour rule to persons under military discipline. After examining the practice in relation to the rule in a number of jurisdictions, there was a near consensus that the 90-day rule on the detention and restriction of an officer or soldier arrested for committing a criminal or service offence be retained. The key consideration for this stance was the finding that the Uniform Code of Military Justice in the United States stipulates a maximum of 120 days of detention.

142. The Commission also finds that there are two conflicting decisions on whether or not the 90-day rule in the Armed Forces laws contradicts the 48-hour rule in the Constitution. The decision to the effect that the 90-day rule is not inconsistent with the Constitution appears to be based on a misreading of the Constitution. The Constitution does not provide for an exception to the rule based on military discipline.

143. The Commission observes that it is critical that there should absolutely be no claw backs on the provisions of the Constitution on fundamental human rights beyond those provided for by the Constitution itself. Various agencies of state and individuals must devise and adopt innovative procedures that at once ensure fidelity to the Constitution and meet their institutional and individual needs.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

144. The Commission recommends that the provisions on double jeopardy in Article 19 of the Constitution be retained.

145. The Commission also recommends that the 48-hour rule should continue to apply in respect of service offences. (*This Rule is recommended in Paragraph 96 under Chapter 13 on Human Rights of this report to be changed to a 24-hour rule for all other offences*).

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

146. The Commission also recommends that the 90-day rule for the detention of persons subject to military discipline, contained in section 61 of the Armed Forces Act, be repealed as being inconsistent with the 48-hour rule in, Article 14(3) of the Constitution.

CHAPTER TWELVE - LANDS AND NATURAL RESOURCES

12.1 INTRODUCTION

1. This chapter of the Report focuses on lands and natural resources. It covers lands, minerals, forestry, wildlife and biodiversity, fisheries, water resources, and oil and gas.

2. Like many African countries, Ghana is very rich in natural resources. Apart from lands and territorial waters, Ghana is a major mineral producer in Africa, producing gold, bauxite, diamonds, manganese, and iron ore. There are also deposits of tin, titanium and impure graphite. Sporadic occurrences of lead, copper, molybdenum, tungsten, niobium, barytes and asbestos are known. The presence of uranium, cassiterite, platinum, molybdenite and tantalite has also been reported.[1099] Additionally, Ghana has significant forest and wildlife resources, water resources and recently struck oil and gas.

3. Ghana's legal framework on lands and natural resources is contained in the Constitution, different pieces of legislation, and administrative practices.

12.2. HISTORICAL BACKGROUND

12.2.1 LANDS

PRE-COLONIAL ERA

4. The period before 1874 may be described as covering the period of pre-colonial Ghana. This was the year in which British administration in Ghana was established. Pre-colonial Ghana had a mainly agrarian economy. With highly centralised states, where unique traditional political structures were in place, land and its ownership, provided a strong unifying force for the organisation and the existence of the people as a distinct group. Land in these areas, was considered as belonging to the entire community. In centralised states such as Asante, Akyem, and Dagbon the tenure system was based on chiefdom. The chief with recognised elders who exercised juridical authority also exercised proprietary authority on behalf of the entire community. Land thus provided a strong force for political and social cohesion. Due to geographical differences, the rainforest belt of the country witnessed gradual migration of farmers from less endowed areas to the cocoa growing areas especially in the Eastern, Ashanti, and Western Regions. The growth in the cocoa, mining and timber industries brought in its wake a new economy which affected land tenure. Migrant farmers started

[1099] Acquah, Peter Claver (1995); *Natural Resources Management and Sustainable Development, the Case of the Gold Sector in Ghana* (a report prepared for the UNCTAD (UNCTAD/COM/41, 15th August 1995) *available at* http://www.unctad.org/en/docs/pocomd41.en.pdf.

acquiring lands on share-cropping land tenure systems for farming. Others acquired large tracts of land through outright purchase (alienation holding), usually organised through group purchase. In the case of the mining and the timber industries, large acres of land were alienated on concession with the payment of annual rent and royalties.[1100]

5. In pre-colonial times, therefore, land was almost as important as life. Lands were vested in Stools, Skins and families. Occupants of the Stools and Skins usually held the allodial titles, but gave certain interests, especially usufructuary interests, to their subjects to enable the subjects farm the land for their sustenance.[1101] Case law authorities have been divided on the issue of whether individuals could also hold allodial interests in land.[1102] This is now statutorily possible.[1103]

COLONIAL ERA

6. The colonial period lasted from 1821 to 1957. Land policies were mainly related to expropriation (with compensation) and appropriation (without compensation) of land.[1104]

7. In 1843, two enactments, namely the British Settlement Act and the Foreign Jurisdiction Act, were passed formalising to a significant extent British rule in the Gold Coast. Between 1894 and 1900, the Colonial Government attempted to deal with the then increasing problems relating to the indiscriminate granting of land concessions to expatriates, by vesting all waste lands, forests and minerals in the Crown.[1105] Lands in the then Northern Territories were vested in the Crown under the Administration (Northern Territories) Ordinance 1902, and the Land and Native Rights Ordinance.[1106] In the south, the traditional land tenure system continued. The introduction of the Public Lands Bill of 1897 was so fiercely resisted by the Aborigines Rights Protection Society that it was withdrawn.[1107]

[1100] Ministry of Lands and Forestry, *Ghana Emerging Land Tenure Issues* (Accra, 22 August 2003) http://www.cilss.bf/actu/praia/Ghana.pdf, (last visited Aug. 14, 2011).
[1101] *Atta Panyin and Another* v. *Asani II* [1961] GLR 305.
[1102] GORDON R WOODMAN, CUSTOMARY LAND LAW IN THE GHANAIAN COURTS 60 – 66 (Accra, Ghana Universities Press, ,); B.J. DA ROCHA, And C.H.K. LODOH, (1999) GHANA LAND LAW AND CONVEYANCING 12-13 (Accra, DR & L Printing and Publishing Services, 2nd Edition, 1996); NII ARMAH JOSIAH-ARYEH, THE PROPERTY LAW OF GHANA, 57 (Accra, Sakumo Publishers, 2005).
[1103] Section 19 of the Land Title Registration Act, 1986 (PNDCL 152).
[1104] Ministry of Lands and Forestry, Ghana *Emerging Land Tenure Issues* (Accra, 22 August 2003) available at http://www.cilss.bf/actu/praia/Ghana.pdf (last visited on Sunday, August 14, 2011).
[1105] D.E.K. AMENUMEY; GHANA, A CONCISE HISTORY FROM PRE-COLONIAL TIMES TO THE 20TH CENTURY 153-161 (Accra, Woeli Publishing Services, 2008,); F.K BUAH. A HISTORY OF GHANA (REVISED AND UPDATED) at 92-94 (Macmillan Publishers Ltd, 1998, 1980).
[1106] Administration (Northern Territories) Ordinance 1902, Cap 111(1951) Rev; Land and Native Rights Ordinance No 1 of 1927.
[1107] NII ARMAH JOSIAH-ARYEH, THE PROPERTY LAW OF GHANA, 201 (Accra, Sakumo Publishers, 2005).

POST-COLONIAL ERA

8. The 1957 Independence Constitution only defined regional boundaries under Section 33 and guaranteed property rights under Section 34. The 1960 Constitution also described the territories of Ghana and the Regions of Ghana in its Articles 5 and 6 respectively and nothing more. Property rights under Article 13 were only part of the fundamental principles solemnly declared by the President on assumption of office, and were held to be unenforceable in the courts of law.

9. Although both the 1957 Independence Constitution and the 1960 Constitution were not by themselves explicit on lands and natural resources, during their operations, a lot of changes were made in land administration in Ghana through legislation. For instance, the State Property and Contracts Act, transferred all State properties vested in the Governor-General to the President and made him the sole authority capable of acquiring land compulsorily in the country.[1108] This function was later regulated under the more elaborate State Lands Act, under which the President could exercise the power of eminent domain subject to related compensation processes.[1109]

10. The rampant political agitations in the south of the country led to the passage of the Ashanti Stool Lands Act and the Akim Abuakwa (Stool Revenue) Act.[1110] By these laws, the lands under these two Stools were vested in the President. By this arrangement, the legal interest in the land went to the Government while the beneficiary interest went to the community. In the North, the Administration of Lands Act of 1962 with Consequential Executive Instruments 87 and 109 of 11*th* July 1963, vested all Northern lands in the President. [1111]

11. The vesting of lands in the President was subsequently extended to cover the rest of the country by the Stool Lands (Validation of Legislation) Act, the Stool Lands Act and the Administration of Lands Act.[1112] Public and vested lands country-wide became State property, subject to administration by the Government's land machinery – the erstwhile Lands Department which was the forerunner of the Lands Commission. The Lands Department also processed and executed deeds in respect of land, mineral and timber concessions on behalf of Government. Under the existing land administration regime:

    "Large tracts of land were acquired for State farms and factories without compensation paid to farmers who were cultivating in the respective areas. Although protests were often

[1108] State Property and Contracts Act, 1960 (CA 6).
[1109] State Lands Act, 1960 (Act 27).
[1110] Stool Lands Act 1958 (No. 28) ; Akim Abuakwa (Stool Revenue) Act, 1958 (No.78).
[1111] Administration of Lands Act, 1962 (Act 123); Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana-Building on Tradition and Modernity* International Institute for Environment and Development, IIED, London. (February 2001). (July 28, 2011, 9: 15 AM) http://pubs.iied.org/pdfs/9002IIED.pdf.
[1112] Stool Lands (Validation of Legislation) Act of 1959, (No. 30); the Stool Lands Act, 1960 (Act 27) and the Administration of Lands Act, 1962 (Act 123).

made by farmers to the District Commissioner, political pressure was used to let farmers abandon the fight to regain their land. In a number of instances they were employed to work on the State Farms Corporation as compensation." [1113]

12. The first comprehensive constitutional attempt at specifically addressing the issue of Lands was in the 1969 Constitution comprising.[1114] These provisions addressed the issue of the vesting of public lands in the President on behalf of, and in trust for the people of Ghana, the establishment of the Lands Commission to hold and manage lands and minerals vested in the President, and the vesting of stool lands in the appropriate stools or skins on behalf of, and in trust for, the subjects of stool or skins in accordance with customary law and usage. The vesting of other natural resources such as minerals, forests and national parks were subsumed under the heading 'Lands'.[1115] Article 18 of the 1969 Constitution also provided for the right to property. This provision generally proscribed expropriation of property. Conditions that triggered expropriation under that Law included, in the interests of defence, public safety, public order, public morality, and public health, and for town and country planning and public benefit. The payment of adequate compensation was also a condition for expropriation.

13. The 1979 Constitution contained provisions similar to those of Chapter 17 of the 1969 Constitution. However, the 1979 Constitution introduced, for, the first time, provisions on natural resources commissions.[1116] The 1979 Constitution also provided for the establishment of the Office of the Administrator of Stool Lands to be responsible for the establishment of a stool lands account, and the collection and disbursement of stool land revenue.[1117] The provisions of the 1979 Constitution informed the consideration of the Committee of Experts' Proposals for the 1992 Draft Constitution for Ghana.

14. Of all the military regimes Ghana has had, it was the Provisional National Defence Council (PNDC) that impacted heavily on the administration of lands in the country. Section 36 of PNDCL 42 provided for the establishment of a Lands Commission.[1118] The previous Lands Department remained as the secretariat of the Lands Commission. In the mid-1980s the Lands Department was formally transformed into the Lands Commission Secretariat. The Executive Secretary of the Commission was appointed by the Council. PNDCL 42 also established an Administrator of Stool Lands in the Secretariat of the Lands Commission with

[1113] Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana-Building on Tradition and Modernity* International Institute for Environment and Development, IIED, London. (February 2001). (July 28, 2011, 9: 15 AM) http://pubs.iied.org/pdfs/9002IIED.pdf.
[1114] Chapter 17 comprising Articles 162, 163 and 164 of the 1969 Constitution of the Republic of Ghana.
[1115] Article 163(5) of the 1969 Constitution of the Republic of Ghana.
[1116] Chapter 21 of the 1979 Constitution of the Republic of Ghana.
[1117] Article 190(2) and 191 of the 1979 Constitution of the Republic of Ghana.
[1118] Provisional National Defence Council (Establishment and Consequential Matters Amendment) Law, 1982 (PNDCL 42).

the following responsibilities: (a) Establishment of a land account for each stool into which all revenues are paid; (b) Management of all existing funds held on account of stools by the Government; (c) Collection of rents, dues, royalties, revenues or other payments to stools and to account for them to the statutorily specified beneficiaries.[1119]

12.2.2. MINERAL RESOURCES

PRE-COLONIAL ERA

15. Ghana's pre-colonial indigenous economy was based on four main activities namely; agriculture, hunting and fishing, and a variety of manufacturing and trade.[1120] In the specific context of minerals and mining, the foremost resource was gold. Historians have reported that gold was mined prior to the first contact of the indigenous people of the Gold Coast with Europeans in the fifteenth century. Indeed, the christening of the country as 'Gold Coast' prior to independence was indicative of this fact. The mining of gold generated the related goldsmith industry. Various pieces of gold jewellery such as chains, trinkets or bracelets were worn by the people. Gold was panned in or near rivers and streams.[1121] This means that the regulation of the mining of gold and other minerals was a subject of customary law.

COLONIAL ERA

16. The focus of mineral policy in Ghana over the past century has been on the mining of gold, diamonds, bauxite and manganese for export. With the advent of colonial rule, a more capital intensive and large-scale form of mining was introduced by British mining interests. The British were, however, selective in the mining of minerals. For instance, whereas the mining of gold by the British merchants dated as far back as the 19th century, other minerals like bauxite were not developed because of the absence of British industrial demand and the presence of alternative sources in other colonies like Jamaica.[1122] With colonialism came the introduction of a colonial policy on minerals and mining. The colonial mineral policy was a five-pronged strategy, involving (1) establishing a legal and administrative framework to facilitate such mineral operations; (2) ensuring the security of tenure for grantees of mineral rights; (3) helping to manage problems which arose in relations between mining companies

[1119] Section 48 of the Provisional National Defence Council (Establishment and Consequential Matters Amendment) Law, 1982 (PNDCL 42); Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana-Building on Tradition and Modernity* International Institute for Environment and Development, IIED, London. (February 2001). (July 28, 2011, 9: 15 AM) http://pubs.iied.org/pdfs/9002IIED.pdf.
[1120] F.K BUAH, A HISTORY OF GHANA (REVISED AND UPDATED) 56-64 (Macmillan Publishers Ltd, 1998, 1980).
[1121] D.E.K. AMENUMEY, GHANA, A CONCISE HISTORY FROM PRE-COLONIAL TIMES TO THE 20TH CENTURY 85-87 (Accra, Woeli Publishing Services, 2008).
[1122] D.E.K. AMENUMEY, GHANA, A CONCISE HISTORY FROM PRE-COLONIAL TIMES TO THE 20TH CENTURY 85-87 (Accra, Woeli Publishing Services, 2008).

and representatives and members of the local communities; (4) obtaining revenue for Government through the levying of duties and income taxes; and (5) contributing to the self-sufficiency of the British Empire.[1123]

POST-COLONIAL ERA

17. Shortly after independence a Commission of Inquiry was set up by the first government to inquire into the terms under which mineral and timber rights were held. The Commission was also to inquire into the existence of unexploited concessions and ascertain when the concessionaires proposed to begin work. The Commission recommended among others, that the Government take over mineral rights from the landowning communities on whose behalf grants had hitherto been made by their chiefs and other local leaders.

18. Following the recommendations of the Commission of Inquiry, a series of legislation was enacted relating to lands and minerals. One of these was, the Minerals Act of 1962.[1124] Section 1 of the Minerals Act vested all minerals in "the President on behalf of the Republic and in trust for the People of Ghana." The Act also gave the President the power to demand the sale, to a State agency, of minerals produced in Ghana at a negotiated price determined by the High Court. The Concessions Act of 1962 provided for the establishment of a tribunal and empowered the Minister, assigned by the President with such responsibility, to apply to the tribunal to determine a concession in respect of which the holder unreasonably refuses to vary a term of the concession which has "become oppressive by reason of a change in economic conditions."[1125]

19. The Minerals Act of 1962 and the Administration of Lands Act of 1962 conferred substantial powers on the Executive to decide upon the use and management of land and mineral resources.[1126] Most large-scale mineral operations took place on stool lands. Meanwhile, a State Mining Corporation had been established prior to the enactment of these laws in 1961. This Corporation acquired five gold mines from British companies who wanted to dispose of their operations. The Government also took over the operation of diamonds. Hence, the State Gold Mining Corporation (SGMC) and the State Diamond Mining Corporation (SDMC) were organised to manage the operations of gold and diamonds respectively. In 1963, the Ghana Diamond Marketing Board (later renamed the Diamond Marketing Corporation) was also established as a statutory corporation. [1127]

[1123] Fui S Tsikata, *The Vicissitudes of Mineral Policy in Ghana* vol. 23, Issues 1-2, Resources Policy 9-14 (June 1997).
[1124] Minerals Act, 1962 (Act 126).
[1125] The Concessions Act, 1962 (Act 124); Fui S Tsikata, *The Vicissitudes of Mineral Policy in Ghana* vol. 23, Issues 1-2, Resources Policy 9-14 (June 1997).
[1126] The Minerals Act of 1962 (Act 126); Administration of Lands Act of 1962 (Act 123).
[1127] The Concessions Act, 1962 (Act 124); Fui S Tsikata, *The Vicissitudes of Mineral Policy in Ghana* vol. 23, Issues 1-2, Resources Policy 9-14 (June 1997).

20. Large scale commercial mining of bauxite ore, the refining of bauxite to produce alumina, the smelting of the alumina to produce aluminium metal and the fabrication of aluminium metal into finished and semi-finished products only became possible after the Volta Aluminium Company (VALCO) was established in 1960.[1128] VALCO's establishment was tied to the establishment of the hydroelectric dam at Akosombo.

21. The foregoing depicts the policy situation in the country until the introduction of the Economic Recovery Program (ERP) by the PNDC in 1983. Prior to the ERP, the 1962 enactments, the SGMC and the Diamond Marketing Board had been retained in spite of the previous changes in government but the fiscal measures introduced by the Minerals Act of 1962 and the Administration of Lands Act of 1962 had been repealed. Mineral duties were increased by the Mineral Duty (Amendment) Act of 1971 (Act 374). In 1972, the Government acquired 20% shares in the then Ashanti Goldfields Corporation (AGC) from the British company Lonrho, which had owned 100% shares since 1969 in exchange for the grant of a 50-year lease of land.[1129]

12.2.3. FORESTRY, INCLUDING WILDLIFE AND BIODIVERSITY

PRE-COLONIAL ERA AND COLONIAL ERA

22. The pre-colonial history of Ghana's forestry is very similar to that of its land which is discussed above. By the second half of the nineteenth century, British administration had gained a firm root – at least on the Gold coast. The colonial administration employed selective policy instruments for land resource management, rather than developing an overall policy framework. There were no policies relating to re-afforestation and replanting.

23. The history of colonial forest policies and resource management in Ghana dates back to 1906 when legislation was enacted to control the felling of commercial tree species and the creation of the Forestry Department in 1908. The demarcation and reservation of the forest estate was largely completed by 1939 and a forest policy was adopted in 1948. From that point, a consistent policy of selection, demarcation, reservation, protection of water supplies, maintenance of favourable conditions for cultivation of agricultural crops and the promotion of research and public education have been vigorously pursued. However, most of the early

[1128] F.S. Tsikata, and Kofi Ansah, *Legal Fiction Versus Business Substance-Valco-Kaiser Relations* in Tsikata (Ed) Essays from the Ghana-Valco Renegotiations (1982-85) 51 (1986).
[1129] F.S. Tsikata, and Kofi Ansah, *Legal Fiction Versus Business Substance-Valco-Kaiser Relations* in Tsikata (Ed) Essays from the Ghana-Valco Renegotiations (1982-85) 51 (1986); A.A TAYLOR,SAM JONAH AND THE MAKING OF ASHANTI 86-87 (Accra Ghana, Sub-Saharan Publishers, &, Johannesburg, South Africa Pan Macmillan, 2006).

forest policies mainly emphasised a sustained supply of timber for the wood industry and promoted over-exploitation. This led to the eventual demise of unreserved forests.

POST-COLONIAL ERA

24. Flowing from the above, Ghana has had a long history of mismanagement of forest resources so that more than 90% of Ghana's forests have been logged since the 1940s. A number of policies and attempted remedies have been initiated by successive governments. These have included the Forestry Commission Act of 1960, which established the Forestry Commission as an implementing agency; the Forest Improvement Fund Act of 1960, which provided a fund for the development of forestry; the Concessions Act of 1962 (Act 124), which provided the general legal framework for transactions relating to concessions; the Forest Ordinance for the Protection of Forests including Reserves of 1972; the Trees and Timber (Chain-saw Operation) Regulation of 1983; the Administration of Land (Amendment) Decree of 1984; the Forest Products Inspection Bureau Law of 1985; the Forest Protection (Amendment) Law of 1986; the Control and Prevention of Bushfires Law of 1990 and the Trees and Timber (Chain-saw Operation) Regulation of 1991 as guides for forests resources management in the country.[1130]

25. Ghana is rich in biodiversity. The country boasts a wide variety of birds, including migratory birds, reptiles and animals with unique habitats; a wide range of plants and flowers also abound in the country. A large number of plant and animal species are believed to be rare. There are also major tourist attractions in the country and many other important national heritage sites located in forest and wildlife reserves in the Country.[1131]

12.2.4. WATER RESOURCES

PRE-COLONIAL ERA

26. Water laws in pre-colonial Ghana regulated water conservation, pollution control, and the protection of catchments and of fisheries. There were rules that prohibited people from farming close to river banks which were considered the abode of river gods; and prohibitions that regulated human activities in and around certain sacred forests and groves that protected

[1130] Trees and Timber (Chain-saw Operations) Regulation, 1991 (LI 1518); Boon, Emmanuel et al; *An Assessment of Forest Resources Policy and Management in Ghana* (paper presented at the 'IAIA09 Conference Proceedings', Impact Assessment and Human Well-Being 29th Annual Conference of the International Association for Impact Assessment,16-22 May 2009, Accra International Conference Center, Accra, Ghana. (Aug 12, 2011, 8: 12 AM) http://www.iaia.org/iaia09ghana/documents/cs/CS2-2_Boon_etal_An_Assessment_of_Forest.pdf.

[1131] Tamakloe Wilson, *State Of Ghana's Environment – Challenges Of Compliance And Enforcement,* (Aug 12, 2011, 8: 12 AM), http://www.inece.org/indicators/proceedings/04h_ghana.pdf.

water resources. These resources in pre-colonial Ghana were vested in stools and skins.[1132] Water laws were enforced by the dictates of the chiefs and the fetish and land priests.

COLONIAL ERA

27. The British Government introduced written laws to exercise control over water in the 1900s. The first attempt at this was the enactment of the Rivers Ordinance[1133] which made it unlawful to pump, divert or by any means cause water to flow from any river, for purposes of irrigation, mines or factories or to generate power, without a license from the Minister responsible for this sector. Parts I and II of the Rivers Ordinance have since been repealed by the Water Resources Commission Act.[1134] Part III of the Ordinance is, however, still operative relating to the provisions on 'licensing for dredging, steam vessels and the power to issue regulations to protect and improve navigability, fishing, timber, mining, etc.[1135] The Ordinance did not have any regulations to make it operational and was overtaken in time by other enactments. These subsequent enactments were agent specific, empowering specific agencies to perform specific functions relating to water and its uses. These enactments included the Forestry Ordinance of 1927[1136] which provided for catchment protection and control of water abstraction in forest reserves. Another law was the Land Planning and Soil Conservation Ordinance of 1953[1137] which contained sections for checking soil erosion and for the control of watercourses. The Public Works Department was also established by the Colonial Government in 1928 for the implementation of access to water in both urban and rural areas.[1138]

POST-COLONIAL ERA

28. The immediate post-independence era was characterised by the establishment of agencies for the regulation of water resources. In 1957, the Meteorological Services Department (MSD) was established for the management of atmospheric water resources assessment. A Water Supply Division of the Public Works Department (PWD) was established in 1958 to manage drinking water supply in both urban and rural areas. The Volta River Authority was established under the Volta River Authority Act of 1961 for the supply of electricity to

[1132] G. A Sarpong, *Customary Water Laws and Practices: Ghana* (Aug 11, 2011, 10: 18 AM) http://www.fao.org/Legal/advserv/FAOIUCNcs/Ghana.pdf.
[1133] Rivers Ordinance, 1903 (Cap 226).
[1134] Water Resources Commission Act, 1996 (Act 522).
[1135] Opoku-Ankomah Y., Dembele Y. & Ampomah, B. Y., *Hydro-political assessment of water governance from the top-down and review of literature on local level institutions and practices in the Volta Basin*, Colombo, Sri Lanka: International Water Management Institute (IWMI Working Paper 111) (2006).
[1136] Forest Ordinance, 1927 (cap 157).
[1137] Land Planning and Soil Conservation Ordinance, 1953 (No. 32).
[1138] Joseph B Agyenim, and Joyeeta Gupta, ; *The Evolution of Ghana's Water Law and Policy* Review of European Community & International Environmental Law (RECIEL) 19(3) (2010).

industrial, commercial and domestic consumers.[1139] In 1965, the Water Supply Division of the PWD was transformed into the Ghana Water and Sewerage Corporation under the Ghana Water and Sewerage Corporation Act of 1965.[1140] Four years later in 1969 a water resources research was carried out under a National Liberation Council Decree.[1141] In that same year, the Institute of Aquatic Biology was established.[1142] In 1970, the Volta Lake Transport Company was registered under the Companies Act of 1963 to operate transport services on the Volta Lake.[1143] The Irrigation Development Authority was also set up for the development and management of irrigated agriculture in 1977 under the Irrigation Development Authority Decree of the Supreme Military Council.[1144] This was followed up with the Irrigation Development Authority Regulations of 1987.[1145]

29. In very recent times, the Water Resources Commission Act, 1996 has established the Water Resources Commission for the coordination of water management.[1146] In 1996, the Public Utilities Regulatory Commission (PURC) was established under the Public Utilities Regulatory Commission Act, 1996 (Act 538) for the regulation of standards of utility services and tariff setting by the Ghana Water Company Limited and other utility companies. Last but not least, the Community Water and Sanitation Agency was established for rural water delivery and management under the Community Water and Sanitation Agency Act of 1998.[1147]

12.2.5. FISHERIES

PRE-COLONIAL ERA

30. In pre-colonial Ghana, fisheries activities were regulated in much the same way as water resources. Thus, traditional systems and customary laws were the main feature of the legal framework for fisheries. The country can boast of a long history of artisanal fishing, dating as far back as the seventeenth and eighteenth centuries. The nineteenth century witnessed the emergence of commercial fishing in Ghana and by the early twentieth century, Ghanaian fishing companies had established presence within the West African sub-region from Senegal to Nigeria.[1148]

[1139] Volta River Authority Act, 1961 (Act 46).
[1140] Ghana Water and Sewerage Corporation Act, 1965 (Act 310).
[1141] National Liberation Council, Sewerage Corporation Act, 1965 (Amendment) Decree, 1969 (NLCD 391).
[1142] Council for Scientific and Industrial Research Decree, 1968 (N.L.C.D. 293).
[1143] Companies Act,1963 (Act 179).
[1144] Irrigation Development Authority Decree of the Supreme Military Council. (SMCD 85)
[1145] Irrigation Development Authority Regulations of 1987 (L.I. 1350).
[1146] Water Resources Commission Act, 1996 (Act 522).
[1147]Community Water and Sanitation Agency Act, 1998 (Act 564); Joseph B Agyenim, and Joyeeta Gupta, *The Evolution of Ghana's Water Law and Policy* 19(3) Review of European Community & International Environmental Law (RECIEL) 2010.
[1148] John Atta-Mills, et al *The Decline of a Regional Fishing Nation: the Case of Ghana and West Africa*, 28 Natural Resources Forum 13-21 (2004).

COLONIAL ERA

31. The colonial period witnessed the involvement of the colonial government in the fisheries sector. The colonial government adopted a free-for-all attitude towards the regulation of the fisheries industry and so the prevailing legal framework did not expressly deal with the fisheries industry. There were, however, pieces of legislation that touched on water use and its management. Among these were the Rivers Ordinance, 1903, the Forests Ordinance, 1949 and the Mosquitoes Ordinance, 1951.[1149] These dealt with the fishing industry only tangentially to the extent that by regulating water uses, fishing was also regulated.

POST-COLONIAL ERA

32. During the First Republic, the State Fishing Corporation was established in 1961 to provide loans to national entrepreneurs. In the end, at least 4 companies were started in the fishing industry in the early 1960s. However, there was mismanagement of these investments leading to the loss of large sums of money by the State.[1150]

33. Other developments in the fisheries sector after independence include the passage by the Government of the National Redemption Council (NRC) Fisheries Decree in 1972;[1151] the Fisheries (Amendment) Regulations in 1977 to amend the Fisheries Regulations, 1964. In 1979, the Government of the Armed Forces Revolutionary Council (AFRC) also promulgated the Fisheries Decree, 1979 and the Fisheries Regulations, 1979.

34. In 1991, the Government of the PNDC promulgated the Fisheries Law, 1991 (PNDCL 256) to repeal the AFRCD 30 whilst saving the Fishing Boats (Certificate of Competency as Skipper and Second Class Engineers) Regulations, 1972 (L.I. 770) and the Fishing Boats (Certificate of Competency First Class and Second Class Engineers) Regulations, 1974 (L.I. 988). In 1993, the Fisheries Commission Act, 1993 (Act 457) was passed to replace Fisheries Law, 1991.[1152]

35. In 2002, yet another Fisheries Act was enacted to consolidate with amendments all the foregoing laws on fisheries; to provide for the regulation and management of fisheries; to

[1149] Rivers Ordinance, 1903 (Cap. 226); the Forests Ordinance, 1949 (Cap. 157); Mosquitoes Ordinance, 1951 (Cap. 157 Rev).
[1150] John Atta-Mills, et al *The Decline of a Regional Fishing Nation: the Case of Ghana and West Africa,* 28 Natural Resources Forum 13-21 (2004).
[1151] National Redemption Council (NRC) Fisheries Decree, 1972 (N.R.C.D. 87); Fisheries (Amendment) Regulations 1977 (L.I. 1106); Fisheries Decree, 1979 (A.F.R.C.D. 30); Fisheries Regulations, 1979 (L.I. 1235).
[1152] Fisheries Law, 1991 (PNDCL 256); Fishing Boats (Certificate of Competency as Skipper and Second Class Engineers) Regulations, 1972 (L.I. 770); Fishing Boats (Certificate of Competency First Class and Second Class Engineers) Regulations, 1974 (L.I. 988).

provide for the development of the fishing industry and the sustainable exploitation of fishery resources and to provide for connected matters. [1153]

36. In addition to the Fisheries Act and Regulations, many other enactments affecting the fisheries industry exist. These include: the Wild Animals Preservation Act; the Volta River Development Act; the Ghana Water and Sewerage Corporation Act; the Oil in Navigable Waters Act; the Irrigation Development Authority Decree; the Minerals and Mining Law 1986; the Environmental Protection Agency Act; the Ghana Highway Authority Act; the Timber Resources Management Act; and the Minerals and Mining Act.[1154]

12.3 THE REGULATION OF LANDS AND NATURAL RESOURCES UNDER THE 1992 CONSTITUTION

37. The territories of Ghana, including its landmass, territorial seas and airspace, are defined under Chapter 4 of the Constitution. The Constitution devotes the whole of Chapter 21 to matters of lands and natural resources. These constitutional provisions generally define public lands and other lands; provide for the management of public lands by the Lands Commission; restrict the ownership of land by non-Ghanaians; provide for the vesting of Stool and Skin lands and property in the appropriate Stools or Skins on behalf of, and in trust for, the subjects of the stool in accordance with Customary Law and usage; and provides for the management of Stool and Skin lands and property jointly, by the Lands Commission and the Office of the Administrator of Stool Land. They also provide for the protection of other natural resources through parliamentary oversight of contracts involving natural resources and the establishment of natural resources commissions. Conspicuously missing are explicit constitutional provisions on the nascent oil and gas industry.

38. Under Article 257(6) every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for, the people of Ghana. This omnibus constitutional provision is replicated in Section 1 of the Minerals and Mining Act, 2006 (Act 703). It is specifically customised to petroleum existing in its natural state under Section 1 of the Petroleum (Exploration and Production) Act, 1984 (PNDCL 84).

[1153] Fisheries Act , 2002 (Act 625).

[1154] The Wild Animals Preservation Act, 1961 (Act 43); The Volta River Development Act, 1961 (Act 46); The Ghana Water and Sewerage Corporation Act, 1965 (Act 310) The Oil in Navigable Waters Act, 1964 (Act 235); The Irrigation Development Authority Decree, 1977 (SMCD 85); The Minerals and Mining Law 1986 (PNDCL 153); The Environmental Protection Agency Act, 1994 (Act 490); The Ghana Highway Authority Act, 1997 (Act 540); The Timber Resources Management Act, 1998 (Act 547); and The Minerals and Mining Act, 2006 (Act 703).

39. With the endowment of rich natural resources, Ghanaians have adopted for themselves a constitutional framework to regulate the exploitation of the resources. This framework includes the provision for the establishment of a number of commissions and institutions including a Lands Commission, an Office of the Administrator of Stools Lands, a Minerals Commission, a Forestry Commission, a Fisheries Commission and such other commissions as the Parliament of Ghana may determine, to be responsible for the regulation and management of the utilisation of the natural resources concerned and the coordination of the policies in relation to them.[1155]

40. The 1992 Constitution grants Parliament the power to authorise any other agency of Government to approve the grant of rights, concessions or contracts in respect of the exploitation of any mineral, water or other natural resource of Ghana.[1156]

41. The Constitution also provides that any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of the 1992 Constitution shall be subject to ratification by Parliament.[1157]

42. Between 1974 and 2001 Ghana embarked on two unsuccessful attempts at oil exploration. The third attempt, commencing in 2004, led to the successful discovery of oil, in commercial quantities. The regulation of the management of revenue from the extraction of oil and gas is now embodied in the newly enacted Petroleum Revenue Management Act, 2011 which was passed on the 11th April, 2011. This Act provides the framework for the collection, allocation and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana in accordance with Article 36 of the 1992 Constitution.[1158] This article provides that "the State shall all necessary action that the national economy is managed and in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy."

43. Under the Petroleum Revenue Management Act, the Annual Budget Funding Amount is designed, among others, to be applied to the even and balanced development of the regions of Ghana. The Act urges that the spending of petroleum revenue must be prioritised as follows: "agriculture; physical infrastructure and service delivery in education, science and

[1155] Articles 258, 267 and 269 of the 1992 Constitution of the Republic of Ghana.
[1156] Article 269(2) of the 1992 Constitution of the Republic of Ghana.
[1157] Article 268 of the 1992 Constitution of the Republic of Ghana.
[1158] Petroleum Revenue Management Act, 2011 (Act 815).

technology; potable water delivery and sanitation; infrastructure development in telecommunication, road, rail and port; physical infrastructure and service delivery in health; housing delivery; environmental protection, sustainable utilisation and protection of natural resources; rural development; developing alternative energy sources; the strengthening of institutions of government concerned with governance and the maintenance of law and order; public safety and security; and provision of social welfare and the protection of the physically handicapped and disadvantaged citizens."

44. The Constitution defers a large part of the protection of natural resources to legislative interventions, executive policies, administrative measures and judicial decisions. For example, there is currently the Minerals Commission, established under the Minerals Commission Act of 1993 to regulate and manage the utilisation of mineral resources and to co-ordinate the policies relating to mineral resources.[1159] The current legal framework for mining is embodied in the Minerals and Mining Act of 2006.[1160] There is also the Water Resources Commission which was established under the Water Resources Commission Act of 1996.[1161] It is responsible for the regulation and management of the utilisation of water resources, and for the co-ordination of any policy in relation to them. The Fisheries Commission was established under the Fisheries Act of 2002.[1162] The Fisheries Commission is responsible for the regulation and management of the utilisation of the fishery resources of the Republic and the coordination of the policies in relation to them.

45. Recently, a number of reforms have been undertaken to address the challenges associated with natural resources management and governance. The recent Land Administration Project (LAP) is targeted at:
    a. Reducing conflicts through boundary demarcation;
    b. Strengthening customary land administration;
    c. Improving deed and land title registration;
    d. Improving accountability and transparency in land administration;
    e. Paying of compensation for lands compulsorily acquired; and
    f. Harmonizing land policy and regulatory frameworks.

46. There are other on-going reforms to the Forestry and Wildlife Laws, and the Fisheries Laws including the developments of Regulations aimed at making them accord with recent developments.

[1159] Minerals Commission Act, 1993 (Act 450).
[1160] Minerals and Mining Act, 2006 (Act 703).
[1161] Water Resources Commission Act of 1996 (Act 522).
[1162] Fisheries Act, 2002 (Act 625).

47. Individual property rights are also guaranteed under Articles 18 and 20 of the 1992 Constitution. Article 18(1) grants an individual the right to own property either alone or in association with others. An 'individual" includes a natural person or a corporate body. The compulsory acquisition of one's property by the State is generally prohibited by Article 20. However, this prohibition is not absolute as there are permitted circumstances for such compulsory acquisition. This provision allows for the compulsory acquisition of the property of both Ghanaians and foreign nationals, subject to the prompt payment of fair and adequate compensation.

48. The consultations held by the Commission revealed 5 key sets of issues pertaining to lands and natural resources which Ghanaians want the Constitution to address:
    a. Ownership of lands and natural resources;
    b. Management of lands and natural resources for sustainable development;
    c. The relative participation of Ghanaians and non-Ghanaians in the ownership of lands and the exploitation of natural resources;
    d. Distribution of the costs associated with the exploitation of natural resources (human insecurity, environmental degradation, destruction of cultural and archaeological sites, etc.); and
    e. Distribution of the benefits from the exploitation of natural resources.

SUBTHEME ONE: OWNERSHIP OF NATURAL RESOURCES

ISSUE ONE: OWNERSHIP AND VESTING OF NATURAL RESOURCES

A. DIMENSIONS OF THE ISSUE

49. The many dimensions of the issue of ownership of natural resources can be summed up as follows:
    a. Whether or not public lands and other natural resources including oil and gas should continue to vest in the President?
    b. Whether or not public lands and other natural resources should be vested in chiefs or the original owners?
    c. Whether stool or skin lands should be vested in appropriate stools or skins?
    d. Whether stool or skin lands should be vested in the entire community?
    e. Whether family lands should be vested in family heads?
    f. Whether family lands should be vested in families?

B. CURRENT STATE OF THE LAW ON THE ISSUE

50. The current state of the law in relation to the ownership of natural resources, lands and minerals is contained in Articles 257(1) and 267(1) of the Constitution. Article 257(1) states that all public lands in Ghana shall be vested in the President on behalf of, and in trust for,

the people of Ghana, whereas Article 267(1) vests all Stool and Skin lands in Ghana in the appropriate Stool and Skin on behalf of, and in trust for, the subjects of the Stool or Skin in accordance with Customary Law and usage. These constitutional provisions have regulated the ownership of public, Stool and Skin lands in particular, and natural resources in general since the inception of the 1992 Constitution.

51. In Article 295(1) of the 1992 Constitution, Stool Land is defined to include "any land or interest in, or right over, any land controlled by a Stool or Skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that Stool or the members of that community or company." This definition does not mention family lands. The High Court has held that the definition of Stool land in Article 295(1) of the 1992 Constitution did not cover family land. The court further stated that the word "family" did not appear in the definition of Stool land, and accordingly, the limitation on the grant of freehold interest in Stool lands provided in Article 267(5) of the 1992 Constitution did not apply and could not be extended to grants of family lands.[1163] Meanwhile, Article 36(8) of the 1992 Constitution also states that "the State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, Stool, Skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the Stool, Skin, or family concerned and are accountable as fiduciaries in this regard."

52. Article 257(6) of the Constitution is to the effect that all minerals found in their natural state in, under or upon any land in Ghana, rivers, streams, water course throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana. However, "mineral" is not defined in the Constitution, leaving unanswered the question as to whether oil, gas and water are minerals.

53. In a 1900 American case, it was stated that "Petroleum, gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals

[1163] *Republic* v. *Regional Lands Officer, Ho; Ex parte Kludze* [1997-98] 1 GLR 1028, where the High Court declared a circular making the Lands Commission's concurrence a pre-requisite for effective grant of family lands as void. In this case, the Lands Commission sought to say in a circular that by virtue of Article 36(8) of the Constitution, family lands form part of public and stool lands and that any grant of family land must be done with the concurrence of the Lands Commission. A gift of part of a family land was given to the applicant. When he presented the title deeds to the regional lands officer, for registration, it was refused on the ground that in line with the circular letter issued by the Executive Secretary of the Lands Commission, the applicant's document could not be registered as a freehold but as a leasehold. The applicant successfully applied to the High Court for an order of mandamus to compel the respondent to register his document as a freehold. In support of his application, he contended among others that Article 267(5) of the Constitution, 1992 which prohibited the creation of freehold interests in stool lands did not apply to family lands since family lands were not stool lands.

which have a fixed situs, cannot be applied to contracts concerning them without some qualifications ... gas is a mineral, and while *in situ,* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents with regard to flowing or even to percolating waters. Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their `fugitive and wandering existence within the limits of a particular tract' was uncertain" [1164]

54. Article 266 of the Constitution which regulates the ownership of land by non-citizens is to the effect that no interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana. Furthermore, any agreement or deed or conveyance which seeks to confer on a person who is not a citizen of Ghana any freehold interest in, or right over, any land is void. These constitutional provisions in sum, seek to prevent foreigners from owning any freehold interest or right over any land in Ghana. By extension, foreign companies doing business in Ghana as external companies cannot own a leasehold of more than 50 years.

C. SUBMISSIONS RECEIVED

55. The overwhelming majority of Ghanaians held the view that the current constitutional provision which vests public lands in the President in trust and on behalf of the people of Ghana should be maintained since the President embodies the will of all Ghanaians and is best placed to determine as well as manage the various uses to which public lands should be put. It was contended that the President can ensure that adequate compensation is paid to land owners whose lands have been compulsorily acquired in the interest of the State and finally ensure the judicious management of revenues accruing from the sale or use of these lands in the interest of the State. A preponderance of submissions suggested that the President is better placed than chiefs are to manage revenues accruing from the sale of public lands and that vesting public lands in chiefs would engender corruption as is evident in the sale of Stool or Skin lands by chiefs.

56. A relatively small number of Ghanaians hold the view that public lands should be vested in the original owners of lands and should only be ceded to government after government has paid adequate compensation to the respective land owners. Proponents of this view suggest

[1164] *Ohio Oil Company* v. *Indiana (No. 1)*, 177 US 190.

that since the original owners of these lands exercise domain over them, it would be unconscionable to allow government to exercise eminent domain over public lands thereby depriving the original owners of the revenues or royalties they would have been entitled to.

57. Others submitted that Stool and Skin lands should continue to vest in the appropriate Stools or Skins on behalf of, and in trust for, the subjects of the Stool. Vesting the lands of a Stool or Skin in entities other than the Skin or Stool can significantly whittle away the control exercised by the respective Stool or Skin over its subjects. It is, therefore, essential to maintain the current constitutional provision under Article 267(1) of the Constitution.

58. Another view was that Stool or Skin lands should vest in the entire community and not just chiefs, who are custodians of lands. Since Skin or Stool lands are owned communally by the entire community, they should not vest in the Skin or Stool, but should vest in the entire community which will be responsible for their management as well as utilisation of royalties or revenues derived from their sale.

59. Others proposed that family lands should not vest in the head of families but should vest in the respective Stool or Skin of each land owning family. This arrangement would ensure that family heads who do not account to the respective family members are circumvented and the Skin or Stool held directly accountable for the use or misuse of the lands.

60. It was also submitted that the current constitutional provision vesting all forests and forestry resources in the President should be maintained to prevent the wanton destruction and depletion of the nation's forest reserves. The President as chief custodian of all natural resources can effectively manage and protect forestry resources and also ensure equity in the distribution of revenues accruing from the exploitation of forestry resources.

61. Further, on forests and forestry resources, the following submissions were made:
    a. All forests and forestry resources should be vested in chiefs on behalf of their subjects or vested in the local communities on behalf of the inhabitants. The chief argument advanced in favour of this arrangement is that chiefs and local communities are responsible for the protection and management of forests and forestry resources and it is best to have these resources vested in them. As custodians of these resources, chiefs or local communities can effectively utilise the royalties or revenues accruing from the exploitation of these resources for the improvement of the community or chiefdom where these natural resources are found. The chiefs and the community leadership could as well be more easily and readily held accountable for their stewardship.
    b. Forests and forestry resources should be vested in the District Assemblies who should be responsible for the management of forestry resources and held accountable for revenues accruing from those forestry resources. District Assemblies who are the

foremost agents of development at the local level can effectively manage the utilisation of the forests and forestry resources for the development of resource bearing communities.

62. On fisheries and marine resources, the following submissions were made:
    a. Fisheries and marine resources just like any natural resource found in its natural state should continue to vest in the President since the Fisheries Commission which is responsible for the management of fisheries and marine resources can maximise the revenues accruing from the exploitation of fisheries resources.
    b. Fisheries and marine resources should vest in fishing communities since they constitute the mainstay of local fishing communities and serve as the only source of income for fisher folk. Vesting fisheries and marine resources in the President would deprive and starve local fishing communities of the revenue accruing from the exploitation of fisheries and marine resources.

63. The following were submissions made in respect of minerals and mining;
    a. Minerals and mineral resources should vest in the President on behalf of, and in trust for, the people of Ghana. The President, acting through his ministers and other governmental agencies can effectively manage mineral resources found in, under or upon any land in Ghana and ensure that proceeds from the exploitation of these mineral resources are used for the benefit of all Ghanaians. Government is better placed than communities to negotiate mining agreements which would largely inure to the benefit of the nation. The current constitutional arrangement should be maintained to ensure the maximization of profits from the extraction of mineral resources.
    b. Minerals should vest in chiefs and local communities where the minerals are found. The chief argument advanced in favour of this position recognised the devastating effects mining has on the environment of the local communities where minerals are mined. It was advocated that vesting mineral resources in chiefs or the local communities would ensure that the people benefit directly from royalties realised from the exploitation of minerals mined in the particular community. Proceeds from the exploitation of these minerals can be utilised to restore the environment which has been impaired by the activities of mining companies, since most mining companies do not adequately compensate mining communities.
    c. Minerals should vest in the mineral-bearing community with oversight responsibility from the District Assembly. District Assemblies are the agents of development at the local level and should be engaged in carrying out developmental projects for the communities where minerals are mined.

64. A last set of the submissions on oil and gas are summarised below:

a. Due to the economic significance of the oil find, the President should continue to manage the resource for the benefit of all Ghanaians. Oil and gas resources should, therefore, be vested in the President on behalf of, and in trust for, the people of Ghana.
b. Oil and gas resources should vest in the communities where the oil and the gas are found. Wherever particular resources are found, the Constitution should ensure that the communities benefit directly from them to the exclusion of other communities that may have other natural resources in abundance. This proposal is to ensure that the resource bearing communities are developed with the proceeds of the exploration and exploitation of oil and gas.

D. FINDINGS AND OBSERVATIONS

65. The Commission observes that at the National Constitution Review Conference (NCRC), the following emerged:
    a. There was consensus for the retention of the current arrangement where all public lands in Ghana are vested in the President on behalf of, and in trust for, the people of Ghana. It was argued that the current arrangement works well for government and the nation as a whole, especially where government needs to use public lands for developmental projects in the interest of the nation. Vesting all public lands in the President would facilitate government's commitment to undertake several developmental projects and will eliminate the protracted negotiations government usually engages landowners in, during the acquisition of lands for development.
    b. It was further proposed that the constitutional mandate of the Lands Commission in managing public and vested lands should be maintained.
    c. Stool and Skin lands should continue to vest in the various Stools or Skins on behalf of the subjects of the Stools or Skins. However, family lands should be included under Article 267(1) of the Constitution and managed by the Lands Commission just as Stool and Skin lands are managed by the Lands Commission. Thus where family lands are subsumed under Stool or Skin lands, the heads of families owning family lands should be given a percentage of the royalties given to the Stool or Skin.
    d. The ownership of forestry resources should be vested in the communities which will be responsible for its management as well. It was further advocated that the Forestry Commission should continue to provide regulatory services whereas the State remains concerned with policy.
    e. Natural trees should be vested in the communities where the trees are found and farmers who cultivate these trees should enjoy the benefits from the proceeds of the sale of these trees.
    f. Fisheries should be expanded to include aqua culture. It was also proposed that fisheries and marine resources should vest in the President on behalf of and in trust for the people of Ghana. However, the fishing communities should be given a larger

proportion of revenue that accrues from the exploitation of fisheries and marine resources.

g. The current state of the law vesting minerals in the President on behalf of, and in trust for, the people of Ghana should be maintained. However, the concept of trusteeship should be clarified in the Constitution. The reasoning behind this proposal can be gleaned from suggestions earlier made on Forestry, that mineral resources should be vested in the President who can ensure the effective management of mineral resources and revenues accruing from the exploitation of minerals.
h. Proceeds from the exploitation of mineral resources should be lodged in a special fund and administered by an independent body. This special fund should be administered along the lines of the Mineral Development Fund.
i. Ownership of hydrocarbons, like all natural resources, should be vested in the President on behalf of, and in trust for, all Ghanaians. This provision should be entrenched in the Constitution to ensure that all Ghanaians benefit directly from the proceeds of the oil and gas find.
j. However, there should be an express provision in the Constitution stating that adequate compensation should be paid communities and individuals who are directly affected by the activities of oil and gas companies. Details of the payment of adequate compensation should be fleshed out in subsidiary legislation.
k. In sum, all natural resources found within the geographical space and territorial waters of Ghana should be vested in the President of Ghana, who will hold them in trust for the people of Ghana.

66. The Commission observes that the recommendations made at the NCRC generally call for the maintenance of the current constitutional provisions governing and regulating the ownership of natural resources. There was, however, a strong call for the Constitution to define clearly the trust relationship created by vesting natural resources in the President on behalf of the people of Ghana.

67. The Commission observes that international and comparative best practice, of the support the idea of the state's ownership of natural resources.[1165] An example is the United Nations General Assembly Resolution 1803 (XVII) on the right of permanent sovereignty over natural resources.[1166] In a number of international arbitration awards, Resolution 1803 was held as reflecting customary international law.[1167] Indeed, the adoption of Resolution 1803

[1165] MALCOLM N SHAW, INTERNATIONAL LAW 331-333 (Cambridge University Press, 4th Ed 2004, 1998 & 1997).
[1166] G.A. Res. 1803 (XVII), 1 U.N. Doc. A/RES/1803 (January 1, 1963); Azadon, Tiewul S; *The Evolution of the Doctrine of Permanent Sovereignty Over Natural Resources* [1978-81] 15 UGLJ 55.
[1167] *Texaco Overseas Petroleum Co. and California Asiatic Oil Co.* v. *Libya* (1977) 53 I.L.R. 389, (1978) 17 I.L.M. 1; *Kuwait* v. *American Independent Oil Co.* (1982) 21 I.L.M. 976; *Amoco International Finance Corp.* v. *Iran* (US

was almost unanimous and it included the votes of the major capital-exporting States, except France.[1168] State ownership of natural resources is therefore concretised in international law.

68. The Commission observes that, globally, the ownership of natural resources has been governed by the constitutions of the respective countries in which the resources are found.

69. The Commission acknowledges the necessity of ensuring national cohesion and finds that should the ownership of natural resources be vested in individuals or some sections of the Ghanaian population, there would be the likelihood of the unity of the nation being compromised. The President, as the chief custodian of all public lands, would effectively manage these lands and ensure their effective utilisation in the interest of all Ghanaians, while securing the cohesion of the country.

70. The Commission observes that there are very large and expansive family lands which are not regulated because the law prohibits their regulation. The general view is that the heads of family have tended to deal with the lands for their personal advantage and to the detriment of the wider family. Involving the Lands Commission in the management of such lands will reduce the breach of trust, ensure the better management of land and more ensure a more equitable sharing of the proceeds of the land.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

71. The Commission recommends the amendment of the Constitution to provide that lands and natural resources are owned by the people and are vested in the President in trust for and on behalf of the people of Ghana.

72. The Commission also recommends that Stool and Skin lands should continue to be vested in the respective Stools and Skins in trust for and on behalf of the people of the communities according to customary law and usage.

73. The Commission further recommends that the Constitution be amended to define Stool or Skin lands to include family lands in the character of Stool or Skin lands.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

74. The Commission recommends that the Chieftaincy Act and the Head of Family (Accountability) Act be further elaborated to institute specific and detailed rules for the

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v. Iran) (1987) 15 Iran-U.S.C.T.R. 189; and the Sedco Case (Second Interlocutory Award)(1986) 10 Iran-U.S.C.T.R. 180.

[1168] It was adopted by 87 votes. Only France and South Africa voted against it. There were 12 abstentions including Ghana, the Soviet bloc, Burma, and Cuba; HARRIS, D. J., HARRIS-CASES AND MATERIALS ON INTERNATIONAL LAW 549 (Sweet & Maxwell, London, (5th Ed) 1998).

accountability of Chiefs and Heads of Family for the management and disposition of lands entrusted to them as also recommended under the Chapter on Chieftaincy.

ISSUE TWO: OWNERSHIP OF LAND BY NON-GHANAIANS

A. DIMENSIONS OF THE ISSUE

75. The main issue is whether a non-Ghanaian should be given a freehold interest in land. From the submissions, this issue is characterised in the following dimensions.
    a. Whether a non-Ghanaian spouse of a Ghanaian should be allowed to own a freehold interest in land in Ghana.
    b. Whether joint ownership of land by a Ghanaian spouse and a non-Ghanaian spouse is sufficient to allow a non-Ghanaian spouse to own a freehold interest in Ghana.
    c. Whether a couple should be married in Ghana or under Ghanaian law before the non-Ghanaian spouse can own a freehold interest in Ghana.
    d. Whether the dissolution of a marriage between a Ghanaian and a non-Ghanaian spouse affects the right of the non-Ghanaian to hold freehold interest in land.
    e. Whether a freehold interest in land of a Ghanaian and non-Ghanaian couple may in Ghana be transferred to a child of the marriage, even after the marriage has been dissolved?

B. CURRENT STATE OF THE LAW ON THE ISSUE

76. The Constitution restricts the ownership of landed property by non-Ghanaians to a leasehold interest of 50 years at any one time. According to Article 266(1) a non-Ghanaian cannot obtain a freehold interest in land in Ghana. Any conveyance of a freehold interest in land to a non-Ghanaian is void under Article 266(2) of the 1992 Constitution.

77. Article 266(3) also converts foreign-held freehold interests predating 22nd August 1969, when the 1969 Constitution came into force, into a 50-year leasehold at a peppercorn rent retrospectively from 22nd August 1969. The freehold reversionary interest is vested in the President on behalf of, and in trust for, the people of Ghana. Article 266(4) now restricts foreign-held leasehold to 50 years at any one time. Last but not least, Article 266(5) also converts foreign-held unexpired leasehold which predated 22nd August 1969, into a 50-year leasehold from 22nd August 1969. Such unexpired leaseholds must have been of more than 50 years.

78. The Constitution also requires in Article 7 that a non-Ghanaian married to a Ghanaian may opt to be registered as a citizen of Ghana. This means that merely being married to a Ghanaian does not automatically make one a Ghanaian. Therefore, where a Ghanaian is

married to a non-Ghanaian, the non-Ghanaian spouse cannot obtain a freehold interest in land in Ghana unless the non-Ghanaian spouse opts to become a Ghanaian and registers as same.

C. SUBMISSIONS RECEIVED

79. One clear view expressed in the submissions is that foreigners should not be allowed to own land at all in Ghana. Those who hold this view are very few.

80. There is yet another view which suggests that there should be unrestricted ownership of land by foreigners. To this group, foreigners should be able to own freehold interest in land. It is reasoned that Ghanaians hold freehold interests in land in other countries, and by the principle of mutuality, the same treatment should be applied to foreigners in Ghana. It was also reasoned that such an arrangement would attract direct foreign investments into the country.

81. A dominant view in the submissions received was that foreigners should not be allowed to own a freehold interest in land. Instead, they should be given leaseholds of not more than 50 years. This view in effect argues for the retention of the existing constitutional arrangement. To do otherwise, it is reasoned, is to return the country to colonial rule someday. Many of the people of Ghana are poor and farming is their mainstay. To allow of the foreign ownership of land for more than a 50-year lease means that in the not-too-distant future, foreigners will permanently take over Ghanaians lands.

82. Some submissions argued that, the law should permit a non-Ghanaian married to a Ghanaian to own a freehold interest in land.

D. FINDINGS AND OBSERVATIONS

83. The Commission finds that, in our constitutional history, the first time that the ownership of land by a non-Ghanaian was restricted to a leasehold of not more than 50 years was when Article 163 of the 1969 Constitution was allowed to stand as part of that Constitution. The 1969 Constitution specifically proscribed the transfer of a freehold interest in land to a foreigner. It made such contracts or deeds void and of no effect. It rather restricted the ownership of land by foreigners to a 50-year lease.[1169] It stated that: "No interest in or right over any land in Ghana shall be created which vests in any person who is not a citizen of Ghana a leasehold estate for a term of more than fifty years at any one time." The 1969 Constitution also converted all pre-existing leasehold interests in land held by foreigners into

[1169] Article 163(7) and (9) of the 1969 Constitution of the Republic of Ghana.

a 50-year lease at a peppercorn rent. The reversionary interest in such lands was vested in the President in trust for and on behalf of the people of Ghana.

84. The Commission finds that during the deliberations of the 1969 Constituent Assembly, the issue was thoroughly debated. Interestingly, the 1968 Constitutional Commission, whose proposals the 1969 Constituent Assembly considered, did not say anything about this issue.[1170] The Commission was only concerned about the abuse of the power of eminent domain exercised by the previous Government.[1171]

85. The Commission finds that the 1969 Constituent Assembly, debated the inclusion of constitutional provision that could convert all existing freehold interests in land held by foreigners to a leasehold of fifty years.[1172] In the view of one member; *"to me, by divesting ourselves of the British freehold of the Gold Coast and then establishing it as the new Ghana, we shall be frustrating the aspirations of our independence if we do not go on to reclaim our lands ..."*[1173]

86. Others also warned that care ought to be taken in order not to saddle the country with endless land litigation. In the words of one member: "The Motion as it stands is completely unsatisfactory because it merely says that on the coming into operation of the Constitution all freehold estates owned by aliens should become converted into leasehold interests. There are vital questions which have been left unanswered... who is going to determine the rents on these leases?...We know that most of these lands were sold about two hundred years ago and their original owners-the families might have become extinct by this time and so when these leases expire fifty years hence, problems are going to arise in litigations to determine who was the owner of the land before it was sold. But no provision has been made as to who is going to determine the reversionary interest or who had owned that land before it was sold... this is a very revolutionary and radical approach and one needs time to consult and obtain views of all the people who will be affected. Usually when we think of aliens we have in mind the Lebanese and Syrians... I agree, Nigerians, Liberians and so on. The big firms are all involved. I would not mention names but you know and it is a fact that they own large portions of land that have been sold to them by our grandfathers. And so any action which we take here is going to affect the interests of these big companies who have powerful friends among us."[1174] There were concerns about how the interest, rents of the lease and the

[1170] Proposals of the Constitutional Commission for a Constitution for Ghana, 1969, paragraphs 696-715
[1171] Proposals of the Constitutional Commission for a Constitution for Ghana, 1969, paragraph 208.
[1172] Official Report of the Proceedings of the Constituent Assembly,1969, (No 48, Col. 1505, Tuesday, 29th April 1969).
[1173] Official Report of the Proceedings of the Constituent Assembly,1969, (No 48, Col. 1505, Tuesday, 29th April 1969).
[1174] Official Report of the Proceedings of the Constituent Assembly, (Tuesday, 29th April 1969, Col. 1505-1506).

reversionary interest would be worked out.[1175] It was suggested that certain nominal or what is called "peppercorn rents" should be paid, and that the reversionary interest should be vested in the State to be held in trust for the people of Ghana by the President and not the original owner who had divested himself of the land.[1176]

87. Others also preferred a middle ground as demonstrated in this quotation: "I would propose that if somebody has already divested himself of his interest in the land but in the interest of the State we are trying to protect the land and bring it back, then when the land comes back, it must form part of the public land. It is accepted, I would suggest, that an easy way to do it is not to bring in any legal implications by the use of the legal phrases 'leasehold' or 'freehold'. Fifty years after the coming into force of the Constitution all land that has been acquired as freehold by aliens should revert to the State, without saying that it should be a lease; this will remove all implications as to the terms and conditions of a lease.[1177]"

88. The Commission also finds that Article 189(8)-(14) of the 1979 Constitution builds on the 1969 provisions restricting ownership of land by non-Ghanaians and adds 4 more clauses*;* outlawing the grant of freehold interest in land to aliens*;* rendering any contract or deed purporting to make such grant void and of no effect*;* converting all foreign-held freehold interests in land into a 50-year lease at a peppercorn rent retrospectively beginning on the 22nd August 1969*;* and vesting the reversionary interest in any such land in the President in trust for the people of Ghana. Article 189(10) of the 1979 Constitution closely reproduced Article 163(9) of the 1969 Constitution. The wording of Article 189(10) was: "No interest in, or right over, any land in Ghana shall be created which vests in any person who is not a citizen of Ghana a leasehold interest for a term of more than fifty years at any one time."

89. The Commission finds that the 1979 Constitution introduced a system whereby a foreigner-held leasehold with unexpired term exceeding 50 years, could only last 50 years beginning on 22nd August 1969. Where a foreigner transferred his leasehold interest in land to a Ghanaian after 22nd August 1969, the Ghanaian transferee could acquire the reversionary interest in the land from the President by giving valuable consideration. Where a foreigner with a pre-1969-Constitution unexpired leasehold interest transferred it to a Ghanaian during the subsistence of the 1969 Constitution, in addition to the interest obtained from the foreigner, the Ghanaian was entitled to the difference between the pre-1969 Constitution unexpired years and the 50 years from 22nd August 1969. With respect to transactions relating to concessions granted by government for the exploitation of any mineral, water or other natural resources of Ghana, such transactions were to be ratified by Parliament.

[1175] Official Report of the Proceedings of the Constituent Assembly, (Tuesday, 29th April 1969, Col. 1507).
[1176] Official Report of the Proceedings of the Constituent Assembly, (Tuesday, 29th April 1969, Col. 1510).
[1177] Official Report of the Proceedings of the Constituent Assembly, (Tuesday, 29th April 1969, Col. 1509).

90. The Commission also observes that the 1979 constitutional arrangement on this issue was very similar to the provisions of Article 266(1)-(5) of the current 1992 Constitution. What is obviously omitted from the current law is the possibility of a Ghanaian, who acquires the foreign-held freehold or leasehold, to purchase the reversionary interest from the President or the difference of the expired term of the foreigner respectively under Article 189(12) and (13) of the 1979 Constitution. Perhaps, this is due to the fact that freehold interest in land is very rare, as demonstrated in the following quotation: "there is nowhere in the world today where you can go and get a freehold land. In our own country today freehold tenure has been thrown overboard and everything is being done by leasehold system."[1178] Moreover, from the proceedings of the Consultative Assembly, that Article 189(12) and (13) of the 1979 Constitution were rendered inoperative by the PNDC.[1179]

91. The Commission observes that the 1991 Committee of Experts did not address in its report for the consideration of the framers of the 1992 Constitution the issue of restricting foreign ownership of land in Ghana.[1180] However, the National Commission for Democracy reported that Ghanaians had expressed the desire for an intelligent and ecologically sound use of land for national development.[1181] In the Consultative Assembly, the issue of the ownership of land by non-Ghanaians was raised. However, the nature of the debates did not question the previous constitutional attempts to restrict foreign land ownership to a 50-year lease.

92. The Commission finally observes that international law prohibits the taking of foreign property without compensation but what amounts to a "taking" is not completely settled. This is because there are competing standards regarding appropriate compensation for such taking. Discrimination against non-citizens in this regard is often prohibited by treaty provisions.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

93. The Commission recommends that 50 years is a long enough time for a foreigner to hold a leasehold interest in land, especially because such leases are renewable and therefore the *status quo* should be maintained.

[1178] Official Report of the Proceedings of the Consultative Assembly, 1992, (Tuesday 25th February 1992, Col. 2808).
[1179] Section 46 of Provisional National Defence Council (Establishment and Consequential Matters Amendment) Law, 1982 (PNDCL 42).
[1180] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, 1992, paragraphs 302-315.
[1181] The National Commission for Democracy, 1991; Evolving a True Democracy, Summary of NCD's Work Towards the Establishment of a New Democratic Order (Report Presented to the PNDC March 25, 1991), paragraph 512.

RECOMMENDATIONS FOR LEGISLATIVE CHANGE

94. The Commission recommends that where there is joint ownership of land between a national and a foreigner, this should be resolved according to the rules of private international law.

ISSUE THREE: EXERCISE OF THE POWER OF EMINENT DOMAIN

A. DIMENSION OF THE ISSUE

95. What constitutes appropriate compensation for a compulsorily acquisition of private property?

B. CURRENT STATE OF THE LAW ON THE ISSUE

96. The current provision on the exercise of the power of eminent domain over lands and natural resources is contained in Article 20(1) of the 1992 Constitution which provides that no property of any description, or interest in or right over any property shall be compulsorily acquired by the State unless the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public interest or the development or utilisation of property in such a manner as to promote the public benefit; or the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

97. Article 20(2) states that the compulsory acquisition of property by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation and a right of access to the High Court of any person who has an interest in or right over the property. Article 20(3) states that where a compulsory acquisition or possession of land effected by the State in accordance with clause 1 of Article 20 involves the displacement of any inhabitants on suitable land, the State shall resettle the displaced inhabitants on alternative suitable land.

C. SUBMISSIONS RECEIVED

98. The overwhelming majority of the submissions received on the issue of power of eminent domain suggest that the current constitutional arrangement where government may compulsorily acquire land in the public interest should be maintained, as it facilitates government's developmental agenda by allowing government to acquire lands throughout the country for purposes of undertaking developmental projects in the larger interest of the state and citizens.

99. A significant number of submissions, however, suggest that Government should not be allowed to acquire lands compulsorily to the detriment of original landowners. Two reasons were given for this position: sometimes the government initially acquires lands under the guise of utilising them in the interest of the public, but they may be utilised for other purposes not serving the public interest; secondly, the quantum of compensation paid to landowners who are deprived of their lands is usually inadequate and payments are not made promptly.

100. It was also submitted that there should be a constitutional amendment to provide a saving clause to protect State investments and interests in the de-vested Northern, Upper East and Upper West Regions. It was reasoned that Government has made substantial developments (Ministries, offices, bungalows, schools, hospitals, etc.) on portions of the lands in the three Northern regions at the time the lands were vested. These lands were not acquired by any Executive Instrument but the State had occupied same for its use. It was argued that Article 257 (3) and (4) of the 1992 Constitution de-vested all lands in the three Northern Regions, yet no provision (saving clause) was made to retain those that were actually occupied by Government ownership. The implication is that the de-vesting has returned the land together with the developments to the persons or Skins who were the owners of the land before the vesting. In practice individuals have been claiming undeveloped portions of these.

101. Since all natural resources, including forest resources are vested in the President on behalf of, and in trust for, the people of Ghana, maintaining the current arrangement will ensure that revenues from the management of forest resources are utilised for the benefit of all Ghanaians.

102. Timber concessions should only be granted to logging companies after holding consultations with all interest groups, particularly, farmers whose farm lands are or would be affected by the concessions.

103. Fair and adequate compensation should be paid promptly to farmers and owners of lands whose rights and interests in these resources have been disturbed as a result of government's or private sector's exploitation of forest and other resources.

104. Fisheries and marine resources should be compulsorily acquired by government. It was reasoned that this would enable the government check the activities of pair-trawling and the use of lights in fishing.

105. Fishing and the exploitation of other marine resources should be the preserve of fishermen and fisherwomen in the various fishing communities since it serves as their source of livelihood. Government interference in the acquisition of marine resources will threaten the existence and livelihoods of fishing communities.

106. Government should enter into partnerships with fishing communities, where the former provides subsidies to the fishermen and the latter pledge to undertake safe fishing practices in order to preserve the fisheries and marine resources for future exploitation.

107. Government is best placed to manage the oil find, since it can effectively marshal the needed resources to invest in the sector and serve as the sole regulator of oil and gas resources. Where government acquires these resources from the oil bearing communities, prompt, adequate and fair compensation should be paid to the communities.

108. Communities where the oil and gas resources are located should be permitted to acquire interests in oil and gas. The reasoning behind this position is that oil-bearing communities should be given the opportunity to develop their local economies by re-investing proceeds from the exploitation of oil and gas resources.

D. FINDINGS AND OBSERVATIONS

109. The Commission finds that:

a. Ownership of all natural resources including oil and gas is best vested in the people of Ghana and held in trust by the President.
b. It would be appropriate to retain the current constitutional provision under Article 20 of the Constitution which permits the President to acquire lands compulsorily in the interest of the public. However, government should make prompt payment of fair and adequate compensation to landowners whose lands are compulsorily acquired by the state in the interest of the public.
c. The concept of "fair and adequate compensation" should be clearly defined in the Constitution.
d. There is the need for the localisation of ownership and management of forestry resources to ensure that issues of consultation and compensation of affected landowners are adequately dealt with.
e. Individual farmers should only have the right is to be consulted, and their rights to give consent should be subject to the overriding consent of the communities.
f. Some specific areas should be protected from mining activities to ensure that the entire environment within communities where mineral resource exploitation occurs is not impaired. This should be addressed by subsidiary legislation.
g. But there should be an express statement in the Constitution that adequate compensation should be paid to those who are directly affected by the find.

110. The Commission observes that the exercise of the power of eminent domain over lands and natural resources is recognised internationally and in the constitutions of various nations, such as the United States, Nigeria, Zimbabwe and South Africa.[1182]

a. The US Constitution, recognises the principle of eminent domain over private or individual property. Amendment V of the US constitution states, in part, that *"...no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property taken for public use, without just compensation"*

b. Section 44(3) of the 1999 Nigerian Constitution, on the compulsory acquisition of property provides that "…the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

c. The Zimbabwe Constitution recognises the exercise of the power of eminent domain over lands and natural resources. Section 16(1)(a) of the Constitution of Zimbabwe, titled Protection from Deprivation of Property states:

> *"*subject to section 16(a), no property of any description, or interest or right there in shall be compulsorily acquired, except under the authority of a law that requires (i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land for settlement for agricultural or other purposes... or in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public; in the case of property, including land*."* The combined effect of section 16(1)(b) and (c) of the same Constitution is that the acquiring authority, is required to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property and that the acquiring authority is required to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right.

d. The Constitution of the Republic of South Africa also upholds the principle of eminent domain over property. Section 25(1) of the Bill of Rights states: *"no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."* Section 25(2) reads:

[1182] U. S. CONST. amend V; The 1999 Constitution of the Federal Republic of Nigeria; Sections 16(1) (b) and (c) of the 1979 Constitution of Zimbabwe (as amended at 30th October, 2007, up to and including amendments made by Constitution of Zimbabwe (Amendment) No. 18 Act, 2007 (Act No. 11 of 2007)) and the 1996 Constitution of the Republic of South Africa.

"property may be expropriated only in terms of law of general application; for a public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court." Section 25(3) further reads: "the amount of the compensation and the time and manner of payment must be equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including; the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation."[1183]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

111. The Commission recommends that the constitution be amended to vest all natural resources in the people of Ghana and for the resources to be held in trust for them by the President.

112. The Commission recommends that the Government's right to acquire lands compulsorily for public purposes subject to the prompt payment of fair and adequate compensation be retained.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

113. The Commission recommends that the Administration of Lands Act and the State Lands Act be re-enacted to detail out conditions precedent and the processes for the compulsory acquisition of lands, including prior consultations with persons who have any interest in the property and the procedure and timing for the prompt payment of fair and adequate compensation.

ISSUE FOUR: RIGHT OF FIRST OPTION TO ORIGINAL OWNERS OF PUBLIC LANDS

A. DIMENSIONS OF THE ISSUE

114. The main dimension of this issue is whether lands compulsorily acquired should be returned to their original owners if they are not used for the purpose for which they were acquired.

[1183] Section 25(2) and (3) of the 1996 Constitution of the Republic of South Africa.

B. CURRENT STATE OF THE LAW ON THE ISSUE

115. Article 20(5) of the Constitution states that any property compulsorily acquired in the public interest or for a purpose for which it was acquired shall be used only in the public interest or for the purpose for which it was acquired. Where the property is not so used the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property.[1184] In a very recent decision, the Supreme Court held that Article 20 has a clear futuristic intention and is not concerned with acquisitions made in the past.[1185]

C. SUBMISSIONS RECEIVED

116. There were submissions suggesting that the Government is holding surplus lands as a result of the non-use of lands compulsorily acquired by the State but which were not utilised for the intended purpose. Those who hold this view therefore call for the surrender of the land so acquired to their original owners.

117. On the other hand, it was also submitted that in the few instances where compulsorily acquired lands had been returned by Government to stools and families, many problems had been created thereby. These included litigation over interests in the land, allegations of corrupt and under-hand dealings by members and leaders of the landholding until and a scramble to sell the land as fast as possible, even without an approved planning scheme. Moreover, in such cases, the original land owners had failed to pay to Government the current value of the lands making the release apparently unconstitutional.

118. It has been urged on the Commission that the Constitutional requirement that an acquired land should be returned to the original owners where the property is not used in the public interest or for the purpose for which it was acquired is quite disturbing. Article 20(6) of the 1992 Constitution appears to be triggered by the mere non-use of the land. They suggested that this article should be amended to provide for such return of the land only when the land is no longer required in the public interest or for the purpose for which it was acquired. Indeed, there are many such lands, the use of which has been delayed because of Government budgetary constraints and other valid reasons. For example, the National Theatre and the Kwame Nkrumah Conference Hall were developed on lands acquired more than 60 years prior to their use, and yet the benefits of the two developments to the nation are beyond any doubt.

119. It was also submitted by some that, Article 20(6) should not have retrospective effect and lands already acquired by the State as of the date the Constitution came into effect should not

[1184] Article 20(6) of the 1992 Constitution of the Republic of Ghana.
[1185] *Nii Kpobi Tettey Tsuru III* v. *Attorney- General* [2010] SCGLR 904.

be affected by the article. Any other interpretation will mean that, if a parcel of land was acquired in the colonial era for a hospital but was put to use as a housing scheme for workers by the colonialists, it may not now be put to commercial use without violating the provisions of the article. Such lands long acquired before the present Constitution should not be affected by the change of use provision. These lands were acquired under a legal regime that did not attach any conditions to the government's use of the land. They were acquired free from all encumbrances. This interpretation will give some flexibility to the State in the use of public lands.

120. Many land owners whose lands have been acquired before the Constitution came into effect are of the opinion that the lands are not exempted from the operation of Article 20(6) and any should result in the return of the land to them. It should, therefore, be made clear in the Constitution that land that was already State land at the time the Constitution came into effect, is not affected by the change of use provision of Article 20(6).

D. FINDINGS AND OBSERVATIONS

121. The Commission finds that at the time of debating the draft provisions of what is now Article 20(6), members of the Consultative Assembly debated the issue of refunding compensation to the State when the original owner exercises his right of first option. It was thought that the provisions could be reworded to take care of appreciation in the value of the property. It is not clear whether they intended the article to take retrospective effect.[1186]

122. The Commission also finds that the current interpretation of Article 20 has occasioned injustices, where the original owners of lands that were compulsorily acquired have neither been paid compensation for the acquisition nor had their lands returned to them where government has not used the lands for the intended purpose.

123. The Commission further finds that in recent times lands that were compulsorily acquired have not been used for their intended purposes and have rather been up parcelled out to private interests to the exclusion of the original owners.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

124. The Commission recommends that the constitution be amended to ensure that where lands are compulsorily acquired and are not used for the purpose for which they were acquired and are also not used for a comparable public purpose, they should be returned to the original

[1186] Official Report of the Proceedings of the Consultative Assembly,1992, (Friday, 7th February 1992, Col. 2132-2137).

owners subject to the return of any compensation given on account of the compulsory acquisition.

SUBTHEME TWO: MANAGEMENT OF NATURAL RESOURCES

ISSUE ONE: MANAGEMENT AND ADMINISTRATION OF NATURAL RESOURCES

A. DIMENSIONS OF THE ISSUE

125. The following dimensions of the issues are derived from the submissions:
    a. Whether the constitutional mandate of the Lands Commission to manage public or vested lands should be maintained.
    b. Whether the management mandate of the Lands Commission gives the Commission the power to sell public land.
    c. Whether the constitutional mandate of the Lands Commission should be amended to accommodate the functions of other land sector agencies currently under the Lands Commission.
    d. Whether traditional authorities, and other landowners should be represented on the Board of the Minerals Commission.
    e. Whether the Government should establish an Oil and Gas Commission to manage the oil and gas sector.
    f. Whether the Ministry of Energy should be the sector ministry in charge of regulating and managing oil and gas in lieu of creating a new ministry specifically for oil and gas or petroleum.
    g. Whether there should be established a Petroleum Commission or Petroleum Regulatory Commission similar to the Minerals Commission.
    h. Whether the Ghana National Petroleum Corporation should be strengthened to play an active role as a national oil company as is the case in other jurisdictions.
    i. Whether the Forestry Commission should be empowered to manage the sustainable exploitation of forests, conservation belts, game reserves, and wildlife.
    j. Whether a distinct Ministry of Fisheries and Aquatic resources be created so as to better manage and regulate the fisheries industry.
    k. Whether the nation should adopt guiding principles for the management and administration of natural resources.

B. CURRENT STATE OF THE LAW ON THE ISSUE

126. A number of constitutional provisions, Acts of Parliament and subsidiary legislation currently regulate the management and administration of lands and natural resources in Ghana.

127. Chief amongst the constitutional provisions are Articles 258(1) and 269(1).[1187] Article 258(1) establishes a Lands Commission which has the mandate of co-ordinating with all relevant public institutions and governmental bodies, to manage public lands and any lands vested in the President by the Constitution or by any other Law or any lands vested in the Commission.[1188] It is also mandated to advice Government, local authorities and traditional authorities on the policy framework for the development of particular areas of Ghana, formulate and submit to government recommendations on national policy in respect of land use capability, and to give advice on and assist in the execution of a comprehensive programme for the registration of title of land throughout Ghana.[1189]

128. The Constitution also guarantees the existence of Regional Lands Commissions, under Article 260(1) which shall be responsible for the performance of the functions specified in Article 258 of the Constitution. These functions are as follows: a) On behalf of the Government, manage public lands and any lands vested in the President by this Constitution or by any other law or any lands vested in the Commission;
    a. Advise the Government, local authorities and traditional authorities on the policy framework for the development of particular areas of Ghana to ensure that the development of individual pieces of land is co-ordinated with the relevant development plan for the area concerned;
    b. Formulate and submit to government recommendations on national policy with respect to land use and capability;
    c. Advise on, and assist in the execution of, a comprehensive programme for the registration of title to land throughout Ghana; and
    d. Perform such other functions as the Minister responsible for lands and natural resources may assign to the Commission.

129. Article 269(1) provides for the establishment of a Minerals Commission, a Forestry Commission, a Fisheries Commission and such other Commissions as Parliament may determine, which shall be responsible for the regulation and management of the utilisation of the natural resources concerned and the co-ordination of the policies in relation to them. This constitutional provision allows Parliament to establish other resource commissions to

[1187] Articles 258(1) and 269(1) of the 1992 Constitution of the Republic of Ghana.
[1188] Article 258 (1)(a) of the 1992 Constitution of the Republic of Ghana.
[1189] Article 258 (1) (b), (c) and (d) of the 1992 Constitution of the Republic of Ghana.

regulate and manage the utilisation of other natural resources. In this regard, commissions such as the Energy Commission and the Water Resources Commission have been established to regulate and manage energy and water as natural resources, with recent calls for the establishment of Oil and Gas Commission and a National Petroleum Commission.

130. These constitutional provisions are further fleshed out in subsidiary legislation, such as, the Lands Commission Act,[1190] the Minerals Commission Act and the Minerals and Mining Act,[1191] the Forestry Commission Act and the Timber Resources and Management Act,[1192] the Water Resources Commission Act[1193] and the Fisheries Commission Act and the Fisheries Act.[1194] These pieces of legislation seek to regulate and manage the utilisation of natural resources in Ghana. Other pieces of legislation include Office of the Administrator of Stool Lands, 1994 (Act 481) and the Petroleum Revenue Management Act, 2011 (Act 815).

C. SUBMISSIONS RECEIVED

131. A significant number of people submitted that the Lands Commission should be given additional powers to better to manage public or vested lands and to ensure vigorous and extensive land reforms in order to bring sanity to the chaos in land management and administration in Ghana. There were some equally compelling submissions that suggested that, the current constitutional mandate of the Lands Commission to manage public or vested lands should be maintained.

132. It was also proposed that the mandate of the Lands Commission should be amended to accommodate all the functions of all other land sector agencies.

133. In the view of some people, traditional authorities and other landowners should be represented on the Board of the Minerals Commission.

134. Some others have suggested that Government should establish an Oil and Gas Commission to manage the oil and gas resource of Ghana.

135. Another trend in the submissions is that there should be established a Petroleum Commission or Petroleum Regulatory Commission similar to the Minerals Commission and that the

[1190] Lands Commission Act, 2008 (Act 767). Under this Act, all the land sector agencies including the Survey Department, the Land Tile Registry and the Land Valuation Board have been brought under the umbrella of the Lands Commission. It is important to point out however that The Office of the Administrator of Stool Lands (OASL), the Town and Country Planning Department, and the Forestry Commission which are also land sector agencies, continue to remain outside the new Lands Commission.
[1191] Minerals Commission Act, 1993 (Act 450); Minerals and Mining Act, 2006 (Act 703).
[1192] Forestry Commission Act, 1999 (Act 571); Timber Resources and Management Act, 1997 (Act 547).
[1193] Water Resources Commission Act, 1996 (Act 522).
[1194] Fisheries Commission Act, 1993 (Act 457);Fisheries Act, 2002 (Act 625).

Ghana National Petroleum Corporation should be strengthened to play an active role as a national oil company as obtains in other jurisdictions.

136. Other submissions however called for the mandate of the Ministry of Energy to be augmented to include the regulation and management of oil and gas and that there should be no new ministry specifically for oil and gas or petroleum.

137. Some submissions called for further empowering the Forestry Commission to better manage the sustainable exploitation of forests, conservation belts, game reserves, and wildlife more effectively.

138. A number of submissions called for the need to ensure well regulated resource exploitation and equitable resource repartition, so as resource rich communities are not disadvantaged and that various human rights abuses that plague such communities are addressed.

139. There were also submissions calling for the creation of a distinct Ministry of Fisheries and Aquatic resources to manage and regulate the fisheries industry.

140. It was also submitted that the Constitution should provide greater autonomy to the Office of the Administrator of Stool Lands so that it can discharge its functions more effectively.

D. FINDINGS AND OBSERVATIONS

141. The Commission observes that it is increasingly becoming common currency that citizens have a basic right to information about government activities and the use of public assets. This principle is enshrined in international instruments, including the Universal Declaration of Human Rights, the Rio Declaration, the Aarhus Convention, and the OECD Guidelines for Multinational Enterprises. The wide international support and country participation in the Extractive Industries Transparency Initiative (ELITE) have also advanced the principle that the public is entitled to information on the payments and revenues derived from extractive industries.[1195]

142. The Commission further observes that alongside the disclosure of information, governments are required to adopt transparent processes for establishing and implementing resource policies, for awarding contracts, for taxing, for collecting and managing revenues, and for taking spending decisions. Resource decisions involve long-term commitments and will be more credible if their rationale is understood by citizens and they are over sighted by the representations of the people in Parliament.

[1195] NATURAL RESOURCES CHARTER, www.naturalresourcecharter.org (last visited July 10, 2011).

143. The Commission observes in relation to the management of stool lands that the duties of the Administrator are critical to the effective management of these stools lands. This is given more prominence by the fact that under Article 267(8) the Administrator together with the Lands Commission is mandated to co-ordinate with relevant state agencies and traditional authority the preparation of a policy framework for the rational and productive development and management of stool lands.

144. The Commission observes that the Administrator is in a position of trust since he holds money that comes in favour of stool lands for the stools. For this reason it will be prudent that the Office of the Administrator of Stool Lands be insulated from governmental control and external influence. This way, the Administrator can effectively function in his office without being subjected to undue influence in the performance of his duties.

145. The Commission observes that the following recommendations were made at the National Constitution Review Conference:
    a. That the constitutional mandate of the Lands Commission should be maintained, and strengthened.
    b. That the mandate of the Lands Commission should be amended to accommodate the functions of other land sector agencies currently subsumed under the Lands Commission.
    c. That the Office of the Administrator of Stool Lands should be made an independent commission, the better to perform its constitutional functions.
    d. That traditional authorities should have representation on the Board of the Minerals Commission.
    e. That the Geological Survey Department should be given constitutional recognition and backing to assist government in the formulation and implementation as well as monitoring of policies affecting natural resources.
    f. That the Ministry of Energy should be the sector ministry in charge of regulating and managing oil and gas and that there should be no new ministry specifically for oil and gas or petroleum.
    g. The Ghana National Petroleum Corporation (GNPC) should be strengthened to play an active role as a national oil company and should be insulated from political interference.
    h. The Forestry Commission should continue to perform its regulatory functions in managing and regulating the extraction and utilisation of forestry resources.
    i. The Constitution should create a distinct Ministry of Fisheries and Aquatic resources to manage and regulate the fisheries industry.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

146. The Commission recommends that the constitutional mandate of the various Natural Resources Commissions be retained.

147. The Commission recommends that Articles 268 and 269 be reformulated to provide for the grant of a resource right upon the recommendation of the relevant resource Commission and subject to ratification by Parliament. Parliament may delegate the power of ratification in respect of any particular class of transactions, contracts and undertakings to any other agency of government.

148. The Commission further recommends that Article 258(1)(d) be amended to reflect the Land Registration Division of the Land Commission's expanded mandate, to advise on and execute a comprehensive programme for the registration of land throughout Ghana.

149. The Commission also recommends the insertion of new functions for the Lands Commission in Article 258(1) relating to surveying, mapping, valuation and such other functions as the Minister responsible for Lands and Natural resources may assign.

150. The Commission recommends the inclusion of the following basic principles in the natural resources chapter of the Constitution or in the Directive Principles of State Policy.
    a. The utilisation of Ghana's natural resources must be for the ultimate good of the people of Ghana. Flowing from the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, Ghana is the primary beneficiary of its natural resources and any programme, project and activity relating to the extraction and utilisation of Ghana's natural resources must be designed to achieve this.[1196] Similarly, Ghana must reserve the right to abrogate any programme, project, activity or contract which goes contrary to this basic principle. Additionally, only the Ghanaian State may mortgage any of its natural resources. In entering into any international treaties in relation to its natural resources, Ghana must do so in particular regards to the relevant United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources.
    b. Ghana's natural resources must be generally managed in order to ensure equitable distribution of both the burdens and the benefits of the exploitations of those resources.

[1196] U.N. General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources GA Res. 1803 (XVII), 17 UN GAOR Supp. (No.17) at 15, UN Doc. A/5217 (1962).

c. That the extraction and utilisation of Ghana's natural resources and the equitable distribution of the burdens and benefits, thereof must be done in an absolutely participatory fashion involving all key stakeholders.
d. There must be local content requirement in extractive industries to enhance the building of local capacity and the general inclusion of Ghanaian business in the extractive industry.
e. Ghanaian Courts must be the primary arbiter in all disputes relating to natural resources in Ghana although such decisions may be appealable to dispute resolution mechanisms outside of Ghana particularly to regional, continental and global judicial bodies.
f. Ghana shall not ordinarily engage in the taking of property, but when it does, it shall pay prompt and fair compensation based on the book value.
g. Effective measures must be taken to effectively regulate the phenomenon of transfer pricing, including ensuring absolute disclosure of any transfer pricing activities, with the severest possible punishment attached to non-disclosure.
h. The State shall regulate the extraction and utilisation of natural resources, so that bearing and resource fringe communities are not disadvantaged and that the numerous human rights abuses occurring in those are addressed forthwith.
i. Ghana shall take active steps to develop artisanal and small scale mining and fishing.
j. Ghana shall take active steps to develop through the ECOWAS and AU mechanisms, protocols and treaties to prevent a race to the bottom in the regulation of natural resources in the sub-region.

151. The Commission further recommends that the Office of the Administrator of Stool Lands should be designated as an Independent Constitutional body.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

152. The Commission recommends that the various Acts of Parliament that deal with the management of natural resources be amended without delay, to incorporate and further elaborate the now basic principles governing natural resources in the Constitution.

ISSUE TWO: SHARING OF BENEFITS DERIVED FROM LANDS AND NATURAL RESOURCES

A. DIMENSIONS OF THE ISSUE

153. The dimensions of the issue were as follows:
a. Whether the Constitution should empower all Natural Resource Commissions to establish special funds for the development of communities affected by mining activities?
b. Whether the Constitution should make provision for the establishment from extractive industry revenues of an investment alternative fund or a future generation fund for national development?

c. Whether there should be a formula for disbursing compensation paid for compulsory land acquisitions made by the government in areas where such lands are not stool lands so as to ensure that development agents such as the District Assemblies also receive a percentage of such funds to enable them meet development goals in those areas.
d. Whether all Natural Resource Commissions should be empowered to prosecute and compulsorily demand the payment of royalties from mining and resource extracting companies?
e. Whether there should be legislation to deal with environmental crime?
f. Whether the current formula for the distribution of revenue accruing to stool or skin lands should be reviewed?

B. CURRENT STATE OF THE LAW ON THE ISSUE

154. The Constitution in Article 267 attempts to provide a formula for the disbursement of revenues realised from the extraction of natural resources.[1197] The article provides that 10% of the revenue accruing from stool lands be paid to the office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue be disbursed in the following proportions: 25% to the stool through the traditional authority for the maintenance of the stool in keeping with its status; 20% to the traditional authority; and 55% to the District Assembly, within the area of authority of which the stool lands are situated.

C. SUBMISSIONS RECEIVED

155. A number of submissions were received on the issue of the management of revenue derived from natural resources.
    a. One set of views was that revenues from natural resources should be managed in a transparent manner to ensure that they are used effectively and judiciously for the benefit of all Ghanaians. It was argued that this would ensure that managers of the nation's resources are held accountable for decisions and policies they make in relation to prospecting for natural resources, granting concessions, extraction and utilisation of natural resources.
    b. A good number of submissions also advocated the empowerment by the Constitution, of all Natural Resource Commissions, to establish special funds for the development of communities affected by mining activities.
    c. Others contended that there should be a formula for disbursing compensation paid for compulsory land acquisitions made by the government in areas where such lands are not stool lands so as to ensure that development agents such as the District Assemblies receive a percentage of such funds to them meet development goals in those areas.

[1197] Article 267 of the 1992 Constitution of the Republic of Ghana.

d. There were other submissions to the effect that all Natural Resource Commissions should be empowered to demand the payment of royalties from mining and resource extracting companies and to prosecute defaulters.
e. There were also those who subscribed to the view that the current formula for the distribution of revenue accruing to Stools or Skin lands should be maintained.
f. There were submissions that revenue management should be the sole duty of the various Natural Resource Commissions established by the Government.
g. Other submissions proposed that the Government set up a stabilization fund where all revenues realised from the extraction and utilisation of natural resources are lodged, and proposed that revenue management be a shared responsibility between resource owners and the Government.
h. Some others contended that revenues realised from the extraction and utilisation of natural resources be partly re-invested in communities affected by the activities of mining companies.

D. FINDINGS AND OBSERVATIONS

156. The Commission observes that at the National Constitution Review Conference, participants proposed that Article 267(6) of the Constitution, which apportions 55% of revenue accruing from Stool lands to District Assemblies and 45% to traditional councils and Stools and Skins after deducting the 10% due Administrator of Stool Lands towards the coverage administrative expenses the be maintained. However, there should be mechanisms to ensure accountability in the management and utilisation of the funds.

157. The Commission further observes that the following proposals were also made at the NCRC:
    a. That the Constitution should stipulate a certain percentage of royalties which should be allocated to communities negatively affected by mining activities.
    b. That there should be a constitutional provision establishing a special fund for communities negatively affected by mining activities. The special fund should be administered along the lines of the Mineral Development Fund and managed by an independent body.
    c. Revenues realised from the extraction and utilisation of Oil and Gas should be pooled into an Oil and Gas Fund to be managed by an Oil and Gas Commission as an investment fund or a future generation fund. This fund should be given constitutional force through provisions entrenched in the Constitution.

158. The Commission observes, from comparative studies that, in Nigeria, the formula for the distribution of oil revenues between the Federal Government and the States has progressively inured to the benefit of the former, so that by 1993, the share of the derivative State had dwindled to a mere trickle of 3%. For instance, prior to the civil war in 1966, the split was

50% for the State of derivation, 20% for the Federal Government, and 30% for a Distributive Pool that was shared among the regions on the basis of population and equality. However, the post-civil war era, saw oil as the main driver of the economy, and as such a Petroleum Decree arrogated to the Federal Government powers to nullify and award new concessions. The aftermath saw drastic, anti-Biafra-secessionist measures and the tightening of the Federal Government's grip on oil resources. [1198]

159. The Commission observes that in jurisdictions like the USA and in respect of environmental degradation, the law differentiates between knowing violations and accidents or mistakes. For knowing violations, the law imposes criminal liability on the person who commits an illegal act that harms or destroys the environment. On the other hand, when it is an accident or mistake, then civil liability would be imposed on the person. Mining and oil companies in Ghana have been involved in certain acts that have harmed both the environment and human life. However, the absence of such a clear cut distinction has led to the settlement of such matters without criminal consequences.

160. The Commission finally observes that currently, there is a Draft Marine Pollution Bill to regulate marine pollution among other related matters.[1199]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

161. The Commission recommends that the various Acts of Parliament that deal with benefit sharing in the Natural Resources sector be amended to ensure greater transparency and accountability in the use of these resources within the sharing arrangement provided by the Constitution.

162. The Commission further recommends a legislative framework to provide clearly for environmental crimes in relation to the exploitation of natural resources.

ISSUE THREE: TAX REGIME

A. DIMENSIONS OF THE ISSUE

163. The dimensions of the issue are:

[1198] John Boye Ejobowah, *Who Owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria*, Vol. 47, No. 1 Africa Today 34-35 (Winter, 2000).

[1199] Last contacted on 9th December, 2011, the Drafting Division of the Ministry of Justice and Attorney-General's Department informed the Commission that the Bill had received Cabinet approval and will soon be laid before Parliament after some corrections had been made to it.

a. Whether existing tax regimes are adequate for maximizing the revenues for the natural resources extracted especially Oil and Gas?
b. Whether tax holidays should be granted to mining companies?
c. Whether stabilization agreements should be reviewed and how often?

B. CURRENT STATE OF THE LAW ON THE ISSUE

164. The Constitution has no specific provision on tax regimes that should govern the exploration and utilisation of natural resources in Ghana. However, Article 268 confers on Parliament the power to grant a right or concession for the exploitation of any mineral, water or other natural resource of Ghana. Under the same provision, Parliament may exempt any particular class of transactions, contracts or undertakings by a resolution supported by the votes of not less than two-thirds of all the members of Parliament.

165. Some enactments governing the exploration and exploitation of natural resources set out the various tax regimes under which these extractive companies operate. For instance, the Minerals and Mining Act has provisions regarding tax regimes that guide the operations of all mining companies in terms of the payment of taxes.[1200] For instance, under Section 29 of the Act, the holder of a mineral right may be granted: (a) exemption from the payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations; (b) exemption of staff from the payment of income tax on furnished accommodation at the mine site; (c) immigration quota in respect of the approved number of expatriate personnel; and (d) personal remittance quota for expatriate personnel free from tax imposed by an enactment regulating the transfer of money out of the country.

C. SUBMISSIONS RECEIVED

166. The Commission received a number of submissions in relation to the desired tax regime that should regulate the operations of mining firms in Ghana. One popular view expressed was that tax regimes should be crafted to impose a higher tax rate on mining companies and other companies operating in the extractive sectors of the economy.

167. Another popular submission was that government's tax regime should be made attractive and able to woo investors to the extractive sector of the economy. It was also suggested that government should not grant tax holidays to mining and other companies. Rather, Government should impose a favourable tax regime and institute measures to retain revenues in the country.

[1200] Minerals and Mining Act, 2006 (Act 703).

168. Other submissions were to the effect that the concession agreements with mining companies should be reviewed every 10 years. This is because such agreements tend to have stabilization clauses which are not beneficial to the country if left unreviewed.

D. FINDINGS AND OBSERVATIONS

169. The Commission finds that the regulation of the financial aspects of extractive industries is the key to generating benefits from the resources for the people of Ghana.

170. The Commission observes that to forestall risks associated with countries endowed with natural minerals resources, foreign investors in the extractive industries usually require host developing countries to issue guarantees on the stability of the legal and fiscal regimes governing investment projects. This objective may be achieved either by enshrining such guarantees in natural resource concession contracts or by enacting statutes containing such guarantees. Known commonly as "stabilization clauses", these contractual and statutory guarantees are aimed at preserving the law of the host country as it applies to the investment. These agreements should be, but are not regularly reviewed in line with changes in the environment.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

171. The Commission recommends that the tax laws of Ghana, as they relate to the natural resources sector be amended to reflect the following:
    a. Rapid payback of investment (such as accelerated depreciation);
    b. A device (such as royalty) providing early revenue to the government and some payment whenever production occurs;
    c. An overall tax burden high enough to outweigh temptation for governments to change terms, but leaving sufficient upside incentive for the investor; and
    d. Relief from taxes on inputs where these are retrogressive (such as Value Added Tax (VAT) without an adequate refund system.

172. The Commission recommends that stabilization clauses in natural resource agreements be reviewed periodically.

CHAPTER THIRTEEN - HUMAN RIGHTS

13.1 INTRODUCTION

1. During the consultative process, the Commission met with a diverse range of constituencies, and there was a striking consistency in the submissions the Commission received on human rights. It was apparent that the people do not want the provisions on human rights amended unless to improve upon them.

2. This chapter on human rights traces the human rights history of Ghana, outlines the messages at the core of the submissions received by the Commission on that theme and presents the recommendations of the Commission on the various human rights issues raised in the light of the Commission's findings and observations.

3. Human Rights are the rights or entitlements a person has simply because he or she is a human being. The Committee of Experts that developed proposals for the 1992 Constitution gave a working definition of human rights as: "Human Rights are universally regarded as inalienable and constitute the birthright of the individual as a human being. Therefore no person may be deprived of his or her Human Rights."[1201]

4. On 10th December, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. From this, regional bodies of the world have formulated their versions of the Human Rights Charter: the American Convention on Human Rights (ACHR), the European Convention on Human Rights and Fundamental Freedoms (ECHR), the African Charter on Human and People's Rights (ACHPR), and the Arab Charter on Human Rights (ArCHR). The ACHPR is unique because it gives recognition not only to individual rights but also to group rights, thus situating the rights of the individual in the context of group rights.

5. Human rights issues have, since the coming into force of the 1992 Constitution of Ghana, taken centre stage in the political, economic and social lives of Ghanaians. The whole of Chapter 5 of the 1992 Constitution, spanning Articles 12 to 33, is dedicated to human rights, while Chapter 6 sets out economic, social, cultural, and developmental rights, which must guide every person and institution in Ghana in the interpretation and application of the Constitution and in development programming. Aside from these two chapters, there are other provisions of the Constitution which confer rights on Ghanaians and persons in Ghana. These include the right to secure tenure for public servants (Article 191 and 199) and the right to administrative fairness (Article 23). It is evident that

[1201] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 128.

Ghanaians are very protective of and prefer to detail out their fundamental human rights in the fundamental Law of the land and to leave nothing to chance. This is the result of centuries of human rights abuses that successive generations of Ghanaians have suffered.[1202]

13.2 HISTORICAL BACKGROUND

6. The history of Human Rights in general spans centuries and draws upon religious, cultural, philosophical and legal developments throughout recorded history. At almost all stages of the development of mankind there have been Human Rights documents in one form or the other in existence. Notable among such documents are the Edicts of Ashoka issued by Ashoka the Great of India between 272 and 231 BC and the Constitution of Medina of 622 AD, drafted by Muhammad to mark a formal agreement between all of the significant tribes and families of Yathrib (later known as Medina).[1203] There are also the British Magna Carter of 1215 and the Charter of Kurukan Fuga of the ancient Mali Empire in Africa (1236). The French Declaration of the Rights and Duties of Man and the Citizens in 1789; the US Constitution and Bill of Rights of 1791; and the Geneva Convention of 1864 are relatively recent examples.

13.2.1 HUMAN RIGHTS IN PRE-COLONIAL TIMES

7. Prior to the arrival of the colonial masters, the various communities that now constitute Ghana were governed by Customary Laws. These Laws varied from community to community but performed the same role of ordering the lives of the people. These Laws included very fine principles of human rights, including the sanctity of life; the right to live in community; the right to property, individual and communal; and the right to fair trial.

8. On the other hand, some aspects of pre-colonial governance, such as slavery, executions that followed the death of some chiefs, betrothal marriages, dictatorial chiefs and patriarchy, have been cited by modern day human rights activists as violations of human rights during the pre-colonial era. These concerns are often narrow conceptualizations and misconceptions. For example, the presence of women chiefs in Northern Ghana and the critical role of the Queenmother in the governance set ups in Southern Ghana are often discounted by critics in favour of the argument that the pre-colonial system was patriarchal. It cannot however be denied that several human rights abuses occurred during the pre-colonial era, sullying the fine human rights principles that formed part of the Customary Laws of the time.

[1202] Although this chapter deals with human rights, issues relating to the voting rights of prisoners as well as Ghanaians resident abroad are not discussed here. Rather, they have been comprehensively dealt with under the chapter on Independent Constitutional Bodies, specifically under the Electoral Commission.

[1203] Faisal (2010) *Historical Development of Human Rights*, (June 14, 2011, 10:27 AM) http://jurisonline.in/2010/05/historical-development-of-human-rights/.

13.2.2 HUMAN RIGHTS IN COLONIAL TIMES

9. From 1471, when the first Europeans were said to have arrived at the Gold Coast till the attainment of independence in 1957, many human rights abuses occurred in the country. Some of the abuses were related to unfair trade, slave trade, the wars of conquests and their related abuses, forced labour and political oppression. The European traders and later colonizers subsumed the human rights of the people under the overriding aim of conquering the people, occupying the territory and extracting as much resources as possible for transmission to the metropolis in Europe.

10. Immediately after the formal declaration of the end of the slave trade, the British entered into the Bond of 1844 with a number of Fante and other local Chiefs. The Bond legalised the imposition of the British legal system on the Gold Coast, acknowledging the power and jurisdiction that the British had exercised *de facto* in the territories adjacent to the British forts and settlements. The declaration was also to the effect that the first objects of the law were the protection of individuals and property and that human sacrifice, panyarring (the putting up of human beings as collateral for debt payment), and other barbarous customs were abominations and contrary to Law. It was further agreed that serious crimes should be tried by the Queen's Judicial Officers sitting with the chiefs, thereby moulding the customs of the country into the general principles of British Law.

11. The effect of the Bond of 1844 on human rights in the Gold Coast was that it laid down the test for the acceptability of Customary Laws to the English Courts. The test was that for a law to be acceptable in the English Courts, it must not be repugnant to natural justice, equity and good conscience.[1204] Thus, any Customary Law or practice that was repugnant to natural justice, equity and good conscience was not acceptable. In a sense this test began the process of subjecting customary laws to the moulding furnace of English principles of human rights. English practices in the colony, no matter how detestable, were presumed acceptable.

13.2.3 HUMAN RIGHTS UNDER GHANA'S POST-INDEPENDENCE CONSTITUTIONS

12. After independence, Ghana started making attempts at securing some fundamental human rights of its citizens in the Ghana (Constitution) Order in Council, 1957 (the 1957 Constitution.) Though the attempts were feeble, a few, such as ensuring a non-political and competitive civil service, were notable. "But before long, the new national government had largely come to view some of the provisions of the 1957 Constitution protecting human rights as impediments to the quest for political stability, national integration and rapid social and economic development. Post-colonial abuse of human rights may be said to have formally began with the Preventive Detention Act of 1958 passed by the Nkrumah CPP

[1204] *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*, Privy Council (1931) A.C. 622 at 673.

administration"[1205] to permit the Prime Minister to detain certain persons for a period of up to 5 years without trial. The Act was seen as a threat to the democratic development of the infant State of Ghana. Under the 1957 Constitution, the only institutional mechanism for the enforcement of human rights was the courts. This was not explicitly stated in the Constitution.

13. The 1960 Constitution introduced a window of hope for the full recognition of human rights. It provided in its Article 13(1) that the President shall assume office by taking an oath that recognised that subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law. That no person should be deprived of his property save where the public interest so requires and the law so provides.

14. Under the 1960 Constitution, the institutional mechanism for the enforcement of human rights was the Courts. Despite the attempts to recognise human rights in the 1960 Constitution, the Supreme Court of Ghana failed to enforce them by holding that the human rights declarations in Article 13(1) were not enforceable because they imposed only a moral obligation upon the President of Ghana. Flowing from that, the Court reneged on its duty to protect the Human Rights of ordinary citizens by declaring that the Preventive Detention Act of 1958, which empowered the President to detain any person without formal trial for as long as it suited the President, was not contrary to the Constitution and that Parliament was competent to pass such an Act even in peace time.[1206] This decision paved the way for widespread human rights abuses by the Government.

15. An amendment to the 1960 constitution increased the powers and prerogatives of the President that paved the way for widespread abuse of Human Rights by the State. This amendment, for instance, established a constitutionally enshrined "one-party" State. The effect of the wide reaching powers of the President were even felt in the judiciary, the government was enabled to set up special Courts to impose the death penalty on political offenders. The rulings of these courts could not be reviewed by any other court. Only the President could review them.

16. In the 1969 and 1979 Constitutions, the framers were careful not to return to the 1960 scenario and enshrined the classical human rights and freedoms in those Constitutions.[1207] An entire chapter in the 1969 Constitution was devoted to Fundamental Human Rights. Apart

[1205] E. Gyimah-Boadi, (2004); *Confronting the Legacy of Human Rights Abuse in Africa: Lessons from Ghana*, (Oct. 16, 2011, 12: 45 PM) www.cddghana.org.
[1206] *Re: Akoto* [1961]GLR 140 (Pt II) 523, SC.
[1207] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 138.

from Article 13 of that chapter on welfare of the family, (which belongs to economic, social and cultural rights) all other provisions dealt with civil and political rights.

17. As a concept, the Ombudsman was first introduced in the 1969 Constitution, and was designed to ensure the best principles of public administration and the good conduct of the administrative State.[1208] The justification for its introduction was the search for a machinery to provide citizens with a better avenue for expressing their grievances, and to have a mechanism capable of investigating complaints from citizens who felt that they had been dealt unfairly with by the government.[1209]

The 1979 Constitution did not differ much from the 1969 Constitution in terms of Human Rights provisions. It also provided for the Directive Principles of State Policy (DPSP) that were to ensure the realization of the human rights provisions in the Constitution. All the arms of government were to be guided by these principles in their application and interpretation of the 1979 Constitution. Virtually all the provisions in the DPSP belong to the categories of economic, social, and cultural rights or the right to development. An institutional mechanism for the enforcement of human rights under the 1979 Constitution was the Ombudsman, to which an entire chapter was devoted.[1210] This institution was criticised throughout its tenure as an irrelevant institution and a toothless bulldog.[1211] It is equally worthy to note that the 1979 Constitution equally provided that an independent and impartial adjudicating authority for the determination of the existence or extent of a civil right or obligation be subject to the provisions of the Constitution.[1212]

13.2.4. HUMAN RIGHTS UNDER THE MILITARY REGIMES

18. The era of military coups d'état in Ghana presented fresh challenges to Human Rights. The first coup was in 1966 and it overthrew the Government of the first President of Ghana, Dr. Kwame Nkrumah. From that time and until the Fourth Republic commenced on 7th January 1993, Ghana was ruled by military regimes, except for two democratic interregnums lasting 27 months each in 1969 and 1979. All conceivable forms of human rights abuses occurred

[1208] Articles 100 and 101 of the 1969 Constitution of the Republic of Ghana; Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 472 to 497.
[1209] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraphs 475 and 476.
[1210] Chapter 11 of the 1979 Constitution of the Republic of Ghana.
[1211] Geoffrey Cameron, National Human Rights and Government Accountability: A Comparative Study of Ghana and Nigeria, Thesis submitted in partial fulfilment of the requirement for the Degree of Master of Philosophy in Politics (Comparative Government), Department of Politics and the International Relations, University of Oxford (April 2008).
[1212] Article 26(1) of the 1979 Constitution of the Republic of Ghana.

during the military regimes in Ghana: deprivation of life, liberty, property, nationality and many other human rights abuses.

13.2.5. HUMAN RIGHTS UNDER THE 1992 CONSTITUTION OF GHANA

19. The human rights provisions under the 1992 Constitution of Ghana are recognised amongst the very best in the world. They guarantee the human rights of all individuals found within the territorial boundaries of Ghana. The provisions on human rights are mainly captured under Chapters 5 and 6 of the 1992 Constitution.

20. Chapter 5 of the Constitution is titled "Fundamental Human Rights and Freedoms" and runs from Article 12 to 33. It protects, among others, the right to life, the right to personal liberty, the right to human dignity, women's rights, children's rights and the rights of the disabled. All the provisions in Chapter 5 of the Constitution are entrenched.

21. Chapter 6 of the Constitution is titled "The Directive Principles of State Policy" (DPSP). The provisions within this chapter run from Article 34 to Article 41. This chapter contains, among others, provisions on the Political, Social and Economic objectives of Ghana, and provides that, these objectives shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society."[1213]

22. After holding for a decade and a half that the Directive Principles of State Policy are not justiciable by and of themselves, unless they are tagged to provisions in Chapter 5 of the Constitution,[1214] the Supreme Court has recently held that "there is a presumption of justiciability in relation to the provisions of chapter 6 of the Constitution, 1992",[1215] although implementation problems respecting some of the provisions persist.

23. The High Court of Ghana has been constitutionally designated the Human Rights Court, allowing any person who alleges that his human rights have been, is being or is likely to be contravened to apply to the Court for redress.[1216] To ensure accessibility, a Human Rights Court has been established as a specialised division of the High Court by administrative action of the Chief Justice.

[1213] Article 34(1) of the 1992 Constitution of the Republic of Ghana.
[1214] *New Patriotic Party* v. *Attorney-General (31st December Case)* [1993-94] 2 GLR 35; *New Patriotic Party* v. *Attorney-General (Ciba Case)* [1997-1998] 1 GLR 378.
[1215] *Ghana Lotto Operators Association* v. *National Lottery Authority (Lotteries Case)* [2007 -2008] SCGLR 1088 at 1113.
[1216] Articles 33, 130 and 140 of the 1992 Constitution of the Republic of Ghana; section 15(1)(d) of the Courts Act, 1993 (Act 459) as amended by the Courts (Amendment) Act 2002 (Act 620).

24. The Constitution has also established Independent Constitutional Bodies to advance the recognition and enforcement of human rights in Ghana. These are the Commission on Human Rights and Administrative Justice (CHRAJ) which has a triple mandate of investigating and remedying complaints and allegations of human rights abuses, acting as an ombudsman, and ensuring anti-corruption; the Electoral Commission, which is charged with actualizing the right to vote and to be voted for; the National Media Commission which is charged with ensuring the freedom and independence of the media; and the National Commission on Civic Education charged with educating Ghanaians on the Constitution, including the human rights provisions of the Constitution. Detailed submissions and recommendations on the above are contained in chapter eight on the Independent Constitutional Bodies.

25. Remarkable successes have been recorded by various institutions in the area of human rights in Ghana since the coming into force of the 1992 Constitution.
    a. The Courts have, by various recent decisions greatly advanced human rights in Ghana. Some of these decisions are in the following cases: criminal justice[1217], prisoners' right to vote,[1218] freedom of association[1219] and justiciability of economic, social, cultural and development rights.[1220]
    b. The Commission on Human Rights and Administrative Justice has chalked a lot of successes in the protection of human rights in Ghana through the resolution of administrative complaints, human rights abuses and allegations of corruption. In the human rights category, the CHRAJ, according to its 2008 *Annual Report*, recorded a total number of 11,323 complaints with the breakdown as follows: 4665 children's-rights-related cases; 1,684 women's-rights-related cases; 2,137 property-rights-related cases; 2,111 economic-and-social-rights-related cases and civic-and-political-rights-related cases.[1221]
    c. The Police and NGOs have equally played significant roles in recognizing the fundamental human rights of people in Ghana. Most of the time, in the rural communities, the Police and the NGOs are the first ports of call for anyone complaining of human rights abuses and their timely interventions have saved people's lives.

26. Ghana's adherence to human rights principles has yielded dividends. Since 1992, Ghana has undertaken five peaceful presidential and parliamentary elections. This achievement is often

[1217] *British Airways* v. *Attorney General* [1996-97] SCGLR 547.
[1218] *Ahumah Ocansey* v. *Electoral Commission; and & Centre For Human Rights And Civil Liberties (Churchil)* v. *Attorney General & Electoral Commission (Consolidated)* (Unreported) Supreme Court, 23rd March 2010, writ No: JI/4/2008).
[1219] *Mensima and Others* v. *Attorney General and Others* [1997-98]1 GLR 159.
[1220] *Ghana Lotto Operators Association* v. *National Lottery Authority (Lotteries Case)* [2007 -2008] SCGLR 1088.
[1221] Commission on Human Rights and Administrative Justice, Annual Report, 2008, p35, 38, 39, 40 and 41.

credited to the fact that the individual's right to vote has been enshrined in the 1992 Constitution as an entrenched provision and it is carefully monitored and protected by institutions such as the CHRAJ and the EC. [1222]

27. The enjoyment, at significant levels, of the freedom of speech and of expression in Ghana since the coming into force of the 1992 Constitution sets the country apart from most other African countries. The proliferation of radio stations in the country and the repeal of the Criminal Libel Law make Ghana's enviable human rights record laudable. The country's current gains in the area of Human Rights have received international recognition. For instance, according to the European Union, "Ghana has a good contemporary track record in protecting civil and political rights over the past decade and basic freedoms such as those of association, movement, speech and assembly are protected in the Constitution."[1223]

28. Recent events in Ghana have ushered in new challenges to Human Rights in the nation. These include calls for abridging the freedom of speech in the face of vitriolic abuses in the media; calls for gender equality in specific domains; and the issue of gay and lesbian rights.

29. In 2003, barely a decade after the 1992 Constitution was operational, a call was made by the first Speaker of Ghana's Fourth Republican Parliament, the late Justice D. F. Annan, for the reform of the human rights provisions of the 1992 Constitution.

SUBTHEME ONE: CITIZENSHIP

ISSUE ONE: DUAL CITIZENSHIP

A. DIMENSIONS OF THE ISSUE

30. The main dimensions of this issue are:
    a. What should be the date of commencement of the Ghanaian citizenship of a person who lost his Ghanaian citizenship upon the coming into effect of the 1992 Constitution but regained it with the Constitutional Amendment in 1996;
    b. Whether persons with dual citizenship should be registered;
    c. Whether the Constitution should create a Ministry for Diaspora Affairs to take care of the issues that confront Ghanaians living in the Diaspora; and
    d. Whether a Ghanaian citizen who holds the citizenship of another country should be able to hold high public office in Ghana.

[1222] Commission on Human Rights and Administrative Justice Annual Report, 2008, p31.
[1223] European Union, *Election Observation Mission to Ghana, 2008, European Union Election Observation Mission to Ghana Presidential and Parliamentary Elections* (June 20, 2011, 9:38 AM) http://www.eueomghana.org/EN/info.html.

B. CURRENT STATE OF THE LAW ON THE ISSUE

31. The current state of the law on the issue of dual citizenship is found in Articles 6, 7 and 8 of the 1992 Constitution, (as amended by Act 527), The Citizenship Act, 2000, (Act 591) and the Citizenship Regulations, 2001 (L.I. 1690).

32. Article 6 of the Constitution provides that where upon the coming into force of the 1992 Constitution a person is a citizen of Ghana, that person shall continue to be a citizen of Ghana. [1224] The same article further provides that a person, born after the coming into force of the Constitution, shall become a Ghanaian citizen whether he is born in or outside Ghana, provided that at the time of his birth, either of his parents or grandparents is or was a citizen of Ghana.[1225] Article 8(1) of the Constitution withdrew the citizenship of any Ghanaian (attaining the age of 21years) who voluntarily acquired or retained the citizenship of any other country by means other than through marriage. However, this article was amended in 1996.[1226] The amendment completely changed the Law by providing that a citizen of Ghana may hold the citizenship of another country in addition to his citizenship of Ghana.[1227]

33. In 2000, the amendment above was given expression in the Citizenship Act.[1228] The legal effect of the above is that, before 1996, a Ghanaian attaining the age of 21years and holding the citizenship of another country, having acquired it through any means other than marriage, immediately lost his or her Ghanaian citizenship but could reacquire it from 1996. The Act also provides that where a citizen of Ghana had lost the citizenship as a result of the law in Ghana which prohibited the holding of dual citizenship by a Ghanaian, that citizen of Ghana may, on an application to the Minister be issued with a certificate of citizenship which shall be effective from the date of issue.[1229] This law, made in pursuance of the 1996 amendment to the Constitution, has been interpreted by the Ministry of the Interior as providing that once a person lost the citizenship of Ghana before 1996, he can only acquire dual citizenship by applying to the Minister of the Interior for the certificate of citizenship and even that citizenship of Ghana if granted, will only take effect from the date the certificate is issued.

34. The issue with regards to registration of citizenship arises from the interpretation of the law. Whereas section 16(3)(b) of the Citizenship Act provides that a citizen (of Ghana) who **acquires** (*emphasis is ours*) the citizenship of another country in addition to the Ghanaian citizenship shall notify in writing the acquisition of the additional citizenship to the Minister

[1224] Article 6(1) of the 1992 Constitution of the Republic of Ghana.
[1225] Article 6(2) of the 1992 Constitution of the Republic of Ghana.
[1226] The article was amended by section 1 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).
[1227] Article 8(1) as amended by section 1 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).
[1228] Section 16(1) of the Citizenship Act, 2000 (Act 591).
[1229] Section 16(5) of the Citizenship Act, 2000 (Act 591).

in the prescribed form and manner, the Regulations which operationalise the Citizenship Act provide that a citizen who **holds** (*emphasis is ours*) the citizenship of another country in addition to the citizenship of Ghana shall register as a dual national in Ghana and the registration is in accordance with section 16(3)(b) of the Citizenship Act.[1230]

35. It has been argued that Regulation 10(1) of the Citizenship Regulations, 2001(L.I.1690) tries to confuse the issues by attempting to substitute the words "**acquire**... in addition to his Ghanaian Citizenship" (which is found is section 16(3)(b) of the Citizenship Act) with the words "**holds** the citizenship of another country in addition to the citizenship of Ghana" and add the words "shall register as a dual national in Ghana."[1231] The effect of this "substitution" is that whereas according to the Act, it is only when the Citizen of Ghana acquires the citizenship of another country that he has to register, according to the Regulations, once a person holds dual citizenship, he must register. In practical terms, according to the Act, for a child, born in the United States to Ghanaian parents, who at moment of birth simultaneously holds the citizenship of the United States by birth and the citizenship of Ghana by descent,[1232] that child does not need to register his dual nationality because he was not first a citizen of Ghana who later acquired the citizenship of the United States. The two citizenships accrued to him automatically and simultaneously at his birth. However, according to the Regulations, such a child must register, just like a person who was a citizen of Ghana but later travelled to the US and acquired the US citizenship, because both of them "hold the citizenship of another country." Clearly the import of the Legislative Instrument is different from the intention of the Act. Yet, the Legislative Instrument being a piece of subsidiary legislation to the Act cannot effect such an amendment to section 16(3)(b) of the Act which is the substantive Legislation.[1233]

36. Article 7 deals with the acquisition of Ghanaian citizenship through marriage. Clauses 5 and 6 of that Article provide additional requirements for the acquisition of Ghanaian citizenship by a non-Ghanaian man who marries a Ghanaian woman.[1234] These additional requirements are not extended to non-Ghanaian women who marry Ghanaian men. Sections 10 (6) and (7) of the Citizenship Act provide that where on an application for registration (of citizenship) under subsection (2) it appears to the Minister that the marriage had been entered into primarily for the purpose of obtaining the registration, the Minister shall request the applicant to establish that the marriage was entered into in good faith.[1235]

[1230] Regulation 10 (1) and (2) of the Citizenship Regulations, 2001(L.I.1690).
[1231] Memorandum from Martin A.B.K. Amidu, Minister for the Interior to The Attorney-General and Minister for Justice, dated 29th April, 2010. (on file with the Constitution Review Commission).
[1232] Article 6(2) of the 1992 Constitution of the Republic of Ghana.
[1233] Memorandum from Martin A.B.K. Amidu, Minister for the Interior to The Attorney-General and Minister for Justice, dated 29th April, 2010. (on file with the Constitution Review Commission).
[1234] Article 7 of the 1992 Constitution of the Republic of Ghana.
[1235] Citizenship Act, 2000 (Act 591).

37. The law on persons with dual citizenship holding public office in Ghana is found under Articles 8 and 94(2)(a) of the 1992 Constitution. Article 94(2)(a) prohibits a person from becoming a Member of Parliament if he owes allegiance to a country other than Ghana. Article 8(2) of the 1992 Constitution also provides that a person holding dual citizenship cannot hold any of the following offices:
    a. Ambassador or High Commissioner;
    b. Secretary to the Cabinet;
    c. Chief of Defence Staff or any Service Chief;
    d. Inspector-General of Police;
    e. Commissioner, Customs, Excise and Preventive Service;
    f. Director of Immigration Service; and
    g. Any other office specified by an Act of Parliament.

38. Section 16(2) of the Citizenship Act, expands the list in Article 8(2) further by including the following as other offices that cannot be held by persons holding the citizenship of any other country than Ghana:
    a. Chief Justice and Justices of the Supreme Court
    b. Commissioner, Value Added Tax Service
    c. Director-General, Prisons Service;
    d. Chief Fire Officer
    e. Chief Director of a Ministry
    f. The rank of a Colonel in the Army or its equivalent in the other security services; and
    g. Any other public office that the Minister may, by legislative instrument, prescribe.[1236]

39. From the above, although, qualification for holding the office of Member of Parliament includes not owing allegiance to another country,[1237] that of holding other sensitive public offices includes not being a citizen of another country.[1238]

40. The current constitutional regime also restricts the ownership of land by people who are non-citizens. A non-citizen cannot have freehold interest in land; and non-citizens cannot hold land for more than 50 years.[1239]

C. SUBMISSIONS RECEIVED

41. The submissions received by the Commission on the issue of dual citizenship are as follows:

[1236] Citizenship Act, 2000 (Act 591).
[1237] Article 94(2)(a) of the 1992 Constitution of the Republic of Ghana.
[1238] Article 8(2) of the 1992 Constitution of the Republic of Ghana and section 16(2) of the Citizenship Act, 2000 (Act 591).
[1239] Article 266 of the 1992 Constitution of the Republic of Ghana.

a. When a Ghanaian who lost his Ghanaian citizenship upon the coming into force of the 1992 Constitution regains his Ghanaian citizenship under the amended law from 1996, the date of commencement of his Ghanaian citizenship on the certificate of citizenship should be the date of birth of the person.
b. Where a Ghanaian citizen loses his Ghanaian citizenship in order to obtain that of another country and then loses the citizenship of that country, the Ghanaian citizenship should revert to the person automatically.
c. Persons whose dual citizenship accrues to them automatically at birth should not be made to register their citizenship. Registration should be reserved for Ghanaian citizens who acquire the citizenship of other countries after birth.
d. Persons holding dual citizenship should not be allowed to become Parliamentarians.
e. Persons holding dual citizenship should be allowed to hold public office in Ghana for the following reasons:
    i. Despite their dual nationality, they are still Ghanaians.
    ii. Ghanaians who acquire the citizenship of other countries are usually very much abreast with events in Ghana despite living outside the country.
    iii. Ghanaians who acquire the citizenship of other countries contribute a lot, in the form of remittances, to the economy of Ghana.
f. Article 8(3) should be expanded to include other ways of losing citizenship other than by marriage.
g. Persons holding dual citizenship should not be allowed to hold certain public offices. The offices listed in the Constitutional amendment and in the Citizenship Act are all sensitive to national security and should not be occupied by persons whose loyalty to Ghana is very much open to question.
h. Ghanaian citizens holding dual citizenship should be allowed to hold property in Ghana like other Ghanaian citizens who do not hold dual citizenship because Ghanaians holding dual citizenship are all Ghanaians and have only taken up dual citizenship for various personal reasons.
i. A Ministry for Diaspora Affairs should be created to respond more promptly and effectively to the needs of Ghanaians in the Diaspora

D. FINDINGS AND OBSERVATIONS

42. The Commission observes that on the issue of the acquisition of dual citizenship and its commencement, the Committee of Experts that developed proposals for the 1969 Constitution, proposed that "any person born outside Ghana, either of whose parents is a citizen of Ghana should himself, *at the date of his birth* be a citizen of Ghana."[1240] The same

[1240] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 153.

Committee again proposed that "when a person reaches the age of 21 and he is a citizen of Ghana as well as a citizen of some other country he should cease to be a citizen of Ghana unless he takes steps to renounce his citizenship of the other country or in the appropriate case makes and registers his intentions concerning residence under the citizenship laws of Ghana."[1241]

43. The Commission observes that the 1969 and 1979 Constitutions of Ghana did not allow for dual citizenship.

44. The Commission also observes that the first time the issue of dual citizenship was provided for in a Ghanaian constitution was after the 1996 amendment to the 1992 Constitution was passed into law.

45. The Commission further observes that on the issue of the acquisition of citizenship by marriage the Committee of Experts that developed proposals for the 1992 Constitution proposed that "any woman who is married to or who marries a citizen of Ghana should herself be eligible to register as a citizen of Ghana so long as she satisfies the laws of Ghana. We would extend this proposal to cover any person whose husband or wife, a Ghanaian, had died so that any such person is not made stateless. We would also propose that the wife of any person who becomes a citizen of Ghana should be eligible to be registered as a citizen of Ghana in accordance with the law as prescribed by Parliament"[1242]

46. The Commission observes that in 1999, there was a bill to amend the Constitution and to make the provisions on persons entitled to be registered as citizens through marriage gender neutral.[1243] The bill was not passed into law.

47. The Commission notes that the National Constitution Review Conference discussed the current provisions on Citizenship which differentiate between men and women with a heavier burden on men to establish their good faith in contracting marriage to a Ghanaian woman. It was therefore proposed that the same conditions need to be applied to both men and women unless there is an established need for differential treatment.[1244]

48. The Commission finds that at present where a citizen of Ghana loses his Ghanaian citizenship to obtain that of another country and then loses the citizenship of that other country, his Ghanaian citizenship does not revert to him automatically, rendering him stateless.

[1241] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 158.
[1242] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 156.
[1243] Constitution (Amendment) Bill, 1999.
[1244] Article 9(2) of UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

49. The Commission however observes that at international law, a person cannot be stateless; on losing an acquired citizenship, the previous citizenship is automatically restored.

50. The Commission observes that there are myriad of reasons for the acquisition of citizenship of other countries by Ghanaians including the taking advantage of opportunities in those countries. Some Ghanaians have through this acquired invaluable knowledge, skills and resources which can be useful for the development of the country.

51. The Commission nevertheless considers that in recognition of the nation's pride and sovereignty, high public offices ought to be occupied by full Ghanaians who do not owe allegiance to any other country. A Ghanaian who has dual citizenship can always renounce his other citizenship in order to take up high office in Ghana.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

52. The Commission recommends an amendment to Article 8 of the 1992 Constitution on dual citizenship to provide that any person who lost his Ghanaian citizenship before may register as a dual citizen. The person's Ghanaian citizenship takes effect from the date the person lost his Ghanaian citizenship.

53. The Commission recommends that Article 7 of the Constitution be made gender neutral.

SUBTHEME TWO: PROTECTION OF RIGHT TO LIFE

ISSUE ONE: DEATH PENALTY

A. DIMENSIONS OF THE ISSUE

54. The issue of the death penalty reveals the following dimensions:
    a. Should the death penalty be abolished?
    b. Should the death penalty be converted to imprisonment for life?
    c. Should the death penalty be retained?

B. CURRENT STATE OF THE LAW ON THE ISSUE

55. In Ghana, legal authority for capital punishment may be derived from both the Constitution and the Criminal Offences Act, 1960 (Act 29).

56. Article 13(1) of the 1992 Constitution provides that every person is entitled to the right to life. However, the article permits a person to be deprived of life "in exercise of the execution

of a sentence of a Court in respect of a criminal offence under the laws of Ghana of which he has been convicted."

57. The offences that are punishable by death are:
    a. Murder;[1245]
    b. Attempt to commit murder by a convict;[1246]
    c. Genocide;[1247] and
    d. Treason and High Treason.[1248]

58. The Criminal Offences Act provides that a person who commits robbery commits a first degree felony punishable by 'imprisonment for a term of not less than 10 years', and a person who commits robbery with the use of 'offensive weapon' is liable for 'imprisonment for a term of not less than 15 years'.[1249]

59. Ghana is a State Party to the International Covenant on Civil and Political Rights, Article 6 of which recognises the "inherent right to life" of the individual and requires every State to protect this right by law. However, the Covenant does not prohibit the death penalty, although it restricts its application to the "most serious crimes" and forbids it to be used on children and pregnant women. In this connection, it is worth noting that the United Nations Human Rights Committee interprets the Article as "strongly suggest[ing] that abolition of the death penalty is desirable." The Committee regards any progress towards the abolition of the death penalty as advancing the right to life. It is also interesting to observe that the Second Optional Protocol to the Covenant commits its signatories to the abolition of the death penalty within their borders; but it allows Parties to make a reservation allowing execution for grave crimes in times of war. Ghana has not ratified this Protocol.

C. SUBMISSIONS RECEIVED

60. The Commission has received a lot of submissions on the death penalty calling both for the abolition and the retention of the penalty. Those who call for the abolition of the penalty argue that the penalty is not being enforced anyway and is, therefore, not an effective deterrent to prospective offenders. They also argue that the nation should never teach its people that it is good to kill in certain circumstances. There is also the possibility of executing innocent persons, which is terrible considering the irreversibility of dying. They

[1245] Section 46 of the Criminal Offences Act, 1960 (Act 29).
[1246] Section 49 of the Criminal Offences Act, 1960 (Act 29).
[1247] Section 49A of the Criminal Offences Act, 1960 (Act 29).
[1248] Article 3(3)(b) of the 1992 Constitution of the Republic of Ghana; Section 180(1) of the Criminal Offences Act, 1960 (Act 29).
[1249] Section 46 of the Criminal Offences Act, 1960 (Act 29) as amended by section 6 of the Criminal Code (Amendment) Decree, 1969 (N.L.C.D. 398).

argue additionally that the right to life must be absolute; that everyone deserves a second chance and could actually change for the better when offered that chance; that the punishment is against the tenets of some religions; and that life imprisonment is effective enough as a punishment for the most grievous crimes.

61. Other submissions called for the death penalty to be converted to imprisonment for life for a number of reasons additional to those urged above. Most Presidents of Ghana have been unwilling to sign death warrants, effectively turning death sentences to life imprisonment. Converting the death penalty to life imprisonment would also avoid the many criticisms of Ghana by the international community for retaining the death penalty. Finally, the death penalty is too short lasting a penalty for murder and should be substituted with a more painful penalty such as life imprisonment with no possibility for parole for 30 to 50 years.

62. Other submissions argued that the death penalty should be retained for a variety of reasons. These range from its deterrent effect on hardened criminals and coup plotters and coup makers; the need to maintain order in the society; the need to maintain the internal security of the country against treasonable activities; through the need to insure against the poor rehabilitation regime in our prisons and saving the cost of the upkeep of many people sentenced to life in prison; to obeying the Biblical and Quranic laws of retaliation for crimes committed and ensuring that criminals are not let upon the public again through the exercise of the President's prerogative of mercy.

63. The Commission also received many submissions on the upsurge in armed robbery cases in the country. The submissions called for the execution of persons convicted for armed robbery and for person caught directly in the act to serve as a deterrent to future armed robbers.

D. FINDINGS AND OBSERVATIONS

64. The Commission finds that the issue of the retention or abolition of the death penalty is highly controversial and emotive.

65. The Commission finds that the issue of capital punishment in Ghana is highly complex and cannot be resolved on the basis of logic, and certainly not on the basis of the views and practices in other countries. Any proposals for dealing with it must take into account what the people can be persuaded to accept. At the same time, it is interesting to note that in many of the countries (in Europe and elsewhere) where the death penalty has been abolished there has generally been little enthusiasm among the general population for the move. Often, the change has been driven by committed political leadership and the middle class. This will most probably be the case in Ghana too. Politicians and the middle class citizens appear to play a major role in changing the status than the ordinary Ghanaian. To bring on board these

segments of the society, convincing arguments in favour of abolition will have to be marshalled and canvassed with determination.

66. The Commissions finds that the primary reason proffered for the retention of the death penalty is based on the retributivist theory which, in sum, proposes that any person who takes the life of another should have his life taken as a punishment.

67. The Commission finds that there are indeed many equally strong arguments against the continued use of the death penalty. Among them are the following:
    a. As it often happens, genuinely innocent people will be executed and there is no possible way of compensating them for this miscarriage of justice. Death is the one penalty which makes an error irreversible; and the chance of error is inescapable since convictions are necessarily based on human judgment. In many countries, the use of capital punishment leads to the execution of persons who have not had appropriate legal assistance, persons who may be innocent, persons who are mentally retarded as well as minors. Two states in the United States, Maine and Rhode Island, abolished the death penalty because of public shame and remorse after it was discovered that some innocent men had been executed.
    b. There is no compelling statistical evidence that the death penalty is a greater deterrent to potential criminals and coup makers than other forms of punishment. Studies on the deterrent effect of the death penalty have been inconclusive. Indeed, it has been claimed that, as a measure to dissuade potential criminals, the death penalty has been an abject failure. This is borne out by statistics that point to the commensurate rise in murders and executions in countries where the death penalty is still in use.
    c. Evidence from the States that have halted or suspended executions in the United States appears to demonstrate that the death penalty is not really essential to society. The experience in these States has been that the absence of the death penalty has had no effect on people's daily lives. Specifically, there is no evidence at all that the residents of the States with no executions are any less safe than the inhabitants of the States in which executions occur. Thus, as a measure to dissuade potential criminals, the death penalty has not been very successful.
    d. The suggestion that those who commit grievous crimes should face the death penalty is unconscionable because it makes the punishment as barbaric as the crimes being punished. While the crimes committed by the convicted persons may sometimes defy description, they do not give to anyone the right to repeat such a vile act in the name of the state and society "The forfeiture of life is too absolute,

too irreversible, for one human being to inflict it on another, even when backed by legal process."[1250]

e. Capital punishment does not always succeed in providing closure or a sense of justice to the families and friends of victims. This is especially so when executions occur in less than 2% of murder cases. Along with the high costs of the death penalty, concerns about the quality of defence counsel, arbitrariness, and wrongful convictions are all elements of the death penalty that need to be carefully weighed when examining public policy.

f. It has also been claimed that to take a life in order to prove how much society values another life does not strengthen humanity. As a public policy the death penalty devalues every human being and detracts crucial resources from programmes that could truly make communities safe.

g. It is difficult to reconcile support for the death penalty with the universal revulsion against the practices in the past when society thought nothing of hanging children or burning witches. Although most people feel disgusted (and sometimes guilty) when they read of the stoning of adulterers, the removal of a thief's hand or the decapitation of a blasphemer, some appear to find it palatable for the State to have a system by which to break a man's neck, to poison his veins or to electrocute him.

h. The death penalty fails to rehabilitate convicts. It is not easy to say what can be accomplished when someone is put to death. The victim is already dead and cannot be brought back to life. Nor can it be defended by the claim that "fear of death" will prevent other people from committing murder. We know that this is not true because many murders are committed "in the heat of passion" when a person is unable to think rationally. In such a scenario, it is unreal to expect the perpetrator to be thinking of fear in the heat of passion.

i. Also, it is not very clear that the death penalty gives increased protection against being murdered. It is often claimed that we need "extreme penalty" as a deterrent to crime. This would be a strong argument if it could be proved that the death penalty discouraged murderers and those responsible for serious crimes. But there is no strong evidence that this is the case and that the death penalty does, in fact, discourage crime. On the contrary, the evidence increasingly shows that capital punishment does not serve as deterrent. Several studies have failed to give any credible support to the view that the death penalty actually deters would-be criminals. If the assumption that the death penalty helps to prevent crime were correct, one would expect that States which have the death penalty for murder would be relatively free from murder. But the available evidence shows that these

[1250] MICHAEL P. HORNSBY, AN INTRODUCTION TO CATHOLIC SOCIAL THOUGHT 122 (Cambridge Univ. Press, 2006).

States do not necessarily have fewer murders, when compared to States that have abolished the death penalty.

j. History shows that the fear of death does not reduce crime and has never done so. In the days when executions were public and brutal some criminals were even crushed to death slowly under heavy weights. But this did not necessarily reduce crime. Indeed, there is evidence to suggest that crime was much more common at that time than now. This would seem to show that executions do not act as a deterrent to those who contemplate serious criminal acts.

68. The Commission finds that the last time anyone was executed in Ghana was in 1993. The reason why there have not been any executions for so long, despite convictions for offences punishable by death, is the unwillingness of the various past (and even current) Presidents of the country to sign death warrants. The effect is that people sentenced to death are kept on death row for some years and after some time they are released under the President's prerogative of mercy or have their death sentences first commuted to imprisonment for life and subsequently totally pardoned and released. The present system, therefore, does not adequately punish people convicted of crimes that are punishable by death.

69. The Commission observes that if the State permits the killing of any person it will be invariably transforming itself into a killer and there is no justification for the State to become a killer.

70. The Commission finds that both the 1969 and 1979 Constitutions of Ghana gave recognition to the concept that human life is sacred and must be protected. A person's right to life was guaranteed regardless of race, place of origin, political opinion, colour, creed or sex. However, both Constitutions and the Criminal Codes under them provided for instances where in the execution of the sentence of a Court the State can deprive a person of his right to life.[1251]

71. The Committee of Experts that developed proposals for the 1992 Constitution proposed that no person should be deprived of his or her life intentionally. The right to life should thus be respected and protected subject to the same restrictions as are found in the 1979 Constitution.[1252] The Committee of Experts however noted that "it does not agree that the application of deadly force for the purpose of effecting a lawful arrest or preventing escape from lawful detention is justifiable."[1253]

[1251] Article 20(1) of the 1979 Constitution of the Republic of Ghana.
[1252] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 143.
[1253] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 144.

72. The Commission finds that in almost every part of the globe, countries have abolished the death penalty. At the end of 2010, out of the 193 independent members of the United Nations (or with observer status with the UN) only 41 or 21% maintained the death penalty in both law and practice. Some 95 States (or 49%) have abolished the death penalty while 8 States (or 4%) retain it for crimes committed in exceptional circumstances (such as in time of war). Some 49 States (or 25%) permit its use for ordinary crimes but have not used it for at least 10 years. Many of these States have a policy (or practice) of not carrying out executions, or have adopted a moratorium on executions. It can thus be seen that current international opinion is predominantly in favour of the abolition of the death penalty.[1254]

73. The Commission observes that the National Constitution Review Conference produced the following varied opinions on the death penalty:
    a. The availability of the death penalty serves as a deterrent to possible criminals. If it were abolished, rates of serious crimes, such as murder, would increase.
    b. The state should have the right to protect its citizens against serious criminals by imposing the death penalty on those criminals.
    c. A law that is not applied should not be retained; the current practice of keeping offenders on death row indefinitely, rather than promptly effecting their sentence, is both illegal and an abuse of human rights.
    d. The death penalty is an unacceptably final solution given the realities of the present Ghanaian justice system. Moreover, there is the risk of wrongful convictions due to deficiencies in that system.

74. The Commission observes that the inability of the NCRC to reach a conclusion on the matter evidently reflects the worldwide dichotomy regarding this all important issue. However, the Commission is of the view that, because human life is concerned and based on the utilitarian principle that punishment must serve the greater good, there is the need to focus on reformation of the criminal rather than the taking of life.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

75. The Commission recommends the replacement of the death penalty with imprisonment for life without parole, a stiffer penalty than the current practice.

[1254] AMNESTY INTERNATIONAL,http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-statistics-2010 (last visited Oct. 14, 2011).

SUBTHEME THREE: PROTECTION OF PERSONAL LIBERTY

ISSUE ONE: PRE-TRIAL DETENTION

A. DIMENSIONS OF THE ISSUE

76. The following are the dimensions of the issue:
    a. What should be the maximum period of pre-trial detention?
    b. Should there be a category of offences which should not attract pre-trial detention?
    c. Should there be an automatic right to be released after a certain period of pre-trial detention?
    d. Should the automatic right of release from pre-trial detention apply irrespective of the offence charged?

B. CURRENT STATE OF THE LAW ON THE ISSUE

77. The 1992 Constitution provides in Article 14(3)(b) that a person who is arrested, restricted or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a Court within 48 hours after the arrest, restriction or detention.

C. SUBMISSIONS RECEIVED

78. The Commission received the following submissions on this issue:
    a. The 48-hour rule should be amended by the insertion of a proviso to Article 14(3) as follows:
        i. "Provided that, a military person arrested, restricted or detained by the appropriate military authorities – for the purpose of bringing him before a service tribunal in execution of an order of a service tribunal; or upon reasonable suspicion of his having committed or being about to commit a service offence under military regulations and who is not released – shall seek his release in accordance with the military regulations to which he is subject."

    b. The 48-hour rule should be changed to a 24-hour rule for the following reasons:
        i. To ensure that persons arrested have access to the courts on the same day they are arrested irrespective of the day of the week.
        ii. To eradicate the mischievous practices of some police officers who use the rule to settle personal scores by arresting people on Fridays and making them stay in Police cells until Monday.

    c. There should be a specific category of offences, for example, first degree felonies, for which a person may suffer pre-trial detention, and no other offence should implicate pre-trial detention.

D. FINDINGS AND OBSERVATIONS

79. The Commission finds that many instances of pre-trial detention in Ghana cannot be justified. The power of pre-trial detention is often not used as a mechanism for the protection of the suspect, the complainant or the public and to ensure the appearance of the suspect at trial. It is rather used as a means of punishing the offender before trial, extracting confessions from him, or enforcing his performance of a contract. These are illegitimate uses of the power of pre-trial detention.

80. The Commission further finds that the current provision on pre-trial detention is often abused. There are many recorded instances of persons detained well beyond the prescribed maximum period of 48 hours without trial. This trend defeats the purpose for which the period of pre-trial detention was extended to 48 hours and gives credence to the fear of abuse entertained by the members of the Committee of Experts for the 1969 and 1979 Constitutions, for which reasons they insisted on making the period of pre-trial detention a maximum of 24 hours.

81. The Commission observes that the Committee of Experts that developed proposals for the 1969 Constitution stated in their report that, "Personal Liberty is often interfered with by the Police. To guard against the abuse of police powers, a certain fundamental conduct is required of the Police in the arrest of persons."[1255] The Committee therefore proposed that "Any person who is arrested or detained … upon a reasonable suspicion of his having committed or being about to commit a criminal offence under the Laws of Ghana should be brought to Court within twenty-four hours if he has not then been released." [1256] This proposal was accepted, and under Article 15(3) of the 1969 Constitution, it was provided that "Any person who is arrested, restricted or detained for the purposes of bringing him before a Court in execution of the order of a Court or upon reasonable suspicion of his having committed or being about to commit a criminal offence under the Laws of Ghana and who is not released shall be brought before Court within twenty-four hours."

82. The Commission observes that the Committee of Experts that developed proposals for the 1979 Constitution proposed the re-enactment of the chapter on the liberty of the individual as found in the 1969 Constitution, in the 1979 Constitution, almost in its entirety.[1257] One of the provisions that were re-enacted was the duration of pre-trial detention. Thus the 24-hour limit

[1255] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 197.
[1256] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 202.
[1257] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 86 – 87.

for pre-trial detention in the 1969 Constitution was retained in the 1979 Constitution as Article 21(3) of the 1979 Constitution.

83. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed increasing the pre-trial detention period, from 24 hours to 48 hours thus: "no person should be detained by any agency of the State for a period exceeding *48 hours* without such a person being brought before a Court of competent jurisdiction."[1258] The Committee further proposed that "no person should be deprived of his or her right to personal liberty, except in accordance with procedures established by Law. In particular, no one may be arbitrarily arrested or detained."[1259]

84. The Commission observes that although the Committee of Experts that developed proposals for the 1992 Constitution did not give any specific reasons for the increase of the period of pre-trial detention, from 24 hours to 48 hours, the Consultative Assembly that deliberated on the proposals of the Committee of Experts mentioned the inadequacy of the state investigative machinery as one of the reasons for which the period of pre-trial detention had to be increased to a maximum period of 48hours to enable the Police work efficiently.[1260]

85. The Commission finds that the inadequacy of the state investigative machinery cannot be grounds to unduly restrict the personal liberties of Ghanaians, especially since the inadequacy can be resolved administratively.

86. The Commission observes the following pre-trial detention limits in a number of countries:

No	**Country**	**Time Limit**
1.	United States	48 hours
2.	Canada	24 hours
3.	Ireland	24 hours
4.	Australia	24 hours
5.	France	48 hours
6.	Germany	48 hours
7.	South Africa	48 Hours

87. The Commission observes that the Constitution of India provides that when a person is arrested and detained in custody, he or she must be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from

[1258] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 147.
[1259] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 143.
[1260] Official Report of the Proceedings of the Consultative Assembly (Tuesday 1st October, 1991, Col. 127).

the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.[1261] The Constitution further provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.[1262]

88. The Commission further observes that the Indian Courts have stressed that, the expression "as soon as may be" in Article 22(5) of the Constitution of India must be interpreted strictly, and the detaining authority must communicate the grounds for a person's detention to him with reasonable dispatch. It is for the Court to consider whether the grounds were communicated within a reasonable time. If the grounds are not communicated to the detainee within a reasonable time, the detention of the detainee can be set aside on this ground.[1263] This demonstrates how jealously the Judiciary protects the rights of the detainee in India.

89. The Commission also finds that there is an overwhelming call by Ghanaians for pre-trial detention to be limited to particular and quite grievous offences only, in order to ensure that persons are not detained because they are suspected of having committed minor crimes.

90. The Commission recognises that there are instances where the liberty of the individual may need to be restricted for his own good or for the good of other members of the public. However, the liberty of the individual in any democracy must be carefully guarded, and so it is imperative that very high standards be set for the security agencies and individuals who may wish to infringe on an individual's liberty.

91. The Commission observes that the Committee of Experts that developed proposals for the 1968 Constitution, proposed that "any person who is unlawfully arrested or detained by any other person or authority be they Government or otherwise should be entitled to compensation from that person or authority for the unlawful arrest or detention."[1264]

92. This was adopted into the 1969 Constitution and subsequently reproduced in the 1979 and 1992 Constitutions of Ghana as " [a] person is unlawfully arrested, restricted or detained by any other person he shall be entitled to compensation from that other person.[1265]

[1261] Article 22(2) of the 1949 Constitution of India.
[1262] Article 22(5) of the 1949 Constitution of India.
[1263] Andrew Harding & John Hatchard, Preventative Detention and Security Law: A Comparative Survey 23 (1993), p. 83; *PN Hoon* v. *Union of India*, AIR 1981 SC 92; *Mangalbhai Motiram* v. *State of Maharashtra*, AIR 1981 SC 510.
[1264] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 204
[1265] Article 15(5) of the 1969 Constitution of the Republic of Ghana; Article 21(5) of the 1979 Constitution of the Republic of Ghana and Article 14(5) of the 1992 Constitution of the Republic of Ghana.

93. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution did not make proposals on the subject.

94. The Commission finally observes that in the last two decades, efforts have been made to provide facilities for justice in all parts of the country, in order to bring justice closer to the people. There is also the possibility of dispensing justice through electronic communication, at least in the case of assessing the validity of a pre-trial detention.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

95. The Commission recommends that Article 14(3) of the 1992 Constitution be amended to reduce the time beyond which a person may not be detained before being brought to trial from 48 hours to 24 hours.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

96. The Commission recommends that Parliament amends the Criminal and Other Offences (Procedure) Act, 1960 to provide:
    (a) An outline of offences that may attract pre-trial detention.
    (b) That all other offences may not attract pre-trial detention, unless the Police are able to prove to the satisfaction of the Magistrate or Judge that the suspect would not appear for trial if released on Police inquiry bail.
    (c) That a Police Officer, after arrest, must immediately grant bail to persons whose offences do not attract pre-trial detention.
    (d) That personal liability is imposed on anyone who recklessly detains anyone beyond 24 hours without the order of a Court.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

97. The Commission recommends that the Chief Justice should make provision within the Court system for the speedy determination of bail and habeas corpus applications, including the designation of Judges and magistrates to hear such applications at the weekend and after hours.

ISSUE TWO: ARREST AND DETENTION OF PERSONS WITH DISABILITY

A. DIMENSIONS OF THE ISSUE

98. The main dimension of this issue is whether or not the constitutional provisions that requires that a person arrested, restricted, or detained should be informed in a language he understands of the reasons for his arrest and his right to a lawyer are adequate for the visually and aurally impaired as well as suspects with speech challenges.

B. CURRENT STATE OF THE LAW ON THE ISSUE

99. Article 14(2) of the 1992 Constitution provides that when a person is arrested, restricted or detained he shall be informed immediately, in a language that he understands of the reasons for his arrest, restriction or detention, and of his right to a lawyer of his choice. Article 19(2)(d) also provides that a person charged with a criminal offence shall be informed immediately, in a language that he understands, and in detail, of the nature of the offence charged.

C. SUBMISSIONS RECEIVED

100. There were submissions for the amendments to the Constitution to contain specific provisions on the arrest of persons with visual, hearing or speech impairment so that they are informed in detail in the language they understand of the reasons for their arrest and the nature of the offence so that they are also able to communicate effectively with those arresting them and to better prepare their defence.

101. Some submissions specifically called for the amendment of the expression "a language that he understands" in Articles 14(2) and 19(2)(d) of the 1992 Constitution to include "sign language" or "communication in the appropriate manner to any such person" for the following reasons:
    a. To avoid the communication and comprehension difficulties that are presented when persons with hearing, speech and visual disability are arrested and detained.
    b. To prevent the negative impact on persons with disability (PWDs) when they are misunderstood by the Police.

102. Other submissions called for more public officers to be trained in sign language so that persons with hearing and speech challenges would have access to interpreters in the hospitals, Courts, Police Stations and several other important public institutions.

D. FINDINGS AND OBSERVATIONS

103. The Commission finds that, although there are implementation challenges, Articles 14 and 19 of the 1992 Constitution, are adequately expressed to cater for the needs of suspects in criminal matters whose hearing, speech and vision are impaired.

104. The Commission notes that the 1969, 1979 and 1992 Constitutions accepted the principles underlying the right of persons arrested, detained or restricted to be communicated with, in the language that they could understand.[1266]

[1266] Article 15(2) of the 1969 Constitution of the Republic of Ghana, Article 21(2) of the 1979 Constitution of the Republic of Ghana and Article 14(2) and 19(2)(d) of the 1992 Constitution of the Republic of Ghana.

105. The Commission finds that there is no reason why this provision of communicating in a language that the person understands should be interpreted to exclude *facilities* for communicating such information to those with hearing, speech and visual defects and for receiving feedback from them.

106. The Commission observes that at the National Constitution Review Conference, it was proposed that Articles 14(2) and 19(2)(d) of the 1992 Constitution, should be amended to include, not only sign language, but the provision of sign language facilities.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

107. The Commission does not recommend any amendment to Articles 14(2) and 19(2) (d) in this regard since the problem is one of implementation.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

108. The Commission proposes the following legislative changes:
    a. Various legislative changes should be made to the Criminal and Other Offences (Procedure) Act, 1960 to require the appropriate facilities to be made available to persons with communication and comprehension disabilities when they are arrested.[1267]
    b. The curriculum of basic schools should be revised to provide basic education on disability issues.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

109. The Commission recommends that institutions that handle PWDs such as the Ghana Police Service, the Ghana Health Service and the Ghana Education Service should institute administrative measures for providing facilities for incorporating basic communication skills with Persons with Disability as part of the training curriculum of their personnel.

SUBTHEME FOUR: EQUALITY AND FREEDOM FROM DISCRIMINATION

ISSUE ONE: DISCRIMINATION

A. DIMENSIONS OF THE ISSUE

110. The main dimension of this issue is whether to include the grounds of discrimination in the Constitution to include sex, sexual orientation, North-South discrimination, Natural resource discrimination, age and disability.

[1267] Criminal Procedure Act, 1960 (Act 30).

B. CURRENT STATE OF THE LAW ON THE ISSUE

111. Article 17 of the 1992 Constitution provides that a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

C. SUBMISSIONS RECEIVED

112. The submissions received by the Commission on this issue can be summarised as follows:
    a. The Constitution should ban discrimination on grounds of 'sex' and "sexual orientation" to avoid possible discrimination on account of biological differences between men and women.
    b. The Constitution should not include 'sex' or 'sexual orientation' in the anti-discrimination clause to ensure that it is not interpreted to recognise homosexuality in Ghana.
    c. All references to only "male" nouns and pronouns in the Constitution should be corrected to include "female" nouns and pronouns and where possible, the word "person" should be substituted for "man" or "women."
    d. The Constitution should include North – South Discrimination in the anti-discrimination clause to ensure that every Ghanaian obtains the same benefit irrespective of where the person finds himself.
    e. The Constitution should include natural resource discrimination in the anti-discrimination clause to ensure that Ghanaians are not discriminated against because of the presence or absence of natural resources in their communities.
    f. Persons With Disability (PWD) is not on the anti-discrimination list in Article 17. Their mention in Article 29 (4) which specifically relates to rights of disabled persons is not sufficient. PWD need to be specifically included in the anti-discrimination clause of the Constitution because they have historically suffered discrimination.
    g. "Age" should be included in the anti-discrimination clause.

D. FINDINGS AND OBSERVATIONS

113. The Commission finds that the framers of the 1992 Constitution substituted "sex" (which was in the 1979 Constitution) with "gender" for the following purpose: to ensure the recognition of the natural/biological state of a woman and a man. The Commission observes that including "sex" in the anti-discrimination clause of the Constitution, in addition to "gender" would add to the legal arsenal of those who argue that the Constitution abhors discrimination on the grounds of sexual orientation.

114. The Commission finds that Article 21(3) of the 2010 Constitution of Kenya provides that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, the youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

115. The Commission observed that at the National Constitution Review Conference, it was proposed that Article 17(2) should be amended to read thus: "A person shall not be discriminated against *directly or indirectly* on grounds of *sex,* gender, race, colour, ethnic origin, religion, creed, *civil, political,* social, *cultural,* or economic status, *disability or age or any other ground."*

E. RECOMMENDATIONS

RECOMMENDATION FOR LEGISLATIVE CHANGES

116. The Commission recommends that the Affirmative Action Act should deal with all types of discrimination against vulnerable groups and minorities.

ISSUE TWO: RECOGNITION OF LESBIAN AND GAY RIGHTS

A. DIMENSIONS OF THE ISSUE

117. The sole dimension of the issue of gay rights is whether or not the Constitution should give recognition to lesbian and gay rights in Ghana.

B. CURRENT STATE OF THE LAW ON THE ISSUE

118. The Criminal Offences Act makes the practice of homosexuality amongst men a criminal offence in Ghana by providing that a person who has unnatural carnal knowledge of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour."[1268] Unnatural carnal knowledge is defined at common law to involve penile penetration of anything other than a vagina. By this definition, the law only anticipates the situation where a man has unnatural carnal knowledge of a woman or another man, but does not envisage the situation where a woman engages in unnatural carnal knowledge of another woman.

C. SUBMISSIONS RECEIVED

119. The Commission received a few submissions from persons wanting the Constitution to recognise the rights of homosexuals in the Constitution. However the overwhelming majority

[1268] Section 104(1)(b) of the Criminal Offences Act, 1960 (Act 29).

of the submissions were to the effect that homosexuality should not be recognised by the Constitution.

120. The submissions received on the issue of lesbian and gay rights can be summarised thus:
    a. The Constitution should not recognise gay rights in Ghana for the following reasons:
        i. Being lesbian or gay prevents procreation without which the society can become extinct.
        ii. Culturally, it is an abomination to be lesbian or gay. The practice of lesbianism or homosexuality is alien to Ghanaian culture.
        iii. Even animals other than human beings do not engage in such a practice, so humans should not.
        iv. Ghana should not copy blindly from foreign countries.
        v. Homosexuality will not bring development to our society.
        vi. Homosexuality is against the laws of nature.
        vii. Homosexuality is against the laws of God. God in His own wisdom made us for purposes of procreation. We should therefore resist demands from unscrupulous Ghanaians to accommodate depraved sexual tendencies.
    b. The Constitution should recognise lesbian and gay rights for the following reasons:
        i. A man should have the freedom to live with his fellow man if that is what pleases him.
        ii. Some people are born homosexuals and should be allowed to express their sexual orientation.

121. There were other submissions which described as inaccurate the generally accepted position on section 104(b) because it is based on the assumption that natural carnal knowledge means having sex via the vagina and therefore having sex by any other means amounts to unnatural carnal knowledge, even if it is with one's spouse.

122. The Commission notes submissions which were on the following opposing but plausible interpretations of the Constitution.
    a. As noted above, the principal basis for challenging laws which give preferential treatment to unions between persons of different sexes, as opposed to same sex unions, is that such preference constitutes unconstitutional discrimination against persons of the same sex who desire to enter into a sexual relationship. On that basis, it may be argued that failure to recognise homosexual relationships in Ghana constitutes discrimination contrary to Article 17 of the Constitution which states that all persons shall be equal before the law and contains the general proposition that a person shall not be discriminated against on grounds, inter alia, "of gender." According to the article, discrimination consists in giving:

"different treatment... attributable only or mainly to their respective description [by gender] whereby persons of another description are subjected to disabilities or restrictions to which other persons of one description are not made subject or are granted privileges or advantages which are not granted to persons of another descriptions."

Although Article 17 grants Parliament the power to enact laws that are "reasonably necessary" to provide among others "for matters relating to marriage, divorce, or other matters of personal law", it could also be argued that a law that prohibits or does not fully recognise same sex marriages and therefore same sex relationships would not be a law that is "reasonably necessary" to provide for marriage. On that basis, it might be argued that the failure to recognise and treat homosexual relationships in the same way as heterogeneous relationships would constitute discrimination and would, as such, be incompatible with the Constitution.

D. FINDINGS AND OBSERVATIONS

123. The Commission finds that during its consultations, the overwhelming number of submissions received on the subject was in favour of the non-recognition of the right to sexual orientation for homosexuals.

124. The Commission finds that in recent times gay and lesbian issues have taken centre stage in Ghana.

125. The Commission finds that in any case, it would be neither necessary nor advisable for the Constitution Review Commission to attempt to deal with this complicated issue at this time. It is very probable that a proposal to give some recognition to same-sex relationships in Ghana at this stage will be condemned by a large section of the population in the country – mainly on religious and cultural grounds. On the other hand, a suggestion to introduce a provision in the Constitution expressly excluding same-sex marriages in Ghana would be clearly seen by many people in the country and outside of it as a reactionary move not worthy of a progressive state.

126. The Commission finds that Ghana's human rights are situated in the African Charter on Human and People's Rights. This Charter provides in the preamble that human rights take "into consideration the virtues of their (The Africans') historical tradition and the values of African civilization." The Charter says further that the individual who seeks his or her human rights to be protected has the responsibility to protect the social and cultural values of the society: "the individual shall also have the duty to preserve and strengthen positive African values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of

society."[1269] Arguably homosexuality could be an example of a situation where the desire of an individual to have sex with a person of the same sex should not be recognised as long as that practice fails to sit with the socio-cultural values of the society in which the individual finds himself.

127. The Commission finds that whichever of these positions will be accepted as correct will depend on the arguments marshalled in its favour and on the views of the courts before which the case is argued. Similar arguments have been made before the courts in different countries, and the responses of the courts have by no means been uniform.

128. The Commission finally finds that the above arguments notwithstanding, there does not appear to be any compelling reason for the Commission to address, let alone attempt to deal with, this issue in the present context. The more advisable approach would seem to be to leave the matter for settlement by the Supreme Court in due course. If and when there is enough interest in the matter (and there is a sufficiently strong feeling about the issue), those who wish to promote the idea will be able to seek an opinion from the Supreme Court, and the Court will be able, soberly and in its own time, to consider the submissions put before it and issue the interpretation of the Constitution in the light of the strength of the arguments advanced. In doing so, the Court may also seek to take account of the prevailing conditions and views in the country at the time.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

129. The Commission recommends that the legality or otherwise of homosexuality be decided by the Supreme Court if the matter comes before the Court.

SUBTHEME FIVE: RIGHT TO FAIR TRIAL

ISSUE ONE: RIGHT TO TRIAL AND RIGHT TO COUNSEL

A. DIMENSIONS OF THE ISSUE

130. The Commission has identified the following dimensions to this issue:
    a. Should persons caught committing murder or armed robbery be afforded a trial before sentence?
    b. Should persons caught committing murder or armed robbery be afforded a right to counsel?

[1269] Article 29(7) of the AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS. (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

B. CURRENT STATE OF THE LAW ON THE ISSUE

131. Article 19 of the 1992 Constitution, is titled "Fair Trial." This article provides that a person is presumed innocent until proven guilty and also guarantees the right of every person to a fair hearing by a Court. Article 14 of the 1992 Constitution guarantees the right of every person who is arrested or detained to a lawyer of his choice. Both articles are entrenched provisions.

C. SUBMISSIONS RECEIVED

132. The first set of submissions received by the Commission on this issue called for the Constitution to be amended to disallow the right to trial and the right to counsel of persons who are caught committing murder or armed robbery. The reasons advanced for this position are as follows:
    a. Such persons do not deserve any trial or the assistance of lawyers since they were caught in the act;
    b. Allowing such persons those facilities often leads to their acquittal making a mockery of the justice system;
    c. Many of them are able to hire the best lawyers available who use various ingenious mechanisms to get them off the hook; and
    d. Such persons should be punished immediately they are caught, without any trial, because of the heinousness of their crimes.

133. Some submissions proposed that persons caught committing murder and armed robbery should be killed instantly. This is because when such persons are imprisoned they may be a bad influence to their cell mates. Subsequently, when such inmates are released they may pose a risk to society. Such instant imposition of the ultimate sentence on them would also serve as a deterrent to others.

134. The last set of submissions on this issue was to the effect that persons accused of murder or armed robbery should be granted the full complement of a fair trial, including the right to counsel. This is because all persons should be presumed innocent until proven guilty. There are many instances when some people have been wrongly accused and later found innocent during the trial. If the law were otherwise many innocent persons would suffer punishment.

D. FINDINGS AND OBSERVATIONS

135. The Commission finds that there are good reasons for the elaborate trial processes and the right of accused persons to counsel of their choice. Those reasons have not been dislodged by the submissions received by the Commission.

136. The Commission observes that the Committee of Experts that developed proposals for the 1969 Constitution proposed that "no person should be deprived of his personal liberty without due process of law."[1270] It further proposed that where a person is detained under emergency legislation, he should be accorded reasonable facilities to consult a legal representative whom he will be free to choose.[1271] This proposal was accepted into the 1969 Constitution, with further elaboration that robed-in the right to counsel; "Any person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to consult Counsel of his own choice."[1272]

137. The Commission observes that the Committee of Experts that developed proposals for the 1979 Constitution adopted the provisions on the protection of personal liberty in the 1969 Constitution. Thus, the 1979 Constitution reproduced the 1969 provision.[1273]

138. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution stated that "… any person who is arrested and detained must be informed of his right to a lawyer of his or her choice who must be given ready access to the person detained."[1274] The Committee also proposed that "no person should be held *incommunicado* and that any person who is deprived of his or her liberty must be allowed access by his or her relatives and friends and legal advisers."[1275] The Committee of Experts reasoned that: "against several odds, our Courts have, to a great extent, striven to safeguard the liberty of the individual, especially where that liberty has been threatened by the Executive. Our system of justice emphasises the innocence of an arrested person until his or her guilt is proven beyond all reasonable doubt. We, accordingly, propose the retention of this time-honoured practice. We further propose that whenever any person is charged with a criminal offence, unless the charge is withdrawn, the case should be given a fair hearing within a reasonable time by a Court."

139. The Commission observes that the current constitutional provision on the right to trial and counsel is in essence, a reproduction of the 1969 and 1979 provision.[1276]

[1270] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 201.
[1271] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 267.
[1272] Article 15(2) of the 1969 Constitution of the Republic of Ghana.
[1273] Article 21(2) of the 1979 Constitution of the Republic of Ghana.
[1274] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 147.
[1275] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 148.
[1276] Article 14(2) of the 1992 Constitution of the Republic of Ghana.

140. The Commission observes that Article 14 of the International Convention on Civil and Political Rights (ICCPR) as well as the Constitutions in other well established democracies guarantee the right to fair trial and the right to counsel to all persons standing trial.

141. The Commission finds that to deny persons accused of armed robbery and murder the right to counsel and the right to trial would violate the fundamental principle underlying our criminal jurisprudence; that a person is presumed to be innocent until proven guilty.

142. The Commission acknowledges the spate of armed robbery attacks, some resulting in fatalities, even as the consultations were on-going. Again, some criminals still roam the street by working the justice system. These heinous crimes and their perpetrators may, however, be more appropriately dealt with through the justice system than by the denial of accused persons of a fair trial and the right to counsel.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE CHANGE

143. The Commission recommends that the provisions of the Constitution on fair trial and the right to counsel be retained.

RECOMMENDATIONS FOR ADMINISTRATIVE CHANGE

144. The Commission recommends that the Ghana Police Service improves its preventive and investigative functions in order to minimise crime and to bring perpetrators to book. This can be done through:
    a. Modern policing methods;
    b. Investment in human resources;
    c. Improvement in intelligence gathering methods;
    d. Improved equipment;
    e. Updating of Police Manuals;
    f. Updating of Police Training curriculum;
    g. Improved training methods and standards; and
    h. Systems for tracking persons who interface with the criminal justice system.

ISSUE TWO: DURATION OF TRIAL

A. DIMENSIONS OF THE ISSUE

145. There are two main dimensions to this issue.
    a. Should the Constitution specify the maximum duration of trials?
    b. Should the Constitution specify the maximum number of sittings for every case to ensure the quick disposal of cases?

B. CURRENT STATE OF THE LAW ON THE ISSUE

146. Article 19(1) provides that "a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a Court." In civil matters, the Court has a maximum period of six weeks, after the close of the case, to deliver judgment, otherwise the Court or a party to the matter may inform the Chief Justice of the delay in the delivery of judgment and the Chief Justice may fix a date for the delivery of judgment by the Court.[1277] The Commercial Court Rules prescribe compulsory pre-trial settlement processes for the parties.[1278] This saves a lot of time when parties agree to settle their dispute instead of going to trial. The Fast Track High Court system has also been established to ensure the speedy disposal of cases.

C. SUBMISSIONS RECEIVED

147. The Commission received many submissions on this issue from all over the country. The first set of submissions called for the institution of maximum periods for the trial of cases. Others called for a maximum number of sittings or hearings for each case. In some cases, the submissions proposed that some category of cases be designated and for differential timeframes and number of sittings allotted for them depending on their complexity. The timeframes mentioned in the submissions ranged from a few weeks to 6 months. In criminal cases, where these limits are exceeded, the accused should be discharged. According to the submissions, delays in the justice system impede real access to justice, inordinately increase the cost of accessing justice and diminish the trust people have in the judicial system.

148. Other submissions called for the Constitution to be amended to specify the maximum period a person may be held on remand pending trial and for the automatic release of that person after the due date. This is to prevent the many instances where persons have been on remand for periods exceeding the normal sentence they would have received had they been tried and convicted. It was argued that the general constitutional expression "reasonable time" used in Article 14(4), in relation to trials, has not prevented the retention on remand of suspects for up to 15 years.

D. FINDINGS AND OBSERVATIONS

149. The Commission finds that although the Constitution requires that cases are determined within a reasonable time, in practice, cases can take an inordinate length of time to get to resolution.

[1277] Order 41 rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I.47).
[1278] Order 58 of High Court (Civil Procedure) Rule, 2004 (C.I.47).

150. The Commission finds that studies have shown that there are several avenues through which delays can occur in civil and criminal proceedings.[1279] This has led to a loss of confidence in judicial processes and therefore an increasing reluctance by many to seek judicial redress to issues.

151. The Commission finds that the Fast Track Division of the High Court, especially the Commercial Courts in that division, has used a combination of revised court rules and modern facilities to improve greatly the speed with which cases are determined. However, this improvement has not been able to resolve the problem of delays in the determination of cases.

152. The Commission acknowledges the practice in Ghana whereby persons are kept on remand with expired warrants for up to 6 years.[1280] This situation has resulted in an increase in the prison population thereby leading to congestion and unsanitary conditions in our prisons. The continuous remand of prisoners on expired warrants is an illegal practice which is contrary to the provisions on fundamental human rights guaranteed by Chapter 5 of the 1992 Constitution.

153. The Commission finds that the practice of keeping accused persons on remand has gained acceptance with prosecutors as it allows them, on the one hand to retain control over the case, and on the other hand not to have any incentive to complete investigations timeously. Thus the case drags on with adjournments for an inordinate period and there seems no end in sight for the remand prisoner, who may end up being acquitted and discharged at the end of the trial.

154. The Commission observes that the Judiciary of Ghana has a system in place through which it directs the release of persons on remand on the basis of expired warrants.

155. The Commission observes that there is an existing practice in the judiciary whereby supervising High Court judges review the work of magistrates in the Courts below in respect of criminal matters.[1281] The rationale behind this practise is to ensure that justice is properly served. The Commission believes that a proper application of this system can reduce delays in trials.

156. The Commission observes that the 1968 Constitutional Commission that developed proposals for the 1969 Constitution proposed that where a person is arrested and detained on reasonable

[1279] Raymond A Atuguba, *et al Ghana Court Users and Uses Study, Final Report*, World Bank Publications, p 14-16 (2010).
[1280] Returns on remand prisoners with expired warrants in the Nsawam Medium Security Prison as at 31st August, 2009, presented by the Ghana Police Service to the Commission on Human Rights and Administrative Justice.
[1281] Section 52 of the Courts Act, 1993(Act 459).

suspicion of having committed or about to commit a criminal offence, if he is not tried within a reasonable time, then without prejudice to any further proceedings that may be taken against him he should be released immediately either unconditionally or upon bail.[1282] This emphasis on trial within a reasonable time after arrest and detention was reproduced in the 1969, 1979 and 1992 Constitutions of Ghana. [1283]

157. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed that whenever any person is charged with a criminal offence, unless the charge is withdrawn, the case should be given a fair hearing within a reasonable time by a Court. This was reproduced in the 1992 Constitution.[1284]

158. The Commission observes that at the National Constitution Review Conference, it was proposed that a provision imposing specific time limits with respect to the length of trial be added to the provisions on Fair Trial under Article 19 of the Constitution.

159. The Commission recognises that the trend towards indicative timelines for the disposal of cases is a positive move that serves to trigger administrative action to address delay.

160. The Commission finds that Alternative Dispute Resolution (ADR) mechanisms, have gained near universal acceptance for the resolution of disputes and access to quick justice. This is evidenced in the passage of the ADR Act in Ghana in 2010.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

161. The Commission does not recommend any amendments to the Constitution in order to impose time limits for the trial of cases.

RECOMMENDATIONS FOR LEGISLATIVE CHANGE

162. The Commission recommends the following legislative changes:
    a. The Civil Procedure Rules for the various courts should be amended to institute:
        i. ADR;
        ii. Case Management; and
        iii. Indicative time frames for various types of cases and various stages of cases.

[1282] Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, paragraph 203.
[1283] Article 15(4) of the 1969 Constitution of the Republic of Ghana; Article 21(4) of the 1979 Constitution of the Republic of Ghana; Article 14(3) of the 1992 Constitution of the Republic of Ghana.
[1284] Article 19(1) of the 1992 Constitution of the Republic of Ghana.

b. The time frames for the disposal of cases in the trial court should not exceed 6 months, and another 6 months for each appellate stage.
c. The Rules of Court Committee should institute rules for case management, to include indicative time limits for different categories of cases. Such time limits should immediately trigger notice to the Chief Justice who should take appropriate measures to deal with the delay.

RECOMMENDATIONS FOR ADMINISTRATIVE CHANGES

163. The Commission recommends the following changes:
a. The relevant supervising High Court judges, the Ghana Prisons Service and the Ghana Police Service should institute immediate steps to release persons on remand on the basis of expired warrants or ensure the renewal of their warrants to avoid the perpetuation of an illegality.
b. The Prisons Review Boards should be activated to periodically review cases of persons on remand.
c. The CHRAJ should undertake the function of inspecting prisons and ensuring that incarcerated persons with expired warrants are released unless their warrants are extended. This recommended function is more fully laid out in the chapter on Independent Constitutional Bodies.
d. The Chief Justice should enforce the six week timeline for the delivery of judgements after addresses have been filed by parties.

ISSUE THREE: LEGAL AID

A. DIMENSIONS OF THE ISSUE

164. Ghanaians want legal aid to be made available in all communities in Ghana. They also want the Legal Aid Board to be provided with the personnel and facilities to effectively champion the legal rights of the marginalised in society.

B. CURRENT STATE OF THE LAW ON THE ISSUE

165. The current position of the law is found in Article 294 of the 1992 Constitution of Ghana and Section 10(1) of the Legal Aid Scheme Act, 1997 (Act 542). The Constitution provides that for the purposes of enforcing any provision of the Constitution, a person is entitled to legal aid in connection with any proceedings relating to the Constitution if he has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.[1285]

[1285] Article 294(1) of the 1992 Constitution and Section 2(1) of the Legal Aid Scheme Act, 1997.

166. The Legal Aid Scheme Act further provides that a person is automatically entitled to legal aid where he or she is charged with an offence punishable by the death penalty or imprisonment for life. For all other criminal offences, a person is entitled to obtain legal aid if he or she is too poor to afford a lawyer. A person may also be entitled to legal aid in some civil cases. [1286]

167. The Courts Act provides that the Supreme Court, the Court of Appeal, the High Court or Regional Tribunal may assign a lawyer by way of legal aid to a party to proceedings before the Court or Tribunal where it appears desirable to the Court or Tribunal in the interests of justice that the party should have legal aid, and that the party is financially unable to obtain the services of a lawyer. In the case of the Circuit Court and District Court, the Court can only assign a lawyer by way of legal aid, with prior approval of the Chief Justice.[1287]

168. Administratively, the Minister for Justice and Attorney-General has oversight of the Legal Aid Scheme.[1288] This arrangement creates a conflict of interest for the Ministry of Justice, especially where a person seeks legal aid for a constitutional matter, a civil matter relating to the government, or to defend a criminal charge with the Attorney-General as respondent or prosecutor as the case may be.

C. SUBMISSIONS RECEIVED

169. The Commission received many submissions relating to legal aid. These are articulated as follows:
    a. Legal aid offices should be established in all districts in Ghana to ensure that the marginalised, who are mostly found in the rural areas, have access to justice with the assistance of trained lawyers. Locating the Legal Aid Scheme offices only at the regional capitals, as is currently the case, diminishes access to the services of the scheme for those that need them the most.
    b. Legal aid offices should be administered in all communities in Ghana so that their services would be at the doorsteps of the rural folks. This will reduce the cost of accessing legal aid.

D. FINDINGS AND OBSERVATIONS

170. The Commission finds that the Constitution does not establish the Legal Aid Scheme, although it provides for legal aid in certain circumstances and for Parliament to regulate the grant of legal aid.

[1286] Section 2 of the Legal Aid scheme Act, 1997 (Act 542).
[1287] Section 114(1) and (2) of the Courts Act, 1993 (Act 459).
[1288] Section 32 of the Legal Aid Scheme Act, 1997 (Act 542).

171. The Commission also finds that the Legal Aid Scheme in Ghana is severely underfunded, relative to other Independent Constitutional Bodies with similar mandates.

172. The Commission finds that, currently, few lawyers show interest in *pro bono* legal practice in Ghana, and the practice is apparently dying out.

173. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed the following modification to the provision on Legal Aid in the 1979 Constitution: "Where the 1979 Constitution enjoined the State only to ensure that provision is made for public assistance for those in need and the conditions under which such assistance may be given, the [1991] Committee recommends in addition that free legal aid should be given so that opportunities for securing justice are not denied to any citizen by reason of economic or other disability."[1289]

174. The Commission observes that the Constitutions and laws of India, the United Kingdom and the United States of America make provisions for the availability of legal aid to ensure access to legal services for their citizens.
    a. Article 39A of the Constitution of India provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
    b. In the United Kingdom, the government provides funding for Legal Aid. The government has set up the Legal Services Commission (LSC) which runs the Legal Aid Scheme in England and Wales and whose work is overseen by the Ministry of Justice. A person is entitled to Legal Aid if he or she satisfies the following criteria:
        i. if the person qualifies under the means test, where the person's income and capital is below the limits set by the government; or
        ii. if the person qualifies under the merits test, where the person's case is deserving enough.
    c. In the United States, the sources of funding for Legal Aid include the following: charities, private donors, the Federal Government and some Local and State Governments.

175. The Commission finds that legal fees are currently so high that most indigents cannot afford lawyers ultimately affecting the quality of justice delivery.

[1289] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991).

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

176. The Commission recommends that the Legal Aid Scheme be established as an Independent Constitutional Body and funded in the same manner as other Independent Constitutional Bodies.

RECOMMENDATION FOR LEGISLATIVE CHANGES

177. The Commission recommends that the Legal Aid Board should prepare regulations setting out the manner for improving access to legal aid for Ghanaians.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

178. The Legal Aid Scheme should collaborate with the General Legal Council and the Ghana School of Law to ensure that a culture of legal aid is instilled in law students.

ISSUE FOUR: SENTENCING

A. DIMENSIONS OF THE ISSUE

179. The following are the dimensions of the issue:
    a. Should the Constitution specify the sentence for every offence?
    b. Should communal service be made an option for convicts?
    c. Should non-custodial sentences be introduced into the Ghana Legal System?
    d. Should custodial sentences of women be commuted to communal service?
    e. Should custodial sentences of pregnant women be commuted to communal service?

B. CURRENT STATE OF THE LAW ON THE ISSUE

180. Article 19(11) of the Constitution provides that "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law." The Constitution makes provision for the punishment of certain offences; for instance, Article 2(5) of the 1992 Constitution, specifies the punishment for the offence of High Crime whilst Article 3(3)(b) prescribes the punishment for High Treason. All other penalties are contained in Acts of Parliament or Subordinate Legislation.

181. Section 312 of the Criminal and Other Offences (Procedure) Act, 1960 provides that when a woman is sentenced to death she should be tested for pregnancy unless the Court has reasonable grounds to believe that she is in a post-menopausal stage of her life.[1290] If the

[1290] Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

result of the pregnancy test is positive her death sentence should be converted to a sentence of imprisonment and she should be detained in a place which will ensure that her health needs are met and that after delivery her child does not remain with her in prison. For women who ar**e** convicted of non-capital offences, the Act provides that the Court after satisfying itself that she is pregnant, must pass on her a non-custodial sentence or may suspend the sentence for a period that it may determine. Where the sentence is suspended, the Court shall explain to the offender in ordinary language that if another offence is committed during the period of the suspension she will be liable to serve the sentence for the original offence in addition to the sentence for the new offence.

C. SUBMISSIONS RECEIVED

182. The submissions received by the Commission on the issue of the sentencing of convicts were as follows:
    a. The Constitution should specify the punishment for every offence.
    b. Communal service should be a sentencing option, especially for minor crimes.
    c. Custodial sentences of all women should be commuted to communal service.
    d. Custodial sentences of pregnant women should be commuted to communal service.

D. FINDINGS AND OBSERVATIONS

183. The Commission finds that it would be out of place for the Constitution to specify the punishment for every conceivable offence. There is good reason for including in the Constitution the penalties for the serious crimes of High Treason, High Crime and Treason, seeing that these offences affect the very foundation of the Constitution.

184. The Commission finds that there is already a provision for the conversion of the death and custodial sentences of pregnant women who have committed non-capital offences to non-custodial sentence under an amendment to the Criminal and Other Offences (Procedure) Act in 2002.[1291]

185. The Commission observes that although there have been proposals for instituting non-custodial sentencing into the Ghana Legal System, no bill has been passed to that effect.

186. The Commission observes that many advanced democracies have instituted communal service as a form of punishment for offenders. The advantages the nation could derive from the introduction of communal service include:
    a. Reduction in congestion in the prisons;
    b. Reduction in the amount of taxpayers' money spent on maintaining prisoners;

[1291] Section 25 of the Criminal Procedure Code (Amendment) Act, 2002 (Act 633).

c. Application of the energies of convicts to activities that would be of benefit to communities; and
d. A long-term effect of reduction in crime rates because of the social embarrassment in the performance of communal service.

E. RECOMMENDATIONS

RECOMMENDATION FOR LEGISLATIVE CHANGES

187. The Commission recommends that the Criminal and Other Offences (Procedure) Act, 1960 be amended to institute the option of communal service for categories of offences.

188. The Commission reiterates its recommendation that the current penal legislative framework should be reviewed and streamlined to incorporate well-studied and defined sentencing guidelines and procedures so as to ensure uniformity in sentencing, as well as to favour the progressive prescription of non-custodial sentences, especially for minor offences.[1292]

SUBTHEME SIX: RIGHT TO INFORMATION

ISSUE ONE: ENFORCEMENT OF THE RIGHT TO INFORMATION

A. DIMENSIONS OF THE ISSUE

189. The dimensions to the issue are:
a. How to enforce the right to information; and
b. The need for the passage of the Right to Information Bill.

B. CURRENT STATE OF THE LAW ON THE ISSUE

190. Article 21(1)(f) of the 1992 Constitution guarantees the right of all persons to have information, subject to such qualifications and laws as are necessary in a democratic society.

C. SUBMISSIONS RECEIVED

191. The submissions received by the Commission on the right to information can be summarised thus:

> The Right to Information Bill should be passed to enable the public access information on issues they do not understand and to ensure that the MMDCEs are held accountable for their governance based on publicly accessible financial records of the MMDAs.

[1292] This recommendation was made earlier in Chapter 6 on the Judiciary.

D. FINDINGS AND OBSERVATIONS

192. The Commission observes that Nigeria passed its Freedom of Information law which was signed by the President on the 28th May, 2011.

193. The Committee of Experts that developed proposals for the 1992 Constitution observed the following: "A political system in which the public surrenders these rights to a political party or government cannot hope to remain democratic. The public must, therefore, be guaranteed the right to know, the right of access to information, as a basic human and constitutional right."[1293]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

194. The Commission recommends the passage of a retrofitted version of the current Right to Information Bill that does not contain too many claw back clauses.

SUBTHEME SEVEN: FREEDOM OF SPEECH AND EXPRESSION

ISSUE ONE: RESTRICTION ON THE SCOPE OF FREEDOM OF SPEECH AND EXPRESSION

A. DIMENSIONS OF THE ISSUE

195. The issue of freedom of speech and expression presented the following dimensions:
    a. Should there be restrictions on the freedom of speech and expression?
    b. Should the criminal libel law be re-introduced?
    c. Should the Constitution speak to the wearing of indecent clothing by Ghanaians?

B. CURRENT STATE OF THE LAW ON THE ISSUE

196. The present position on the law on the issue of freedom of speech and expression is found under Article 21(1)(a) of the 1992 Constitution and section 207 of the Criminal Offences Act. Article 21(1)(a) provides that; "All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media." Section 207 of the Criminal Offences Act, 1960, provides that a person who in a public place or at a public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or by which a breach of the peace is likely to be occasioned, commits a misdemeanour.[1294] Section 208 of the Criminal Offences Act equally provides that "Any

[1293] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 186.
[1294] Criminal Offences Act, 1960 (Act 29).

person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace knowing or having reason to believe that the statement, rumour or report is false is guilty of a misdemeanour."

C. SUBMISSIONS RECEIVED

197. The submissions received by the Commission on the issue of freedom of speech and expression are as follows:
    a. There is a lacuna in the law given that section 207 of the Criminal Offences Act, 1960, (Act 29) criminalises only the use of abusive or insulting words or behaviour that is with intent to provoke a breach of the peace or by which a breach of the peace is likely to be occasioned. The present state of the law seems to imply that if a person uses abusive words which are unrelated to causing a breach of the peace then the person is not liable. It was submitted that the law should be amended to outlaw the use of abusive or insulting words or behaviour in public places generally, because children could learn from it and also to bring order into the society.
    b. The media should be restricted from disseminating information that might be unpleasant or improper for children. Radio commentators and other public figures should be refrained from using abusive and undesirable language on the airwaves.
    c. The legislative provision creating the offence of "causing fear and alarm to the public" should be amended, because it is an infringement on people's freedom of speech. Also the provision deters people from contributing to issues of national development.
    d. Limitations should be placed on the freedom of speech because it is being abused by journalists and politicians.
    e. There should be a law to address indecent dressing among the youth.

D. FINDINGS AND OBSERVATIONS

198. The Commission finds that Ghana is hailed as one of the few African countries with a very liberal Press. Due to the chequered human rights history of the country, Ghanaians hold in high premium their freedom of speech and expression.

199. The Commission observes that in recent times with the introduction of phone-in programmes on television and radio, people make unguarded statements sometimes leading to social unrest.

200. The Commission observes that some media houses have been charged with the criminal offence of causing fear and panic, whilst some journalists have been found liable for slander and defamation and have been ordered to pay substantial damages

201. The Commission observes that the Committee of Experts that made proposals for the 1992 Constitution, proposed the retention in the 1969 and 1979 Constitutions "freedom of speech and expression, which would include freedom of the press and other media."[1295] "Freedom of the press and expression also means that any citizen who has anything to say about national affairs should have access to the public sector mass-media, limited only by practical considerations of space and time, and by existing laws of sedition, criminal libel and those protecting privacy etc."[1296]

202. The Committee, however, cautioned that "Press and Media Freedom and independence have to be matched by the highest journalistic standards. A venal and irresponsible press is a danger to democracy. Newspapers which knowingly publish falsehoods must run the risk of being suppressed by the Courts. Those who operate the media are not immune from the exacting and all pervasive standards of probity and accountability."[1297]

E. RECOMMENDATIONS

RECOMMENDATION FOR LEGISLATIVE CHANGES

203. The Commission recommends that the Draft Broadcast Bill be approved by Cabinet without delay for passage by Parliament.

204. The Commission recommends that the National Media Commission passes comprehensive subsidiary legislation to regulate media standards and the conduct of media practitioners as well as provide corresponding sanctions for breaches and mechanisms for enforcing those sanctions.

SUBTHEME EIGHT: PROPERTY RIGHTS OF SPOUSES

ISSUE ONE: LEGAL DEFINITION OF MARRIAGE

A. DIMENSIONS OF THE ISSUE

205. The following are the dimensions of this issue:
    a. What should be the definition of "spouse" in the Constitution?
    b. Should the Constitution define marriage?
    c. Should marriage be defined to include concubinage and cohabitation?

[1295] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 56.
[1296] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 186.
[1297] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 191.

B. CURRENT STATE OF THE LAW ON THE ISSUE

206. The current state of the law is found under the Marriages Act, 1884-1985 (CAP 127). Under this law, the various forms of marriage recognized in Ghana are: Customary marriage, Mohammedan marriage, Christian marriage and other forms of marriage. The Act does not indicate though what these other forms are or maybe. The Constitution does not define "marriage" and is silent on the definition of a "spouse."

C. SUBMISSIONS RECEIVED

207. The submissions received by the Commission can be categorized as follows:
    a. The definition of "spouse" should not be extended to cover persons who live in concubinage or cohabitation. The reason is that if the man wanted to make the woman his spouse he would marry her. Therefore, the refusal of the man to marry the woman should be taken to mean that he never wanted her to be his spouse. There are some women who deliberately refuse to have their partners perform the marital rights but live with them for a long period of time. The Constitution should therefore not impose such a woman on a man as his spouse or vice versa.
    b. Article 22 contains provisions on spousal property rights but the Constitution does not define who a spouse is. The Constitution should therefore define the term spouse to cover cases of *cohabitation and concubinage* in the absence of any formal marriage rites or ceremonies. This will ensure that a person who cohabits with another or lives in concubinage is not disinherited, upon the death intestate of his or her partner by the family of the deceased partner because there was never a formal marriage ceremony.
    c. A spouse should be defined to include a person who has been in concubinage or cohabitation with another of the opposite sex for a specific period of time and has children with the person. This definition is to protect the women, especially, upon the death intestate of their partners. Sometimes, a man and a woman cohabit or live in concubinage because they do not have the means to perform the ceremonies required for legitimizing the relationship.
    d. The majority of submissions received by the Commission on the issue of same-sex marriage forcefully condemned and rejected any possible recognition of same-sex marriage in Ghana by any Law least of all the Constitution.
    e. There was a handful of submissions which argued that recognising same sex relationships is imperative in a country that prides itself of an enviable human rights record.

D. FINDINGS AND OBSERVATIONS

208. The Commission finds that in Ghana marriage may be contracted either under custom or under statute. Through these routes there are 3 main types of marriage recognised in Ghana:

the Customary Law marriage, Mohammedan marriage and Christian marriage. These three types of marriage are captured under the Marriages Act, 1884-1985. The Act also provides for other types of marriage, but is silent on what these other types may be.

209. The Commission finds that in Ghana what constitutes a valid customary law marriage or valid statutory marriage is not in contention because the requirements for satisfying them are known.[1298] What is in contention is whether or not certain other types of unions can be classified as marriages. Some of these unions are concubinage, cohabitation or same-sex unions**.**

210. The Commission observes that there is a lot of agitation for a precise definition of marriage in Ghana because of the direct effect of marriage on inheritance, adoption and tax liability among others.

211. The Commission finds that a general definition of marriage for all purposes is not necessarily helpful. Thus, the definition of marriage for the purpose of establishing a union between parties as qualifying them to adopt a child, may be different from the definition of marriage for the purposes of the distribution of spousal property upon the dissolution of the union, and may also differ for the purposes of inheritance.

212. The Commission finds that the definition of marriage should not be contained in the Constitution, but rather in an Act of Parliament and in the judgments of the Courts of Law.

213. The Commission finds that at first brush the majority of the people of Ghana find the concept of same-sex marriage repulsive.

214. The Commission observes that in many countries, same-sex marriages have been approved by Acts of the Legislature, even without judicial pronouncements on the issue of their constitutionality. In others, same-sex marriages have been legitimised mainly as a result of court decisions which state or imply that a ban on (or discrimination against) same-sex marriages is unconstitutional. An example is the 2003 decision of the Court of Appeal of Ontario (in Canada) that the Canadian law on marriage violated the equality provisions in the Canadian Charter of Rights and Freedoms because it restricted the legal definition of marriage to unions between heterosexual couples.

215. The Commission observes that in Africa, South Africa remains the only country where same sex marriages are recognised after the Constitutional Court of the country ruled that same sex marriages should enjoy the same legal status as those between men and women. The Court

[1298] *Yaotey* v. *Quaye* [1961] 2 GLR 573 at 578 per Ollennu J; Marriages Act, 1884 – 1985 (CAP 127).

held that, the refusal to give legal status to same sex marriages, though grounded in common law violated the Constitution's guarantee of equal rights.[1299] But the Court effectively stayed its ruling for one year to give the Parliament time to amend a 1961 marriage law[1300] to reflect its decision. Should the legislature balk, however, the Court noted that, the law will be automatically changed to make its provisions gender neutral. The Civil Union Act was passed in 2006 by the National Assembly by 299 votes to 41 and by the National Council of Provinces by 36 votes to 11. The Act provides for the "voluntary union of two persons... which is solemnised and registered by way either of either a marriage or civil partnership."[1301]

216. The Commission observes that in addition to civil unions, civil partnerships, domestic partnerships, registered partnerships, or unregistered partnership/unregistered co-habitation offer legal status and varying legal benefits of marriage to same-sex couples in countries such as Andorra, Argentina, Australia, Belgium, Brazil, Canada, Colombia, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Liechtenstein, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and Uruguay. Some benefits are also available in parts of Mexico and in ten states of the United States (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Nevada, Oregon, Rhode Island, Wisconsin, as well as Washington in the Federal District of Columbia).

217. The Commission observes the following opposing but plausible interpretations of the 1992 Constitution of Ghana.
    a. As noted above, the principal basis for challenging laws which give preferential treatment to unions between persons of different sexes, as opposed to same sex unions, is that such preference amounts to unconstitutional discrimination against persons of the same sex who desire to enter into a marriage union. On that basis, it may be argued that failure to recognise same sex marriages in Ghana constitutes discrimination that is not permitted by Article 17 of the Constitution. That article states that all persons shall be equal before the law and contains the general proposition that a person shall not be discriminated against on grounds, inter alia, "of gender." Although the Article grants Parliament the power to enact laws that are "reasonably necessary" to provide among others "for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law", it could also be argued that a law that prohibits or does not fully recognise same sex marriages would not be a law that is "reasonably necessary" to

[1299] *Minister of Home Affairs* v *Fourie*.[2005] ZACC 19, 2006(1) SA 524 (CC).
[1300] Marriage Act, No. 25 of 1961.
[1301] The Civil Union Act, No. 17 of 2006.

provide for marriage. On that basis, it might be argued that the failure to recognise and treat same-sex marriage in the same way as heterogeneous marriage would constitute discrimination and would, as such, be incompatible with the Constitution.

b. The Commission finds that it is also possible to argue that the Constitution does not, and cannot be assumed to prohibit laws that merely take account of and give recognition to natural or physical differences between different persons.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

218. The Commission recommends no constitutional change in this regard.

RECOMMENDATION FOR LEGISLATIVE CHANGES

219. The Commission recommends that marriage should continue to be defined by the Marriages Act.

ISSUE TWO: SPOUSAL PROPERTY RIGHTS

A. DIMENSIONS OF THE ISSUE

220. The Commission has identified the following dimensions of the issue:
    a. Should properties be distributed equally between the spouses upon the dissolution of a marriage?
    b. Should the properties to be distributed upon the dissolution of a marriage include assets individually acquired during marriage?

B. CURRENT STATE OF THE LAW ON THE ISSUE

221. The current state of the law on the issue of spousal property rights is found under the following:
    a. Article 22(3)(b) of the Constitution, 1992 which provides: "With a view to achieving the full realisation of the rights referred to in clause (2) of this article, assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage." Clause 2 of the article provides that Parliament may as soon as practicable after the coming into force of the Constitution enact legislation regulating the property rights of spouses.
    b. Section 20 of the Matrimonial Causes Act 1971 (Act 367) empowers a Court, in a divorce case, to settle the property rights of the parties on "just and equitable basis." It provides: "20. (1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such

movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable."

C. SUBMISSIONS RECEIVED

222. The numerous submissions that the Commission has received on spousal property rights can be categorised as follows:
    a. Article 22(3) (b) should be amended to provide that assets acquired *before* and *during* marriage shall be distributed *equally* between the spouses upon the dissolution of the marriage. Because would-be spouses sometimes, based on the promise to marry, help each other to acquire properties before contracting the marriage and the properties are registered in the name of the benefitting partner only.
    b. Nothing should be declared as individual property during the subsistence of the marriage unless the property was acquired solely by one partner before marriage.
    c. Property acquired should be divided up equally between the spouses. It should not be based on any substantial contribution to the acquisition of such property.
    d. Upon the dissolution of a marriage, properties should be distributed *equitably* between the spouses because some women do not help their husbands in the acquisition of property during the subsistence of the marriage, so the distribution of property should take account of the contribution of the spouse to the acquisition of the properties.
    e. Upon the dissolution of a marriage, the distribution of property should not favour the spouse who initiated the divorce.
        i. If a man divorces his wife, the property should be divided into three parts, two-thirds for the wife and the remaining for the husband.
        ii. The person who initiates divorce should compensate the other party duly because it is not fair for one party to opt out of the marriage especially where the couple has suffered together.
        iii. Article 22 (3)(a), should clearly state whether a woman's property will be shared equally with the man in a situation where she initiates the divorce.
        iv. If a man divorces his wife he is made to compensate the wife immensely, however if the wife divorces her husband she is let off the hook. This should be redressed.
        v. The Constitution must protect the one against whom the divorce process is initiated from being cheated.
        vi. Where there is a divorce the property should be divided into three parts; one-third to each spouse and the third part to the children.

D. FINDINGS AND OBSERVATIONS

223. The Commission finds that the current position of the law is that there is no need for the parties to a marriage to demonstrate having made financial contribution or substantial contribution to the acquisition of jointly-acquired property in order to benefit from the property. In *Anang* v *Tagoe* it was held that where a wife made contributions towards the requirements of a matrimonial home in the belief that the contribution was to assist in the joint acquisition of property, the court of equity would take steps to ensure that, that belief materialised.[1302]

224. The Commission finds that although the Constitution provides for "equitable" distribution of property upon the dissolution of a marriage, in interpreting this provision, the Supreme Court of Ghana equates the equitable distribution to equal distribution of property and explains that the principle of the equitable sharing of joint property would ordinarily entail applying the equality principle unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership."[1303] To demonstrate this position clearly, the Commission has taken the liberty to refer to the following Supreme Court decisions *Mensah* v *Mensah*[1304] and *Boafo* v *Boafo*.[1305]

225. The Commission observes that the Committee of Experts that developed proposals for the 1979 Constitution proposed that every spouse is entitled to a reasonable provision out of the estate of the other spouse whether such estate be testate or intestate. This was meant to ensure that every spouse, properly married in accordance with the Laws in force in Ghana, shall be entitled to a reasonable share in the inheritance of the other spouse. Hence, any law, custom, usage, testamentary or other disposition which does not allow of such a reasonable share shall be inconsistent with the Constitution and, to that extent, null and of no legal effect.

226. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed that:
    a. Women should have equal access as their spouses to property jointly acquired during marriage; and
    b. Assets which are jointly acquired during marriage should be distributed equitably between the spouses upon dissolution of the marriage.

227. The Commission acknowledges the existence of a minority view that different systems of marriage have their different systems of dealing with access to and distribution of the

[1302] *Anang* v. *Tagoe* [1989-90] 2 GLR 8.
[1303] *Boafo* v. *Boafo* [2005-2006] SCGLR 711.
[1304] *Mensah* v *Mensah* [1998-99] SCGLR 350.
[1305] *Boafo* v *Boafo* [2005-2006] SCGLR 705.

property of a marriage. The Commission, however, believes that there should be no fetter on Parliament's power to determine the operational details in this very important area of national life.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

228. The Commission does not recommend any change to Article 22 of the 1992 Constitution.

ISSUE THREE: PROPERTY RIGHTS OF SPOUSES LAW

A. DIMENSIONS OF THE ISSUE

229. The main dimension of this issue is what should be done to ensure the realisation of the constitutional injunction on Parliament to pass legislation regulating the property rights of spouses "as soon as practicable" after the coming into force of the Constitution.

B. CURRENT STATE OF THE LAW ON THE ISSUE

230. The Constitution places an injunction on the Parliament to pass the property rights of spouses Law. Article 22(2) provides "Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses."

C. SUBMISSIONS RECEIVED

231. The following are the submissions received by the Commission all advocating the passage of the property rights of spouses Law:
    a. There should be a provision making it mandatory for Parliament to take immediate steps to pass Laws to protect spousal property rights.
    b. The property rights of spouses should be strengthened through the passage of the Law to prevent the deceased spouses' extended family from taking over property of the bereaved spouses to the detriment of the surviving spouses.
    c. The Property Rights of Spouses Bill should be passed into Law to ensure equity in the distribution of the properties of a marriage since the properties are acquired by both spouses.

D. FINDINGS AND OBSERVATIONS

232. The Commission finds that upon the coming into force of the Constitution it became mandatory for Parliament to enact legislation regulating the property rights of spouses.[1306]

[1306] Article 22(2) of 1992 Constitution of the Republic of Ghana.

Unfortunately, the Parliament of Ghana has failed to enact the required legislation to regulate this extremely important area of national life.

233. The Commission finds that the failure of the Parliament of Ghana to pass the Property Rights of Spouses Bill after almost two decades of the operation of the Constitution 1992 is not only unconstitutional inaction but also a negation of a duty that Parliament owes to Ghanaians.

234. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed that Parliament should enact legislation regulating the property rights of women in marriage with the view to achieving the full realisation of these (spousal property) rights.

235. The Commission observes that traditional practices and social norms continue to deny women their statutory entitlement to inheritance and property.[1307]

236. The Commission observes that Parliament has selectively implemented the constitutional injunction to pass some laws within a certain period of time by privileging those that provide a specific timeframe over those that are more liberal.

237. The Commission finds that the effect of the apparent deliberate inaction of Parliament regarding making the law on spousal rights is the untold hardship brought upon a great proportion of the nation's population. A lot of young people are unable to achieve their potential in life because they are saddled with a parent who was left with nothing upon the dissolution of the marriage or upon the death intestate of the breadwinner of the family. This social canker is gradually turning into a social menace, increasing the number of street children, the number of armed robbers and the number of people who need to depend on the government for survival.

238. The Commission observes that the practice whereby surviving spouses are denied access to property acquired during marriage subsists despite the presence of the Intestate Succession Act, 1985 (PNDCL 111).

239. The Commission observes that there is an urgent need for property rights of spouses to be properly regulated by detailed legislation.

240. The Commission observes the existence of various types of unions in Europe and America for the purposes of inheritance. Some of these unions are civil unions, civil partnerships,

[1307] Human Rights Report of Ghana, 2010, (on file with the Constitution Review Commission).

domestic partnerships, registered partnerships, or unregistered partnership/unregistered co-habitation.

241. The Commission observes that at the National Constitution Review Conference, the participants proposed that Article 22(2) which enjoins Parliament to enact, as soon as practicable after the coming into force of the Constitution, legislation on the property rights of spouses should be enforced.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGE

242. The Commission recommends that Parliament should pass legislation to regulate the property rights of spouses as required by the Constitution within six months of the constitutional amendments proposed in this report.

SUBTHEME NINE: ECONOMIC, SOCIAL AND CULTURAL RIGHTS

ISSUE ONE: RIGHT TO FOOD

A. DIMENSIONS OF THE ISSUE

243. The dimensions presented by this issue are the following:
    a. Should the Constitution provide for the standardization of food prices?
    b. Should the Constitution guarantee the right of every Ghanaian to three square meals a day?
    c. Should the Constitution guarantee the provision of food to the poor during periods of drought?
    d. Should the school feeding programme be provided for in the Constitution?
    e. Should the school feeding programme cover every school child in Ghana irrespective of the school the child attends?

B. CURRENT STATE OF THE LAW ON THE ISSUE

244. At present there is no specific law in Ghana on the right to food. Article 33(5) of the Constitution can however, be interpreted to incorporate the right to food because it provides that rights that are considered to be inherent in a democracy and intended to secure the freedom and dignity of man but are not specifically mentioned in Chapter 5 shall not be regarded as excluded.

245. Article 25 of the Universal Declaration of Human Rights (1948) provides that everyone has the right to a standard of living, including food. The States Parties to the International

Covenant on Economic, Social and Cultural Rights (Ghana) recognise the right of everyone to an adequate standard of living, including adequate food, and to the continuous improvement of living conditions.[1308]

246. The right to food establishes three categories of enforceable obligations on the State to:
    a. Respect the right to adequate food of its people;
    b. Protect the right of adequate food of its people against third parties; and
    c. Fulfil the right of adequate food (facilitate and provide).

247. The violation of the right to food would be deemed to have occurred in the following situations among others:
    a. If the state is unwilling (not unable) to comply;
    b. If there is discrimination in access to food on grounds of race, colour, sex, language, age.
    c. In the case of the prevention of access to humanitarian food aid in internal conflicts or other emergency situations;
    d. Where the state adopts legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food;
    e. If the state fails to regulate the activities of individuals or groups so as to prevent them from violating the right to food of others;
    f. If the state fails to ensure the satisfaction, at least, of the minimum essential level required to be free from hunger.[1309]

248. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

249. The Government of Ghana instituted a school feeding programme in 2005 with 10 pilot schools in different regions of the country The basic concept of the Ghana School Feeding Program is to provide children going to kindergartens and primary schools in the poorest regions of the country with a hot and nutritious meal at school. The overall objective of the GSFP is to 'Contribute to Poverty Reduction and Food security'. More specifically, the objectives of the program are three-fold. First, the program aims at the traditional objectives of school feeding programs (SFP); increasing school enrolment, attendance and retention rates. Second, the program aims at reducing hunger and malnutrition among children going

[1308] Article 11(1) of the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND. CULTURAL RIGHTS. (G.A. res. 2200A (XXI), 21 U.N.GAOR Supp (No. 16) at 49,. U.N. Doc. A/6316 (1966).

[1309] Committee on Economic, Social and Cultural Rights, twentieth session, Geneva, 26 April- 14 May 1999, Agenda item 7: *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: General Comments* 12. The right to adequate food (Art.11):.12/05/99 E/C. 12/1999/5 (General Comments).

to public kindergartens and primary schools. The third objective of the program is to strengthen food production networks. This has to be achieved by the home-grown component of the program which means the schools provide a market for the agricultural products of farmers in the community. In the long run, this aspect of the program aims at structurally strengthening the local food production and consumption network within the participating communities. This in turn has the potential to boost domestic food production and increase the food sovereignty of the country. The programme is however not backed by legislation.[1310]

C. SUBMISSIONS RECEIVED

250. The Commission received the following submissions on the right to food:

a. The Constitution should formally recognise the right of Ghanaians to food and water, and the state's obligation to guarantee food security for the population of Ghana.
b. There are so many people in Ghana who cannot find food to eat but the government does not do anything about it.
c. The Constitution states that Chapter 5 is not exhaustive of all rights; therefore, other rights may be incorporated. Why should very important rights such as the right to health and food be left to interpretation while the right to be free from torture is clearly spelt out?
d. The time has come for Ghana's Constitution to have an explicit provision on the right to food since Ghana is a member of the community of civilised nations working for the progress of human kind through the United Nations system.
e. Governments should be tasked with providing a specific minimum amount of food on a daily basis for the poor all over the country, stretching from the national capital to regional and district capitals to villages to alleviate the problem of hunger.
f. All governments must ensure that all communities in the country have access to potable water.

D. FINDINGS AND OBSERVATIONS

251. The Commission observes that since 2005 when the school feeding programme was launched[1311] to provide food for as many hungry children as possible while simultaneously

[1310] Wievenlien Punt, *From Exogenous To Endogenous: The Way Forward For The Ghana School Feeding Programme*: *(A situation analysis of caterers and farmers in the Ghana School Feeding Programme and the identification of opportunities for strengthening the market relation between these actors),* (June 16, 2011, 9:35 AM) http://hgsf-global.org/en/bank/comms/doc_details/96-from-exogenous-to-endogenous-gsfp.

[1311] Wievenlien Punt, *From Exogenous To Endogenous: The Way Forward For The Ghana School Feeding Programme*: *(A situation analysis of caterers and farmers in the Ghana School Feeding Programme and the identification of opportunities for strengthening the market relation between these actors),* (June 16, 2011, 9:35 AM) http://hgsf-global.org/en/bank/comms/doc_details/96-from-exogenous-to-endogenous-gsfp.

building the market for small farmers by patronising locally produced foods. The programme is however not backed by legislation.[1312]

252. The Commission finds that there are a lot of Ghanaians who find it difficult to provide one full meal a day for themselves and their families.

253. The Commission observes that:
    a. Article 43(1)(c) of the 2010 Constitution of Kenya provides that every person has the right to be free from hunger, and to have adequate food of acceptable quality.
    b. Article 27(1)(b) of the 1996 Constitution of South Africa provides that everyone has the right to have access to sufficient food and water.

254. The Commission further observes that the Right to adequate food is recognised, implicitly and explicitly, in several instruments under international law, all of which have been ratified by Ghana. One important example is the Universal Declaration of Human Rights. Article 25(1) of the Declaration provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[1313] This is virtually reproduced in Article 11(1) of the International Covenant of Economic, Social and Cultural Rights which recognises the "right of everyone to an adequate standard of living for himself and his family, including adequate food."[1314]

255. The Commission observes that the United Nations (UN) has a Human Rights Committee that publishes its interpretation of the content of human rights provisions, in the form of General Comments on thematic issues. General Comment 12 has clarified the scope of the right to adequate food by stating that "the core content of the right to adequate food implies:
    a. The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

[1312] Cliff Dank et al., *Ghana School Feeding Program: An Analysis of Warehouses, School Gardens, and Energy-Efficient Cookstoves*. J(une 2007). (June 16, 2011, 10:25 AM) http://hgsf-global.org/en/bank/downloads/doc_details/38-ghana-school-feeding-program-an-analysis-of-warehouses-school-gardens-a-energy-efficient-cookstoves.

[1313] Article 25 of the Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

[1314] Committee on Economic, Social and Cultural Rights, twentieth session, Geneva, 26 April- 14 May 1999, Agenda item 7: *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: General Comments* 12. The right to adequate food (Art.11):.12/05/99 E/C. 12/1999/5 (General Comments).

b. The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."[1315]

256. The Commission further observes that the General Comment 12 provides that the right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realised progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of Article 11(International Covenant on Economic, Social and Cultural Rights), "even in times of natural or other disasters."[1316]

257. The Commission observes that the Special Rapporteur on the Right to Food has stated that "an approach grounded in the right to food requires that we address the root causes of hunger and malnutrition. The right to food should also serve as a signpost in order to achieve increased consistency across the different sectors relevant to the realization of the right to food; including not only food aid and agricultural and rural development, but also social protection, the protection of agricultural workers, land policies, health and education, or trade and investment."[1317]

258. The Commission finds that the right to food as part of the broader Economic, Social and Cultural rights is incorporated in a number of national constitutions including the Kenyan and South African Constitutions.

259. The Commission finds that the right to food for example does not focus only on the provision of food directly to people but the promotion of policies that will ensure the sustenance of food production and equitable distribution systems.

[1315] Committee on Economic, Social and Cultural Rights, twentieth session, Geneva, 26 April- 14 May 1999, Agenda item 7: *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: General Comments* 12. The right to adequate food (Art.11):.12/05/99 E/C. 12/1999/5 (General Comments).

[1316] Committee on Economic, Social and Cultural Rights, twentieth session, Geneva, 26 April- 14 May 1999, Agenda item 7: *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: General Comments* 12. The right to adequate food (Art.11):.12/05/99 E/C. 12/1999/5 (General Comments).

[1317] Olivier De Schutter, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Culturatl Rights, Including The Right To Development*, (Report of the Special Rapporteur on the right to food, Crisis into opportunity: reinforcing multilateralism, 21st July, 2009).

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

260. The Commission recommends that the Constitution be amended to guarantee specifically the right to food for all Ghanaians.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

261. The Commission recommends that the National Development Planning Commission should produce a holistic National Development Plan that would include ensuring the sustainable production of food to feed Ghanaians.

ISSUE TWO: RIGHT TO HEALTH

A. DIMENSIONS OF THE ISSUE

262. The Commission identifies the following dimensions of the issue:
    a. Should the Constitution provide for the National Health Insurance Scheme?
    b. Should the Constitution guarantee the provision of free healthcare for all Ghanaians?
    c. Should the Constitution guarantee the provision of free healthcare for the poor and the disabled?

B. CURRENT STATE OF THE LAW ON THE ISSUE

263. Article 30 of the Constitution is titled "Rights of the Sick." It provides that a person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs. "Indeed, some progressives have argued that the way in which the fundamental human rights provisions of the 1992 Constitution of Ghana are couched allows for a strong argument that incorporates the right to health as a positively enforceable right under the Constitution. They argue thus, in the light of the omnibus rights provision in Article 33(5), which provides that, '[t]he rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned…shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.'"[1318]

[1318] Ellen Bortei-Doku Aryeetey, Raymond A. Atuguba, and Benjamin Kunbour, *The Right to Development Report: Ghana Country Study* (2004). A Research Report Prepared for the FXB Centre for Health and Human Rights, Harvard School of Public Health, Harvard University, and the United Nations Independent Expert on the Right to Development p. 38ff (On file with the Constitution Review Commission).

264. The socialist government of Dr. Kwame Nkrumah instituted a policy of free health care when Ghana attained its independence in 1957. After his overthrow in 1966, this policy experienced major reversals in the face of dwindling national coffers, ideological changes, and an increasing debt burden.[1319]

265. In 1971, the Hospital Fees Act[1320] was passed, instituting user-fees for all persons seeking medical care. The Act, however, contained provisions that exempted certain categories of persons from paying user-fees for health care services. The government that passed this law was overthrown the very next year and did not have the time to implement it.

266. In the 1990s, extensive research was conducted on the negative distributional impact of health policies, including user fees which had been imposed by International Financial Institutions on the Ghanaian government during the mid-1980s.[1321] The studies documented extensively the impact of structural adjustment-related health policies on Ghana's health care infrastructure and cast doubt on whether the policies could actually have the effect of providing good quality health care as recommended by the World Bank and implemented by the government of Ghana.

267. Although the system of exempting certain categories of persons (children under 5 years, the elderly over 70 years, and "paupers") from paying fees had consistently been written in the laws which imposed such fees, in practice, those in the exempt categories could not access the benefits of the exemption.

268. With the inability to pay hospital fees, many patients died at health institutions in the full glare of health care professionals. In some instances patients were subject to dehumanising display in national media or detained at the hospitals until they could pay their bills or someone paid the bills on their behalf. It is these inhumane features of the *cash and carry* system of financing health care that rekindled national interest in a search for an alternative.

269. The National Health Insurance Scheme was set up under the National Health Insurance Act, 2003, (Act 650) as a sustainable mechanism for financing health care.

270. In July 2008, the Ghanaian government introduced a policy and programme of free maternal health care under the National Health Insurance Scheme. The National Health Insurance Council reported that it had already registered a total of 50,924 pregnant women, just 18 days

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[1319] Raymond, A. Atuguba, *Implementing Economic and Social Rights (ESRs) in Africa: The Case of the Right to Health in Ghana*. A Paper Presented at Harvard Law School under the auspices of the Graduate Program and the Human Rights Program, 13th March, 2008. (on file with the Constitution Review Commission).

[1320] Hospital Fees Act ,1971 (Act 387).

[1321] Brooke G. Schoepf, Claude Schoepf, and Joyce V. Millen, *Theoretical Therapies, Remote Remedies: SAPs and the Political Ecology of Poverty and Health in Africa* in JIM Y. KIM ET AL (ED.), DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR 91 (Common Courage Press, 2000).

after the inception of the programme.[1322] Funding for this new policy was provided by the British Government and under it, the mother and child could obtain free health care from the first day of pregnancy until a year after delivery.

C. SUBMISSIONS RECEIVED

271. The following is the summary of the views expressed by Ghanaians on the issue of the right to health:
    a. The Constitution should provide for the National Health Insurance Scheme.
    b. The state should provide the National Health Insurance Card for every child, as defined in the Constitution, including those who live on the street and do not have the money to afford the premium of the National Health Insurance Scheme.
    c. The Constitution should provide for the payment of a one-time premium under the National Health Insurance Scheme.
    d. The Constitution should guarantee the provision of free healthcare for children below 18 years, persons above 60 years and the disabled.
    e. The Constitution should guarantee the provision of free healthcare for all Ghanaians.
    f. The Constitution should guarantee the provision of free healthcare for the poor and disadvantaged in society.
    g. The Constitution should guarantee the provision of mental health facilities in all District and Regional Hospitals in Ghana.

D. FINDINGS AND OBSERVATIONS

272. The Commission finds that the World Health Organisation has defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[1323] By this definition of health, the mental health of an individual is a key element in determining the well-being of a person.

273. During the consultations the Commission observed the deplorable state of the nation's health facilities, particularly outside the regional capitals. The primary, crucial need of health care revolve around funding. Generally, health care is grossly underfunded and there is an urgent need for funds to be allocated to this sector. There is also an immediate need for reforms to be carried out in mental health service delivery in Ghana. Due to inadequate funds, health professionals largely improvise to be able to undertake very delicate and sometimes major surgeries. To say that the practice is very dangerous is an understatement.

[1322] Lucy Adoma Yeboah and Gifty Appiah-Adjei (2008), "*More Pregnant Women Register Under Free Maternal Health Care Programme*," Daily Graphic, July 19, 2008. (July 30, 2011, 8:15 AM), http://www.modernghana.com/news/174979/1/more-pregnant-women-register-under-free-maternal-h.html.
[1323] World Health Organisation. Basic documents. 39th ed. Geneva: WHO, 1992.

274. The Commission observes that there is a Health Institutions and Facilities Bill awaiting passage into law which would ensure that hospitals and health care facilities meet certain minimum standards to be able to continue operating.

275. The Commission finds that there is an urgent need for the passage of a progressive Mental Health Law to improve the delivery of mental health services in Ghana and ensure the mental health of all Ghanaians.

276. The Commission observes that on 30th May, 2011, the United Nations Special Rapporteur on the right to health at the conclusion of her first visit to Ghana issued a news release commending Ghana for her record in health care and the right to health, but indicated the following challenges:
    a. National Health Insurance: "Its coverage areas and long-term sustainability need further consideration"
    b. Funding of Health: "In order to ensure that the current gains made in the area of the right to health are sustained, the government must develop a strategy to address possible deficits in future funding… as Ghana transforms into a middle-income country, its eligibility for international funding in critical areas such as HIV will diminish."
    c. Mental Health: "I deeply regret that the Mental Health Bill of 2006, which would be a significant step toward ensuring the mental health of all Ghanaians, has stalled in Parliament. I urge the government to accelerate deliberation on the Bill and guide its passage through Parliament because there is an urgent need to improve mental health services in Ghana."

277. The Special Rapporteur also stressed the importance of tackling the substantial human resource constraints that exist within the mental health sector, particularly in nursing. Per this definition of Health, the Mental Health of an individual is a key element in determining the wellbeing of a person.

278. The Commission observes that there are more than 650,000 people suffering from severe mental disorder and about 2,166,000 are estimated to be suffering from a moderate to mild depression, various kinds of anxieties and various sleep disorders. Estimates available to the Commission also indicate that some 98% of the total population of the people suffering from the various degrees of mental disorder will not get the needed treatment unless there are vigorous efforts to improve mental health delivery.

279. The Commission observes that "The passage of the Mental Health Bill would serve many useful purposes including but not limited to: guaranteeing that the fundamental human rights of patients are respected and protected. Passing the bill will ensure that mental health service

units are adequately and appropriately staffed and resourced to attract trained Ghanaian mental health professionals from abroad. It will also create an enabling environment in which mental disorders would be detected early, diagnosed and treated. Besides, and more importantly, the bill will eliminate the phenomenon of mentally challenged patients roaming the streets of the major cities."[1324]

280. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution agreed that the Constitution should provide that "every individual should have the right to enjoy the best attainable state of physical and mental health. The state should take the necessary measures to protect the health of the people of Ghana."[1325]

281. The Commission observes that Article 43(1)(a) of the 2010 Constitution of Kenya provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

282. The Commission observes that Article 41(1) of the Russian Constitution provides that everyone shall have the right to health.

283. The Commission observes that there is a lingering argument that market forces should be allowed to work out the modalities in the health sector instead of government giving out handouts. This view of a right as fundamental as that of health, appears to have lost touch with the realities of our times. Even in the United States of America, which is arguably the most capitalist of societies, the Health Care Reform Legislation was passed in March, 2010 by the US House of Representatives and the Patient Protection and Affordable Care Act which was equally passed in March comes to terms with how poor its citizens have become because of the previous "profits-before-patients" health care system.[1326] Although there are Courts in some States that are currently pronouncing the health policies unconstitutional and the matter is before the US Supreme Court.

284. The Commission observes that there is before Parliament a Bill for the re-enactment of the National Health Insurance Act to improve further the institutional and funding mechanisms for health care for all Ghanaian residents.

285. The Commission observes that in the 2011 State of the Nation Address, the President stated the following:

[1324] Agyapong Vincent & Mantey Mark, *Open Letter to the President, Appeal for Passage of Mental Health Bill,* Daily Graphic, Wednesday, July 6, 2011, at 19.
[1325] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 176.
[1326] AMNESTY INTERNATIONAL USA, http://blog.amnestyusa.org/us/first-step-for-the-right-to-health-care-in-the-us/, (last visited Aug. 24, 2011).

a. In order to achieve the health-related Millennium Development Goals by 2015, Government will continue to concentrate on improving health outcomes... targeting resources towards the health of women and children, and the prevention and control of communicable and non-communicable diseases.
b. The National Health Insurance Scheme (NHIS) will continue to provide financial risk protection against the cost of basic quality health care for all citizens In Ghana.
c. In the area of health infrastructure, the construction works on District Hospitals will continue. Regional Hospitals and staff housing at Wa, Kumasi, Sekondi-Takoradi and Tema will commence. Other projects include the on-going refurbishment of the Tamale Teaching Hospital and the expansion of radiotherapy and nuclear, medicine centres at the Korle-Bu and Komfo Anokye Teaching Hospitals.
d. Following the passage of the Mental Health Act, government will adopt a community mental health care strategy to facilitate the implementation of the Act. The required Legislative Instrument to operationalise other aspects of the Act will also be laid before Parliament.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

286. The Commission recommends that Article 30 of the Constitution on "Rights of the Sick" be titled "The Right to Health" and should guarantee the right of every Ghanaian to the highest attainable standard of health, including access to healthcare services without barriers.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

287. The Commission recommends that the re-enactment of the National Health Insurance Act be expedited.

288. The Commission also recommends a thorough Mental Health Bill to make it more progressive and for its immediate passage into Law.

ISSUE THREE: RIGHT TO HOUSING

A. DIMENSIONS OF THE ISSUE

289. The dimensions to the issue of the right to housing were:
a. Guaranteeing the right to housing of all Ghanaians in the Constitution.
b. Provision of houses or facilitate the acquisition of houses for all Ghanaians.
c. Making it compulsory for all landlords to provide toilet facilities in their properties for the use by tenants.
d. Rent Control.

B. CURRENT STATE OF THE LAW ON THE ISSUE

290. At present there is no specific law in Ghana on the right to housing. Article 33(5) of the Constitution can however, be interpreted to incorporate the right to housing because it provides that rights that are considered to be inherent in a democracy and intended to secure the freedom and dignity of man but are not specifically mentioned in Chapter 5 shall not be regarded as excluded.

291. The Rent Act, 1963 (Act 220) contains provisions relating to the control of rents and the recovery of the possession of premises in certain cases.

292. There are several administrative laws such as the Accra Metropolitan Assembly (AMA) by-laws that regulate housing issues in Ghana. For instance, there are AMA by-laws that mandate landlords to have toilet facilities in their buildings for the use of their tenants. Recently the Supreme Court in the Adjei-Ampofo case where pans full of night soil are disposed of usually by head porterage gave the AMA a fixed period within which to phase out the use of the pan latrine system where human beings carry faecal matter to dispose of.[1327]

C. SUBMISSIONS RECEIVED

293. The submissions received on the issue of the right to housing can be summarised as follows:
    a. Governments should be tasked with providing a specific number of social housing units all over the country stretching from the national capital to regional and district capitals each year to alleviate the problem of indecent housing conditions.
    b. The law should make it mandatory for every house to have an-inbuilt toilet facility so that people do not contaminate the area surrounding their homes.
    c. The Constitution should guarantee the right to housing and toilet facilities.
    d. The payment of rent advances should not cover a period exceeding 6 months.
    e. If housing is not provided to people to have shelter which is a physical need, their rights will be abused. This is why teenage girls are raped on streets by irresponsible men.

D. FINDINGS AND OBSERVATIONS

294. The Commission finds that at present there is a huge housing deficit in Ghana.

295. The Commission observes attempts by the government to provide housing units under various schemes for categories of Ghanaians.

[1327] Adjei –Ampofo (No.2) v. Accra Metropolitan Area & Attorney-General (No.2) [2007-2008] 1 SCGLR 663.

296. The Commission observes that approximately 40% of the countries in the world, representing various legal, social and cultural traditions, have enshrined the right to adequate housing in their respective constitutions.

297. The Commission observes the following international trends on the right to housing:

a. Article 26(1) of The 1996 Constitution of South Africa guarantees the right of everyone to adequate housing and 26(3) provides that no one may be evicted from their home, or have their home demolished, without an order of a court made after considering all the relevant circumstances. No legislation may also permit arbitrary evictions.

b. Article 14(b) of the 1994 Constitution of Argentina provides that the State shall grant the benefits of social security, which shall be comprehensive and unwaivable. In particular, the law shall establish access to decent housing. The Constitution of Argentina provides one of the best examples of how a state has not only constitutionally protected the right to adequate housing, but has explicitly mandated that international human rights instruments be relied upon in order to interpret the meaning of that right.

c. Article 65 of the 1976 Constitution of Portugal guarantees the rights of all to a dwelling of adequate size that meets satisfactory standards of hygiene and comfort and preserves personal and family privacy. The article sets out the measure that must be taken by the government in order to realise the right to housing. These are that the State shall:

    i. draw up and implement a housing policy as part of general national planning and support plans for urban areas that guarantee an adequate network of transport and social facilities;
    ii. promote, in conjunction with local authorities, the construction of economic and social housing;
    iii. promote private construction, when in the public interest, and access to privately owned or rented dwellings; and
    iv. encourage and support the initiatives of local communities for the resolution of their housing problems and for promoting the establishment of housing cooperatives and their own building projects.

d. Article 65(3) provides that the State shall adopt a policy for the institution of a system of rents that are compatible with family incomes and allow for individual ownership of housing. The Constitution of Portugal provides yet another good example of how a country has constitutionally protected the right to adequate housing. It also exemplifies how it delegates certain housing rights obligations to its domestic political organs. Additionally, this constitutional protection goes one step further by ensuring that housing rights are addressed and protected at the local level by making these right the prerogative of regional and local authorities.

As such, the Portuguese Constitution allows for decentralisation while ensuring federal oversight to ensure that regional and local authorities abide by minimum housing rights standards.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

298. The Commission recommends an amendment to the Constitution to provide for the right to housing.

RECOMMENDATION FOR ADMINISTRATIVE CHANGE

299. Based on the proposed amendment, the National Development Planning Commission should develop a comprehensive plan to ensure that every Ghanaian enjoys the right to adequate housing.

ISSUE FOUR: RIGHT TO EDUCATION

A. DIMENSIONS OF THE ISSUE

300. The issue of the right to education presented the following dimensions:
    a. Enforcement of Free Compulsory Universal Basic Education.
    b. Provision for free education from the basic level to the tertiary level.
    c. Provision of free or affordable education for the disadvantaged in society.
    d. Provision of scholarship schemes for children of farmers.

B. CURRENT STATE OF THE LAW ON THE ISSUE

301. The relevant law is provided under Article 25 of the 1992 Constitution. That article is on educational rights and it provides that all persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right, basic education shall be free, compulsory and available to all; secondary education, including technical and vocational education shall be made available and accessible to all with a progressive introduction of free education; and higher education shall be made equally accessible to all, on the basis of capacity and by a progressive introduction of free education.

302. Article 38(2) of the Constitution provides that "The Government shall, within two years after Parliament first meets after the coming into force of this Constitution, draw up a programme for implementation within the following ten years, for the provision of free compulsory and universal basic education."

C. SUBMISSIONS RECEIVED

303. The following is a summary of the views of Ghanaians on the right to education:

a. Free Compulsory Universal Basic Education should be enforced for the following reasons:
    i. There should be law enforcers who will ensure that school children actually attend school during school hours and do not loiter.
    ii. Although the Constitution provides for free basic education, in practice basic education is not free. There are instances where parents are told that, the government only pays fees for the first and second terms and leaves out the third term, so the parents must pay for the third term. As a result of this, many basic school children are unable to attend school thereby defeating the whole purpose of the constitutional provision.
    iii. An education fund should be specially set up for the provision of free education for children in the Western Region. This is because a lot of natural resources are extracted from this Region for the nation's benefit yet the children in the communities do not enjoy the support of the State even in their education, whereas children in the three northern regions which do not contribute much in the way of resources for the nation's development enjoy free education. Children of the people of the Western Region should therefore get automatic scholarships from kindergarten to the tertiary level as it is done in the Northern Region of Ghana because it is also a deprived area.
b. Children should be taken care of at school up to the university level by the state.
c. Government should cater for the education of the child of every teacher to the university level because teachers do not have enough funds to educate their children. Catering for the education of their children will serve as a motivation for teachers.
d. All students who obtain aggregate 6 should be entitled to free education at the Senior High School level because most parents cannot afford to cater for the education of their brilliant wards at that level.
e. The law should ensure that government subsidises the cost of education. Most parents are unable to afford the high cost of education for their children.
f. The state must provide free or affordable education for the disadvantaged in society. The children of disadvantaged must have free education in the basic schools and SHS. In the technical schools, apprenticing should be made free to help the needy to educate their children.
g. Government should give support to farmers so they can cater for the education of their wards.
h. Orphans and needy children must be sponsored in schools by the various District Assemblies. Specifically Government should provide scholarships for the children of

farmers because they do not have enough income from the proceeds of their farms to educate their children.

i. Article 28 of the 1992 Constitution which grants every child the right to be protected from engaging in work that constitutes a threat to his health, education or development, should be amended to recognise, in addition to the protected right, the obligation of the state to ensure that every child of school-going age attends school.
j. Article 38(2) requires the drawing up of an educational plan for the period of ten years to ensure Free Compulsory Universal Basic Education. This plan should be extended for another 10 years if it is unattained during the first 10 years considering that education is expensive.
k. Professional studies should start at the SHS level.

D. FINDINGS AND OBSERVATIONS

304. The Commission notes the existence of the Free Compulsory Universal Basic Education policy and further notes that the capitation grant is being implemented in public schools.

305. The Commission observes the following international comparative experiences on the right to education:
    a. Article 43(1) of The Russian Constitution provides that everyone shall have the right to education. Article 43(2) guarantees general access to education and free pre-school, secondary and secondary vocational education in state and municipal educational institutions and at enterprises. Article 43(4) makes basic general education compulsory.
    b. Article 29(1) of the South African Constitution provides that everyone has the right to a basic education, including adult basic education, and to further education, which the state, through reasonable measures, must make progressively available and accessible.
    c. Article 40 of the Rwandan Constitution provides that every person has the right to education. Freedom of learning and teaching shall be guaranteed in accordance with conditions determined by law.
    d. Article 53(1)(b) of the 2010 Kenyan Constitution provides that every child has the right to free and compulsory basic education.
    e. The Ugandan Constitution provides under that the State shall promote free and compulsory basic education.[1328]

306. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution proposed that children should not be allowed to leave school until they have completed their basic education or have attained the age of 18 years, whichever comes

[1328] Article 18 of the 1996 Constitution of the Republic of Uganda.

first, save in so far as this may be authorised by an Act of Parliament on grounds of health or other considerations pertaining to the public interest.[1329]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

307. The Commission recommends that Free Compulsory Universal Basic Education be fully enforced by the Ministry of Education with emphasis on quality education.

308. The Commission recommends that the Right to Education be explicitly guaranteed in the Constitution.

ISSUE FIVE: RELIGIOUS RIGHTS

A. DIMENSIONS OF THE ISSUE

309. The issue of religious rights presented the following dimensions:
    a. Should Sharia Law govern Muslims in Ghana?
    b. Should churches be licensed by the state?
    c. Should churches pay taxes to the state?
    d. Should the practice of the Christian religion in public schools be outlawed?
    e. Should the Constitution guarantee the right of every Ghanaian to express his or her religion freely?

B. CURRENT STATE OF THE LAW ON THE ISSUE

310. The current state of the law on the issue of religious rights is found under Article 21(1)(c) of the 1992 Constitution. It provides that: "All persons shall have the right and freedom to practise any religion and to manifest such practice."

C. SUBMISSIONS RECEIVED

311. The following is a summary of the submissions received by the Commission on religious rights:
    a. The Constitution must contain express provisions on the freedom of religion so that citizens will respect each other's religion.
    b. The part of the Constitution which states that there is the freedom of worship should be emphasised and elaborated.

[1329] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 3.

c. A total number of seven days must be made available for the celebration of Moslem festivals. Three days before the celebration begins and four days for the celebration.
d. Article 21(c) on the freedom to practise any religion and to manifest any religion should be reviewed. Religion has been used as a tool to destroy a nation; not all religions should be allowed to exist because some religions are not religions at all.
e. Regulation of religion should not be brought under state control; the *status quo* should be maintained.
f. Religious bodies should be made to cater for their members rather than exploit them. Some people join churches only to realise that they have been making others rich.
g. Religion should be sanitised; what is happening elsewhere must not happen in Ghana.
h. There has to be a church formation regulatory body to grant permit to individuals who want to build churches. This is because churches have a great impact on society and must be carefully regulated.
i. The law on the right to religion should be enforced to stop the infringement of the right to practice religion in schools or educational institutions.
j. There should be a mosque in every second cycle school to ensure freedom of religion.
k. The law should ensure that spiritualists are not licensed because they are behind all evil activities taking place in the country.
l. Churches should be mandated by law to pay tax on the monies donated to them by their congregations so that their contributions can help in national development. This will also reduce the number of churches being established as well.
m. The law should tax the collection/offertory and tithes of churches because they make a lot of revenue and taxing them will enable the government raise a lot of revenue.
n. Government should set up a Ministry of Religious Affairs to govern churches because there are a lot of churches being set up. This ministry would regulate the activities of churches and allow the nation to benefit from the revenue of the churches.

D. FINDINGS AND OBSERVATIONS

312. The Commission finds that the current state of the law is on religious rights the precise reproduction of the equivalent provisions on the issue in the 1969 and 1979 Constitutions which the Committee of Experts of the 1992 Constitution decided to retain because it is a fundamental human right.

313. The Commission finds that to ensure national unity and cohesion the *status quo* regarding religious rights should be maintained.

314. The Commission observes that in Botswana, the law ensures that in every community where there is a church, the church funds the building of schools and other amenities for the use of the community.

315. The Commission finds the recent spate of inimical practices of the heads of some religious bodies is not in the public interest. While some of them are in jail for their nefarious activities, others are battling their cases in court or are being investigated by the law enforcement agencies on suspicion of having committed various crimes.

316. The Commission observes that the freedom to practice any religion and to manifest such practice is not absolute and that it is subject to the public interest.

317. The Commission endorses the current state of the law which allows the imposition of reasonable restrictions on fundamental freedoms but does not deny the citizen those freedoms to which he was entitled.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

318. The Commission recommends that Article 21(4) (c) should be amended to include in the list of criteria that may lead to restrictions in the exercise of rights, the words "public order" and "public morality."

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

319. The Commission recommends that the relevant regulatory authorities work with the various religious associations to abate, if not eliminate, the many inimical practices some religious groups and their officers engage in, and which were the subject of many submissions to the Commission.

SUBTHEME TEN: GENDER

ISSUE ONE: GENDER QUOTA IN ELECTIVE AND NON-ELECTIVE OFFICES

A. DIMENSIONS OF THE ISSUE

320. The Commission identifies the following dimensions to the issue of gender quota in elective and non-elective public offices:
    a. Should there be a gender quota in elective and non-elective offices?
    b. Should the provision in the Constitution granting equal rights of women to training and promotion be enhanced?

B. CURRENT STATE OF THE LAW ON THE ISSUE

321. Articles 17 and 35(5) of the 1992 Constitution disallow discrimination on grounds of gender. The Constitution provides in Article 35(6) that the State shall take appropriate measures to

achieve reasonable regional and gender balance in recruitment and appointment to public office. The Supreme Court has recently held that the entire Constitution, including the Directive Principles of State Policy, where Article 35(6) is found, is justiciable.[1330]

322. Under Article 17(4) (a) of the Constitution, Parliament is not barred from enacting laws that are reasonably necessary to provide for the implementation of policies and programmes aimed at redressing social imbalance in the Ghanaian society, including redressing gender imbalance.

323. Article 27(3) of the Constitution provides that: "Women shall be guaranteed equal rights to training and promotion without any impediments from any person."

324. The Constitution further provides in Article 36(6) that the State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps to ensure the full integration of women into the mainstream of the economic development of Ghana.

C. SUBMISSIONS RECEIVED

325. Throughout the consultations, the issue of a gender quota for elective and non elective public offices generated lively debate and interesting submissions. The submissions received by the Commission on this issue can be categorised as follows:
    a. That there should be a gender quota in appointments to public offices, including Ministerial positions. The reasons advanced in favour of this submission were as follows:
        i. Although women form 51% of the national population, they are not fairly represented in decision making processes. The effect is that minority of the population usually decides for the majority of the population, a situation they find unacceptable.
        ii. Secondly, although women in Ghana possess a wealth of knowledge, talent and experience essential for national development, these potentials are under-utilised. The absence of a specific gender quota in the Law has resulted in men occupying most of the elective and non-elective public offices.
    b. The options submitted for the quota for appointments to public offices and ministerial positions for women ranged from 20% to over 70%. The gender quota system, they believe, would ensure that women are adequately represented at vital decision making processes; that their vast wealth of knowledge, talent and experience are fully harnessed for national development and that there is healthy competition between

[1330] *Ghana Lotto Operators Association* v. *National Lottery Authority* [2007 -2008] SCGLR 1088.

males and their female counterparts in all spheres of life, a situation which is currently alien to our deeply patriarchal society.

c. There were equally submissions which expressed the opinion that there should be no gender quota in the public offices and ministerial positions. Appointments, they think, should be based on merit or competence and not on gender; otherwise incompetent people may be appointed to certain offices just to satisfy the constitutional provision. The nation will be adversely affected the most when incompetent persons are appointed into public offices. Further, there might be constitutional crisis where government is unable to find the required number of qualified women to occupy those offices.

d. On the issue of the gender quota in candidates of political parties, there were submissions calling for a constitutional provision that would require political parties to guarantee that a percentage of their candidates are women. When the political parties are forced to present women candidates, it will serve as a platform for women to participate more actively and confidently in the political discourse of the country. Other submissions rejecting the proposal for gender quota in candidates for election reasoning that the absence of a gender quota would ensure open competition based on competence.

e. Submissions in favour of the reservation of a specified number of seats in Parliament for women reasoned that, due to the patriarchal nature of our society, women who contest elections usually lose. This accounts for the present situation where only a small fraction of the seats in Parliament are occupied by women. Thus, if a specific number of seats are reserved for women in Parliament, women will be assured of adequate representation at the highest law making forum of the country, irrespective of whether they win elections. Submissions against the reservation of seats for women in Parliament mainly proposed that women should compete for seats in Parliament just like their male counterparts. Others suggested intensive sensitization of women at the grassroots instead of handing out seats to them as the solution to the problem of limited representation of women in Parliament.

326. At the level of the District Assemblies, there were arguments in favour of reserving seats for women. The rationale behind the proposal was to ensure that women who usually are the most affected by decisions taken at the Assemblies such as increase in market tolls, are adequately represented at the Assemblies. It will also ensure that they can make inputs directly into the Assemblies' by-laws. To this end suggestions were made to make two thirds of the assembly members women or to reserve a percentage of the government appointees to the assemblies for women.

327. It was also proposed that the scope of the provision on equal right of women to training and promotion should be detailed out through the enactment of an Affirmative Action Law. At

present, because our society is deeply patriarchal, the equal right of women to training and promotion is hardly enforced. Often, men are automatically chosen over their female colleagues. When the Affirmative Action Law is passed, it will ensure that both men and women are given equal opportunities especially at the work environment. This will ensure that both genders work hard to merit the desired training or promotion.

328. The Commission received submissions advocating the inclusion of a new clause in the Constitution: Article 27(A) which will contain provisions for the establishment of a constitutional body to be known as "The Ghana National Commission on Gender Equality," whose functions, among others would be to facilitate the implementation of the affirmative action law and all other gender equality policies.

    The functions of the Commission would be:

    a. To promote respect for and the attainment, protection and development of gender equality and equity in public and private institutions and in all spheres of life.
    b. To facilitate the implementation of the affirmative action law and all other gender equality policies and programmes.
    c. To monitor, investigate and report on the observance of gender equality and equity in all spheres of life.
    d. To receive and investigate complaints about gender discrimination and take steps to secure appropriate redress where gender discrimination is established.
    e. To, on its own initiative to investigate instances of gender discrimination and make recommendations to improve the functioning of state institutions in this regard.

D. FINDINGS AND OBSERVATIONS

329. The Commission finds that the public services in Ghana, especially the higher echelons, are dominated by men.

330. The Commission observes that the Constitution adequately provides for a broad framework within which to achieve gender balance in the recruitment and appointment to public offices and that there is already a constitutional duty on the State to take appropriate measures to achieve reasonable gender balance in the recruitment and appointment to public offices and to ensure full integration of women into the mainstream of national life.

331. The Commission observes that in giving effect to the equality of the genders as a fundamental human right, many jurisdictions around the world are developing policies and Laws that would reduce the gender gap in the public sector. Increasingly, many countries are introducing various types of gender quotas for public offices. In some countries, gender quotas are mandated by the national constitution itself, while in others the quota provision is

stipulated in other legislation. Yet in others, the quota provision is mandated for political parties when they present candidates for election into office.

332. The Commission observes the following international comparative experience:
    a. South Africa, in its quest to address the issue of gender balance in its Public Service, is proposing to adopt "a process that moves away from treating gender issues as 'business as usual', towards locating it at the very centre of the transformation process in the Public Sector. Achieving the goal of gender equality is therefore premised on the fundamental integration of women and gender issues within all structures, institutions, policies, procedures, practice, programmes and projects of government."[1331] In addition, the South African Cabinet has given support to the development of a Gender and Governance plan of action that would ensure that substantial progress is made on women's empowerment and gender equality in the Public Service. The country in March 2006 achieved a 30% women representation in Senior Management Service in the Public Service and by March 2009, the South African Cabinet approved a 50% target for women at all levels of the Senior Management Service.[1332]
    b. The Civil Service of Nigeria can boast of widespread female presence, yet women senior public administrators are relatively rare. The national government of Nigeria established a Ministry of Women Affairs almost a decade ago; however, there is no doubt that the government shapes and limits women's role in the civil services.[1333]
    c. Argentina is ranked as one of 10 top countries worldwide with a high percentage of women representation in legislative office. The country adopted a 1991 quota law that required that women should account for at least 30% of candidates for public office. This law has had a positive effect on the proportion of women holding elected office. Prior to the introduction of the Law, women formed 6% of persons in the Chamber (Legislative body). This figure increased dramatically to 34% after the implementation of the national gender quota law for legislative elections in 1991.[1334]

333. As previously noted, the Supreme Court of Ghana, has held that the Directive Principles of State Policy, including the provisions in those Principles which call for redressing gender imbalances, are presumed to be justiciable.[1335] This means that any question regarding the failure of any appointing authority to ensure reasonable gender balance in recruitment and

[1331] Public Service and Administration, Republic of South Africa; A strategic framework for gender equality within the public service (2006 – 2015) Consultation Document, page 3.
[1332] Public Service and Administration, Republic of South Africa; A strategic framework for gender equality within the public service (2006 – 2015) Consultation Document, page 4.
[1333] ROBERT A DIBIE, PUBLIC MANAGEMENT AND SUSTAINABLE DEVELOPMENT IN NIGERIA: MILITARY, (Ashgate Publishing, Ltd., 2003).
[1334] Mala N. Htun, *Women, Political Parties and Electoral Systems in Latin America* (July 16, 2011, 9:35 AM) http://www.idea.int/publications/wip2/upload/Latin_America.pdf.
[1335] *Ghana Lotto Operators Association* v. *National Lottery Authority* [2007 -2008] SCGLR 1088.

appointment to any public office should be actionable in court. What constitutes "reasonable gender balance in recruitment and appointment to public offices" would vary from case to case, but it is a question that can be safely left to the courts to determine.

334. The Commission also observes that in the light of the broad and fairly adequate constitutional provisions outlined above, and as expounded upon by the Supreme Court, the question whether or not to adopt a gender quota to address gender imbalances in appointments to public office may be achieved by means other than by a constitutional amendment.

335. The Commission finds that throughout the country's history, women's participation at the highest level of decision making has been disappointing.

a. The first nation-wide general elections in the Gold Coast were held in 1951. No woman was elected to the Legislative Assembly.
b. The second general election was held on 15th June, 1954. Eight (8) parties contested the election for the 104 seats in the Legislative Assembly. Only one woman won the election to the Assembly.
c. In 1959, in recognition of the tremendous role women played in the financial, organisational and propaganda machinery of the CPP to bring the party to power, special legislation was passed. This was the Representation of the People (Women Members) Act of 1959. The law made provision for a women's electoral college to conduct 'the women only election' either in a special election or contemporaneously with any general election. This law, though enacted, was never implemented.
d. The 1959 legislation was repealed by the Representation of the People (Women members) Act, No. 8 (1960). The 1960 Legislation provided a different method of indirect elections for the new women members. Elections were held for the special women seats in June 1960 and the names of the 10 women members, elected to represent various regions in the country, were published in the *Ghana Gazette* of July 1960. Two (2) members represented the Central and Western regions; 3 members for the North and Upper regions; 2 members for the Eastern region and a member each for the Ashanti, Brong-Ahafo and Volta regions. Women representation with special seats continued under the CPP government until the regime was overthrown in 1966. When Constitutional rule resumed in 1969, of the 140 Members of Parliament who were sworn in on 5th September 1969, only one was a woman. In 1970, a by-election ushered in the second elected woman.
e. Five (5) women were elected into the 140-member Parliament of the Third Republic.

f. The First Parliament of the Fourth Republic (1993) had a total membership of 200 of which 14 were female. It is interesting to note that the only two independent candidates of that Parliament were females.
g. In January 1997, at the start of the Second Parliament of the Fourth Republic of Ghana, only 14 of the 200 Parliamentarians were women.
h. In January, 2001, there was a total of 18 women of the 200 Members of Parliament. The number of seats in Parliament was increased to 230 in the 2004, in response to population increase.
i. In January, 2005, only 25 of the 230 parliamentary seats were occupied by women.
j. In 2009, of the 230 parliamentary seats, only 20 were occupied by women, a further reduction from the previous disappointing record.
k. One would have thought that after almost half a century of elections, women would have obtained some significant representation in Parliament but, sadly, the reverse holds true.[1336]

336. The Commission finds the following on the presentation of women, including quota systems for women, in Parliament in other African countries:
a. In Uganda, the Constitution requires Parliament to have one woman representative for every district, and such numbers of representatives of the army, the youth, workers with disabilities and other groups as Parliament may determine.[1337]
b. In Niger, in 2002, a quota law was adopted by the Government obliging all competing political parties to allot 10% of their elected positions to women.
c. In the United Kingdom, the Liberal Democrats, prior to the 2005 elections, placed women in 40% of the "winnable seats " whilst the Labour Party has adopted a system in which party members have 2 votes, one for a woman and one for a man, and the woman and the man with the most votes are elected.[1338]
d. In Sweden, the Social Democratic Party adopted the Zipper system in 1993, in which one sex alternates the other on party lists. The Left Party on the other hand adopted in 1993, a system in which there was a 50% minimum quota for women on party lists. The same was adopted in 1997 by the Green party, but with one modification: the 50% quota is plus/minus one person. In the Moderate Party, the quota is: two women and two men shall be placed on the top four positions on the party list for the election to the European Parliament in 2009.[1339]

[1336] G. Ofori-Boadu "Taking Advantage of the Constitutional Review Process to Increase Women's Participation in Politics" (on file with the Constitution Review Commission).
[1337] Article 78(1) of the 1995 Constitution of the Republic of Uganda.
[1338] QUOTA PROJECT, http://www.quotaproject.org/uid/countryview.cfm?country=77 (last visited Aug. 24, 2011).
[1339] QUOTA PROJECT, http://www.quotaproject.org/uid/countryview.cfm?country=77 (last visited Aug. 24, 2011).

e. In Poland, an electoral Law enacted on 5th January, 2011 introduced quotas on electoral lists in the elections to local councils, to the *Sejm* and to the European Parliament. The Law stipulates that the number of candidates of either gender on the electoral lists may not be lower than 35% of the overall number of candidates on this list. If a list falls short of meeting this requirement, the committee notifies the authorised person of the need to amend the list within 3 days. Should this fail to result in a properly structured list, the committee refuses to register the entire list. For lists that include 3 candidates, the rank order or placement rule is that there should be at least one candidate of each gender.[1340]

337. The Commission observes that the Committee of Experts that developed proposals for the 1968 Constitution proposed that "subject to one or two reservations no law should be passed in Ghana which contains any provision that is discriminatory either of itself or in its effect. We propose that no person should be treated in a discriminatory manner by reason of any written law, the performance of the functions of any public officer or any public authority."[1341] This proposal was accepted in the form of Article 25(1) of the 1968 Constitution which stated that no law shall make any provision that is discriminatory either of itself or in its effect subject to some restrictions. This was repeated in Article 31(1) of the 1979 Constitution.

338. The Commission observes that the 1992 Constitution permits Parliament to enact laws that are reasonably necessary to provide for the implementation of policies and programmes aimed at redressing any social imbalance, such as gender imbalances in public appointments. This could be done in the context of an affirmative action law.[1342]

339. The Commission observes that the Constitution of Rwanda provides that "the State of Rwanda commits itself that woman are granted at least 30% of posts in decision- making organs."[1343]

340. The Commission observes that at the National Constitution Review Conference there was a proposal for the amendment of Article 27(3) of the 1992 Constitution of Ghana to provide that the State shall put in place affirmative action programmes and measures aimed at accelerating *de facto* equality between men and women, and this shall not be considered discrimination as defined in the present constitution, and shall in no way entail as a consequence, the maintenance of unequal or separate standards. This provision shall, among others, mandate the State to pass an Affirmative Action Law which tackles gender

[1340] QUOTA PROJECT, http://www.quotaproject.org/uid/countryview.cfm?country=77 (last visited Aug. 2, 2011).
[1341] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), paragraph 257.
[1342] Articles 35(6)(b), 36(6) and 17(4)(a) of the 1992 Constitution of the Republic of Ghana.
[1343] Article 9(4) of the 2003 Constitution of the Republic of Rwanda.

inequalities in governance, education, employment, the economy, resource control, cultural practices and other spheres of life. The participants at the Conference further advocated the inclusion of a new clause in the Constitution (Article 27(A)) which will contain provisions for the establishment of a constitutional body to be known as "The Ghana National Commission on Gender Equality," whose functions, among others, would be to facilitate the implementation of the affirmative action law and all other gender equality policies and programmes.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

341. The Commission recommends that Parliament enacts a comprehensive Affirmative Action Act which should address broader issues of equality of gender.

342. The Commission further recommends that the Affirmative Action Act shall be enacted by Parliament within 6 months of the coming into force of the amendments to the Constitution.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

343. The Commission recommends that all public institutions adopt gender policies, including recruitment policies, aimed at achieving a balanced structuring of those institutions in terms of gender.

344. The Commission recommends that the Electoral Commission takes the provisions of the Affirmative Action Act into account in the performance of its functions.

345. The Commission recommends that political parties be encouraged by all public agencies to adopt Voluntary Political Party Quotas. Here, political parties may voluntarily include in their constitutions percentages of women to be presented as candidates for election or set and implement targets to include a certain percentage of women as candidates for elections, beyond what is mandated in the Affirmative Action Law. The Electoral Commission may consider taking this up at the level of the Inter-Party Advisory Committee (IPAC).

ISSUE TWO: MATERNITY AND PATERNITY LEAVE

A. DIMENSIONS OF THE ISSUE

346. There were two main dimensions of this issue:
    a. Should the Constitution provide for paternity leave in addition to maternity leave?
    b. What should be the period of maternity leave and paternity leave?

B. CURRENT STATE OF THE LAW ON THE ISSUE

347. The 1992 Constitution and the Labour Act, 2003 (Act 651) provide for only maternity leave. Article 27(1) of the Constitution provides that special care shall be accorded to mothers during a reasonable period before and after child-birth; and during those periods, working mothers shall be accorded paid leave. Section 57(1) of the Labour Act, 2003 (Act 651) provides that a woman worker, on the production of a medical certificate issued by a medical practitioner or a midwife indicating the expected date of her confinement, is entitled to a minimum period of maternity leave of 12 weeks in addition to the period of annual leave. Thus, both laws provide only for maternity leave, and the Labour Act further provides that the period of such leave is 12 weeks. There is no direct provision for paternity leave in any law in Ghana.

C. SUBMISSIONS RECEIVED

348. The following patterns are observed from the submissions received on this issue:
    a. There was general agreement that the maternity leave provisions in the Constitution and in the Labour Act be maintained.
    b. The submissions in favour of granting men paternity leave reasoned that the grant of paternity leave would enable the fathers assist the mothers at the critical stages of childcare immediately after delivery. Further, it would enable the fathers spend quality time with their infants with a view to establishing critical paternal bonds between father and child right from infancy.
    c. The submissions rejecting the introduction of paternity leave generally argued that when fathers take time off from work, they do not actually help mothers take care of children. Instead, they use the time to resolve their personal issues or engage in a broad range of social vices.
    d. On the duration of maternity and paternity leaves, the submissions received by the Commission can be summed up as follows:
        i. To enable working fathers assist their spouses in the early days after child-birth, a paternity leave period ranging from 2 weeks to 2 months should be allowed.
        ii. Women should be granted 6 months of maternity leave in any of the following ways:
            1. Three (3) months before delivery and 3 months after delivery. Generally, women become weak after 6 months of pregnancy, therefore, if they are allowed a 3 month period of leave from work before delivery, it will enable them gain the strength they need to go through the delivery process. This will in turn reduce maternal mortality. The remaining 3 months of leave after delivery will enable the mothers nurse their children before returning to work.

2. Six (6) months maternity leave to be taken at her option. In recent times, there has been an increase in caesarean deliveries and women require more time for healing from these operations than from the normal deliveries. Thus, if the woman is given the option to commence her six months of maternity leave whenever she wishes, she will be able to use all of that period after delivery in order to completely recover from the caesarean delivery and regain her strength before resuming work.
3. A six month period of maternity leave would enable lactating mothers undertake fully, the exclusive breast feeding of their infants for the period, and in the manner prescribed and advocated by the National Health Policy.

e. Some submissions advocated the retention of the current duration of maternity leave, because an increment would make the employment of women unattractive to businesses.
f. Other submissions were to the effect that the Constitution should mandate the provision of day care centres or crèches at work places so that nursing mothers may breastfeed their children when they resume work at the end of their maternity leave.
g. Although Article 27 of the Constitution appears very good for working mothers or women in the professional sector of the economy, it does not provide for female farmers in the rural areas, for example.

D. FINDINGS AND OBSERVATIONS

349. The Commission finds that currently, there is no law in Ghana that specifically grants paternity leave, however, some Industrial and Commercial Workers have been able to negotiate about 4 days paternity leave into their collective bargaining agreements.

350. The Commission further finds that although the Law provides for a minimum period of 12 weeks (3 months) for maternity leave[1344] and extends it for at least 2 additional weeks where the confinement is abnormal or 2 or more babies are born,[1345] in practice, depending on what is in the Collective Bargaining Agreement of the woman worker, the period of maternity leave is usually between 3 and 4 months. This period does not include the annual leave period (usually fifteen working days) which the Law entitles the woman worker to take. [1346]

351. The Commission observes that the 1969 Constitution provided that the family being the unit of society, Parliament shall enact such laws as will ensure that parents undertake their natural

[1344] Section 57(1) of the Labour Act, 2003 (Act 651).
[1345] Section 57(3) of the Labour Act, 2003 (Act 651).
[1346] Section 57(1) of the Labour Act, 2003 (Act 651).

right and supreme sacred duty in the upbringing of children in co-operation with such institutions or organisations as Parliament may by law prescribe.[1347]

352. The Commission observes that the Committee of Experts that developed proposals for the 1979 Constitution proposed that Article 13 of the 1969 Constitution that was entitled "welfare of the family", and dealt with the rights of women and children, should be replaced with separate provisions on the rights of women as mothers and on the rights of children.[1348] The 1979 Constitution contained the following provision: "where assistance, special care and facilities necessary for the maintenance safety and development of a woman as a mother are provided by or at the expense of the State, such assistance, special care and facilities shall be available to all mothers without discrimination."[1349]

353. The Commission observes that whereas the 1969 Constitution provided for the rights of "parents", the 1979 and 1992 Constitutions provided only for the rights of the "mother."[1350]

354. The Commission acknowledges the apparent threat that an increase in the period of maternity leave poses to the employment of women. That notwithstanding, the Commission observes that the current period of maternity leave is inadequate for the following reasons:
    a. The high rate of maternal and infant mortality in the country is partly attributable to insufficient care for mothers before delivery and insufficient time for mothers to nurse their infants before resuming work. Estimated and adjusted maternal mortality is at 560 deaths per every 100,000 live births. The 2006 MICS found that the under-five mortality rate was 111 deaths per 1000 live births, while the infant mortality rate was at 71 deaths per 1,000 live births. The underweight prevalence in 2006 was 17.8%, while the prevalence of stunting was at 22.4%. These are partly caused by poor childcare practices among some parents, such as the lack of exclusive breastfeeding, with 45.6% of children not being exclusively breastfed. The percentage of children who were not fully immunised was at 35.6%. The lack of care-seeking for suspected pneumonia was high, at 66.4%, while 67.4% of under-5 children were not sleeping under insecticide treated nets.
    b. For the increasing number of women who undergo caesarean sections to be delivered of their babies, the present arrangement does not offer enough time to heal before having to resume work.
    c. It does not provide sufficient time to allow mothers who wish to satisfy the 6-month period of exclusive breast feeding prescribed by the Ghana Health Service as necessary for the healthy development of the infant.

[1347] Article 13(c) of the 1969 Constitution of the Republic of Ghana.
[1348] Proposal of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978, paragraph 88.
[1349] Article 32(1) of the 1979 Constitution of the Republic of Ghana.
[1350] Article 27(1) of the 1992 Constitution of the Republic of Ghana.

355. The Commission observes that allowing for paternity leave, and increasing the period of maternity leave, will make the law in Ghana consistent with current international trends as discussed below:
    a. The ILO Convention 102 on Social Security (Minimum Standards) creates obligations for benefits with regard to maternity.[1351]
    b. The Constitution of the Russian Federation requires the State to provide support for the family, maternity, fatherhood and childhood.[1352]
    c. In Belgium, the law permits 15 weeks of paid maternity leave. A woman obtains 82% of her salary for the first 30 days and 75% of her salary thereafter. The law also grants a total of 10 days paternity leave out of which 3 days are compulsory and with pay. The remaining 7 days are unpaid, but 82% of the salary is paid by the Health Insurance Fund.
    d. In Germany, the law grants 12 months of maternity leave and pays 65% of the pay of the woman but not more than 1,800 Euros. Where the woman worker is a single mother, the Law grants her 14 months of maternity leave but with the same payment plan. Where the woman wishes to receive 100% of her pay then she would be entitled to only 14 weeks of maternity leave. The maternity leave period commences 6 weeks before birth.
    e. In Italy, the duration of paid maternity leave is 22 weeks (5 months). During this period, a woman is entitled to 80% of her salary. The period of paid paternity leave is 13 weeks (3 months) and the father is entitled to 80% of his salary during this period. Where the leave is unpaid, a mother is entitled to a maximum of 26 weeks (6 months) whilst the father is entitled to a maximum of 30 weeks (7 months). Between the mother and father of the child, they are entitled to a maximum of 44 weeks (10 months) of leave.
    f. In Norway, both parents are entitled to a total of 56 weeks or 46 weeks of paid maternity or paternity leave. The father must take at least 12 weeks while the mother must take at least 3 weeks of leave immediately before birth and 6 weeks immediately after birth. The rest of the weeks can be shared between mother and father. The parents receive 80% of their salary should they opt for 56 weeks of maternity leave. However, they are entitled to 100% of their salaries if they opt of 46 weeks of maternity leave.
    g. In the United States of America, the Family and Medical Leave Act of 1993 requires covered employers to provide employees job-protected unpaid leave for qualified medical and family reasons, including Pregnancy. To qualify for the FMLA mandate, a worker must be employed by a business with 50 or more employees within a 75-mile radius of his or her worksite, or a public agency, including schools and state,

[1351] The Social Security (Minimum Standards) Convention, 1952 (No. 102).
[1352] Article 7(2) of the 1993 Constitution of the Russian Federation.

local, and federal employers (the 50-employee threshold does not apply to public agency employees and local educational agencies). He or she must also have worked for that employer for at least 12 months (not necessarily consecutive) and 1,250 hours within the last 12 months.

h. In the United Kingdom, a mother is entitled to a total period of 52 weeks paid maternity leave.
i. In Tanzania, a mother is entitled to a total of 12 weeks of fully paid maternity leave while the father is entitled to 5 days of fully paid paternity leave. The period of paid maternity leave may only be taken once every 36 months.
j. In Cameroun, a woman is entitled to 14 weeks of fully paid maternity leave, whilst the father is entitled to up to 10 days of paid paternity leave.

356. The Commission observes that at the National Constitution Review Conference, the following proposals were made:
    a. Article 27 on Women's Rights should be amended to cover women's rights more comprehensively, including reproductive rights.
    b. Women and men have the right to equal treatment, including the right to equal opportunities in civil, political, economic, cultural and social spheres, thus some measure of paternity leave should be granted.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

357. The Commission recommends that:
    a. The present heading of Article 27 of the 1992 Constitution "Women's Rights" be changed to "Gender Rights."
    b. Article 27(2) of the 1992 Constitution should be amended to provide as follows: "Facilities shall be provided for the care of children below school-going age *at the work place* to facilitate care by parents."

RECOMMENDATION FOR LEGISLATIVE CHANGE

358. The Commission recommends that section 57 of the Labour Act be amended to provide for a minimum period of 16 weeks of paid maternity leave exclusive of the period of paid annual leave. The annual leave period may be taken in addition to the maternity leave period. This period of paid maternity leave may commence from the sixth month of pregnancy.

359. The Commission recommends that the Labour Act be amended to provide for a short period of paternity leave.

SUBTHEME ELEVEN: CHILDREN'S RIGHTS

ISSUE ONE: CHILDREN'S RIGHTS

A. DIMENSIONS OF THE ISSUE

360. The issue presents the following dimensions:
    a. Should the definition of a child in the Constitution be amended?
    b. Should there be an amendment to the constitutional provisions on the rights of children so that these rights may be further elaborated?
    c. Should the Constitution's pronominal reference to a child as "it" be amended?
    d. Should the Constitution be amended to include the duties of children?

B. CURRENT STATE OF THE LAW ON THE ISSUE

361. The Constitution defines a child for its purposes as anyone below the age of 18.[1353] The Children's Act reproduces the constitutional definition of a child.[1354] In the absence of a statutory provision stipulating the age of majority for the purposes of general contractual liability, the common law age of majority of 21 years remains applicable. The Interpretation Act, 1960 equally defines an infant as a person who has not attained the age of 21 years.[1355] The Courts Act defines an "infant" as a person under the age 18 years, the Criminal Procedure Code defines a juvenile as a person under 18years[1356] and the Juvenile Justice Act, defines a juvenile as a person under 18 years.[1357]

362. Although the 1992 Constitution[1358] and the Children's Act[1359] both ascribe rights to the child, the law often refers to the child as an object by the use of the pronoun "it".[1360]

363. The Constitution and the Children's Act outline many rights of the Child in Ghana. The provisions of the latter law are particularly detailed. Both laws are, however, silent on the duties of children.

364. Ghana signed and ratified the Convention on the Rights of the Child on 29th January 1990 and 5th February, 1990 respectively. On 18th August 1997, Ghana signed the African Charter on the Rights and Welfare of the Child; on 13th June 2000, Ghana ratified the Convention

[1353] Article 28 of the 1992 Constitution of the Republic of Ghana.
[1354] Section 1 of the Children's Act, 1998 (Act 560).
[1355] Section 32 of the Interpretation Act, 1960 (CA 4).
[1356] Section 414 of the Criminal and Other Offences (Procedure) Act, 1960 as amended by section 61(c) of the Juvenile Justice Act, 2003 (Act 653).
[1357] Christine Dowuona-Hammond, *Towards A Uniform Age Of Majority In Ghana: Rethinking Contractual Capacity Of Minors*, Vol.XX UGLJ 62 (1996 – 1999).
[1358] Article 28 of the 1992 Constitution of the Republic of Ghana.
[1359] Children's Act, 1998 (Act 560).
[1360] Article 28 of the 1992 Constitution of the Republic of Ghana.

concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; and on 23rd September 2003, Ghana signed the Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in armed conflicts.

C. SUBMISSIONS RECEIVED

365. The Commission received a lot of submissions on the issue of children's rights. They are summarised as follows:
    a. There should be a uniform age for a child, a juvenile and a minor for all purposes.
    b. The principles that govern children's rights (the best interest of the child, non-discrimination, right to life, survival and development; participation and sense of responsibility according to evolving capacities) should be captured in the human rights provisions of the Constitution.
    c. There should be better and more effective measures to implement and enforce specific child rights.
    d. "Light and hazardous" work should be well defined in the Children's Act, 1998 taking into account our social orientation.
    e. Article 28 should be amended to specify the work a child can do for a parent.
    f. There should be more support for men and women in rural areas and poor urban communities so that they can better take care of their children. This would hopefully curb the increasing incidents of children living and working on the streets and other related social vices.
    g. The Constitution's pronominal reference to a child by "it" should be amended and replaced with "he" or "she."
    h. The Constitution should contain provisions on children's duties in order to make children responsible and accountable.
    i. The provisions on children's rights should be amended to include a provision on the discipline of children for the following reasons:
        i. At present, parents are afraid to discipline their own children for fear of falling foul of the law, and this is resulting in indiscipline in the society; and
        ii. The socio-cultural environment of Ghana advocates the disciplining of children, so the Constitution should take this into account.

D. FINDINGS AND OBSERVATIONS

366. The Commission observes that on the whole the age of majority differs from statute to statute, depending on the purpose for which it is stipulated.[1361]

[1361] Christine Dowuona-Hammond, *Towards A Uniform Age Of Majority In Ghana: Rethinking Contractual Capacity Of Minors*, Vol.XX UGLJ 62 (1996 – 1999).

367. The Commission observes that in Constitution and the Children's Act, the age of majority is 18 years in Ghana.[1362] This cut-off age is almost universal, and is the preferred age for international organizations and highly industrialised societies. There are some departures from the norm, with the 1995 Constitution of Uganda, for example, providing that children shall be persons under the age of 16 years.[1363]

368. The Commission observes that in Ghana, the age of majority is only on paper. In advanced industrialised nations, children are expected to graduate from high school by age 18, and at that age also, they are able to work in acceptable and less hazardous occupations. At the age of 18 years, the cultural and legal conditions of the West make it legally permissible for children to stand up to their parents, move out of their parents' homes, and the processes of formal and informal socialization actually prepare the child for this kind of independence. At 18, many Ghanaian children are still in high school, cannot claim independence, live under their parents' or guardians' roofs, and have not been equipped with the life skills necessary for them to live independently. The Ghanaian child looks up to her parents for guidance long after age 18, and that is because our traditional culture does not recognise 18 years as the age of majority. In most Ghanaian societies, childhood ends with marriage and starting a home.

369. The Commission finds that societies must have the best interest of the child as a primary consideration in all decisions and actions that may affect present and future children at all societal levels.[1364] This principle, according to international law, is meant to underpin the implementation of child rights. The Children's Act contains this principle. However, it is not enshrined in the Constitution.

370. The Commission observes that the Constitution states that there should be no discrimination in the enjoyment of rights between children born in and out of wedlock.[1365]

371. The Commission finds that there are children who suffer discrimination in Ghana. Children born with disabilities and their parents are often victims of abandonment, neglect, and stigma in their communities. Other children who suffer discrimination are children in street situations, orphaned children, the children of asylum-seekers, children of immigrants, and children infected with or affected by HIV/AIDS.

372. The Commission observes that Ghana, through the efforts of government, international organizations and NGOs, is working hard to ensure that children's rights are respected. The

[1362] Article 28(5) of the 1992 Constitution of the Republic of Ghana; Section 1 of the Children's Act, 1998 (Act 560).
[1363] Section 34 of the 1995 Constitution of the Republic of Uganda.
[1364] Convention on the Rights of the Child, G.A. Res. 44.25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N.Doc. A.44/49 (1989).
[1365] Article 28(1)(b) of the 1992 Constitution of the Republic of Ghana.

Government, through Programmes such as the National Programme on the Elimination of Worst Forms of Child Labour (NPECLC), is working to ensure that Children's rights are respected. For example, Ghana commemorated this year's (2011) World Day Against Child Labour with a series of awareness creation events in some cocoa growing communities in the country aimed at ensuring the elimination of the worst forms of child labour in cocoa production.

373. The Commission observes the following international comparative experiences:

a. The South African Constitution contains copious provisions on the rights of the child which range from the right to a name, to the right not to be used directly in armed conflict.[1366]

b. The Kenya Constitution provides that every child has a right to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; to the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time and to be held separately from adults and in conditions that take account of the child's sex and age. The Constitution further provides that the best interests of the child are of paramount importance in every matter concerning the child.[1367]

c. The Constitution of Uganda contains the following provisions on the rights of Children: children shall have the right to know and be cared for by their parents or those entitled by law to bring them up; a child is entitled to basic education which shall be the responsibility of the State and the parents of the child; no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs; children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical mental, spiritual, moral or social development; a child offender who is kept in lawful custody or detention shall be kept separately from adult offenders; and the law shall accord special protection to orphans and other vulnerable children.[1368]

[1366] Section 28 of the 1996 Constitution of the Republic of South Africa.
[1367] Article 53 of the 2010 Constitution of Kenya.
[1368] Article 34 of the 1995 Constitution of the Republic of Uganda.

374. The Commission observes the growing agitation among Ghanaians regarding how the provisions of the Children's Act are detached from the socio-cultural realities of the country, and based on models which are not relevant to Ghana's experiences and way of life.

375. The Commission observes that the Children's Act makes it a right for every child to grow up with his or her parents.[1369] If this section is present in the British model, it is because their culture thrives primarily on the nuclear family system. Ghanaian cultures thrive on the extended family system. Apart from the capital city, Accra, and a few regional capitals where the culture of living in a nuclear family is gaining popularity for economic reasons, for the most parts of the country the Ghanaian extended family system remains intact. This legislation overlooks the traditional relevance of the extended family system by unrealistically calling on all children to live with their parents. The extended family system that has been beneficial in the socialization of children should be acknowledged in our children's law. The Children's Act may, therefore, provide that children should grow up with a loving family, either with their own parents or a loving parental figure.

376. The Commission observes that the Children's Act mandates that every child has a right to a name and nationality.[1370] Entailed in this right is the right of the child to know the child's natural parents and the extended family. This is a positive aspect of the legislation. However, until traditional birth attendants participate in the registration of new births, we might continue to have unregistered children. Their participation could take the form of a regular reporting system where they submit information to the registrar about new births.

377. The Commission finds that international standards use pronouns to refer to the child that denote the child as a human being. The use of words that denote the child as a "thing" is a reflection of a country's acceptance that the child is not a holder of rights and a suggestion that everyone should treat the child as such.

378. The Commission finds that in recent times there has been an upsurge in child pornography and child prostitution in Ghana. Children are often too innocent to understand what is being done to them and too frightened to report what has been done to them. The ratification and domestication of the Protocol on the Prevention of the Sale of Children, Child Prostitution and Child Pornography will offer more protection for the children of Ghana and ensure their healthy growth and development.

379. The Commission observes that the UN General Assembly adopted in December 2011, the third Optional Protocol to the Convention on the Rights of the Child, which establishes a communications procedure for violations of Children's rights. The effect of the adoption of

[1369] Section 5 of the Children's Act, 1998 (Act 560).
[1370] Section 4 of the Children's Act, 1998 (Act 560).

this optional protocol is that now children who are victims of abuses and violations of their rights will be able to make a complaint to the UN Committee on the Rights of the Child (the Committee), if they have not been able to get legal remedies for these violations in their countries. The Protocol however requires the ratification of at least 10 states to enter into force.

380. The Commission observes the following proposals that emerged from the National Constitution Review Conference on Children's Rights:
    a. That the principles of children's rights should be captured in the preamble to Article 12 or Article 28 of the 1992 Constitution (e.g., the best interest of the child; non-discrimination; right to life; survival and development; right to health; participation and sense of responsibility according to evolving capacities).
    b. That the Constitution should be amended to create the Office of the Special Commissioner for Children within the CHRAJ. The Special Commissioner will be responsible for the protection, implementation and monitoring of children's rights. This will necessarily require the extension of the mandate of the CHRAJ to reflect the function of the Commissioner.
    c. That the Optional Protocols to the Convention on the Rights of the Child (CRC) on the Prevention of the Sale of Children, Child Prostitution and Child Pornography should be ratified and domesticated.
    d. That Article 245 of the 1992 Constitution on the functions of District Assemblies should be amended such that District Assemblies shall have a constitutional duty and mandate to draw up yearly programmes and a budget for the care and protection of children within the district.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

381. The Commission recommends that the Constitution be amended to include the basic principles of children's rights (ie. the best interest of the child; non-discrimination; right to life; survival and development; right to health; participation and sense of responsibility according to evolving capacities).

382. The Commission recommends the amendment of the Constitution to create the "Office of the Special Commissioner for Children, Persons With Disability, and the Aged" within the CHRAJ. The Special Commissioner will be partly responsible for the protection, implementation and monitoring of children's rights, according to generally agreed international standards.

RECOMMENDATION FOR LEGISLATIVE CHANGES

383. The Commission recommends that, flowing from the recommendation for constitutional change, the Children's Act should be substantially revised.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

384. The Commission recommends that Government ratifies the optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

ISSUE TWO: SUPPORT TO THE FAMILY AS THE FUNDAMENTAL UNIT OF SOCIETY

A. DIMENSIONS OF THE ISSUE

385. The dimensions of this issue were as follows:
    a. Does the Constitution need to accord the family greater recognition and support as the fundamental social unit for the care and protection of children and the general development of society?
    b. In what practical ways may families be supported and strengthened to perform their preponderant social roles.

B. CURRENT STATE OF THE LAW ON THE ISSUE

386. The following is an analysis of the current state of the law on this issue:
    a. The Constitution's response to this issue is to require Parliament to enact laws to ensure the protection and advancement of the family as the basic unit of society and for safeguarding the interest of children.[1371] The law should provide that every child has the right to the same measure of special care, assistance and maintenance as is necessary for her development from natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law. The law should further provide that parents undertake their natural right and obligation of care, maintenance and upbringing of their children and the children be entitled to reasonable provision out of her or his parent's estate.
    b. Parliament responded to the demands of Article 28 in 1998, when the Children's Act was passed. The approach of the Act was to stipulate certain rights for the child, specifying parents as duty bearers and attempting to establish a regime for children in need of care. However, the Act conceals the point that the state remains the principal duty bearer although parents are obviously the immediate care givers.

[1371] Article 28(1)(a) to (e) of the 1992 Constitution of the Republic of Ghana.

c. In its stipulation, the Act states that no one should deny any child the right to live with his [or] her parents and family and grow up in a caring and peaceful environment.[1372] Exceptions to this rule include instances where living with her parents may lead to "significant harm to the child," physical abuse to the child, or the attenuation of her general interests as a child. Parents are under a duty not to deprive a child of her welfare irrespective of the marital status of the parents or whether they are living together or in separation.
d. The parents are further entrusted with a duty to ensure the child's "right to life, dignity, respect, leisure, liberty, health, education, and shelter from his parents."[1373] The parents have a further responsibility to "protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression." They are further responsible to "provide good guidance, care, assistance and maintenance for the child," much as they must ensure the "child's survival and development." When temporarily absent, the parents must ensure that the child is cared for by "a competent person and that a child under eighteen months of age shall only be cared for by a person of fifteen years and above."[1374]
e. The law further makes parents responsible for the registration of their children, with the names of both parents appearing on the registration certificate, unless the father is unknown to the mother.
f. In accordance with the Constitution, the Children's Act stipulates that no one should deprive the child of reasonable entitlement from her or his parent's estate. This entails that parents have a duty to ensure that there is reasonable provision in their wills and that, in case of intestacy; a child should receive a reasonable entitlement from her parents' estate.[1375]
g. The Act further stipulates other rights for children, where the correlative duties are on both the parents and everyone else. No person should deprive any child of "access to education, immunisation, adequate diet, clothing, shelter, medical attention or any other thing required for his development."[1376] Similarly, no person should "deny a child medical treatment by reason of religious or other beliefs."[1377] In the same vein, no person should "deprive a child of "the right to participate in sports, or in positive cultural and artistic activities or other leisure activities."[1378]
h. The Children's Act's response to the Constitutional requirement that a child with disability be treated with dignity, and be provided with special care, education and

[1372] Section 5 of the Children's Act, 1998 (Act 560).
[1373] Section 6 of the Children's Act, 1998 (Act 560).
[1374]Section 6 of the Children's Act, 1998 (Act 560).
[1375] Section 7 of the Children's Act, 1998 (Act 560).
[1376] Section 8(1) of the Children's Act, 1998 (Act 560).
[1377] Section 8(2) of the Children's Act, 1998 (Act 560).
[1378] Section 9 of the Children's Act, 1998 (Act 560).

training to the best of their ability so that they are self-reliant, has been to restate that position.

i. The Children's Act alludes to the right of the child to participate in decision-making which affect the child's well-being according to the child's evolving capacities in its section 11. It provides that no person shall "deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being, the opinion of the child being given due weight in accordance with the age and maturity of the child."[1379]

j. The Act further prohibits parents and others from subjecting a child to "exploitative labour."[1380]

k. The Children's Act attempts to criminalise the practice of Child betrothal. [1381] However, the offences created are easy to defend as the Act stipulates that the offences are committed when a person forces a child to be betrothed, to be a subject of dowry, or to be married. Considering that a parent is entitled to provide guidance to her child, it is easy to argue against an allegation that an offence was committed by simply saying that the parent was merely offering advice to the child. The practice persists in Ghana well after the enactment of the Children's Act.

C. SUBMISSIONS RECEIVED

387. The Commission received the following submissions:

a. Article 28(1) (e) of the 1992 Constitution on the enactment of laws by Parliament for the protection and advancement of the family as the unit of society with the broader aim of promoting the interest of children, should be amended to include a clear statement that the State undertakes to provide support to the family as the fundamental unit of society. The reason for this suggestion was that, in addition to being in tandem with international standards, there was a need to have the state recognised as the principal duty bearer for the well-being of children, the fulfilment of which duty is heavily dependent on the familial environment.

D. FINDINGS AND OBSERVATIONS

388. The Commission observes that in the 1968 Constitution, it was provided that the family being the fundamental unit of society, Parliament shall enact such laws as will ensure:

a. The right of women and children to such special care and assistance as are necessary for the maintenance of their health, safety and development and well-being;

b. That all children shall have a right to the enjoyment of the same measure of special care and assistance;

[1379] Section 11 of the Children's Act, 1998 (Act 560).
[1380] Sections 11 and 87 of the Children's Act, 1998 (Act 560).
[1381] Section 14 and 15 of the Children's Act, 1998 (Act 560).

c. That parents undertake their natural right and supreme sacred duty in the upbringing of children in co-operation with such institutions or organisations as Parliament may by law prescribed; and
d. That, laws are generally enacted as are necessary for the protection, advancement and welfare of the family.[1382]

389. The Commission observes that the 1979 Constitution provided that where assistance, special care and facilities necessary for the maintenance, safety and development of a woman as a mother are provided by or at the expense of the State, such assistance, special care and facilities shall be available to all mothers without discrimination.[1383]

390. The Commission finds that:
a. It is best practice to recognise the family as the pivotal social unit for the nurture of children, as has been done in countries as diverse as Azerbaijan,[1384] Ireland,[1385] Uganda,[1386] Ukraine,[1387] and Timor-Leste.[1388]
b. Both the Constitution and the Children's Act are heavily focused on the parents and family of a child as the principal duty bearers for the realisation of the rights of the child.

391. The Commission also finds that there is limited recognition of the State as a principal duty bearer for the realisation of the rights of the child.

392. The Commission observes that the approach taken by the Children's Act toward the realisation of the rights of the child is to criminalise acts or omissions that deny or deprive the child of the enjoyment of those rights. The assumption, therefore, is that parents and other duty bearers have sufficient capacities to carry out the duties and responsibilities that correspond to the stipulated rights. This is not the case for all parents. Largely because of this reason, the State has to remain the key duty bearer for the respect, protection, fulfilment, and promotion of child rights. For failing parents, one cause is the lack of knowledge or the absence of proper care practices at the household level.

393. The Commission also observes with approval that Article 28(1)(c) provides that Parliament shall enact such laws as are necessary to ensure that parents undertake their natural right and obligation of care, maintenance and upbringing of their children in cooperation with such

[1382] Article 13 of the 1969 Constitution of the Republic of Ghana.
[1383] Article 32(1) of the 1979 Constitution of the Republic of Ghana.
[1384] Article 17 of the Constitution of the Republic of Azerbaijan.
[1385] Article 42 of the 1937 Constitution of Ireland.
[1386] Article 34(1) of the 1995 Constitution of the Republic of Uganda.
[1387] Article 51 of the 1996 Constitution of Ukraine.
[1388] Article 18 of the 2002 Constitution of the Democratic Republic of East Timor.

institutions as Parliament may, by law, prescribe in such manner that in all cases the interest of children are paramount.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

394. The Commission recommends that Article 28 of the Constitution be amended to provide that the State shall support the family in the realisation of the rights of the Child.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

395. The Commission recommends that the various District Assemblies should include in their yearly programmes and budgets, elaborate provisions for the care and protection of children within the Districts.

SUBTHEME TWELVE: RIGHTS OF THE YOUTH

ISSUE ONE: RIGHTS OF THE YOUTH

A. DIMENSIONS OF THE ISSUE

396. The main dimensions of this issue are
    a. The provision of a National Youth Policy in the Constitution; and
    b. The commuting of custodial sentences of Youth to community service.

B. CURRENT STATE OF THE LAW ON THE ISSUE

397. The main piece of legislation that directly addresses the issues of the youth is the National Youth Authority Act, 1974, (N.R.C.D 241). The law establishes the National Youth Authority [1389] and mandates it to develop a strong and disciplined youth imbued with a spirit of nationalism and a sense of public service and morality.[1390]

398. Other pieces of legislation that contain some youth-related provisions are: the Ghana National Service Scheme Act[1391] and the Communications Service Tax Act.[1392] The Ghana National Service Scheme Act provides that one of the functions of the National Service Scheme is to carry out specified activities determined by the President for the development of programmes for the advancement of the quality of life of the youth;[1393] whilst the

[1389] Section 1(1) of The National Youth Authority Act, 1974 (N.R.C.D 241).
[1390] Section 2 of the National Youth Authority Act, 1974 (N.R.C.D. 241).
[1391] Ghana National Service Scheme Act, 1980 (Act 426).
[1392] Communication Service Tax Act, 2008 (Act 754).
[1393] Section 1(2)(C) of the Ghana National Service Scheme Act,1980 (Act 426).

Communications Service Tax Act, provides that at least 20% of the revenue generated from the tax shall be used to finance the national youth employment programme.[1394]

399. A National Youth Policy, to provide the conceptual framework for working towards Youth participation in national development was approved by Cabinet in August, 2010. The National Youth Policy has the theme: "Towards an empowered Youth, impacting positively on national development."[1395]

C. SUBMISSIONS RECEIVED

400. Most of the submissions received on the youth related to the development and constitutionalisation of a National Youth Policy as a measure to ensure that the youth are recognised as a distinct constituency in Ghana and with special needs that must be addressed. They were expressed as follows:
    a. There should be a clear-cut youth policy for the following purposes:
        i. To allow the youth to make fruitful contributions towards the development of the country.
        ii. To give clear direction on the relationship between the government and the youth.
        iii. To facilitate youth development and employment.
        iv. To help protect the rights of the youth of Ghana.
        v. To ensure the proper grooming of the future leaders of our country.
    b. The National Youth Employment Policy should be enshrined in the Constitution and its existence should not be tied to the whims of successive governments.
    c. The National Youth Policy should provide for the non-politicisation of issues related to the development of the youth.

401. There is the need to have a Youth Commission in place of the present Youth Council which should be provided for in the Constitution. The present Youth Council is non-functional, is politicised and derives its purpose from a law which was passed as far back as 1974 and whose provisions have lost touch with the needs of the present times. The Youth Commission created to replace the Youth Council should be retrofitted, independent and proactive, made up of committed people who would, in fact, champion the cause of the youth.

402. There should be a comprehensive law on the youth.

[1394] Section 5 of the Communication Service Tax Act, 2008 (Act 754).
[1395] National Youth Policy of Ghana, TOWARDS AND EMPOWERED YOUTH, IMPACTING POSITIVELY ON NATIONAL DEVELOPMENT, August 2010. (on file with the Constitution Review Commission).

403. There are a lot of young people in prison serving sentences for misdemeanours when their sentences could be commuted to community service, which service would be useful to the Country.

D. FINDINGS AND OBSERVATIONS

404. The Commission finds that issues relating to the youth of Ghana are very important to the people of Ghana and this is evidenced by the existence of an entire Government Ministry in charge of the Youth. It, however, appears that the Ministry of Youth and Sports is more vibrant in its sports programming than its youth programming.

405. The Commission observes that the Constitution does not directly address the youth at all in its text.

406. The Commission finds that at present there are a lot of Ministries, Departments and Agencies such as the Ministry of Youth and Sports, the Department of Social Welfare, the National Youth Employment Programme, the National Service Scheme, the National Youth Council and numerous youth organizations – formal and informal, registered and unregistered, all addressing youth-related issues in an uncoordinated manner.

407. The Commission observes that there is a National Youth Policy that was approved by Cabinet in August, 2010.

408. The Commission finds that there is a National Youth Council capable of coordinating programmes, projects, and activities relating to the youth and there is no urgent need to establish a Youth Commission in the Constitution. What may be needed are more resources and better leadership for the Council to execute its mandate for the general advancement of the Youth of Ghana.

409. The Commission observes that the Youth form the bulk of inmates in the country's prisons. Some of the Youth are serving sentences for misdemeanours which can easily be converted to community service, making them more productive to the society.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

410. The Commission recommends that the essence of the National Youth Policy be contained in the Directive Principles of State Policy in the Constitution.

411. The Commission recommends that a retrofitted version of the National Youth Policy be integrated into the National Development Plan as recommended in this report.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

412. The Commission recommends that a portion of the funds for the National Youth Employment Programme be applied to fund the National Youth Council.

ISSUE TWO: REPRESENTATION AND EMPOWERMENT OF THE YOUTH

A. DIMENSIONS OF THE ISSUE

413. The dimensions of this issue are as follows:
    a. The provision of a quota for the youth in elective and non-elective public offices;
    b. The need to make the appointment of the National Youth Coordinator other than by the President so that she may independently champion the interests of the youth, including the need to have the youth fully employed; and
    c. The need to ensure that the youth are gainfully employed so that they stay away from crime and other vices.

B. CURRENT STATE OF THE LAW ON THE ISSUE

414. Under the current state of the law, the National Youth Coordinator shall be appointed by the President in accordance with Article 195 of the Constitution.[1396]

415. No law provides for a quota for the youth in elective and non-elective public offices.

C. SUBMISSIONS RECEIVED

416. The numerous submissions received by the Commission on this issue can be divided into the following categories:
    a. There should be a quota for the Youth in elective and non-elective public offices.
    b. The National Youth Coordinator should not be appointed by the President as a measure of his independence.
    c. There should be extensive job creation especially for the youth to prevent them from engaging in crime and other vices.
    d. A retrofitted, independent and proactive National Youth Council should be able to work for the general advancement of the youth and the full employment of the youth in particular.
    e. The voice of the youth is quite attenuated in national affairs. In many instances, a desire to be heard leads to demonstrations that sometimes pose a threat and danger to

[1396] Section 8 of The National Youth Authority Act, 1974 (N.R.C.D 241).

life, limb and property. This may be addressed by providing for youth quotas in public offices, including in Parliament.

D. FINDINGS AND OBSERVATIONS

417. The Commission finds that the youth in Ghana have had enough space in leading the country and in participating in all segments of national life. For example, as of the 24th of August 2011, out of the total number of 61 Ministers in Ghana, 19 can be described as youthful, forming about 32% of the number of Ministers in Ghana. Additionally, the youth have historically been highly visible in our structures of governance, including in political office. The youth also occupy a good segment in the business community, including the headship of major companies.

418. The Commission finds that the real issues for the youth are: limited, inadequate and costly educational opportunities; unemployment, underemployment and the absence of real job opportunities upon completion of their education; limited job security for those who find jobs; unavailable or limited opportunities for representation in national fora; and the absence of appropriate social interventions to enable youth who lose their parents or guardians to continue their education.

419. The Commission observes that:
    a. Article 55 of the 2010 Constitution of Kenya contains provisions on the youth. It provides that: "The State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and are protected from harmful cultural practices and exploitation."
    b. The 1995 Constitution of Uganda provides that Parliament shall consist of such numbers of representatives of Youth as Parliament may determine.[1397] Under the Electoral Law of Uganda, the Parliament of Uganda shall include 5 Youth representatives, one of whom must be a woman.[1398]
    c. In Rwanda, the National Youth Council elects 2 people to the Chamber of Deputies, which is the lower house of the Rwandan Parliament.[1399]

420. The Commission observes that at the National Constitution Review Conference it was proposed that the Constitution must provide quotas for the youth for public appointments.

[1397] Article 78(1) of the 1995 Constitution of the Republic of Uganda.
[1398] QUOTA PROJECT, http://www.quotaproject.org/uid/countryview.cfm?country=77 (last visited Aug. 24, 2011).
[1399] Powley Elizabeth, Rwanda: *Women Hold Up Half the Parliament*, in Women in Parliament: Beyond Numbers; (Aug 24, 2011, 11:38 AM) http://www.idea.int/publications/wip2/upload/Rwanda.pdf.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

421. The Commission recommends that the Constitution be amended to include a provision in the Directive Principles of State Policy to the effect that the state shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and are protected from harmful cultural practices and exploitation.

SUBTHEME THIRTEEN: THE AGED

ISSUE ONE: RIGHTS OF THE AGED

A. DIMENSIONS OF THE ISSUE

422. The following are the dimensions of this issue:
    a. Should the Constitution enshrine a welfare scheme for the aged in Ghana?
    b. Should the Constitution create a Ministry for the aged?

B. CURRENT STATE OF THE LAW ON THE ISSUE

423. The current state of the Law on the Aged can be found in Chapters 5 and 6 of the Constitution. Chapter 5 of the 1992 Constitution is on Fundamental Human Rights and Freedoms. The general human rights provisions under Chapter 5 of the Constitution of Ghana, relate to the aged. Chapter 6 of the 1992 Constitution is on the Directive Principles of State Policy. Under this chapter, the State shall enact appropriate laws to assure the protection and promotion of all other basic human rights and freedoms, including the rights of the aged.[1400] Further, the State shall provide social assistance to the aged such as will enable them to maintain a decent standard of living.[1401]

C. SUBMISSIONS RECEIVED

424. The following submissions were received on the aged:
    a. The Constitution should provide a welfare scheme for the aged which is different from the pension scheme for the following reasons:

[1400] Article 37(2)(b) of the 1992 Constitution of the Republic of Ghana.
[1401] Article 37(6)(b) of the 1992 Constitution of the Republic of Ghana.

i. The aged need some form of livelihood to cater for them in their old age so that they can live a decent life. The current pension scheme does not provide this.
ii. Most of the aged have been abandoned by their children and cannot fend for themselves.
iii. The aged have served Mother Ghana in their youth and in their old age appear neglected by the same society they served.
iv. The aged need a lot of care and the State must provide that care.

425. The Constitution should create a Ministry for the Aged, since there are ministries in charge of children, youth, and women. Such a ministry would directly address the concerns of the aged and in a coordinated manner.

D. FINDINGS AND OBSERVATIONS

426. The Commission finds that the main problems of the aged relate to economic and social wellbeing, especially those related to access to healthcare, including for psycho-social support.

427. The Commission finds that care for the aged is very important and requires specific legal provisions, budgetary allocation and administrative actions to address. In Ghana, the appropriate department to provide the required welfare for the aged is the Social Welfare Department. However, that Department is highly under-resourced and is unable to cater for the needs of the aged in an appropriate manner.

428. The Commission observes that the rights of the aged are a matter of growing concern in Ghana. The Speaker of Parliament recently implored the Minister for Justice and Attorney-General to consider the possibility of putting together legislation that would create a legal regime for the care of the aged in the country.[1402]

429. The Commission observes that the question of ageing was first debated at the United Nations in 1948 at the initiative of Argentina. The issue was again raised by Malta in 1969. In 1971 the General Assembly asked the Secretary-General to prepare a comprehensive report on the elderly and to suggest guidelines for national and international action. In 1978, the General Assembly decided to hold a World Conference on Ageing. Accordingly, the World Assembly on Ageing was held in Vienna from July 26 to August 6, 1982 wherein an International Plan of Action on Ageing was adopted. The overall goal of the Plan was to strengthen the ability of individual countries to deal effectively with ageing in their population, keeping in mind

[1402] Parliamentary Debates, (Thursday, June 30, 2011) (Statement of Justice Joyce Bamford-Addo, Speaker of Parliament).

the special concerns and needs of the elderly. The Plan attempted to promote understanding of the social, economic and cultural implications of ageing and of related humanitarian and development issues. The International Plan of Action on Ageing was subsequently adopted by the General Assembly in 1982 and the Assembly in subsequent years called on governments to continue to implement its principles and recommendations. The Assembly urged the Secretary-General to continue his efforts to ensure that follow-up action to the Plan is carried out effectively.[1403]

430. The Commission finds that the combined effect of sections 14 to 18 of the 1999 Constitution of Nigeria is to provide a broad range of rights and entitlements to the aged, including ensuring that the aged are protected completely against any moral and material neglect; and that they have old age care and pensions.[1404]

431. The Commission observed that at the National Constitution Review Conference proposed that Article 29 of the Constitution on the rights of persons with disability be amended to include the aged and for Parliament to be enjoined to pass laws on the rights of the aged.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

432. The Commission recommends that the Constitution be amended to guarantee the right of the aged to live in dignity, to be free from abuse and to obtain adequate state pensions and social welfare.

433. The Commission further recommends that the Constitution be amended to appoint a Special Commissioner of CHRAJ for Children, PWDs and the Aged.

434. The Commission recommends that within 12 months of the coming into force of the new Constitution, Parliament should enact legislation on the rights of the aged.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

435. The Department of Social Welfare and the District Assembles should allot greater attention to the aged in their plans and budgets than is currently the case.

[1403] http://www.legalserviceindia.com/article/l170-Rights-Of-Senior-Citizen.html; last visited on 11th October, 2011

[1404] Federal Ministry of Justice, Abuja, Nigeria's 3rd periodic country report: - 2005 – 2008 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria; page 64

SUBTHEME FOURTEEN: RIGHTS OF PERSONS WITH DISABILITY

ISSUE ONE: DESCRIPTION OF PERSONS WITH DISABILITY

A. DIMENSIONS OF THE ISSUE

436. The main dimension to this issue is whether or not the labelling of PWD as "disabled persons" be changed in the constitution and other laws of Ghana.

B. CURRENT STATE OF THE LAW ON THE ISSUE

437. Article 29 of the 1992 Constitution is titled: "Rights of the Disabled." This Article contains provisions relating to PWDs and refers to them as "disabled persons."

C. SUBMISSIONS RECEIVED

438. The summary of the submissions received by the Commission on this issue is as follows:
    a. The word "disabled" used in Article 29 should be changed to "differently-abled." This is because all people have a disability of one kind or the other.
    b. The Constitution should be amended to refer to the "disabled" as "Persons with Disability."

D. FINDINGS AND OBSERVATIONS

439. The Commission finds that the term "persons with disabilities" was introduced by the Convention on the Rights of Persons with Disabilities. Before this, PWDs were variously referred to as disabled persons, handicapped persons, crippled persons, deformed persons and such other similar terminology.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

440. The Commission recommends that the Constitution be amended to replace the term Disabled Persons with Persons With Disability. This will make the law consistent with current international best practice.

ISSUE TWO: RIGHTS OF PERSONS WITH DISABILITY

A. DIMENSIONS OF THE ISSUE

441. The dimensions of this issue are as follows:
    a. Should the rights of PWDs in the Constitution be generally enhanced?

b. Should there be a quota for persons with disability in appointments to public bodies, elective and non-elective alike?
c. Should there be special facilities for persons with disability?

B. CURRENT STATE OF THE LAW ON THE ISSUE

442. The law on disability in Ghana is mainly found in Article 29 of the 1992 Constitution and in the Persons with Disability Act, 2006 (Act 715). There are also draft regulations to elaborate on the provisions of the Act, but these are yet to be passed into law.

443. The rights of persons with disability that are protected under Article 29 include the right to live with their families or with foster parents and to participate in social, creative or recreational activities;[1405] and a prohibition against differential treatment of such persons in respect of their residence other than that required by their conditions or by the improvement which they may derive from such treatment.[1406] Again, the Constitution guarantees the protection of persons with disability from all exploitation and all treatment of a discriminatory, abusive or degrading nature.[1407]

444. The Persons with Disability Act contains detailed provisions on the rights of persons with disability, their health care, education, transportation and the employment of persons with disability. The Act establishes a National Council on Persons with Disability whose function is to propose and evolve strategies to enable persons with disability to enter and participate in the mainstream of the national development process.[1408]

C. SUBMISSIONS RECEIVED

445. The submissions received by the Commission on this issue are as follows:
a. In Article 36 and 37(2)(b) of the 1992 Constitution, the state is enjoined to pass laws to enable PWDs, the aged and other vulnerable groups to assert their rights. Article 38(3)(b) talks about free adult literacy programmes, education, rehabilitation and resettlement of PWDs. These are the strengths of the Constitution as far as PWDs are concerned.
b. The Directive Principles of State Policy do not include PWD in the economic and political objectives. They are only mentioned in the social objectives. Any possible review of Article 29 should consider the inclusion of a clause that would emphasise the need for PWD to be included in those segments because that may well hold the key to the solution to many challenges faced by PWD.

[1405] Article 29(1) of the 1992 Constitution of the Republic of Ghana.
[1406] Article 29(2) of the 1992 Constitution of the Republic of Ghana.
[1407] Article 29(4) of the 1992 Constitution of the Republic of Ghana.
[1408] Sections 41 and 42 of the Persons with Disability Act, 2006 (Act 715).

c. Despite the constitutional and legislative guarantee of their rights, inclusion has not been the norm and the Commission should review Article 29 of the 1992 Constitution as the world has moved from elementary care institutions for PWDs, through rehabilitation, mobilization and integration, to full participation of PWDs in political, social and cultural affairs.
d. Article 36 of the 1992 Constitution, which provides for the economic objectives of the country mentions the inclusion of PWD in the development of Ghana. However, Article 35 on political objectives does not provide for the inclusion of PWDs. This should be rectified.
e. A weakness in the implementation of constitutional provisions may be the fact that there are hardly any administrative measures that have been put in place to operationalise the constitutional provisions. The general provisions in the Constitution and in the Act should be concretised in administrative regulations in order to mainstream disability issues.
f. The Disability Council should be given an expanded mandate to better protect and enhance the rights of PWDs, and their decisions should be well publicised.
g. The disability group should determine the chairperson to the Disability Council.
h. A quota should be provided for PWDs in Parliament.
i. Government should provide advanced technological devices for the easy movement of PWDs.
j. In general, the Disability Policy of 2000 and the PWD Act of 2006 have been very sub-optimally implemented. For instance, the Regulations required by section 58 of the Persons with Disability Act to operationalise that seminal and ground-breaking legislation as far as PWDs are concerned are yet to materialise. Meanwhile, even certain aspects of the Act which could be implemented without those Regulations are regularly flouted by persons without disabilities.
k. Part Five of the Labour Act, 2003 (Act 651) has comprehensive provisions on the employment of PWDs which are not at all dissimilar to those contained in Part Two of the PWDs Act. Here again, the necessary administrative procedures and measures should be put in place to operationalise these laws. The inclusion of PWDs requires that their needs be factored into policy planning, planning of programmes and projects, and budgets at all levels – national and local. These must be done at the level of the administration.

D. FINDINGS AND OBSERVATIONS

446. The Commission finds that PWDs have generally poorer health, lower educational achievements, fewer economic opportunities and higher rates of poverty than people without disabilities. At present there are a lot of PWDs who are unable to achieve their dreams in life

because they lack the opportunity so to do. This is largely due to the lack of services available to them and the many obstacles they face in their everyday lives.

447. The Commission finds that the first ever World Report on Disability, produced jointly by the World Health Organisation and the World Bank, suggests that more than a billion people in the world today experience disability.[1409] The report provides the best available evidence about what works to overcome barriers to health care, rehabilitation, education, employment, and support services, and to create the environment which will enable people with disabilities to flourish. The report ends with a concrete set of recommended actions for governments and their partners. At the intersection of public health, human rights and development, the Report is critical for policy-makers, service providers, professionals, and advocates for people with disabilities and their families.

448. The Commission finds that the Constitution protects PWDs from all forms of discrimination and stops short of guaranteeing the right of PWDs to employment. It, however, provides protection for the employment of persons with disability by offering incentives to disabled persons engaged in business and also to business organisations that employ disabled persons.[1410]

449. The Commission observes that the Constitution already makes provision for access to public places by PWDs[1411] whilst, the Persons With Disability Act specifically requires the owner or occupier of a place to which the public has access to provide appropriate facilities that make the place accessible to and available for use by a person with disability.[1412] The Act further provides that a person who provides any service to the public place, must provide the necessary facilities that make the service available and accessible to a person with disability. The violation of any of these requirements is an offence in law and the offender is liable on summary conviction to a fine not exceeding fifty penalty units or to a term of imprisonment not exceeding three months or to both.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

450. The Commission recommends that a retrofitted version of the Draft PWDs Regulations be completed by the Disability Council and the Ministry in charge of Social Welfare for passage by Parliament, without further delay in order to operationalise the rights of PWD in the Constitution and the Persons with Disabilities Act.

[1409] World Health Organisation & The World Bank, *World Disability Report*, WHO & IBRD Doc. (2011) *available at* http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf.
[1410] Article 29(7) of the 1992 Constitution of the Republic of Ghana.
[1411] Article 29(6) of the 1992 Constitution of the Republic of Ghana.
[1412] Section 6 of the Persons With Disability Act, 2006 (Act 715).

SUBTHEME FIFTEEN: ENVIRONMENT

ISSUE ONE: ENVIRONMENTAL RIGHTS

A. DIMENSIONS OF THE ISSUE

451. The main dimension of the issue is whether the Constitution should guarantee the individual's right to a clean and sustainable environment.

B. CURRENT STATE OF THE LAW ON THE ISSUE

452. The Constitution provides for the protection of the environment in the Directive Principles of State Policy. Article 41 of the Constitution also makes it the duty of every Ghanaian to protect and safeguard the environment.

453. Various Acts of Parliament and Subsidiary Legislation, including By-Laws of District Assemblies aim at protecting and improving the environment.

C. SUBMISSIONS RECEIVED

454. The submissions received by the Commission in this regard can be summed up thus:
    a. The Constitution should guarantee the right of the individual to a clean and healthy environment. In addition, the people should be given the right to participate in discussions on environmental issues.
    b. There should be environmental laws enshrined in the Constitution.
    c. A sanitation court should be established to enforce Environmental laws.
    d. The environmental situation in our markets is bad. There should be laws to make the markets healthy places for business.
    e. There should be specific laws on pollution and these must be enforced.

D. FINDINGS AND OBSERVATIONS

455. The Commission finds our urban centres are overpopulated and congested and still rapidly expanding. The situation has unleashed its attendant negative effects on the environment. The nation's urban centres are now characterised by unsanitary conditions and the spread of airborne and waterborne diseases.[1413] These environment-related diseases represent 60 to 80% of the cases reported in the capital's hospitals and health centres. Among these diseases

[1413] Jacob Songsore & Gordon McGranahan, *Environment, Wealth and Health: Towards an Analysis of Intra-urban differentials within the Greater Accra Metropolitan Area, Ghana*, vol. 5 no. 2 10-34 Environment and Urbanization (October 1993).

are: malaria, diarrheal diseases, intestinal worms and upper respiratory diseases. Accra is also an endemic zone for cholera and typhoid fever.[1414]

456. The Commission finds that Ghana generally enjoys 'clean' atmospheric conditions and the country's programme under the Montreal Protocol (control of chlorofluorocarbons) is progressing smoothly. In 1997, UNEP rewarded Ghana's efforts with an award for her exemplary efforts to implement the Montreal Protocol. The Commission has, however, observed two threats to the enjoyment of a clean atmosphere in Ghana.
    a. Emissions from point sources such as vehicles, industries, and dust from unpaved roads and the burning of refuse, tend to create atmospheric pollutants within their immediate environments.
    b. The most abundant greenhouse gas produced and emitted in Ghana is Carbon Dioxide (CO2.) There are CO2 sinks in the forested and the reforested land (which remove the CO2.) The trend of the total CO2 equivalent removals, however, shows a significant decline of about 49 percent from 1990 to 1996. There is the fear that the rate of deforestation will offset net CO2 removal as forests, which serve as sinks for excess CO2, are being depleted.

457. The Commission observes that Ghana's rich biodiversity is gradually being depleted due to a variety of factors, prominent among which are poaching, habitat loss and deforestation. It is undisputable that there is a pressing need to effectively domesticate the Biodiversity Convention. This is in view of the precarious biodiversity conditions prevalent in Ghana.

458. The Commission finds that an estimated 90 percent plus of Ghana's high forest have been logged since the late 1940s. The unscrupulous activities of both licenced and unlicensed loggers were often brought to the attention of the Commission during its consultation tour of Ghana. The rate of depletion of the country's forest cover leaves much to be desired and poses a great threat to the environment of future generations. The current deforestation rate is about 22,000 hectares (ha) per annum. There is the gloomy likelihood that the country's forestry sector will soon die out.

459. The Commission observes that the Committee of Experts that developed proposals for the 1992 Constitution stated that; "Today, environmental issues are matters of global concern because of the international effects of the degradation of the environment even in one country. Thus, it is necessary for the State not only to protect and safeguard the national environment, but also to cooperate with other States and bodies for purposes of protecting the wider global environment."

[1414] Hens, Luc & Emmanuel K Boon, *Institutional, Legal and Economic Instruments in Ghana's Environmental Policy*, (Oct. 23, 2011, 2:35 PM) http://oceandocs.net/bitstream/1834/375/1/epghana.pdf.

460. The Commission finally observes that:

a. The Constitution of South Africa provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measure that prevent pollution and ecological degradation, that promote conservation and that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. [1415]

b. The Constitution of Kenya guarantees the right of every person to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations.[1416]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

461. The Commission recommends that the right to a clean and healthy environment be specifically provided for in the Constitution.

ISSUE TWO: ENFORCEMENT OF ENVIRONMENTAL LAWS

A. DIMENSIONS OF THE ISSUE

462. The main dimension of the issue relates to how to improve upon the enforcement of environmental laws.

B. CURRENT STATE OF THE LAW ON THE ISSUE

463. There are many laws on the environment in Ghana. However, most of them are not adequately enforced. Examples are the Water Resources Commission Act of 1996 and the Fisheries Act of 2002. The Ghana Maritime Authority Act of 2002 also contains provisions relating to the protection of the marine environment.[1417]

464. Ghana has a long history of attempting to safeguard the environment from being abused by enacting and including environmental protection in appropriate legislation. In 1963, the Minerals (Off-shore) Regulations, was enacted. In 1974, the government established the

[1415] Section 24 of the 1996 Constitution of the Republic of South Africa.
[1416] Article 42 of the 2010 Constitution of Kenya.
[1417] Water Resources Commission Act, 1996 (Act 522); Fisheries Act, 2002 (Act 625); The Ghana Maritime Authority Act, 2002 (Act 630).

Environmental Protection Council (EPC). The work of the EPC during this period was rather *ad hoc* and environmental problems were tackled as and when they arose.[1418] In 1994, the Environmental Protection Council was transformed into the Environmental Protection Agency (EPA). The EPA has through the institution of streamlined "Environmental Assessment Administration Procedures" been guided by a preventive rather than reactionary approach with regards to environmental problems and concerns. These procedures were derived from the main environmental legislation, the Environmental Protection Agency Act, and the Environmental Assessment Regulation.[1419]

465. Prior to the Stockholm Conference, Ghana had not only participated in but also signed at least fifteen international conventions and treaties on environmental issues from the International Plant Protection Convention of 1951 to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and their Destruction in 1972. Of these 15 Conventions, 3 are not yet ratified. The country has also signed the Rio Conventions, but these are yet to be ratified by Parliament.[1420]

C. SUBMISSIONS RECEIVED

466. It was generally submitted to the Commission that there are huge environmental problems all over the country, from, deforestation, through environmental degradation in mining and other areas and through the exploitation of oil, to filth especially in urban areas. It was also generally agreed that the legislative framework for dealing with environmental problems is basically adequate but there is a huge implementational problem.

467. It was also submitted to the Commission that there should be an environmental court in every district to enhance sanitary conditions in our communities.

D. FINDINGS AND OBSERVATIONS

468. The Commission observes that since its establishment in 1994, the Ghanaian Environmental Protection Agency (EPA) has functioned commendably as an Agency with powers to regulate the activities within the environment.[1421]

[1418] Mike Anane, *Towards sustainable development in Ghana*, UN- GLS; Voices From Africa, (Aug. 25, 2011 10:04 AM), http://www.unsystem.org/ngls/documents/publications.en/voices.africa/number6/vfa6.03.htm.
[1419] Environmental Protection Agency Act, 1994 (Act 490), Minerals (Off-shore) Regulations, L.I. 257; Environmental Assessment Regulation, LI 1652.
[1420] Hens, Luc & Emmanuel K Boon, *Institutional, Legal and Economic Instruments in Ghana's Environmental Policy*, (Oct. 23, 2011, 2:35 PM) http://oceandocs.net/bitstream/1834/375/1/epghana.pdf.
[1421] Section 1 of the Environmental Protection Agency Act, 1994 (Act 490).

469. The Commission finds that one of the functions of the EPA is to ensure compliance with the laid down environmental impact assessment procedures in the planning and execution of development projects, including compliance in respect of existing projects. Compliance monitoring is done by the Environmental Quality Department of the Agency in collaboration with other departmental staff within and outside the Agency. Non-compliance response involves mainly using statutory notices, site visits, and, as the last resort, legal action.

470. The Commission finds that the Ministry of Environment Science and Technology has produced a draft National Environment Management Policy which is yet to be approved by Cabinet. These go to affirm the Commission's position that the problem is not with the generation of policies and laws on the environment but with their enforcement. Due largely to the absence of a strong political will recognising the urgency in protecting the environment as well as the inadequacy of environmental management resources, the enforcement of the existing laws has become largely ineffective.

471. The Commission finds that there is an urgent need to ensure compliance with enviromental laws. Initial attempts by the EPA to prosecute environmental cases were unsuccessful mainly because of the difficulty in sustaining charges: they did not have the necessary evidence for effective prosecution. To address the situation, the Agency is developing guidelines for the investigation and prosecution of environmental violence.[1422]

472. The Commission observes that the Constitution of Kenya lays down the procedure to be followed to enforce one's environment rights in Kenya. Under this provision, if a person alleges that his or her right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed upon or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.[1423]

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

473. The Commission recommends that government should ratify all outstanding international environmental agreements, subject to the national interest and according to the terms of the Constitution.

[1422] United Nations Enviromental Program (UNEP), http://www.unep.org/dec/onlinemanual/Enforcement/InstitutionalFrameworks/TrainingActivities/Resource/tabid/1104/Default.aspx, (last visited August 26, 2011).
[1423] Article 70 of the 2010 Constitution of Kenya.

474. The Commission also recommends that the Ministry of Environment Science and Technology should institute a special programme of action for education on, and enforcement of environmental laws in Ghana.

SUBTHEME: CONSUMER RIGHTS

ISSUE ONE: CONSUMER RIGHTS

A. DIMENSIONS ON THE ISSUE

475. The dimensions of this issue are:
    a. Constitutional protection of the rights of consumers in a fast growing society.
    b. The regulation of advertisements.
    c. The enactment of Consumer Protection Laws.
    d. The establishment of Consumer Protection regulatory bodies.
    e. The protection of Consumer rights.

B. CURRENT STATE OF THE LAW ON THE ISSUE

476. The Constitution provides that the State should safeguard the health of all Ghanaians.[1424] The Food and Drugs Board (FDB) was established by the Food and Drugs Law 1992, (PNDCL 305B). This law has since been amended by the Food and Drugs (Amendment) Act, of 1996 to provide for the fortification of salt to alleviate nutritional deficiencies and to bring the provisions of the law in conformity with the 1992 constitution. The Board is vested with the mandate to protect the public health by assuring the safety, efficacy and security of human and veterinary drugs, biological products, medical devices, our nation's food supply, cosmetics etc.[1425] The Ghana Standards Authority (GSA) which is the national Standards body was established by the Standards Decree, 1967 (NLCD 199) which has been superseded by the Standards Decree, 1973 (NRCD 173). These legislations together mandate the Authority to undertake:
    a. National Standards development and dissemination;
    b. Testing Services;
    c. Inspection Activities;
    d. Product certification scheme;
    e. Calibration, Verification and Inspection of Weights, Measures and Weighing and Measuring Instruments;
    f. Pattern approval of new weighing and measuring instruments;
    g. Destination Inspection of imported High Risk goods;
    h. Promoting Quality Management Systems in Industry; and

[1424] Article 36(10) of the 1992 Constitution of the Republic of Ghana.
[1425] Food and Drugs (Amendment) Act, 1996 (Act 523).

i. Advice the Ministry of Trade, Industry, on standards and related issues.

477. Also, the Constitution guarantees access to information subject to limitations that are necessary.[1426] Article 35(1) of the Constitution further provides that the State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law. Article 35(6) requires that the State shall take appropriate measures to provide adequate facilities for, and encourage free mobility of people, goods and services throughout Ghana.

478. The Public Utilities Regulatory Commission Act established the Publish Utilities Regulatory Commission to protect the interest of consumers and providers of utility services, to monitor standards of performance for the provision of services and to provide guidelines on rates chargeable for the provision of utility services among others.[1427]

479. Article 166 of the 1992 Constitution provides for the establishment of the National Media Commission and its membership and charges it with promoting and ensuring the freedom and independence of the media for mass communication of information.

480. The Ministry of Trade and Industry is currently reviewing a draft Consumer Protection Policy and Act for onward transmission to cabinet for approval.

C. SUBMISSIONS RECEIVED

481. The submissions received on consumer rights were the following:
    a. That the rights of consumer should be enshrined in the constitution since consumers in Ghana are most vulnerable and unprotected in this economy. Also, the growth of businesses cannot be achieved without considering the consumer.
    b. There should be a Committee established to vet and approve advertisements before they are aired on radio and televisions.
    c. The National Media Commission should determine the appropriate times for showing particular adverts on the television and it should sanction companies whose adverts violate local and international laws on advertisements.
    d. The various laws on Consumer Rights should be merged into one comprehensive law.
    e. Consumer Protection Laws should address the proliferation of foreign inferior goods on the Ghanaian market and abolish importation of consumables so as to encourage their local production.
    f. A Consumer Protection Authority should be established which would regulate the Consumer Protection activities and enforce Consumer Protection Laws.

[1426] Article 21(1)(f) of the 1992 Constitution of the Republic of Ghana.
[1427] Sections 1 and 3 of the Public Utilities Regulatory Commission Act, 1997 (Act 538).

g. That the Electricity Company of Ghana (ECG) must be properly monitored so that they will inform Ghanaians before power outages. Frequent unannounced power outages destroy electrical appliances of consumers.

D. FINDINGS AND OBSERVATION

482. The Commission observes that the United Nations General Assembly on 9th April, 1985, adopted Guidelines for Consumer Protection in its resolution 39/248. The Guidelines have since been expanded by the UN Economic and Social Council Resolution of 1999 to include issues of sustainable consumption. These guidelines represent an internationally accepted regulatory framework which serves as a basis for the elaboration and strengthening of national policies and legislation in the area of consumer protection.

483. The Commission finds that attempts at establishing a legislative framework on consumer protection in Ghana have been progressively shaped by the prevailing economic conditions and developments. For example, the 1970s witnessed extensive governmental intervention in the making of consumer contracts, particularly with regard to the control and regulation of the pricing of goods and services due to harsh economic conditions and the scarcity of commodities.

484. The Commission observes that although several legislation in the country may offer some protection to consumers, these are uncoordinated and this has led to poor enforcement and limited protection for consumers in Ghana.

485. The Commission observes that with the increase in business and trade activities in Ghana, there are increased calls for enhanced mechanisms to protect end users of products and services.

486. The Commission also observes that the movement for having a consumer protection regime in the country has led to the formation of several organizations including the Consumer Protection Society of Ghana and the Ghana National Association of Consumers.

487. The Commission also observes that various bodies, including the Private Enterprise Foundation, have drafted a framework code of conduct for consumer protection for Ghanaian business enterprises which are yet to be implemented.[1428]

488. The Commission finds that the Ministry of Trade and Industry and other allied State agencies are developing policies and laws to provide for consumer protection and expects that these State institutions will soon come out with a national policy to address the concerns of consumers of goods and services.

[1428] Christine Dowuona-Hammond and Raymond A. Atuguba, Consumer Protection in Ghana. A Research Report Prepared for the Freiderich Ebert Foundation (FES)-Ghana, (June 2006).

489. The Commission finds that consumers are increasingly calling for a number measures to ensure that they get their money's worth. It is, therefore, necessary to address the issue of consumer protection through the introduction of consumer rights in the Constitution.

E. RECOMMENDATIONS

RECOMMENDATION CONSTITUTIONAL CHANGES

490. The Commission recommends that the Constitution should be amended to include provisions on consumer rights as part of the fundamental human rights. Broadly, consumer rights should cover matters including:
    a. Information on competing goods and services;
    b. Protection from misleading or false advertisements or labelling of goods and services;
    c. Protection from dangerous or hazardous goods;
    d. Unfair competition and anti-trust; and
    e. Safety of goods.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

491. The Commission recommends that Parliament should elaborate on the constitutional provisions on consumer rights in an Act of Parliament.

CHAPTER FOURTEEN-MISCELLANEOUS MATTERS

14.1 INTRODUCTION

1. This chapter focuses on the various issues raised in the submissions to the Commission that did not fit appropriately into any of the thematic chapters. Most of these issues are general in nature and affect all facets of national life and development. Most of the issues will require either legislative or administrative actions to resolve. Others may involve general policy decisions by government. A few, however, may require constitutional changes.

2. The issues cover the following: the Review of the Constitution; National Orientation; Culture; Ethnicity; Politics and Polarisation; Corruption and Wastage; the Territories of Ghana; the Location of the National Capital; the Indemnity Clauses; International Relations; and the Declaration of War.

3. Each issue stated above will be discussed in detail in the ensuing paragraphs including a historical and legal overview.

ISSUE ONE: REVIEW OF THE CONSTITUTION

A. DIMENSIONS OF THE ISSUE

4. The review of the Constitution itself became an issue in some submissions. The dimensions of the issue included the need or otherwise for a review of the Constitution; the timing of review exercises; the manner in which the Constitution Review Commission was set up; and proposals for future constitution review exercises.

B. CURRENT STATE OF THE LAW ON THE ISSUE

5. The Constitution provides for the processes and procedures for its amendment. For the purposes of amendment, a provision of the Constitution may either be entrenched or non-entrenched.[1429] The entrenched provisions may be broadly categorised into three:
    a. Those provisions that go to the core values and principles underlying the Constitution and highlighted in its preamble including: freedom, justice, probity, and accountability; the Rule of Law; the protection and preservation of fundamental human rights and freedoms; the unity and stability of Ghana, the principle of universal adult suffrage; and the principle that all powers of government spring from the sovereign will of the people of Ghana.

[1429] Chapter 25 of the 1992 Constitution of the Republic of Ghana.

b. They also include the provisions that define the territories of Ghana and divide Ghana into administrative regions (Articles 4 and 5); provisions that are absolutely necessary to defend those territories (Article 210 on the Armed Forces of Ghana); and those that secure law and order within the territories of Ghana (Article 210 on the Police Service).
c. The entrenched provisions finally include those provisions that regulated Ghana's transition from a military rule to multi-party democracy in 1993 (Article 299 and the Transitional Provisions). Except for, perhaps, the indemnity clauses under section 34, and the preservation of confiscated properties and penalties under section 35 of the Transitional Provisions, most of these provisions are spent as they have all served their purposes.

6. All the other provisions of the Constitution not indicated above are non-entrenched. They are non-entrenched in the sense that they do not require a referendum to be amended. They require the votes of at least two-thirds of all members of Parliament to amend.

7. The Constitution requires that any amendment to the Constitution has to be effected by means of an Act of Parliament. However, that Act cannot be effective unless the sole purpose of that Act is to amend the Constitution and it has been passed in accordance with the Constitution.[1430] If a provision is entrenched, the Constitution requires that the bill is gazetted at least 6 months prior to its introduction in Parliament.[1431] The Constitution further requires the Speaker of Parliament to refer the bill to the Council of State for advice before Parliament proceeds to consider it.[1432]

8. Entrenched provisions are not to be amended unless the bill for the amendment has been submitted to a referendum and at least 40% of all eligible voters voted at the referendum. The Constitution requires that a minimum of 75% of votes cast at the referendum should be in favour of the bill[1433] before Parliament can proceed to pass it.

9. It is mandatory for Parliament to pass a bill that has received the required approval at a referendum.[1434] The President is similarly obliged by the Constitution to assent to the bill once it has been passed by Parliament.[1435]

10. Non-entrenched provisions do not require a referendum as a pre-requisite to being amended; they require the votes of at least two-thirds of all members of Parliament. A bill for the

[1430] Chapter 25 of the 1992 Constitution of the Republic of Ghana.
[1431] Article 290(3) of the 1992 Constitution of the Republic of Ghana.
[1432] Article 290(2) of the 1992 Constitution of the Republic of Ghana.
[1433] Article 290(4) of the 1992 Constitution of the Republic of Ghana.
[1434] Article 290(5) of the 1992 Constitution of the Republic of Ghana.
[1435] Article 290(6) of the 1992 Constitution of the Republic of Ghana.

amendment of a non-entrenched provision cannot be introduced unless it has been published twice in the *Gazette* with the second publication being made at least 3 months after the first. The introduction of the bill has to be done at least 10 days after the second publication.[1436] At the first reading of the bill, the Speaker has to refer it to the Council of State for consideration and advice. The Council of State has 30 days within which to render its advice.[1437] Where Parliament approves the amendment bill, the President is obliged to sign it when it has been approved at the second and third readings by the votes of at least two-thirds of all Members of Parliament.[1438]

11. Parliament is prohibited from amending sections 34, 35 and 37 of the Transitional provisions.[1439] The Constitution provides in Article 299 that these provisions would have effect notwithstanding anything to the contrary in the Constitution.

12. The Constitution requires that a bill affecting the chieftaincy institution be referred to the National House of Chiefs prior to its introduction in Parliament.[1440]

13. There are no constitutionally specified processes for the formulation of a bill before it is introduced to Parliament.

SUBMISSIONS RECEIVED

14. A summary of the submissions received on this issue is as follows:
    a. Some submissions indicated that the current constitution review exercise was illegal. Those who held this view argued that the power to amend the Constitution was vested in Parliament and any attempt to review the Constitution outside of a parliamentary framework would be illegal. According to this view, the Commission should have been established by an Act of Parliament. They also argued that the President's decision to set up the Commission under Article 278 of the Constitution was unprecedented.
    b. Others argued that the Constitution is too young to be reviewed and that it should have been allowed to grow and evolve its own conventions. They also contended that if there is any problem with the Constitution, it relates to its under-enforcement, and not its content or text. Thus, it would be enough to allow the Supreme Court to elaborate on the provisions of the Constitution through interpretation and enforcement rather than resorting to an extensive review. It was also argued that the issues confronting the nation at the moment were largely those of good governance and the general sustenance and wellbeing of the Ghanaian. They added that, beyond the text of the Constitution,

[1436] Article 291(1) of the 1992 Constitution of the Republic of Ghana.
[1437] Article 291(2) of the 1992 Constitution of the Republic of Ghana.
[1438] Article 291(3)and(4) of the 1992 Constitution of the Republic of Ghana.
[1439] Section 37 of the Transitional Provisions of the 1992 Constitution of the Republic of Ghana.
[1440] Article 106 (3) of the 1992 Constitution of the Republic of Ghana.

Ghanaians have certain unacceptable attitudes towards the Constitution which prevent the full realization of its ideals.

c. Yet, some others submitted that the Constitution was a very good document that had served Ghana well. They took the view that although some provisions in the Constitution have been problematic, they do not warrant a comprehensive review, but rather a process of amending a few of its provisions.
d. The overwhelming majority of submissions reviewed by the Commission on this issue, however, indicated that there was the need to review the Constitution. The proponents of this view argued that after almost two decades of operating the Constitution, many have realised that some provisions required further clarity and others have proven inimical to the growth of the nation's nascent democracy and as such needed to be removed from the Constitution or further clarified. This initiative, it was argued, would enable the Constitution rid itself of nebulous provisions which have often been exploited to stultify the growth of constitutionalism as well as pervert democratic processes in Ghana.
e. Some others have argued that the nation must periodically review its fundamental law. Thus, even if the review exercise does not result in any amendments to the Constitution, the cathartic effect of allowing ordinary citizens to have a say on the Constitution and to assess its strengths and weaknesses for the purpose of guiding constitutional conduct was enough dividend from the exercise. A periodic process of undertaking constitutional introspection was valuable by and of itself.
f. Some submissions further proposed that a regular process of constitution review should be provided for in the Constitution. In their estimation, reviewing the Constitution was too important a process to be left to the whims and caprices of successive governments. They argued that periodic reviews would allow the Constitution to take account of the dynamic nature of society. It would also give governments adequate time to prepare for the exercise. The proponents of this view were not unanimous on the frequency of such reviews. Their suggestions ranged between 5 to 20 years.
g. Flowing from the above, some submissions called for the establishment of a permanent Constitution Review Commission to review the Constitution periodically. Such a body would also, in between reviews, work on a continuous basis to identify the strengths and weaknesses of the Constitution and make proposals for advancing the strengths and rectifying the weaknesses.
h. The Commission also received submissions which called for the amendment procedure for entrenched provisions in the Constitution to be amended. The proponents of this advocated an easier amendment procedure for the entrenched provisions.
i. Other submissions called for the language of the Constitution to be made less technical. The rationale for this proposal is to allow the ordinary citizen, who must be invested in the Constitution, to read, understand and, where legally allowed, take steps to enforce it. These set of submissions contend that simplifying the language of the Constitution

and translating the Constitution into local languages would enable more and more Ghanaians imbibe the values and norms enunciated by the fundamental law of the land. It was further submitted that the translation of the Constitution into local languages would benefit greatly many Ghanaians who cannot read English but are able to read in their local languages.

j. Some other submissions were to the effect that the language of the Constitution should be gender neutral as a measure of equally between the sexes.

k. Some submissions also called for the Constitution to be taught in schools to increase the knowledge of it.

D. FINDINGS AND OBSERVATIONS

15. The Commission observes that Ghana has, since independence, operated five constitutions. They are the 1957, 1960, 1969, 1979 and the current 1992 Constitutions. With the exception of the 1957 Constitution and the current 1992 Constitution, all the constitutions were overthrown by military regimes and subsequently abrogated. The 1957 Constitution elapsed after the National Assembly voted to declare Ghana a Republic and subsequently a new Republican Constitution was approved in 1960. Again, with the exception of the 1957 Independence Constitution and the 1960 Republican Constitution, all the constitutions have been the product of military regimes brought into being through decrees by the military regimes of the time.[1441]

16. The Commission, however, observes that in all the constitutions except the 1957 Constitution, Ghanaians had the opportunity to make inputs through their participation in the work of the Legislature, a Committee of Experts or through Constituent and Consultative Assemblies.

17. The Commission further observes that the processes leading up to the formulation of a draft Bill for the amendment of the Constitution and Acts of Parliament are different from the processes that are to be observed after the Bill is introduced in Parliament. Whilst the Constitution provides for what should happen when a Bill is introduced in Parliament, it does not address the processes that lead to the production of the draft Bill.

18. The Committee also observes that, historically, Ghanaians have had the opportunity to review or amend an existing constitution only twice. The other forms of review, amendment or abolition have come only through coups d'état. During the lifetime of the 1960 Constitution (1960-1966), an amendment to it was introduced in the National Assembly and subsequently passed. The 1964 amendment to the 1960 Constitution among others made the Convention People's Party the National Party. It changed the flag of Ghana to consist of three equal horizontal stripes, the upper stripe being red, the middle stripe white and the

[1441] During the PNDC era, "laws" were used instead of decrees.

lower stripe green with a black star in the centre of the white stripe. The amendment also dispensed with the powers of the people of Ghana to amend certain parts of the Constitution through a referendum and also granted the President power to remove a judge from office "at any time" and for "reasons which to him appear sufficient."

19. The Commission observes that the 1992 Constitution had been previously amended in 1996 by Parliament in order to allow Ghanaians to hold dual citizenship; to change the role of the Vice-President as the automatic Chairman of the Armed Forces, Police and Prisons Councils; to convert the entitlements of members of Parliament to gratuity and to allow more time between the death of a Member of Parliament and timing of a by-election; to increase the membership of the National Media Commission (NMC); and to proscribe founding members and political party office holders from becoming members of the NMC.[1442]

20. The Commission finds that the Bill for constitutional amendments in 1996 was drafted by the Executive and transmitted to Parliament for passage into law.

21. The Commission further finds that in 1999, the Executive introduced in Parliament a Constitution (Amendment) Bill which was gazetted on 16th July, 1999. The Bill sought to among others amend the Constitution in order to accelerate disposal of cases before the superior court of judicature and to provide clearly that the Regional Tribunals have the same jurisdiction as the High Court in criminal matters unless otherwise specifically provided. It also sought to amend the retirement age and to reduce the approval requirements for District Chief Executives and Presiding Members. The Bill was, however, withdrawn from Parliament.

22. The Commission finds that under Ghana's constitutional architecture, no legislation can pass without the active involvement and approval of Parliament. Parliament's jurisdiction as the prime legislator in the country is not undermined by the establishment of a Presidential Commission of Inquiry to conduct a review of the Constitution. Any recommendations by such a Commission requiring legislative action would, after consideration by the Executive, be referred to Parliament.

23. The Commission further finds from Ghana's constitutional history that all legislation, without exception, passing through Parliament has originated from the Executive. The Constitution, however, has no limitations on the ways in which the Executive may inform itself as to the necessity or otherwise of a piece of legislation. Some of the mechanisms that have been adopted by the executive include the following:

[1442] The Constitution of the Republic of Ghana (Amendment) Act 1996 (Act 527).

a. The setting up of a Commission of Inquiry to conduct consultations and research into matters covered by the bill. The Commission of Inquiry into the Working and Administration of the Company Law of Ghana (under the chairmanship of Professor Gower), for instance, drafted the proposals for the Companies Act, 1963 (Act 179).
b. The use of permanent public institutions, especially the Law Reform Commission, to conduct research and consultations for the drafting of legislative reforms. Such legislative proposals by the Law Reform Commission, for instance, resulted in the Intestate Succession Act, 1985 (PNDCL 111) and its kindred statutes, including the Administration of Estates (Amendment) Law, 1985 (PNDCL 185), and the Head of Family (Accountability) Act, 1985 (PNDCL 114).
c. Studies and research under various programmes initiated by the Executive. For instance, the Public Financial Management Reform Programme under the President Kufour administration resulted in a set of statutes on financial administration including the Financial Administration Act, 2003 (Act 654)[1443] and the Internal Audit Agency Act, 2003 (Act 658).[1444]
d. Nationwide consultations by various Ministries sponsoring one particular Bill or the other have also been common in the formulation of Bills for consideration by Parliament. In 2010 for instance, the Ministry of Energy organised nationwide consultations on the Petroleum Revenue Bill and related matters on Ghana's oil find.
e. Advocacy campaigns and consultations by civil society organisations have also produced working drafts of bills that are then adopted by the Executive. The involvement of civil society organisations in legislative processes of Ghana has resulted in laws like the Domestic Violence Act of 2007 and the Whistleblowers Act of 2006. There are currently bills before Parliament, like the Presidential (Transition) Bill of 2010 and the Freedom of Information Bill of 2010, which were originally drafted through the efforts and initiatives of civil society organisations.[1445]

So a Commission of Inquiry is just one of numerous ways available to the Executive for advising itself as to whether or not to legislate on a matter.

24. The Commission observes from international best practices that, independent commissions have been set up by Presidents to conduct different constitution reviews. The extent and reach of the mandate of the commissions have differed in each jurisdiction.
    a. In Zambia, constitution amendment has been initiated by successive governments under the Inquiries Act, under which the President may appoint a Commission and determine its terms of reference. The Commission then reports to the President, who

[1443] The memorandum accompanying the Financial Administration Bill to Parliament.
[1444] The memorandum accompanying the Internal Audit Agency Bill to Parliament.
[1445] Domestic Violence Act, 2007 (Act 732); Whistleblower Act, 2006 (Act 720); Presidential (Transition) Bill, 2010; Freedom of Information Bill, 2010.

has the prerogative to accept or reject the report and to initiate the Constitution Bill which the Commission drafts.[1446]

b. In India, the National Commission to Review the Working of the Constitution was set up by an Executive Order instead of by a Resolution of Parliament.

25. The Commission further observes that in other jurisdictions the process of review may be initiated by the Legislature rather than by the Executive.

a. In Ireland for example, there is in place an Irish All-Party Oireachtas Committee that publishes periodic reports on areas where constitutional change may be desirable or necessary.[1447]

b. In the Solomon Islands, there is a Constitution Review Committee of the National Assembly. This committee is basically responsible for reviewing the Constitution regularly. Once it has done its review, it usually advises the government on the changes that it considers necessary. It also requests written submissions from members of the public. This committee not only reviews the Constitution but also deals with the issues arising from the use, abuse or misuse of constitutional powers, rights and responsibilities.[1448]

26. The Commission also observes that the process of initiating amendments to a constitution is not always the prerogative of the Executive or the Legislature. For instance, in the 2010 Kenyan Constitution, it is provided that an amendment to the Constitution may be proposed by a popular initiative signed by at least one million registered voters. A popular initiative for an amendment to the Constitution may be in the form of a general suggestion or a formulated draft Bill.[1449]

27. The Commission finds that the various submissions it has received on the review and amendment of the Constitution reflect the raging debate on whether, as the fundamental law of the country, the Constitution should be subject to frequent review. The submissions are also a reflection of the debate as to whether the process for review should be rigid or flexible. Unlike the 1969 Constitution which had very cumbersome amendment procedures and even prohibited the amendment of certain provisions of that Constitution, the 1979 and 1992 Constitutions introduced a less rigid process differentiating between the matters which are considered as essential characters of the Constitution, and should, therefore, be entrenched, and those matters that are not, and are referred to as the non-entrenched provisions.

[1446] Inquiries Act, Cap 41.
[1447] The term "Oireachtas" refers to the National Parliament or the Legislature of the Republic of Ireland.
[1448] Standing Order 71A of the National Parliament of Solomon Islands.
[1449] Article 257 of the 2010 Constitution of Kenya.

28. The Commission observes that this practice of indicating different amendment procedures for different parts of a Constitution also exists in other jurisdictions.
    a. In Uganda, a bill proposing to change the articles which relate to sovereignty of the people; supremacy of the Constitution; prohibition of derogation from particular human rights and freedom; political systems; prohibition of one party state; functions of Parliament; tenure of office of the President; independence of the judiciary; amendments requiring a referendum; and Institution of Traditional or Cultural Leaders require the support of not less than two-thirds of all members of Parliament, and approval by the people in a referendum.[1450] On the other hand a bill proposing to change the articles which relate to the Republic of Uganda's taxation; local government system; regional governments; functions of the Government and district councils; financial autonomy of urban authorities; and amendments requiring approval by district councils require the support of not less than two-thirds of all members of Parliament, and approved by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts in Uganda.[1451]
    b. In South Africa, whereas a bill amending the provision on the Republican status of South Africa has to be passed by the National Assembly, with a supporting vote of at least 75% of its members; and the National Council of Provinces, with a supporting vote of at least 6 provinces that on the Bill of Rights requires passage by the National Assembly, with a supporting vote of at least two-thirds of its members; and the National Council of Provinces, with a supporting vote of at least 6 provinces.[1452]

29. The Commission observes that although the 1992 Constitution has been amended once in a limited way, that amendment process was not preceded by a review exercise. In 1996, a Constitution Amendment Bill to amend some non-entrenched provisions of the Constitution was introduced by Government and passed by Parliament in accordance with the Constitution.[1453]

30. The Commission further observes that a Bill introducing amendments in 1999 was withdrawn by Government and no other amendment has since been initiated or introduced in Parliament to date.

31. The Commission observes that, since 1957, none of the Constitutions of Ghana have indicated a specific period for a review exercise to be undertaken and that this is the first time that a comprehensive review exercise is being undertaken during the life of an existing Constitution.

[1450] Article 260 of the 1995 Constitution of the Republic of Uganda.
[1451] Article 261 of the 1995 Constitution of the Republic of Uganda.
[1452] Section 74(2) of the 1996 Constitution of the Republic of South Africa.
[1453] Article 291 of the 1992 Constitution of the Republic of Ghana.

32. The Commission observes that it is the general practice in many jurisdictions that Constitutions do not indicate specific periods for a review or amendment. However, there are a few jurisdictions where their Constitutions indicate a specific review period.
    a. In the Federated States of Micronesia, Marshall Islands and Fiji, their Constitutions require a periodic review every 10 years.[1454]
    b. In the Republic of Palau on the other hand a legislature is required, at least every 15 years, to ask voters whether or not the constitution should be amended.[1455]
    c. In the Republic of Portugal, the Assembly of the Republic may revise the Constitution once 5 years elapses after publication of any revision law. The Assembly of the Republic may, however, by a majority of four-fifths of its members entitled to vote, assume powers of constitutional reform at any time after revision.[1456]

33. The Commission finds that the submissions made are reflective of the desire of the general populace to have a Constitution that is not easily manipulated but yet not stultified in time, recognising that "*A written Constitution…is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development.*"[1457]

34. The Commission finds that the opposition to the constitution review exercise fizzles out in the light of the overwhelming submissions received and the millions of persons who have taken part in the Commission's consultations and hearings. To say that the review process is unnecessary in itself is an assertion that can only be sustained by assessing the Constitution. In other words, a review of the Constitution is necessary to ascertain whether a review of it is necessary or not.

35. The Commission finds that a distinction has to be drawn between the amendment of the Constitution and a review process which will be the basis for any envisaged amendment proposals. While the former rests solely and squarely in the realm of Parliament, it will be erroneous to say that a process which gives an avenue for Ghanaians to make an input into an amendment proposal usurps the powers of the Legislature. Indeed, the participation of Parliament itself in the National Mini Consultations is in itself an indication of Parliament's understanding of the need for the review and Parliament's support for the Commission. Again, Parliament submitted a report to the Commission detailing matters it considers important in the review process. All of these are significant and lend credence to the work of the Commission.

[1454] Powles, Guy, *Changing Pacific Island Constitutions: Methods and Philosophies*, Victoria University of Wellington Law Review; Special Issue, 22: 63-83 (June, 1992).
[1455] Section 1 of Article 14 of the 1979 Constitution of the Republic of Palau.
[1456] Article 284 of the 1976 Constitution of the Republic of Portugal.
[1457] *Tuffour* v. *Attorney-General* [1980] GLR, 637, at pp. 647-648.

36. The Commission observes that it is necessary to put in perspective that the Commission's mandate permits it only to ascertain the views of Ghanaians as to the strengths and weaknesses of the Fourth Republican Constitution and advice the President accordingly. The fact that the Commission received tens of thousands of submissions calling for the amendment of the Constitution is a strong sign that the review process is more than necessary.

37. The Commission finds that a thorough appreciation of the Constitution points to the fact that there are some deficiencies in the capacity of certain institutions established by the Constitution. This is revealed in a lot of the submissions received. Chief among the deficiencies revealed is the problem of consistent and sustained funding of key public institutions. Inadequate funding has rendered some of these institutions ineffective in the discharge or implementation of their constitutional mandate. Therefore, the calls for implementation imply the need for institutional reforms. The reforms, which could only result from a comprehensive review of the Constitution, will then prepare these bodies for the task of effectively implementing the provisions of the Constitution.

38. On the question of gender neutrality of the text of the Constitution, the Commission agrees with the reasons given in the submissions. The reviewed Constitution must portray a nation that respects humankind and accords both the male and female equal status. The Commission is, thus, of the position that the Constitution should be gender neutral.

39. The Commission strongly agrees with the proposals for the use of simple language and translation of the Constitution into local languages. An integral part of this review exercise is to ensure greater accessibility of the Constitution to Ghanaians. Therefore, the Commission acknowledges the need to ensure that the text of the Constitution is easily understandable.

40. The Commission observes that the NCCE is tasked with civic education and it has done a lot of work in this regard. However, there remains a lot more work still to be done if the citizenry is really to appreciate the importance of the Constitution.

41. The Commission also observes that there are a number of bodies tasked with the review of legislation in this country. Notable among these are the Statute Law Revision Commissioner and the Law Reform Commission. There is also the Ascertainment of Customary Law project of the National House of Chief, pursuant to the constitutional mandate of the House to undertake the study, interpretation and codification of customary law.[1458] The Commission finds it desirable to harmonise these institutions and consolidate their various mandates. In

[1458] Article 272(b) of the 1992 Constitution of the Republic of Ghana.

addition, they should be empowered to review the Constitution at specified times, for example every 10 years.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGE

42. The Commission recommends that the language of the Constitution be simplified and made gender neutral.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

43. The Commission recommends that the NCCE should undertake accelerated programmes aimed at ensuring that all Ghanaians have access to the Constitution and understand its contents.

44. The Commission recommends that the NCCE translates the Constitution into all the major languages in Ghana.

45. The Commission recommends that the NCCE should adopt various communications tools, such as cartoons, posters, banners, pamphlets and leaflets, as well as issue abridged versions of the Constitution, in order to better educate all Ghanaians on it.

46. The Commission recommends that the NCCE should take steps to collaborate with the Ghana Education Service and tertiary institutions, to formulate curricula and syllabi for the studying of the Constitution at all levels of Ghana's educational system.

ISSUE TWO: NATIONAL ORIENTATION

A. DIMENSIONS OF THE ISSUE

47. The dimensions of the issue are as follows:
    a. Whether the Constitution should have provisions spelling out how to promote and enhance the cohesion, unity and integrity of the nation.
    b. The need to adopt an official national language chosen from one of the existing local languages.
    c. The need to increase active education and accessibility to the Constitution.
    d. The need to promote respect for public officers in the public psyche and civility in public discourse.

B. CURRENT STATE OF THE LAW ON THE ISSUE

48. The Constitution provides that the State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person. The State is also to promote actively the integration of the people of Ghana.[1459] Political parties are given the freedom by the Constitution to participate in the shaping of the will of the people of Ghana and to propagate ideals which are of a national character towards the shaping of the will of the people.[1460]

49. The Directive Principles of State Policy (DPSPs) in the Constitution contain the duties of a Ghanaian citizen. The duties of a citizen include to uphold and defend the constitution and to foster national unity and live in harmony with others.[1461] The DPSPs also enjoin the State to foster the development of Ghanaian languages as part of the cultural objectives of the people of Ghana.[1462]

50. Included in the functions of the National Commission for Civic Education in the Constitution are the functions to create and sustain awareness of the Constitution and to educate generally on the Constitution.[1463] Under the National Service Scheme, the Board of the Scheme is mandated to take the measures that will instil a sense of civic duty and voluntarism in the citizens. The board is also required to develop programmes for the advancement of the quality of life of the youth.[1464]

C. SUBMISSIONS RECEIVED

51. The Commission received submissions on the issue of national orientation. A summary of these submissions are as follows:
    a. There should be a national programme that will create national consciousness and identity by blending all the unique characteristics of the various tribes in Ghana.
    b. A local language should be adopted as the official language of Ghana to enhance the unity of the nation. It was reasoned that the adoption of a local language will depict a total break-away from the colonial masters and create a unique identity for Ghana. The proponents of these submissions also reasoned that the adoption of a local language as the national language will help promote a sense of belonging among Ghanaians. Some identified Twi as the most widely spoken language and suggested that it should be the one to adopt.

[1459] Article 35(4) and (5) of the 1992 Constitution of the Republic of Ghana.
[1460] Article 55(3) of the 1992 Constitution of the Republic of Ghana.
[1461] Article 41(c) of the 1992 Constitution of the Republic of Ghana.
[1462] Article 39(3) of the 1992 Constitution of the Republic of Ghana.
[1463] Article 233 of the 1992 Constitution of the Republic of Ghana.
[1464] Section 1 of the Ghana National Service Scheme Act, 1980 (Act 426).

c. Some submissions introduced a further dimension to this issue of the adoption of a national language by calling for a constitutional provision that will ensure that the various Ghanaian languages are used as the medium of instruction and taught as subjects in Ghanaian schools.
d. Some submissions also called for the Constitution to be made accessible to the average Ghanaian. These submissions proposed that government should be put under a duty to make copies of the Constitution available to citizens free of charge so that the citizens can stay informed on the contents of the Constitution.
e. The majority of the submissions received expressed concerns about the current state and level of indecency in public discourse and the blatant disrespect for senior public officials. The submissions called for urgent action to redress the situation.

E. FINDINGS AND OBSERVATIONS

52. The Commission observes that the need to design a national orientation programme or agenda has engaged the minds of several governments in Ghana since independence.
    a. In the aftermath of independence, a subject on civic education was introduced called "Civics for Self-Government." This was an examinable subject in first cycle schools to produce men and women with a clear understanding of their rights and responsibilities and appreciation of the challenges of an emerging independent nation.
    b. Also under the Nkrumah regime, the Kwame Nkrumah Ideological Institute (officially known as the Kwame Nkrumah Institute of Economics and Political Science) was established to promote socialism in Ghana as well as the liberation of Africa from colonialism. The Institute was designed to promote national independence and re-orient the Ghanaian from the colonial mentality.
    c. The National Service Corps which was a precursor to the National Service Scheme was established during the Busia regime to promote a sense of national belonging and self service and sacrifice among the youth of Ghana.[1465]
    d. The existing National Service Scheme was established in 1973 by a Military Decree with the mandate to mobilise and deploy Ghanaian citizens of 18 years and above, especially newly qualified university graduates on national priority development programmes that contribute to improving the quality of life of the ordinary Ghanaian, for a one-year mandatory national service.[1466] The Scheme was given constitutional legitimacy under the 1979 Constitution of Ghana. The National Service Scheme is currently regulated by an Act of Parliament which states as part of the functions of

[1465] Badu A.Yaw and Parker Andrew, "*The Role of Non-governmental Organizations in Rural Development: The Case of the Voluntary Work camps Association of Ghana*", Journal of Social Development in Africa (1994) 9.1. 27-39.
[1466] National Service Scheme Decree 1973 (NRCD 208).

the scheme to "take measures that will instil a sense of civic duty and voluntarism in the citizens"[1467]

e. The 1979 Constitution provided that the government should actively encourage national integration and Parliament should enact legislation that will "foster a feeling of belonging and of involvement among the various peoples of Ghana, to the end that loyalty to Ghana will override sectional, ethnic or other loyalties."[1468]
f. During the PNDC era, attempts were made to promote the understanding of the "Revolution" as a national agenda. This led to the formation of the Cadres for the Defence of the Revolution, the National Youth Organising Commission, and the June Four Movement.
g. Under the Kufour administration, the government re-designated the Ministry of Information as the Ministry of Information and National Orientation. The aim was to ensure that Ghanaians upheld cultural norms and values that promoted unity and understanding.

53. The Commission observes that in many African countries the question of national orientation has been often asked and attempts have been made to formulate programmes and policies to deliver on a national orientation platform. In Nigeria, for example, a National Orientation Agency has been set up.

54. The Commission finds that attempts in Ghana to establish a national orientation agenda have not succeeded, largely because of the lack of consensus on the nature and scope of any national orientation programme or agenda. This lack of consensus can be attributed to a history of orientation programmes being geared towards the ideology of one party or being hijacked by parochial and self-serving private interests.

55. The Commissions observes that most participants at the consultations it held did not have copies of the Constitution. Some had never seen a copy of the Constitution before. There was, however, a great yearning among participants to learn about the operation of the 1992 Constitution.

56. The Commission finds that the overwhelming call to know about the operation of the Constitution, evident at all levels of consultation, is a reflection of the Ghanaian's desire to be part and parcel of the governance of the country.

57. The Commission finds that since the Constitution derives its authority from the people of Ghana and defines their way of life, it is necessary to ensure that all Ghanaians are conversant with the contents of the Constitution. In this regard, the Commission observes

[1467] Ghana National Service Scheme Act, 1980 (Act 1980).
[1468] Article 7 of the 1979 Constitution of the Republic of Ghana.

that the Constitution of Uganda provides for the promotion of public awareness of the Constitution by the State, including through translation into local languages, dissemination through the media and teaching in education and training institutions.[1469] In South Africa, the Constitution is officially translated into all the major languages of South Africa.

58. The Commission observes, on the issue of the need for a national language, that in Ghana there are about 79 indigenous languages spoken nationwide among the different tribes and ethnic groups. In many parts of the country, language is not synonymous with the ethnic group. Although many ethnic groups share a common language, there are generally different dialects within the language of a particular ethnic group.

59. The Commission finds that the use of English as a national language dates back to the pre-independence era and is as a result of the nation's colonial heritage. Since independence, the constitutions of Ghana have not indicated what the national official language should be. While there is no specific legislation on English as the national language, there are some pieces of legislation that refer to the use of English as the official language.[1470]

60. The Commission further observes that despite the absence of an official document indicating that English is the official language of Ghana, English has by convention been accepted as such and has become the language spoken for all official governmental and business transactions.

61. It is worth noting that in the 1957 Independence Constitution the ability to speak and read English was one of the qualifications for eligibility to become a member of the National Assembly. This requirement was replicated in the 1969 Constitution but has since not found expression in subsequent constitutions.

62. The Commission notes that English has official or special status in at least 75 countries worldwide making it a useful language for Ghana in its global commerce and communications.

63. The Commission also observes that South Africa has 11 official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tswana, Tsonga, Venda, Xhosa and Zulu. In this regard it is third only to Bolivia and India in the number of official languages. While all the languages are formally equal, some languages are spoken by more people than others. The languages of South Africa are given expression and legal effect by a provision in their Constitution.[1471]

[1469] Article 4 of the 1995 Constitution of the Republic of Uganda.
[1470] Section 28 and 32 of the Judicial Service Act, 1960 (CA 10); Civil Service Act, 1993 (PNDCL 327).
[1471] Section 6 of the 1996 Constitution of the Republic of South Africa.

64. The Commission finds that the retention of English as the national language would guard against any disunity that may be attendant to the selection of one indigenous language over the others.

65. The Commission also finds that a comprehensive language policy within the overall framework of a National Development Plan would be the most appropriate way to address the concerns of all those calling for the adoption of one of the many Ghanaian dialects as a national official language.

66. The Commission finally finds that, in recent times, the level of civility and tolerance in public discourse has descended to its lowest ebb and this development is an issue of concern. This development is not in accord with Ghana's traditional and cultural notions of decency in public discourse.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

67. The Commission recommends that the National Media Commission should be well resourced to regulate and monitor the airwaves and impose sanctions on errant media houses that gloss over indecency in their newspapers, radio and television stations that they operate.

ISSUE THREE: CULTURE

A. DIMENSIONS OF THE ISSUE

68. The position being canvassed under this issue is that the Ghanaian cultural values should be reflected in the Constitution. The issue also addresses ways to stem the gradual decline in the culture of Ghana and the increase in the westernization of the Ghanaian society.

B. CURRENT STATE OF THE LAW ON THE ISSUE

69. As part of the laws of Ghana, the Constitution includes the rules of law which at custom are applicable to particular communities.[1472] The Constitution further provides that every person is entitled to profess and practice any culture. It however, prohibits cultural practices that are dehumanizing and injurious to the physical and mental well-being of a person.[1473]

[1472] Article 11 of the 1992 Constitution of the Republic of Ghana.
[1473] Article 26 of the 1992 Constitution of the Republic of Ghana.

70. The Constitution also enjoins the State to take steps to integrate customary values into national life. The State is further enjoined to encourage the conscious introduction of cultural dimensions to relevant aspects of national planning.[1474]

71. The National Commission on Culture is mandated to promote the evolution of an integrated National Culture and create a distinct Ghanaian personality to be reflected in African and world affairs.[1475]

C. SUBMISSIONS RECEIVED

72. The submissions on this issue could be summarised as follows:
    a. There is the need to outline a clearer role for the chieftaincy institution as the custodian of the nation's culture.
    b. There is the need to enhance the Preamble of the Constitution with specific reference to culture. Proponents of this position reasoned that the quality of our Constitution could be enhanced if it had a preamble which indicated our fundamental cultural values.
    c. That the Constitution should make explicit statements for the protection of heritage sites and archaeological finds in a separate section. This is to highlight their importance in the cultural life of the nation.
    d. If culture is to be given as much importance as other domains of national life, a Commission for culture, heritage and archaeological sites and treasures might need to be established by the Constitution.
    e. That there must be the clarification of the roles performed by the Ministry of Chieftaincy and Culture and the National Commission on Culture.

D. FINDINGS AND OBSERVATIONS

73. The Commission finds that successive governments, both civilian and military, have, since independence, recognised the need to promote the cultural values of Ghanaians. A document of national relevance such as the Constitution finds its force when the citizens identify with the ideals enshrined in the Constitution.

74. The Commission observes that, internationally, there have been properly streamlined guidelines to protect the cultural identity and heritage of various nations. Notable in this regard is the UNESCO World Heritage Convention which seeks to preserve and promote the diverse heritage of various cultural identities.

[1474] Article 39 of the 1992 Constitution of the Republic of Ghana.
[1475] National Commission on Culture Act, 1990 (PNDCL 238).

75. The Commission finds that in several African countries, provisions are made in their constitution for the preservation of their cultures.
    a. In Nigeria, for example, it is provided in the Constitution that the State shall protect, preserve and promote the Nigerian cultures which enhance human dignity.[1476]
    b. Similar provisions to those in the Nigerian Constitution appear in the Constitution of South Africa.[1477]
    c. The Preamble of the 2010 Kenyan Constitution indicates that the Kenyan is proud of his ethnic, cultural and religious diversity. It recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. It adds that every person may participate in the cultural life of the person's choice.
    d. In the 2003 Rwandan Constitution, the Preamble reaffirms the country's adherence to the International Covenant on Economic, Social and Cultural Rights, Article 11 of the Rwandan Constitution states that discrimination of whatever kind including ethnic origin, tribe, clan and culture is prohibited and punishable by law. It also states that every citizen has the right to activities that promote national culture.
    e. At least 4 statements in the Constitution of the Independent State of Papua New Guinea (PNG) touch on culture and customs: in the preamble, where the people pay homage to their ancestors; the acknowledgement of their ancestors as the source of their strength and origin of their combined heritage; a call, as part of their "National Goal and Directive Principles, for all forms of beneficial creativity, including sciences and cultures, to be actively encourage; and lastly, a call for the "recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively to achieve the ends of development."[1478]
    f. The Commission further finds that there is evidence worldwide of measures that have been instituted to ensure the respect of the indigenous and ancestral values and monuments of countries as well as their promotion and appreciation of the world's cultural and natural heritages.[1479]
    g. The Commission finds that in nation building the value of the unique cultural identities of the citizenry could be a unifying force with incomparable dividends.

76. The Commission finds that Ghana has instituted its own measures over the years to promote and enhance the appreciation of culture. Soon after independence in 1957, a Cultural Policy

[1476] Section 21 of the 1999 Federal Constitution of Nigeria. The Chapter further adds that the promotion of human dignity should be in accordance with the Fundamental objectives and the Directive Principle of State Policy.
[1477] Section 31 of 1996 Constitution of the Republic of South Africa.
[1478] Article 5 falls under the Chapter entitled "The Papua New Guinea Ways".
[1479] UN Educational, Scientific and Cultural Organisation, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972.

document for Ghana was prepared. This maiden policy was adopted by UNESCO and since then successive governments have used it as a reference point. In 1983, however, the first elaborate work on a Cultural Policy was done, revised and discussed at the Cabinet level but did not receive approval.[1480] In 2004, a Cultural Policy was adopted; which adoption was a culmination of efforts made since 1957 to have a National Cultural Policy. Currently, there is the Ministry of Chieftaincy and Culture, a merger of the National Commission on Culture and the Chieftaincy Secretariat, which is mandated in part to promote culture in the Country.

77. The Commission observes that the term "cultural values" needs clarification. It is imperative to understand that the "culture" of Ghana (as of all other people) is never static or unchanging; and there is no merit in seeking to maintain practices, institutions and beliefs in their pristine forms merely because they were accepted by societies in the past. For a progressive society, culture must be a living feature that is able to adapt itself to and adopt new influences and ideas, in order to respond to and meet new demands and challenges.

78. The Commission observes that the 1992 Constitution appears to provide the means for the people to seek to protect their culture and also provides a basis and mechanism for progressively developing it, where necessary.
    a. The Constitution ensures the right of all persons to enjoy, practice, profess, maintain and promote any culture, subject only to the provisions of the Constitution.[1481]
    b. Also, the Constitution states that customary practices which dehumanise persons or are injurious to their physical and mental well-being are prohibited.[1482]
    c. Furthermore, the provisions in the chapter of the Constitution on Chieftaincy are intended fully to reflect the cultural values of the various groups in Ghana.[1483] These provisions, among others, guarantee the institution of chieftaincy with its traditional councils as established by customary law and usage;[1484] and deny Parliament the power to enact laws to undermine the institution of chieftaincy.[1485]
    d. The Constitution also gives to the National House of Chiefs (and Regional Houses) the mandate to undertake the progressive study, interpretation and codification of customary law with a view to evolving, where appropriate, a unified system of rules of customary law, and to compile the customary laws and lines of succession applicable to each stool or skin and to undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.[1486]

[1480] NATIONAL COMMISSION ON CULTURE, CULTURAL POLICY OF GHANA (2004).
[1481] Article 26(1) of the 1992 Constitution of the Republic of Ghana.
[1482] Article 26(2) of the 1992 Constitution of the Republic of Ghana.
[1483] Chapter 22 of the 1992 Constitution of the Republic of Ghana.
[1484] Article 270(1) of the 1992 Constitution of the Republic of Ghana.
[1485] Article 270(2) of the 1992 Constitution of the Republic of Ghana.
[1486] Article 272(b), (c) and 274(f) of the 1992 Constitution of the Republic of Ghana.

e. The Constitution also works bars chiefs from participating in active party politics as a measure to safeguard the dignity of chiefs (as the fathers and mothers of their communities) by insulating them from rough- and- tumble of partisan politics and thus enable them to maintain the dignity and impartiality as between all their subjects which are essential prerequisites for the effectiveness and ready acceptance of chiefs and chieftaincy.[1487]

79. The Commission finds that, properly implemented, the above provisions together with the recommendations of the Commission should not only preserve and protect our cultural heritage but also provide a useful and necessary mechanism by which the cultural values of the people of Ghana can be developed and refined to serve their evolving needs and aspirations.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

80. The Commission recommends that the Preamble to the Constitution should be reviewed to reflect the cultural legacy and values of Ghanaian society.

81. The Commission recommends that the National Commission on Culture be established by the Constitution to perform functions that will ensure the cultural advancement of the nation.

RECOMMENDATION FOR ADMINISTRATIVE CHANGES

82. The Commission recommends that the National House of Chiefs be provided with the necessary resources to continue to ensure that the chieftaincy institution remains a bastion of the culture of the nation.

ISSUE FOUR: ETHNICITY

A. DIMENSIONS OF THE ISSUE

83. The issue manifested itself through calls that the Constitution should provide the means and mechanisms to resolve matters relating to ethnicity.

B. THE CURRENT STATE OF THE LAW ON THE ISSUE

84. The Constitution provides for the prohibition of discrimination against a person on the grounds of ethnic origin.[1488] It also enjoins the State to actively promote integration of the people of Ghana and prohibits discrimination and prejudice on the grounds of place of origin,

[1487] Article 276 of the 1992 Constitution of the Republic of Ghana.
[1488] Article 17 of the 1992 Constitution of the Republic of Ghana.

circumstances of birth, gender, religion, creed or other beliefs.[1489] The State is further under a duty to use appropriate measures to foster a spirit of loyalty to Ghana, which spirit overrides sectional, ethnic and other loyalties.[1490]

85. Beyond the duties on the State regarding ethnicity, the Constitution enjoins political parties to be national in character and have membership that is not based on ethnic, religious, regional or other sectional divisions. The Constitution also prohibits political parties from using words, symbols or slogans which arouse ethnic divisions.[1491]

86. Beyond political parties, the Avoidance of Discrimination Act, 1957 (No. 38) prohibits any association in Ghana from using or engaging in ethnic propaganda to the detriment of any other community. The legislation also bars the securing of election of persons on account of their ethnic background. Further, all persons are prohibited from discriminating against any child on grounds including ethnic origin.[1492]

87. Other legislation which touch on the issue of ethnicity also exist in the statute books. These legislation cut across the finance, education, employment and governance sectors and point to frequent reference and usage of ethnicity in the country.[1493]

C. SUBMISSIONS RECEIVED

88. On the subject of ethnicity, the Commission received the following submissions:
    a. That all the major ethnic groups should be represented in appointments to public offices to ensure a fair distribution of the 'national cake'. Also, this fair representation should reflect in employment in the public and private sectors.
    b. Others also argued that all persons involved in fanning ethnic conflicts should be arrested and prosecuted to serve as a deterrent to others. The submissions indicated a growing number of conflicts which had ethnic and tribal undertones.
    c. A significant number of submissions called for constitutional measures to check the growing trend of voting on ethnic lines in national elections.
    d. Other submissions called for the rotation of the Presidency along the major ethnic groups. They argued that this system would make it possible for ethnic groups that had not been prominent in national politics to ascend to the presidency.

[1489] Article 35 of the 1992 Constitution of the Republic of Ghana.
[1490] Article 35(6)(a) of the 1992 Constitution of the Republic of Ghana.
[1491] Article 55 of the 1992 Constitution of the Republic of Ghana.
[1492] Section 3 of Children's Act, 1998 (Act 560).
[1493] Credit Reporting Act, 2007 (Act 726); Anti-Terrorism Act, 2008 (Act 762); University of Ghana Act, 2010 (Act 806), Labour Act, 2003 (Act 651); Borrowers and Lenders Act, 2008 (Act 773).

e. Closely linked with the issue of ethnicity in politics were submissions that called for the review of current practices where vice-presidential candidates were chosen on tribal lines. For supporters of this view, the current practice was relegating certain ethnic groupings to the vice-presidential slot and this would soon create a sense of discrimination in the country.

D. FINDINGS AND OBSERVATIONS

89. The Commission recognises that Ghana is an amalgam of several ethnic groups in one unitary state. This amalgam includes ethnic groupings that have a history of conflicts within and among themselves.

90. The Commission finds that political, social and economic realities in Ghana are affected by ethnic factors, real or perceived. The Commission also acknowledges that there has been manifestation of a festering resentment in certain ethnic groups against perceived hegemony of other ethnic groups, or undue favour to members of particular ethnic groups in terms of appointments, access to government contracts, and the concentration of political power among others.

91. The Commission observes the horrible consequences of ethnicity in other countries where ethnic tensions and hatred led to the disintegration of the State, and the killing of thousands of people due to their ethnic affiliations.
    a. Less than two decades ago in Rwanda, nearly a million Tutsis and moderate Hutus were killed in a spate of ethnic cleansing.
    b. Since 2003, Sudan has been accused of carrying out a campaign against several black Christian ethnic groups in Darfur, in response to a rebellion by Africans alleging mistreatment. Sudanese irregular militia known as the Janjaweed and Sudanese military and police forces are alleged to have killed an estimated 450,000 people, expelled around two million, and burned 800 villages.[1494]
    c. The post-election violence in Kenya led to violence between the Kikuyu ethnic group and the Luo ethnic group, with each group supporting one of the candidates in the elections.
    d. In Northern Ireland, ethnicity is the underlying cause of the conflict between Catholics and Protestants, with Catholics representing persons who believe they are Irish while the Protestants consider themselves British. This ethnic conflict is considered to have span some 40 years.
    e. In the Republic of Bosnia-Herzegovina, conflict between the three main ethnic groups, the Serbs, Croats, and Muslims, resulted in genocide committed by the Serbs against

[1494] ROBERT O COLLINS, CIVIL WARS AND REVOLUTION IN THE SUDAN: ESSAYS ON THE SUDAN, SOUTHERN SUDAN, AND DARFUR, 1962-2004 159 (Tsehai Publishers, 2005).

the Muslims in Bosnia. The conflict was from 1992-1995 and about 200,000 people were estimated to have died.[1495]

92. The Commission also observes that in certain countries, ethnicity has become the bedrock of every act of state. In Ethiopia, for example, the 1994 Constitution is a direct result of the government pursuing a policy of "ethnic democracy." Ethnicity served as the foundation for Ethiopia's political parties and it motivated the Constitution's two-tier federal system. In addition to the central government, there are nine regional states whose borders roughly trace ethnic lines. The constitutional structure has cemented ethnicity as the definitive issue in Ethiopian politics.

93. The Commission notes that in Ghana there have been several ethnic clashes which have resulted in many deaths and have attempted to destabilise the nation.
    a. In 1994 it was reported that the Konkomba/Nanumba/ Dagomba/ Gonja ethnic conflicts led to the destruction of 441 villages and the displacement of over 178,000 people. Also at least 2,000 people lost their lives.[1496]
    b. In Bawku, the Mamprusis and Kusasis have been fighting each other over a period of time. The first major conflict between the two ethnic groups erupted in 1983 and there have been skirmishes ever since.
    c. There have been major conflicts in the Peki and Tsito area, Tuobodom and Techiman, the Ga state, and Winneba just to cite a few of the areas affected by ethnic conflict in southern Ghana.
    d. Aside from these major conflicts, there have also been several minor but deadly skirmishes over the years in southern Ghana. Many chieftaincy and land disputes in Southern Ghana have also led to the death of many Ghanaians.

94. The Commission also observes that although this is hardly openly recognised and nationally discussed, there is much ethnic bloc voting in Ghana.

95. The Commission finds that the politics of ethnicity is one of the dominant determining factors in electioneering at the national level in Ghana and most Africa countries. This combines with other factors such as poverty and illiteracy to fuel inter-ethnic and intra-ethnic conflicts.

96. The Commission observes that the issue of ethnicity is two-fold: whether to allow the existing provisions on ethnicity to remain, or whether to propose that the Constitution should

[1495] HISTORY PLACE, http://www.historyplace.com/worldhistory/genocide/bosnia.htm (last visited 7th October, 2011).
[1496] Jönsson, Julia, *The Overwhelming Minority: Traditional Leadership and Ethnic Conflict in Ghana's Northern Region*, Centre for Research on Inequality, Human Security and Ethnicity Working Paper No. 30, February, p.18. 2007 (Oct. 14, 2011, 11:45 AM), www.crise.ox.ac.uk/pubs/workingpaper30.pdf.

explicitly recognise ethnicity and tribalism as a fact of life and devise stringent mechanisms in the Constitution to ensure ethnic balance and the equitable treatment of ethnic groups in all aspects of national life. The Commission is of the opinion that considering the serious effects of ethnicity on the continent and its negative consequences, there is the need for the Constitution to have very clear and stringent provisions which will prevent any situation that might lead to an ethnic conflict.

97. The Commission observes that Ghana is a multi-ethnic nation, so it is essential that the Constitution and laws under the Constitution do not in any way encourage or accentuate ethnic differences. It is appropriate and necessary to recognise and make use of the benefits and advantages of our diversity, but nothing should be done to undermine the unity and solidarity of the nation by any laws or practices that pit ethnic groups against each other. The Commission finds wisdom in the general view that, as a country with a heterogeneous and diverse population, Ghana should strive to ensure that all elements of the society are catered for.

98. The Commission observes that while it may sometimes be necessary and advisable to take ethnic representation in the composition of certain bodies and institutions of state seriously, it will not be right to use ethnic affiliation as a sole criterion for the appointment or selection of persons to positions or offices, among others. [1497]

99. The Commission finds that there is no acceptable definition of ethnic affiliation. Each so-called ethnic group in Ghana is sub-divided into sub-groups and even smaller sub-divisions (for example, Akans into Asante, Brong, Fante, Akim etc; Ewes into Anlo, Tongu, Agave, etc; Ga-Adangbes into Ga, Krobo, Ada; Persons from the Northern part of the country into Dagomba, Dagaare, Mamprusi, Frafra, etc). In many cases, the feeling of exclusiveness within sub-groups and sub-divisions may be as strong as or stronger than between the large groups. For example different groups of Asantes (Atwima, Kwabre, Sekyere, Ahafo etc), or of Akims (Abuakwa, Bosome, Kotoku) or of Gas (Ga Mashie, La etc.), or of Dagombas (different "gates") may insist on their rights as against the rights of other sub-divisions of the same group. Any attempt to deal with ethnicity will have to confront these and many other problems. It is neither desirable nor useful for the State to seek to do this, and it would not be possible to do it in any meaningful way in the context of the Constitution alone.

100. The Commission finds that it is for good reason that the Constitution rightly enjoins the State to actively promote the integration of the people of Ghana and prohibit discrimination and prejudice on grounds of, *inter alia*, "ethnic origin".[1498] It also requires the State to foster a

[1497] Article 35 (6)(b) of the 1992 Constitution of the Republic of Ghana.
[1498] Article 35(5) of the 1992 Constitution of the Republic of Ghana.

spirit of loyalty to Ghana that overrides all ethnic loyalties".[1499] This appears to be all that can and should be done by and in the Constitution.

101. The Commission finds that one of the legacies of the Kwame Nkrumah regime was its effort to keep ethnicity out of national politics. It is that effort which has culminated in ethnicity-based political parties being unconstitutional under the Fourth Republic.

102. The Commission finds that rural-urban migration in Ghana makes the ethnic proposition untenable. The cities and regions that are currently experiencing population pressures, and which garner a huge percentage of the voter turn-out, are very cosmopolitan and multi-ethnic.

103. The Commission finds that the proposals that the Presidency should rotate among the ethnic groups will deepen ethnicity rather than eliminate it. The Commission's understanding of the proposal for a President to enjoy majority support across the regions is to avoid a situation whereby a candidate for Presidential election can concentrate his or her campaign in limited regions/ethnic areas and still be able to win the election after which he or she will pander to the interest of only those regions/ethnic groups to the neglect of the rest of the Republic.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

104. The Commission recommends that stringent legislation be put in place to criminalise ethnic actions that have the potential of causing conflict.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

105. The Commission recommends that there should be deliberate government action to address the deepening effect of ethnicity in all aspects of national life.

ISSUE FIVE: POLITICS AND POLARISATION

A. DIMENSIONS OF THE ISSUE

106. This issue encompasses the ways in which the Constitution may abate the over politicization of issues of national importance; the economy; and traditional institutions, among others.

[1499] Article 35(6)(a) of the 1992 Constitution of the Republic of Ghana.

B. CURRENT STATE OF THE LAW ON THE ISSUE

107. The Constitution, in spelling out the political objectives of Ghana, indicates that Ghana is a democratic state and sovereignty rests with the people of Ghana. This provision enjoins the State to promote the culture of political tolerance among the citizenry.[1500]

108. The right to form political parties is also guaranteed in the Constitution. The political parties have to be national in character and their internal organisations have to conform to democratic principles and the Constitution.[1501]

109. The Constitution prohibits Parliament from enacting laws that will make Ghana a one-party State or that will impose on the people of Ghana a common programme or set of objectives of a political nature.[1502]

110. The Political Parties Act further provides the legal framework generally for the founding, registration and operation of political parties in Ghana.[1503]

C. SUBMISSIONS RECEIVED

111. The issue of politics and polarisation were related to the following set of submissions:
    a. The over-politicization and polarisation of national issues. The submissions pointed to the fact that media discussions and parliamentary debates of important national issue always have the governing party on one side and the opposition party on the other.
        i. According to the submissions, national issues are not discussed dispassionately, based on the facts and the clarity of argument. Rather, supporters and opponents of government take opposing sides on any issue never seeming to reach a convergence point. Consequently, a policy by a political party while in government will be changed by the opposition when the opposition comes to power. Very often, this change is not done on the basis of empirically verifiable facts but merely because the policy or programme was started by the new government's political opponent.
        ii. The submissions showed that polarisation goes to affect public servants who are removed from their posts upon a change in government on the suspicion that they belong to the political party of the outgoing government.
        iii. According to the submissions, over the years, the setting up of Commissions of Inquiry have been politicised and been used as a tool for investigating

[1500] Article 35 of the 1992 Constitution of the Republic of Ghana.
[1501] Article 55 of the 1992 Constitution of the Republic of Ghana
[1502] Article 3 and Article 56 of the 1992 Constitution of the Republic of Ghana.
[1503] Political Parties Act, 2000 (Act 574).

past officers of erstwhile regimes. The submissions called for a streamlining of the way and manner Commissions of Inquiry are established.

b. The submissions also indicated that the current situation where campaigning appears to start right from general elections does not give time to the government to execute its policies and does not allow the electorate to rest from the whole politicking period.
c. According to some submissions, there is the need to review the 'winner takes all' system in the nation's politics which hardly considers members of opposition parties as partners in development. The rationale for this call is that the 'winner takes all' system gives rise to corruption, bribery and violence in the country because political parties would want to use all means possible to win elections.
d. The state funding of political parties was also addressed in some submissions. These submissions indicated that the funding of political parties by the state would ensure an even playing field and reduce the risk of state funds being siphoned into political party activities.
e. A change in the current system of governance was also proposed. The submissions that contained this proposal focused on:
    i. The need to change the presidential system to the parliamentary system with a Prime Minister in charge of government business and a ceremonial President as Head of State. The proponents of the position submitted that this system worked better and would lead to the de-concentration of the powers of state in one person.
    ii. Some submissions called for the introduction of a one-party state to deal with all the political chaos.
    iii. Others submissions, however, called for a two-party system in the country since the current electoral situation appeared to tilt towards two major political parties.
    iv. Further submissions called for the abolishment of party politics and political parties. This is because political parties have and continue to be the source of major divisions in the country. The submissions proposed a monarchical or theocratic system of government as an alternative system to party politics.
    v. Other submissions called for "omandocracy": a political system based on "love for the state/country/nation". The Twi words 'oman' and 'odo' mean "state/country/nation" and "love" respectively.
f. Other submissions also proposed the institution of provisions in the Constitution that will balance the power between political authority and the citizens and ensure that the citizens would always have the opportunity to address abuse of political power even before elections are due.

D. FINDINGS AND OBSERVATIONS

112. The Commission observes that since independence Ghana has had several forms of government including a parliamentary, presidential, military and now the hybrid system of government which combines practices from the Presidential and Parliamentary systems. These have either not been successful or their successes have been short-lived due to the effects of coups d'état.

113. The Commission observes that in the history of Ghana the idea of a union government as a solution to polarisation has been suggested but has not been accepted. Twice in the nation's history, Ghanaians have opted for multiparty democracy: first in the UNIGOV referendum in 1978 and secondly when the National Commission for Democracy held consultations in 1991 on returning Ghana to civilian rule.

114. The Commission also observes that the Constitution guarantees the right to form political parties.[1504] This right is consistent with the establishment of a multi-party democracy. Also the Constitution provides that all parties shall possess a national character and not be based on ethnic or other interest. Further, it provides that all parties shall operate on democratic principles.[1505] More importantly, the Constitution prohibits the establishment of a one-party state.[1506]

115. The Commission finds it useful to emphasise that the political environment in Ghana is no more polarised than it is in other countries. Indeed, the general perception outside Ghana is that the country is a much more relaxed and politically matured society than almost all other African countries, and even many 'so-called' developed democracies. The supposed political polarisation of Ghana pales in comparison to the situation in such countries as the United States (where Republicans, especially adherents of the "Tea Party", and Democrats view each opposing group as "enemies of the nation") and the United Kingdom (where support for the different parties in many cases reaches the level of "tribal loyalties"). Similar forms of polarisation between different political ideologies and their adherents can be found in countries such as Germany, France and even Canada.

116. The Commission finds that this form of polarisation may not be pleasant or comfortable to live with, but it is part of the democratic process. So long as it does not degenerate into hate campaigns that result in actual violence, it should be accepted and tolerated as unavoidable in a country where people have the right to hold and express diametrically opposed political views. In any case, there does not appear to be much that can be done to prevent this kind of

[1504] Article 55(1) of the 1992 Constitution of the Republic of Ghana.
[1505] Article 55(4) of the 1992 Constitution of the Republic of Ghana.
[1506] Article 3 of the 1992 Constitution of the Republic of Ghana.

polarisation by either the law or the Constitution. It can only be hoped that the heat and vehemence will be reduced in time as the people become more sophisticated and gradually come to accept that holding different political views does not necessarily make people worse or more dangerous.

117. The Commission finally observes that many submissions called for ways to de-politicise the nation. The fear is that the over-politicization of national issues will ultimately lead to under-development. Abating the over-politicization of national issues can hardly be achieved through the amendment of the Constitution alone. It is more likely to be achieved through more detailed legislation and administrative action.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

118. The Commission recommends that the Directive Principle of State Policy (DPSP) be amended to include a provision that enjoins the state to take measures to deal with the rising tendencies of politicization of every aspect of national life and ethnicity within the Ghanaian polity.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

119. The Commission recommends that the Political Parties Act be amended to institute closed sessions for electioneering campaigns.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

120. The Commission recommends that the NCCE and the media should take the lead role in orienting Ghanaians to be accommodative of opposing political views.

121. The Commission recommends that the media should adopt rules and ethics for political discussions and commentaries, especially for political commentators on their discussion programmes.

122. The Commission further recommends that the Electoral Commission should strengthen the IPAC platform to build consensus on various vexed issues relating to the over politicisation of national discourses.

123. The Commission finally recommends that the Political Parties Code should be given statutory force to regulate the conduct of political parties and the conduct of political party officials in between elections.

ISSUE SIX: CORRUPTION AND WASTAGE

A. DIMENSIONS OF THE ISSUE

124. The dimensions of this issue relate to the causes and remedies for increasing incidents of corruption in public and private life as well as the need to avoid revenue leakages. The issue also considers the effective mechanisms that the Constitution and the penal system could adopt to combat corruption and wastage of national resources.

B. CURRENT STATE OF THE LAW ON THE ISSUE

125. The Constitution places a duty on the State to take steps to eradicate corrupt practices and the abuse of power.[1507]

126. The Constitution also indicates that a public officer shall not place himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office. Some public officers are also placed under constitutional a duty to declare their assets and liabilities.[1508]

127. Parliament has by law extended the list of public officers required to declare their assets and liabilities to cover all public officers.[1509]

128. The law also provides that a person who by a wilful act or omission causes loss, damage or injury to the property of a public body or an agency of the State commits an offence. It also provides that a person who, in the course of a transaction or business with a public body or an agency of the State, intentionally causes damage or loss, whether economic or otherwise, to the body or agency commits an offence.[1510]

129. The law further states that a person through whose wilful, malicious or fraudulent action or omission the State incurs a financial loss commits an offence.[1511]

130. Further, the law adds that a person who, while holding a public office, corruptly or dishonestly abuses the office for private profit or benefit or not being a holder or a public office acts or is found to have acted in collaboration with a person holding public office for the latter to abuse the office corruptly or dishonestly for private profit or benefit, commits an offence.[1512]

[1507] Article 35 of the 1992 Constitution of the Republic of Ghana.
[1508] Chapter 24 of the 1992 Constitution of the Republic of Ghana.
[1509] Public Officers Holders (Declaration of Assets and Disqualification) Act, 1998 (Act 550).
[1510] Section 179 of the Criminal Offences Act, 1960 (Act 29).
[1511] Section 179 of the Criminal Offences Act, 1960 (Act 29).
[1512] Section 179C of the Criminal Offences Act, 1960 (Act 29).

131. It is also stated that a public officer or any person who corrupts a public officer in his duties commits a misdemeanour.[1513]

132. A public officer or a person is said to commit corruption if that person directly or indirectly agrees or offers to permit his conduct to be influenced by the gift, promise or prospect of a valuable consideration to be received by that person from any other person.[1514]

133. The Commission on Human Rights and Administrative Justice (CHRAJ) is mandated not only to investigate complaints of corruption and abuse of power by a public officer in the exercise of his official duties, but also to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including making reports to the Attorney-General and the Auditor-General, resulting from such investigations.[1515]

134. The Constitution also provides for a set of arrangements to ensure fiscal discipline, effective management of resources and economic governance.[1516]

135. The Constitution further envisages a strong supervisory role of Parliament.[1517] In this regard, the Public Accounts Committee (PAC) examines the audited accounts of Ghana. The PAC holds public hearings on the report by the Auditor-General; interrogates public officers on the findings of the Auditor-General; and makes various recommendations including those for the reform of the administrative State as well as recommendation for the refund of monies lost to the State.

136. The Public Procurement Act also provides mechanism to sanitise procurement in the public sector and to help curb corruption in the public sector.[1518] The law aims to improve accountability, value for money, transparency and efficiency in the use of public resources.

[1513] Section 239 of the Criminal Offences Act, 1960 (Act 29).
[1514] Section 240 of the Criminal Offences Act, 1960 (Act 29).
[1515] Article 218 of the Constitution; Section 7 of the Commission of Human Rights and Administrative Justice Act, 1993 (Act 456).
[1516] Chapter 13 of the 1992 Constitution of the Republic of Ghana where the Constitution sets out, among others: provisions for imposing taxes; a procedural mechanism for authorising expenditure of state, withdrawing monies from public funds, and contracting loans; provisions for the establishment of a Central Bank to among others encourage and promote economic development and efficient utilisation of the resources of Ghana through effective and efficient operation of a banking and credit system; and provision for the establishment of the Office of the Auditor-General to audit the public accounts of Ghana and the accounts of all public offices.
[1517] Article 103(3) of the 1992 Constitution of the Republic of Ghana, pursuant to which Parliament has set up the Public Accounts Committee.
[1518] Public Procurement Act, 2003 (Act 663).

137. The Whistleblower Act encourages Ghanaian citizens to volunteer information on corrupt practices to appropriate government agencies. The Act also provides for the protection against victimization of persons who make these disclosures.[1519]

138. The Economic and Organised Crimes Office (EOCO) has the mandate to investigate any suspected offence provided for by law which appears to the Director, on reasonable grounds to involve serious financial or economic loss to the State or to any state organisation or other institution in which the State has financial interest.

139. The Constitution does not define "corruption" and the forms it may take. What constitutes corruption is contained in the Criminal Offences Act, 1960 (Act 29).[1520]

140. Ghana has also employed the use of Commissions of Inquiry to investigate issues of corruption and make recommendations for reform.[1521] The recourse to Commissions of Inquiry has for a long time been a prominent feature of Ghana's administrative machinery.[1522]

141. In addition to all the laws discussed above, there are the Guidelines on Conflict of Interest and the Code of Conduct for Public Officers, both published by the CHRAJ to assist public officials to identify, manage and resolve conflicts of interest.

142. Also at different stages of the law-making process are Bills relevant to the fight against corruption. First there is the Public Officers Liability Bill of 2009, which when passed, will give statutory force to the two publications by the CHRAJ identified above; give more meaning and effect to the Code of Conduct of Public Officers (Chapter 24 of the Constitution); and generally provide for the conduct of public officers in the performance of their functions. There is similarly the Mutual Legal Assistance Bill of 2009, which when enacted, will enable Ghana to provide for the implementation of international agreements for mutual legal assistance in respect of criminal matters.

[1519] Whistleblower Act, 2006(Act 720).

[1520] Sections 239 to 245 of the Criminal Offences Act, 1960 (Act 29) on corruption of and by public officer or juror; explanation as to corruption by public officers; explanation as to corruption of public officer; special explanation as to corruption of and by public officer; corrupt agreement for lawful consideration; acceptance of bribe by public officer, after doing an act; and promise of bribe to a public officer, after an act is done. Sections 252 to 254 on accepting or giving bribe to influence public officer or juror; corrupt promise by judicial officer or juror and corrupt selection of a juror.

[1521] See the section of this report in chapter 8 on Commission of Inquiry.

[1522] The Commission of Enquiry Act, 1964 Act (250); Chapter 18 of the 1969 Constitution; Chapter 23 of the 1979 Constitution, all of which contain the concept of Commissions of Inquiry and have informed the current provisions of the Constitution at Chapter 23.

C. SUBMISSIONS RECEIVED

143. A substantial number of submissions called for provisions in the Constitution that would ensure the reduction of corruption at all levels of public life. The submissions argued that corruption was becoming rife in every facet of national life. Submissions pointed to corruption in the police service, the justice sector, the public service, the educational sector and at the harbours and ports of entry.

144. Other submissions pointed to corruption in public appointments and promotions, the allocation of public funds and called for decisive legislation to address these situations.

145. Some submissions called for a mechanism to reduce the current level of corruption in party politics so that the monetization of party politics and the phenomenon of vote buying will cease.

146. Other submissions also dwelt on the application of the law on wilfully causing financial loss to the State. They argued that the law should be reviewed and applied broadly as, currently, it appears that it is used against prominent members of the opposition any time there is a change in government.

147. The effect of corruption, according to the submissions, is that it hinders fair trial and increases the cost of goods and services. Also, Ghana's nascent democracy suffers since vote buying has become a recurrent feature of national elections. The body politic is rendered sick because corruption is systemic.

148. Other submissions also call for legislation to block the financial leakages in the state.

D. FINDINGS AND OBSERVATIONS

149. The Commission finds that corruption is not in any way a new development in Ghana and observes that the issue of corruption is very rife in national life and has been the subject of many interventions by past and present governments.
    a. In 1970, during the Busia regime, Justice P.D. Anin was named to head a 5-man Commission of Inquiry into bribery and corruption; its goals were 'to study the area, prevalence, and methods of bribery and corruption in Ghanaian society and, whether there were factors in society which contributed to this.' The Anin Commission was asked to find the causes and the effects of corruption and propose the cures to political corruption cases.[1523]

[1523] Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report) Vol. I (1974), paragraph 2.

b. The Anin Commission noted that in a country like Ghana, where corrupt practices were rampant, law-breakers were likely to rationalise their conduct as a reaction against cumbersome procedures and restrictive policies.[1524] It accordingly recommended, among others, a comprehensive and multi-dimensional approach towards the eradication of bribery and corruption and the establishment of a permanent body to investigate corruption.[1525]
c. During the Provisional National Defence Council (PNDC) regime, the issue of corruption was discussed and the move made by the government was to bring about a 'new system of justice by establishing the means not only to bring those against whom allegations of corruption have been made to trial, but also to ensure constant monitoring of public officials.' Three institutions were created to deal promptly with the problems; these were the People's Defence Committee (PDCs), the Workers Defence Committee (WDCs) and the Citizens Vetting Committee (CVCs).
d. During the Kufour administration, the government declared zero tolerance for corruption and proceeded to enact legislation including the Public Procurement Act and the Whistleblowers Act to deal with corruption in the public sector.[1526]

150. The Commission observes that a recent survey by the Ghana Integrity Initiative found that about 70% of respondents had been involved in bribery is some way or other; and, moreover, that 90% of them looked on unconcerned when corruption occurred in their presence.[1527]

151. The Commission finds that in Ghana there is a clear perception that several institutions are corrupt and that the majority of people have to contend with it on a near regular basis.

152. The Commission also finds that there is a clear lack of understanding by the majority of Ghanaians that anti-corruption bodies are not totally independent and thus they are unable to fight corruption and its evils effectively and evict them from the Ghanaian society.

153. The Commission notes the concerns of persons who made submissions on the subject of electoral corruption that voting patterns of the electorate can be influenced through

[1524] Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report) Vol. I (1974), paragraph 61; Daniels Janet, *Final Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report)*, Vol. VIII No. 1 RGL 39 [April 1976].
[1525] Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report), (1974); Daniels Janet, Final Report of the Commission of Enquiry into Bribery and Corruption (Anin Commission Report) [April 1976] VOL. VIII NO. 1 RGL 39—44; and Henry Kwasi Prempeh, "Making the Policy of "Zero Tolerance for Corruption" a Reality in Ghana: A Focus on the Serious Fraud Office", Ghana Center for Democratic Development (CDD-Ghana), Critical Perspective No. 12 (2003).
[1526] Public Procurement Act, 2003 (Act 663); Whistleblower Act, 2007 (Act 720).
[1527] Ghana Integrity Initiative, *Voice of the People Survey: An Urban Household Corruption Perception Survey of Southern Ghana*, Project Completion Report. (2005) http://www.tighana.org/giipages/publication/Voice%20of%20the%20People.pdf.

inducement, bribery and other forms of corruption. The Commission agrees with these views and notes that these practices pose serious dangers to democracy and good governance. If unchecked, these practices can thrust the nation into chaos.

154. Ghana has taken some steps over the years to update its legislative arsenal in the fight against corruption, most notably with amendments to the laws on public financial administration and public procurement. These reforms seek to harmonise the many public procurement guidelines used in the country and to bring public procurement into conformity with international standards.[1528] Also, there is legislation to check financial administration especially within the public sector.[1529]

155. The Commission observes that, since 2000, CHRAJ has been working on a draft National Anti-Corruption Action Plan which is yet to be finalised and presented to Cabinet for approval and subsequent adoption as a national working document.

156. The Commission finds that though the Constitution attempts to curb the menace of corruption through the assets declaration regime, the absence of compulsion and the lack of transparency in the exercise defeat the very purpose of that regime.

157. The Commission observes that, in 1964, the Corrupt Practices (Prevention) Act, 1964 (Act 230) was passed to provide a better and obviously more expeditious method of investigating and dealing with corrupt practices. This Act was repealed in 1996 by the Statute Law Revision Act, 1996 (Act 516). Act 516 did not state any specific reason for the repeal of Act 230. That notwithstanding, the Commission finds that certain events may readily supply the reason for the repeal of Act 230. For example, the coming into force of the 1992 Constitution and its legal regime may provide some clue to the reason. The establishment of the Commission on Human Rights and Administrative Justice (CHRAJ) under Chapter 18 may also be instructive in this regard. CHRAJ is given the constitutional mandate to, *inter alia*, investigate complaints of corruption and abuse of office by public officials in the exercise of official duties. These functions are not materially different from those prescribed by Act 230. This development, it is suggested, renders Act 230 superfluous and thus spent.

158. The Commission observes that the issue of corruption is also a problem in other jurisdictions and it is being addressed through certain institutional mechanisms.
    a. In Nigeria the anti-graft agency, the Economic and Financial Crimes Commission (EFCC) is in the forefront of fighting corruption in Nigeria.

[1528] Public Procurement Act, 2003 (Act 663).
[1529] Financial Administration Act, 2003 (Act 654).

b. In Kenya the Anti-Corruption Commission (KACC) was established under the Anti-Corruption and Economic Crimes Act. No 3 of 2003 and is the premier institution for fighting corruption in Kenya.

159. The Commission finds that corruption in the management of government projects meant for communities should be given special attention. To most of the inhabitants of the rural areas, these projects end up in the hands of some persons who misuse these projects or use them for their private gain. Legislation on local governance should therefore be improved to deal with these matters.

160. The Commission finds that corruption has served and continues to serve countless persons as an illicit means of achieving wealth and obtaining privilege to the detriment of the larger society but to the benefit of the very few.

161. The Commission finds that the fact that corruption persists does not relieve the nation of the responsibility to address it. The failure to deal with corruption does not make it go away.

162. The Commission also finds that corruption reinforces the hand of those who seek profit outside the realm of the law and the economy, and the simple, elementary rules and notions of equity and justice.

163. The Commission finds that the problem of corruption does not relate only to the inadequacy and in some cases the absence of a robust legislative framework but also to the under-enforcement of legislative provisions. On the one hand, the existing constitutional and legislative arrangements, while commendable, have within them deficiencies that require urgent remedy. On the other hand, there are areas where the law is silent or at the best, vague; thereby calling for new provisions or more elaboration on existing provisions.[1530]

164. The Commission further finds that corruption in Ghana is not restricted to the public sector. Private businesses are also involved in corruption; they bribe customs, police, drug enforcement, tax, judicial and procurement officers in order to avoid tax payments, secure lucrative public contracts, access emerging markets and smuggle illegal commodities.

165. The Commission observes that revenue leakages occur as a result of incompetence, irresponsibility, or the lack of integrity of persons in charge of projects and other areas of expenditure. The Constitution is not the appropriate avenue to inculcate competence or a sense of responsibility or integrity in public officials. The ways in which these qualities can be ensured in public officials include adopting appropriate procedures for selecting persons

[1530] The Constitution for instance does not define corruption. The Criminal Offences Act which defines corruption, on the other hand, does so in very narrow terms which do not conform to international standards.

for positions of responsibility and ensuring good education and training. Also, there should be well defined legal sanctions which would be applied fairly.

166. The Commission further observes that one of the laws that could be used for this purpose is the law on wilfully causing financial loss to the State. It is perhaps true that, in its present form, the legislation is not sufficiently precise to be effectively and impartially implemented. Moreover, the circumstances of its adoption and the way in which it has been used may have made it difficult for many people to accept it as a useful law for general application. That law in its present state is prone to abuse by successive governments against political opponents, although the principle behind the law is sound. It appears to promote the objective of the Directive Principles in Article 41(f) which enjoins every citizen "to protect and preserve public property and expose and combat misuse and waste of public funds and property." Properly drafted and impartially applied, such a law could contribute significantly to the task of dealing with the problem of revenue leakages – at least where they result from the gross incompetence, carelessness or irresponsibility of holders of public officers or persons charged with responsibility for the expenditure of state finances.

167. The Commission observes that there is ample provision in the 1992 Constitution on the issue of corruption. Article 35(8) enjoins the State to take steps to eradicate "corrupt practices"; Article 37(1) directs the State to endeavour to secure and protect a social order founded on the "ideals and principles of... probity and accountability"; while Article 218(e) gives the power to the CHRAJ to investigate all instances of alleged or suspected corruption and the misappropriation of public monies by public officials and to take appropriate steps... resulting from such investigations."

168. The Commission observes that perhaps the most effective way for Ghana to deal with corruption is to strengthen the CHRAJ in the execution of its mandate with respect to the prevention and eradication of corruption. On the whole it is true to say that the CHRAJ has had great success in the protection of human rights, the promotion of administrative justice and the investigation of high profile corruption cases. However, there is no denying that the level of corruption in Ghana is much more than what is acceptable. It would appear, therefore, that a great deal needs to be done to enable the CHRAJ to be more effective in discharging this part of its mandate. What needs to be done may not necessarily require amendments to the Constitution, but the possibility should be explored.

169. The Commission observes that in the history of the country Commissions of Inquiry have served as mechanisms to investigate acts of corruption especially in the public sector. This mechanism was made initially through legislation[1531] and subsequently by constitutional

[1531] Commission of Inquiry Act, 1964 (Act 250).

provisions.[1532] This mechanism has led to several findings on corruption and prosecution of public officers for acts of corruption.

170. The courts in Ghana have decided that, "the constitutional arrangements under Article 280 of the 1992 Constitution … does [sic] not allow the Attorney General to initiate prosecution against persons affected adversely by the findings of a Commission of Inquiry established under Article 278 of the constitution" and that the findings of Commissions of Inquiry should never develop into criminal trials.[1533] The Court reasoned that any prosecution mounted on adverse findings of a Commission of Inquiry will undermine the provisions of Chapter 23 of the 1992 Constitution, particularly Article 280(2) and (5). These provisions provide that where a commission of inquiry makes an adverse finding against any person, the report of the commission of inquiry shall, for the purposes of the Constitution, only be deemed to be the judgment of the High Court six months after the finding is made and announced to the public; or the Government issues a statement in the Gazette and in the national media that it does not intend to issue a White paper on the report of the commission, whichever is the earlier; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal.

171. The Commission observes that, while the elements of the law on wilfully causing financial loss to the State have been endorsed by the Supreme Court, the scope of the offence is still extremely wide and vague.[1534] It tends to politicise crime and has failed to achieve its purpose. It is widely perceived as a tool for political vendetta and is highly prone to abuse by successive governments against their opponents. Besides, this law mixes up the civil conduct of negligence with criminal conduct.

172. The Commission finds that it would be most appropriate to define "corruption" to cover all the offences that fall within the scope of the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. This way, corruption will be given its broadest and most comprehensive meaning, as opposed to the current narrow terms under which corruption under the penal laws of Ghana finds expression.[1535]

[1532] Chapter 18 of the 1969 Constitution, Chapter 23 of the 1979 and Chapter 23 of the 1992 Constitution.

[1533] *The Republic* v. *Charles Wereko-Brobbey and Kwadwo Okyere Mpiani (the Ghana @ 50 Case)* (Unreported), High Court, 10th August, 2010, Suit No. ACC 39/ 2010.

[1534] *Ali Yusuf Issa (No.2)* v. *The Republic (No. 2)* [2003-2004] SCGLR 174; *The Republic* v. *Ibrahim Adams and Others*, (Unreported), High Court, Suit No. FT/MISC. 2/2000 (28/04/03).

[1535] Sections 239 to 245 of the Criminal Offences Act, 1960 (Act 29) provide information on corruption of and by public officer or juror; explanation as to corruption by public officers; explanation as to corruption of public officer; special explanation as to corruption of and by public officer; corrupt agreement for lawful consideration; acceptance of bribe by public officer, after doing act; and promise of bribe to a public officer, after an act is done. Sections 252 to 254 on accepting or giving bribe to influence public officer or juror; corrupt promise by judicial officer or juror and corrupt selection of a juror.

173. The Commission further finds that the absence of law clearly defining incidents of conflict of interest has also not enhanced the fight against corruption. The Constitution does not define these situations. Neither does the Public Office Holder (Declaration of Assets and Disqualification) Act, 1998 (Act 550), which is supposed to give meaning and effect to the Code of Conduct for Public Officers provided under Chapter 24 of the Constitution. The CHRAJ's Guidelines on Conflict of Interest and the Code of Conduct for Public Officers, while they are commendable, do not have statutory force and are, thus, not justiciable.

174. The Commission finds that the implementation of the Public Procurement Act which is one of the effective tools to combat corruption and wastage in national expenditure has not been as smooth and effective as expected. The implementation of the Act in certain cases has introduced rather rigid and cumbersome processes which have rather promoted corrupt acts.

175. The Commission observes that the Internal Audit Agency, as the oversight body responsible for internal auditing in the public sector, is the first line of defence for safeguarding the nation's resources by ensuring their legal and accountable use. External auditing by the Auditor-General and investigations by anti-corruption agencies like the CHRAJ are after the fact – after transactions have been completed. As evidenced by various reports by the Auditor-General, many corrupt practices could be stopped in their tracks, and many leakages could be blocked if internal auditing were much more efficient. While the Internal Audit Act, 2003 (Act 658) provides a good starting framework, it would be prudent to review it to make internal auditing more efficient.

176. The Commission finally finds that any programme to fight against corruption and wastage in public expenditure will be most effective if it is holistic and all encompassing. In this regard, the Commission welcomes the Anti-Corruption Action Plan which is being drawn up by the CHRAJ. It would be appropriate to incorporate such a plan into the policies of all Ministries, Departments and Agencies (MDAs), and Metropolitan, Municipal and District Assemblies (MMDAs) within a framework of the National Development Plan.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

177. The Commission recommends that the Constitution be amended to provide that prosecution may follow from the findings of Commissions of Inquiry set up under the Constitution.

178. The Commission also recommends that the Directive Principles of State Policy (DPSP) be amended to include a provision that enjoins the state to take effective steps to deal with corruption and wastage which have become a canker in the society.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

179. The Commission recommends a comprehensive review of the Criminal Offences Act to define corruption to encompass all corruption-related offences and to cover all offences that fall under the scope of the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.

180. The Commission further recommends that the law on wilfully causing financial loss to the State be repealed.

181. The Commission recommends that the Mutual Legal Assistance Act, 2010 be seriously enforced.

182. The Commission recommends that the Public Officers' Liability Bill be quickly passed into law.

183. The Commission recommends that the Public Procurement Act, be amended to make it more effective and efficient.

184. The Commission recommends that the rules of evidence be reviewed and amended to shift the burden of proof unto a person alleged to have been bribed, in a situation where that person admits that he collected money equal to the sum of the alleged bribe, but insists that the money so received was not a bribe.

185. The Commission recommends that the internal audit system as institutionalised under the Internal Audit Act be reviewed and made more effective to combat corruption and wastage. The review of the Act could include the following:
    a. Changes to the Internal Audit Agency Board to expressly reflect representation from the Institute of Internal Auditors.
    b. Changes to the Act to create an internal audit class of public officers with the Internal Audit Agency as the mother body. By this arrangement, the Internal Audit Units will not be part of the MDAs and MMDAs and the Local Government Service; they will be part of the Internal Audit Agency.
    c. Changes to proscribe MMDCEs from chairing Audit Report Implementation Committees.
    d. Changes to provide for more definite actions by the Director-General of the Agency on internal audit reports.

186. The Commission also recommends that, where a person is found to be corrupt, the proceeds of the corruption must be traced and forfeited to the state.

187. The Commission also recommends that a person found to be corrupt should be prohibited from holding public office for 5 years.

188. The Commission further recommends that the minimum term of imprisonment for corruption should be 5 years.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

189. The Commission recommends the firm application of a retrofitted asset declaration regime in the Constitution and implementing legislation in order that it functions as an anti-corruption measure.

190. The Commission recommends that the Commission on Human Rights and Administrative Justice (CHRAJ) be provided with enough resources, from the democracy fund for independent constitutional bodies, to execute its anti-corruption mandate effectively.

191. The Commission recommends that the prosecutorial discretion of the Attorney-General be exercised judiciously and not in favour of, or against, the members or sympathisers of any one political party.

192. The Commission recommends that the Office of the Auditor-General be well funded and strengthened to clear its backlog of annual reports and subsequently submit reports to the Public Accounts Committee of Parliament.

193. The Commission recommends that the Public Accounts Committee should put in place effective mechanisms to monitor the implementation of its recommendations on the Auditor-General's reports.

194. The Commission recommends that all relevant anti-corruption institutions should mount a sustained campaign to educate the public on the ills of corruption.

195. The Commission finally recommends that the CHRAJ complete and launch the National Anti-Corruption Action Plan.

196. The Commission recommends that all MDAs and MMDAs should adopt codes of conduct that include anti-corruption provisions.

197. The Commission recommends that stringent anti-corruption measures be implemented at our ports of entry.

ISSUE SEVEN: TERRITORIES OF GHANA

A. DIMENSIONS OF THE ISSUE

198. The issue here is whether the territories of Ghana as expressed in the Constitution should be altered, in order to have greater and better administration of the regions, or be maintained. The issue also considers the constituting elements of the nation state, Ghana, as at independence and the manner in which these constituting elements became part of Ghana at independence.

B. CURRENT STATE OF THE LAW ON THE ISSUE

199. The Constitution provides that Ghana is a unitary state comprising territories which, immediately before the coming into force of this constitution, existed in Ghana.[1536] The Constitution also enjoins the State to protect and safeguard the independence, unity and territorial integrity of Ghana.[1537]

200. The Constitution further gives the opportunity to Ghanaians to petition the President to create, alter or merge regions by setting out the procedure to be undertaken prior to the creation, alteration or merger of any region.[1538]

C. SUBMISSIONS RECEIVED

201. The Commission received two distinct submissions which touched on the territorial integrity of Ghana.

202. The first set of submissions concentrated on the alteration and re-alignment of some of the existing regions in the country. It was submitted that the Northern and Western Regions were too large and should be divided and split into two for the effective administration of the country. The Commission also received submissions which called for the re-naming and re-alignment of some of the regions also for the purpose of the effective administration of the regions and the country as a whole.

203. The second set of submissions concerns the 1956 Plebiscite which resulted in the former British Togoland joining the Gold Coast in an independent Ghana in 1957. The submissions on this matter centred on the absence of an official document evidencing the union of the former British Togoland, which was a Trust Territory under British administration, and the

[1536] Article 4 of the 1992 Constitution of the Republic of Ghana.
[1537] Article 35 of the 1992 Constitution of the Republic of Ghana.
[1538] Article 5 of the 1992 Constitution of the Republic of Ghana.

former Gold Coast. The submissions also called for recognition in the Constitution of the former British Togoland as an identifiable people and a constituting element of Ghana. Other persons who made submissions on this issue added that Ghana and the former British Togoland should come to new terms of agreement in which the latter is recognised as an independent entity within Ghana as exists between Tanzania and Zanzibar.

D. FINDINGS AND OBSERVATIONS

204. The Commission observes that the existing territories of Ghana as indicated under the current constitution were first provided for under the independence Constitution of Ghana.[1539] The Commission also observes that from 1960 to date all Constitutions have maintained the existence of the territories of Ghana immediately before the coming into force of the Constitutions – including the territorial waters and air space.

205. The Commission further observes that the 1992 Constitution and all previous constitutions of Ghana have spelt out clear procedures by which the territories of Ghana may be altered or merged.

206. The Commission notes that, in 1959, the Ashanti Region was altered and from that alteration the Brong Ahafo Region was created. Similarly the Upper West Region was formerly part of the then Upper Region which had itself been carved out of the Northern Region in July 1960. In pursuance of the decentralisation policy, the government, in 1983, divided the Upper Region into two regions: Upper East Region and Upper West Region.

207. The Commission observes that several countries including Uganda and Nigeria, like Ghana, have defined their territories in their Constitutions. However, this is not the case in Zambia whose constitution does not define the territories of Zambia. The Commission notes that the Constitution Review Commission of Zambia has in its Report recommended that the constitution be reviewed to include a provision on the territories of Zambia.

208. The Commission observes, on the issue of the status of the former British (Western) Togoland, that Part IX of the 1957 Constitution of Ghana defines the Regions of Ghana at independence. It provided that the Trans-Volta/Togoland Region became part of the territories of Ghana and subsequently became Trans-Volta/Togoland Region. It further added Northern Togoland to the Northern Territories to make up the Northern Region.[1540]

209. The Commission finds that all the submissions which were made on the former British Togoland were made largely by members of the movement called the Western Togoland

[1539] Article 63 of the 1957 Ghana (Constitution) Order-in-Council.
[1540] Article 63(1)(e) of the 1957 Ghana (Constitution) Order-in-Council.

Restoration Congress which is based in some parts of the Volta Region. The submissions on this matter did not receive support from any other region.

210. The Commission finds that some of the petitioners on the British Togoland issue indicated that the relationship that should exist between the former British (Western) Togoland and Ghana should be similar to the relationship between Tanzania and Zanzibar.

211. The Commission further finds that the island of Zanzibar gained independence from Britain in December 1963 as a constitutional monarchy. In 1964, a revolution led to the establishment of the Republic of Zanzibar and Pemba. In that same year, the Republic was subsumed by the mainland former colony of Tanganyika. This United Republic of Tanganyika and Zanzibar was renamed United Republic of Tanzania, of which Zanzibar remains a semi-autonomous region. This was achieved through an agreement called the Articles of Union which was incorporated in a 1964 interim Constitution as the Acts of Union. The most notable feature of the Acts of Union was the establishment of the double government structure that is also part of Tanzania's current Constitution. This structure included one government for the Union and one largely autonomous independent government for Zanzibar. The President of Zanzibar also served as Vice-President of the Union.

212. The Commission also observes that the National Constitution Review Conference (NCRC) concerned the issue of the petition to recognise the British (Western) Togoland as an identifiable people. During the conference, the proponents of the issue re-stated their case to the effect that the issue was whether or not there was a valid existing document for the union of the peoples of former British (Western) Togoland and Independent Gold Coast which came into effect in 1957 after the 1956 Plebiscite and not a recognition and autonomy of that territory. The Conference questioned the rationale behind and the import of the petition. It however, reached the consensus that since the issue had been re-stated and it was not a request for secession but a request only to find out if there was any document that brought into effect the union between British (Western) Togoland and the Gold Coast the matter may be considered.

213. The Commission observes that the position and request of the Western Togoland Restoration Congress (the main group behind this submission) has the potential of affecting the sovereignty and continuous existence of the nation state called Ghana. To accede to the request for autonomy even within Ghana as exists in Tanzania and Zanzibar may open the floodgates for other constitutive parts of Ghana prior to 1957 to make similar requests. This may eventually lead to the break-up of the unitary republic.

214. The Commission advises that there is no basis for the grant of such a petition and the nation should be mindful of such potential divisive tendencies.

215. Having regard to the length of time Ghana has been administered as a composite and unitary state, the well established rules of international law on the intangibility of established frontiers and the territorial integrity of a state as well as the interests of nation building, the Commission finds the petition baseless, potentially disruptive to the established constitutional order and thus unworthy of consideration.

216. The Commission finds that the provisions in the Constitution regulating the creation, alteration and merger of administrative regions in Ghana are adequate and should not be disturbed.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

217. The Commission does not recommend any constitutional change to the territories of Ghana.

ISSUE EIGHT: LOCATION OF THE NATIONAL CAPITAL

A. DIMENSIONS OF THE ISSUE

218. Although the submissions on this issue were not many, the Commission considers it worthwhile to focus on this issue and make some recommendations on the matter. This is particularly so because, over the years, many comments have been made regarding the continued sitting of the nation's capital in Accra.

B. CURRENT STATE OF THE LAW ON THE ISSUE

219. There is currently no legislation dealing directly with where, when and how the national capital is sited. In the Constitution it is stated that the territories which existed as Ghana, prior to the coming of the Constitution shall continue to be the territories of Ghana after the constitution comes into force.[1541]

220. On 19 March 1877, Accra replaced Cape Coast as the capital of the British Gold Coast colony. The move had been decided on as far back as 1851, when Governor Hill obtained the Colonial Office in London's permission for it on a number of grounds. These included the more central position of Accra in the British protectorate as it then existed, the need to develop in the eastern areas educational, judicial and other facilities (which could be better

[1541] Article 4 of the 1992 Constitution of the Republic of Ghana.

done under the eye of the Governor), the need to subdue the tribes in the Accra region, and the superiority of Accra over Cape Coast in a sanitary point of view.[1542]

C. SUBMISSIONS RECEIVED

221. The Commission received three distinct sets of submissions on the issue of the relocation of the capital city.
    a. The first set called for the relocation of the capital city from Accra to anywhere else in the country. The reason cited primarily for this view was that the capital had become overpopulated and become increasingly difficult to plan. For the proponents of this position the current state of Accra is unbefitting of a national capital.
    b. The second set of submissions called for the relocation of the capital to the centre of the country preferably to the Brong Ahafo Region. The reasons cited for this position include the sprawling unplanned nature of Accra and the fact that relocating the capital to the centre will help protect the government from external sea aggression.
    c. The third set of submissions called for the institution of a rotational capital city concept. The reason cited for this position was that rotating the capital will ensure even development nationwide and will also ensure that each region will have a taste and understanding of governance at the national level.

D. FINDINGS AND OBSERVATIONS

222. The Commission finds that the calls for the relocation of the capital from Accra are not new and have been made even prior to the coming into force of this Constitution. In the early 1990s, there were media reports that the government had approved plans for the relocation of the capital from Accra to Dodowa. However, the Commission is unable to ascertain what became of any such plans.[1543]

223. The Commission also finds that the bases for deciding to relocate capital cities are diverse. Some countries choose new capitals that are more easily defended in a time of invasion or war. Some new capitals are planned and built in previously undeveloped areas to spur development. New capitals are sometimes located in regions deemed neutral to competing ethnic or religious groups as the location could promote unity, security, and prosperity.

224. The Commission finds from an analysis of countries that have relocated their capital cities shows that the decision was not arrived at lightly and was often based on painstaking research and wide consultations.

[1542] FRANCIS BENNION, BENNION'S CONSTITUTIONAL LAW OF GHANA 199 (London, Butterworths African Law Series, 1962).
[1543] MODERN GHANA, http://www.modernghana.com/news/271153/1/dodowa-the-capital-city-of-ghana.html, (last visited October 8, 2011).

225. The Commission further observes that in some countries, the name and location of their capital have been in their Constitution to give it some legal protection and permanence. The 1999 Federal Constitution of Nigeria gives constitutional backing to Abuja as the Capital of the Federation and seat of the Government of the Federation and also vests all lands in Abuja in the Government of the Federation.

226. The Commission also finds that the current rapid and unplanned development in the capital has the potential for chaos and needs to be addressed and arrested as a matter of urgency.

227. The Commission observes some examples of countries that have been able to successfully relocate their capitals.

    a. Brazil's capital relocation from the very overcrowded Rio de Janeiro to the planned, built city of Brasilia occurred in 1961. This capital change had been considered for decades. Rio de Janeiro was thought to be too far from many parts of this large country. To encourage the development of the interior of Brazil, Brasilia was built from 1956-1960. Upon its establishment as Brazil's capital, Brasilia experienced very rapid growth. Brazil's capital change was considered very successful, and many countries have been inspired by Brazil's capital relocation achievement.[1544]
    b. Nigeria on the other hand designated Abuja as its Federal Capital in the 1970s to signify neutrality and national unity. Another situation which added impetus for the move to Abuja was the population boom of Lagos that made that city overcrowded and conditions squalid.
    c. Similarly in 1983, Yamoussoukro became the capital of Cote d'Ivoire. This new capital was to spur development in the central region of Cote d'Ivoire. However, many government offices and foreign missions remain in the former capital Abidjan which is now styled as the commercial capital of Cote d'Ivoire.

228. The Commission, however, observes that in certain cases plans to relocate national Capitals have either not been very successful or have led to the creation of economic capitals as distinct from political capitals.

    a. As far back as 1990, the Diet, Japan's Parliament, passed a resolution to investigate moving Japan's capital city out of Tokyo. The idea for moving the capital in Japan was first proposed and discussed when Tokyo hosted the 1964 Olympic Games. The Diet wanted to move the capital out of Tokyo to alleviate

[1544] The President of Brazil at the time, Juscelino Kubitschek, who ordered the construction of Brasília was said to be fulfilling an article of the country's Constitution dating back to 1891 stating that the capital should be moved from Rio de Janeiro to a place close to the centre of the country.

the "excessive concentration" of political and economic functions in the world's largest megalopolis of 33 million people. In addition, the possible breakdown of government functions in the event of a major earthquake striking Tokyo further led the Diet to legislate the move. To date the relocation has not taken place although there is a fresh impetus to relocate the capital from Tokyo after the 2011 earthquake and tsunami that hit the country.

b. In the case of the Republic of Benin although Porto Novo is the official capital, Cotonou which is the largest city and which used to be the capital City, remains the economic capital and houses many governmental agencies.
c. Tanzania began moves to move its capital from the coastal city of Dar-es Salaam to centrally located Dodoma. Since 1996, the official capital of Tanzania has been Dodoma, where Parliament and some government offices are located, but even after many decades, the move is not complete. Today, Dar-es Salaam remains the principal commercial city of Tanzania and the *de facto* seat of most government institutions. Between independence and 1996, the main coastal city of Dar-es Salaam served as the country's political capital.
d. The Commission observes that in South Africa Cape Town is the legislative capital or seat of Parliament, Bloemfontein is the judicial capital and Pretoria is the administrative capital or the seat of the President and Cabinet. Johannesburg holds the position as the commercial centre. These cities are spread round the country therefore there is no concentration of activities in any one part of the country.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

229. The Commission recommends that the government considers the proposal for change of the capital seriously, in order to separate, at the very least, the political capital from the economic capital.

230. The Commission recommends that the issue of whether or not the capital should be relocated be left to administrative action and not constitutional design.

ISSUE NINE: THE INDEMNITY CLAUSES

A. DIMENSIONS OF THE ISSUE

231. The matters for consideration by the Commission on the question of the Indemnity Clauses in the Constitution centred on the following:

a. Whether or not it is legally possible to tamper with the indemnity clauses in any way.
b. Whether or not the indemnity clauses should be retained or repealed.
c. Whether there should be a review of the clauses to make it possible for people to seek remedy in situations which were clearly illegal and could not have been in furtherance of the administration of any military regime.

B. CURRENT STATE OF THE LAW ON THE ISSUE

232. The Constitution provides that the Transitional Provisions "shall have effect notwithstanding anything to the contrary in the Constitution."[1545] This ordinarily means that where the Transitional Provisions conflict with a provision in the Constitution, the Transitional Provisions shall prevail over that provision. The Transitional Provisions in the Constitution provides for Indemnity Clauses.[1546]

233. The combined effect of the readings of the relevant sections on the Indemnity Clauses show that no legal action can be brought against a member of a military regime for an act, be it actual or purported, or omission done during the pendency of that administration. Also, property seized under the authority of the Armed Forces Revolutionary Council (AFRC) and the Provisional National Defence Council (PNDC) may not be returned to the original owners. The property may only revert to their owners when the Commission on Human Rights and Administrative Justice (CHRAJ) is satisfied that it had been lawfully acquired by the petitioner before the petitioner assumed a public or political office.

234. The Transitional Provisions also debar Parliament from amending portions of the Transitional Provisions.[1547]

C. SUBMISSIONS RECEIVED

235. The Commission received submissions on the indemnity clauses in almost every district and region that was visited. The issue of the indemnity clauses was also a subject of comment from persons who made submissions at all other levels of the consultations held by the Commission.

236. The Commission received more submissions in favour of the retention of the clauses than their repeal. There were, however some submissions which neither called for the retention nor repeal of the clauses but for a review of the clauses to vest the courts with jurisdiction to determine some matters which require remedial intervention.

[1545] Article 299 of the 1992 Constitution of the Republic of Ghana.
[1546] Sections 34, 35, 37 of the Transitional Provisions of the 1992 Constitution of the Republic of Ghana.
[1547] Section 37 of the Transitional Provisions of the 1992 Constitution of the Republic of Ghana.

237. In support of the retention of the indemnity clauses, the Commission received the following submissions.
    a. Some submissions stated that the National Reconciliation Commission (NRC) had provided the avenue for persons aggrieved by any action during military regimes to vent their feelings and receive some form of compensation. They argued that to repeal the Indemnity Clauses therefore will make the whole NRC, its processes, and outcomes useless.
    b. Other submissions focused on the possible aftermath of the repeal. Many of the submissions thought that a repeal of the clauses will lead to chaos and possibly, civil war. According to these submissions the indemnity clauses are a sensitive matter and its repeal may spark new coups in the country. They further argued that the indemnity clauses were inserted to provide some stability for the nation and thus their repeal may destabilise the nation and disrupt the peace and unity of the nation.
    c. Some submissions asked that the nation should move forward and let sleeping dogs lie. Proponents of this view feared that the repeal of the clauses will open old wounds and affect the growth of democracy. They suggested that the coups d'état should be treated as part of the past and of nation building. It was stressed that what the nation needs is peace and development. These submissions also added that the nation should learn to forgive.
    d. Other submissions indicated that the coups d'état were considered as justified in their historical context, therefore, the indemnity clauses should be maintained. They argued that the provisions were necessary to secure the current democratic governance and that their repeal might affect the democratic order in the country. It was further argued that military takeovers cannot be considered necessarily bad as they sought to correct social injustice during a particular time in the nation's development. The proponents of this position also argued that the nation has reaped the benefits of the coups, and it will be wrong for people to be held responsible for their excesses.
    e. Some submissions argued that attempting and succeeding to repeal the clauses will antagonise a section of the citizenry and will lead to the outbreak of endless retaliations which will bring about unnecessary political squabbles

238. In support of the repeal of the indemnity clauses, the following reasons were advanced:
    a. That repeal will pave the way for persons who committed crimes during the military regimes to be brought to book and tried for their offences and atrocities.
    b. That the indemnity clauses should be repealed because they are unconstitutional in nature and are a contravention of the provisions of Article 2 of the Constitution.
    c. That removing the clauses will signal to the citizenry that the Constitution does not and will not countenance impunity, but will call to account all those in charge of state power.

d. That the indemnity clauses should be repealed because Ghanaians did not approve of their introduction and that they were smuggled into the Constitution at the last moment.
e. That the indemnity clauses are obnoxious and undermine the principles enshrined in the Preamble and fly in the face of probity and accountability.
f. That the National Reconciliation Commission, which is being cited as having addressed the grievances of persons affected by actions of military governments, was a fact finding commission and did not address the validity or otherwise of the clauses, so they should be removed.
g. That the repeal will allow people wronged during the regimes to seek redress from the courts.
h. That the indemnity clauses should be removed from the Constitution since they serve no useful purpose.
i. Repeal will send a clear signal to future coup makers that they will not be spared.
j. That the clauses constitute a barrier to democracy.

239. The Commission also received submissions which called for the review of the Indemnity clauses. For proponents of this position the Constitution should make it possible for actions which were not approved by the military regimes but which appear protected by the indemnity clauses to be subject to review by the courts.

D. FINDINGS AND OBSERVATIONS

240. The Commission observes that the principle underlying the indemnity clauses in the 1992 Constitution is neither new nor unusual.[1548]
    a. The 1969 and 1979 Constitutions contained similar provisions. Section 3 of the First Schedule of the 1969 Constitution and Sections 15 and 16 of the First Schedule to the 1979 Constitution indemnified the persons responsible for bringing about the changes in government on 4 June 1979 (the first Rawlings coup), on thirteenth of January 1972 (the Acheampong coup) and on twenty-fourth February 1966 (the Kotoka coup).
    b. Sub-sections 2 to 4 of Section 15 of the First Schedule to the 1979 Constitution declared that no executive, legislative or judicial action taken or purported to have been taken by the Armed Forces Revolutionary Council or in the name of that Council shall be questioned in any proceedings whatsoever, even if the action was not taken in accordance with any procedure prescribed by law, including acts or omissions done in contravention of any law, whether substantive or procedural.
    c. In all cases the relevant provisions on indemnities were entrenched by the respective Constitutions.

[1548] Section 34 of the Transitional Provisions of the 1992 Constitution of the Republic of Ghana.

241. The Commission finds in essence that, the indemnities under the 1992 Constitution are not different from those under the 1979 Constitution. However, unlike the indemnities in the previous Constitutions, there are transitional provisions in the 1992 Constitution which seek to perpetuate the effects of acts of the unconstitutional regimes of 1979 and 1981-1992, some of which may have been unlawful and could be considered as abuses and violations of human rights. In this regard it is relevant to note that the transitional provisions of the 1969 Constitution, in their turn, granted certain facilities and favours ("terminal awards") to the persons responsible for the 1966 coup.

242. The Commission observes that, it may be true that granting indemnities to persons who disrupt the constitutional process by force is not conducive to the promotion of democracy and constitutional governance, but it is accepted, however reluctantly, that granting some indemnity may sometimes be necessary to enable a country to regain the benefit of democratic constitutional government.

243. The Commission finds that indemnities can sometimes serve as an effective means for societies to come to terms with their painful past and bring about healing and reconciliation. Indemnities have been used in some countries, such as in South Africa, Germany and Argentina and Liberia to deal with the aftermath of unconstitutional or repressive regimes. For example, post-apartheid South Africa found it helpful to adopt a form of transitional justice system that concentrated more on redress for victims of human rights abuses than on punishment of perpetrators of the abuses. Their Truth and Conciliation Act sought to provide a "bridge" between the past of a deeply divided society and a future founded on democracy and peaceful co-existence. It was based on the need for understanding rather than vengeance, for reparation and not retaliation or victimization. Amnesty was granted for political offences committed in past conflicts and victims were afforded the opportunity to recount the violations they suffered and, in some cases, to obtain reparation, rehabilitation and restoration of dignity.

244. The Commission observes that although there were hardly any prosecutions of persons responsible for grave violations of legality and abuses under the apartheid system, South Africa came out of the ordeal. Though as a country it has its challenges, it is a much better society than it would have been if it had sought retribution and punishment for those guilty of serious acts of violence and lawlessness.

245. The Commission further observes that indemnity provisions which are sometimes also called amnesty provisions or immunity provisions exist also in constitutions in other jurisdictions.
    a. In Chile an immunity clause was introduced in March 2000 through a constitutional amendment giving all ex-presidents immunity from prosecution and guaranteeing them a financial allowance.

b. In November, 2007, President General Pervez Musharraf Government amended the Constitution of Pakistan through an executive order called the "Constitution (Amendment) Order 2007." The Order which was promulgated under the Provisional Constitution Order (PCO), in essence, takes away the powers of judicial review by superior courts of all actions taken under the PCO and was to provide "constitutional cover" to all actions taken during the period of emergency.[1549]
c. In Sierra Leone on March 14, 1996, the National Provisional Ruling Council led by Brigadier Julius Maada Bio promulgated the Indemnity and Transition Decree (No. 6) of 1996 to among other things "grant immunity to members of the Armed Forces of the Republic of Sierra Leone, the National Provisional Ruling Council and appointees of the National Provisional Ruling Council…"[1550] Section 2 and 3 of the Decree provides civil and criminal immunity to "acts in respect of change in Government" and "acts done during Government of the NPRC" respectively.

246. The Commission finds that whatever may be the merits or demerits of the indemnities in the 1992 Constitution, it is not advisable or helpful to seek to remove them at this stage. The 1992 Constitution has helped to maintain peace and nurture democracy in Ghana for almost twenty years. No benefit will accrue to the country or to its democratic potential from a reopening of an issue that was put to rest a long time ago. On the contrary, an attempt to upset the existing arrangement is likely to create problems which the country can well do without.

247. The Commission observes that repealing the indemnity provisions in the 1992 Constitution requires amendment of provisions which are deeply entrenched. There is some doubt whether it will be possible to achieve this legally and bring such amendments into force. Also the successful adoption of such amendments would require a measure of consensus that does not appear to be achievable in the country at this time.

248. The Commission also finds that there would be serious difficulties in mounting successful prosecutions against persons concerned after such a long interval. Some of the persons involved, as well as witnesses whose testimony would be vital for any prosecutions, have long passed away. Further, the removal of the indemnities could adversely affect the democratic dispensation because it would give the negative impression that the country is reneging on a settlement that it has previously accepted. This could seriously undermine stability in the country.

249. The Commission observes that in one of the earliest academic critiques of the Transitional Provisions in the 1992 Constitution, the writer called for the establishment of a Permanent

[1549] Sub-article 1 of the Article 270AAA of the Executive Order.
[1550] This Decree was subsequently amended on March 27, 1996 by the Indemnity and Transition (Amendment) Decree (No. 10) of 1996.

National Reconciliation Commission. This Commission was expected to help the nation find ways of working out a scheme in which the desire for punishment does not prevail over the need for national reconciliation and the yearning for harmony does not shelter illegitimate acts of impunity.[1551] This recommendation was seen in the establishment of a National Reconciliation Commission after almost a decade.

250. The Commission observes that with regard to the transitional provisions of the 1992 Constitution which seek to perpetuate the injustices and illegalities of the military regimes, it is important to recall that the National Reconciliation Commission (NRC) was set up with the objective first to establish an accurate and complete record of human rights violations and abuses under unconstitutional governments and to make recommendations on appropriate measures to be taken to make reparations or take measures to assuage the pain suffered by the victims of the violations and abuses, including recommendations on how to prevent the re-occurrence of such violations and abuses. The NRC provided a mechanism for making reparations to many of the persons who were found to have been victims of gross violations or abuses of human rights under various military administrations.

251. The Commission finds that instead of attempting the difficult (perhaps impossible) task of removing the indemnities and the transitional provisions which established them, consideration might rather be given to the possibility of revisiting the work of the National Conciliation Commission, with a view to ascertaining whether further measures are needed to provide additional reparations or to assuage grievances and, if so, what measures may conveniently and legally be taken.

252. The Commission observes that the Indemnity provisions were absent in the Committee of Experts' Proposals for a Draft Constitution of Ghana, presented to the PNDC on 31 July, 1991. In Chapter 18 of the Report, it was stated that the subject of Transitional Provisions was broached, but it was not discussed due to time constraints. The Report only stated that the Committee hoped to submit proposals on the matter to the Consultative Assembly. The Committee of Experts after presenting its Report in fulfilment of its mandate ceased to exist. Therefore, it did not submit any such proposals on the Transitional Provisions in general and the Indemnity Clauses in particular, to the Consultative Assembly or to any other Authority.

253. The Commission finds that the evidence points to the fact that the Indemnity Clauses, especially section 34 of the Transitional Provisions, were not fully debated by the

[1551] C. E. K Kumado, *Forgive Us Our Trespasses: An Examination of the Indemnity Clause in the 1992 Constitution of the Republic of Ghana*, 19 UGLJ 83-101 (1993-95).

Consultative Assembly. They were discussed by the PNDC Legal Team led by Justice D.F. Annan and the Speaker of the Consultative Assembly, Pe Rowland Ayagitan II and some of the Chairpersons of the Standing Committees of the Consultative Assembly. Upon reaching an agreement on the final formulation of the Indemnity Clauses, they were inserted into the Transitional Provisions.[1552]

254. The Commission observes, however, that during the consultative assembly proceeding there were some discussions on the formulation of transitional provisions.[1553] It was stressed that all the previous Transitional Provisions had been arrived at in consultation with the Governments at the time in power. The Committee felt that it was very essential that discussions be held with the PNDC Government.[1554] Subsequently, the Committee on State Policy met and it was apprised of the thinking of the Government. The Committee discussed the 1979 Transitional Provisions and then decided to base its recommendations for the Transitional Provisions on the 1979 Transitional Provisions. It also made a major request for amnesty for all political prisoners, convicts and refugees. The Report of the Committee was submitted to the Legal and Drafting Committee. The draft was discussed by the various subject-matter Committees.[1555]

255. The Chairman of one of the Subject-Matter Committees that considered the draft, stated that, "On the question of the amnesty and related matters, … it was discussed and it was generally felt that the PNDC should be left to take the initiative on the implementation of these things. It should go from us in a form of recommendations but should not form part of this Constitution."[1556]

256. The Commission also observes that the Chairman of the Committee on Powers of Government at the Consultative Assembly[1557] stated that the Committee recommended the inclusion of an amnesty clause for reasons such as reconciliation, enhancement of the image of the PNDC itself, and people taking advantage of the provision of amnesty. Finally, it was stated that the inclusion would impress the international community.[1558]

257. The Commission further observes that the conclusions of the National Constitution Review Conference overwhelmingly supported the continued retention of the indemnity clauses. The

[1552] NANA ATO DADZIE & KWAMENA AHWOI, JUSTICE DANIEL FRANCIS ANNAN IN THE SERVICE OF DEMOCRACY 84 (Sub-Saharan Publishers, 2010).
[1553] There is indication in the Official Report of the Proceedings of the Consultative Assembly (Thursday, March 26, 1992, Col. 3827) that, the Committee on State Policy was "charged with the task of formulating or making recommendations on the Transitional Provisions for the Constitution …"
[1554] Mr. C. Stanley-Pierre stated, "I am using the words discussions intentionally" Official Report of the Proceedings of the Consultative Assembly (Thursday, March 26, 1992, Col. 3827).
[1555] Official Report of the Proceedings of the Consultative Assembly (Thursday, March 26, 1992, Col. 3827).
[1556] At [Col. 3831 of the Official Report], Mr. Yaw Osafo-Maafo Chairman of the Rights of the People
[1557] Dr. I.K. Chinebuah, Chairman of the Committee on the Powers of Government.
[1558] Official Report of the Proceedings of the Consultative Assembly (Thursday, March 26, 1992, Col. 3832).

session which considered this issue reasoned among others that: it will be legally expensive and time consuming to attempt to review or repeal the provisions; a repeal has the great potential for chaos both in the foreseeable and unforeseeable future; repeling the indemnity provisions might lead to the possibility of the entire Constitution being brought into question; and the negotiation of an agreement for the return to constitutional rule was no fluke and repealing the Indemnity Clauses would have grave consequences for the whole nation and the stability of our young democracy.

258. The Commission further observes that at the NCRC, the question of whether or not it was legally possible to tamper with the Indemnity Clauses was discussed but a consensus was not arrived at. A section of participants held the view that a combined reading of the provisions on indemnity makes it legally impossible to amend the indemnity clauses. However, other participants reasoned that since sovereignty was vested in the people of Ghana, it would be legally and morally reprehensible to suggest that Ghanaians cannot change any aspect of the Constitution. Persons supporting this view admit that although amending the Indemnity Clauses is difficult, it will still be possible through the amendment of Article 299 and Chapter 25.

259. The Commission further observes that members of Parliament in their report on the 44 indicative set of issues for the consultative process also supported the retention of the indemnity clauses on the grounds that enough reconciliation had already taken place.[1559] The report also stated that nothing should be done to open up old wounds and create chaos.

260. The Commission reiterates its acceptance of the cardinal principle that any national progress would have to be based on the general principle of equality before the law and the rejection of impunity. However, this has to be balanced with the need to keep a peaceful, united and homogenous nation.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

261. The Commission recommends the retention of the indemnity clauses.

RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

262. The Commission recommends that the recommendations of the National Reconciliation Commission be assessed for fuller implementation.

[1559] Report of the Special Committee on the Review of the 1992 Constitution, adopted 30th March, 2011. (on file with the Constitution Review Commission).

ISSUE TEN: THE CONDUCT OF GHANA'S INTERNATIONAL RELATIONS

A. DIMENSIONS OF THE ISSUE

263. The main dimension of this issue is how a review of the Constitution should reflect and affect the way and manner Ghana pursues its international objectives, in particular, the ratification of treaties. Another dimension of the issue is how to reflect the ideals of the African Union (AU) and the Economic Community of West African States (ECOWAS) in the Constitution.

B. CURRENT STATE OF THE LAW ON THE ISSUE

264. The Constitution requires Government to conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana.[1560] It also provides that the President is vested with the power to represent Ghana abroad and also to receive envoys accredited to Ghana.[1561]

265. The Constitution enjoins the Government in its dealings with other nations, among other things, to promote and protect the interests of Ghana and to adhere to the principles of all international organisations of which Ghana is member.[1562]

266. The government is also mandated in its dealing with other nations to adhere to the principles enshrined in or as the case may be, the aims and ideals of the Charter of the Organization of African Unity. The Organization of African Unity has since been replaced by the African Union since 2002. The Constitution further mandates the government in its dealing with other nations to adhere to the principles enshrined in or as the case may be, the aims and ideals of the Treaty of the Economic Community of West African States.[1563]

267. The President is also given the powers to execute treaties, agreements or conventions in the name of Ghana. However, these treaties are subject to ratification by an "Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all members of Parliament.[1564]

268. The Constitution also requires Parliament to approve international business or economic transactions to which the government is party.[1565]

[1560] Article 73 of the 1992 Constitution of the Republic of Ghana.
[1561] Article 74 of the 1992 Constitution of the Republic of Ghana.
[1562] Article 40 of the 1992 Constitution of the Republic of Ghana.
[1563] Article 40 of the 1992 Constitution of the Republic of Ghana.
[1564] Article 75 of the 1992 Constitution of the Republic of Ghana.
[1565] Article 181(5) of the 1992 Constitution of the Republic of Ghana.

C. SUBMISSIONS RECEIVED

269. On the issue of the ratification and status of treaties in Ghana, the Commission received submissions which called for the review of the provisions to ensure that the scope of the treaties subject to ratification is clarified. The submissions were informed by the fact that since the Fourth Republic, some governments have brought some agreements to Parliament for ratification while other agreements have not been subject to ratification. While several international agreements had been entered into by government without parliamentary approval, there were even some local contracts with international organisations which had been given parliamentary approval.

270. It was also submitted that Article 40(d) (ii) should be reviewed to read the "Constitutive Act of the African Union." Other submissions on the African Union called for a provision in the constitution that would compel government to join all African governments in advocating African unity under one strong government. The submissions stated that this was the only way successive governments and the citizenry would be reminded to work towards the achievement of African unity.

271. The Constitution should be re-aligned to be compatible with the ECOWAS framework, enhance regional integration including having a common currency for the ECOWAS sub-region.

272. The country should put in strict controls to check the activities of itinerant herdsmen who enter the country and cause mayhem and destruction to farms and farming communities, within a broader framework of checking immigration from ECOWAS countries.

D. FINDINGS AND OBSERVATIONS

273. The Commission observes that since the inception of the nation Ghana, the function of executing treaties has been vested in the executive arm of government and this has found expression in all the Constitutions of Ghana to date. The ratification of these treaties, however, is the function of Parliament.

274. The Commission observes that the situation of distinguishing between the execution and the ratification of treatise is evidenced in several other jurisdictions. However, in other jurisdictions, the requirement of ratification of an executed treaty is absent.

275. The Commission observes that legislative ratification of treaties is not unique to Ghana.

a. In the United States, participation by the Senate or Congress in the process is constitutionally mandated.[1566]
b. In the United Kingdom, the Crown alone retains the right to make and ratify treaties. But the crown cannot legislate directly, and parliamentary approval is required before a treaty can become part of English law.[1567]
c. In Germany, the law declares that treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of Federal law, of the bodies competent in any specific case for such Federal legislation.[1568]
d. The Commission notes also that in South Africa the negotiating and signing of all international agreements is the responsibility of the national executive. However, an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive.[1569]

276. The Commission observes that under the 1960 Republican Constitution, Parliament was conferred with the power to approve the surrender of Ghana's sovereignty in furtherance of African Unity. This provision has, however, not been repeated in any of the subsequent Constitutions.

277. The Commission also observes that at the time of the writing of the 1992 Constitution the continental regional integration body was the Organization of African Unity and that since 2002 that body has been succeeded by the African Union. The provisions of the Constitution on that issue may thus be revised to accord with the current reality.

278. The Commission finds that at the heart of most of the submissions raised on the ECOWAS, was the need to ensure that the protocols of the body were working in the best interest of the country. Many of the submissions viewed the current protocols on the free movement of people in ECOWAS as the reason for the influx of itinerant herdsmen from other jurisdiction into the country to cause mayhem. In particular the concerns dwelt on the protocols on the movement of trans-humans which regulates the movement of nomadic herdsmen within West Africa. The protocol spells out rules and regulations about where they should pass with the cattle, where there should be boreholes for their water and where there should be veterinary outposts to treat them.

[1566] U.S. CONST. article VI and article XI §2.
[1567] *Blackburn* v. *Attorney-General* [1971] 2 All ER 1380
[1568] Article 91(a) of the 1949 Basic Law (Constitution) of the Federal Republic of Germany.
[1569] Section 231 of the 1996 Constitution of the Republic of South Africa.

279. The Commission also observes that the Constitution does not interpret the term "international business transaction", although conceivably, they may cover business or economic transaction or agreements concluded by the Government with a foreign government, a foreign company, a firm or transnational corporation or an international institution or an agency of a foreign government. The Constitution does not appear to exempt any such transaction from the ratification process.[1570]

280. The Commission is of the opinion that the current provisions on the execution and ratification of treaties in the Constitution are adequate and should only be reviewed to clarify the nature and character of the agreements which require parliamentary ratification.

281. The Commission observes inasmuch as the issue of an integrated Africa remains an ideal that Africans desire, a constitutional provision to compel government to cede the nation's sovereignty for an African Union government is unwise. It would be desirable for the final decision to be part of an African Union government to be subjected to approval at a referendum.

282. The Commission acknowledges the importance of regional integration and the strides being made by ECOWAS. However, the issue of the free movement of foreign itinerant herdsmen and its attendant problems should be of concern to all, since it remains a security issue to many Ghanaians. It would, therefore, be appropriate to review domestic legislation to address the growing phenomenon.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

283. The Commission recommends that the Constitution be amended by the substitution of "the Constitutive Act of the African Union" for "the Charter of the Organization of African Unity."[1571]

RECOMMENDATION FOR LEGISLATIVE CHANGES

284. The Commission recommends that a law be passed to clearly define the categories of treaties and agreement that need to be ratified by an Act of Parliament, by a resolution of Parliament and by delegation of the power of ratification by Parliament.

285. The Commission recommends that the law on immigration be reviewed to address the growing phenomenon of itinerant herdsmen.

[1570] Article 181 of the 1992 Constitution of the Republic of Ghana.
[1571] Article 40(d)(ii) of the 1992 Constitution of the Republic of Ghana.

RECOMMENDATIONS FOR ADMINISTRATIVE CHANGES

286. The Commission recommends that a decision to join an African Union government should be subjected to a referendum.

ISSUE ELEVEN: DECLARATION OF WAR

A. DIMENSIONS OF THE ISSUE

287. Although the Commission received only a single submission on this issue, the Commission considers it worthwhile to address and make recommendations on the issue. This is because there appears to be a lacuna in the nation's jurisprudence regarding the issue of Declaration of War.

B. CURRENT STATE OF THE LAW ON THE ISSUE

288. Currently, there is no legislation dealing directly with how Ghana may declare war. The Constitution, however, makes the President the Commander-in-chief of the Armed Forces of Ghana.[1572] The President acting on the advice of the Council of State may declare the existence of a state of emergency in Ghana or any part of Ghana.[1573] This declaration is subject to parliamentary approval within 72 hours.[1574] The Constitution further provides the circumstances under which a state of emergency may be declared which include the occurrence of natural disasters.[1575]

289. Additionally, the Constitution provides that a state of emergency will cease to have effect after 7 days unless before expiration it is approved by the majority of Parliamentarians.[1576] When approved a state of emergency continues in force for a maximum of 3 months unless extended one month at a time or revoked by Parliament.[1577]

290. The Constitution also provides that actions taken in furtherance of a state of emergency shall not be held to be as inconsistent with the human rights provisions if those acts are reasonably justifiable for the purpose of dealing with the emergency situation.[1578] However, there are detailed provisions on how persons detained during the pendency of a state of emergency should be treated.[1579]

[1572] Article 57(1) of the 1992 Constitution of the Republic of Ghana.
[1573] Article 31(1) of the 1992 Constitution of the Republic of Ghana.
[1574] Article 31(2) and (3) of the 1992 Constitution of the Republic of Ghana.
[1575] Article 31(9) of the 1992 Constitution of the Republic of Ghana.
[1576] Article 31(4) of the 1992 Constitution of the Republic of Ghana.
[1577] Article 31(5)(6)(7) of the 1992 Constitution of the Republic of Ghana.
[1578] Article 31(10) of the 1992 Constitution of the Republic of Ghana.
[1579] Article 32 of the 1992 Constitution of the Republic of Ghana.

291. Parliament is provided with residual powers by the Constitution to enact legislation where there is no provision express or by necessary implication which deals with any matter or issue in the country.[1580]

C. SUBMISSIONS RECEIVED

292. The Commission received one submission on the issue of the declaration of war. The submission called for the active involvement of the representatives of the people in the decision to declare war. The proponent of this issue argued that the decision to declare war meant that the State will have to commit financial and human resources which would have long term effects on the citizenry. There was therefore the need to institute a process that involves the representatives of the people before such a decision is taken.

D. FINDINGS AND OBSERVATIONS

293. The Commission finds that the fact of declaring war is usually a formal act by which one nation goes to war against another. The declaration may be in the form of speech or the signing of a document by an authorised authority of a national government in order to create a state of war between two or more states.

294. The Commission further finds that there is a distinction between the commitment of troops to any operation such as a peace-keeping mission and the declaration of war which involves the entirety of a nation.

295. The Commission notes that developments in international law since 1945, notably the Charter of the United Nations, including its prohibition on the threat or use of force in international relations, may well have made the declaration of war redundant as a formal international legal process. However, the Commission takes the position that the supreme law of the country should have provisions to govern the declaration of war and the commitment of the nation's armed forces to war.

296. The Commission observes that though there is no explicit constitutional provision on the declaration of war, the power that vests in the President as Commander-in-Chief of the Ghana Armed Forces[1581] who, as such, reserves the authority to declare and commit troops to war, is a product of the crystallization of conventions of international influence, notable among which are the First Hague Conference in 1899 and the Second Hague Conference in 1907.

[1580] Article 298 of the 1992 Constitution of the Republic of Ghana.
[1581] Article 57(1) of the 1992 Constitution of the Republic of Ghana; Section 8(1) of the Armed Forces Act, 1962 (Act 105).

297. The Commission also observes that none of the Constitutions predating the 1992 Constitution have had clear provisions on the declaration of war.
    a. Under the 1960 Constitution, the President was vested with the power to order any of the divisions of the armed forces, to engage in operations for the defence of Ghana and for any other purpose that the President, as the Commander-in-Chief, finds to be expedient.[1582]
    b. In the 1969 Constitution the powers of the President as Commander-in-Chief were curtailed with the introduction of the Armed Forces Council to advise the President on matters relating to the armed forces.[1583] The President under the 1979 Constitution was Commander-in-Chief of the Armed Forces and also had an Armed Forces Council to advise him on matters relating to the Armed Forces of Ghana.[1584]

298. The Commission observes that the legality of who is competent to declare war varies from jurisdiction to jurisdiction. In some nations, power is given to the Head of State or Sovereign; in other cases, this power is vested in the Legislature.
    a. In the United States, Congress, which makes the rules for the military, has the power under the constitution to "declare war."[1585] However, neither the U.S. Constitution nor any law stipulates what format a declaration of war must take. The last time Congress passed a bill with the title "Declaration of War" was in 1942, when the U.S. declared war on Romania. Since then, the U.S. has used the term "authorization to use military force" as in the case against Iraq in 2003.
    b. In the United Kingdom, only the Monarch has the power to declare war under the Royal Prerogative.[1586]
    c. In France, it is provided in the Constitution that a declaration of war must be authorised by Parliament. It also requires government to inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of the intervention.[1587]
    d. The Constitution of the Republic of South Africa provides that a state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to restore peace and order.[1588] To this extent, the Parliament passed the South Africa State of Emergency

[1582] Article 54(1) of the 1960 Constitution of the Republic of Ghana.
[1583] Chapter 15 of the 1969 Constitution of the Republic of Ghana.
[1584] Chapter 16 of the 1979 Constitution of the Republic of Ghana.
[1585] U.S. CONST. art 1§8.
[1586] The Governance of Britain: War powers and treaties: limiting Executive powers. Presented to Parliament by the Secretary of State for Justice and Lord Chancellor by Command of Her Majesty, October 2007.
[1587] Article 35 of the 1958 Constitution of the Republic of France.
[1588] Section 37 of the 1996 Constitution of the Republic of South Africa.

Act.[1589] The Act provided that the President might, by proclamation in the *Gazette*, declare a state of emergency in the Republic or in any area within the Republic.

E. RECOMMENDATIONS

RECOMMENDATIONS FOR CONSTITUTIONAL CHANGE

299. The Commission recommends that a provision be included in the Constitution requiring a two-thirds majority of Members of Parliament to validate a declaration of war by the President.

[1589] South Africa State of Emergency Act No. 64 of 1997.

CHAPTER FIFTEEN-THE WAY FORWARD

15.1 SUBMISSION OF THE FINAL RESEARCH REPORT AND RECOMMENDATIONS

1. The Commission will present the final research report and recommendations of the Commission to His Excellency the President in December 2011. This will allow for government to:
    a. Prepare for the impending referendum of the people on the entrenched provisions of the Constitution and begin developing Constitution amendment bills for both the entrenched and non-entrenched provisions of the Constitution;
    b. Start developing legislative proposals for the urgent legislative changes recommended by the Commission; and
    c. Begin to implement the urgent administrative actions recommended by the Commission.

15.2. IMPLEMENTATION OF THE RECOMMENDATIONS

15.2.1 TECHNICAL COMMITTEE TO ASSIST WITH IMPLEMENTING THE RECOMMENDATIONS

2. The commission recommends to government to establish a Technical Committee to assist government implement the recommendations of the Commission.

15.2.2 FORESEEABLE CHALLENGES AND PROPOSALS FOR REMEDIATION

3. The Commission foresees that the Presidential and Parliamentary elections of 2012 would be a challenge to the implementation process. Government officials would spend significant time preparing for the campaign and campaigning for re-election. The electioneering process would also shift national focus from the broader governance issues implicated in the recommendations. It will be difficult, for example, to garner the support of the media for non-election related agendas. It is also unlikely that the EC would be able to manage both presidential and parliamentary elections, plus a referendum in the same calendar year.

4. The Commission reiterates its recommendation for government to establish a non partisan Technical Committee to assist with the implementation process.

5. The Commission recommends that the referendum of the people be held in 2013, after the 2012 elections.

6. The Commission finally recommends that the urgent recommendations for legislative and administrative changes be initiated in the 2012 calendar year.

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PART VI

APPENDICES

APPENDIX 1: CONSTITUTION REVIEW COMMISSION OF INQUIRY, 2010 (C.1.64)

C. I. 64

CONSTITUTION REVIEW COMMISSION OF INQUIRY INSTRUMENT, 2010

WHEREAS the President is satisfied that it is in the public interest that there should be appointed a Commission of Inquiry into the operation of the 1992 Constitution.

NOW THEREFORE in exercise of the powers conferred on the President by paragraph *(a)*, clause (1) of article 278 of the Constitution, this Instrument is made this 8th day of January, 2010.

Appointment of Commission

1. There is hereby appointed by this Instrument, a Commission of Inquiry.

Membership of the Commission

2. The members of the Commission are

(a) Prof. Albert K. Fiadjoe, Professor (Emeritus) of Public Law, Chairperson,

(b) Osabarima Kwesi Attah II, Paramount Chief of Cape Coast,

(c) Naa Iddirisu Abu, Kumbun Naa, Paramount Chief of Kumbungu,

(d) Mr. Akenten Appiah-Menka, Lawyer and Industralist,

(e) Mrs. Sabina Ofori-Boateng, Consultant to the Legislative Drafting Unit, Office of Parliament,

(f) Very Reverend Prof. Samuel K. Adjepong, President, Methodist University College Ghana; Chairperson, African Peer Review Mechanism Governing Council,

(g) Dr. Nicholas Amponsah, Senior Lecturer, Department of Political Science, University of Ghana,

(h) Mr. Gabriel Pwamang, Legal Practitioner, and

(i) Mrs. Jean Mensa, Executive Director, Institute of Economic Affairs (IEA).

Terms of reference

3. The terms of reference of the Commission are

(a) to ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution;

(b) to articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and

(c) to make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

Secretariat of the Commission

4. (1) There shall be established a Secretariat of the Commission to be headed by an Executive Secretary.

(2) The Executive Secretary shall be appointed by the President and shall perform the functions that the Commission may direct.

Mode of operation of Commission

5. (1) The Commission shall carry out its inquiry in accordance with this Instrument and Chapter twenty-three of the Constitution.

(2) The Commission may co-opt the services of persons that it considers fit for the proper performance of the functions of the Commission.

Public officers to assist the Commission

6. (1) The President may assign public officers to assist with the functions of the Commission on the recommendation of the Commission.

(2) The President shall cause to be assigned to the Commission police officers who the Commission considers necessary for the proper performance of the functions of the Commission.

Engagement of consultants

7. The Commission may engage consultants to advise it as it considers necessary for the performance of its functions.

JOHN EVANS ATTA MILLS
President of the Republic of Ghana

Date of *Gazette* notification: 11th January, 2010.

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APPENDIX 2: COMMISSIONS OF INQUIRY (PRACTICE AND PROCEDURE) RULES, 2010

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COMMISSIONS OF INQUIRY (PRACTICE AND PROCEDURE) RULES, 2010

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COMMISSIONS OF INQUIRY (PRACTICE AND PROCEDURE) RULES, 2010

IN EXERCISE of the powers conferred on the Rules of Court Committee by clause (2) of article 281 of the Constitution, these Rules are hereby made this 12th day of November, 2009.

Administration

Powers of a Commission

1. (1) A Commission of Inquiry pursuant to clause (2) of article 280 of the Constitution, has the powers of the High Court specified in article 279 of the Constitution

(2) A Commission, for the purposes of an inquiry,

(a) shall have access to information and records which relate to the performance of the functions of the Commission;

(b) may visit an establishment or a place in order to conduct an inquiry;

(c) may question a person in respect of a subject matter under inquiry by the Commission;

(d) may require a person to disclose truthfully information within that person's knowledge relevant to a subject matter under inquiry by the Commission;

(e) may require a person to produce a document or an article in whatever form which, in the opinion of the members of the Commission, relates to an inquiry under these Rules and which is in the possession or control of that person.

(3) A Commission shall have the powers of the police for the purposes of entry, search, seizure and removal of a document or an article relevant to the inquiry by the Commission.

(4) A Commission or a person authorized by the Commission may,

(a) with a search warrant or with the consent of the occupier of the premises enter, search, seize and remove a document or an article, or

(b) where consent has not been forthcoming and in the opinion of the members of the Commission obtaining a search warrant will defeat the purpose of the entry, seizure and removal of a document or an article relevant to the inquiry, enter, search,

take possession of and remove the document or article without a search warrant.

(5) A document, an article or an information obtained by the inquiry shall not be made public unless authorized by the Commission.

(6) For the purposes of the conduct of the proceedings, a Commission has the power

(a) to require a person to disclose truthfully, an information within the knowledge of that person and which is relevant to the proceedings;

(b) to examine a witness on oath or affirmation and to administer the oath or affirmation;

(c) to issue subpoena requiring the attendance of a person before the Commission and require the production of an article, a document or any other record relevant to the proceedings;

(d) to cause a person who refuses to comply with an order or a directive of the Commission or acts in a manner contemptuous of the Commission to be charged by the Attorney-General with contempt of court and for that person to be tried by the High Court; and

(e) to require a person to fill a form providing the information required by, and within the period specified in, the form.

Independence of the Commission

2. (1) A Commission is, in the performance of its functions, independent and is not subject to the direction or control of a person or an authority.

(2) The members and staff of the Commission

(a) shall serve impartially and independently, and

(b) shall perform the functions of office in good faith and without fear, favour, bias or prejudice.

Meetings of the Commission

3. (1) A Commission shall meet at the times and at the places the chairman considers necessary.

(2) The chairman shall preside at the meetings of the Commission.

(3) Where a Commission consists of more than three members,

(a) the members shall elect one of their number to preside at the meeting of the Commission in the absence of the chairman,

(b) the quorum at a meeting of the Commission shall not be less than three members, where there are five members, nor less than two-thirds of all of the members of the Commission in any other case,

(c) a decision of the Commission shall, as far as possible, be taken by consensus or in the absence of a consensus, by a majority of the members, but where there is a tie in the votes the chairman shall have a casting vote.

(4) Where a member of the Commission discovers during a meeting or the proceedings of the Commission that the member has or may have a financial or personal interest in the matter before the Commission which is likely to cause a conflict of interest for that member,

(a) the member shall make a full disclosure in writing of the nature of the interest and shall not be present during the discussion of, or participate in a decision on, the matter; and

(b) the disclosure shall be entered in the record of the proceedings.

(5) A member who does not comply with subrule (4) ceases to be a member of the Commission.

(6) Where a person ceases to be a member under subrule (5) the chairman shall inform the President of the vacancy that has occurred.

(7) The failure to disclose interest as required by subrule (4) shall not affect the validity of the meeting nor of the proceedings of the Commission.

(8) Where a member fails to disclose interest as required by subrule (4), the other members of the Commission may review a decision taken at the meeting or during the proceedings at which the defaulting member was present.

Committees of the Commission

4. (1) A Commission may appoint committees, consisting of persons who are or are not members of the Commission, to perform a function of the Commission assigned to the committee by the Commission.

(2) A member of the Commission shall be chairman of a committee of the Commission.

COMMISSIONS OF INQUIRY
(PRACTICE AND PROCEDURE) RULES, 2010

Appointment of staff

5. (1) The President shall appoint for a Commission

(a) a lawyer of not less than ten years standing at the Bar to act as the legal adviser to the Commission, and

(b) any other staff necessary to provide administrative support and assistance to the Commission.

(2) The lawyer and the other staff

(a) shall hold office on the terms and conditions specified in their letters of appointment, and

(b) shall perform the functions determined by the members of the Commission.

Public and Private Hearings

6. (1) The proceedings of a Commission shall be held in public, but the Commission may for a good reason have private hearings.

(2) A person may apply to the Commission to have a hearing involving that person to be held in private and the application itself shall be heard in private by the Commission.

(3) The Commission shall, in its proceedings both in private and in public, permit the presence of

(a) a person whose conduct is the subject of the inquiry, and

(b) any other persons whose presence the members of the Commission consider necessary.

(4) Except where the Commission, for a good reason, directs otherwise, in proceedings held in private, the Commission shall direct that,

(a) information from the proceedings shall not be made public,

(b) a person shall not disclose the identity of a witness in the proceedings, and

(c) the records of the proceedings shall be kept in the manner that will protect the identity of a witness.

Collection of Statements

7. (1) On the appointment of a Commission, the chairman

(a) may establish an investigation unit to which the Commission shall assign the investigative functions of the Commission, and

(b) may issue a statement inviting the public to submit memoranda.

(2) A memorandum to be submitted under subrule (1) shall contain

(a) information in respect of the matters which relate to the subject matter of the inquiry,

(b) a list of the documentary evidence to support the information provided under paragraph *(a)*,

(c) certified true copies of the relevant documents, and

(d) an affidavit in support of the matters referred to in paragraph *(a)*,

(3) An investigation unit established under subrule (1) shall gather information from persons who may wish to appear before the Commission.

Proceedings

Notice of hearing

8. (1) The lawyer for the Commission shall,

(a) within three weeks of the appointment of the Commission, or

(b) at any time during the proceedings of the Commission,

as is appropriate, serve a notice to appear before the Commission and give evidence to a person

(c) whose conduct is the subject of the inquiry, or

(d) who has an interest, personal or otherwise, in the inquiry, or

(e) who the members of the Commission consider should appear before the Commission to give evidence.

(2) The notice shall

(a) include a statement of the reasons for the invitation and the questions which the person invited is likely to be required to answer;

(b) indicate clearly the place where and the time at which or period within which that person is required to attend the inquiry;

(c) state, in accordance with article 282 of the Constitution, the right of that person

(i) to be represented by a lawyer of that person's choice, and

(ii) to be assisted by an expert as is reasonably necessary for the purpose of protecting that person's interest;

(d) inform the person invited of the requirement to submit

(i) a statement of that person's case,

(ii) the records and documents which that person intends to rely on, and
(iii) the names, addresses and any other particulars of witnesses, who that person intends to call to support that person's case, and

(e) require the person invited to state the name, address and any other particulars of that person's lawyer to enable future communication to be sent to that lawyer.

(3) For the purposes of these Rules, the notice is duly served if

(a) it is sent by fax, or electronic mail, or any other electronic device, or
(b) it is delivered by hand, or
(c) it is sent by registered mail through the post, to the last known address or place of residence of the person required to be served, or
(d) it is published in a medium of mass communication which has national coverage or circulation, or
(e) in any other manner that the Commission may direct.

Response to notice

9. (1) A person on whom a notice of inquiry is served shall, within two weeks after the service, submit to the Commission a response to the notice.

(2) Where, before or at any stage of the hearing it appears to the members of the Commission that a notice is defective, the Commission shall give directions for the amendment of the notice.

(3) Where the notice is amended, the person invited to the inquiry

(a) shall be served with the amendment, and
(b) shall be given eight days within which to respond to the amendment.

Statement of the Chairman

10. The chairman of a Commission shall, before the formal taking of evidence, address the public, explaining the purposes of the Commission.

Address by lawyer for the Commission

11. The lawyer for the Commission shall, after the statement of the chairman, address the Commission outlining the evidence which would be placed before the Commission.

Procedure for examining witness

12. (1) The lawyer for the Commission is responsible for

(a) calling a witness for the introduction of the statement made to the Commission by the witness as evidence before the Commission,

(b) the cross-examination of the witness on the statement made to the Commission as given on oath by the witness, and

(c) the re-examination of the witness after the cross-examination of the witness by any other lawyer appearing before the Commission.

(2) A lawyer or an expert witness appearing for a person whose conduct is the subject of the inquiry and any other lawyer appearing before the Commission may cross-examine a witness after the cross-examination of the witness by the lawyer for the Commission having regard to article 282 of the Constitution.

(3) The chairman or any other member of the Commission may examine a witness after the lawyers have cross-examined and re-examined the witness.

Privilege of witness and indemnity

13. A witness appearing before a Commission is entitled to the same privileges to which a witness before the High Court is entitled.

Compellable witness, admission of incriminating evidence

14. (1) Subject to subrule (2), in proceedings before a Commission, a person called as a non-target witness or as an expert witness shall be compelled to produce a document or an article and to answer a question with regard to the subject matter of the inquiry although the document, article or answer may incriminate that person.

(2) Where a person gives incriminatory evidence under subrule (1), the evidence shall not be used in criminal or civil proceedings against that person.

Production of official documents

15. Article 135 of the Constitution, which relates to the production of official documents in a Court, shall apply to proceedings before a Commission as it applies to proceedings before a Court.

COMMISSIONS OF INQUIRY
(PRACTICE AND PROCEDURE) RULES, 2010

Miscellaneous

Representation by lawyer at proceedings

16. (1) A person who has been subpoenaed or called to appear before the Commission at a hearing of the Commission may be represented by a lawyer.

(2) The Commission may, in order to expedite proceedings, place reasonable limitations with regard to the time allowed in respect of the cross-examination of a witness or an address to the Commission.

(3) The Commission may appoint a lawyer to act on behalf of a person appearing before it where

(a) in the opinion of the members of the Commission that person is not financially capable of appointing a lawyer, and

(b) the members are of the opinion that it is in the interest of justice for that person to be represented by a lawyer.

(4) A person referred to in subrule (1) shall be informed of the right to be represented by a lawyer of that person's choice.

Disclosure of identity of applicants and witnesses

17. (1) Subject to rule 6, a Commission shall, with due regard to the purposes of these Rules and the object and functions of the Commission, decide whether, and to what extent, the identity of a person who makes an application under these Rules or gives evidence at the hearing of the application or at any other inquiry or investigation under these Rules may be disclosed in a report of the Commission.

(2) A person who believes that the personal safety of that person may be jeopardized by a disclosure made under these Rules in the course of an inquiry by a Commission, may request the Commission to take the measures that the members of the Commission consider adequate for the protection of that person.

Confidentiality

18. (1) A member of a Commission and a member of the staff of the Commission shall, with regard to

(a) a matter dealt with by the Commission or that member of staff, or

(b) information which comes to the Commission's or member of staff's knowledge in the performance of the functions of the Commission or of the member of staff,

preserve and assist in the preservation of those matters which are confidential in terms of these Rules or which have been declared confidential by the Commission.

(2) A person holding an office or an appointment under the Commission who is likely to have access to confidential information of the Commission shall, before proceeding to perform a function under these Rules, take or subscribe to the Oath of Secrecy set out in the Second Schedule to the Constitution.

(3) A Commission shall determine the category of persons to whom subrule (2) is applicable.

(4) A member of a Commission shall not, except

(a) for the purposes of the performance of functions,

(b) when required by a Court to do so, or

(c) under an enactment,

disclose to a person an information acquired by the member by reason of being a member of the Commission.

(5) Subject to subrule (4) and to rule 17, a person shall not disclose or make known information which is confidential by virtue of a provision of these Rules.

(6) A person who is not authorized by the Commission does not have a right of access to information that is confidential by virtue of these Rules.

(7) Subject to the Public Records and Archives Administration Act, 1997 (Act 535), the Commission shall, on the conclusion of the performance of its functions, give directions as to the treatment, storage, safekeeping and disposal of the information, material, record or document collected, gathered or used by the Commission in the course of the performance of its functions.

(8) A member of a Commission shall not

(a) through association, statement, conduct or in any other manner jeopardize the independence or damage the credibility, impartiality or integrity of the Commission,

(b) make use of or profit from a confidential information gained as a result of the membership of the Commission, or

(c) divulge information relating to the functions of the Commission to any other person except in the course of the performance of the functions of the member.

(9) A member of a Commission who contravenes any of the provisions of subrule (8) commits an offence and is liable on summary conviction to a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding two years or to both the fine and the imprisonment.

Completion of report

19. (1) A Commission shall, within sixty days of the conclusion of the performance of its functions submit its report to the President to be dealt with in accordance with clauses (3) to (6) of article 280 of the Constitution.

(2) The report shall comprise the findings and recommendations of the Commission and shall, among others,

(a) provide proper documentation and establish the nature and causes of the matters which form the subject matter of the inquiry, including

(i) the witnesses called before the Commission, and

(ii) the findings, the recommendations and the reasons for the findings and the recommendations, and

(b) provide an accurate historical record of matters inquired into by the Commission.

Application of Rules

20. (1) A Commission may deviate from the application of a provision of these Rules where, in the opinion of the members of the Commission, strict adherence to the provision is not compatible with, or is not essential to, the performance of the functions of the Commission.

(2) Subject to these Rules, the High Court (Civil Procedure) Rules, 2004 (C.I. 47) shall apply to the proceedings of a Commission with the modifications that are necessary for the effective performance of the functions of the Commission.

(3) The modifications may be in writing or verbal as determined by the chairman.

COMMISSIONS OF INQUIRY
(PRACTICE AND PROCEDURE) RULES, 2010

Interpretation

21. In these Rules, unless the context otherwise requires,

"chairman" includes a sole Commissioner appointed under clause (2) of article 278 of the Constitution;

"Commission" means a Commission appointed under clause (1) of article 278 of the Constitution;

"Court" means a court of competent jurisdiction;

"document" includes a record made or stored in physical or electronic form and written, electronic, audiotape, videotape, digital reproductions, photography, maps, graphs, microfiche and any other data or information recorded or shared by means of any other device;

"expert witness" means a court expert within the meaning of Order 26 of the High Court (Civil Procedure) Rules, 2004 (C.I. 41);

"functions" includes powers and duties;

"inquiry" includes an investigation;

"meetings" includes the proceedings of a Commission;

"non-target witness" means a person whose conduct is not the subject of an inquiry by a Commission, but

(a) who is implicated, concerned or in any other manner affected in a matter before a Commission, or

(b) who has possession of a document or an article or knowledge material to the functions of the Commission,

"target witness" means a person

(a) whose act, conduct or omission is the subject of the inquiry by the Commission, and

(b) who has possession of a document or an article or knowledge material to the functions of the Commission,

"officer" means a member of the Police Service not below the rank of inspector;

"search warrant" includes an order in writing issued by a Justice of the Superior Court of Judicature, a Judge of a Circuit

Court or a Magistrate

(a) on an affidavit or sworn oral testimony, and

(b) in the name of the Republic or of the Attorney-General, directed to a police officer or a person specified by the Commission authorizing that officer or that person to search for and seize any property or document relating to the subject matter of inquiry by the Commission.

"witness" includes an expert witness, a non-target witness and a target witness.

COMMISSIONS OF INQUIRY
(PRACTICE AND PROCEDURE) RULES, 2010

(Signed)
Hon. Mrs. Georgina Wood
Chief Justice
Chairperson

(Signed)
Hon. Mrs. Betty Mould-Iddrisu
Attorney-General and Minister for Justice
Member

(Signed)
Hon. Mr. Justice William Atuguba
Justice of the Supreme Court
Member

(Signed)
Hon. Mr. Justice J. B. Akamba
Justice of the Supreme Court
Member

(Signed)
Hon. Mr. Justice Senyo Dzamefe
Justice of the High Court
Member

(Signed)
Brigadier-General T. Allotey
Judge Advocate General
Member

(Signed)
D. R. K. Sankah Esq.
Editor, Ghana Law Reports
Member

(Signed)
Mr. Vincent Kizito Beyuo
Representative, Ghana Bar Association
Member

(Signed)
Ms. Esine Okudzeto
Representative, Ghana Bar Association
Secretary/Member

APPENDIX 3: DETAILED ACKNOWLEDGEMENT LIST

1. THE PRESIDENCY AND OTHER STATE INSTITUTIONS

INSTITUTION	NAME	DESIGNATION
The Presidency	His Excellency Professor John Evans Atta-Mills	President of the Republic of Ghana
	His Excellency John Dramani Mahama	Vice President of the Republic of Ghana
	Mr. Henry Martey Newman	Chief of Staff
	Lt. Colonel Lawrence Attachie	Office of the President
	H.E. Ken Kanda	Former Director of State Protocol
	Mr. Kwame Tenkorang-Asamoah	Director of State Protocol
	Mr. Enoch Osei-Mensah	Principal Protocol Officer
The Judiciary	Her Ladyship Mrs. Georgina Theodora Wood	Chief Justice
	Justices of the Superior Courts	Supreme Court, Court of Appeal and High Court Justices.
	Judges and Magistrates of the Lower Courts	Circuit Judges and District Magistrates
The Legislature	Rt. Honourable Joyce Adelaide Bamford Addo	Speaker of Parliament

	Honourable Edward Doe Adjaho	First Deputy Speaker of Parliament
	Honourable Michael Aaron Ocquaye	Second Deputy Speaker of Parliament
	Honourable Cletus Avoka	Majority Leader in Parliament
	Honourable Osei Kyei Mensah-Bonsu	Minority Leader in Parliameny
	Members of the Constitution Review Committee of Parliament	
	All parliamentarians of Ghana	Members of Parliament
Ministry of Justice and Attorney Generals' Department	Hon. Mrs. Betty Mould Iddrisu	Former Minister for Justice and Attorney General
	Hon. Mr. Martin Amidu	Minister for Justice and Attorney General
	Hon. Ebo Barton Odro	Deputy Minister for Justice and Deputy Attorney General.
	Mr. Ahmed Suleiman	Chief Director, Ministry of Justice
Ministry of Finance and Economic Planning	Mr. A. A. Addo	Principal Budget Officer (Budget Division)
	Mr. Kwadwo Awua Peasah	Chief Economics Officer
	Mrs. Angela Heymann	Senior Legal Counsel
	Mrs. Eva Mends	Head, Budget Development Unit
Ministry of Foreign	Hon. Alhaji Mohammed	Minister of Foreign Affairs and

Affairs and Regional Integration	Mumuni	Regional Integration
	Mrs. Martha Pobee	Director, Public Affairs
	Mr. Sammy Eddico	Director of Protocol
	Ms. Barbara Addo	Ministry of Foreign Affairs
Other Key Personalities	H.E. Flt. Lt. Jerry John Rawlings	Former President of Ghana
	H.E. John Agyekum Kufuor	Former President of Ghana
	H.E. Aliu Mahama	Former Vice President of Ghana
	Rt. Hon. Ebenezer Begyina Sekyi-Hughes	Former Speaker of Parliament
	H. L. Justice N.Y.B Adade	Former Ag. Chief Justice
	H. L. Justice F.Y. Kpegah	Former Ag. Chief Justice
	Hon. Nana Addo Dankwa Akuffo-Addo	Flagbearer of the New Patriotic Party for the 2008 Elections
	Hon. Dr. Papa Kwesi Nduom	Flagbearer of the Convention Peoples Party for the 2008 Elections
	Dr. Edward Nasigri Mahama	Flagbearer of the Peoples' National

		Convention for the 2008 Elections

2. **DONORS/SPONSORS**

INSTITUTION /BRIEF DESCRIPTION OF SUPPORT	NAME	DESIGNATION
United Nations Development Programme (UNDP) Coordinated all major donor support for the project and provided funding support to the project.	Ms. Ruby Sandhu-Rojon	Resident Representative
	Dr. K. K. Kamaluddeen	Country Director
	Prof. Clever Nyathi	Former Senior Peace & Governance Advisor
	Mr. Lawrence Lachmansinghe	Peace & Governance Advisor
	Mr. Eric Opoku	Former Governance Officer
	Mr. Kevin Deveaux	Parliamentary Development Policy Adviser, Headquarters, New York
	Ms. Hilda Mensah	Program Officer, Access to Justice, Governance Unit
	Mr. Evans Gyampoh	Program Officer, Governance Unit
	Mr. Peter Segbedzi-Pongo	Finance Clerk, Programme and Management Support Unit
	Mr. Magnus Nordanskog	Intern from the European Parliament
European Union	H. E. Mr. Claude Maerten	Head of Delegation

Provided funding support to the Project	Ms. Daria Fané	Head of Good Governance
	Mr. Francesco Torcoli	Programmes Officer
	Mr. Judi Keal Regnaut	Political Affairs Officer
British High Commission Provided funding support to the Project	Mr. Roger Coventry	Criminal Justice Advisor
	Mr. Henry Afrifa	Migration Support Officer
	Ms. Vernelle Trum	Chief Political Officer
	Dennis Amenyitor	Political Specialist
	Ms. Gifty Bingley	Communications Officer
United States Agency for International Development (USAID)	Mr. Emil Stalis	Democracy and Special Project Coordinator
Danish International Development Agency (DANIDA)	Ms. Vibeke Gram Mortensen	Programme Officer – Gender Issues
	Ms. Susan Yemidi	Senior Programme Officer
Canadian High Commission	H.E Trudy Kernighan	High Commissioner
	Mr. Ian Myles	Country Director, CIDA
Embassy of Switzerland	Mr. Martin Saladin	Former Counsellor for Economic Affairs
Peace Nexus Foundation Provided technical	Ms. Anne Gloor	Founder
	Ms. Xenia Dormandy	Executive Director

support for data analysis.		
	Mr. Mark Knight	Research and Analysis Officer
United Nations International Children Education Fund (UNICEF) Provided support for consultations on issues related to children.	Mr. Rene Van Dongen	Deputy Representative
	Ms. Juliana Lindsey	Chief of Advocacy. Communications Monitoring and Analysis
	Ms. Sheema Sengupta	Chief, Child Protection
	Ms. Amy Hobbin	Child Protection Officer (Legal Protection)
The World Bank Supported the Text-In Campaign of the Commission	Mr. Kafu Kofi Tsikata	Senior Communications Specialist
	Mr. Smile Kwawukume	Senior Public Sector Specialist
Australian High Commission	Mr. Peter Fiamor	Political and Economic Researcher
Friedrich Ebert Foundation (FES) Provided Funding Support to Project	Mrs. Daniela Kuzu	Country Director
	Mr. Danaa Nantogmah	Programmes Officer
Embassy of the Republic of Korea in Ghana	Mr. Ho-kwon Ryu	Political Counselor

Embassy of Japan	Mr. Shin-Ichi Honda	First Secretary, Head of Economic Cooperation Unit
Private Sector Support	Ghana Commercial Bank Limited	
	Amansie West Rural Bank	
	Intercom Programming & Manufacturing Co. Ltd (IPMC)	
	Anglogold Ashanti Ghana Limited	
	Stanbic Bank Ghana Limited	
	State Insurance Company Limited (SIC)	
	Bonzali Rural Bank	

3. **THE COMMISSIONERS AND STAFF OF THE COMMISSION**

CATEGORY/RESPONSIBILITY	NAME	DESIGNATION
The Commissioners	Prof. (Emeritus) Albert	Chairman

The team of 9 Commissioners were sworn into office by H.E. the President of the Republic of Ghana This team had the responsibility to execute the mandate of the Commission.	Kodzo Fiadjoe	
	Osabarimba Kwesi Atta II	Member
	Kumbun Naa Yiri II, Naa Alhaji Iddirisu Abu	Member
	Mrs. Sabina Ofori-Boateng	Member
	Dr. Akenten Appiah-Menka	Member
	Very Rev. Professor Samuel Kwasi Adjapong	Member
	Mr. Gabriel Pwamang	Member
	Dr. Nicholas Amponsah	Member
	Mrs. Jean Mensa	Member
The Executive Secretary Had oversight responsibility of the Commission's Secretariat and the day-to-day management of the Commission's Activities. The Executive Secretary also worked as the Principal Researcher of the Commission who lead the research team in collecting, collating and analyzing research data.	Dr. Raymond Akongburo Atuguba	Executive Secretary / Principal Researcher
Secretariat Staff	Mr. Alex Dei	Director of Finance and Administration

Provided support to the Executive Secretary in the management of the Commission's activities including managing events, media outreach, documentation of the Commission's activities, operational and logistical support, information technology, finance, accounting and human resource management as well as monitoring and evaluation.	Mr. Rowland Atta-Kesson	Research Manager
	Ms. Baaba Amoah	Monitoring and Evaluation and Documentation Manager
	Ms. Noreen Norkor Nortey	Consultations and Communications Manager
	Papa Kow Sessah Acquaye	Media and Events Manager
	Mr. Stephen Okity-Duah	Operations Manager
	Mr. Kofi Afrifa Agyen	Accounts Manager (February-July, 2010)
	Mr. Henry Cornelius	Accounts Officer, then Accounts Manager (August 2010 – December 2011)
	Mr. Patrick Kofi Gyebi	IT Manager
	Mr. Daniel Baddoo	Research Associate
	Ms. Joana Serwaa Acheampong	Research Associate
	Mr. Kweku Senanu Adzraku	Research Associate
	Ms. Lorna Bannerman-Mensah	Research Associate
	Ms. Seraphine Kogo	Research Associate (February-September, 2010)
	Ms. Shirley Ewurama Ferguson	Research Associate
	Ms. Phoebe Washington-Nortey	Executive Assistant
	Mr. Darlington Akum	IT Assistant
	Ms. Pamela Gadzekpo	Front Desk Executive

	Mr. Simon Osei	Caretaker
	Mr. Emmanuel Tetteh Wayo	Driver
	Mr. Eric Bright Asare	
	Mr. Liberty Hosoo	
	Mr. Rueben Azaledzi	
Temporary Staff	Mr. Amos Ayisi	Driver
	Mr. Tortoo Sodja	
	Mr. Daniel Tsikata	
	Mr. Asomeni	
	Mr. Felix Gakpleadi	
Interns	Mr. Kwesi Aikins, *Doctoral Student-University Bielefeld, Germany*	Intern/Associate Researcher
	Ms. Lorraine Ocloo, *School of Oriental African Studies (SOAS), United Kingdom*	Intern/Executive Assistant/Research Associate
	Ms. Yaa Ofori-Ansah, *School of Oriental African Studies (SOAS), United Kingdom*	Intern/Executive Assistant
	Ms. Alyse Karen Freed *Arizona State University, United States of America*	Intern
	Ms. Roicia Banks, *Arizona State University, United States of America*	Intern
	Mr. Fowler, Damien, *Arizona State University, United States of America*	Intern

	Mr. Gates, Quinn R., *Arizona State University, United States of America*	Intern
	Mr. Zachary Hudson, *Fordham Law School, United States of America*	Intern

4. **RESEARCH SUPPORT**

CATEGORY/BRIEF DESCRIPTION OF SUPPORT	NAME	DESIGNATION
Research Team Supported the Principal Researcher (i.e. the Executive Secretary) and the Research Manager to collect, collate, code and analyse research data. The team was also responsible for producing all reports of the various levels of consultations and meetings as well as the matrices for the National Constitution Review Conferece and support for the Final Report and Draft Bills of the Commission.	Abdul Baasit Abdul Aziz	Researcher
	Clement Akapame	Researcher
	Eric Delanyo Alifo	Researcher
	Ernest Abotsi	Researcher
	Ernest Owusu Dapaah	Researcher
	Francis Asong Obuajo	Researcher
	Godwin Adagewine	Researcher
	Kwabena Oteng Acheampong	Researcher
	Joseph Mante	Researcher
	Jennifer Owusu	Researcher
	Mawuse Hor Vormawor	Researcher
	Nana Tawiah Okyir	Researcher
	Samuel Fembeti	Researcher
	Albert Agbamey	Associate Researcher
	Christine Buamah-	Associate Researcher

	Aduboffour	
	Godwin Eli Kwadzo Dzah	Associate Researcher
	Kwabena Saforo Kwadade	Associate Researcher
	Sharon Betty Baddoo	Associate Researcher
	Paul Mba Yelzaalem	Associate Researcher
	Emmanuel Abosi	Statistician
	Reginald Ogum Kenney	Statistician
Field/Research Assistants The team of research assistants provided support to the Researchers during the Community and District Consultations, the Follow-Up Community and District Consultations both in the 170 districts across the country. The team also supported with the preparation and holding of the Regional Consultations in all 10 Regions of Ghana as well as support for the National Constitution Review Conference. Their tasks included logistical arrangement for meetings, preparation of	Mr. Roger Dakey	Research Assistant
	Ms. Marian Amoah	Research Assistant
	Mr. Isaac Apeakorang	Research Assistant
	Mr. Seth Addai	Research Assistant
	Mr. Ebenezer Egya Aggrey	Research Assistant
	Ms. Lily Atutiga	Research Assistant
	Mr. Kenneth Atogiba	Research Assistant
	Ms. Eyram Agbemava	Research Assistant
	Mr. Mohammed Nasir Alfa	Research Assistant
	Mr. Kangwongnuo Vitus Gbang	Research Assistant
	Ms. Alberta Tetteh	Research Assistant
	Mr. Jeliu Issahaku Sulemana	Research Assistant
	Mr. Kidisil Augustine	Research Assistant
	Mr. Prince Baah	Research Assistant
	Mr. Abu Saaka	Research Assistant
	Mr. Hassan Tampuli	Research Assistant

daily activity reports and draft consultation meeting reports.	Ms. Belinda Pwamang	Research Assistant
	Mr. Peter Nana Asiedu	Research Assistant
	Mr. Samuel Korley Quaye	Research Assistant
	Ms. Esenam Afua Adzadzi	Research Assistant
	Mr. Stephen Ofori	Research Assistant
	Ms. Diana Anku	Research Assistant
	Mr. Dennis Darko	Research Assistant
	Mr. Faisal Ayariga	Research Assistant
	Ms. Agnes Banieh	Research Assistant
	Ms. Esaa Acolatse	Research Assistant
	Mr. Jude Atuahene	Research Assistant
	Ms. Beatrice Afia Anoff	Research Assistant
	Mr. Nicholas Ampoh	Research Assistant
	Mr. Kofi Adinkrah	Research Assistant
	Mr. Eric Nyarko	Research Assistant
	Ms, Monica Wayoe Anokye	Research Assistant
	Mr. Towrac Nana Otu	Research Assistant
	Ms. Theodocia Quaicoo	Research Assistant
	Ms. Mavis Larbi	Research Assistant
	Ms. Georgina Kusi	Research Assistant
	Mr. Gadzekpo Bernard Edem	Research Assistant
	Mr. Collins Nunyonameh	Research Assistant
	Mr. Boachie Tennisson	Research Assistant
	Mr. Thomas Akogliya	Research Assistant

	Ms. Cynthia Quaynor	Research Assistant
	Ms. Akua Acheampong	Research Assistant
	Ms. Mavis Awuku	Research Assistant
	Mr. Joseph Apaala	Research Assistant
	Mr. Hugh Marcel Potakey	Research Assistant
	Mr. Nicholas Seyram Darbi	Research Assistant
	Mr. Gordon Yakpir Mabengban	Research Assistant
	Ms. Agnes Okyerefo	Research Assistant
	Ms. Lydia Appiah-Kyei	Research Assistant
	Togbui Aposa VI	Research Assistant
	Ms. Adele Acolatse	Research Assistant
	Mr. Godwin Tamakloe	Research Assistant
	Ms. Naomi Dodoo	Research Assistant
	Mr. Michael Tekpetey	Research Assistant
	Ms. Selma Awumbila	Research Assistant
	Ms. Dorcas Taylor	Research Assistant
	Mr. Joojo Nkrumah	Research Assistant
	Ms. Zeinab Ayariga	Research Assistant
	Nana Fredua Agyemang	Research Assistant
	Ms. Emelia Asiedu-taku	Research Assistant
	Mr. Joe Slovo Tia	Research Assistant
	Ms. Janetta Dromi Amewuga	Research Assistant
	Ms. Ramona Abugabe	Research Assistant

	Ms. Dzifa Adadevoh	Research Assistant
	Mr. Justice Srem-Sai	Research Assistant
	Mr. Benedict Morkli	Research Assistant
	Mr. Kizito Akudago	Research Assistant
Text Coders This team supported the In-House research team to code submissions into the NVIVO software system	Ms. Harriet Baffoe	Text Coder
	Mrs. Miriam Kosi	Text Coder
	Mr. Emmanuel Sowatey	Text Coder
Word Processors This team typed out handwritten and hard copy submissions.	Ms. Anastasia Akosua Gyamfi	Word Processor
	Mr. Foster Kwasi Elisa Fia	Word Processor
	Mr. George Asare-Afriyie	Word Processor
	Ms. Selasie Davies	Word Processor
	Ms. Vincentia Tettey	Word Processor

5. CONSULTANTS AND EXPERTS

BRIEF DESCRIPTION OF SUPPORT	NAME	DESIGNATION
Provided specialized support to the Commission as required for the effective execution of its mandate.	Reverend Professor Ofori Amankwah	Consultant, Centre for Public Interest Law
	Prof. V.C.R.A.C. Crabbe	Constitutional Making Expert / Drafting Consultant
	Professor A.N. Mensah	Consultant/Editor
	Ms. Gloria Mintah	Consultant / Reviewer

	Mr. S. O. H Afriyie	Editor
	Mr. Emmanuel Addo Sowatey	National Peace Council, Ghana
	Mrs. Eudora Koranteng	Rapporteur General for the NCRC
	Nana Dr. S. K. B. Asante	Consultant
	Justice Stephen Allan Brobbey	Consultant
	Prof. Kwamena Ahwoi	Consultant
	Dr. S. Y. Bimpong-Buta	Consultant
	Mr. Kofi Bentum Quantson	Consultant
	Prof. E. V. O. Dankwa	Consultant
	Prof. E. Gyimah-Boadi	Consultant
	Mr. Chris Agyei	Consultant
	Dr. Thomas Mensah	Consultant
	Dr. Samuel Adams	Consultant
	Prof. Samuel O. Gyandoh	Consultant
	Nana Kobina Nketsia V	Expert on Culture
	Owula Adote Barima	Expert on Culture
	Dr. Sylvester Ankamah	Expert on Culture
	Professor Emeritus J. H. Nketia	Expert on Culture
	Prophet Isaac Kwadwo Obeng	Expert on Culture
	Professor George Hagan	Expert on Culture

	Captain Robert Tindana	Security Consultant

6. MONITORING AND EVALUATION AND DOCUMENTATION SUPPORT

ORGANISATION/BRIEF DESCRIPTION OF SUPPORT	NAME	DESIGNATION
Preparation of the Emerging Issues for the Community and District Level Consultations Preparation of the Midterm Review for Community and District Level Consultations	Mrs. Christine Dowuona-Hammond	Consultant
	Professor Nii Ashie Kotey	Consultant
	Professor Kofi Quashigah	Consultant
	Ms. Ama Fowa Hammond	Consultant
	Mr. Maxwell Opoku-Agyemang	Consultant
	Dr. Dominic Ayine	Consultant
	Mr. K. Adams	Consultant
	Mr. Augustine Niber	Lead Consultant for Midterm Review of C&D Consultations
	Mr. Kissi Agyebeng	Associate Consultant for Midterm Review of C&D Consultations
	Mr. Samuel O. Manteaw	Associate Consultant for Midterm Review of C&D Consultations
	Mr. Sulemana Anamzoya	Associate Consultant for Midterm Review of C&D Consultations
Supported in the set up of a documentation system for the Commission.	Mr. Emmanuel Darkey	Consultant

Midterm Review of the Project Conducted an independent and comprehensive review of the Commissions work within the first year of its establishment. This included programming, administrative and research activities of the Commission.	Ms. Taaka Awori	Consultant
	Dr. Nicholas Atampugre	Consultant
	Dr. Rose Walls	Consultant

7. INFORMATION TECHNOLOGY (IT) SUPPORT

ORGANISATION/BRIEF DESCRPTION OF SUPPORT	NAME	DESIGNATION
AKK Risk Management Consulting Ltd. Consultancy services on setting up and management of the Commissions' data and IT Security systems.	Dr. Anthony Adam Karim	Chief Executive Officer
Office of the President Support for initial IT Set-up and the CRC website domain and hosting.	Mr. Anthony Felix Baffoe	IT Manager
In-house Consultant Responsible for managing the Commission's internet based applications including the website, facebook, twitter and blogs as well as the text-in campaign.	Mr. Kobby Graham	New Media Consultant

Dwerks Graphix	Mr. Ezekiel Kevin Annang	CEO/Creative Director
ISOFT Ghana Limited	Mr. Fiifi Koomson	
Independent Consultant Web 2.0 Support	Dr. Amos Anyimadu	Consultant
Anti Virus	Xpand Network Systems	
Switches /Routers Etc	Ultra Laser Services	
Computer Accessories	Kwatsons Electricals Limited	
Nvivo Software	QSR International	
Servers	Dealer computer and Office Supplies	
Laptops	Intu IT (Gh) ltd	
Printing suppliers	Imaging Technologies Ghana Limited	
Software Suppliers	Redellan Business	
Laptops	Vinnet-Plus Computers	
Computers	Accu-Computers (Gh) Ltd	
Printing Suppliers	Next Computers	

8. INSTITUTIONS THAT SUPPORTED THE VARIOUS CONSULTATIONS

LEVEL OF CONSULTATION	ORGANISATION/BRIEF DESCRIPTION OF SUPPORT	NAME	DESIGNATION/ROLE
Community and District Consultations/Regional Hearings and Fora.	**Metropolitan, Municipal and District Coordinating Councils.** The officials in the	All 170 Metropolitan, Municipal and District Chief Executives in	Metropolitan, Municipal and District Chief Executives

	coordinating councils were instrumental in the arrangement and holding of consultations in the communities and districts as well as the collection of submissions for onward submission to the Commission. The Commission also received some financial support from some Coordinating Councils.	Ghana.	
		All 170 Metropolitan, Municipal and District Directors of NCCE in Ghana	Metropolitan, Municipal and District Directors
		All District Directors of the Information Service Department	Metropolitan, Municipal and District Directors
		All 170 District Directors of the National Commission on Civic Education	Metropolitan, Municipal and District Directors
	Regional Coordinating Councils Collaborated with the Commission in the holding of the Regional Hearings and Open fora. They also provided oversight support for community and district and follow-up consultations in	Hon. Mark Woyongo	Minister, Upper East Region
		Hon. Alhaji Issahaku Salia	Minister, Upper West Region
		Hon. Moses Mabengba	Minister, Northerm Region
		Hon. Kwadwo Nyamekye-Marfo	Former Minister, Brong Ahafo Region
		Hon. Kofi Opoku-Manu	Minister, Ashanti Region
		Hon. Ama	Minister, Central

	the respective regions.	Benyiwa-Doe	Region
		Hon. Paul Evans Aidoo	Minister, Western Region
		Hon. Nii Armah Ashitey	Minister, Greater Accra Region
		Hon. Samuel Ofosu-Ampofo	Former Minister, Eastern Region
		Hon. Joseph Amenowode	Minister, Volta Region
		All Ten Deputy Ministers	Deputy Ministers, All Ten Regions
		All Ten Regional Coordinating Directors	Regional Directors, All Ten Regions
		All 10 Regional Directors of the National Commission for Civic Education (NCCE)	Regional Directors, All Ten Regions
		All 10 Regional Directors of the Information Services Department	Regional Directors, All Ten Regions

		(ISD)	
	Asanteman Council	Otumfuo Osei Tutu II	Asantehene
	The National and Regional Houses of Chiefs	Naa Professor John S. Nabila	President, National House of Chiefs
		Pe Charles Awampaga	President, Upper East Regional House of Chiefs
		Naa Sohimwininye Danaah Gore II	President, Upper West Regional House of Chiefs
		Yagbon Wura Bawah Abudu Doshie	President, Northern Regional House of Chiefs
		Osahene Kwaku Aterkyi II	President, Brong Ahafo Regional House of Chiefs
		Daasebre Osei Bonsu II	Vice President, Ashanti Regional House of Chiefs
		Daasebre Professor Emeritus Oti Boateng	President, Eastern Regional House of Chiefs
		Awulae Attibrukusu II	President, Western Regional House of Chiefs
		Daasebre Kwebu Ewusi VII	President, Central Regional House of Chiefs
		Togbe Afede	President, Volta

		XIV	Regional House of Chiefs
		Nene Abram Kabu Akuaku III	President, Greater Accra Regional House of Chiefs
		Mr. Rexford Takyi	Registrar, National House of Chiefs
National Mini Consultations	The Convention Peoples' Party		
	The New Patriotic Party		
	The National Democratic Congress		
	Peoples' National Convention		
	Ghana Centre for Democratic Development		
	Institute for Democratic Governance		
	The Institute of Economic Affairs		
	NETRIGHT		
	Youth Network, Ghana (YOUNET)		
	Institute of Local Government Studies		
	Ghana Federation of the Disabled		
	Ghana Journalists Association		

	National Media Commission		
	Commission on Human Rights and Administrative Justice.		
	Electoral Commission.		
	National Commission for Civic Education.		
	Public Services Commission.		
	Trades Union Congress.		
	Ghana Federation of Labour.		
	The Media	Professor Kwame Karikari	Media Foundation for West Africa
		Mr. Bright Kwame Blewu	General Secretary, Ghana Journalists Association
		Mr. Fortune Alimi	Editor, Daily Guide
		Mr. Ransford Tetteh	President, Ghana Journalists Association
	Lands and Natural Resources	Office of the Administrator of Stool Lands	
		The Lands Commission	

		The Minerals Commission	
		The Forestry Commission	
		The Water Resources Commission	
		The Ghana Chamber of Mines	
		Integrated Social Development Centre (ISODEC)	
		Wassa Communities affected by mining (WACAM)	
		Forest Watch Ghana (FWG), a civil society coalition of over 35 NGOs hosted by Civic Response.	
	National Economy	National Development Planning Commisson (NDPC)	

		The Bank of Ghana (BoG)	
		The Statistical Service	
		The Ghana Revenue Authority	
		The Office of the Auditor General	
		The Office of the Controller and Accountant-General	
		Centre for Policy Analysis	
	National Security	National Security Secretariat	
		The Ghana Armed Forces	
		The Ghana Police Service	
		The Ghana Prisons Service	
		The Ghana	

		National Fire Service	
		The Ghana Immigration Service	
		The Narcotics Control Board	
		The National Peace Council.	
	National Commission for Civic Education	The Late Ambassador Larry Bimi	Commissioner
		Mrs. Augustine Akumanyi	Deputy Commissioner
		Mr. Samuel Akuamoah	Director of Public Education
National Constitution Review Conference	**Facilitators** Performed the following roles at the conference: • Guiding the session in a manner that keeps participants attentive and encourage full participation. • Ensuring that participants have clearly understood the issues and are able to contribute openly and	Prof. Ernest Aryeetey	Facilitator
		Dr. Kwesi Jonah	Facilitator
		Dr. Rasheed Draman	Facilitator
		Justice V.C.R.A.C. Crabbe	Facilitator
		Prof. Ken Attafuah	Facilitator
		Dr. S. Y.	Facilitator

	freely. • Coordinating interventions of National and International Consultants and ensure that they are well briefed and are able to follow the allotted time frames. • Encouraging participants to think out of the box and challenge them to inform the positions they take and the conclusions they arrive at with experiential and expert knowledge and evidence. • Assisting each team build consensus on issues and reach closure. • Working with the Rapporteurs to provide a summary of the discussions and conclusions to be presented at plenary.	Bimpong-Buta	
		Prof. Henry Kwesi Prempeh	Facilitator
		Mr. Ernest Owusu Dapaah	Facilitator
		Mr. Ernest Abotsi	Facilitator
		Dr. Callistus Mahama	Facilitator
		Mr. Kwame Gyasi	Facilitator
		Mr. Kwesi Afriyie Badu	Facilitator
		Mr. Emmanuel Asiedu-Mante	Facilitator
		Prof. Philip Ebow Bondzi-Simpson	Facilitator
		Mr. Ben Ephson	Facilitator
		Dr. Vladimir Antwi-Danso	Facilitator
		Mr. Gabby Otchere-Darko	Facilitator
		Prof. Nicholas Nsowah	Facilitator

		Nuamah	
		Mr. Kofi Bentum-Quantson	Facilitator
		Major General Nii Carl Coleman	Facilitator
		D.C.O.P George Anko-Bil (Rtd) -	Facilitator
		Mr. William Kojo Asiedu	Facilitator
		Mr. E. A. Atinga	Facilitator
		Dr. Emmanuel Bombande	Facilitator
		Lt. Col. Emmanuel Kotia	Facilitator
		Prof. William Oduro	Facilitator
		Mr. Kyeretwie Opoku	Facilitator
		Mr. Bishop Akologo	Facilitator
		Mr. Abdulai Darimani	Facilitator
		Mr. A. K.	Facilitator

		Armah	
		Nene Ofoe Amegatcher	Facilitator
		Nana Oye Lithur	Facilitator
		Mr. Nick Halm	Facilitator
		Mrs. Angela Dwamena Aboagye	Facilitator
		Ms. Dorcas Coker Appiah	Facilitator
		Mr. George Sarpong	Facilitator
		Mrs. Hillary Gbedemah	Facilitator
		Ms. Bernice Sam	Facilitator
	National Consultants Brought to bear on the thematic discussions the following: • National experiences, including experiences at the local and national levels: • Practical examples, lessons learnt and better ways of addressing the issues in the Ghanaian	Mr. Sebastian Gavor	National Consultant
		Prof. Ken Attafuah	National Consultant
		Mr. Kwaku Baa Owusu	National Consultant
		Dr. Audrey Gadzekpo	National Consultant
		Dr. Charles Abbey	National Consultant
		Dr. Ferdinand Tay	National Consultant

	context; • Depth and substance in the thematic discussions.	Dr. Emmanuel Akwetey	National Consultant
		Prof. Emmanuel Gyimah Boadi	National Consultant
		Justice J. C. Amonoo-Money	National Consultant
		Mr. Kwame Gyan	National Consultant
		Ms. Anna Bossman	National Consultant
		Prof. Thomas Akabzaa	National Consultant
		Dr. Steve Amissah	National Consultant
		Justice Emile Short	National Consultant
		Mr. S. Y. Seini	National Consultant
		Nana Kobina Nketsia V	National Consultant
		Naa Prof John S. Nabila	National Consultant
		Prof. Irene Odotei	National Consultant
		Prof. George Hagan	National Consultant
		Prof.	National Consultant

		Kwamena Ahwoi	
		Mr. Eric Osae	National Consultant
		Mr. E. B. Lamptey	National Consultant
		Dr. Bashirideen Koray	National Consultant
		Ms. Dzozdi Tsikata	National Consultant
		Prof. Kofi Quashigah	National Consultant
		Nii Osah Mills	National Consultant
		Mr. Kingsley Ofei-Nkansah	National Consultant
		H.E. James Aggrey-Orleans	National Consultant
	International Consultants Brought to bear on the thematic discussions at the conference, the following: • International comparative experiences, including experiences from the African continent and the developing world in general; • Proven Practices from around the world,	Professor Shulamith Koenig	International Consultant
		Mr. Robert Kesten	International Consultant
		Professor Kathleen Modrowski	International Consultant
		Dr. Thomas Aboagye	International Consultant
		Mr. David Ellis	International Consultant

	particularly from the African Continent and developing countries in general; • Ensure depth and substance in the thematic discussions.	Judge Leif Sevon	International Consultant
		Mr. Sam Okudzeto	International Consultant
		Ms. Annie Demirjian	International Consultant
		MP Matteo Mecacci	International Consultant
		Prof. S. Y. Gyandoh	International Consultant
		Mr. Garton Sandifolo Kamchedzera	International Consultant
		Prof. Iong-bo Park	International Consultant
		Mr. Woo Jin Hwang	International Consultant
	Additional Rapporteurs Additional Rapporteurs for the National Conference. This team supported the in-house research team to report on the conference	Mr. David Asumda	Rapporteur
		Ms. Emelia Asiedu-Taku	Rapporteur
		Nii Armah Amarfio Richster	Rapporteur
	Venues for the main and thematic group discussions	Accra International Conference Centre	
		National Theatre of Ghana	

		Office of Parliament	
Diaspora Consultation	**Embassy of Ghana in Washington DC, USA** Support for Consultations in Washington DC	H.E Daniel Ohene Agyekum	Ambassador
		H.E Mrs. Edith Haizel	Deputy Ambassador
		Mrs. Vanessa Mensah Adu	Information and Public Affairs Officer
		Staff of the Embassy	
		Akwaaba Radio	Staff
	Consulate of Ghana in New York DC, USA Support for Consultations in New York	H.E Ken Kanda	Ghana's Permanent Representative to the United Nations in New York
		Mr. William Awindor-Kanyirige,	Deputy Permanent Representative
		Mr. S.R. Yaw Bimpong	Counselor/ Minister
		Mr. M.Y. Amantana	Protocol Officer
		Mr. Eric Agyenim-Boateng	Driver
	Support for consultations in Atlanta Georgia, USA	Mr. Kwasi Aye-Addo	President of the Ghana Council, Atlanta Georgia
		Madam	President of Ghana Women Association,

		Evelyn Davis	Atlanta, Georgia
		Kofi and Janice Panford	Members, Ghana Council
		Mr. George Atta Annan	Secretary of the Ghana Council, Atlanta, Georgia
		Nana Adoma Twum	President of the Ghana Chiefs, Atlanta, Georgia
		Mr. Nat Barimah	Director, Obimanso Radio
		Mr. Kojo Fynn	Presenter, Obimanso Radio
		Rev. Dr. Robert Yaw Owusu	Atlanta, Georgia
	Support for consultations in Chicago Georgia, USA	Mr. Robert Bernett	Honorary Consular General
		Mr. John Henry Assabill	President, Ghana National Council, Chicago
	Embassy of Ghana in Rome, Italy	H. E. Mrs. Anita Stokes Hayford	Ambassador
		Ms. Georgina Adzo Djameh	Deputy Ambassador
		Mr. Charles Baah	Counselor/ Minister

		Mr. Simon Atieku	First Secretary in charge of Political and Economic Affairs
		Mr. Kofi Omari Somuah	President of the Ghanaian community in Vicenza
		Mr. Evans Attoh	Driver
	High Commission of Ghana, Canada Support for Consultations in Canada	H. E. Dr. Richard Turkson	Ghana's High Commissioner to Canada
		Mr. Kwodwo Mawutor	Consular General, Ghana High Commission
		Mr. Kwame Owusu-Banahene	Vice Consul, Ghana High Commission
		Ms. Crescentia Alisah	Ghana High Commission
		Ms. Anna Aidoo	Ghana High Commission
		Mr. K. Obeng-Koranteng	Ghana High Commission
		Nana Doggo	Chief Linguist for Ghana High Commission
		Mr. Clement Tedeku	Ghana High Commission

		Mr. Foster Nuamah	Ghana High Commission
		Nii Kwei-Aku (V)	Chief of Ga-Adangme Association of Toronto
		Rev. Frank O. Adu	Ghanaian Presbyterian Church
		Dr. Martin Lakumi	Okuapeman Association
		Mr. Julius Dogbe	Retired Justice of Peace, Ontario
		Prof. Ato Sekyi-Otu	Emeritus Professor in Political Science, University of York
		Abrantie R. Boakye	CHRY 105.5 FM
		Mr. Kweku Twumasi-Agyei	Leader of Ghanaian Association of Ottawa
		Wofa Yaw Nyarko	President of Ghana Canadian Association of Ontario
	Embassy of Ghana in the Netherlands Support for consultations in the Netherlands	H.E. (Mrs.) Aanaa Ennin	Ambassador
		Mr. E. Odoi-Anim	Deputy Head of Mission
		Ms. Salamatu Yakubu	Head of Chancery
		Mr. George Allotey	Protocol Officer

	Embassy of Ghana in the Germany Support for consultations in the Germany	H. E. Mr. Paul King Aryene	Ambassador
		Mr. Yaw Senalor Yawului	Head of Chancery
	High Commission of Ghana in Kenya Support for consultations in Kenya	H.E. Kingsley Karimu	High Commissioner Embassy of Ghana in Kenya
		Mr. Herbert Addy Nettey	1st Secretary, Embassy of Ghana in Kenya
		Mr. Humphrey Attiapah	Counselor/Minister
		Mr. Kingsley Nettey	Leader of the Ghanaian Community in Kenya
	Embassy of Ghana in Botswana Support for consultations in Botswana	Mr. Opare Kumi	Honorary Consul, Botswana
		Mr. Michael Anane Domfeh	Ghana High Commission, Namibia
		Ms. Julia Acolatse	Ghana High Commission, Namibia
		Mrs. Nancy Duah	Vice President of the Ghanaian Community
		Mr. Daniel Awuah	Member, Ghanaian Community
		Mrs. Opare-Kumi	Member, Ghanaian Community
		Mr. Benito	Member, Ghanaian

		Acolatse	Community
		Mr. Bernard Ameah	Member, Ghanaian Community
	High Commission of Ghana in the Republic of South Africa Support for consultations in South Africa	H. E. Lee Ocran	High Commissioner
		Mr. Abass Ibrahim	Deputy Head of Mission
		Mr. Adotey-Anum	Embassy Staff
		Mr. Amanor Mantey	Embassy Staff
		Mr. Boakye	Embassy Staff
		Mr. Josas Tsebo	Embassy Staff
		Mr. Charles Agyapong	Embassy Staff
		Mr. S.K. Wulinminga	Chairman, Ghanaian Association of Butterworth
		Obaasima Group	Johannesburg
		Mr. Akosah-Bempah	Johannesburg
		Mr. Kwabena Asare	Chairman, Ghanaian Community, Springs
		Alhaji Salifu Abubakari	Chairman, Ghana Muslim Association,

			Johannesburg
	High Commission of Ghana in Nigeria Support for consultations in Nigeria	H.E. (Mrs) Irene Maamah	High Commissioner
		Mr. Eddison Mensah Agbenyegah	Head of Chancery
		Mr. Sylvester Parker-Allotey	Consul-General
		Mr. John Bosco Kpebesani	Counselor/ Minister
		Mr. George Anokye	Protocol Officer
		Mr. Edmund Yaw Obeng	2nd Secretary – Protocol
	Embassy of Ghana in Egypt Support for consultations in Egypt	H. E. Amin Amidu Sulemani	Ambassador
		Mr. Peprah Ampratwum	First Secretary
		Mr. Fred Frimpong	Consular Officer
		Mr. Nabil	Press Attache
		Mr. Mansur Yakubu	President of the Ghanaian community in Egypt
Special Consultation	Liaisons for organising the special consultations with key personalities.	Mr. Roger Ansongwine	Chief of Staff of the Vice President
		Mr. John Jinapor	Office of the Vice President

		Abdulai	
		Ms. Saratu Atta	Office of the 2008 Flagbearer of the NPP
		Mr. Hillary Danquah	Office of the 2008 Flagbearer of the NPP
		Mr. Kofi Adams	Office of Former President J.J Rawlings
		Mr. Frank Agyekum	Office of the Former President John Agyekum Kofour
		Mr. Mohammed Awal	Office of Former Vice President Aliu Mahama
		Mr. Yaw Buabeng Asamoah	Office of Former Vice President Aliu Mahama
		Ms. Edith Akrong	Office of the Speaker of Parliament
		Mr. Ebenezer Djietror	Office of the Clerk of Parliament
		Justice Alex B. Poku-Acheampong	Judicial Secretary

ATTACHMENT

DRAFT BILLS FOR THE AMENDMENT OF THE 1992 CONSTITUTION.

DRAFT BILL FOR THE AMENDMENT OF ENTRENCHED PROVISIONS

ARRANGEMENT OF CLAUSES

Clauses

1. Article 11 of the Constitution amended
2. Article 13 of the Constitution amended
3. Article 14 of the Constitution amended
4. Article 19 of the Constitution amended
5. Article 20 of the Constitution amended
6. Article 21 of the Constitution amended
7. Article 24 of the Constitution amended
8. Article 24A inserted in the Constitution
9. Article 25 of the Constitution amended
10. Article 27 of the Constitution amended
11. Article 28 of the Constitution amended
12. Article 30 of the Constitution amended
13. Article 30A inserted in the Constitution
14. Article 31 of the Constitution amended
15. Article 42 of the Constitution amended
16. Article 43 of the Constitution amended
17. Article 60 of the Constitution amended
18. Article 66 of the Constitution amended
19. Article 68 of the Constitution amended
20. Article 70 of the Constitution amended
21. Article 71 of the Constitution amended
22. Article 72 of the Constitution amended
23. Article 78 of the Constitution amended
24. Article 82 of the Constitution amended
25. Article 83 of the Constitution amended
26. Article 84 of the Constitution amended
27. Article 85 of the Constitution amended
28. Articles 86 and 87 of the Constitution amended
29. Article 89 of the Constitution amended
30. Article 146 of the Constitution amended
31. Article 216 0f the Constitution amended
32. Article 240 of the Constitution amended
33. Article 252 of the Constitution amended
34. Article 286 of the Constitution amended

35. Consequential amendments
36. Transitional Provisions

CONSTITUTION (AMENDMENT) BILL

A

Bill

Entitled

Constitution (Amendment) Act 20xx

An ACT to amend the Constitution of the Republic of Ghana.

Passed by Parliament and assented to by the President:

Article 11 of the Constitution amended

1. Article 11 of the Constitution is amended by the substitution for clause (7) of

"(7) Any Order, Rule or Regulation of a legislative character made by a person or authority under a power or authority conferred by this Constitution or any other law shall,

(a) be submitted to Parliament;
(b) be considered as laid before Parliament on the day it is placed on the Order Paper;
(c) be published in the *Gazette* on the day it is laid; and
(d) not come into force unless it is approved by a simple majority of the votes of the members of Parliament , within 21 sitting days of its being laid."

Article 13 of the Constitution amended

2. Article 13 of the Constitution is amended by the substitution for clause(1) of

"Protection of right to life

13(1) No person shall be deprived of his life intentionally."

Article 14 of the Constitution amended

3. Article 14 of the Constitution is amended in clause (3) by the substitution for "forty-eight hours" of "twenty-four hours".

Article 19 of the Constitution amended

4. Article 19 of the Constitution is amended by the substitution for clause (2) of

"(2) A person charged with a criminal offence shall

(a) in the case of an offence other than high treason or treason, the punishment for which is imprisonment for life, be tried by a judge and jury and the verdict of the jury shall be by such majority as Parliament may by law prescribe."

Article of the Constitution amended

5. Article 20 of the Constitution is amended by the insertion after clause (6) of

"(7) Clause (6) of this article applies to any property compulsorily acquired by the State irrespective of the date of the acquisition."

Article 21 of the Constitution amended

6. Article 21 of the Constitution is amended in clause (4)

(a) by the substitution for paragraph (c) of

"(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public order, public morality, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons"; and

(b) by the substitution for paragraph (e) of

"(e) that is reasonably required for the purpose of safeguarding the people of Ghana against threat to public morality, teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of

Ghana, the national symbols and emblems, or incites hatred against other members of the community;"

Article 24 of the Constitution amended

7. Article 24 of the Constitution is amended by the insertion after clause (4) of

"(5) Every person has the right

(a) to have adequate food;

(b) to housing and to reasonable standard of sanitation;

(c) to clean and safe water in adequate quantities; and

(d) to a clean and healthy environment."

Article 24A inserted in the Constitution

8. The Constitution is amended by the insertion after article 24 of

"Consumer rights

24A. (1) Consumers have the right

(a) to goods and services of reasonable good quality;
(b) to the protection of their health, safety and economic interest;
(c) to the information necessary for them to obtain full benefit from goods and services; and
(d) to compensation for loss or injury arising from defects in goods and services.

(2) Parliament shall enact the necessary legislation to provide for

(a) the implementation of the provisions of clause (1) of this article,

(b) consumer protection, and

(c) fair, honest and decent advertising."

Article 25 of the Constitution amended

9. The Constitution is amended by the insertion at the beginning of clause (1) of article 25 of

"The right to education for every Ghanaian is hereby guaranteed and accordingly ..."

Article 27 of the Constitution amended

10. The Constitution is amended by the substitution for article 27 of

"Gender rights

27(1) Women and men have the right to equal treatment, including the right to equal opportunities in civil, political, economic, cultural and social spheres.

(2) The State shall not directly or indirectly discriminate against women on any ground and shall pursue by appropriate means, a policy of eliminating discrimination against women in all spheres of life.

(3) Special care shall be accorded mothers during a reasonable period before and after childbirth; and for those periods, working mothers shall be given paid leave.

(4) Facilities shall be provided for the care of children below school going age at the work place to facilitate care by parents.

(5) Women shall be guaranteed equal rights to training and promotion without any impediment from any person.

(6) Parliament shall enact an Affirmative Action Act which shall include provisions that,

(a) in all appointments to public offices, no gender shall have less than 30% of the appointments;

(b) ensures advantage for vulnerable groups and minorities;

(c) identifies a public institution or public body to facilitate and monitor the implementation of the provisions of this article, the Affirmative Action Act and other gender equality policies and programmes."

Article 28 of the Constitution amended.

11. Article 28 of the Constitution is amended by the ininsertion after clause (1) (e) of the following:

"(f) the State provides support for children of needy families."

Article 30 of the Constitution amended.

12. The Constitution is amended by the substitution for article 30 of

"**Right to health**

30. (1) Every person has the right to a reasonable standard of health, which includes access to health services and reproductive health care.

(2) A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by another person of medical treatment, education or any other social or economic benefit based on religious or other beliefs."

Article 30A inserted in the Constitution

13. The Constitution is amended by the insertion after article 30 of

"**Rights of the aged**

30A. (1) The State shall as far as practicable take the necessary measures to ensure the right of the aged,

(a) to live in dignity and respect and be free from any form of abuse; and

(b) to receive reasonable care and assistance from the State.

(2) Parliament shall enact such legislation as are necessary to ensure the implementation of clause (1) of this article."

Article 31 of the Constitution amended

14. Article 31 of the Constitution is amended,

(a) in clause (9) by the insertion immediately before "a natural disaster", of "war"; and

(b) by the insertion after clause(9) of

"(9a) The President may with the prior approval of not less than two-thirds of all the members of Parliament declare that a state of war exists between Ghana and another country."

Article 42 of the Constitution amended

15. The Constitution is amended by the substitution for article 42 of

"**Right to vote**

42(1) Subject to clause (2) of this article, every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.

(2) Parliament may by an Act provide for criminal offences the conviction for which a person may be deprived of his right to vote by a competent court for such period as may be provided in the Act."

Article 43 of the Constitution amended

16. Article 43 of the Constitution is amended by the substitution for clause(1) of

"Membership of the Electoral Commission

43. (1) There shall be an Electoral Commission which shall consist of

(a) a Chairman; and

(b) two other members."

Article 60 of the Constitution amended

17. Article 60 of the Constitution is amended

(a) in clause (8), by the repeal of
"is absent from Ghana or";

(b) by the substitution for clause (10) of
"(10) The Vice- President shall within 14 days of assuming office as President under clause (6) of this article nominate, for the approval of Parliament, a person qualified to hold office as Vice-President";

(c) by the insertion after clause (11) of
"(11a) Where the office of the Vice- President becomes vacant by death, resignation or removal of the Vice-President, the President shall,

(a) within 14 days of the death, resignation or removal; and

(b) with the approval of Parliament

appoint a person qualified to hold office as Vice-President; except that such an appointment shall not be made where there is a period of 30 days or less to the holding of a presidential election.;" and

(d) by the insertion after clause (12) of
"(12a) Where a person has taken an oath in a substantive office or in an acting capacity under this article or any other article of this Constitution, the oath shall continue in force until the person ceases to hold that office."

Article 66 of the Constitution amended

18. Article 66 of the Constitution is amended

(a) by the substitution for clause (2) of

"(2) A person shall not be elected to hold office as President of Ghana for more than two terms but where a person has served as President of Ghana for a term of four years or less, that person may after an intervening period stand again for election as President, except that a person shall not serve as President of Ghana for a total period of more than eight years.";

(b) by the insertion after clause(3)(b) of

"(c) if the President having been elected as a member of or on the ticket of a political party,

(i) he leaves that political party; or

(ii) he leaves that political party and joins another political party: or

(d) if the President having stood as an independent candidate and been elected, he joins a political party."; and

(c) by the insertion after clause(4) of

"(5) The provisions of this article shall apply to the Vice-President."

Article 68 of the Constitution amended

19. Article 68 of Constitution is amended by the substitution for clauses (2), (3), (4), (5) and (6) of

"(2) The President on leaving office as President shall not

(a) hold any office of profit or emolument, except with the permission of Parliament, either directly or indirectly; or

(b) be eligible for appointment to any high public office including that of the Speaker, a member of the Council of State or a member of Parliament.

(3) The President shall receive such salary, allowances and facilities as shall be determined by the Independent Emoluments Commission.

(4) On leaving office, the President shall receive pension equivalent to his salary and other end-of-service benefits, allowances and facilities as determined by the Independent Emoluments Commission.

(5) Subject to the other provisions of this Constitution the President shall be liable to pay tax.

(6) Where the President is removed from office under paragraph (c) of clause (1) of article 69 of this Constitution, or he resigns, he shall be entitled to such pension and other retiring awards and facilities as determined by the Independent Emoluments Commission"

Article 70 of the Constitution amended

20. The Constitution is amended by the substitution for article 70 of

"**Appointments by the President**

70.(1) The President shall acting in consultation with the Council of State and with the prior approval of Parliament appoint,

(a) the Chairman and other members of the Electoral Commission;

(b) the Commissioner for Human Rights and Administrative Justice and the Deputies;

(c) the Chairman and members of the Independent Emoluments Commission;

(d) the Auditor-General;

(e) the Administrator and the Deputies of the District Assemblies Common Fund;

(f) the Administrator and the Deputies of the Independent Constitutional Bodies Fund; and

(g) such other appointments as Parliament may provide by an Act.

(2) The President shall in consultation with the Council of State, appoint

(a) the chairmen and the other members of,

(i) the Public Service Commission;

(ii) the National Commission on Civic Education;

(iii) the Lands Commission;

(iv) the governing bodies or councils of public institutions whether corporate or unincorporated;

(b) the Statistician-General; and

(c) the holders of such other public offices as are provided by this Constitution or as may be provided by any other law not inconsistent with this Constitution."

Article 71 of the Constitution amended

21. The Constitution is amended by the substitution for article 71 of

"**Emolument of specified officers**

71.(1) The emoluments payable to

(a) the President, the Vice President;

(b) the Speaker and Deputy Speakers;

(c) the Chief Justice and the other Justices of the Superior Court of Judicature;

(d) the Chairman and other members of the Council of State;

(e) the Ministers, Deputy Ministers and members of Parliament; and

(f) the Administrator of District Assemblies Common Fund and the Deputies

are charged on the Consolidated Fund and shall be determined by the Independent Emoluments Commission.

(2) For the purposes of this article, "emoluments" means salary, allowance, facility, privilege, pension, and end-of-service benefits."

Article 72 of the Constitution amended

22. Article 72 of the Constitution is amended by the substitution for clause (2) of

"(2). Clause (1) shall not apply to conviction for treason, high treason, genocide, murder or armed robbery"

Article 78 of the Constitution amended

23. Article 78 of the Constitution is amended by the substitution for clause (1) of

"78(1). Ministers of State shall be appointed by the President with the approval of Parliament from among members of Parliament and persons qualified to be elected as members of Parliament."

Article 82 of the Constitution amended

24. Article 82 clause (5) of the Constitution is amended by the substitution for "may" of "shall".

Article 83 of the Constitution amended

25. Article 83 of the Constitution is amended

(a) by the substitution for clause (1) of

"The National Security Council

83(1) There shall be a National Security Council which consist of the

(a) President ;
(b) Vice-President ;
(c) Ministers for the time being holding the portfolios of foreign affairs, defence, interior and finance and such other Ministries as the President may determine;
(d) Chief of Defence Staff;
(e) Chief of Army Staff;
(f) Chief of Naval Staff;
(g) Chief of Air force Staff;
(h) Inspector General of Ghana Police Service;
(i) Director-General of the Criminal Investigations Department;
(j) Director-General of the Prisons Services;

(k) Director of External Intelligence ;
(l) Director of Internal Intelligence;
(m) Director of Military Intelligence; and
(n) Commissioner of Customs, Excise and Preventive Service.

(b) by the substitution for clause(6) of

"(6) The National Security Co-ordinator shall be the Secretary to the National Security Council."

Article 84 of the Constitution amended

26. Article 84 of the Constitution is amended by the substituting for paragraph (d) of

"(d) developing for implementation by the security agencies a national security policy framework that addresses,

(i) treason, subversion and terrorism;
(ii) ethnic, chieftaincy and land disputes;
(iii) electoral violence;
(iv) economic crimes including telecommunication fraud;
(v) human trafficking and transnational organized crimes;
(vi) civil disorder;
(vii) epidemics and national emergencies;
(viii) matters of common interest to the departments of the security agencies; and
(ix) any other matters that the National Security Council may determine."

Article 85 of the Constitution amended

27. The Constitution is amended by repealing article 85 and substituting

"**Establishment of security agencies**

85. No agency, establishment or other organization concerned with national security shall be established except as provided for under this Constitution or by an Act of Parliament."

Article 86 and 87 of the Constitution amended

28. The Constitution is amended by repealing articles 86 and 87 and inserting after Chapter 8 the following-

"**CHAPTER 8A**

NATIONAL DEVELOPMENT PLANNING COMMISSION

Establishment of a National Development Planning Commission

86(1) There shall be a National Development Planning Commission comprising

(a) the Minister for Finance;
(b) the Governor, Bank of Ghana;
(c) the Statistician-General;
(d) one Regional Planning Officer from each region;
(e) one representative of each of the major political parties;
(f) two representatives of the National House of Chiefs;
(g) two representatives of the private sector;
(h) two representatives of organized labour;
(i) two representatives of civil society; and
(j) the Director-General of the Commission.

(2) Parliament shall by an Act define a major political party for the purposes of paragraph (e) of clause (1).

(3) Persons for appointment to the Commission under paragraphs (e),(f),(g),(h) and (i) of clause (1) shall,

(a) be nominated by the institutions they represent; and
(b) be persons with knowledge relevant to development.

(4) All the members of the Commission shall be appointed by the President.

(5) The Commission shall elect a Chairman and a Deputy Chairman from among its members other than the ex-officio members.

Objective and Functions of the Commission

86A.(1) The objective of the Commission shall be to-

(a) develop a long-term, comprehensive, strategic multi-year National Development Plan that has in-built medium and short term plans; and

(b) monitor the implementation of the Plan.

(2) The Commission shall,

(a) develop in the Plan, programmes, projects and activities that ensure the even development of all parts of the country;

(b) develop a Plan that covers all areas of national life including development plans on social, economic, housing, environment, infrastructure, agriculture, good governance, tolerance, national orientation and family life;

(c) be gender, youth and disability sensitive in developing the Plan;

(d) make recommendations on the order of priority in the implementation of programmes, projects and activities in the Plan, and

(e) perform other functions provided by Parliament in an Act of Parliament.

(3) The Commission shall in developing the Plan,

(a) have regard to the provisions of the Directive Principles of State Policy, and

(b) undertake broad consultations with the people of Ghana, starting from the grass roots level.

Approval and amendment of the National Development Plan

86B. (1) The Commission shall submit the developed National Development Plan for approval by Parliament before implementation of any part of the Plan.

(2) A resolution for the approval of the Plan shall be supported by the votes of not less than two-thirds of all the members of Parliament.

(3) Parliament may amend the Plan

(a) before approval;

(b) at the request of the Commission after the approval by the votes of not less than two-thirds of all the members of Parliament.

(4) Any proposal for changes to the approved Plan shall be submitted to the Commission which may take such action as it considers appropriate.

(5) The approved Plan and any subsequent amendment to it shall be published in the *Gazette* and such other public medium as the Commission shall determine.

Implementation and monitoring of the Plan

86C. (1) The Plan shall be implemented by public institutions and bodies charged with the responsibility for implementing government policies.

(2) The Commission shall be responsible for setting targets, monitoring and evaluating the implementation of the Plan.

(3) The Commission shall submit annual reports to Parliament on its monitoring and evaluation of the implementation of programmes, activities and projects in the Plan.

Compliance with the Plan

86D. (1) It shall be the responsibility of every Government to ensure the implementation and continuous implementation of the approved Plan by the public institutions and bodies charged with the responsibility for implementing government policies.

(2) Any policy, legislation, administrative action, programme, project, initiative, budget, or other financial disbursement which is inconsistent with the approved Plan shall be unconstitutional.

(3) A citizen of Ghana has the right to take such lawful action as the person considers necessary for the enforcement of the implementation of the Plan, including a request for the institution of a parliamentary inquiry, and recourse to the High Court.

Tenure of members of the Commission

87. (1) The members of the Commission shall be appointed for two terms of 5 years each which may not be held in succession.

(2) Article 146 shall apply to the removal of members of the Commission.

Terms and conditions of members

87A. The members of the Commission shall be paid such allowances as shall be determined by the Independent Emoluments Commission.

Appointment of chief executive

87B. (1) The chief executive of the Commission shall be the Director-General who shall be appointed by the Commission in consultation with the Public Services Commission.

(2) The terms and conditions of service of the Director-General shall be stated in a contract with the Commission and shall, in respect of salary, benefits and allowances, be as determined by the Independent Emoluments Commission.

Appointment of other staff of the Commission

87C. (1) The Commission shall employ officers and other employees acting in consultation with the Public Services Commission.

(2) The salaries and benefits payable to the officers and other employees of the Commission shall be as determined by the Independent Emoluments Commission.

Expenses of the Commission

87D. The expenses of the Commission including salaries, allowances and any other benefits payable to or in respect of the staff and other employees of the Commission shall be paid from the Independent Constitutional Bodies Fund.

Independence of the Commission

87E. Subject to the provisions of this Constitution or any other law not inconsistent with this Constitution, the Commission in the performance of its functions shall not be subject to the direction or control of any person or authority."

Article 89 of the Constitution amended

29. Article 89 of the Constitution is amended,

(a) in clause (2) by the substitution for paragraph (d) of,

"(d) five other members appointed by the President each representing

(i) the Association of Ghanaian Industries;
(ii) the Christian Groups and the Muslim Groups;
(iii) the Academy of Arts and Science;
(iv) the National Peace Council; and
(v) organized labour.";

(b) by inserting after clause (8) of

"(9) Parliament shall by an Act provide in respect of the Council of State its

(a) functions which shall include advice to Parliament, the Judiciary and other national institutions;
(b) funding;
(c) accounting;
(d) annual reports; and
(e) such related matters as Parliament may determine."

Article 146 of the Constitution amended

30. Article 146 of the Constitution is amended

(a) by the substitution for clause (3) of

"(3) If the President receives a petition for the removal of a Justice of a Superior Court other than the Chief Justice, the President shall refer the petition to the Chief Justice, who shall in consultation with the Council of State determine whether there is a *prima facie* case.";

(b) by the substitution for clause (6) of

"(6) Where the petition is for the removal of the Chief Justice, the President shall acting in consultation with the Council of State determine whether there is a *prima facie* case.

(6a) Where the President determine that there is a *prima facie* case, the President shall appoint a committee consisting of two Justices of the Supreme Court, one of whom shall be appointed Chairman by the President, and three other persons who are not members of the Council of State nor members of Parliament nor lawyers."

Article 216 of the Constitution amended

31. Article 216 of the Constitution is amended

(a) by the substitution for paragraph (b) of

"(b) four Deputy Commissioners.";

(b) by the insertion of

"(2) Subject to the overall supervision of the Commissioner, each Deputy Commissioner shall for the purposes of performing the functions of the Commission be assigned responsibility for one of the following –

(a) the protection of rights of children, persons with disability and the aged and monitoring the implementation of those rights;
(b) human rights issues generally;
(c) anti-corruption; and
(d) the other ombudsman functions of the Commission."

Article 240 of the Constitution amended.

32. Article 240 of the Constitution is amended by the substitution for clause (1) of the following:

"**Local Government**

240.(1) Ghana shall have a system of local government and administration which shall, as far as practicable, be decentralized at three levels as follows:

(a) de-concentration at the Regional Coordinating Council;
(b) devolution at the level of the District Assembly; and
(c) delegation at the level of the Sub-District.

(1a) Parliament shall by an Act define in detail the particulars of each level of the decentralization."

Article 252 of the Constitution amended

33. Article 252 of the Constitution is amended by repealing article 252 and inserting after Chapter 20 the following:

"**CHAPTER 20A**

DISTRICT ASSEMBLIES COMMON FUND

Establishment of District Assemblies Common Fund

252.There shall be a fund to be known as the District Assemblies Common Fund.

Object of the Fund

252A. The object of the Fund is to make available to the District Assemblies, financial resources for the development of the districts.

Sources of money for the Fund

252B. (1) The sources of the money for the Fund shall include,

(a) an amount of not less than five percent of the total annual revenue of Ghana allocated by Parliament;

(b) any other money that Parliament may approve; or

(c) grants, donations, gifts or voluntary contributions to the Fund.

(2) The allocation from Parliament under clause (1) (a) shall be paid in quarterly installments.

(3) Nothing in this Chapter or any other law shall prohibit the State or other bodies from making grants-in-aid to any District Assembly.

Appointment of Administrator and Deputy Administrators

252C. There shall be appointed for the management of the Fund,

(a) a District Assemblies Common Fund Administrator; and

(b) two Deputy Administrators

by the President in consultation with the Council of State and with the prior approval of Parliament.

Independence of the Administrators

252D. Except as otherwise provided in this Constitution or in any other law not inconsistent with this Constitution, the Administrators shall not in the performance of their functions, be subject to the direction or control of any person or authority.

Management of the Fund

252E. (1) The moneys that accrue into the Fund shall be distributed among all the District Assemblies on the basis of a formula approved by Parliament.

(2) The formula shall be submitted by the Administrator to Parliament.

(3) Parliament shall by law provide for the functions and the tenure of office of the Administrator and the Deputies in a manner that will ensure the effective and equitable administration of the Fund.

Removal from office

252F. The provision in article 146 of this Constitution on the removal of a Justice of the Superior of Judicature shall apply to the Administrator and the Deputies.

Expenses of the Fund

252G. The administrative expenses of the Fund including salaries, allowances and other benefits payable to or in respect of persons serving with the Fund shall be determined by the Independent Emoluments Commission and shall be paid from the Consolidated Fund.

Appointment of staff for the Fund

252H. The officers and other employees of the Fund shall be appointed by the Administrator and the Deputies acting in consultation with the Public Services Commission."

Article 286 of the Constitution amended

34. Article 286 of the constitution is amended as follows:

(a) by repealing clauses (1),(2) and (3) and substituting the following:

"Declaration of Assets and Liabilities

286. (1) A person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property, assets, and liabilities owned by him either directly or indirectly

(a) within 30 days of taking office ;

(b) at the end of every year in office but not later than the 31st day of January in the subsequent year; and

(c) within 30 days after ceasing to hold office.

(1a) The Auditor-General shall within 14 days of receipt of the declaration submit it to the Commissioner for Human Rights and Administrative Justice who shall within 6 months of receipt of the submission verify the contents of the declaration.

(1b) A person who fails to declare or knowingly makes a false declaration under clause (1) commits an offence.

(1c) Parliament shall enact legislation to provide for,

(a) penalty for the contravention of clause (1) of this article; and

(b) such relevant matters as Parliament may determine.

(2) The Auditor-General shall, on request, produce in evidence a declaration made under clause (1) of this article,

(a) before a court of competent jurisdiction;
(b) before a Commission of Inquiry appointed under article 278 of this Constitution; or
(c) in any investigation before the Commissioner on Human Rights and Administrative Justice.

(3) The Auditor-General may upon a written request by a person in exercise of a Right to Information and for a specified purpose grant access to the contents of a declaration made under clause(1) of this article.";

(b) by substituting for clause (6) of

"(6) The Auditor-General and Commissioner for Human Rights and Administrative shall make a written declaration their assets and liabilities to the Speaker who shall cause the contents to be verified." ; and

(c) by repealing article 287.

Consequential Amendments

35. The articles of the Constitution stated in column 2 of Schedule 1 of this Act are amended to the extent specified in column 3.

Transitional Provisions

36. The transitional provisions stated in this Act shall have effect in accordance with the terms of the provision.

Consequential Amendments
Schedule 1
(Clause 31)

Column 1	Column 2	Column 3

	Article	Extent of amendment
1.	3(3)	repeal of "suffer death" and the insertion of "life imprisonment without parole";
2.	19(2)(a)	repeal of "or death";
3.	19(2)(a)(i)	repeal of the whole sub-paragraph;
4.	19(2)(b)	repeal of the whole paragraph;
5.	43(2)	deletion of "70" and the insertion of "70(1)"
6.	145 clauses (1), (2), (3) and (4)	repeal of "or a Chairman of a Regional Tribunal";
7.	146 clauses (1) and (2)	repeal of "or a Chairman of a Regional Tribunal";
8.	146 clause (3)	repeal of "or for the removal of the Chairman of a Regional Tribunal";
9.	146 clause (4)	repeal of "Chairmen of Regional Tribunals or both";
10.	146 clause (8)	repeal of "or Chairman";
11.	146 clause (10)(b)	repeal of "or a Chairman of a Regional Tribunal" and "or that Chairman of a Regional Tribunal";
12.	187 clause (11)	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent Constitutional Bodies Fund";
13.	187 clause (14)	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent Constitutional Bodies Fund";
14.	286 clause (5)(e)	repeal of "Chairman of a Regional Tribunal";

Transitional Provisions
(Clause 32)

Public Office

(1) Where an office under the Constitution is not continued in force under this Act, a person holding such an office immediately before the coming into force of the Act, shall cease to hold that office, and shall be paid the relevant benefits attached to the office as provided under his conditions of service.

Determination of emoluments or remuneration

(2) Where under the Constitution or any other law in force immediately before the commencement of this Act, the power to determine the emoluments or remuneration attached to a public office is vested in any person, body or authority, that power shall continue to be exercised subject to the approval of the Independent Emoluments Commission established under Chapter 13A of the Constitution.

Urgent legislation

(3) Parliament shall within twelve months of the coming into force of this Act enact legislation on the following:

(a) Gender rights (article 27(6));

(b) Rights of the aged(article 30A(2));

(c) Declaration of Assets and Liabilities(article 286(1c))

DRAFT BILL FOR THE AMENDMENT OF NON-ENTRENCHED PROVISIONS

ARRANGEMENT OF CLAUSES

Clause

37. Article 7 of the Constitution amended
38. Article 8 of the Constitution amended
39. Article 35 of the Constitution amended
40. Article 35A inserted in the Constitution
41. Article 36A inserted in the Constitution
42. Article 37 of the Constitution amended
43. Article 44 of the Constitution amended
44. Article 47 of the Constitution amended
45. Article 99 of the Constitution amended
46. Article 108 of the Constitution amended
47. Article 112 inserted in the Constitution
48. Article 117 of the Constitution amended
49. Article 124 of the Constitution amended
50. Article 126 inserted in the Constitution
51. Article 128 of the Constitution amended
52. Article 131 of the Constitution amended
53. Article 133 of the Constitution amended
54. Article 137 of the Constitution amended
55. Article 149 of the Constitution amended
56. Article 153 of the Constitution amended
57. Article 166 of the Constitution amended
58. Article 167 of the Constitution amended
59. Article 183 of the Constitution amended
60. Article 183A inserted in the Constitution
61. Article 185 and 186 of the Constitution amended
62. Chapter 13A inserted in the Constitution
63. Article 190 of the Constitution amended
64. Article 194 of the Constitution amended
65. Article 197 of the Constitution amended
66. Article 199 of the Constitution amended
67. Article 217 of the Constitution amended
68. Article 218 0f the Constitution amended
69. Article 221 of the Constitution amended
70. Article 223 of the Constitution amended

71. Article 232 of the Constitution amended
72. Article 235 of the Constitution amended
73. Chapter 19A inserted in the Constitution
74. Chapter 19B inserted in the Constitution
75. Article 241 of the Constitution amended
76. Article 242 of the Constitution amended
77. Article 243 of the Constitution amended
78. Article 244 of the Constitution amended
79. Article 246 of the Constitution amended
80. Article 248 of the Constitution amended
81. Article 257 of the Constitution amended
82. Article 258 of the Constitution amended
83. Article 267 of the Constitution amended
84. Article 277 of the Constitution amended
85. Article 280 of the Constitution amended
86. Article 294 of the Constitution amended
87. Article 295 of the Constitution amended
88. Preamble to the Constitution amended
89. First Schedule A inserted in the Constitution
90. Consequential amendments
91. Transitional Provisions

CONSTITUTION (AMENDMENT) BILL

A

BILL

ENTITLED

CONSTITUTION (AMENDMENT) ACT 20…

AN ACT to amend the Constitution of the Republic of Ghana.

PASSED by Parliament and assented to by the President:

Article 7 of the Constitution amended.

1. The Constitution is amended by the substitution for article 7 of

"Persons entitled to be registered as citizens

7. (1) A person who is not a citizen of Ghana and is or has been married to a citizen of Ghana may, upon making an application in the prescribed manner, be registered as a citizen of Ghana.

(2) Clause (1) of this article applies also to an applicant who was married to a person who would have continued to be a citizen of Ghana under clause (1) of article 6 but for the death of that person.

(3) Where the marriage of a person is dissolved after the registration as a citizen of Ghana under clause (1) of this article, that person shall continue to be a citizen of Ghana unless the citizenship of Ghana so acquired is renounced.

(4) A child of the marriage of a person registered as a citizen of Ghana under clause (1) of this article shall continue to be a citizen of Ghana unless the child renounces the citizenship of Ghana.

(5) Where upon an application for registration under clause (1) of this article it appears to the relevant authority that the marriage had been

entered into primarily for the purpose of obtaining the registration, the authority,

(a) shall request the applicant to establish that the marriage was entered into in good faith which shall include evidence of having lived together for an aggregate period of at least five years; and

(b) may register if satisfied that the marriage was entered into in good faith.

(6) An application under clause (1) of this article shall not be entertained unless the applicant permanently resides in Ghana."

Article 8 of the Constitution amended.

2. Article 8 of the Constitution is amended by the insertion after clause (3) of

"(4) A person who was a citizen of Ghana by birth and lost that citizenship by virtue of the law which prohibited the holding of dual citizenship may apply for a certificate of citizenship by birth and the certificate shall be effective from the date of the loss of the Ghanaian citizenship."

Article 35 of the Constitution amended

3. Article 35 of the Constitution is amended by the substitution for clauses (8) and (9) of the following:

"(8) The State shall take effective steps to eradicate from the public services corruption, wastage and abuse of power.

(9) The State shall promote among the people of Ghana the culture of political tolerance; and shall for this purpose take effective measures to deal with unwarranted politicization of various aspects of national life and

also the issue of ethnicity."

Article 35A inserted in the Constitution.

4. The Constitution is amended by the insertion after article 35 of

"**National Security Objectives**

35A. (1) The State and the security agencies shall take all action necessary to ensure the security of the state and the safety of every person in Ghana.

(2) The State shall take all necessary steps to establish a sound and proactive national security apparatus whose underlying principles shall include,

(a) guaranteeing a secure State where the liberty and freedoms of all the people are protected;

(b) undertaking strategic development of comprehensive security strategies that incorporate issues of human, economic, environmental, and food security; and

(c) ensuring that the security services and individuals bear their fair share of the national security responsibilities.

(3) The security agencies shall be properly equipped to enable them effectively perform their functions.

(4) The State shall put in place mechanism to ensure the speedy resolution of armed conflicts, conflicts that relate to chieftaincy, land and other conflicts.

(5) The State shall take appropriate measures to protect and safeguard the national security for posterity; and shall seek cooperation with other states and institutions for the purpose of protecting the wider security of the international community."

Article 36A inserted in the Constitution

5. The Constitution is amended by inserting article 36A as follows:

"Natural resource objectives

36A. (1) The use of Ghana's natural resources shall be for the ultimate benefit of the people of Ghana; and accordingly any programme, project or activity that relates to the extraction and use of any natural resource shall be to achieve this purpose.

(2) The exploitation of the natural resources shall be managed in such a manner as to ensure, as far as practicable, an equitable distribution of the benefits of the exploitation of the natural resources.

(3) The State shall regulate the exploitation and the use of the natural resources of Ghana in such a manner that the communities of the area of the extraction of the resources are not disadvantaged.

(4) The exploitation and use of Ghana's natural resources and the distribution of the relevant benefits shall be made in a participatory manner that involves all the stakeholders.

(5) Bilateral international treaties that relate to Ghana's natural resources must be entered into with regard to the relevant United Nations Resolution [on Permanent sovereignty.]

(6) The State shall take appropriate steps to encourage Ghanaian business participation in the extractive industry.

(7) Agreements for the exploitation of the natural resources of Ghana shall include terms that enhance the building of local capacity.

(8) Ghanaian courts shall be the primary arbiter in disputes that relate to natural resources in Ghana."

Article 37 of the Constitution amended.

6. Article 37 of the Constitution is amended by the insertion after clause (5) of

"(5a) The State shall take measures to ensure that the youth,

(a) access relevant education and training;
(b) have opportunities to associate, and participate in political, social, economic and other spheres of life;
(c) as far as practicable, access employment; and
(d) are protected from exploitation and harmful cultural practices."

Article 44 of the Constitution amended

7. The Constitution is amended by the substitution for article 44 of

"Qualification, tenure and conditions of service of members of the Electoral Commission

44 (1) A person is not qualified to be appointed a member of the Electoral Commission unless the person qualifies to be elected as a member of Parliament.

(2) The Chairman and the other members of the Electoral Commission shall each hold office

(a) for a period of ten years which shall not be renewable; and

(b) subject to such other terms and conditions as shall be determined by the Independent Emoluments Commission.

(3) The Chairman and other members of the Commission shall not, while they hold office on the Commission, hold any other public office.

(4) Where a member is absent or dies, the Commission shall continue to work until the President in accordance with article 70(1) appointment a qualified person to fill the vacancy."

Article 47 of the Constitution amended.

8. Article 47 of the Constitution is amended by the substitution for clause (6) of

"(6) Where the boundaries of a constituency established under this article are altered as a result of a review, the alteration shall come into effect for the next general election."

Article 99 of the Constitution amended.

9. Article 99 of the Constitution is amended by the substitution for clause (2) of

"(2) A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal whose decision on the matter shall be final."

Article 108 of the Constitution amended.

10. The Constitution is amended by the substitution for article 108 of

"**Settlement of financial matters – money bills**

108.(1) Any bill that falls within the definition of "money bill" as provided in clause (2) of this article shall not be introduced in Parliament unless it is introduced on a motion by or on behalf of the President.

(2) For the purpose of this Constitution "money bill" means a bill that makes provision for,

(a) taxation;
(b) the imposition or alteration of a charge on the Consolidated Fund or any other public fund;
(c) any withdrawal or payment from the Consolidated Fund or any other public fund;
(d) the raising or guaranteeing of a loan or loan repayment;
(e) the appropriation, receipt, custody or investment of public money;

(f) any matter incidental to these.

(3) Where there is any dispute as to whether a bill falls within the definition of a money bill, the Speaker shall refer the matter to the Finance Committee of Parliament which shall determine the matter.

(4) A money bill includes an amendment to a money bill."

Article 112 of the Constitution amended.

11. Article 112 of the Constitution is amended by the substitution for clauses (3) and (4) of

"(3) Notwithstanding any other provision of this article at least one-third of all members of Parliament may request a meeting of Parliament, and the Speaker shall, within seven days after the receipt of the request, summon Parliament to meet not later than seven days after the summons.

(4) Subject to clause (2) of article 113, a general election of members of Parliament shall be held within sixty days before the expiration of the period specified in clause (1) of that article; and a session shall be appointed to commence within fourteen days after the expiration of the sixty days."

Article 117 of the Constitution amended.

12. The Constitution is amended by the substitution for article 117 of

"**Service of Process**

117. During the meetings of Parliament, any civil or criminal process that comes from any court or place outside of Parliament for service,

(a) on the Speaker or member of Parliament, shall be served through the Clerk to Parliament;

(b) on the Clerk to Parliament, shall be served thorough a Deputy Clerk of Parliament;

(c) on a Deputy Clerk to Parliament, or any other employee of Parliament, shall be served directly on the person."

Article 124 of the Constitution amended.

13. Article 124 of the Constitution is amended by the substitution for clause (2) of

"(2) There shall be a Parliamentary Service Board which shall consist of –

(i) the Speaker, as Chairman;
(ii) the Leader of the Majority Party in Parliament;
(iii) the Leader of the Minority Party in Parliament;
(iv) the chairman of the Public Service Commission;
(v) a representative of the Institute of Chartered Accountants of Ghana;
(vi) a representative of civil society; and
(vii) the Clerk to Parliament.

(2a) The representatives under paragraphs (e) and (f) shall be nominated by the respective organization".

Article 126 of the Constitution amended.

14. Article 126 of the Constitution is amended by the substitution for clause (1) of

"Composition of the Judiciary and exercise of judicial powers

126.(1) The Judiciary shall consist of –

(a) The Superior Court of Judicature comprising,
(i) the Supreme Court;
(ii) the Court of Appeal;
(iii) the High Court; and

(b) such lower courts as Parliament may by law establish."

Article 128 of the Constitution amended.

15. Article 128 of the Constitution is amended by the substitution for clause (1) of

"**Composition of Supreme Court and qualification of the Judges**

128.(1) The Supreme Court shall consist of the Chief Justice and not more than fourteen other Justices of the Supreme Court."

Article 131 of the Constitution amended.

16. Article 131 of the Constitution is amended by the insertion after clause (2) of

"(2a) Notwithstanding the provisions of clauses (1) and (2) of this article, there shall be no right of appeal against a judgment, an order or a decision of the Court of Appeal on an interlocutory matter to the Supreme Court except in a constitutional matter."

Article 133 of the Constitution is amended.

17. Article 133 of the Constitution is amended by the substitution for clause (2) of

"(2) The Supreme Court, when reviewing its decisions under this article, shall, as far as practicable, be constituted by the Justices who originally presided over the case."

Article 137 of the Constitution amended.

18. Article 137 of the Constitution is amended by the substitution for clause (2) of

"(2) Except as otherwise provided in this Constitution, an appeal shall lie as of right from a judgment, decree, order or decision of the High Court to the Court of Appeal; except that where the appeal is on an interlocutory matter, the decision of the Court of Appeal shall be final."

Article 149 of the Constitution amended.

19. The Constitution is amended by the substitution for article 149 of

"**Conditions of service of judicial officers**

149. Judicial officers shall receive such salaries, allowances, and other benefits as shall be determined by the Independent Emoluments Commission."

Article 153 of the Constitution amended.

20. The Constitution is amended by the substitution for article 153 of

"***The Judicial Council***

Judicial Council

153.There shall be a Judicial Council which shall comprise the following –

"(a) the Chief Justice who shall be Chairman;

(b) the Attorney-General;

(c) a Justice of the Supreme Court nominated by the Justices of the Supreme Court;

(d) a Justice of the Court of Appeal nominated by the Justices of the Court of Appeal;

(e) a Justice of the High Court nominated by the Justices of the High Court;

(f) two representatives of the Ghana Bar Association; one of whom shall be a person of not less than twelve years' standing as a lawyer;

(g) a representative of the Ghana Prisons Service;

(h) a representative of the lower courts;

(i) the Judge Advocate-General of the Ghana Armed Forces;

(j) a representative of the Police Service;

(k) the Editor of the Ghana Law Reports;

(l) a representative of the Judicial Service Staff Association nominated by the Association;

(m) a chief nominated by the National House of Chiefs;

(n) a representative of the Christian Group (the National Catholic Secretariat, the Christian Council and the Ghana Pentecostal Council);

(o) a representative of the Muslim Councils and the Ahmadiyya Mission;

(p) a representative of the private sector; and

(q) two other persons who are not lawyers appointed by the President."

Article 166 of the Constitution amended.

21. The Constitution is amended by the substitution for article 166 of

"166. (1) The National Media Commission shall consist of –

(a) one representative each nominated by

(i) Ghana Bar Association;

(ii) the Christian Group (the National Catholic Secretariat, the Christian Council and the Ghana Pentecostal Council);
(iii) the Federation of Muslim Councils and the Ahmadiyya Mission;
(iv) the training institutions of journalists and communicators;
(v) the Ghana National Association of Teachers;
(vi) Parliament;
(vii) organized labour;

(b) two representatives nominated by the Ghana Journalists Association;
(c) two women nominated by women groups; and
(d) two other persons appointed by the President one of whom is a woman."

(2) The Commission shall elect its own Chairman from among its membership.

(3) A person who is a founding member of a political party, is a leader or member of its executive or holds any office in a political party does not qualify to be appointed a member of the Commission."

Article 167 of the Constitution is amended.

22. Article 167 of the Constitution is amended by the

(a) insertion after paragraph (a) of
"(aa) to grant broadcasting frequencies";

(b) repeal of paragraph (b) and the substitution of the following:

"(b) to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media including,

(i) investigation, mediation and settlement of complaints made by or against the media;

(ii) making awards of compensation in matters before it;

(iii) imposing sanctions;

(iv) initiating court action for the enforcement of its decisions."

Article 183 of the Constitution amended.

23. Article 183 of the Constitution is amended by the substitution for clause (4) paragraph (a) of

"(4) The following shall apply to the Governor of the Bank of Ghana –

(a) he shall be appointed by the President acting in consultation with the Council of State for periods of four years each at a time but the appointment shall cease when the appointing President ceases to hold office;"

The Constitution is amended by the insertion of article 183A

24. The Constitution is amended by the insertion after article 183 of

"**Independence of the Bank of Ghana**

183A. Except as otherwise provided in this Constitution or any other law not inconsistent with this Constitution, the Bank of Ghana shall not, in the performance of its functions, be subject to the control or direction of any person or authority."

Articles 185 and 186 of the Constitution amended.

25. The Constitution is amended by the substitution for articles 185 and 186 of

"*Statistical Service*

Statistical Service

185.(1) There shall be a Statistical Service which shall form part of the Public Services of Ghana.

(2) The head of the Statistical Service shall be the Statistician-General.

(3) The Statistician-General shall be appointed by the President in consultation with the Council of State and upon such terms and conditions as shall be determined by the Independent Emoluments Commission."

Independence of the Statistical Service

185A. Except as otherwise provided in this Constitution or any other law not inconsistent with this Constitution, the Statistical Service shall not, in the performance of its functions, be subject to the control or direction of any person or authority.

Statistical Service Board

186.(1) There shall be a Statistical Service Board which shall consist of-

(a) a chairman and four other members appointed by the President under article 70(2);
(b) the Statistician-General; and
(c) the Director-General of the National Development Planning Commission.

(2) The President in appointing the members under paragraph (a) of clause (1) shall take into account the expert relevant knowledge of the persons.

(3) The Statistician-General shall be responsible for the collection, compilation, analysis and publication of socio-economic data on Ghana and perform such other function as may be provided by or under an Act of Parliament.

(4) The Board shall determine the manner in which data may be compiled and kept by any public authority in Ghana."

Chapter 13A is inserted in the Constitution.

26. The Constitution is amended by the insertion after Chapter 13 of

"CHAPTER 13A

INDEPENDENT EMOLUMENTS COMMISSION

Establishment of the Independent Emoluments Commission

189A. (1) There shall be established by an Act of Parliament, an Independent Emoluments Commission.

(2) The Independent Emoluments Commission shall be composed of –

(a) a Chairman,

(b) one Deputy Chairman, and

(c) three other persons, at least one of whom is a woman.

(3) A person shall not be appointed as a member unless the person has at least 15 years working experience in:

(a) human resource management;

(b) accounting;

(c) wage and salary administration; or

(d) industrial or labour law.

(4)The members of the Commission shall be full time members and shall be appointed by the President in consultation with the Council of State and with prior approval of Parliament.

Functions of the Commission

189B. (1) The functions of the Commission shall be to –

(a) determine and review the emoluments attached to all public offices;

(b) monitor the salaries, allowances and other benefits paid to public officers;

(c) consolidate, as far as practicable, the emoluments of public officers; and

(d) perform such other functions as Parliament may by an Act of Parliament determine.

(2) In the performance of its functions, the Commission shall have regard to –

(a) the availability of public funds for the payment of the emoluments and the sustainability of the payments;
(b) the productivity and performance of the public officers;
(c) the need to attract and retain skilled and qualified persons in the public offices;
(d) the status or level of the public officers; and
(e) transparency and fairness.

Tenure of Members of the Commission

189C. The members of the Commission shall each hold office for a term of five years, renewable for a further term of five years only.

Terms and Conditions of Service of Members

189D. Except as provided in article 189C, the Chairman shall have the same conditions of service as a Justice of the Supreme Court; the deputy chairman shall have the same conditions of service as a Justice of the Court of Appeal and the other members shall have the same conditions of service as a Justice of the High Court.

Removal from Office

189E. The provisions in article 146 on the removal of a Justice of the Superior Court of Judicature shall apply to the members of the Commission.

Appointment of staff of the Commission

189F. The officers and other employees of the Commission shall be appointed by the Commission acting in consultation with the Public Services Commission.

Divisions of the Commission

189G. The Commission shall create within its secretariat such divisions as it considers appropriate for administering the emoluments attached to different public offices.

Expenses of the Commission

189H. The administrative expenses of the Commission including salaries, allowances, pensions and other benefits payable to or in respect of persons serving with the Commission shall be paid from the Independent Constitutional Bodies Fund established under Chapter 19B.

Independence of the Commission

189I. Subject to the provisions of this Constitution and to any other law not inconsistent with this Constitution, the Commission in the performance of its functions shall not be subject to the direction or control of any person or authority.

Interpretation

189J. In this Chapter, unless the context otherwise requires –

"emoluments" means salary, allowance facility, privilege, pension and end-of-service benefits.

Article 190 of the Constitution is amended.

27. Article 190 of the Constitution is amended,

(a) by the substitution for clause (1) of

"**The Public Services of Ghana**

190. The Public Services of Ghana shall include –

(a) the public services specified in First Schedule A;
(b) public services established under this Constitution;
(c) public services established by or under an Act of Parliament;
(d) public corporations other than those set up as commercial ventures; and
(e) such other public services as Parliament may by law provide; and

(b) by the repeal of clause (2)."

Article 194 of the Constitution amended.

28. Article 194 of the Constitution is amended by the substitution for clause (2) of

"(2) The Public Services Commission shall consist of a Chairman and two other members who shall all be full-time members."

Article 197 of the Constitution amended

29. The Constitution is amended by the substitution for article 197 of

"Regulations

197. The Public Services Commission in consultation with the President may by constitutional instrument make Regulations

(a) for regulating the whole of the public services; and

(b) for the effective performance of its functions under this Constitution or any other law

except that a Minister with responsibility for a public service may, on the advice of the governing board or council of that public service, by legislative instrument make Regulations, not inconsistent with Regulations made by the Public Services Commission, to address issues peculiar to that public service."

Article 199 of the Constitution amended.

30. Article 199 of the Constitution is amended by the substitution for clause (4) of

"(4) Notwithstanding clause (1) of this article,

(a) Parliament may by an Act of Parliament provide a higher mandatory retirement age for officers in any public service where Parliament considers that that mandatory age of retirement is justified having regard to the nature of work of the service concerned;

(b) a public officer who retires from the public service upon attaining the mandatory retirement age of sixty years may, where the exigencies of the public service requires, be engaged immediately after the retirement for a limited period of not more than two years at a time and not exceeding five years in all and upon such terms and conditions as the appointing authority may determine".

Article 217 of the Constitution amended.

31. The Constitution is amended by the substitution for article 217 of

"Appointment of members of the Commission

217.(1) The Commissioner and the Deputy Commissioners shall be appointed by the President under article 70 (1) of this Constitution."

"(2) Except as otherwise provided in this Constitution the President in nominating persons for appointment on the Commission shall have regard to persons with experience in

(a) law particularly in the law on human rights;

(b) anti-corruption;

(c) public administration; and

(d) labour and industrial relations."

Article 218 of the Constitution amended.

32. Article 218 of the Constitution is amended as follows:

(a) by the substitution for paragraph (e) of

"(e) investigate all instances of alleged or suspected corruption and misappropriation of public moneys by officials and to take appropriate steps, including

(i) instituting action in the courts to seek enforcement of its decisions; and

(ii) submitting its report to the Attorney-General and the Auditor-General resulting from the investigations.

(b) by the insertion after paragraph (g) of the following

(2) The Commission may without formal complaint from any person initiate investigation in any matter that falls within the functions of the Commission."

Article 221 of the Constitution amended.

33. The Constitution is amended by the substitution for article 221 of

"Qualification of Commissioner

221. A person shall not be qualified for appointment as the Commissioner for Human Rights and Administrative Justice, unless the person qualifies to be appointed a Justice of the Court of Appeal."

Article 223 of the Constitution is amended

34. The Constitution is amended by the substitution for article 223 of

"Tenure and other conditions of service of the Commissioners

223. The Chairman and the other members of the Commission shall each hold office

(a) for a period of ten years which shall not be renewable; and

(b) subject to such other terms and conditions as shall be determined by the Independent Emoluments Commission."

Article 232 of the Constitution amended.

35. Article 232 of the Constitution is amended by the substitution for clause (1) of

"Membership of the Commission

232. (1) The Commission shall consist of a Chairman and two other members."

Article 235 of the Constitution is amended

36. The Constitution is amended by the substitution for article 235 of

"Tenure and other conditions of service of members of the Commission

235. The Chairman and the other members of the Commission shall each hold office

(a) for a period of ten years which shall not be renewable; and

(b) subject to such other terms and conditions as shall be determined by the Independent Emoluments Commission."

Chapter 19A inserted in the Constitution.

37. The Constitution is amended by the insertion after Chapter 19 of

"CHAPTER 19A

NATIONAL COMMISSION ON CULTURE

Establishment of National Commission on Culture

239A. There shall be established a National Commission on Culture.

Membership of the Commission

239B. The membership of the Commission shall be provided in an Act of Parliament.

Functions of the Commission

239C. The Commission on Culture shall in pursuit of the cultural objectives stated in article 39,

(a) promote the development of an integrated national culture that creates a distinct Ghanaian personality;

(b) initiate policies, programmes and activities for the dissemination, propagation and promotion of national pride, solidarity and consciousness;

(c) supervise the implementation of programmes and activities for the preservation, promotion and presentation of Ghanaian culture;

(d) prepare proposals for the establishment of an educational system that motivates and stimulates creativity based mainly on Ghanaian traditions and values;

(e) establish a code of behaviour compatible with the Ghanaian tradition of humaneness and a disciplined and moral society; and

(f) perform other functions that relate to the Ghanaian culture as Parliament may provide.

Chapter 19B inserted in the Constitution.

38. The Constitution is amended by the insertion after Chapter 19A of

"CHAPTER 19B

INDEPENDENT CONSTITUTIONAL BODIES FUND

Establishment of Independent Constitutional Bodies Fund

239A. There shall be established by an Act of Parliament, a fund to be known as the Independent Constitutional Bodies Fund.

Object of the Fund

239B. The object of the Fund is to provide financial resources required by the independent constitutional bodies and other statutory institutions to which this Chapter applies, in the performance of the functions conferred on them by this Constitution and any other law.

Sources of money for the Fund

239C. The sources of money for the Fund shall be,

(a) an amount of money equal to a percentage, determined by Parliament, of the annual total national revenue;

(b) any other monies that Parliament may allocate for the Fund;

(c) moneys that accrue from investments made by the managers of the Fund;

(d) grants, donations, gifts and any other voluntary contribution made to the Fund; and

(e) any other moneys that becomes lawfully payable to the Fund.

Management of the Fund

239D. (1) There shall be an Administrator of the Fund and two Deputy Administrators, appointed by the President in consultation with the Council of State and with the prior approval of Parliament.

(2) Parliament shall by an Act provide for,

(a) the further administration of the Fund:

(b) the power of the Administrators to invest moneys of the Fund;

(c) matters that relate to the expenditures of the independent constitutional bodies.

Estimates of independent constitutional bodies

239E. (1) All independent constitutional bodies to which this Chapter applies shall submit their annual estimates of administrative and development expenditure to the Administrator.

(2) The Administrator shall submit the estimates to Parliament directly and subject to the approval of Parliament, make appropriate resource allocations to the bodies.

(3) The administrative expenses of the office of the Administrator of the Fund shall be subject to the approval of Parliament and shall be payable from the Fund.

Scope of application

239F**.** The Independent Constitutional Bodies to which this Chapter applies are,

(a) the National Development Planning Commission;
(b) the Electoral Commission;
(b) the Commission on Human Rights and Administrative Justice;
(c) the National Commission on Civic Education;
(d) the National Media Commission;
(e) the Auditor-General and the Audit Service;
(f) the Independent Emoluments Commission;
(g) the Legal Aid Scheme;
(h) the National House of Chiefs; and
(i) such other independent bodies as Parliament may by an Act provide".

Article 241 of the Constitution amended

39. Article 241 of the Constitution is amended by the substitution for clause(2) of

"(2) The President acting on the advice of the Electoral Commission may by executive instrument provide for the redrawing of the boundaries of districts or for reconstituting the districts."

Article 242 of the Constitution amended.

40. Article 242 of the Constitution is amended

(a) by the repeal of paragraph (b); and

(b) by the substitution for paragraph (d) of,

"(d) other members not being more than thirty percent of all the members of the District Assembly, appointed by the President in accordance with the advice of the traditional authorities in the area of the District Assembly.".

Article 243 of the Constitution amended.

41. Article 243 of the Constitution is amended

(a) by the substitution for clause (1) of

"**Chief Executives of District Assemblies**

243. (1) There shall be a Chief Executive for every district.

(1a) Where the district is by law designated a Metropolis, the Chief Executive,

(a) shall be elected by the registered voters of the area in a public election;
(b) is elected if the person obtains a majority of the valid votes cast; and
(c) shall be designated the Mayor of the Metropolis.

(1b) Where the area is by law designated a Municipality, the President shall

(a) nominate a number of persons who shall be vetted by the Public Services Commission;

(b) select three of the number vetted by the Public Services Commission to contest in a public election in the Municipality

and the person who obtains the majority of the valid votes cast shall be declared elected.

(1c) Where the Assembly is not a Metropolis or Municipality, the President shall appoint the Chief Executive with the prior approval of a simple majority of the votes of the members of the Assembly present and voting at the meeting.;

(b) by the repeal of clause (3) and the insertion of

"(3) The office of a Metropolitan Chief Executive shall become vacant if –

(a) on a petition for the removal of the Chief Executive signed by not less than one-third of all the members of the Assembly, the Assembly passes a resolution, supported by not less than two-thirds votes of all members for the removal; or

(b) the Chief Executive resigns or dies.

(4) The office of a Chief Executive of a Municipal Assembly shall become vacant if –

(a) on a petition signed by at least one-third of all the members of the Assembly, the Chief Executive is removed from office by the President with the prior approval of not less than two-thirds majority votes of all the members of the Assembly; or

(b) the chief executive resigns or dies.

(5) The office of a Chief Executive of a District Assembly shall become vacant if –

(a) a vote of no confidence supported by the votes of two-thirds of all the members is passed against the Chief Executive; or

(b) the appointment of the Chief Executive is revoked by the President; or

(c) the Chief Executive resigns or dies.

(6) Where a petition for the removal of a Chief Executive is being considered by the Assembly,

(a) the petition shall be debated by the Assembly; and

(b) the Chief Executive is entitled during the debate to be heard in his defence."

Article 244 of the Constitution amended.

42. Article 244 of the Constitution is amended by the substitution for clause (2) of

"(2) The Presiding Member shall be elected by the votes of the majority of the members of the Assembly present and voting."

Article 246 of the Constitution amended.

43. Article 246 of the Constitution is amended

(a) by the substitution for clause (2) of

"(2) Unless the person resigns, dies or ceases to hold office under article 243, the term of office of

(a) a Metropolitan Chief Executive shall be four years; except that the person may seek further election;
(b) a Municipal Chief Executive shall be four years; except that Parliament may by an Act provide for the number of times a person may hold office as a Municipal Chief Executive;
(c) a District Chief Executive shall be four years and the person shall not hold office for more than two terms in succession.;

(b) by the insertion after clause (2) of

"(3) The office of a member of a District Assembly becomes vacant if –

(a) the member resigns or dies; or

(b) the member is removed from office; or

(c) the Assembly is dissolved after the four years; and

(c) by the insertion after clause (3) of

"(4) Where a vacancy occurs in the membership of a District Assembly, the District Coordinating Director of the Assembly shall notify the Electoral Commission in writing within seven days of becoming aware of the vacancy and the Electoral Commission shall, within thirty days of being notified, hold a by-election to fill the vacancy, except that where the vacancy is as a result of the death of a member, the by-election shall be held within sixty days after the occurrence of the vacancy."

Article 248 of the Constitution amended.

44. Article 248 of the Constitution is amended by the insertion after clause (2) of

"(3) Notwithstanding the provisions of clauses (1) and (2), Parliament may when it considers it appropriate, by an Act provide for elections to District Assemblies or any lower government unit on political party basis."

Article 257 of the Constitution amended.

45. Article 257 of the Constitution is amended

(a) by the substitution for clause (1) of

"Public lands and other public property

(1) All public lands in Ghana are owned by the people of Ghana and are vested in the President in trust for the people of Ghana";

(b) by the substitution for clause (6) of

"(6) Every mineral including oil and gas in its natural state in, under or upon any land in Ghana, rivers, streams, water bodies and water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the people of Ghana and is vested in the President in trust for the people of Ghana."

Article 258 of the Constitution amended.

46. Article 258 of the Constitution is amended in clause (1) by the repeal of paragraphs (d) and (e) and the insertion of

"(d) advise on and execute a comprehensive programme for the registration of title to land throughout Ghana;

(e) on behalf of government, regulate surveying and mapping, and provide survey and mapping services;

(f) regulate land valuation and provide land valuation services; and

(g) perform such other functions as the Minister responsible for land may assign to the Commission."

Article 267 of the Constitution amended

47. Article 267 of the Constitution is amended by the insertion after clause(9) of the following:

"(10) Except as otherwise provided in this Constitution or in any other law which is not inconsistent with this Constitution, the Office of the Administrator of Stool Lands shall not be subject to the direction or control of any person or authority in the performance of its functions."

Article 277 of the Constitution amended.

48. The Constitution is amended by the insertion before the definition of "chief", of

"active party politics" means

(a) being a member of a political party;

(b) standing for election to any office to which a person may be elected as a representative of a political party;

(c) holding office in a political party;

(d) forming a political party;

(e) speaking in public or publishing anything in writing to the public for or against any political party or candidate of a political party other than in the course of an academic work;

(f) contributing in cash or in kind towards the funds of a political party or a candidate for public election; or

(g) conducting oneself in public in a manner likely to suggest identification with or opposition to a political party."

Article 280 of the Constitution amended.

49. The Constitution is amended by the substitution for article 280 of

"**Functions of commission of inquiry**

280. (1) A commission of inquiry shall

(a) make a full, faithful and impartial inquiry into any matter specified in the instrument of appointment,

(b) report in writing the result of the inquiry, and

(c) furnish in the report the reasons leading to the conclusions stated in the report.

(2) The President shall, subject to clause (3) of this article, cause to be published the report of a commission of inquiry together with the White Paper on it within six months after the date of the submission of the report by the Commission.

(3) Where the report of a commission of inquiry is not to be published, the President shall issue a statement to that effect giving reasons why the report is not to be published.

(4) A finding of a commission of inquiry shall take effect from the date of publication of a White Paper under clause (2) of this article or the date of publication of a statement by the President under clause (3) of this article whichever is earlier.

(5) Where a commission of inquiry makes an adverse finding against a person and the President issues a White Paper under clause (2) of this article, the findings may form the basis for

(a) criminal prosecution;

(b) dismissal from public office;

(c) civil action for recovery of money or property; or of money; or

(d) refund of money or return of property.

(6) Subject to paragraphs (a) and (c) of clause (5) of this article, a person shall have a right of appeal against the adverse finding to the Court of Appeal within three months of the publication of the report."

Article 294 of the Constitution amended.

50. The Constitution is amended by the repeal of article 294 and the insertion of

"**Establishment of Legal Aid Scheme**

294. (1) There shall be established a Legal Aid Scheme.

(2) The object of the Scheme is to enable legal assistance to be made available to persons entitled to legal aid.

Persons entitled to legal aid

294A. (1) For the purpose of enforcing any provision of this Constitution, a person shall be entitled to legal aid in connection with any proceedings that relate to this Constitution if the person has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.

(2) Subject to clause (1) of this article, Parliament shall by or under an Act of Parliament,

(a) regulate the grant of legal aid;

(b) provide for other matters for which legal aid may be granted;

(c) provide for the membership of the Legal Aid Board; and

(d) provide for such related matters as Parliament may determine.

(3) For the purposes of this article, legal aid shall consist of representation by a lawyer, including all such assistance as is given by a lawyer, in the steps preliminary or incidental to any proceedings or for arriving at or giving effect to a compromise to avoid or to bring to an end any proceedings.

Expenses of the Scheme

294B. The administrative expenses of the Scheme, including salaries, allowances and other benefits payable in respect of persons who work with the Scheme shall be paid from the Independent Constitutional Bodies Fund."

Article 295 of the Constitution amended.

51. Article 295 of the Constitution is amended by the substitution for the definition of "stool land" in clause (1)

"stool land" includes any land or interest in, or right over any land, controlled by,

(a) a stool or skin;

(b) the head of a particular community;

(c) a captain of a company; or

(d) a head of family

for the benefit of the subjects of that stool, skin, the members of that community, company, or family."

Preamble to the Constitution amended.

52. The Preamble to the Constitution is amended by the insertion after the first paragraph of

"AND paying homage to the memory of our forebears and founders of our nation, acknowledge the worthy customs, cultural heritage, and traditional values and wisdom of our people;".

First Schedule A inserted in the Constitution

53. The Constitution is amended by the insertion after the First Schedule of "First Schedule A"

(Article 190 (clause 24)

(a) the Civil Service,

(b) the Judicial Service,

(c) the Audit Service,

(d) the Education Service,

(e) the Prisons Service,

(f) the Parliamentary Service,

(g) the Health Service,

(h) the Statistical Service,

(i) the National Fire Service,

(j) the Police Service,

(k) the Immigration Service,

(l) the Legal Service"

Consequential amendments

54. The articles of the Constitution stated in column 2 of Schedule 1 to this Act are amended to the extent specified in column 3.

Transitional Provisions

55. The transitional provisions stated in this Act shall have effect in accordance with the terms of the provisions.

Consequential amendments

Schedule 1

(Clause 54)

Column 1	**Column 2**	**Column 3**
	Article	**Extent of amendment**
15.	40(d)(ii)	repeal of "the Charter of the Organisation of African Unity" and the insertion of "the Charter of the African Union";
16.	44(3),(4)	repeal of "two Deputy Chairmen", and the insertion of "two other members" in both clauses;

17.	44(5)	repeal of the whole clause
18.	54	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent Constitutional Bodies Fund.";
19.	89 clause (7)	repeal of "in accordance with article 71 of this Constitution" and the insertion of "by the Independent Emoluments Commission.";
20.	94 clause (2)(c)(ii)	repeal of "by death or";
21.	94 clause (2)(e)	repeal of "or death or other sentence";
22.	95 clause (5)	repeal of "in accordance with article 71 of this Constitution" and the insertion of "by the Independent Emoluments Commission.";
23.	98 clause (1)	repeal of "in accordance with article 71 of this Constitution" and the insertion of "by the Independent Emoluments Commission";
24.	131 clause (1)(a) and (b)	repeal of "or a Regional Tribunal";
25.	137 clause (1)	repeal of "and Regional Tribunal';
26.	142 and 143	repeal of both articles;
27.	144 clause (3)	repeal of "and Chairmen of the Regional Tribunals";
28.	144 clause (4)	repeal of the whole clause;
29.	144 clause (5)	repeal of "and Chairmen of Regional Tribunal";
30.	144 clause (8)	repeal of the whole clause;
31.	144 clause (9)	repeal of "or a Chairman of the Regional Tribunal";
32.	144 clause (10)	repeal of "or a Chairman of the Regional Tribunal"
33.	147 and 152	repeal of both articles;
34.	156 clause (1)	repeal of "and a Chairman of a Regional Tribunal" and "or Chairman of a Regional Tribunal";
35.	161	repeal of ""court includes tribunal"";
36.	161(a)	repeal of "or tribunal however so described";
37.	171	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent Constitutional Bodies Fund";
38.	194(5)	repeal of "Vice-Chairman" and the insertion of " two other members";
39.	194 clause (6)	repeal of paragraph (b);
40.	194 clause (7)	repeal of the whole clause;
41.	217	repeal of "70" and insert "70(1)"
42.	227	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent Constitutional Bodies Fund";
43.	236	repeal of "a Deputy Chairman" and insert " the other members";
44.	239	repeal of "shall be charged on the Consolidated Fund" and the insertion of "shall be paid from the Independent

		Constitutional Bodies Fund”;
45.	250(1)	repeal of “shall be determined by Parliament” and the insertion of “shall be determined by the Independent Emoluments Commission”;
46.	250(2)	repeal of “shall be determined by the District Assembly” and the insertion of “shall be determined by the Independent Emoluments Commission”;
47.	259	repeal of “70” and the insertion of “70(2)”;
48.	295 clause (1)	repeal of “and includes a tribunal” in the interpretation of “court”;

Transitional Provisions
(Clause 55)

Judiciary

(1) Upon the coming into force of this Act, a chairman of any Regional Tribunal in operation shall be transferred to the High Court as a Justice of the High Court.

Public Office

(2) Where immediately before the coming into force of this Act a person holds an office which is continued in existence under this Act, the tenure and other terms and conditions of service of that person shall continue to be the same as existed immediately before the coming into force of this Act and shall not be varied to his disadvantage.

(3) Where an office under the Constitution is not continued in force under this Act, a person holding such an office immediately before the coming into force of this Act, shall cease to hold that office, and shall be paid the relevant benefits attached to the office as provided under his conditions of service.

Determination of emoluments or remuneration

(4) Where under the Constitution or any other law in force immediately before the commencement of this Act, the power to determine the emoluments or remuneration attached to a public office is vested in any person, body or authority, that power shall continue to be exercised subject to the approval of the Independent Emoluments Commission established under Chapter 13A of the Constitution.

(5) Upon the coming into force of the Act establishing the Independent Emoluments Commission, the Fair Wages and Salaries Commission shall cease to have effect.

Urgent Legislation

(6) Parliament shall within twelve months of the coming into force of this Act enact legislation on the following:

(a) Independent Emoluments Commission (article 189A(1));

(b) Independent Constitutional Bodies Fund (article 239A));