

AMENDING THE CONSTITUTION OF GHANA: IS THE IMPERIAL PRESIDENT
TRESPASSING?

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I. INTRODUCTION

In January 2010, Ghana's President John Atta Mills appointed a commission to review and propose amendments to the country's current constitution, in force since 1993.¹ The "constitutional instrument" establishing the commission tasked the nine-member body² to "ascertain from the people of Ghana, their views on the operation of the constitution, and in particular its strength and weaknesses, articulate the concerns of the people on amendments that might be required for a comprehensive review and make recommendations to government for consideration."³ A Ministry of Justice document setting forth the administration's agenda for constitutional reform identifies about forty specific provisions⁴ and omissions in the constitution as likely candidates for review and amendment, and the commission is directed to consider these pre-identified issues in its review.⁵ By its terms of reference, the commission's final work product must include "a draft Bill for possible amendments to the constitution."⁶

With the exception of one or two local commentators who have publicly questioned the need, at this time, to review Ghana's constitution, and others who have objected to the

¹ Constitutional Instrument 2010 (C.I. 64).

² The commission is chaired by an emeritus professor of public law. Its membership includes two chiefs, four lawyers (including a prominent member of the leading opposition party, the head of an influential NGO, and a consultant to the parliamentary legal drafting office); a senior lecturer of political science, and an educationist. The Executive Secretary to the commission, who will head the commission's secretariat, is a legal academic on the faculty of law of Ghana's premier university. He, too, is an appointee of the president.

³ *Supra* note 1.

⁴ See Appendix 1.

⁵ The Ministry of Justice, Ghana, Consultative Review of 16 Years of the Operation of the 1992 Constitution of Ghana: Project Proposal (October 2009). The total cost of the constitutional review is estimated at US\$ 2,716,685.00, with the Government of Ghana contributing 20% of the budget and the remainder projected to come from unspecified donors. We do not explore the role that such donor funding has on driving reform agenda in Ghana.

⁶ *Ibid.*

commission on cost grounds,⁷ the appointment of the commission by the President has been generally welcomed by Ghanaian civil society and even touted by the President's supporters as exemplifying his administration's commitment to strengthening the constitutional foundations of Ghana's nascent democracy.⁸ Notably, no objection or voices of dissent have been heard from any political party or politician. To the contrary, Ghana's political parties have joined with civil society in pledging their cooperation to the commission as it carries out its presidentially-assigned mandate.⁹

Missing from the reaction to the appointment of the commission is a discussion or questioning of the constitutional propriety of the President unilaterally and exclusively initiating a process and setting an agenda for a comprehensive review of the country's constitution, including a timetable, leading up to likely changes to what is "the fundamental and supreme law of the land."¹⁰ Perhaps, because there appears to be widespread agreement as to the ends, or the desirability of revising certain parts of the constitution, little attention has been paid to the

⁷ See e.g., Constitutional Review Takes Off - But Kumado Says It's A Misplaced Priority, Daily Graphic (11 January 2010), also available at <http://www.graphicghana.com/news/page.php?news=5981> (last accessed on 10 May 2010).

⁸ See e.g., CDD-Ghana Welcomes Constitutional Review Commission, Ghana News Agency (15 January 2010) also available at <http://elections.peacefmonline.com/politics/201001/36547.php> (last accessed on 10 May 2010).

⁹ See e.g., Minority Leader urges Ghanaians to Support Constitutional Review Process, Ghana News Agency (13 February 2010), also available at <http://ghanaweb-news.com/LatestGhanaNewsofSaturday13February2010.aspx> (last accessed on 10 May 2010).

¹⁰ Ghana's Parliament amended the constitution in 1996 to allow dual citizenship; to change the position of the Vice President as the automatic Chair of the Armed Forces, Police and Prisons Councils; to review entitlements of Members of Parliament to gratuity and to allow more time between the death of a Member of Parliament and the holding of a by-election; to increase the membership of the National Media Commission (NMC); and to proscribe founding members and office holders of political parties to be members of the NMC. However, this is the very first time that the current constitution is being subjected to a wholesale, rather than clause-specific, review and revision. Ghana's only and previous experience with a wholesale review of a constitution occurred in 1960, when the Independence constitution was replaced by a republican constitution. See *infra* at 9-10.

means, or the propriety of the process initiated by the President, including its constitutional soundness. It is the common fallacy of “the end justifies the means,” which, as usual, overlooks the risk that the means might corrupt the ends.

The constitutional instrument establishing Ghana’s constitution review commission cites article 278(1)(a) of the constitution as the source of the president’s authority for setting up such a commission.¹¹ That provision, part of the chapter of the constitution relating to Commissions of Inquiry, authorizes the President, if he is “satisfied that a commission of inquiry should be appointed” to appoint such a commission to inquire into “any matter of public interest.”¹² From the standpoint of the presidency, then, the President’s assertion of plenary authority in this matter is deemed uncontroversial in light of article 278(1)(a). Indeed, considering that no objection or challenge has been raised to the president’s action by any political party or a coordinate branch of government (specifically, Parliament), it is fair to surmise that the president’s broad conception of the scope and content of the prerogatives of his office is not seriously contested politically or legally.

This should come as no surprise. Like the rest of Africa, Ghana has had an unbroken political tradition of “imperial presidency.”¹³ Beginning with the first post-independence government under Kwame Nkrumah, the politics of the country has been characterized by executive supremacy. This phenomenon, which reached its height during Nkrumah’s rule in the

¹¹ Supra note 1.

¹² Constitution of the Republic of Ghana (4th Republican Constitution) (1993), Article 278(1)(a), copy available at <http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php> (last accessed on 10 May 2010).

¹³ See H. Kwasi Prempeh, ‘Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa’, 35 *Hastings Const. L.Q.* 761 (Summer 2008): 784-95.

First Republic (1960-1966) and the military government of Jerry John Rawlings (1982-1993), has survived successive constitutional and regime changes. Despite the exceptional strides Ghana has made in its current transition to democracy, there is inescapable evidence that the tradition of an imperial president endures in Ghana, as elsewhere in Africa.¹⁴ Notably, every single piece of proposed legislation *introduced* in, or enacted into law by, the Parliament of the Fourth Republic (i.e., since 1993) has been introduced by and on behalf of *His Excellency* the President. Parliament has completely yielded to presidential initiative not only in matters of legislation but in virtually every area of public policy.¹⁵ Ghana's Parliament and the political establishment generally must thus believe that, as has happened with ordinary legislation,¹⁶ the initiative, agenda and process of constitutional reform must be set by, and managed at the direction of, the President.

We disagree. We believe that a reliance on article 278(1)(a), as authority for presidential initiative and unilateralism in setting the agenda for a review and possible amendment of the constitution of Ghana, is misplaced. We argue in this article that a comprehensive review of the constitution, such as is contemplated in this case, is an act *sui generis*, not just “any” matter of public interest that is to be governed by the generic provisions relating to *ad hoc* commissions of inquiry. In our view, the appropriate constitutional text that must inform and govern the process

¹⁴ See H. Kwasi Prempeh, ‘Presidents Untamed’, in Larry Diamond & Marc Plattner (eds.), *Democratization in Africa: Progress and Retreat*, John Hopkins University Press (2010) .

¹⁵ Occasionally a Member of Parliament will complain about the broad sweep of the President's powers, as happened when President Atta Mills appointed Majority leaders of Parliament in 2010. See e.g., Minority leader: Mills is putting parliament under his armpit, Ghana News Agency (27th January, 2010) also available at <http://news.myjoyonline.com/politics/201001/41124.asp> (last accessed on 10th May, 2010). See also, Daily Graphic, The president is too powerful—Ala Adjetey, Aug. 31, 2007, available at <http://www.myjoyonline.com/politics/200708/8186.asp>

¹⁶ See *infra* at 28-30.

of constitutional review in Ghana is not the generic provision relating to *any* commission of inquiry but the specific provisions of the constitution that set forth the structure and mechanics of constitutional amendment, namely articles 289, 290, 291 and 292, which together constitute chapter 25 of the constitution.¹⁷ While none of these provisions answers precisely the very narrow question of which constitutional organ, the President or Parliament, must initiate or set the agenda for constitutional review, we argue that, careful attention to the text, structure and implications of the scheme for constitutional amendment set forth in chapter 25 coupled with the unique character of a revision of the fundamental and supreme law of the land, compels the conclusion that Parliament, not the President, is the constitutionally legitimate body to initiate and lead the exercise.¹⁸ Because of the historic nature of this constitutional review—it being the first time since 1960 that a currently “subsisting” Ghanaian constitution is to undergo a

¹⁷ Fourth Republican Constitution, Chapter 25.

¹⁸ In the world of constitutions, proposals to amend a constitution can be triggered in a variety of ways: by initiative, legislative resolution, constitutional convention, or a review commission. An initiative requires citizens to gather a set number of signatures or petitions calling for an amendment to be placed on a ballot. It is typically invoked by filing with a designated official (e.g., Electoral Commissioner) a copy of the proposed revision or amendment, signed by the required number of citizens. Legislative resolutions emanate from the legislature. A constitutional convention is convened to consider a revision of the entire constitution. For instance, in March 1960, the Government of Ghana constituted parliament into a constitutional convention to consider its proposals for a Republican Constitution (see E. Schwelb, ‘The Republican Constitution of Ghana’, *The American Journal of Comparative Law* (Autumn 1960): 634-656. A review commission is typically a constitutional created agency that convenes at set intervals to review the constitution and make proposals for amendments. The framers of a constitution may choose any combination of these methods. For instance, the constitution of the State of Florida allows any of these methods to trigger the amendment process (Article XI Florida Constitution). Article 289 (1) of Ghana’s constitution specifies that “Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.” Thus, while this provision is explicit that only Parliament may amend the provision, it leaves room to debate how the bill for amendment gets to Parliament. Presumably, as implied by the setting up of the review commission, the provision does not foreclose the option of using a review commission. But if so, can a bill of amendment arise out of an initiative? And how many signatories are required? Similar questions arise in the setting up of a commission — who appoints members of the review commission? what is the scope of their work? etc. These questions do not become insignificant merely because the President issues a constitutional instrument. We believe amending the constitution is a matter that is too important to allow the rules to be made on an ad hoc basis.

comprehensive or wholesale review unprovoked by any specific event—we believe that an assertion of presidential primacy and control over the process and agenda for constitutional review, and parliamentary acquiescence in this move, sets a bad *constitutional* precedent, one that further entrenches the imperial presidency and extends its tentacles to new and dangerous frontiers.

The rest of the article proceeds as follows. In section II, we examine, briefly, the history of constitution-making and constitutional change in Ghana since the end of the colonial period. We follow in section III with a discussion of the plan of constitutional amendment mapped out in the current constitution and conclude from that survey that Parliament, not the President, is the constitutionally appropriate body to initiate and set the agenda for constitutional change in Ghana. We support this conclusion not only through a textual and structural analysis of the constitution, but also by articulating a set of policy reasons why Parliament is where the power to review and revise Ghana's constitution must be located. In section IV we proceed to answer the question why, in light of the arguments advanced in section III, the President has encountered virtually no opposition to his decision to assume primacy and control over the process and agenda for constitution reform. We offer some concluding thoughts in section V.

We must note at the outset that the position we defend in this article does not imply our opposition to the desirability of amending or repealing certain provisions of the Ghana constitution. To the contrary, we believe that certain features and provisions of Ghana's current constitution indeed warrant careful re-examination and revision in order to advance the ongoing

project of democratic constitutionalism in Ghana's Fourth Republic.¹⁹ Our concern here is mainly with *process*, namely the means by which any such constitutional revision must be pursued and, specifically, which organ of government must determine the timing and set the agenda for constitutional reform. We believe that the constitutionally appropriate organ in this regard is the Parliament of Ghana, not the President.

II. A SHORT HISTORY OF MAKING CONSTITUTIONAL CHANGE IN GHANA

On March 6, 1957, Ghana attained sovereign statehood and commenced its life as a new nation under the Independence Constitution.²⁰ Since then the country has adopted a succession of four constitutions, which Ghanaians commonly refer to as the First,²¹ Second,²² Third²³ and Fourth²⁴ Republican Constitutions.²⁵ Ghana's five constitutions can be distinguished primarily by the nature of the executive power and, for the purpose of this article, by the locus of the amending power. The Independence Constitution, under which Ghana retained the Westminster

¹⁹ Examples include the absence of ceilings on the number of Supreme Court justices, Ministers, and Members of Parliament, which allows the President to expand the size of the Court and his ministerial team at will. Even more curious is the size of the legislature, which can be expanded (or for that matter shrunk) by the Electoral Commission *ad infinitum*.

²⁰ The Ghana (Constitution) Order in Council, 1957. See *also* S. O. Gyandoh, Jr. and J. Griffiths, *A Sourcebook of the Constitutional Law of Ghana*, Volume 1 Faculty of Law, University of Ghana (1972): pp. 128-141 for a reprint of the Independence Constitution.

²¹ The Constitution of the Republic of Ghana (1960). See *Ibid.* at 162-170 for a reprint.

²² The Constitution of the Republic of Ghana (1969). See *Ibid.* at 1-56 for a reprint.

²³ The Constitution of the Republic of Ghana (1972).

²⁴ *Supra* at note 11.

²⁵ The First Republican Constitution became effective on July 1, 1960 and was abrogated by a military junta on February 24, 1966. The Second Republican Constitution became effective on August 22, 1969 and was abrogated by a military junta on January 13th 1972. The Third Republican Constitution became effective on September 24, 1979 and was abrogated on December 31, 1981. The Fourth Republican Constitution became effective on January 6th, 1993 and remains the fundamental law in Ghana today.

constitutional tradition, installed during the late colonial period, vested executive power in the Queen of England, represented in Ghana by a Governor General.²⁶ The power of the Queen was however merely ceremonial. The general direction and administration of the country was under the control of a cabinet of ministers drawn from the majority party in Parliament and led by the Prime Minister as head of government.²⁷

The amending power under the Independence Constitution was vested in Parliament. All amendments to the constitution required a two-thirds majority of Members of Parliament.²⁸ A second layer of super-majority (two-thirds) approval by Regional Assemblies was required for amendments relating to such matters as chieftaincy and the Regional Assemblies.²⁹

The Regional Assemblies required to be established by the Independence Constitution were duly established by an Act of Parliament in September 1958.³⁰ However, because the regional assemblies law transferred no meaningful authority to the assemblies, the opposition party, which had accepted some devolution of power to regional assemblies as a compromise for its pre-independence demand for a federal constitution, boycotted the ensuing regional assembly elections.³¹ As a result, the Regional Assemblies were all controlled by members elected on the

²⁶ Constitution (1957), Article 6.

²⁷ *Ibid.*, Article 7.

²⁸ A few articles were entrenched and put beyond the reach of amendment. For instance, under Articles 31 (2) “No law shall make persons of any racial community liable to disabilities to which persons of other such communities are not made liable,” and Article 31 (3) “Subject to such restrictions as may be imposed for the purposes of preserving public order, morality or health, no law shall deprive any person his freedom of conscience or the right to freely profess, practise or propagate any religion.”

²⁹ *Ibid.*, Article 32.

³⁰ Regional Assemblies Act, 1958 (No. 25)

³¹ F. A. R. Bennion. *The Constitutional Law of Ghana*, Butterworths, London (1962): 65.

ticket of the ruling party led by Prime Minister Nkrumah.³² Using its majorities in these assemblies, together with its control of Parliament, the government managed to repeal in December 1958 the constitutional limitations on amendment of the constitution.³³ Henceforth, it would require only a simple majority of Parliament to amend the Constitution. In March 1959 the first such law was passed providing for the dissolution of all the Regional Assemblies.³⁴

It is also important to note that, by this time, the Nkrumah government had managed, through the use of a Preventive Detention Act (PDA) enacted in 1958,³⁵ to send leading or suspected members of the opposition to jail or exile. Detention under the PDA constituted grounds for disqualification from or forfeiture of membership in Parliament. Aggressive use of the law against rival party politicians therefore resulted, over a short period of time, in Ghana's first Parliament becoming a *de facto* one-party legislature.³⁶

In January 1960, the government published a bill setting forth its plan to hold a plebiscite in which the people of Ghana would be asked to state whether they approved proposals to be submitted by the Government for a new, republican constitution. As the Independence Constitution had not anticipated or provided for Ghana's conversion to a "republican" form of

³² Ibid.

³³ Ibid. at 69

³⁴ See Schwelb, *supra* note 15 at 636-640.

³⁵ Under the Preventive Detention Act, the Government (i.e., the Prime Minister) could order the arrest and detention without trial of any citizen for periods of up to five years at a time.

³⁶ Other amendments to the Independence Constitution included the dissolution of the Judicial Service Commission, the creation of Brong Ahafo region from the northern part of Ashanti region and a small area taken from Northern region, and a repeal of several parts of the House of Chief Act. See Bennion *infra* at 70-72.

government, whereby the British monarch would cease to be titular head of state,³⁷ the government's plan triggered questions about what broad principles a republican constitution should embrace, how the new Republican President was to be elected, and most important, at least for current purposes, who to draft and enact the new constitution.³⁸

The opposition party, already under assault from the persistent harassment, arrest and detention of its leaders under the PDA, was naturally suspicious of the government's plan to move the country to a "republican" constitution. The opposition also took the view that, if a new constitution needed to be written, it ought to be done by a constituent assembly comprising a mixture of elected and appointed members, representative of all interests in the country.³⁹ Under the opposition party's proposal, the constituent assembly would have included, in addition to Members of Parliament, elected and appointed representatives of chiefs, the universities, the churches, the muslim council, the professional associations, the chambers of commerce, the farmers union, the trades union congress, the ex-servicemen organizations, the national women's federation, and the political parties. The Government, on the other hand, held the view that because the incumbent "members [of the National Assembly] were chosen by the people at the last general election to represent them in making laws for Ghana," it was only "right that Members of Parliament and not other persons who have not been so chosen should constitute the Constituent Assembly." This debate was resolved, predictably, in favor of the Government

³⁷ The Minister of Local Government made the following statement in the National Assembly. "The present Members of Parliament were however not elected by the people for the purpose of enacting a republican constitution and the question of a republic was not an issue at the last general election. . . . Nevertheless, it cannot be said that this House, as at present constituted, has a mandate from the people to adopt or make on their behalf, any particular form of republican constitution." See *Ibid.* at 80.

³⁸ *Ibid.*

³⁹ *Ibid.* at 81.

position by the passage of the Constituent Assembly and Plebiscite Act by the National Assembly in February 1960.⁴⁰ The Act provided that the National Assembly⁴¹ “is hereby authorized to resolve itself from time to time into a Constituent Assembly with full power to enact such proposals for or in connection with the establishment of a new Constitution as it thinks fit, including provisions whereby Ghana is established as a Republic.”⁴²

In March 1960, the government published a White Paper explaining its proposals for a Republican Constitution. The White Paper also contained a draft of the Constitution. Later that same month, the National Assembly sitting as a Constituent Assembly approved the draft Constitution.⁴³ The ensuing plebiscite,⁴⁴ held in April, resulted in a “yes” vote in favor of the draft Constitution⁴⁵ and in the choice of Nkrumah as President.⁴⁶

⁴⁰ Ibid. at 82

⁴¹ Technically, Parliament under the Independence Constitution comprised the Queen and a national assembly of not less than 104 members elected by adult suffrage. Legislative power was vested in Parliament. However when Parliament acted without the Queen, as was the actual practice, it was simply called the National Assembly.

⁴² Constituent Assembly and Plebiscite Act, 1960 (No. 1), s. 2(1).

⁴³ Bennion at 85.

⁴⁴ The plebiscite asked voters two questions: (1) Do you accept the draft republican Constitution for Ghana as set out in the White Paper issued by the Government on 7th March, 1960? (2) Do you accept Kwame Nkrumah or Joseph Boakye Danquah as the first President under the new Constitution? Ibid. at 89.

⁴⁵ The Constitution as eventually enacted by the Constituent Assembly departed, in certain important respects, from the text of the draft constitution as presented to the plebiscite. For a discussion of the differences between the text of the final Constitution and the approved draft, see L. Rubin & P. Murray, *The Constitution and Government of Ghana* (2d ed., 1964): 17-27.

⁴⁶ Worldwide reaction to the adoption of the constitution was decidedly mixed. In UK, the *Daily Mirror*, wrote “The new Constitution puts paid to any idea that Ghana is heading for dictatorship.” In USA, the *Washington Post*, remarked “What makes the move of special significance is that Ghana, as the first West African country to attain full independence from colonial status in 1957, is in many respects the bellwether for the continent during an exciting period.” In South Africa, the *Natal Witness* referred to the Constitution as “Black Bonapartism” and in France, *L’Information* described the draft constitution as “at the same time authoritarian and expansionsist.” See Ibid. at 86-88.

The First Republican Constitution was effectively a constitutional coup d'état effected by Nkrumah and the ruling party, using a series of constitutional amendments, constitutional revision, and ultimately a wholesale constitutional rewrite.⁴⁷ The new constitution vested extraordinary power in the President.⁴⁸ In exercising his functions as President, the President was empowered to act in his own discretion and was not obliged to follow advice tendered by any other person.⁴⁹ Notably, the 1960 Constitution made no provision for a deputy or vice president. There were other notable provisions. "Kwame Nkrumah is hereby appointed first President of Ghana, having been chosen as such before the enactment of the Constitution in a plebiscite conducted in accordance with the principle set out in Article 1 of the Constitution."⁵⁰ Further, "the President may at any time by proclamation dissolve the National Assembly."⁵¹ As one commentator noted at the time, the presidential regime installed in Ghana's First Republic was extraordinary; "unlike the American President, the President of Ghana can dissolve the National Assembly, unlike the Prime Minister of Britain, he could not be unseated by the legislature."⁵²

⁴⁷ Ghana, thus, became the first member of the Commonwealth to adopt a Republican Constitution without having had the means to do so expressly indicated in its founding constitution. Although both Pakistan and India had become republics earlier, their Independence Act had provided constituent assemblies. See *Ibid.* at 74.

⁴⁸ First Republican Constitution, Article 8.

⁴⁹ *Ibid.*, Article 8 (4)

⁵⁰ *Ibid.*, Article 10

⁵¹ *Ibid.*, Article 23.

⁵² Schwelb, *supra* note 15 at 644.

The amending power under the First Republican Constitution was divided between the Parliament and the People.⁵³ The power to amend or repeal certain entrenched provisions in the Constitution was reserved to “the People,” with the residual amending or legislative power going to Parliament.⁵⁴ The term “Parliament” in Ghana’s First Republican Constitution was used as a term of art, to mean the National Assembly (legislature) and the President acting jointly.⁵⁵ While the legislative power was vested in Parliament, the Constitution also gave the first President (Nkrumah) power to unilaterally make provisions having the force of law.⁵⁶ In addition, article 55 of the Constitution empowered the first President to give directions by “legislative instrument” which may alter or repeal any existing law other than the Constitution.⁵⁷

In 1964, the amending power was exercised to introduce a one-party state and to grant to the President the power to remove judges of the Superior Courts at any time and for reasons which to him appear sufficient.⁵⁸ Thus by 1964, Ghana’s first President had exploited the amending powers to complete the subordination of all branches of government and institutions of state to the control and discretion of the President. Having installed a constitutional dictatorship and thus foreclosed all lawful avenue for a change of government, Nkrumah’s government made

⁵³ First Republican Constitution, Article 20.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Under Article 8(4), the President was also the Commander-in-Chief of the Armed Forces and the “Fount of Honour.”

⁵⁷ The First Republican Constitution was extravagant in other respects. For instance, Article 2 provided that, “In the confident expectation of an early surrender of sovereignty to a union of African States and territories, the people now confer on Parliament the power to provide for the surrender of the whole or any part of the sovereignty of Ghana.”

⁵⁸ S. O. Gyandoh, ‘Interaction of the Judicial and Legislative Processes in Ghana Since Independence’, 56 *Temp. L.Q.* 351 (1983) at 360.

itself and the country vulnerable to regime change by extra-constitutional methods. The military was to supply that method on February 24, 1966. With Parliament, the presidency, and the constitution abolished, Ghana's first military regime ruled by means of decrees which were issued in the name of a council comprising senior military and police officers and a few selected civilian politicians. The council exercised supreme legislative and executive authority.

In September 1966, the ruling council, signaling its intention and commitment to return the country to civilian rule under a democratic constitution, established an eighteen-(later seventeen)-member constitutional commission,⁵⁹ assisted by a three-person secretariat, to draft proposals for a new constitution.⁶⁰ In December 1968, the draft Constitution that had emerged from the commission's work was entrusted to a larger and more representative Constituent Assembly for debate and ratification.⁶¹ The assembly ratified the final constitution in August 1969, paving the way for new multi-party elections and the installation of a new democratically-elected government later that same year.⁶²

The Second Republican (1969) Constitution reverted Ghana to a Westminster-style government, with a Prime Minister as head of government and a non-executive President as head of state.⁶³ The amending power in the 1969 constitution was located in Parliament. While amendments generally required the approval of two-thirds of all Members of Parliament, certain

⁵⁹ Constitutional Commission Decree, 1966 (N.L.C.D. 102). See also Constitutional Commission (Amendment) Decree, 1967 (N.L.C.D. 158) and Constitutional Commission (Amendment) Decree, 1967 (N.L.C.D. 149).

⁶⁰ For an account of the constitutional commission, see Robin Luckam, 'The Constitutional Commission 1966-69', in Dennis Austin & Robin Luckam, (eds.) *Politicians in Ghana 1966-1972* (1975), pp..

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Second Republican Constitution, Article 48.

specified provisions of the constitution, notably the bill of rights and provisions relating to the right to vote, could not be amended “in any way that may detract or derogate from any such provision or the principles embodied in any such provision.”⁶⁴ Furthermore, to prevent incumbent self-entrenchment, a vote to amend a wide range of provisions which passed one parliament could not take effect unless the successor parliament also voted to approve those changes by the requisite two-thirds majority.⁶⁵

The life of Ghana’s second republic was cut short when the elected government was overthrown in its first term by officers of the armed forces in January 1972. Following the pattern of the first military junta, the new military council ruled by decree for the next six years, going through a number of personnel and internal organizational changes during this period. Civilian constitutional rule was again restored in the last quarter of 1979, this time on the basis of a constitution that departed from the Westminster model and embraced key features of the American Presidential system.

The Third Republican Constitution bifurcated the provisions of the constitution, for purposes of amendment, into entrenched and non-entrenched provisions. Amendments to the entrenched provisions required, among other hurdles, the approval of voters in a referendum. Amendments to non-entrenched clauses required passage by a two-thirds majority of Parliament, but also had to secure the prior supermajority approval of both a council of state and local government councils.⁶⁶

⁶⁴ Ibid., Article 169(4).

⁶⁵ Ibid., Article 169.

⁶⁶ Third Republican Constitution, Article 210.

Like the Second Republic, Ghana's Third Republic was aborted by the military in the coup of December 31, 1981.⁶⁷ The new coup-installed government, under the chairmanship of Jerry John Rawlings, remained in power for the next decade, until mounting pressure from both domestic and external factors, compelled it to return the country to constitutional rule in 1993, paving the way for Ghana's current Fourth Republican Constitution.

The picture that emerges from a review of the history of constitution-making and constitutional change in Ghana, aside from the high mortality rate of Ghanaian constitutions resulting from frequent *coups d'état*, is that Ghana's successive constitution-makers have moved toward progressively more "rigid" constitutions since the collapse of the First Republic, making wholesale constitutional change increasingly difficult to accomplish. This is clearly a reaction to the experience under the Independence and First Republican Constitutions, and reflects a determination on the part of the framers of Ghana's constitutions to prevent future incumbents from manipulating the process of constitutional change to entrench themselves in office or whittle down the protections and safeguards built into the constitution to forestall the emergence of a constitutional dictatorship. The same learning, we posit, informs the amendment provisions of the current constitution.

III. REVIEWING AND AMENDING THE GHANA CONSTITUTION: WHO MUST SET THE AGENDA?

The provisions governing amendments to Ghana's current Constitution are contained in Chapter 25 of the Constitution, titled "Amendment of the Constitution." According to article 289(1), which opens the chapter, "Subject to the provisions of the Constitution, Parliament may,

⁶⁷ Ironically, flight Lieutenant Jerry Rawlings who presided over the return to the civilian Third Republic was the same man who led the junta that aborted the Republic.

by an Act of Parliament, amend any provision of this Constitution.” The rest of chapter 25 classifies the provisions of the Constitution into two, namely “entrenched provisions” and “non-entrenched provisions,” and, then, delineates the mechanics for the amendment of each class of provisions. The primary difference in the process of amendment between the two classes of constitutional provisions is that, while an amendment of an entrenched provision must secure the approval of a super-majority (75%) of *voters* in a national referendum (with a minimum voter participation rate of forty percent of registered voters), amending a non-entrenched provision requires the approval of only a super-majority of *legislators*. In each case, before an approved amendment comes into effect it must have received the assent of the President. Importantly, however, the constitution makes the President’s assent *mandatory*, and thus merely a ministerial act, once a proposed amendment has secured the requisite popular or legislative approval.⁶⁸

The scheme for amendment outlined in chapter 25, read in light of the constitution as a whole, offers strong support for the proposition that it is Parliament, not the President, that is supposed to set the agenda and initiate the process of constitutional revision. First, article 289(1) expressly designates Parliament, and Parliament alone, as the body that “may, by an Act of Parliament, amend any provision of this Constitution.” Unlike the 1960 Constitution of Ghana, which defined the term “Parliament” to include both the President and the legislature (then called the “National Assembly”) acting jointly,⁶⁹ under the current Constitution

⁶⁸ Fourth Republican Constitution, Article 290 (3).

⁶⁹ First Republican Constitution, Article 20 (1) stipulates “there shall be a Parliament consisting of the President and the National Assembly.”

“Parliament” refers to the legislature *alone*.⁷⁰ Admittedly, an Act of Parliament, which, under article 289(1), is the prescribed *form* a constitutional amendment must take, is technically the product of the Parliament and the President acting together. However, as we have already stated, when it comes to amending a provision of the 1992 Constitution, the constitutionally prescribed division of labor assigns to the President only the ministerial or pro-forma “back-end” role of assenting to a pre-approved amendment.

Second, it is important to emphasize that the extent of the Ghanaian President’s constitutional authority is limited to powers expressly granted him by the Constitution (including those incidental powers necessary for the accomplishment of the express powers)⁷¹ plus those powers properly delegated to him under constitutionally-valid statutes. The Fourth Republican Constitution of Ghana does not create a President of unlimited power. Nor does the President inherently possess the constitution’s “residual power,” or the remainder of the power that is not expressly or impliedly allocated under the Constitution. All such residual power is, of necessity, reposed in Parliament, to be exercised by it, as and when needed, through the passage of appropriate legislation. The President is constitutionally the sole repository of the “executive authority” of the State, but that power is the power to *enforce* enacted laws, not to make or change them. With regard specifically to who gets to initiate new law, the Constitution is always quite clear when the intention is to have the President, and only the President, originate

⁷⁰ Fourth Republican Constitution, Article 93 (1) “There shall be a Parliament of Ghana which shall consist of not less than one hundred and forty elected members, and (2) Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution.”

⁷¹ Article 297(c) of the Constitution provides, “In this Constitution and in any other law where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing.”

particular kinds of legislation. This is the case, for example, with bills relating to public finance. Thus, for instance, in article 174 (1), the constitution states that “no taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.” To forestall disputation as to when and by whom a bill of taxation is to be originated, Article 179 (1) specifically empowers and commands the President to “cause to be prepared and laid before Parliament at least one month before the end of the financial year, estimates of the revenues and expenditure.”⁷² Similarly, in Article 108, the constitution clearly bars Parliament from proceeding on bills that impose charges on the consolidated or other public funds, “unless the bill is introduced by, or on behalf of the President.” The express delineation in the constitution of those specific instances where legislative initiative belongs to the President implies, following the maxim “*expressio unius est exclusio alterius*,” that in all other cases the origination of legislative action must remain with the legislative body itself. Thus, when Article 289 (1) expressly designates Parliament as the body that “may amend any provision of the constitution,” and does not designate the President as the one who must introduce a bill of amendment, it must be understood that the origination power in matters of constitutional amendment remains with Parliament. Not only that, but also no extra-parliamentary body is empowered to do any preparatory work for Parliament, unless Parliament itself has validly authorized such a body.

Other elements of the mechanics of constitutional amendment outlined in chapter 25 support our conclusion. Notably, as to both entrenched and non-entrenched provisions, Article

⁷² As another example, Article 82(1) is of the form “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.” It will be straining logic to intolerable limits to argue somehow that because there is no explicit reference to who can originate such a bill of censure, it follows that the President must set the agenda for bills of censure.

290 requires the Speaker of Parliament to refer a bill for amendment of a provision of the Constitution to the Council of State for its advice before further action on it may be taken by the Parliament. What is significant about this requirement, that Parliament obtains the advice of the Council of State on a bill to amend the Constitution, is that it is the only time in the entire Constitution when the Council of State is specifically required to render advice to Parliament, rather than the President, on a pending legislation. Throughout the rest of the Constitution (that is, when the matter does not pertain to an amendment of the Constitution) the role of the Council of State is to advise the President on a broad range of matters and actions constitutionally assigned to the President.⁷³ The fact that, in the specific instance of a proposed amendment to the Constitution, the Council of State is brought into the process (and early) to offer its advice to Parliament must mean something, and we would argue that it means two things: first, that legislation to amend a provision of the Constitution is constitutionally *different* from ordinary legislation; hence, the vastly different legislative processes; and, second, that Parliament is the primary actor and agenda-setter when it comes to proposals to revise the constitution.

It is not enough to argue, in rebuttal, that, under the current arrangement announced by the President, Parliament still has an opportunity and the responsibility ultimately to consider and approve the draft Bill that would result from the work of the constitution review commission. The crucial issue here is who determines if and when there would be a constitutional review as well as the agenda for such review. It matters little that Parliament will inevitably get its *say* before any proposed amendment can pass or that a parliamentary super-majority is required to

⁷³ Indeed Article 89(1) states that the role of the Council of State is “to counsel the President in the performance of his functions.”

approve a proposed amendment. As experience has shown, Presidents in the Fourth Republic have had little difficulty getting Parliament to ratify whatever presidential initiatives are placed before it. Ultimately, it is who determines if and when the constitution must be reviewed and who sets the agenda and timetable that matters.

In addition to drawing support from structural inferences based in the text of the Constitution, the case for regarding Parliament, not the President, as the primary actor and initiator in the area of constitutional review also rests on strong policy considerations.

First, Parliament is unique among the institutions of the Constitution in being the only body whose membership straddles the diverse political and regional demography of the nation. The President, though elected by a national electorate, is elected on the ticket of a single party and is generally identified with that party and perceived as promoting the policy preferences and legislative agenda of his party. In contrast, the Parliament of Ghana's Fourth Republic draws its membership from diverse and rival shades and aggregations of political opinion and interests, as represented by the political parties. In addition to its politically or ideologically representative character, Parliament also represents, like no other body does, the full range of the nation's regional and ethno-cultural diversity. This superior representativeness of the legislature, in both the political/ideological and the demographic senses, makes it the body best suited to set the agenda for the revision or amendment of the document that defines the basic "rules of the game" for the organization, exercise and control of power within the state.

We recall that during the 1960's debate over how the proposed transition from the Independence Constitution to a Republican Constitution would be effected, the Nkrumah government insisted on constituting the then existing Parliament or National Assembly into a

Constituent Assembly which would then draft the new constitution. The Nkrumah government's argument against the opposition party's preferred alternative of an expanded but extra-parliamentary constitution-drafting body comprising a mix of elected and nonelected members was that such a body lacked the democratic legitimacy and mandate of an elected legislature. That argument indeed had merit, even though the opposition's alternative, too, more than met the test of social legitimacy and representativeness. The main problem with the government argument in 1960's Ghana, however, was that, by that time, the government had already used the PDA to neutralize and diminish considerably the size of the opposition in the National Assembly, making that body representative only in theory, but not in fact. This is not the case with the Fourth Republican Parliament (that is, since 1997).

Second, the multi-party character and composition of Ghana's Parliament, as opposed to the single-party face of the presidency, assumes even greater significance when viewed in the light of the *super-majority* threshold that a proposed constitution must clear in the legislature or the national referendum in order to be approved. This high super-majority threshold means that, unlike ordinary legislation which can be enacted with a simple one-party majority, a proposed constitutional amendment cannot see the light of day unless it can garner strong bi-partisan support among legislators or the national electorate. The way to assure and build the necessary degree of bipartisan support and cooperation for a constitutional revision agenda is not to run it as a single-party/presidential agenda until the process has advanced to a point when bi-partisan co-optation may well be too late. At a minimum, the majority and minority parties in Parliament must have an equal opportunity early in the process to put forth their own plans and priorities for constitutional reform, rather than have the President and his party hijack the process from the beginning and hope, in the end, to win over the opposition party. Securing the

necessary super-majority or bipartisan consensus for constitutional reform might prove unnecessarily difficult to accomplish if the opposition party does not regard the reform project as a joint enterprise from the start. The only way to ensure that is for the process of constitutional review to originate in Parliament, not outside it.

Third, the Parliament of Ghana is already structured internally to handle matters related to constitutional and legal reform. Among the committees of parliament is a Committee for Legal and Constitutional Affairs. There are also committees on the judiciary and on various other functional areas of government. Parliament can therefore easily and efficiently manage the business of constitutional review by parceling out the various constitutional review proposals of different political parties to appropriate functional-area or subject-matter committees. Thus, any efficiency advantage that a presidentially-appointed commission might be expected to have over Parliament, on account of the latter's unwieldy size, is easily overcome by using the legislature's committee system to handle the business of constitutional review. The parliamentary committee approach has other advantages. Under article 103(6) of the constitution, parliamentary committees must be so constituted as to "reflect the different shades of opinion in Parliament."⁷⁴ This degree of bi-partisanship and inclusiveness is not guaranteed in a presidential commission, which is composed solely of personal appointees of the President. Parliamentary rules also enable the committees of Parliament to hold public hearings and to receive or solicit input and submissions from experts and the general public as well as engage the services of consultants just like an extra-parliamentary commission appointed by the President. Additionally, committees of parliament have the same subpoena and other evidence-gathering powers and

⁷⁴ Fourth Republican Constitution, Article 103.

privileges as would a presidential commission. In short, there is no unique advantage that a presidentially-appointed constitution review commission brings to the process that Parliament, acting through its committees, lacks.

On the other hand, Parliament has certain advantages, apart from its superior democratic legitimacy and representativeness, which a presidential commission cannot match. Unlike commissions that are appointed by the President on an ad hoc basis, Parliament is a permanent constitutionally-established body. Placing Parliament in charge of constitutional review will thus enable it to develop, over time, the appropriate institutional competence and memory, as well as accumulate a body of knowledge and related resources, in the area of constitutional review. This opportunity for institutional development and growth, which a historically enfeebled Parliament, like Ghana's, desperately needs, is lost when Members of Parliament yield or concede the initiative in constitutional review to an ad hoc, extra-parliamentary commission established at the pleasure of the President. Ultimately, it is a waste of scarce national resources for presidents to empanel ad hoc commissions for tasks that Parliament is competent and well organized to accomplish. Outsourcing constitutional review to an ad hoc commission, bringing Parliament in at the end only to approve a "done deal," reduces the legislative chamber to a rubber-stamp, which ironically is one of the ailments that the current review is asked to cure.

Fourth, placing Parliament in the driver's seat in matters of constitutional review would ensure that the decision whether to commence or undertake a review of the constitution is "decentralized" rather than left to sole discretion or will of the President. A constitutional review process that is triggered only if the President desires it leaves the possibility and timing of constitutional change hostage to presidential inertia or disinterest. This is particularly likely to

be the case where changes may be desired in the constitution in order to constrain executive or presidential power. In fact, particularly in new African democracies like Ghana, where a tradition of presidential hegemony continues to cast a dark shadow on current efforts to institutionalize constitutionalism, limiting executive power and discretion is often one of the primary goals of advocates of progressive constitutional reform. In such situations, allowing the presidency to “capture” the process and agenda for constitutional change is the surest way to frustrate and undermine progress toward constitutionalism. Where Parliament is the initiating body, the process of constitutional reform could be triggered by more than one person or party, as long as certain predetermined conditions (that could be set forth in the standing orders of Parliament) have been met.

Lastly, the history of presidential abuse of the amendment power in Ghana, counsels *against* leaving the President in charge of determining the timing of, and setting the agenda for, constitutional reform. The immediate post-independence experience, especially under the First Republic, is particularly instructive in this regard. Every single constitutional amendment that was made under the Independence Constitution and, later, the Constitution of the First Republic (1960, as amended in 1964) was made at the behest of Nkrumah, in his capacity, first, as Prime Minister and, later, as President. Nearly all of these constitutional changes were in reaction to developments and events, including judicial rulings, which Nkrumah perceived as challenging his supremacy or threatening his hold on power.⁷⁵ Importantly, the successive amendments had, both individually and in the aggregate, the purpose or effect of consolidating more and more

⁷⁵ See William Burnett Harvey, *Law and Social Change in Ghana*, Princeton University Press (1966). See also H. Kwasi Prempeh, *Toward Judicial Independence and Accountability in an Emerging Democracy: The Courts and the Consolidation of Democracy in Ghana* Institute of Economic Affairs, Accra (1997), pp. 31-33.

power in the hands of a single individual, enfeebling the legislature, judiciary and opposition parties, and eventually installing a one-party state and a dictator with an indefinite tenure. Although Ghana's current constitution has installed certain substantive and procedural firewalls to prevent a recurrence of some of the experiences under the First Republic, to cede to the president discretionary control over whether and when the constitution may be amended is to trust a single individual with too much power over the pace and fate of constitutional change in the country and thus reflects a failure to heed the lessons of history. Notably, the few amendments that have so far been made to the 1992 Constitution were made at the initiative of then President Rawlings. It is doubtful that any of these earlier amendments to the current constitution was meant to strengthen the foundations of Ghanaian constitutionalism. In fact, a set of these amendments was pushed through by President Rawlings to reconfigure the presidency more firmly as a "unitary executive" by shifting to the President certain formal roles which the constitution had originally assigned to the Vice-President. This rebalancing of power between the president and the vice-president came in the wake of a rift between President Rawlings and his first Vice-President that grew worse, more public and more personal with time.

In other contemporary African democracies where presidents have claimed or exercised a similar prerogative to determine the timing and agenda for constitutional reform, many have taken advantage of that power to attempt to push through proposals to remove presidential term-limit provisions in their constitutions. Even when such attempts have failed, as happened in Nigeria, Malawi and Zambia, they have precipitated needless political tension and crises and threatened to undermine recent democratic gains. Merely to leave a president with a certain power is to invite or tempt the exceptionally ambitious to, at least, attempt to use such power, even if they might be ultimately unsuccessful in their ambition.

Locating the power to initiate and set the agenda for constitutional review in Parliament, instead of the President, does not mean that the President would be denied the opportunity of a meaningful participation in the process or that his role must be limited to the perfunctory one of assenting to a *fait accompli*. There are multiple avenues for the President to make substantive input into, or help shape the content of, a constitutional reform agenda that is before Parliament. First, the President can transmit his administration's views and proposals directly to Parliament, to be considered, along with others, at the start of the process. Second, as a majority of the President's Ministers are, under the current constitution, also Members of Parliament, the President already has dependable agents in Parliament who can readily adopt and sponsor the administration's own preferred agenda, in competition with those of other parties, on the floor of the House. Third, the President's views on constitutional reform can be adequately represented in Parliament by his party, which is typically the majority or single largest party in Parliament. Minority parliamentary parties would lack a similar ability to influence the setting of the constitutional reform agenda, *from the beginning*, if the initiation of the process and the agenda-setting were to be located in the presidency or in an extra-parliamentary ad hoc commission set up by the president.

IV. WHY GHANA'S PRESIDENTS CONTINUE TO HAVE THEIR WAY

Although the Ghana Parliament has firm grounds, based in the text and structure of the constitution as well as in sound policy, to assert primacy and control over an agenda for constitutional reform, it has not done so. Instead, it has taken a back seat, implicitly conceding to the President the power to initiate and set the agenda and timetable for constitutional review. There are at least three possible reasons why Ghana's Parliament might be unsure of its power in

this field and, conversely, why the President is so certain that it stands on firm grounds in seizing the initiative.

The first is the prevailing understanding of article 278(a)(1). This is the provision of the Constitution pursuant to which the President purportedly established the constitution review commission and charged it with the comprehensive review of the Constitution and the development of a draft bill for amendments to the Constitution. That provision provides, “the President shall, by constitutional instrument, appoint a commission of inquiry into any matter of public interest where the President is satisfied that a commission of inquiry should be appointed.”

On the face of it, the phrase, “any matter of public interest,” seems elastic and open-ended, and thus might be read to impose no limitation of any kind on the subject-matter about which a presidential commission might be appointed. But such literalism, particularly in the interpretation of a constitutional text, is rejected under prevailing Ghanaian constitutional law. The Supreme Court of Ghana has maintained that constitutional text must be read not literally but purposively.⁷⁶ This rejection of literalism is in fact common to judicial interpretation of constitutional texts in common law legal cultures. For example, the First Amendment to the U.S. Constitution states, “Congress shall make *no* law . . . abridging the freedom of speech.” But as the Supreme Court of the United States has long held, the “no law” in the First Amendment

⁷⁶ See e.g. Professor Stephen K. Asare v. Attorney General Writ no. 3/2002, issued 28 January 2004. (“What interpretation is to be given the words should depend upon the court’s perception of the purpose of the provision and the context of the words, rather than on their dictionary meaning. The “plain meaning” approach to judicial interpretation is not necessarily the most apposite. In my view, words hardly ever have a meaning in *vacuo*. Words take on a meaning in association with the other words in whose context they are used. Therefore, the interpretation of words almost invariably means doing more than finding their mere dictionary (or “literal” or “plain”) meaning”).

cannot reasonably be read literally to mean that Congress cannot enact any legislation at all that regulates free speech.⁷⁷

Similarly, the phrase “any matter of public interest” in article 278(1)(a) of the Ghana Constitution cannot be read literally to empower the President to establish a commission at his pleasure to undertake any and every conceivable assignment that the President deems to be in the “public interest.” Because matters “in the public interest” are virtually without limit and, at a minimum, extend to any matter that lies within the functions and jurisdiction of a public institution, a literal reading of article 278(1)(a) would grant the President license to appoint commissions to take on the full range of functions constitutionally assigned to other bodies outside the executive branch, and thus undermine the independence and credibility of such institutions and make nonsense of the constitutional scheme of separation of powers.

A careful reading, not merely of article 278(1)(a), but of the entire chapter 23 (devoted to “Commissions of Inquiry”), reveals that what is contemplated there is not an all-purpose commissioning power but the power to commission what is, in effect, an independent inquiry to investigate and establish the truth relating to a specific occurrence, affair or the activities of an entity. Such an inquiry would be considered judicial or quasi-judicial in nature. Thus, article 280(2) of the Constitution states that, adverse findings made against a person (which presumably covers legal persons), by an article 278 commission, is deemed to have the same juridical status as a judgment of the High Court, an appeal from which lies with the Court of Appeal.⁷⁸

⁷⁷ See e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (holding that the “question in each case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring substantive evils that congress has a right to prevent”).

⁷⁸ 4th Republican Constitution, Article 280(2).

Furthermore, the rules of procedure applicable to article 278 commissions are determined by the Rules of Court Committee,⁷⁹ a constitutional body chaired by the chief justice with a membership drawn from the judiciary and the bar.⁸⁰

In short, the commission established by the President of Ghana to undertake a comprehensive review of the constitution *and* draft a bill of proposed amendments to the Constitution is of a radically different *kind* than the commissions contemplated under article 278(1)(a). In fact, the history of commissions of inquiry in Ghana bears out this narrower understanding of the kind of commission article 278 contemplates. Commissions of inquiry established in Ghana have, almost without exception, been limited to the independent judicial/quasi-judicial inquiry kind. A presidential commission of inquiry has never before been used to undertake exclusively a comprehensive review of a *subsisting* constitution of Ghana or, for that matter, to draft a bill for proposed amendment of the constitution, and in our view the framers of the 1992 Constitution of Ghana did not propose to break new ground in this area. Rather, the special constitutional scheme set up for amending the Constitution clearly suggests an intention to adopt a process of constitutional change that has an extraordinary degree of democratic participation and legitimacy. We believe that only a process formulated and led by Parliament, not one imposed on it by the President, meets this high bar. The prevailing understanding of article 278(1)(a), pursuant to which the will of the President determines whether, when and how the Constitution would be reviewed or revised, subverts the constitutional plan.

⁷⁹ Ibid., Article 281(2).

⁸⁰ Ibid., Article 157.

It is instructive that in jurisdictions that employ a constitutional commission as the vehicle for constitutional reform, the constitution typically provides exhaustive guidance on how the membership of the commission is to be constituted, the timing of review, and how the commission will conduct its business. The constitution of the State of Florida, in the United States, is a classic example. Article XI(2) of the Florida Constitution provides:

“a) Within thirty days before the convening of the 2017 regular session of the legislature, and each twentieth year thereafter, there shall be established a constitution revision commission composed of the following thirty-seven members: (1) the attorney general of the state; (2) fifteen members selected by the governor; (3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and (4) three members selected by the chief justice of the supreme court of Florida with the advice of the justices. (b) The governor shall designate one member of the commission as its chair. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments. (c) Each constitution revision commission shall convene at the call of its chair, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it.”

The virtue of this mode of constitutional review is that it sets forth *in the constitution* clear rules defining the membership, scope, powers, and operating procedures for constitutional commissions, as well as how members of the commission are to be selected and the timing of constitutional review. Notably the Florida approach involves all three branches of government in the selection of the members of the constitutional commission. Altogether, the Florida approach ensures that the process and decision as to when and by whom the constitution shall be reviewed are not left to the pleasure of any

one officeholder or organ of state. If Ghana wishes to adopt the constitutional commission approach in future to review and revise its constitution, the Florida approach has much to commend in its favor. In the absence of that, Parliament must remain in charge of the agenda for constitutional reform, as it alone, among the branches of government, has the requisite degree of representativeness and diversity of political interests to lend *ex ante* legitimacy and consensus to the reform agenda.

A second reason why Parliament and the Ghanaian political class would appear to countenance the President's use of his commissioning powers to seize the initiative and set the agenda for constitutional review stems from a misreading of yet another provision of the Constitution; in this case, article 108. Article 108 provides:

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

Successive speakers and legislators in the Parliament of the Fourth Republic have apparently read Article 108 to vest the President with practically exclusive power to initiate all

bills for the consideration of Parliament.⁸¹ This extraordinary reading of article 108 is said to follow from the fact that almost every piece of proposed legislation will, in its implementation, impose some “charge,” however *de minimis*, on “the Consolidated Fund or other public funds of Ghana.”⁸² Parliament’s apparent acceptance of this clearly erroneous interpretation of article 108 has caused it to defer entirely to the initiative of the President in all legislative matters, leaving Ghana’s Parliament with practically no proactive role in the formulation of laws.⁸³ The Ghana Parliament has thus turned itself into a mere “approval” chamber for bills proposed and introduced by or on behalf of the President.

At any rate, the subservience of Parliament to the President, occasioned by the mangled reading of Article 108, applies, if it must, only to the making of *ordinary* legislation. It cannot extend to the *extraordinary* act of amending a *constitution*. While a constitutional amendment may be regarded as a species of legislation in the broadest sense of the term, and under Ghana’s Constitution is ultimately passed in the *form* of an Act of Parliament, it is indisputably different in character and substance from ordinary legislation. Thus, whatever meaning one might give to

⁸¹ See Rt. Hon. Peter Ala-Adjetey, ‘*Reflections on the Effectiveness of the Parliament of the Fourth Republic of Ghana*’, Center for Democracy and Development, Accra (2006), p. 18 (“Largely because of these enervating provisions in our Constitution, hardly any Member of Parliament is able to exercise any initiative in the passing of laws affecting development of any kind whatsoever in the body politic. Practically all initiatives in Parliament are thus left in the hands of the executive, which, by this state of affairs, can effectively control the way Parliament operates, since Parliament is even impotent to take measures to improve its own facilities unless it can persuade the President to initiate such measures on its behalf”). Mr. Ala-Adjetey was the Speaker of Ghana’s Parliament from 2001 to 2004.

⁸² Ibid. at 27 (“For all practical purposes, it is difficult to think of cases in which measures are initiated by individual members of Parliament which will have the effect of reducing charges on the Consolidated Fund or reducing payments made out of or withdrawals from the Fund”).

⁸³ See H. Kwasi Prempeh, ‘*The Executive-Legislature Relationship under the 1992 Constitution: A Critical Review*’, Center for Democracy and Development, Accra (2003), pp. 12-15 (criticizing the conventional understanding of Article 108 and arguing that its proper meaning is to give the President, at most, only the exclusive power to introduce a Finance Bill, or the Budget).

Article 108, that *general* provision cannot apply to or control the process for amending the Constitution. Rather, because constitutional amendments are a special case, they are governed by the *specific* process outlined in chapter 25 of the Constitution. Perhaps no rule of constitutional or statutory construction is more firmly established than that general enactments do not override or displace the specific.⁸⁴

The last plausible explanation why Ghana's president has been allowed to capture the current constitutional reform project is simply the force of habit or tradition. Legislative inertia and deference to the executive is an entrenched feature of Ghana's constitutional politics dating back to the early years of the Republic. Executive power grabs in Ghana are thus a fairly routine affair, so routine, in fact, that most of them go unnoticed and unchallenged.

This state of affairs has been made worse by the perennial under-resourcing of Parliament, itself a result, partly, of the fact that under existing practice, Parliament must depend on the presidency for its budget.⁸⁵ If Ghana's imperial presidency has survived into the current democratic era, it is not because of any authoritarian predilections on the part of Ghana's contemporary presidents. In fact, both President Mills and, before him, President Kufuor have demonstrated no personal appetite for a "muscular" presidency. Once thrust into office,

⁸⁴ See e.g., *In the Matter of A Parliamentary Election for the Wulensi Constituency Held on 7th December, 2000*. Suit No. CM 73/2003 issued on 15th January, 2003. In this case, the Ghana Supreme Court held that its general supervisory appellate power under Article 129(1) was supplanted by the specific appellate procedure set up for elections in Article 99(2). Notably, Article 99 merely says that the High Court has jurisdiction to hear and determine questions as to whether a person has been validly elected as a Member of Parliament (or whether the seat of a Member of Parliament has become vacant), and a person aggrieved by the determination of the High Court may appeal to the Court of Appeal. The Court ousted its supervisory jurisdiction, notwithstanding that Article 99 did not stipulate the Court of Appeal's decision is final.

⁸⁵ Ala-Adjetei, *supra* note 68.

however, the Ghanaian president soon realizes that he is very much “monarch of all that he surveys,” and he is so, invariably, with the full endorsement and complicity of Parliament.

V. CONCLUSION

The imperial presidency has been one of the most perdurable features of Ghanaian political life, dating back to the early years of the republic.⁸⁶ The tentacles of the Ghanaian president, like those of his peers across Africa, extend far and wide, enfeebling all other institutions of state in the process. Virtually every initiative in contemporary Ghana, as in the past, has come from the President. This is the case even when those initiatives and decisions are expressly and exclusively preserved in the Constitution for Parliament. Ghana’s Fourth Republican presidents have imposed on Parliament their choice of Speaker and gone even further to name, who among, the Members of Parliament in the president’s party would be the Majority Leader.

Currently, Ghana is embarked on a comprehensive review of its Fourth Republican constitution. This process, too, has been initiated unilaterally by the President through his appointment of an extra-parliamentary constitution review commission. Not only has the President singlehandedly appointed all nine members of the review commission and its executive secretary, he has defined the scope of their work and identified about 40 specific provisions and issues which the commission must consider, including the idea of extending (prospectively) presidential tenure from four to five years. Never before has a sitting President (or prime

⁸⁶Supra note 15

minister) of Ghana handpicked a few individuals and tasked them to review and draft proposals for amendments to an existing democratic constitution.

We have argued in this article that this latest extension of the Ghanaian President's prerogatives is both ill-advised and of dubious constitutionality. In our view, Parliament, not the President, is the legitimate and proper constitutional body to initiate and determine the timing and content of constitutional review in Ghana. As the "the road to hell is often paved with good intentions," we caution that, particularly when it comes to altering the fundamental law of the land, agreement on matters of substance must not be allowed to cloud or subvert fidelity to sound process. Taming the imperial presidency in Ghana, as in the rest of Africa, must begin with wresting away from presidents the power to determine whether, when and how constitutional change shall proceed.

Appendix 1. List of proposed changes to the Constitution

1. A review of the provisions of Chapter Eight of the Constitution to determine whether there should be a curtailment of the excessive powers of the Executive President.
2. A review of the Constitution to determine whether it should be amended to allow more easily for the tabling and passage of Private Member Bills in Parliament.
3. Flowing from the above, a review of article 108 barring anyone other than the President or someone designated by him to propose a bill that has financial implications.
4. The decoupling of the position of Attorney-General from that of Minister for Justice (article 88).
5. A review of the constitutional injunction in article 78(1) that a majority of Ministers of State should come from Parliament.
6. A review of article 78(2) which does not place a ceiling on the number of ministers a President may appoint.
7. Absence of a ceiling on the number of judges that may be appointed to the Supreme Court and the Appeal Court under Article 128(1) and 136(1)(b) of the Constitution.
8. A reconsideration of applying the tenure of judges to the heads of the independent constitutional bodies; Commission on Human Rights and Administrative Justice (CHRAJ), National Commission on Civic Education (NCCE), Electoral Commission (EC) and the National Media Commission (NMC).
9. The overlapping functions of independent constitutional bodies such as the Commission on Human Rights and Administrative Justice (CHRAJ); the National Commission on Civic Education (NCCE); the Electoral Commission (EC); and also between some constitutional bodies and statutory bodies such as the anti-corruption mandate of the CHRAJ and the Serious Fraud Office (SFO).
10. The panel system at the Supreme Court, especially the power of the Chief Justice to empanel the Court for all cases, even for cases involving the Chief Justice as Plaintiff or Defendant;
11. Proposals for empanelling all members of the Supreme Court to sit on all or key cases in order to ensure finality to litigation and consistency of precedence.
12. A proposal for amending the Constitution to allow the CHRAJ to investigate all forms of malfeasance of a public officer without a complaint made to it.
13. A clarification of the public character or otherwise of the chieftaincy institution and whether or not a chief may hold public office (Articles 94 (3) (c) and 276 (2)).
14. A change of the timing for the holding of Presidential and Parliamentary elections (articles 63(2) and 112(4)).
15. A consideration of the prohibition on serving a court process on a the Speaker of Parliament, a Member of Parliament or the Clerk of Parliament, even when (s)he has left the precincts of Parliament contained in article 117.

16. A proposal for increasing the tenure of office of a President from four to five years under article 66(1).
17. The inclusion of provisions to regulate a scenario where a sitting President leaves the party on whose ticket he was voted into power.
18. The inclusion of provisions to regulate a scenario where a Vice President resigns from office.
19. The provision of more effective provisions in the Constitution in order to effectuate real decentralization of governmental powers and functions to the District Assemblies (Chapter 20).
20. The reconsideration of the attempt to impose a partisan government on a non-partisan local government system (article 248(1)).
21. A review of the Constitution to allow for the election of District Chief Executives (article 243).
22. A review of the death penalty provisions and the possible abolition of the death sentence (articles 3(3) & 19 (2)).
23. A reconsideration of the exclusion of Executive Instruments from the category of subsidiary legislation which require prior parliamentary approval for their validity, (article 11(7)).
24. A review of the composition of the Electoral Commission in terms of Article 43 to determine whether part-time membership be removed and be replaced by full-time members.
25. A reconsideration of Article 45 with a view to granting the Electoral Commission the power to monitor and enforce compliance with electoral laws by political parties.
26. A review of Article 55(17) to provide for Parliamentary debate of the Annual Reports of the Electoral Commission.
27. A review of Article 71(1) to remove the power granted the President to determine the salaries, allowances and facilities of Members of Parliament and the Speaker.
28. A reconsideration of Article 75(1) in terms of rewording for better clarity.
29. A review of Article 82(5) to establish whether it should be amended to make it mandatory, rather than discretionary, for the President to revoke the appointment of a Minister once Parliament has passed a vote of no confidence in that Minister.
30. A review of Articles 142-147 to determine whether the Regional Tribunals be removed from the court structure of Ghana.
31. A reconsideration of the Article 146(6) to determine whether it should be amended to include Parliamentary oversight and public proceedings in the process for removing the Chief Justice from office.
32. A review of article 190(1) on the listing of the Public Services of Ghana in order to more fully take account of changes in the Public Services.
33. A review of the provisions on retiring age and pension to allow lawyers in senior grades of the Legal Service to retire at sixty-five, (Article 199(1)).

34. A review of the Article 221 to determine whether it should be amended to allow for the appointment of non-lawyers to the membership and chairmanship of the CHRAJ.
35. A reconsideration of Article 218(a) – (e) to determine whether it should be amended to remove the traditional ombudsman or administrative justice functions from the CHRAJ and to assign them to a new institution (such as the Labour Commission) so that the CHRAJ can focus on human rights and anti-corruption.
36. A review of Article 225 to determine whether it should be amended to identify or create a source of funding similar to that of the Common Fund to finance the CHRAJ and its commissioners.
37. A review of the provisions of Chapter 18 of the Constitution to provide for Parliamentary debate of the CHRAJ annual reports and to ensure accountability and social auditing of the performance of the CHRAJ.
38. A review of the provisions on amendments of entrenched provision in order to make the process more meaningful to the citizenry (article 290(5)).
39. A review of the provisions on the amendments of non-entrenched provisions to clarify matters relating to the reference to the Council of State of proposed amendments after the first reading of a Bill for the purpose (Article 291(2)).

Source: The Ministry of Justice, Ghana, Consultative Review of 16 Years of the Operation of the 1992 Constitution of Ghana: Project Proposal (October 2009).