Briefing Paper

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GHANA'S 1992 CONSTITUTIONAL REVIEW PROCESS: AVOIDING ERRORS AND OMISSIONS IN THE PROPOSED AMENDMENTS

A CDD-Ghana Position Paper

■ Introduction

Promulgated in 1992, the Constitution of the Republic of Ghana is 22 years old this year. This makes it the longest lasting constitution in Ghana's post-independence experience. It has become the reference for discussions on the nation's political and economic governance and social development. However, while it has been lauded for providing the framework for the establishment of institutions and processes for the democratic governance achievements of the Fourth Republic (competitive multi-party elections, flourishing civil society, free media, enjoyment of basic liberties, etc.), the 1992 Constitution has also come under heavy criticism for fostering a hegemonic executive and weak institutional checks and balances among other issues. It is for this reason that CDD-Ghana joined other stakeholders to welcome President Mills' 'constitutional review' initiative in 2010.

This paper critically examines the amendments that have been proposed for a future referendum. Particular attention is paid to the degree to which the proposed constitutional amendments address the key governance challenges that have been experienced with 1992 Constitution, some of which it was supposed to help cure. These include the following:

1. The over–centralization of our political system, with a strong hegemonic president who presides over a vast network of patronage. It was hoped that constitutional review would sufficiently address Ghana's constitutionally backed spoils system, an example of which is the practice whereby a change in government is accompanied by wholesale changes in personnel – even in institutions where technical expertise rather than political affiliation should be prioritized

2. The emasculation of Parliament (which is a corollary of the over-concentration of power in the executive) severely impairing the ability of the institution to exercise its representation and oversight roles effectively

3. The unnecessarily high cost of government, including the presence of institutions of state that have been constitutionalized and are arguably superfluous or of dubious utility

4. The prevalence of excessive polarization, hyper-partisanship, toxicity, and "winner takes all" attitudes and practices that have come to characterize our national politics

The proposals made by the Constitutional Review Commission (CRC) are tepid and half-hearted. The fundamental changes needed to improve the constitution are unpopular amongst the political

elite. The almost wholesale acceptance by government of the CRC's weak proposal is therefore not surprising, given that the proposed changes would be more advantageous to ruling regimes. There is no dispute about the fact that some of the suggested changes to the Constitution made by the CRC, and ultimately adopted by the Constitutional Review Implementation Committee (CRIC), are useful. However, the concern is that many of the proposed changes are unhelpful and in some cases, potentially pernicious.

Below are discussions of some of the problematic proposed changes and reforms to the entrenched provisions.

■ The Right to Vote

Currently, Article 42 of the Constitution gives every Ghanaian citizen, with sound mind, of eighteen years or older the right to vote and the eligibility to be registered as a voter for the purposes of public elections and referenda. The proposed amendment seeks to make Article 42 a non-entrenched provision of the Constitution. The effect of the proposed amendment is that Parliament would be enabled to amend the voting age and offences that deprive a person the right to vote by statute at will. Lowering the bar for amendment of the provisions governing eligibility to vote is unwise and retrogressive in light of challenges the country has experienced, with problems of bloated voter roll and voter eligibility suspicions. Furthermore, it leaves the decision to alter up to the discretion of the government and the Electoral Commission. For example, the ability to reduce or raise the voting age, and hence restrict or expand the right to vote, would be at the discretion of the government in power and the Electoral Commission. It may facilitate partisan and politically expedient/self-serving motives in decisions on the franchise. It can also be used to restrict the voting rights of non-resident Ghanaians.

■ Guaranteeing Fundamental Human Rights

The 1992 Constitution contains a number of progressive provisions protecting fundamental human rights. These include the right to free speech, freedom from arrest and unlawful detention, and the rights to privacy, information, freedom of religion, among many others. The rights are already justifiably subject to an exception – i.e. they are to be exercised "subject to respect for the rights and freedoms of others and the public interest" [Article 12(2)]. These clauses give wide discretionary capacity to courts to limit fundamental rights. Quite inexplicably, an amendment has been proposed to give even more discretion to the courts to limit these rights. The proposed amendment would include in Article 21(4)(c) "public order" and "public safety" as bases for which human rights can be restricted.

This proposed amendment represents a further dilution of the safeguards around the broad application of rights-based provisions. The existing claw back clauses in the Constitution are broad enough. There is no justification for expanding them. Expansion also comes with the risk of giving the executive justification to use amorphous clauses such as 'causing fear and panic' to restrict free speech or restrict right to assemble and to circumvent the requirement to apply to courts to stop a demonstration.

■ Increasing the Capacity of Parliament to Engage in Executive Oversight

The existing constitutional requirement that the president chooses a majority of ministers from among MPs severely undermines the independence and effectiveness of parliament. It makes it extremely unlikely that MPs who serve concurrently as ministers will criticise or question a policy or program of the executive on the floor of the House. Secondly, the demands of ministerial responsibility, coupled with the generally more substantial power, prestige, perks and opportunities for patronage attached to a ministerial appointment, mean that MPs appointed to serve as ministers will invariably allow

their parliamentary duties to be neglected, which provides a strong incentive to attempt to compensate by steering projects to their constituencies. The third negative effect of Article 78 on the work of Parliament is that it provides those MPs on the executive side who are not ministers with an added incentive to curry favour with the executive as almost every MP aspires to be a minister. The proposed response of the CRC to this governance deficit is simply absurd.

The suggested amendment will enable the President to appoint ministers from within or without Parliament.Thus, the president can choose all or none, a majority or minority of his/her ministers from Parliament. It woefully fails to address the challenge of executive/presidential over-dominance as well as the ineffectiveness and/or marginalization of Parliament. In addition, it has the possibility of significantly aggravating governance issues arising from the present arrangement under which the president chooses majority of his ministers from parliament. Presidents completely beholden to their parties may end up appointing all their ministers from Parliament, while presidents with little regard for their parties or Parliament may end up appointing no ministers from Parliament. A key deficit with the current arrangement is that it weakens the incentive for the political party in control of the parliament and the executive to conduct any meaningful executive oversight. This amendment does not address this deficit. In fact, it only makes it worse.

- **Reducing Patronage and Winner Takes All (WTA) – Addressing the president's excessive powers of appointment**

The present position is that the President has the authority to appoint members of independent constitutional bodies including the Commissioner for Human Rights and Administrative Justice and his Deputies, the Auditor-General, the District Assemblies and the Common Fund Administrator. Other appointments are; the Chairpersons and other members of the Public Services Commission, the Lands Commission, the governing bodies of public corporations, and National Council for Higher Education. In addition, acting on the advice of the Council of State, the president has the authority to appoint the Chairperson, Deputies, and other members of the Electoral Commission. The proposed amendment introduces a new article, 70[a], which will allow for the removal of members of the independent constitutional bodies via the procedure similar to the removal of a Justice of the Superior Court under Article 146. That process includes the submission of a petition to the President; a prima facie case of misbehaviour or incompetence as determined by the Chief Justice, and an appointed committee that makes a recommendation to the Chief Justice, who then forwards the recommendation to the President for a decision.

The primary concern with membership of Independent Constitutional Bodies, however, is not how they are removed. The problem is how they are appointed. CHRAJ commissioners, Public Services Commissioners, Lands Commissioners, the Auditor General, District Assembly Common Fund Administrator and other such positions do not require parliamentary approval of any sort. The current proposals from the CRC (and adopted by the CRIC) simply suggest that some of these appointments, which were hitherto made solely by the executive, should be subjected to approval by a simple majority of Parliament. The proposed amendment does not adequately address the primary deficit with the existing appointment of the leadership of independent constitutional bodies, which is the lack of cross party confidence in such appointees. Indeed, the President would in practice still have unrestricted capacity to appoint party loyalists into technocratic positions. A requirement of super-majority (i.e. 2/3rds majority) approval by Parliament would have a better chance of enhancing cross-party confidence and reduce partisanship. It would also significantly enhance the likelihood that these positions will be occupied by technocrats rather than persons appointed due to their connection to a ruling party. Reducing the authority of the president and increasing the role of Parliament in making appointments to these supposedly

independent constitutional bodies is the best way to curb winner takes all politics and its other concomitants.

In addition, Article 71 sets out how the salaries, allowances, and the facilities and privileges of certain officials are to be determined. The President, on the recommendations of a committee of not more than five persons appointed by the President, determines the salaries of the Speaker and Deputy Speakers and members of Parliament, the Chief Justice and other Justices of the Superior Court of Judicature, and the Auditor-General. The salaries and allowances for the President, Vice President, the Chairman and other members of the Council of State, and Ministers of the State and Deputy Ministers are to be determined by Parliament on the recommendations of the same committee appointed by the President. The proposed amendment will empower an Independent Emoluments Commission (which is created pursuant to clause 18) to determine the emoluments of specified officers of the state. The effect of this amendment would be to derogate from the powers afforded to the President and Parliament in determining the salaries of Government and State officials. One wonders, of course, how "independent" an emoluments commission appointed by the executive can be. Moreover, matters relating to the emolument of public officers occur too infrequently to have a dedicated permanent commission in place – particularly when there is a Fair Wages Board engaged in the determination of public sector wages.

■ The National Development Planning Commission (NDPC)

The 1992 Constitution [Article 86(2)] created an NDPC, which consists of a Chairperson appointed by the President in consultation with the Council of State, the Minister of Finance and other Ministers of State the President appoints, the Government Statistician, the Governor of the Bank of Ghana, one representative from each region of Ghana appointed by the Regional Co-ordinating Council of the region, and other persons appointed by the President. A proposed amendment to Article 86(2) would change the composition of the National Development Planning Commission to include, among other members, representation from political parties in Parliament. The Chairman and members will be appointed by the President in consultation with the Council of State. Unfortunately, this does not address the primary issues of politicization of technocratic functions and lack of independence whereby the NDPC is used as a reception for senior 'foot soldiers' of the party.

Also, per Article 87 of the Constitution, the NDPC can make development proposals for multi-year rolling plans, development of districts, and strategic analyses of macro-economic and structural reform options. A proposed amendment would add a provision stipulating the formulation of a national development policy framework, a long-term strategic national development plan, and monitoring and evaluation of the long-term national development framework. Another proposed amendment would require a two-thirds majority of Parliament to approve the long-term national development policy framework. The rationale for this proposed amendment is far from clear. To begin with, far fewer projects have been discontinued due to a change of government in the Fourth Republic. In fact, military coups and ensuing military regimes did a lot more than any administration has done so far to truncate government projects. But this amendment is not about preventing the occurrence of military coups.

Infrastructure projects like the Bui Dam and policy initiatives like School Feeding have lived beyond the lives of the administrations that initiated it. Currently, it is much more the norm for projects to be stalled by a change of administration for lack of funds, bureaucratic bungling, crude political brinkmanship, and the desire of the newly elected governments to re-award the projects to contractors more friendly to them or those from whom they can more reliably collect kick-backs. None of these tendencies will be addressed by a "constitutionalized" National Development Plan. At any rate, a simple requirement that major policies initiated by any government must be backed by an act of parliament before

implementation so that changing the same policies would require approval by Parliament.

■ **Missing/Absent Provisions**

The level of attention given to the NDPC and other less substantive amendments in the constitution proposals is especially galling when one considers the number of issues which are not addressed at all by the reform process, or are addressed inadequately. One obvious governance challenge is widespread public corruption, and particularly, how to overcome the most significant obstacle in the enforcement of Ghana's numerous anti-corruption statutes – i.e. the absence of an independent prosecution mechanism. The Attorney-General (AG) is a minister of state and the principal legal adviser to the government. That individual also has sole responsibility to initiate and conduct prosecutions of criminal offences. This combination of roles has come under scrutiny in recent times due to the tension and potential conflict of interest between the two roles. The independence of the AG has been called into question in respect of the prosecution on high profile opposition party politicians, and attracted criticisms of selective justice. Given the position as the initiator of prosecutions and chief legal adviser to the executive, it is difficult for the AG to appear impartial or independent in criminal matters relating to opposition or governing party politicians. It is critical that these two roles are separated, and the creation of an independent prosecutor's office.

Other serious deficits unaddressed in the constitutional reform process are:

1. The need to place restrictions on the President's ability to create new ministries, departments and agencies, rename existing ones, or merge them without parliamentary approval. Under the present constitutional order, the President can create and fund new agencies, including ones that duplicate existing ones and even starve them of funding
2. The untrammelled powers the president, ministers and other executive branch actors have over the disposal of high value state assets/resources(e.g., land, forestry, minerals, state-owned enterprises, etc.) which fuels unbridled presidential patronage, winner takes all practices, hyper political partisanship and national disunity
3. The seeming failure to address the unclear asset declaration regime that encourages and facilitates opacity and corruption in the public sector. ❑❑

✍ *CDD-Ghana Briefing Papers are generated from commissioned research on topical issues, as well as presentations at round-table discussions at the Center.*

This is a CDD-Ghana Position Paper

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