HOW THE CONSTITUTION REVIEW PROCESS SHOULD BE COMPLETED

Kwamena Essilfie Adjaye,[1*] Ernest Amoabeng Ortsin[2] and Anthony Hugh Cobbinah[3]

Abstract: The 1992 Constitution has endured longer than previous constitutions, nonetheless there have been calls for amendment of some provisions. These calls were heeded when a Constitution Review Commission (CRC) was established in January 2010. After reviewing the major opinions from nationwide hearings and many memoranda, the CRC presented its report in December 2011, a report in which many recommendations were made. The Government studied these recommendations and stated its position on the recommendations in a White Paper issued in June 2012. Then the Government set up a Constitution Review Implementation Committee (CRIC) in October 2012 to implement the recommendations, which fall into two categories, those that require referenda and those that don't. But a law suit in July 2014 challenging its constitutionality stalled the work of the CRC until there was a favourable ruling in October 2015. This ruling notwithstanding, the CRC's recommendations have still not been implemented. The work of the CRC and its recommendations are evaluated, with emphasis on two major issues, decentralization and the death penalty. Recommendations are then made on how decentralization can be strengthened, including on how to create new districts and elect chief executives of metropolitan, municipal and district assemblies; on how to abolish the death penalty; and on how to complete the CRC's work. Our overriding recommendation is that all the recommendations of the CRC should be implemented by the end of December 2017.

[1] *Interim Chairman, Ghana Growth and Development Platform. *Corresponding author email: keadjaye@ghanagdp.org | Tel: 0575113030*

[2] *Interim Coordinator, Ghana Growth and Development Platform*

[3] *Member, Ghana Growth and Development Platform*

CONTENTS

1 THE ISSUE

For years there were calls for review and amendment of the 1992 Constitution. In response to these calls a Constitution Review Commission (CRC) was established in January 2010. The CRC completed its work and presented its report to the Government which thereafter issued a White Paper and then established a Constitution Review Implementation Committee (CRIC) to work on the implementation of recommendations. But the work of the CRIC was stalled by a court case until the Supreme Court ruled in favour of the CRIC and CRC to continue their work.

In this paper the authors evaluate the constitution review process, evaluate the recommendations of the CRC, and propose how the process can be completed. Three major issues are addressed: the decentralization process is reviewed and recommendations are made about how it can be strengthened, encompassing how new districts should be created and how Metropolitan, Municipal and District Chief Executives (MMDCEs) should be elected; legislation on the use of the death penalty in Ghana, practices elsewhere, and findings of the CRC are analyzed; and how referenda can be held on amendments of entrenched provisions such as the abolition of the death penalty and the election of MMDCEs are stated.

The next section is Background, followed by sections on Analysis, Summary of Opinions, and Recommendations.

2 BACKGROUND

2.1 The 1992 Constitution

The 1992 Fourth Republican Constitution was promulgated on January 7, 1993. It has proven to be the most enduring of all the nation's constitutions, as the First Republican Constitution lasted about six years from July 1, 1960 to February 24, 1966, the Second Republican Constitution which came into force on October 1, 1969 lasted for only 27 months, and the Third Republican Constitution which was birthed on September 24, 1979 also lasted for only 27 months.

In its 23 years of operation the 1992 Constitution has anchored six presidential and parliamentary elections. Two of the elections, in 2000 and in 2008, resulted in the smooth transfer of power from an incumbent government to an opposition party. Calibrating this achievement by the Huntington "two turnover test,"[1] it can be said that Ghana's democratic experiment has reached a level of consolidation.

[1] Samuel P. Huntington in his 1991 book, 'The Third Wave: Democratization in the Late Twentieth Century,' postulated that democratizing countries reach "consolidation" when they are able to change governments at least on two occasions.

There are different schools of thought about the reasons why the 1992 Constitution appears to have steadily weathered the vagaries of the often fluid political environment. The first argues that it has endured because of the fact that the composition of the Consultative Assembly that fashioned the Constitution was exemplarily unique. It's argued that the 1992 Constitution is the only one whose writing involved the rank and file of the Ghanaian population, including market women, farmers, drivers, and artisans. This consultative approach used, it is argued further, ensured that the constitution that emerged had complete buy-in and 'ownership' by the general population.

The second school of thought argues that the 1992 Constitution has endured because it was written at a time when Ghanaians had grown distrustful of Utopian military adventurists. It's argued that the violation of the rights and freedoms of the people by the military had reached such intolerable levels that the people were no longer ready to countenance authoritarian regimes. Thus, the guarantees of the rights and freedoms of the people in the 1992 Constitution is promoting and safeguarding the free, peaceful and democratic environment that Ghanaians had been yearning for.

Ghana under the 1992 Constitution has received both continental and international praise for its commitment to democracy and constitutionalism. It remains a shining example for several countries on the African continent and beyond.

2.2 Proposals for Amendment of the 1992 Constitution

In spite of all it positive attributes, however, the 1992 Constitution has not been without critical scrutiny. Over the years some provisions have attracted scathing commentary from constitutional experts, lawyers, academics, politicians, civil society activists and other persons as well as groups. One of the most sharp-pointed criticisms of the 1992 Constitution is that it has created a practice of 'winner-takes-all' in the country and this is partly to blame for the deep-seated polarization of the politics of Ghana.

Another criticism is that Article 78 (1) which requires the President to appoint a majority of ministers from the Parliament weakens the principle of separation of powers. This provision has often been faulted for the seeming emasculation and overrun of the powers of the Parliament by the Executive.

A third major criticism has been that the appointing powers of the President are too sweeping and too far-reaching. The appointment of MMDCEs by the President is perhaps the most popularly cited example. It appears that the majority opinion of local government experts and others is that MMDCEs should be elected and not appointed.

2.3 Establishment of the CRC

With the above stated issues and several others forcefully finding expression in the public space prior to the 2008 general elections, in their 2008 manifesto the National Democratic Congress (NDC) made a promise to review the 1992 Constitution. To this end President John Evans Atta Mills, acting in accordance with Article 278 (1) of the Constitution which confers on the President powers to appoint a Commission of Inquiry into matters of public interest, inaugurated a Constitution Review Commission (CRC) to review the 1992 Constitution with Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64) on January 11, 2010. The CRC was tasked to collate views of Ghanaians on which provisions of the 1992 Constitution require amendment.

The CRC was specifically mandated to do the following, among others:[2]

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

2.4 Overview of the Work of the CRC

In executing its mandate, the CRC travelled all over the country to hold consultative fora with Ghanaians from all walks of life. The CRC also received numerous memoranda on what provisions of the Constitution needed to be amended and even on how the CRC should conduct its affairs. In addition, it also engaged the services of experts to review the constitution and make recommendations for reforms.

The CRC worked for two years. The CRC received a total of 83,161 formal submissions after two rounds of consultations in 170 administrative districts in all ten regions of the country. After analyzing all the submissions, as well as receiving expert opinions from both local and international consultants, the CRC completed and presented its report to the Government on December 20, 2011.[3] The report highlights 177 major issues which are condensed into 12 thematic areas.[4]

[2] Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64).
[3] Constitution Review Commission, *Report of the Constitution Review Commission,* Accra, 2011.
[4] These are: National Development Planning; Executive; Legislature; Judiciary; Public Services; Independent Constitutional Bodies; Decentralisation and Local Government; Traditional Authority; Lands and Natural Resources; National Security; Human Rights; and Miscellaneous.

2.5 Overview of the Work of the CRIC

After receipt of the report, as per Article 280 (3) of the Constitution, the Government on June 15, 2012 gazetted a White Paper stating its positions on the recommendations made by the CRC.[5] The Government accepted some of the recommendations and rejected some others with reasons or explanations.[6]

Subsequent to the issuance of the White Paper the Government set up the Constitution Review Implementation Committee (CRIC) on October 2, 2012 to study further and engage with citizens and then implement the recommendations approved in the White Paper.

To this end, the CRIC initiated a process to collate views to guide how recommendations of the CRC should be implemented.

The recommended amendments fall into two categories, those that concern entrenched provisions in the Constitution and therefore require referenda to amend, and those that can be amended by Parliament without referenda.

2.6 The Legal Challenge against the CRC

But while the work of the CRIC was ongoing the CRC was slapped with a lawsuit which consequently stalled the work of the CRIC.

Prof. Stephen Kwaku Asare, a US-based Ghanaian professor in July 2014 instituted a lawsuit in the Supreme Court challenging the constitutionality of the CRC. His argument was that Parliament, as per Article 290 of the Constitution, is the sole body vested with powers to amend the Constitution. However, in a majority 5 - 2 decision by a seven-member panel presided over by the Chief Justice, Her Ladyship Mrs. Georgina Theodora Wood, the Supreme Court affirmed the legality and constitutionality of both the CRC and the CRIC and dismissed the case on October 14, 2015.

Since the Supreme Court ruling there have been calls for the CRIC and CRC to complete their mandates and thereby complete the constitution review process as soon as possible.

2.7 Implication of the Supreme Court Ruling

The Supreme Court ruling means that the constitution review process must continue to its logical conclusion. It is for these reasons that this Working Paper addresses major issues and how to complete the review process.

[5] Government of Ghana, *White Paper on the Report of the Constitution Review Commission of Inquiry,* Accra, 2012.
[6] Constitution Review Commission, *Variance Report,* Accra, 2012.

3 ANALYSIS

3.1 Evaluation of the CRC's work

The work of the CRC has been generally viewed by many as being satisfactory. In terms of coverage, it touched on virtually all the thorny issues that had been discussed and debated since the promulgation of the 1992 Constitution. Their methodology of combining expert views with grassroots opinions enriched their information gathering process. Their consultations were extensive and expansive, in all ten regions and a majority of the districts of the country, as stated above. The CRC created conditions that allowed for public 'ownership' of the views and opinions that were articulated. The widespread use of new media technologies to collate, document and archive information is also quite commendable.

In the charged political atmosphere in Ghana perhaps the biggest achievement of the CRC is the fact that it was able to complete its consultation and report without being tagged as having been partisan. They received the support and cooperation of many Ghanaians in executing their mandate. The CRC distinguished itself as an effective constitution review commission.

3.2 The Recommendations of the CRC

In sum, the CRC made 478 recommendations for the retention, review, or amendment of provisions of the 1992 Constitution. The recommended amendments were 264 in number and they were arranged into three groups, constitutional, legislative and administrative. As stated in Section 2.5 above, the CRIC distilled the recommendations into two categories, those that require referenda to amend, and those that don't.

This paper focuses on the decentralization process and the death penalty, and how referenda can be organised to amend these recommendations of the CRC.

3.3 Decentralization

3.3.1 Legislation on Decentralization and on the creation of new Districts

The 1992 Constitution states in Article 240 (1) that "Ghana shall have a system of local government and administration which shall, as far as practicable, be decentralized."

The main legislation on decentralization is the Local Government Act, 1993 (Act 462). There are other legislations that are relevant, like the Local Government Service Act, 2003 (Act 656), the Internal Audit Agency Act, 2003 (Act 658), the Financial Administration Act 2003 (Act 654), the Public Procurement Act, 2003 (Act 663), and the Model Standing Orders, the guidelines issued by the Minister for the Ministry of Local Government and Rural Development (MLGRD) as per Section 18 (6) of Act 462.

The Local Government Act sub-section 2 (a, b) mentions the creation of districts. It is stated that the President is the only person who, through a Legislative Instrument, can declare an area within Ghana to be a district.

In Section 3 of the Act the Electoral Commission (EC) and the MLGRD are given the responsibility for the creation of districts acting on behalf of the President. In other words, it's a shared responsibility, with the EC and MLGRD complementing each other.

Act 462 sets out the functions of Metropolitan, Municipal and District Assemblies (MMDAs). It states the various committees that can be created in the MMDAs. It also allows for the creation of sub committees of the Executive Committee (Section 24).

In part II of Act 462 the planning functions of the District Assemblies are set out in Sections 46 to 69. Act 462 states the powers of the District Assemblies and their limits.

The Local Government Service Act mentions the various constituents of the service in Section 2.

The Model Standing Orders can be said to be the instrument that guides the assemblies in their work. An example is the language that can be used in proceedings in an assembly.

3.3.2 Creation of new Districts and their geographical distribution

The number of assemblies has increased from the one hundred and ten (110) that it was in 1988. Twenty-eight (28) were added in 2003, twenty-three (23) in 2007, and then forty-six (46) new ones were created in 2012, bringing the total to 216.

The 46 created in 2012 were distributed regionally as follows: Ashanti, 3; Brong Ahafo, 5; Central, 3; Eastern, 5; Greater Accra, 6; Northern, 6; Upper East, 4; Upper West, 2; Volta, 7; and Western, 5 (see the Annex).

Act 462 states the population requirements for the creation of districts. A district should have a minimum of seventy-five thousand (75,000) people (Section 4 a (i)), a municipal area should have a minimum population of ninety-five thousand (95,000) (Section 4 a (ii)), and a metropolitan area should have a minimum population of two hundred and fifty thousand people (250,000) (Section 4 a (iii)). The Act states that there must be geographical continuity and economic viability of the area (Section 4 (b)), with the term economic viability explained (Section 5).

As population increases, the dynamics of assemblies change. A District Assembly will grow into a Municipal Assembly which in turn will grow into a Metropolitan Assembly. A Metropolitan Assembly could also be broken down into districts where the population has increased to the extent that further break down is necessary to ensure performance of core functions.

A review of the population trends of the country reveals that much as the overall population is growing some areas are sparsely populated. If a new district is created in a sparsely populated area it raises serious issues about its economic viability. Relatedly, will there be the financial resources from local, national and donor sources for operating the district? Will the resources be adequate for providing offices and accommodation for the staff? Will businesses be viable in the district? Will the district attract investors? When a new district is created in an area where its economic and financially viability is questionable, it places pressure on the personnel who are posted there as the resources available are not adequate for them to work efficiently and effectively. These two factors, economic and financially viability, should be the primary considerations in the creation of new districts.

When new districts were created in 1988 a number of communities were ready to support the creation of the districts with land and structures as the creation of the districts was regarded as a means of bringing development and opening up the districts for government support. It was not uncommon for buildings to be given free to the assemblies. The offer of land was used to entice investors as there was the prospect of jobs being created from their investment. But the creation of districts since then has not been approached in similar fashion. The approach and attitude lately has been that if a government wants to create the district in an area then it should do everything. The process of creation of districts has resulted in chaotic situations so many traditional authorities seem not to be interested these days. Why have things changed?

If not for political expediency it's always better to create districts that can be viable rather than districts that are likely to be distressed. Our concern, as stated above, is economic and financial viability. This can be vividly seen in the recent past when the District Assembly Common Fund (DACF) was not forthcoming. Much as the DACF is a statutory grant to the assemblies for development, some of the assemblies could not undertake capital projects without the DACF, which meant that they might not be viable. It can be argued that if the number of districts was small more development would occur because development would be spread over a smaller number of districts.

Some of the assemblies cannot survive without grants from central government. Sections 88 and 89 of Act 462 allow assemblies to borrow but assemblies have difficulties borrowing. When grants are withheld, these assemblies have difficulty operating.

It is interesting to note that our political parties generally like the creation of new districts as it gives them the opportunity to offer appointments to their members.

3.3.3 CRC on Decentralization and on the creation of new Districts

Decentralization and local government are addressed in the CRC report. It is recommended that decentralization be practiced at the Regional Coordinating Councils, that there should be devolution of power to the Assemblies, and delegation of power to the Sub-Districts.

In order to push for continuation of the decentralization program, the CRC recommended that the MLGRD should within twelve (12) months of the coming into force of this recommendation initiate the passage of subsidiary legislation to spell out the deferent modes of operation of the MMDAs at all three levels, Metropolitan, Municipal and District.

On the creation of MMDAs, the CRC recommended that it should be done by the President and the EC with the approval of Parliament. However, this recommendation was not accepted by the Government. The Government wants the EC to have the power to create districts in consultation with the President and then for the Parliament to approve. Thereafter, the Government wants the MLGRD to establish districts approved by the Parliament.

Decentralization and Local Government are among the entrenched clauses in the 1992 Constitution. Article 290 addresses how entrenched clauses can be amended.

3.3.4 CRC on the Election of MMDCEs

The Commission made three recommendations on the election of MMDCEs: that the mayors of Metropolitan Assemblies “should be popularly elected”; that in Municipal Assemblies the President should nominate candidates for vetting of competence by the Public Services Commission, “after which 3 nominees” stand for public election; and that in District Assemblies the President should nominate one person who should be approved by simple majority.

In its White Paper the Government didn’t accept these recommendations, suggesting instead a system for all three levels similar to what the CRC had recommended for Municipal Assemblies: that the President should nominate at least five persons who would be vetted by the Public Services Commission for competence, with three chosen to be popularly elected.

Section 20 of Act 462 states that the chief executive of each district shall be appointed by the President with the prior approval of not less than two-thirds majority of the members of the District Assembly present and voting at the meeting. The election of chief executives of MMDAs is addressed by Article 240 of the 1992 Constitution; it is an entrenched clause. Again, Article 290 addresses how entrenched clauses can be amended.

3.4 Death Penalty

3.4.1 Global Overview

Globally, the death penalty is one of the most controversial and emotion-laden topics in discussions of human rights. Whereas some people opine that the continued use of the death penalty is a blot on the conscience of humanity, others feel it is a just recompense for criminally-minded people in society. The debate has raged on for several decades in the modern world as to whether indeed the death penalty is an effective deterrent to the commission of crimes. Countries are divided on this issue, and so whilst some have taken steps to abolish it, within the framework of international protocols on human rights, others have held on tightly to it.

A snapshot of the worldwide situation reveals that there has been significant increase in the number countries that have either abolished or are in the process of abolishing the death penalty in recent years. The 2014 Amnesty International report on the death penalty indicates that as many as 140 countries out of the 193 member states of the United Nations (UN) have now abolished the death penalty either in law or practice. This includes 98 countries that have abolished the death penalty for all crimes; seven (7) that have abolished it for ordinary crimes only; and 35 that have not applied it in the last ten years.[7]

Even though 58 countries still apply the death penalty according Amnesty International, the current situation marks substantial progress compared with 1977 when only 16 countries had abolished the death penalty either in law or practice. Amnesty International is hopeful that the situation will continue to improve if efforts are sustained in the global campaign to eliminate the death penalty. In 2014, the number of people known to have been sentenced to death was 2,466, which was a 28% increase over the figure for 2013. However, the number of executions for the same period was 607, a decline of 22% over the figure for 2013. The good news was that in 173 countries there were no executions.[8]

There are several international treaties and protocols that call for the abolition of the death penalty. Of foremost significance is the Second Optional Protocol to the International Covenant on Civil and Political Rights adopted by the United Nations (UN) General Assembly in 1989. In this protocol, the UN calls for the total abolition of the death penalty, with a caveat that countries may only use it in times of war. Countries are expected to state their exemptions at the time of signing the protocol.

[7] Amnesty International, *Death Sentences and Executions 2014*, London.
[8] Ibid.

3.4.2 The Death Penalty in Ghana

Ghana is a signatory to the International Covenant on Civil and Political Rights even though it is yet to ratify it. The country's 1992 Constitution upholds the rights and freedoms of citizens, as stipulated in Article 12 (2): "Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest."

The Constitution further guarantees the right to life in Article 13 (1): "No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted." This provision means that although the Constitution guarantees the right to life the state can take the lives of convicted criminals.

According to the legal statutes of Ghana, offences that attract the death penalty include:

a. Murder, Section 46 of the Criminal Offences Act, 1960 (Act 29);
b. Attempt to commit murder by a convict, Section 49 of the Criminal Offences Act, 1960 (Act 29);
c. Genocide, Section 49A of the Criminal Offences Act, 1960 (Act 29);
d. Treason and High Treason, Article 3(3) (b) of the 1992 Constitution, and Section 180 (1) of the Criminal Offences Act, 1960 (Act 29).

However, it is interesting to note that the last time a Ghanaian president signed the death warrant for the execution of a prisoner was in 1993. This is in spite of the fact that several dozens of people languish in prison cells on death row. The seeming nonchalance of previous and current presidents to sign death warrants has raised questions about why Ghana continues to maintain capital punishment on its statutes.

In 2014, for instance, there were nine death sentences pronounced in Ghana, but none of them was carried out. Rather, President John Dramani Mahama, as part of the commemoration of the country's 57th Republic Day Anniversary on July 1, exercised his prerogative of mercy (under Article 72) to commute 21 death sentences to life imprisonment.

Thus, with a virtual moratorium on executions some legal experts and human rights campaigners have been calling for the abolishment of the death penalty in the country, arguing that Ghana is already a de facto abolitionist state.

3.4.3 CRC on the Death Penalty

According to the CRC, it received a myriad of submissions on the death penalty; some of those submissions called for its retention whilst others called for its abolition.

For those who called for its retention, their core arguments included the following:

i) That the death penalty serves as a deterrent against crimes;
ii) That coup plotters and hardened criminals (including armed robbers) deserve the death penalty;
iii) That the death penalty serves as commensurate justice for victims of murders and their families;
iv) That their religious beliefs support the death penalty;
v) That those who engage in pre-meditated murder must also be killed; and
vi) That the death penalty saves the nation the upkeep cost of condemned prisoners.

For those who were opposed to the death penalty and called for its abolition, their core arguments included the following:

i) That the justice system is not perfect and so there could be wrongful executions;
ii) That where innocent persons are executed, they cannot be recalled back to life;
iii) That evidence does not lend credence to the fact that the death penalty deters people from committing crimes;
iv) That the state must not be seen to be a killer;
v) That the death penalty is not punitive enough since the dying process is immediate;
vi) That the death penalty is violent and a blemish on human conscience;
vii) That Ghanaian presidents are often not willing to sign death warrants;
viii) That where the state refuses to carry out executions of condemned prisoners, it becomes an abuse of their rights;
ix) That the world is gradually moving towards abolition of the death penalty; and
x) That it blights the human rights record of the country.

The CRC recommended the abolition of the death penalty and called for its replacement with life imprisonment without parole, which it described as a “stiffer” punishment. The CRC says it took into consideration the weight of the submissions it received vis-à-vis its own analysis of global trends in reaching that decision. However, the Commission conceded that the issue still remains dicey and would require further engagement with citizens about the full import of the abolition of the death penalty. Therefore, it called on the political elite and middle class to take up the challenge. The Government accepted this recommendation in its White Paper.

Box 1 - Abolishing the Death Penalty: Switzerland's experience

Switzerland abolished the death penalty as far back as 1942, perhaps owing to its bad experiences with the practice in the Medieval and early 20th centuries. In Swiss history there is the famous story of Anna Göldi who was executed by decapitation on suspicion of witchcraft. The facts of the case were that, under torture, Anna who was a maidservant, confessed to using supernatural means to put needles in the bread and milk of one of her master's daughters. She allegedly confessed to having a pact with the devil who gave her those powers.

On trial, however, she denied the forced confessions and pleaded her innocence. Even though the court did not try her on charges of witchcraft, she was found guilty of poisoning and sentenced to death. She was decapitated on June 13, 1782, much to the disgust of the Swiss public and the entire Europe. Many people believed the charge against Anna was trumped up by her powerful master who was surreptitiously having an affair with her and felt alarmed when she threatened to divulge the secret.

Years later, more and more evidence emerged to prove the innocence of Anna. This impelled the Swiss parliament on September 20, 2007, more than 226 years after the death of Anna, to finally acknowledge her innocence and describe her sentence as a "miscarriage of justice." Today, at Glarus, the town where Anna was executed, at the premises of the court house where she was tried, a memorial in the form of two permanently lit lamps stands in her honor.

Ever since abolishing the death penalty, Switzerland has been at the forefront of the international campaign for the revocation of the death penalty in all its forms. The country has made a commitment with like-minded international partners to end the death penalty by 2025. It is on this basis that the Swiss government has shown keen interest in the work of the CRC, particularly with respect to the debate on the abolition of the death penalty.

Box 2 - The Death Penalty in the US

It is important to mention that according to the Death Penalty Information Centre (DPIC), since 1973 about 156 people sentenced to death in the United States have later been exonerated. For these persons, what it means is that if they had been executed, they would have been executed wrongfully.

And there is no way their lives could have been restored. So, the question that comes up is: How many more people may have been sent to their graves either because they lacked the financial muscle to get a robust defence or due to weaknesses in the justice system?

Box 3 - The Death Penalty in other West African Countries

Ghana's most immediate neigbhours, Togo and Cote D'Ivoire, have both abolished the death penalty. Benin has placed a moratorium on the death penalty since 1987.

Why is Ghana still keeping the death penalty on its statues? It worth noting that no president since 1993 has been willing to assent to death warrants. Perhaps it is time for the country to ratify and fully accede to the International Covenant on Civil and Political Rights and abolish the death penalty.

3.5 Referenda

3.5.1 Amendments that require Referenda

Chapter 25 of the 1992 Constitution has well-defined modalities for amendment. Articles 289, 290, 291 and 292 contain specific provisions on how the Constitution can be amended. Basically, the provisions of the Constitution can be divided into two parts when it comes to amendments. As stated above, there are provisions that are entrenched and require a painstaking process for amendment through referenda, whilst there are others considered non-entrenched that can be amended by Parliament.

The "entrenched provisions" in the Constitution can be found in Articles 1, 2 and 3 (The Constitution); Articles 4 and 5 (Territories of Ghana); Articles 11 (Laws of Ghana); Chapter 5 (The Fundamental Human Rights and Freedoms); Articles 42, 43, 46, 49, 55 and 56 (Representation of the People); Chapter 8 (Executive); Articles 93 and 106 (Legislature); Articles 125, 127, 129, 145, and 146 (Judiciary); Article 162 clauses 1 to 5 (Freedom and Independence of the Media); Articles 174 and 187 (Finance); Article 200 (Police Service); Article 210 (Armed Forces of Ghana); Articles 216 and 225 (Commission on Human Right and Administrative Justice); Article 231 (National Commission on Civic Education); Article 240 and 252 (Decentralization and Local Government); Article 270 (Chieftaincy); Article 286 (Code of Conduct for Public Officers); Chapter 25 (Amendment of the Constitution); and Articles 293 and 299 (Miscellaneous).

These entrenched articles and clauses form the backbone of the 1992 Constitution. These articles and clauses are entrenched in order for them to be protected against arbitrary amendments which could lead to their abuse. The CRC researched and found that some countries have stipulated time periods -- some of five years, some others of ten years -- within which they amend entrenched provisions in their constitutions. The time periods are to allow for preparatory work to be done before amendments are made. But the 1992 Constitution doesn't have any stipulated time period.

3.5.2 Necessary conditions for holding a Referendum

The two main issues under evaluation in this paper, decentralization and the death penalty, fall under the entrenched clauses and therefore require a referendum for amendment. The procedure for amending the entrenched clauses in the Constitution is quite cumbersome and might involve financial cost which could be significant. However, if carefully planned, some of the challenges can be minimized substantially.

The Constitution states in Article 290 (2) (3) (4) that where a referendum is required, at least 40% of registered voters across the country must participate and 75% of them must vote in favour of the

amendment. At the end of the process, the President is required by Article 290 (6) to give his/her "assent to it."

The EC is responsible for conducting referenda. Just as for elections, to conduct referenda the EC will require funding, personnel and logistics.

In the case of the non-entrenched provisions, their amendment procedure is spelt out clearly in Article 291 (1) (a), (2) and (3). When this procedure has been followed, Parliament would amend the provision and the President would assent. All the bills that would be assented to by the President shall be accompanied by a certificate, as indicated in Article 292 (a) and (b).

3.5.3 Holding Referenda

As stated earlier, some of the recommendations of the CRC require referenda. The challenge now is whether referenda can be combined with the general elections or whether they should be held separately. There are those who argue that combining referenda with the general elections would save cost. Others argue that combining the two would be quite laborious and confusing.

Referenda must be held on decentralization and the death penalty, the two main issues under evaluation in this paper, because they are entrenched clauses and therefore require referend~~a~~ for amendment.

Article 290 (3) states a requirement of a minimum period of six months for a bill for amending an entrenched clause to be published in the Gazette before a referendum can be held.

4 SUMMARY OF OPINIONS

Members have been aware of and formed opinions about the subject of this paper, the constitution review process. A number of comments and suggestions were made by members, which were incorporated into the paper.

Following are notable comments that were not incorporated:

The argument that the 1992 Constitution has created a practice of 'winner-takes-all' reveals serious misunderstanding of democracy (Section 2.2). It's 'winner-take-all' in every democracy – unless and until there's a coalition government of two or more parties.

Regarding the argument that political parties can easily sway the voting public to support the abolition of the death penalty (Section 5.4 a)), there was the opinion that it is a bit presumptuous. Also, that there would be no need to appeal to the political parties to support abolition because if they are convinced about it, they can drive the processes and canvass support for abolition. The

reason given for this counter argument is that there is the phenomenon of 'skirt and blouse' in our voting pattern, and that this practice can easily extend to similar issues, i.e., even if a political party is not supporting abolition its members who support abolition will vote for it.

5 RECOMMENDATIONS

5.1 How to strengthen Decentralization

We support the CRC's recommendation that the MLGRD should ensure passage of subsidiary legislation on the operation of MMDAs within twelve months, i.e., by the end of December 2016.

In order to strengthen decentralization we recommend action in three respects:

5.1.1 Improve public education about decentralization:

Interest in decentralization has gone down, with the low turnout in the recent 2016 election of Assembly members as one identifiable indicator of loss of interest. Thus, there must be a concerted effort to get people interested in decentralization. This must be done through a public education campaign. The overriding objective of the campaign must be to educate the populace that decentralization is for their benefit as it brings state and government services closer to them.

5.1.2 Improve the appointment, transfer and conditions of service of workers:

The human resource department of the MMDAs has to be properly staffed, established and functioning in order to make the MMDAs effective agents of decentralization.

There are two main problem areas, appointments and transfers. When appointments are done politically, the need for technical competency and ability to work with local personnel may be compromised. Imagine working with a chief executive whose qualification is inadequate but for political reasons he/she was appointed. The chief executive could treat officers working under him/her with contempt which would make the work environment stressful and consequently less productive.

Therefore, we recommend that appointments should not be done politically and by central government. They should be done at the local level, so that appointees are directly responsible to the local community, represented by their elected representatives.

Consultations are not done much especially when it comes to transfers. In some instances some transfers are done without taking account of the condition of the worker(s) to be transferred. Workers who are so affected are sometimes not given any hearing. They either go on transfer or leave the service. For those who go on transfer such an experience can affect their motivation and their work output then suffers. When transfers are decided from outside the MMDA, it increases the

likelihood of loss of acquired local knowledge and working relationships which will undermine the effectiveness of the affected offices.

Therefore, we recommend that transfers should be decided locally but with provisions to forestall victimization.

Another issue of concern is the condition of service of the worker. When the working environment is not congenial, work output may not be to the benefit of the MMDA.

One recent example is the legislation on national sanitation passed by the Parliament. It has not been effective on the ground. Before the legislation was passed if there had been serious evaluation of why environmental health officers have been ineffective it would have become clear that their condition of service was the main reason. One major aspect has been that resources needed for effective work has not been available to them. Also, previously by legislation environmental health was placed under the Ministry of Health; for some other time they were placed under the MLGRD; and now they report to the Director of Health Services. These changes led to some confusion which undermined the motivation of environmental health workers. Thus, we recommend that the condition of service of workers should be improved.

5.1.3 Improve financing of MMDAs:

When transfers, in particular the DACF, are withheld or delayed the affected MMDAs experience financial difficulties to the extent that some are barely able to operate. The Parliament, the Ministry of Finance, the Controller and Accountant-General's Department and the Administrator of the DACF itself must all ensure that there are no delays and withholding of grants.

It is also our view that Act 462 must be amended to allow the MMDAs to borrow in the capital market such as through municipal bonds, and to undertake investments that will earn them some returns to use to function effectively and to promote local economic development (LED). How to address this challenge was the subject of a conference in 2009.[9]

To this end a Local Government Borrowing Bill has been placed before Parliament. The Bill also addresses how institutional structures should be aligned properly, the generation and development of local capacities and competencies, and how to facilitate the transmission of resources necessary for assemblies to function properly.

[9] International Labour Organisation, "Financing Local Economic Development: Old Problems, New Strategies," ILO-Ghana Decent Work Country Programme, Conference Proceedings, 2009.

We recommend that the Local Government Borrowing Bill should be passed soon so as to give MMDAs the power to borrow and thereby widen their pool of resources. As the bill for amendment of Act 462 is in Parliament, we hope that it will be worked on expeditiously so that it can be passed soon. In the meantime MMDAs must use the provisions in Sections 86 (1), (2) to (6), Section 88 and 89 of Act 462 to improve their financial status.

Also, we recommend that central government should consider allowing MMDAs to retain a certain percentage of locally collected taxes (not internally generated funds, IGF) in the MMDAs for local administration.

5.2 How to create new Districts

The minimum population sizes for districts, municipal and metropolitan areas stated in Act 462 are stated in Section 3.3.1. The other requirements are "geographical continuity" and "economic viability" of the area.

The Government didn't accept the CRC's recommendation on who should have primary responsibility for the creation of new MMDAs. In order that there is no delay or confusion, we would like the Government's approach to be implemented.

We recommend that the following conditions must be satisfied before new districts are created:

5.2.1 Need for proper studies:

The MLGRD should undertake proper feasibility studies of the economic and financial viability of every district it intends to create. It should then submit the study reports to the EC. The EC should also conduct its studies to confirm, modify and include further details. This can then be submitted to the president for decision making.

In recent times there have been disputes about the boundaries, names, and citing of the capitals of newly created districts. Some of the newly created districts which may not be viable should be rejoined to the former districts from which they were created. Also, there have been cases where the creation of districts has led to the EC having to create new constituencies because existing constituencies would now straddle two or more districts. If districts are to be created, they must be economically viable and for the good of the people and not for political expediency.

We recommend a freeze on the creation of districts. The professional approach of feasibility studies being undertaken to determine the economic and financial viability of proposed districts should be instituted. After this approach has been instituted we recommend that new districts should be

created only after economic and financial studies have been undertaken that are satisfactory, and the geographical continuity and minimum population size requirements have also been satisfied.

5.2.2 Need to improve resources of the EC and MLGRD:

The MLGRD and EC should be resourced to discharge their responsibilities for the creation of new districts. But the provision of resources should be driven by the decision to create new districts, i.e., resources must be provided once the decision has been finalized to create new districts.

5.3 How to elect MMDCEs

We, like many other groups and persons have reviewed the system of electing MMDCEs and have come to the conclusion that it needs to be changed.

5.3.1 Change the nature of election to partisan:

The current system of election of MMDCEs is supposed to be non-partisan, but it hasn't really been non-partisan and it also hasn't worked well.

This experience of what is supposed to be a non-partisan system not being non-partisan points to the need to make the election partisan, just like elections for parliament and president.

We recommend that the election of MMDCEs at all three levels, Metropolitan, Municipal and District, must be changed from non-partisan to partisan and all be popularly elected. The elections should be open elections so that all persons who feel qualified can participate.

By our recommendation we are supporting the CRC's recommendation of popular election of mayors of Metropolitan Assemblies.

We also recommend:

5.3.2 Training of MMDCEs:

Whether it's the current supposed non-partisan approach or the partisan approach that we are recommending, the selected person or winning candidate should undergo training on the local government system before taking office. Training is provided by the Institute of Local Government Studies.

Prospective MMDCEs need to know the workings of the Assembly system in order to prepare them to operate effectively. As stated in Section 3.3.4 and above, the CRC recommended popular election of some MMDCEs. This recommendation wasn't accepted by the Government, and a system with the President nominating at least five persons who are subsequently vetted by the

Public Service Commission after which three of them stand for popular election was proposed instead.

Furthermore, we recommend:

5.3.3 Improve public education:

As stated in 5.1 above, the turnout was low in the recent 2016 election of Assembly members, further evidence that interest in the election of members is going down. Thus, in order to bring up interest, the recommended education campaign must have a major component on the election of Assembly members as well as MMDCEs.

5.4 How to abolish the Death Penalty

In order to abolish the death penalty in Ghana the 1992 Constitution will have to be amended. Also, we have to ratify the International Covenant on Civil and Political Rights.

From the conclusions of the findings of the CRC, and from discussions among the authors and comments and suggestions by members it does appear that if the issue of the repeal of the death penalty were put to a vote today without adequate public sensitization it may backfire. This is because given the recent increased spate of armed robbery there have been calls for the death penalty for armed robbers. Besides, many people cocooned in their daily economic struggles for survival aren't concerned about issues of human rights which they consider elitist and foreign.

Thus, we are of the view that if the Government and interested international partners are really committed to the abolition of the death penalty in Ghana, how to hold a referendum would have to be carefully thought out and well-planned.

We recommend a coalition of willing forces to spearhead a national public campaign for abolishing the death penalty. We identify the following bodies and institutions whose buy-in would be most critical:

a) **Political Parties:** The CRC pointed out that in countries where the death penalty has been revoked in recent years it has largely been at the behest of the elite and political class. It does seem that the situation would not be any different in Ghana. Within the current democratic dispensation if political commitment could be secured from all political parties, especially the major ones, the voting public could be easily swayed in favor of the abolition of the death penalty. We need to get the political parties to support the abolition of the death penalty.
b) **Faith Based Organizations (FBOs):** Religious leaders in Ghana wield huge influence over the population. And given the fact that some people ground their defence of the death penalty on

religious grounds, it would be important to seek for the blessing of pastors, imams, and traditionalists in the campaign.

c) **Traditional Authorities:** In the local communities chiefs and opinion leaders serve more or less as the mouthpiece of the people. The people of this country accord their local leaders a lot of respect as custodians of tradition and custom. That is why it would be imperative to woo the active collaboration of chiefs and community leaders.

d) **Civil Society Organizations (CSOs):** Presently in Ghana CSOs – think tanks, non-governmental organizations (NGOs), community-based organizations (CBOs), women and youth groups, pressure groups – play important roles in political, economic, development and social affairs. The support of these groups in the campaign could have far-reaching effect.

e) **Media:** The media is more influential presently than it has ever been in the history of Ghana. The electronic media, particularly radio, now covers the entire country. There is presently an unprecedented high radio listenership and television viewership that could be used to advantage. It therefore goes without saying that the media would be key allies in this campaign.

f) **Former Death Row Inmates:** There are at least two former celebrity death row inmates who have been released on presidential pardons. Getting them to join the campaign would be worthwhile. The story would certainly be told better from the horse's own mouth, so to speak.

g) **Prison Officials:** The custodians of prisoners would no doubt also have some useful experiences to share about the conditions of condemned prisoners. When the discussion is about how prisoners are reformed their insights would be useful.

The CRC recommended abolition of the death penalty and the Government accepted this recommendation, as stated in Section 3.4.3.

5.5 How to hold Referenda

Decentralization and the death penalty, the two major issues addressed by this paper, are entrenched clauses and therefore require referenda for amendment. In our opinion it would have been ideal for a referendum on the election of MMDCEs (the main issue of decentralization that requires a referendum) and on the abolition of the death penalty to have been combined with the 2016 elections.

But since that can't be done and the nation can't wait until the 2020 elections for a referendum to be held concurrently, referenda should be held separately as soon as possible.

We recommend that all referenda required to implement recommendations of the CRC should be held in 2017.

We recommend also that special funding be secured before the end of 2016 for the EC to hold referenda on all amendments in 2017.

We recommend further that January and February 2017 should be used for public education and preparation for the referenda, and that all referenda should be held by the end of 2017.

5.6 How to complete the work of the CRC

For the constitution review process to be completed the CRIC would need to be given all the support it requires to complete its work, since it is the sole body mandated to study and implement the recommendations of the CRC. But the CRIC and CRC cannot achieve their mandates alone. They must work in close collaboration with the parties identified below.

First, the Presidency, which initiated the process, must consolidate its commitment by making available all the necessary logistics that the CRC and CRIC would require to complete their mandate. Second, Parliament, which is required by Article 289 of the Constitution to play a key role in the amendment of the Constitution, must assume a more frontline role in the scheme of affairs. Parliament must approve those recommendations that don't require referenda by the end of 2017. Third, the Council of State, which is enjoined by Article 290 (2) of the Constitution to advise on the amendment of entrenched provisions, must also get active in ensuring that the CRC completes its mandate. Fourth, as recommended above, the EC must hold all referenda by the end of 2017. Fifth, the media, political parties, the TUC, professional and trade associations, CBOs, the Peace Council, religious bodies, national and regional houses of chiefs, and the general public must lobby and agitate for completion of the work of the CRC.

It seems that public re-sensitization and re-education might be required to complete the constitution review process.

Once the recommendations of the CRC are implemented the work of the CRC will be completed. It has been a long process which now needs to be brought to a conclusion.

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Annex: 46 New Districts Created in 2012

Region	Mother District	New District	District Capital
Ashanti	Mampong	Asokore Mampong Muni.	Asokore Mampong
	Asante Akim Central Muni.	Asante Akim North	Agogo
	Sekyere Afram Plains	Sekyere Afram Plains	Drobonso
Brong Ahafo	Asutifi	Asutifi South	Hwidiem
	Techiman	Techiman North	Tuobodom
	Tain	Banda	Banda Ahenkro
	Sene	Sene West	Kajaji
	Dormaa Municipal	Dormaa West	Nkrankwanta
Central	Ewutu Senya	Awutu-Senya-East	Kasoa
	Twifo-Heman Lower Denkyira	Twifo-Ati Mokwa	Hemang
	Mfantseman	Ekumfi	Essarkyir
Eastern	Kwaebibirem	Denkyembour	Akwatia
	Suhum-Kraboa-Coaltar	Ayensuano	Coaltar
	Akuapem South	Akuapim South	Aburi
	West Akim	Upper West Akim	Adeiso
	Kwahu North	Afram Plains South	Tease
Greater Accra	AMA	La Dade-Kotopon Muni.	La
	Tema	Kpone Katamanso	Kpone
	Ga East	La-Nkwantanang-Madina	Madina
	Dangme East	Ada West	Sege
	Dangme West	Ningo/Prampram	Prampram
	Ga South	Ga Central	Sowutuom
Northern	Tolon-Kumbugu	Kumbungu	Kumbungu
	West Gonja	North Gonja	Daboya
	Yendi	Mion	Sang
	Tamale	Sagnarigu	Sagnerigu
	Zabzugu/Tatale	Tatale Sangule	Tatale
	West Mamprusi	Mamprugo Moaduri	Yagaba
Upper East	Talensi-Nabdam	Talensi	Tongo
	Bawku	Pusiga	Pusiga
	Bawku	Binduri	Binduri
	Builsa	Builsa South	Fumbisi

Upper West	Lawra	Nandom	Nandom
	Nadowli	Daffiama Bussie Issa	Issa
Western	Bia	Bia East	Adaborkrom
	Juabeso	Bodi	Bodi
	Wassa Amenfi East	Wassa Amenfi Central	Manso Amenfi
	Suaman	Suaman	Dadieso
	Mpohor Wassa	Mpohor	Mpohor
Volta	Krachi West	Krachi Nchumuru	Chindiri
	Hohoe	Afadjato (East Dayi)	Ve Golokwati
	Adaklu-Anyigbe	Adaklu	Adaklu Waya
	Ho	Ho West	Dzolokpuita
	Akatsi	Akatsi North	Ave Dakpa
	Central Tongu	North Tongu	Battor Dugame
	Kpando	North Dayi	Anfoega

Source: Ministry for Local Government and Rural Development