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REFLECTIONS ON THE CONSTITUTION, LAW AND DEVELOPMENT

NANA DR. S. K. B. ASANTE

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ABOUT THE AUTHOR

Educated at Asokore Methodist School and Achimota School, Samuel Kwadwo Boaten Asante, (also known as Nana Susubribi Krobea Asante, Asokorehene), took an LL.B (Hons) Degree from Nottingham University in 1956, an LL.M from London University (Kings College and the Institute of Advanced Legal Studies) in 1958, and was admitted as a Solicitor (Hons) of the Supreme Court of England and to the Ghana Bar in 1960.

He was a pioneer lecturer in law at the Department/Faculty of Law, Legon (1961-65) and Acting Head of the Law Department in 1962.

In 1963, a Fullbright Grant and an Aggrey Fellowship took him to Yale Law School, USA, where he obtained his doctorate in Juridical Science (JSD) in 1965. He lectured at the Faculty of Law, Leeds University (UK) in 1965-66.

Thereafter, he combined his scholarly and academic endeavours with active national and international public service as a development lawyer and practitioner.

He has been an Attorney in the Legal Department of the World Bank, Washington DC, (1966-69); Adjunct Professor of Law at Howard University, Washington DC, (1967-69); Solicitor General and later Deputy Attorney General of Ghana (1969-77); Distinguished Visiting Professor of Law and Business, Temple University Law School, Philadelphia - USA (1976); Chief Legal Adviser at the UN Centre on Transnational Corporations, (UNCTC), New York, (1977-83); Visiting Fellow of Clare Hall and Visiting Member of the Law Faculty, Cambridge University (1978-79); Director, UNCTC (1983-92); Visiting Professor of Law, Faculty of Law, University of Ghana, (1991), Director in charge, Division of Natural Resources, Energy, Environment Science & Technology at the UN, New York, (1993) and Chairman, Public

Utilities Regulatory Commission of Ghana 1997-2002.

An active international arbitrator, he is a member of the International Court of Arbitration of the International Chamber of Commerce, Paris, a panelist of several other international arbitral institutions and Chairman of the Ghana Arbitration Centre.

He is also an international legal consultant in the areas of international investment law, international law, governance and legal sector reforms.

In 1991-2, he was the Chairman of the Committee of Experts that formulated proposals for the current Constitution of Ghana (1992).

Nana Professor Asante was elected a Fellow of the Ghana Academy of Arts & Sciences in 1976 and Vice President (Arts) of the Academy in 1996. He is a Fellow of the World Academy of Art & Science, Hon. Fellow of the Society for Advanced Legal Studies, UK, and Life Member of Clare Hall, Cambridge University.

He is a member of several international legal associations and was a member of the Executive Council of the American Society of International Law 1979-82, and of the Board of Directors of the International Development Law Institute, Rome, 1983-92

He delivered the JIC Taylor Memorial Lectures on 'Transnational Investment Law and National Development' at Lagos University in 1978 and has been a guest Lecturer at numerous institutions of learning world wide as well as international seminars and workshops.

Dr. Asante has published widely on numerous topics covering various areas, including international investment law, international business transactions, international law, transnational corporations, international commercial arbitration, property law, constitutional law, legal sector reforms and law and development. He is a recipient of the Ghana Book Award for distinguished writers.

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My thanks first go to the Ghana Academy of Arts and Sciences for doing me the honour of inviting me to deliver these lectures. I am also particularly grateful to the Friederick Ebert Foundation for agreeing to publish them.

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I am also indebted to the Most Rev. Emeritus Professor Kwesi Dickson, Prof. Akilagpa Sawyerr, Dr. Letitia E. Obeng, all Fellows of the Academy, for chairing the various lectures with such grace and consummate skill.

I cannot forget to mention the meticulous and critical work of my research assistant, Richard Frimpong Oppong of the Ghana School of Law, and the Senior Associate in my law firm, Emmanuel Amofa, Esq., who reviewed the manuscript and supplied me with invaluable data.

My thanks are also due to the Honorary Secretary of the Academy and the staff members of its Secretariat, as well as the sponsors of the Lectures, for their support. I am grateful for the customary hospitality extended by the British Council to the Academy during the annual celebration of J.B.'s life. The wide coverage of the lectures by the media houses and the impressive patronage of the proceedings by the general public were most gratifying.

These acknowledgements would be incomplete without placing on record my affectionate gratitude to my wife, Philomena, for all her support and sacrifices during my engrossment in preparing these lectures. The strict regime of silence which accompanied my writing sessions sometimes drove her, in her own words, "to talk to the flowers in the garden!"

Finally, I would like to express my deep appreciation to my industrious and dedicated Personal Assistant, Ms. Joyce Nortey, for typing and organizing the manuscript.

S. K. B. Asante
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September 2002

REFLECTIONS ON THE CONSTITUTION, LAW AND DEVELOPMENT

LECTURE I

PREAMBLE: REMEMBERING J. B. DANQUAH

It is a distinct honour and privilege to have been invited to deliver this year's J. B. Danquah Memorial Lectures on a topic that will be universally recognised as central to the public endeavours of our hero, Dr. J. B. Danquah. Last year, as Chairman of one of the sessions in the 34th J. B. Danquah Lecture series delivered by Dr. E. Lartey, I laboured valiantly to establish the linkage between Dr. Danquah and technology being the subject of those Lecture series. This year, my task is much easier, for the barest familiarity with the life of J. B. Danquah will confirm that he was pre-occupied with governance, constitutionalism, law and development. A foremost statesman, lawyer and philosopher, Dr. Danquah devoted his life to the emancipation and development of Ghana and its citizens and to the creation of an appropriate constitutional and legal framework for the realization of that objective. He was equally dedicated to the enunciation and protection of fundamental human rights for all Ghanaians.

Danquah's pivotal political role in the Gold Coast Youth Association, the Joint Provincial Council, United Gold Coast Convention (UGCC) and the Coussey Constitutional Committee is well-documented elsewhere (e.g. Joe Appiah) and need not be recounted here. As he was for many of my contemporaries, Danquah was my role model in every sense. To address you on a subject that attracted the intellectual interest of our hero is at once daunting but gratifying.

Most of my predecessors on this platform regaled us with anecdotes about their personal encounters with Dr. J. B. Danquah I would like to share a few recollections of my own with you.

Sometime in 1952, the Plato Club of Achimota School decided to invite Dr. J. B. Danquah to deliver a lecture. Some of us balked at the idea of inviting such an eminent politician and intellectual, particularly in view of the popular perception that he was inaccessible to 'lesser mortals'. As Vice President of the Club, I was charged with the delicate and formidable task of approaching him about his availability. I remember gingerly making my way to him in the precincts of old Parliament House during tea break from a parliamentary session and broaching the subject with some apprehension. To my amazement, he readily agreed, but advised me to send him a formal invitation.

This was promptly done.He honoured the invitation and gave a most erudite and illuminating lecture on "Culture and Civilisation."

Another memorable encounter in a purely social setting took place on September 22, 1961 at Legon. Professor John Lang, Professor of Law at Legon, was hosting a dinner for not only the staff of the Law Department - Kwamena Bentsi-Enchill, Gordon Woodman, Tom Rose, Bev Pooley, A. C. Kuma and myself - but also for a number of prominent personalities from Accra and Legon, such as Mr. Justice Ollennu, General Alexander, the British CDS of Ghana Armed forces, Professor Ray Wright, Pro-Vice Chancellor of the University of Ghana and Dr. J. B. Danquah.

Dinner was late because we were all waiting for General Alexander who had been held up by some urgent business. We occupied the time with the usual pre-dinner exchange of pleasantries and I was able to observe Dr. Danquah as an engaging and convivial conversationalist, swapping jokes with other guests.

All this abruptly came to an end when General Alexander arrived a few minutes before 9pm with apologies and then rushed to the radio intimating that a major announcement was imminent on the 9pm news. We all huddled around the radio and heard the dramatic announcement that General Alexander and all expatriate officers in the Ghana Armed Forces had been summarily replaced by Ghanaians. That unceremonious termination of the assignment of British military officers some 40 years ago turned out to be a portent of what was to follow in the early 60s.

But my most enduring memory of Dr. Danquah was watching him argue the appeal against the detention of Baffour Osei Akoto and others before the Supreme Court in 1961 in the celebrated case of Re: Akoto[1]. A lot has already been said and written about the decision of the Supreme Court in this case and its chilling impact on the evolution of the concept of judicial review and a justiciable bill of rights in the constitutional order of the day.

I will no doubt revert to this later on in my discussion of substantive constitutional issues; but I would like to explain why Danquah's appearance made such a profound impact on me, then a young attorney of barely one year's standing at the Bar.

First, in view of the constitutional and, indeed, political significance of the ultimate decision of the Supreme Court in that case, it is surprising that the hearing of the appeal itself attracted little attention. There was no throng of party activists or spectators clamouring for seats in the chamber, nor did members of the Bar display any particular interest in the proceedings. Indeed no more than half a dozen persons witnessed this historic event.

Second, Danquah appeared alone in this case; he had no junior counsel. His only assistant was an old and faithful law clerk. I subsequently gathered, however, that an American Constitutional lawyer and civil rights activist, Pauli Murray, then

teaching at \the Law School, had drawn Danquah's attention to some relevant American authorities. On the opposite side was Geoffrey Bing Q.C., the Attorney General, supported by Austin Amissah, Senior State Attorney, with Francis Bennion, the English Parliamentary Counsel, providing invaluable research support in the background. One had the uneasy, but sad, feeling that Danquah was engaged in a solitary, if heroic, battle for a cause which many dismissed as doomed.

In July the previous year, Danquah had stood unsuccessfully against Nkrumah as Presidential candidate. Nkrumah was duly installed as President. Danquah's spirited campaign against the notorious Preventive Detention Act, 1958 had failed. The Bar Association was ominously silent on these matters, although they put up a ferocious resistance to Nkrumah's attempt to divest lawyers of their wigs and gowns as relics of a colonial anachronism. Some members of the legal profession considered Danquah's persistent civil rights campaigns as quixotic and divorced from reality. Some thought that he was more of a philosopher than a lawyer.

Third, at one stage in the proceedings, Danquah exploded in anger against Bing, the Irish born lawyer who occupied the august office of Ghana's Attorney General. This outburst was precipitated by a caustic comment by Bing on some of the authorities cited by Danquah. Danquah berated Bing for serving as a diabolical expatriate tool for the erection of oppressive laws against Ghanaians, while his (Bing's) people enjoyed freedom, and then sat down in disgust. He subsequently apologized to the Chief Justice, Sir Arku Korsah in Twi: "Opanin wo di bem!!" When Bing angrily complained about Danquah's "gratuitous insults" the CJ quietly pointed out that Danquah had already apologized in the vernacular.

This was a graphic demonstration of Joe Appiah's observation that although Danquah was courteous in normal discourse and had an equable temperament, he was given to bursts of anger in court when he was outraged at the violation of hallowed principles.

Fourth, from the juristic point of view, the proceedings represented a classic clash between two diametrically opposed juridical doctrines, namely, the British doctrine of parliamentary sovereignty and the robust concept of judicial review, as espoused and practiced in the US. Bing contended that the Supreme Court of Ghana had no jurisdiction to strike down the Preventive Detention Act (P.D.A.) as unconstitutional because the Presidential declaration affirming certain fundamental rights and freedoms under the 1960 Constitution was not a justiciable Bill of Rights, and that in any case, that Constitution did not embody what he characterized as the American notion of a "higher law" which could be invoked to limit the sovereignty of Parliament. The only limitation on Parliament's sovereignty power was the Constitutional prohibition against repealing entrenched provisions expressly reserved for the people.

Armed with a number of American and Commonwealth authorities, Danquah argued not only that the Presidential declaration to uphold fundamental rights was

justiciable but that the Supreme Court was generally competent to declare legislative or executive acts null and void if they violated the Constitution, particularly, if they invaded fundamental rights and freedoms. PDA belonged to this obnoxious category and was repugnant to the Constitution.

Although Danquah's submission did not prevail in the Akoto case, they subsequently became the cornerstone of the juristic edifice which was erected after his death for the protection of human rights. All constitutions promulgated after 1966 have faithfully incorporated Danquah's arguments in the Akoto case[2]. These revolve around the following principles:

(1) An emphatic concept of judicial review empowering the Supreme Court to declare an executive or legislative act null and void on grounds of contravening the Constitution[3].

(2) The Supreme Court's power to make consequential orders to give effect to such a declaration.

(3) An unequivocal promulgation of fundamental rights and freedoms enforceable by the High Court and other agencies[4].

Joe Appiah has said that one of Danquah's notable contributions to the Constitutional and political evolution of Ghana was the role he played in securing the merger of Ashanti and the Colony under the 1946 Burns Constitution.

In my view, an equally important constitutional legacy of Danquah is his profound influence on the establishment and consolidation of the concepts of judicial review and a justiciable bill of rights. His heroic struggle for human rights which he waged relentlessly on political platforms, in Parliament, in the Courts and from a prison cell was finally, albeit posthumously, crowned with success.

We are all indebted to him.

INTRODUCTION

And now, a short introduction to the subject-matter of these Lectures. Reflecting on the general theme of the Constitution, Law and Development spells the danger of degenerating into an eclectic rambling of disjointed thoughts on a wide range of topics, a favourite past-time some would say - a prerogative of senior citizens. While recognising this potential danger, I would plead in my defence that the golden thread running through these Lectures is a recognition of the close relationship between law and development that derives not from any theoretical, jurisprudential premise but from the circumstances of my own professional experience. If I may echo the words of Oliver Wendell Holmes: "the life of the law is not logic but experience". The popular conception of law is that it is a system of prohibitions against anti-social conduct. It is rarely seen as an instrument of development. The central object of these Lectures is to highlight the developmental implications of law well beyond the obvious imperative of maintaining law and order.

As a law teacher and researcher in the areas of property law, international law and international investments, as a senior law officer of Ghana, as an Attorney with the World Bank and legal adviser and director with a number of United Nations economic organisations, as an adviser on constitutional and legal sector reforms in a number of countries, as an embattled regulator of public utilities, as a private corporate lawyer and arbitrator and finally as a chief,[4] [A]engrossed in the provision of basic needs in a changing social and economic environment, I have come to appreciate that law has a critical developmental function. There is no aspect of development which is not affected in some way by the constitutional or legal order.
A few random projects drawn from my own professional experience will illustrate this. As a legal researcher, my first major publication[5] attempted to portray the relationship between land law and economic and social goals, an area which is still crucial to our development endeavours.

One of my assignments as an Attorney at the World Bank (Washington DC) in 1967 was to review the statutes for establishing the constituent corporations of the East African Community, which had just been established by a treaty among Tanzania, Kenya and Uganda for the purposes of a sub-regional economic integration. These corporations, e.g. the East African Railways Corporation, the East African Harbours Corporation and the East African Airways Corporation, were the operating agencies of the Community, which were provided with substantial financing from the World Bank for their operations. Part of my responsibility was to draft and negotiate the relevant international loan agreements between the World Bank and the Corporations in respect of such financing.

Another assignment at the World Bank involved a long trip to Seoul, South Korea, in 1968, to assist in the establishment of the Korea Development Finance

Corporation, which played a major role in funding industrial ventures in that country. My task consisted in drafting and negotiating some of the legal documents to provide for the participation of the World Bank, the International Finance Corporation, an affiliate of the World Bank, and nine private banks from Europe, Japan and the US, in the equity and financing of the new corporation. I was to learn years afterwards that this corporation turned out to be one of the main agents of industrialisation in South Korea whose per capita income in 1968 was not higher than that of Ghana.

As Solicitor-General and later Deputy Attorney General of Ghana, I remember the legal component of the round of negotiations with the World Bank, Saudi Fund, European Investment Bank, European Development Fund, Kuwait Fund, ADB, CIDA and others for procuring financing for the construction of the Kpong hydroelectric facility. Again, in the early 1970s I led the Ghana team that acquired a majority equity interest (55%) in Ashanti Goldfields Corporation and Consolidated African Selection Trust (CAST) and negotiated the acquisition of 100% equity in what are now Ghana Oil Company (GOIL) and Tema Oil Refinery (TOR) respectively. I should also mention the protracted debt-rescheduling negotiations that finally resulted in a long-term debt settlement with Ghana's western creditors under the Treaty of Rome 1974. This gave us a substantial debt relief, which should have been employed for vital social and economic development. I also supported the Law Reform Commissions' proposals for legislation to abolish widowhood rites and establish the accountability of heads of families in respect of the administration of family property. As chairman of the Government Management Committee for the Land Administration Research Centre at the Kwame Nkrumah University of Science and Technology (KNUST), I participated in the formulation of the project for the introduction of a pilot scheme for land title registration, which was later developed by Professor George Benneh and others.

At the United Nations Centre on Transnational Corporations, New York, we participated in a number of advisory missions to the Peoples Republic of China on the structuring of their investment regimes and their mining and petroleum legislation to facilitate foreign investment and international business transactions when that country began to liberalize its economic policies in the early 1980s. We also assisted numerous countries in the negotiation of their international transactions with transnational corporations with respect to petroleum development projects, industrial and agricultural joint ventures, mining concessions, power contracts, such as the VALCO Agreement and other forms of foreign investment and technology transfer.

I was also involved in the negotiation of an international code of conduct to regulate the activities of transnational corporations in host countries and an international agreement to combat illicit payments and bribery in international business transactions.

It can hardly be disputed that the structure and content of a national constitution have profound developmental implications. For example, nothing could be more injurious to the investment prospects of a country than an indictment that that country has no rule of law, that contractual obligations are meaningless and unenforceable, that the basic law or Constitution of the land provides no protection for private property rights or

business interests or human rights generally and that the judiciary is inefficient, corrupt and unreliable.

My involvement in the formulation of the 1992 Constitution of Ghana was informed by this realization[6].

Indeed our own development experience provides more than ample empirical evidence of the connection between governance, law and development. Our repeated and persistent attempts to install democracy and constitutionalism after a series of authoritarian or military regimes attest to the recognition of the idea that we cannot develop in the widest sense of the term unless we operate under an enabling system of governance.

"Development" for the purposes of these Lectures has to be approached in its broadest sense, encompassing the political, economic, social and human dimensions. It is a holistic concept that connotes a lot more than economic development.

As explained in the Brandt Report, statistical measurements of growth exclude the crucial elements of social welfare, of individual rights, of values not measurable by money. Development is more than the passage from poor to rich, from a traditional rural economy to a sophisticated urban one. It carries with it not only the idea of economic betterment; but also of greater human dignity, security, justice and equity.

Structure of the Lectures

These Lectures are divided into three parts.

The first addresses constitutionalism and effective government. It surveys the executive arrangements and the extent to which Parliament and the Judiciary act as effective constraints on the Executive.

The second lecture considers some social and economic development aspects of the Constitution, in particular, fundamental rights and freedoms, the social and economic goals subsumed under the Directive Principles of State Policy and some specific economic and social issues, such as administration of lands and the reform of our traditional cultural practices to comply with the tenets of the Constitution.

The third lecture deals with law and development. The emphasis here is on the impact of law on private sector development and the relationship between international business negotiations and transactions and the development effort.

I would like to seize this opportunity to pay a tribute to my fellow members of the Committee of Experts who laboured under excruciating circumstances to produce a document which provided a major impetus to the restoration of constitutionalism in this country.[7] We may be unsung, but we can derive quiet satisfaction from the fact that the constitutional order which we helped to establish has survived for an

unprecedented period of 10 years and constitutes Ghana's main claim to international attention and acclaim.

Time constraints will not allow me to give a presentation on the process of formulating the Constitution and my role in that process. However, I would like to set the record straight on a matter, which has often been raised with me, namely the origin of the Transitional Provisions of the 1992 Constitution. I have to declare unequivocally that I had no role whatsoever in the drafting of the Transitional Provisions of that Constitution. I actually returned to my post at the United Nations, New York, before the drafting of that part of the Constitution.

My occasional critique of some provisions of the Constitution has provoked this question "Why did you not fix it if you participated in the formulation of the Constitution?" My first answer is that my Committee does not claim authorship of all provisions of the Constitution. The Consultative Assembly did not endorse all our recommendations. My second response is to invoke the answer of the Yale Law Professor who was asked by the Supreme Court of the US to explain the contradiction between his submissions before the Court and his opinions in his written work. "I have changed my views!" although I would say it with appropriate humility.

CONSTITUTIONALISM AND EFFECTIVE GOVERNMENT

A. EXECUTIVE ARRANGEMENTS

The burden of this Lecture is to evaluate the efficacy of the constitutional arrangements on the Executive and the extent to which the Legislature and the Judiciary act as effective constraints on the Executive to ensure constitutionalism.. In my submission, effective government and constitutionalism are essential prerequisites to development.

The criteria for evaluating the executive arrangements under the 1992 Constitution must necessarily be informed by the lessons of African experience of governance in the post-independence era. On the one hand, the dismal record of executive excesses and its destabilizing and stifling impact have exploded the myth, much canvassed by the first generation of African leaders and military strongmen, that authoritarianism is a sine qua non of political stability and development. On the other hand, the recent incidence of state collapse or disintegration of authority in several African countries, such as Somalia and Liberia, demonstrates the critical importance of devising structures that ensure the effectiveness of the state machinery and the strong presence of national authority throughout the body politic.

Against this background, the following criteria may be used in evaluating the executive arrangements under the Constitution.

1. Do the constitutional provisions undermine the effectiveness of the machinery of state or the efficacy of national authority or the effectiveness of national government?

2. Does the Constitution impose inappropriate or excessive constraints on the Executive?

3. Does the Constitution allocate excessive powers to the Executive? In other words, are the executive arrangements by themselves subversive of constitutionalism and democracy?

a. Efficacy of National Authority

The issue of the efficacy of statehood or national authority must be strictly distinguished from the issue of authoritarianism, which connotes the abuse of executive power.

The first question therefore encompasses not only the effectiveness of the executive organs in asserting state authority, but also the effectiveness of the other arms of government, the Judiciary and the Legislature, in administering the entire state.

The phenomenon of "state collapse" or "failed state" occurs when a state can no longer perform its basic functions. At a minimum, the state must perform the most basic functions of maintaining law and order, providing national defence and

establishing a framework for managing economic transactions and enhancing societal cohesion. State collapse or failure involves a fundamental loss of institutional capacity. State collapse, in effect, is the breakdown of good governance, law and order, when the state as a decision making and executing and enforcing institution, can no longer make and implement decisions.

As far as the constitutional provisions are concerned, it cannot seriously be contended that these are inherently inimical to state authority. The Constitution does not impose any impediments to the effective exercise of executive power at the national, regional or district level. Executive power is fully complemented by a national judicial system, which operates in all regions and districts. The occasional lapses in the maintenance of law and order are not traceable to any inherent deficiencies of the Constitution. Although the Police have sometimes complained about the restraints imposed by the Constitution on their law enforcement operations, it has not been convincingly demonstrated that the effectiveness of the Police has been stifled or impeded by the Constitution.

As to Parliament, the scope of its legislative competence has no regional or local limitations. The effectiveness of parliamentary oversight of the Executive, which is an issue of constitutionalism, will be discussed later.

The writ of the courts extends to every corner of the land. The judicial power of Ghana is fully vested in the Courts[8]. In short, there is nothing in the constitutional arrangements that inherently undermines or subverts state authority.

b. Effective Executive Power

The second question, which is closely related to the first, addresses exclusively the effectiveness of executive power under the Constitution. The former President used to complain about labouring under stifling constitutional constraints. While it is understandable that the transition from the robust and untrammelled executive powers of the PNDC era to the executive powers in a constitutional regime might have been disconcerting to his Excellency, an objective analysis of the presidential powers under the Constitution overwhelmingly demonstrates that, with possibly one exception[9], the Executive has all the armoury of constitutional powers for effective government.

As discussed below, the more critical issue is whether the powers conferred on the President by the Constitution are excessive.

The restraints on executive power do not go beyond those incidental to the normal system of checks and balances in a liberal constitutional regime, namely, the courts' independent power of judicial review of executive action and Parliaments' legislative power, control of the budget and general oversight of the executive branch.

As far as the presidential powers are concerned, the executive authority of Ghana is vested in the President who is empowered to exercise such authority either directly or through his subordinates. (Article 58)

The President is assisted by the Cabinet in determining the general policy of the Government (Article 76), but it has to be emphasized that executive power of Ghana is vested exclusively in the President, not the Cabinet. In that sense, there is no cabinet system of government in Ghana as in the British system. Unlike the British Prime Minister, the Ghanaian President is not a primus inter pares. He is the Chief Executive, period.

The President is invested with powers of appointment and patronage, - Ministers of State, members of Cabinet, officers of the public services, Boards of Directors of public commissions and corporations boards, managers, ambassadors, a significant number of the membership of the Council of State, are all appointed by the President, some in consultation with designated constitutional bodies, such as the Council of State.

The President is the Commander-in-chief of the Armed Forces and controls the security agencies. He plays a key role in the appointment of judges. His writ extends to the District Assemblies: He nominates the District Chief Executives and thirty percent of the membership of the Assemblies. The President's cabinet initiates legislation; and no legislation with financial implications for the Consolidated Fund or other public funds may be introduced in Parliament except by or on behalf of the President.

These powers are clearly sufficient for the effective exercise of executive power and for effective government. The only constitutional requirement which may possibly operate as a drag on effective governance is the requirement of consultation with the Council of State in the appointment of certain categories of public officers, in particular, the governing boards and management of public corporations or statutory bodies.

Effective governance requires that the President launch his governmental team expeditiously. The first test of the effectiveness of a new President is how expeditiously he can install his Government made up of Ministers and Deputy Ministers of State and principal public officers. However, the appointment of the chief executives and governing boards of public corporations may be further complicated by the requirement of prior consultation with the Council of State for the following reasons:

(1) Members of governing boards and management of public bodies must first be nominated by the responsible Ministers for the President's consideration;

(2) The Council of State may not be properly constituted even where nominations are forthcoming;

(3) The Council of State may elect to conduct background investigations about the nominees before submitting its recommendations to the President.

The overall effect of these processes is that these appointments may not be completed until well over six months after the inauguration of the President as we have witnessed.

It is submitted that such a protracted process is not dictated by the imperatives of good governance, and that there is not much that the Council of State can add to the

information and advice which the President's Cabinet, security agencies and official advisers and staffers can furnish on the background and suitability of the proposed appointees.

c. The Scope of Presidential Powers: Executive Structures

The third question has attracted critical comment from scholars. Ocquaye[10], Gyimah-Boadi, Kwasi Prempeh[11], Sandbrook and Oelbaum[12] have all characterised presidential powers under the 1992 Constitution as excessive and inimical to the inculcation of constitutionalism. In the words of Kwasi Prempeh

> "Ghana's chief executive has historically been the monarch of all that he surveys. And this has generally not been good for the development of constitutionalism in Ghana. Regrettably, the 1992 Constitution does little to change that. Instead, the Constitution reinforces the tradition of executive supremacy by allocating to the President a vast (indeed excessive) "power of patronage", and a disproportionate share of the "power of the purse" and the power to make law, and of course the usual monopoly of the "power of the sword", which everywhere belongs to the President as Commander-in-Chief. Only "the power to pronounce judgment" is left completely in the hands of the judiciary, but even here the President wields a good amount of influence and leverage through the powers of patronage and the purse.
>
> "Overall, the power and authority vested in the President under the 1992 Constitution is simply too much for a bad President to have and yet too much for a good President to need. Moreover, the Constitution imposes few constraints on the exercise of his authority and powers. Instead of credible checks and balances, the Constitution has imposed on the President a good number of advicegivers in the form of advisory bodies, notable among which is the 25-member Council of State."[13]

Are these strictures valid? Perhaps some reference to the Parliamentary history of the executive arrangements would be appropriate at this juncture. In its report on Proposals for a draft Constitution of Ghana, (July 1991), the Committee of Experts on the Constitution had, pursuant to its terms of reference, proposed an executive structure that combined an Executive President with a Prime Minister as a mechanism for defusing the concentration of executive power in the hands of one functionary[14]. The structure was unfortunately termed a "split executive."

Whether that term struck members of the Consultative Assembly as having schizophrenic connotations or not, the proposed structure was emphatically rejected by the Consultative Assembly on the grounds that it would inevitably generate conflict between the President and the Prime Minister, particularly if confronted with "a

cohabitation" between two persons belonging to different political parties, as has happened in France. The Consultative Assembly preferred the combination of President and Vice-President which they confidently maintained would be conducive to executive harmony and stability. It is not my intention to rehash the Committee's case for the Executive President-Prime Minister proposition. But perhaps you will forgive me for reminding you that the sanguine predictions of the Honourable members of the Consultative Assembly were not borne out by history, at least not in the first presidential term of the Fourth Republic. Conflict between the President and Vice President was not unknown, notwithstanding the installation of the equivalent of an "imperial Presidency."

During the formulation of the Constitution, there were also fervent advocates of the Westminster model, i.e., a combination of a ceremonial President and a Prime Minister heading the Government, as under the 1969 Constitution.

Indeed some scholars have doubted the feasibility of the American presidential system for Asia, Latin America and Africa where democratisation is weak. They maintain that in these conditions, the presidential system usually results in presidential dominance over the legislature.[15] Arend Lijphart[16] strongly advocates the parliamentary system with proportional representation and coalition governments as appropriate for divided societies. On the other hand, Horowitz[17] contends that the parliamentary system has led to the establishment of authoritarian regimes in sub-Saharan Africa. All this suggests some caution in predicting the outcome of constitutional experiments.

One of the practical advantages of having a Prime Minister to serve with an Executive President is to have a functionary who concentrates on the business of co-ordinating the economic management of the country, or other areas of governmental endeavours. In theory, the President should perform such a role, but experience shows that the President's other functions as the symbol of national unity, as the mediator of the conflicting interests of the various communities and as the principal actor in the country's diplomatic and external relations cannot easily be combined with the more prosaic task of co-ordinating the various economic ministries and superintending the implementation of government policies.

Where a Vice-President has the requisite managerial and technical ability, he can perform such a role; but Vice-Presidents are often chosen on broad political considerations, such as regional balance, not necessarily on the basis of managerial credentials.

An express constitutional provision for a Prime Minister allows the President to choose a person with the requisite managerial qualifications for the position and disposes of any doubts about the constitutionality of such a position.

It should be pointed out in passing that although the Executive President/Prime Minister structure was introduced into the French Constitution under General de Gaulle, it has been adopted not only by numerous French speaking African countries but also many Eastern and Central European states, Asia and also a significant number of English speaking African countries such as Tanzania, Namibia and Zambia.

The recent appointment of a Senior Minister to chair the Government's economic management team recognises the force of this argument, notwithstanding the absence of an explicit constitutional provision for a coordinating Minister. Questions have been raised about the constitutionality of the office of Senior Minister on the ground that the Constitution does not explicitly provide for it. However, an examination of the executive powers of the President makes clear that the President is expressly empowered to exercise executive authority through officers subordinate to him [(Article 58 (3)].

The co-ordination of ministries and departments is an essential ingredient of this executive authority and the President may delegate that role to a subordinate designated as a Senior Minister or Coordinating Minister. Indeed in this respect, I can see no constitutional bar to the appointment of a Prime Minister for the purpose of performing this coordinating function, though it is conceded that an express constitutional provision in this regard would be preferable.

To revert to the scope of the presidential powers conferred by the Constitution, it is submitted that most of them are not unusual in presidential systems of government. Indeed, they are substantially based on the presidential powers prescribed under the 1979 Constitution, which, far from being excessive, coincided with what some authors have characterised as a partial state collapse in Ghana. The presidential powers of appointment and patronage under the 1992 Constitution are wide, but, except in a few cases, are not excessive.

Constitutionalism, the rule of law and democracy cannot be achieved by a regime of rigorous constraints alone but by the inculcation of a culture of restraints and certain core democratic values. The issue is whether we will be saddled with Kwasi Prempeh's "bad President" or "good President".

A President committed to core democratic values and constitutionalism exhibits restraint, which is not spelled out in the Constitution, whereas a "bad President" will always explore avenues for authoritarian assertion.

As the distinguished Nigerian constitutional lawyer, Nwabueze said:

> "Experience has amply demonstrated that the greatest danger to constitutional government in emergent states arises from the human factor in politics, from the capacity of politicians to distort and vitiate whatever governmental forms may be devised. Institutional forms are of course important, since they can guide, for better or worse, the behaviour of the individuals who operate them. Yet, however, carefully the institutional forms may have been constructed, in the final analysis, much more will turn upon the actual behaviour of the individuals upon their willingness to observe the rules, upon a statesmanlike acceptance that the integrity of its procedures should transcend any personal aggrandisement."[18]

d. Appointment of Judges

The presidential power to appoint judges is circumscribed by procedures which are unusual in other African constitutional arrangements[19]. The appointment of the Chief Justice is subject to the constitutional requirement of consultation with the Council of State and the express approval of Parliament. In the case of the appointment of other judges of the Supreme Court, the President is strictly required to act on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.

These elaborate procedures and checks are unknown to most African countries. Judges are usually appointed by the President as a matter of executive discretion or, at most, in consultation with a Judicial Commission or an equivalent body. A Malawian story illustrates this point. At a public ceremony on a Friday, the Honourable Judges of the Supreme Courts of Malawi firmly instructed the Director of Public Prosecutions (DPP) not to occupy a seat reserved for Senior Judges. On the following Monday, by a curious coincidence, the President of the country appointed the DPP as Chief Justice, who then took precedence over all Judges.

The cynic may demur on the ground that an assertive President will always prevail over these checks and balances. However, if this happens, then the fault does not lie with the constitutional arrangements but with the persons operating these checks.

Indeed the Ghanaian constitutional procedures for appointing Supreme Court judges are more elaborate than those of the US Constitution which require the President to appoint Supreme Court Judges with the advice and consent of the Senate[20]. The President of the United States is not bound to appoint Supreme Court Judges on the advice of a judicial council or in consultation with any advisory body such as the Council of State. The only requirement is to seek the advice and consent of the Senate which is equivalent to our Parliamentary approval.

e. Appointment to Executive Positions

Appointments to executive positions must necessarily emanate from the President as the Chief Executive. However, the application of this power to the appointment of middle level management and staff of various public bodies and corporations has proved cumbersome and protracted. This argues for expeditious delegation of the Presidential power of appointing such public officers pursuant to Article 195(2).

J. H. Mensah v. Attorney-General[21] raised the interesting constitutional issue as to whether the requirement of prior parliamentary approval for the appointment of ministers of state (Article 78[1]) applied to "hold-over ministers", that is persons who were to be retained by the President as ministers in his second term after serving in the previous term as ministers with the prior approval of Parliament.

The Supreme Court unanimously held in unequivocal terms that the logic of the Presidential system was that the tenure of office of ministers automatically expired with the particular term of the President, notwithstanding the absence of any explicit reference to such an event as one of the grounds for the termination of a minister's office in Article 81.

The "hold-over ministers" were therefore subject to prior parliamentary approval. A contrary ruling would have meant that the ministers would automatically retain their office even if another person had been inaugurated as President, a proposition that was manifestly absurd in political terms.

It may well be that the position would have been simplified if the Constitution had incorporated Article 17 (d) of the 1960 Constitution of Ghana which has been borrowed by the Constitution of Tanzania, namely.

"The office of a Minister shall become vacant immediately before
the assumption of office of a President."

This would lead to the automatic termination of all ministerial appointments upon the swearing in of a President, whether in his first or second term. Such a mandatory termination of appointment would dispose of any doubts about the requirement of prior Parliamentary approval as a precondition of the reappointment of "hold-over" ministers.

f. Excessive Presidential Powers Some possible instances

Although the bulk of the executive powers are, in my submission, neither excessive nor inherently prone to authoritarianism, there are two aspects which may be characterised as unduly intrusive and potentially inimical to constitutionalism. These are the limitations expressly imposed on Parliament's legislative powers by Article 108 and the extension of Presidential patronage to the district level. [Articles 242 (d) and 243 (i)]

Under Article 108, Parliament is prohibited from proceeding upon certain bills with financial or tax implications unless they are introduced by or on behalf of the President. These are bills, which make provision for any of the following:

(i) the imposition or the increase in taxation;
(ii) the imposition of a charge on the Consolidated Fund or other public funds of Ghana;
(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 imposition or remission of any debt due to the Government of Ghana.

While the above matters should properly engage the attention of the President and should be introduced into Parliament in consultation with him, the conferment of an exclusive right on the President to introduce legislation in Parliament in the area is

repugnant to Parliament's constitutional control of the purse. As Kwasi Prempeh has observed[22]; this has the effect of subordinating Parliament to the Executive in financial matters, something which upsets any viable system of separation of powers.

Such a limitation on legislative competence appears unwarranted, particularly since it debars Parliament from taking appropriate measures to provide funds for its own purposes. Parliament is reduced to submitting appeals to the Ministry for Finance for its own budgetary requirements. Article 108 is a relic from the 1979 Constitution (Article 90) and appears to have been repeated without a critical reappraisal of its propriety in a constitution designed to ensure a viable Parliament.

g. The President's role in Local Government:
<u>Accountability at the Local Level</u>

Although decentralization was conceived as a mechanism for enhancing local participation in the decision-making process and promoting the accountability of local officials to the people in the various districts, the democratic outcomes of these arrangements have been rendered nugatory by the emergence of the District Chief Executive (DCE) who, in practice, is not accountable to the District Assembly or any regional authority. A DCE is appointed by the President with the approval of the relevant District Assembly. He presides over the executive committee of the District Assembly and wields such power, both as the chief representative of central government in the district and the local boss, as to nullify the District Assembly's theoretical power to pass a vote of no confidence in him. The prospects of passing such a vote are diminished by the fact that as much as 30% of the membership of the District Assembly is made up of Presidential nominees. Such a system is clearly open to abuse and has, in fact, been abused by several DCEs.

It is to the credit of President Kufour that he has already signalled his intention to call for a constitutional amendment to ensure that DCEs are elected directly by the District Assemblies and are fully accountable to them.

The cumulative impact of the Presidential power to appoint District Chief Executives and as many as 30% of the membership of District Assemblies not only provides extensive powers of presidential patronage but also undermines the concept of decentralization itself. It is difficult to conceive of any rationale for such an intrusion into local deliberative bodies except to enhance the President's sphere of influence in an area that is ostensibly non-partisan. The requirement of consultation with traditional authorities or other interest groups in the district in appointing the 30% is not meaningful, even if implemented. Traditional authorities are hardly consulted and their wishes are invariably ignored in the process of making such appointments.

It is submitted that if there should be any departure from the elective principle, the appointing powers should be ceded substantially to the traditional authorities, which have a vital interest in the business of the District Assemblies.

In as much as DCEs are politicians and not civil servants or local government officers, they should be elected by the Assembly from among members of the Assembly. The provision for Presidential appointment even with the requirement of the approval of the two-thirds majority of the District Assembly concerned still contravenes the principle of local autonomy implicit in decentralization and amounts to the imposition of an un-elected functionary as the dominant personality in the District Assembly, wielding enormous executive powers and patronage with little or no accountability to any local person or authority.

The Committee of Experts had proposed that the Executive Committee of a District Assembly should be chaired by the Chairman of the District Assembly, an elected officer and that the chief representative of the Government in the district, a civil servant, should be an ex-officio member of the Executive Committee.[23] This proposal was not endorsed by the Consultative Assembly. Under the Constitution, the District Chief Executive, the political appointee, presides over the Executive Committee of the District Assembly and is the chief representative of the Central Government in the District, responsible for the day-to-day performance of the executive and administrative functions of the District Assembly [Article 243 (2)].

B. PARLIAMENTARY OVERSIGHT OF THE EXECUTIVE

Parliament has over the period under review grown in stature as an effective legislative body and as a forum for serious national deliberations. The shortcomings artificially imposed by the boycott of the House by the largest opposition party in 1993 have now disappeared with the inauguration of a fully representative body. Nevertheless, perceptive observers of our constitutional system such as, Ocquaye and Prempeh, as well as senior parliamentary officials, have pointed out that Parliament has not been particularly effective in discharging its oversight functions over the Executive.

Parliament has not established itself as a vigilant watchdog over the activities of the Executive, despite the constitutional powers of committees of Parliament to conduct investigations and enquiries into the activities and administration of ministries and departments.

These powers of investigation are expressly stipulated under article 103(3) of the Constitution. US Congressmen have had to infer their investigative powers from their legislative powers. Congressional investigations into various matters are justified as background studies pertinent to their legislative function. Their Ghanaian counterparts are expressly empowered to conduct investigations and enquiries not only in respect of legislative proposals, but also in the performance of their oversight functions in respect of the activities and administration of the Executive. Yet Parliament has not availed itself of these investigative powers, except with respect to the preparation of estimates.

a. The efficacy of the oversight mechanism

According to a former Senior Parliamentary officer, the Parliamentary Committee system has not developed into an effective oversight mechanism. This is attributed partly to the failure of the system to attract the substantive interest of MPs and partly to the lack of technical support and other resources. Indeed, the lack of technical and other resources has operated as a serious and pervasive constraint on the effectiveness of MPs and their ability to scrutinize technical matters presented to them by the Executive.

On the other hand, the Executive is well equipped with a horde of experts, civil servants, consultants and international financial institutions. The result is that the capacity of an ordinary MP to review a complex technical project presented by a Minister to Parliament is highly attenuated. He is usually outmatched and indeed overwhelmed by the Executive.

Lack of adequate technical support and resources is also a contributory cause of the failure of MPs to prepare and sponsor private members bills.

Another contributory factor is that until recently MPs appeared to have ceded the right of preparing bills to the Attorney General's Department, notwithstanding the absence of any constitutional impediment to the sponsoring of bills by individual MPs. In short, the dearth of private members bills may well be due in part to inertia on the part of MPs. This may well change with the establishment of a legislative drafting unit in Parliament.

b. The impact of constitutional provisions on parliamentary oversight

Some scholars contend that apart from limited resources and the inertia of MPs, defects in the constitutional arrangements have also undermined the oversight responsibilities of Parliament.

The issue, then, is whether the Legislature's powers of oversight over the Executive under our Constitution are potent or effectual.

This issue becomes particularly pertinent, having regard to the contention of several commentators such as Ocquaye, Kwasi Prempeh, Sandbrook and Oelbaum, that the powers conferred on the President under the Constitution are excessive.

The Legislature's oversight of the Executive consists of two main elements: the power of the purse; that is, the power to approve the Government's Budget and to impose taxes; and the power to investigate or scrutinize any ministerial act.

H. Kwasi Prempeh and Mike Ocquaye have castigated Parliament for its perfunctory discharge of these responsibilities and have attributed this partly to defective aspects of the Constitution and partly to MPs' own inertia.

They contend that Article 78(1) requiring the President to appoint a majority of ministers from Parliament undermines Parliament's oversight function by co-opting a

Substantial number of the MPs to the Executive and holding out the prospect of such appointment to others. This in effect removes any inclination to be critical of Executive action.

This critique would apply with even greater force to the Westminster constitutional model, which sanctions the appointment of all ministers from Parliament.

Clearly, the principle of collective responsibility, even if not formally incorporated into the Ghanaian Constitution, would frown on fellow members of the same Government criticising their ministerial colleagues in Parliament.

Furthermore, the highly partisan attitude of MPs to parliamentary proceedings undermines the evolution of a distinctive and autonomous institutional persona which is a prerequisite to Parliament's effective oversight of the Executive.

On the other hand, our previous experience of American Presidential system, which excluded ministers from Parliament in the Third Republic, eroded any notion of ministerial responsibility to Parliament. Ministers who had no connection with Parliament showed little inclination to appear before it, or render any accounting to it in respect of their executive performance.

It is further to be noted that apart from this brief experience under the Third Republic (1979-81), all constitutional arrangements of Ghana since independence have made provision for the appointment of Ministers from Parliament. The feeling of political and constitutional observers is that the membership of Ministers in Parliament allows other MPs some leverage over the Ministers and that they are more deferential to the authority of Parliament than Ministers appointed from without. In any case, few politicians look forward to the prospect of entering Parliament without the possibility of a ministerial appointment. Whether actuated by political expediency or constitutional principles, Ghanaian political experience has established a linkage between membership in Parliament and the prospect of ministerial appointment. However, this does not entirely justify the strict constitutional requirement that a majority of Ministers of State be appointed from Parliament a stipulation which has often impeded parliamentary proceedings for lack of a quorum. [(Article 78(1)]

While a requirement of prior consultation with the President would have been warranted by considerations of administrative expediency, a total prohibition of Parliamentary initiative in this regard seems, on reflection, to be an unnecessary intrusion into the province Parliamentary responsibility, particularly as it has the effect of denying Parliament itself any autonomy in making adequate financial provision for itself.

It is my view that one of the constraints on the effectiveness of Parliament is that members have not been equipped with the requisite human and material resources to exercise their oversight and legislative responsibilities effectively. This is not likely to improve in the face of such a serious limitation on its institutional autonomy. This should be corrected in a future review of the Constitution.

c. <u>The principle of Executive responsibility to Parliament</u>

Perhaps a more fundamental question is whether the Constitution expressly incorporates the concept of executive responsibility to Parliament. In its Report on Constitutional Proposals, 1991, the Committee of Experts dwelt at some length on the critical importance of expressly enunciating such a concept in the Constitution as follows:

"Relations with Parliament

21. The Committee strongly urges that the Constitution should incorporate some concept of executive responsibility to Parliament. We are convinced that any concept that underscores the ultimate responsibility of executive functionaries to the people's representatives and serves as a constraint on executive excesses would be conducive to good governance and the rule of law. The experience of African countries, including our own, clearly demonstrates the need for appropriate constraints on executive power. The constitutions of several countries that have Executive Presidents have unequivocally enunciated the principle of executive responsibility, either in explicit terms or by way of concrete devices, that provides for Parliamentary oversight over the Executive. Thus, Articles 42 and 43 of the Sri Lanka Constitution make clear that the President and the Cabinet of Ministers are responsible to Parliament for the due exercise, performance and discharge of their responsibilities and functions under the Constitution.

The Namibian Constitution recognises the principle of executive responsibility to Parliament and ordains that the Cabinet is collectively responsible to Parliament. Under the French Constitution, the concept of executive responsibility to Parliament is underscored by various provisions requiring the Government to present its programmes and policies to Parliament, which is invested with the power to reject such programmes and policies, a power that entails the right to cause the resignation of the Government. It is to be noted, however, that in the above countries, parliamentary oversight over the Executive does not involve the power to unseat the President through a vote of no confidence or a rejection of Government policy. In most countries, the dissolution of a Cabinet does not entail the termination of the President's tenure. Zimbabwe's Constitution, however, takes the principle of executive responsibility to Parliament further by providing that a parliamentary vote of no confidence in the Government leaves the President with one of these options:

He may (1) dissolve Parliament; or
(2) dismiss the Vice-President and the Cabinet; or

(3) resign himself."

21. In the light of the above considerations, the Committee recommends that the principle of executive responsibility to Parliament be elaborated in the Constitution as follows: -

i. All Ministers should be accountable individually for the administration of their own ministries, and collectively for the administration of the work of the Council of Ministers both to the President and to Parliament.

ii. The Council of Ministers should be responsible to Parliament for the due exercise, performance and discharge of their powers, duties and functions under the Constitution.

iii. The President may address Parliament at any time on the State of the Nation.

iv. The Prime Minister, as leader of Government business in Parliament, should present the Government's programmes and policies to Parliament.

v. In the event that Parliament considers the Government's statement of policy on programme or official budget unacceptable, it should give notice of the intention to reject it, and if the Government fails to revise the said programme, policy or official budget to the satisfaction of Parliament, Parliament may proceed to reject it formally. Such rejection will not lead to the resignation of the Council of Ministers.

vi. If Parliament passes a vote of no confidence in the Government, the President would be obliged to dismiss the Prime Minister and other Ministers, dissolve the Council of Ministers and appoint a new Council of Ministers and other Ministers of State".[2 3]

The Committee's recommendations were not explicitly endorsed by the Consultative Assembly and the Constitution is woefully lacking in any express enunciation of the concept of executive responsibility to Parliament or any devices to underscore such responsibility apart from the power to conduct investigations and enquiries into executive acts.

This was because after rejecting the Committee's proposals on the structure of the Executive, the Consultative Assembly substantially adopted the executive arrangements under the 1979 Constitution where the theory and practice of executive responsibility to Parliament were attenuated, by reason of the more pronounced separation of the Executive from Parliament in that document

This may well be a case of throwing away the baby (executive responsibility to Parliament) with the bath water (the office of Prime Minister)

Any evaluation of Parliament's performance in the Fourth Republic will have to take cognisance of the distressing historical fact that of all the three branches of Government, Parliament has experienced the worst traumas unleashed by political instability in post-independence Ghana. Parliament has, in fact, been unconstitutionally dissolved cumulatively for a period of at least 22 years since independence. This has inevitably had its toll on the capacity, expertise and resources of Parliament. Its legislative function is hampered by the lack of its own legislative draftsman; its oversight responsibilities are equally undermined by the paucity of its expertise in scrutinizing executive acts and its ability to conduct investigations and enquiries is impeded by a woeful lack of resources.

It would appear, however, with assistance from the donor community or other international sources, some action is being taken to rectify this situation. A new legislative drafting unit is to be established in Parliament to assist in drafting legislation.

This would enhance the capacity of MPs to introduce legislation, including private members' bills. Parliament is also establishing a Policy Analysis Department staffed with qualified personnel and researchers to assist in analysing the policy implications of MPs work. It is also intended to install internet and other forms of information technology to strengthen the information base for Parliament.

C. THE JUDICIARY AND CONSTITUTIONALISM

The Rule of Law is inseparable from an effective independent, impartial and honest Judiciary . The Judiciary is central to any mechanism for ensuring the Rule of Law and Constitutionalism.

There can be a little doubt about the crucial role of the Judiciary in ensuring political stability and social cohesion, social and economic interests. The Constitution vests the judicial power of Ghana in the Judiciary and proclaims its independence generally in Article 125.

The Judiciary's independence is underscored in specific terms under Article 127 which stipulates that in its exercise of the judicial power of Ghana, the Judiciary is guaranteed its independence not only in its judicial functions, but also in its administrative functions including its financial administration. [See Article 127(1)]

Clause 2 Article 127 states:

> "Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever, shall interfere with Judges or judicial officers or other

persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the Courts may reasonably require to protect the independence, dignity and effectiveness of the Courts, subject to this Constitution"

Judges are immune from liability in respect of their acts or omissions in the exercise of their judicial power. (Article 127 (3))

Their salaries and other emoluments are charged on the Consolidated Fund and they are assured financial security by constitutional provisions, which (a) prohibit any diminution in their remuneration or perquisites and (b) allow Judges to retire on their salaries.

Notwithstanding the above emphatic constitutional guarantees, the exercise of judicial power has generated considerable comment. The following points should be noted:

1. With regard to their relations with the Executive, it cannot be convincingly demonstrated that the Superior Courts have surrendered their independence. While it is true that the Courts have ruled in favour of the Executive in a number of key constitutional cases, the Judiciary has, on the whole, not hesitated to assert its independence when adjudicating constitutional disputes involving the executive arm.

2. However, the credibility of the Judiciary is seriously affected by a pervasive perception of venality, which must be addressed to ensure the efficacy of the Rule of Law. Public confidence in the ability of the ordinary court system to administer justice seems to have ebbed and unless this is restored, the entire Rule of Law would be undermined.

3. The independence of the Judiciary also raises the issue of the intellectual or jurisprudential independence of the members of the Judiciary. The Constitution invests the Judiciary with far-reaching powers to determine the constitutionality of legislative and executive acts. This power of judicial review, the power to strike down any act of the Executive and Legislature, places the Judiciary in a unique position, which is inconceivable under the British concept of Parliamentary sovereignty. The ability of the Judges to meet this challenge depends on their integrity, their appreciation of their delicate but crucial constitutional role, their commitment to the core values of the Constitution and their ability to apply these values to the resolution of disputes in a changing world.

   More importantly, the efficacy of the Supreme Court as the arbiter of constitutionalism is contingent on the extent to which its decisions command the respect of the public generally.

JUDICIAL REVIEW AND ITS IMPLICATIONS

a. <u>The scope of judicial review under the Constitution</u>

One of the most remarkable constitutional powers ever conferred on an organ of state is the power of a small band of unelected officials to review the acts of the President, the Executive and Parliament and to declare them null and void if they adjudge such acts to be unconstitutional.

This is the power of judicial review explicitly conferred on the Supreme Court by article 2 of the Constitution in the following terms:

1. "A person who alleges that

   (a) an enactment or anything contained in or done under the authority of that or any other enactment;
   (b) any act or omission of any person

   is inconsistent with or in contravention of a provision of this Constitution may bring an action in the Supreme Court for a declaration to that effect.

2. The Supreme Court shall, for the purposes of declaration under Clause (1) of this article, make such orders or give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made."

The above powers are reinforced by potent sanctions unequivocally imposed by clauses 3, 4 and 5 of this article as follows:

"(3) Any person or group of persons to whom an order or direction is addressed under clause (2) of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction.

(4) Failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the cases of the president or the Vice-President, constitute a ground for removal from office under this Constitution.

(5) A person convicted of high crime under clause (4) of this article shall -

a be liable to imprisonment not exceeding ten years without the option of a fine; and
b not be eligible for election, or for appointment, to any public office for ten years beginning with the date of the expiration of the term of imprisonment."

As all students of American constitutional law know, the concept of judicial review was not explicitly stipulated in the U.S. Constitution; the concept was rather inferred by judicial interpretation in the case Marbury v. Madison.[24] Its validity has sometimes been challenged in the US on the grounds that it contravenes the democratic majoritarian principle. The concept has however prevailed over these occasional assaults.

b. Juristic traditions and concepts before 1969: The British Legacy

In Ghana, successive Constitutions since 1966 have explicitly enunciated and proclaimed the twin concepts of judicial review and a justiciable bill of rights in the light of the authoritarian and illiberal excesses that prevailed in our political and constitutional experience of the early sixties. Indeed, as mentioned earlier, these provisions are an emphatic rejection of the legacy of the case of Re Akoto.

Some commentators have, in denouncing the Akoto decision, suggested that that decision may have been induced by "judicial cowardice" or "judicial inertia" (Bimpong Buta)[25] and that a less timorous Bench would have construed the Presidential Declaration under Article 13 of the 1960 Constitution as an enforceable or justiciable bill of rights. While I cannot make any confident pronouncements on the psychological state of the three venerable members of the Akoto Bench[26]; I would submit that their decision is also explicable, at least in part, on the basis of strict adherence to the following juristic doctrines and traditions, which would have shaped the perspectives of jurists steeped in British legal traditions.

1. As noted earlier, the concept of Parliamentary supremacy inhibits judges from questioning the legality or constitutionality of an Act of Parliament[27]. In the eyes of the Akoto Bench, that fundamental principle was not altered by the 1960 Constitution, except in the limited area of Parliament's competence to amend or repeal the entrenched provisions of that Constitution.

2. The British concept of judicial review was originally a much narrower concept, limited to ensuring administrative justice within the framework of administrative law. It concerned itself with such issues as whether a Minister has acted within the scope of his legislative mandate, that is, the legality of administrative acts not the constitutionality of an Act of Parliament. Even within this narrow sphere, British judicial attitudes at the time of the Akoto decision were characterised by extreme caution. Wade and Forsyth[28] have observed that in the middle part of the 20th Century "a deep gloom settled on English Administrative Law". The Courts showed signs of losing confidence in their constitutional function of imposing law on government. These attitudes changed dramatically in the second half of

the 20th century. They adopted a much more aggressive conception of the Courts' public role after realising how much ground had been lost and what damage had been done to the defences against abuse of power which still remained.

> "The Courts realised more clearly than ever before, in light of the rate at which the state was expanding, that their public law jurisdiction was a crucial cornerstone of the machinery for securing responsible government." (H. R. W. Wade and C. F. Forsyth Administrative law (Oxford, Clarender) 1994

Thus, commenting on the Liversidge v. Anderson[29] decision in which the Court upheld the Minister's subjective determination that a detention was in the public interest, the English Court of Appeal declared in 1977:

> "The majority's conclusion strongly opposed by Lord Atkin that a subjective language clause could preclude any proper judicial scrutiny of the decision-making process stands in sharp contrast to the modern judiciary's attitudes in this field. As subsequent decisions have demonstrated it would appear that it would have been relatively easy to interpret the subjective provision in a manner which preserved a meaningful role for judicial review"[30].

3. The British traditionally had no justiciable bill of rights. Although this was partly a reflection of the fact that it has no written constitution, British jurists were traditionally uncomfortable adjudicating on human rights issues on the ground that these inevitably involved a determination of sensitive political or social issues which were more appropriate for Parliament than the Judiciary. Their positivist approach drew a sharp distinction between the interpretation of the law, the province of the Judiciary and policy determination, the preserve of the Legislature.

However, more recently, British attitudes to a justiciable bill of rights were of course substantially affected by the adoption of the European Convention on Human Rights and the consequential enactment of the Human Rights Act in the UK. The Courts can no longer shy away from evaluating English statutes or executive acts against the standards stipulated in the Convention and the consequential English Legislation on Human Rights. However, the deep-seated respect for Parliamentary sovereignty still persists to the extent of precluding the competence of the British Courts to declare an Act of Parliament null and void on grounds of inconsistency with a provision of the Convention or the Human Rights Act of the UK.

A careful division of labour, based on conventional roles, has been worked out. The Courts are competent to interpret an English Statute and declare that it is incompatible with a provision of the Human Rights Convention or the Human Rights Act. After that, it is for the Executive to initiate, and Parliament to enact

remedial legislation to Comply with the Convention. (Human Rights and the Criminal Justice and Regulating Process, University of Cambridge Centre for Public Law)

In a fascinating and illuminating article on Human Rights in Ghana[31], the Attorney General and Minister of Justice, Hon Nana Akufo Addo, then President of the Greater Accra Branch of the Ghana Bar Association, analysed a series of Ghanaian judicial decisions culminating in Re Akoto in which the Courts invoked English notions of Parliamentary sovereignty as well as positivist juristic ideas to declare themselves incompetent to review or reverse deprivation of personal liberty under the PDA. Ironically, some of these cases were argued by English barristers before English judges sitting in Ghanaian Courts!!

These attitudes may have led the Akoto Bench to hold that the Presidential Declaration of basic principles was not justiciable, and that the subjective discretionary powers sanctioned in Liversidge v. Anderson precluded the Court from making an objective determination as to whether the activities of Akoto and others threatened public security within the meaning of PDA.

If the prevailing juristic ideas and traditions restricted English judges' conception of their role of placing appropriate restraints on Government and holding it to account in the middle of the 20th century, then, perhaps we may understand the doctrinal limitations under which the English trained panel in the Akoto case laboured.

In any case, the 1960 Constitution did not provide the usual armoury of mechanisms for enforcing fundamental rights or freedoms.

No jurisdiction was conferred on the High Court to enforce any fundamental human rights and freedoms. The Supreme Court was accorded limited powers of judicial review. It had original jurisdiction to determine all matters where a question arose whether an enactment was made in excess of powers conferred on Parliament by or under the Constitution.

It was not invested with a general power to determine whether any act of Parliament or the Executive was inconsistent with or in contravention of the Constitution.

It may be countered that the US Supreme Court was able to infer the doctrine of judicial review notwithstanding the absence of any constitutional provisions expressly conferring the power of judicial review and that their Ghanaian counterpart should have been more imaginative or enterprising. The answer may well be that the Akoto Bench was handicapped not only by the illiberal political environment in which it operated, but also by a less activist judicial tradition.

The Constitution of 1992, like the Constitutions of 1969 and 1979, emphatically rejected this juristic tradition, and replaced it with a new dispensation founded on the supremacy of the Constitution. Under this constitutional order, Parliament

itself is subject to the provisions of the Constitution. Any act of the Executive or the Legislature or any other person may be challenged as unconstitutional in the Supreme Court.

While we deplore the outcome and legacy of the Akoto case, we must realise the cardinal importance of the legal philosophy, perspectives and attitudes of judges who are entrusted with the awesome responsibility of interpreting and enforcing the Constitution.

This raises a number of critical issues about our Judiciary. As several writers have pointed out, judicial independence can be a dangerous weapon in the hands of a Judiciary that has little appreciation of its role under a liberal Constitution, is not committed to the core values of the Constitution and is still wedded to juristic concepts and techniques of a system that is not imbued with the fundamental precepts of constitutionalism. A Supreme Court, intoxicated with its independence, may well turn out to be an unruly horse.

1. How then have our judges performed under our new constitutional order?
2. What has been their approach to exercising the awesome power of judicial review?

C. The Judiciary's approach to the interpretation and enforcement of the Constitution.

A study of Supreme Court decisions since the promulgation of the 1992 Constitution discloses that after nearly a decade of constitutional adjudication, there is perceptible evidence of an evolving philosophy of interpretation. Whilst it is too early to detect a full-fledged approach, the following significant features are discernible:

1. Judges of our Supreme Court, on the whole, appreciate the fundamental distinction between interpreting the Constitution and construing an enactment. In this regard, the following pronouncement of Sowah JSC in Tuffour v. Attorney General has frequently been cited as establishing the basic principles of constitutional interpretation in Ghana:

> "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.

The Constitution has its letter of the law. Equally, the Constitution has its spirit.... Its language...must be considered as if it were a living organism capable of growth and development... A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation

that consideration to bear, in bringing it into conformity with the needs of the time."

> "...the narrow rules of construction applicable in cases of contracts, wills, statutes and ordinary legislation may or may not be adequate when it comes to the interpretation of a Constitution or law intended to govern the body politic .... Our interpretation should therefore match the hopes and aspirations of our society and our predominant consideration is to make the administration of justice work."[32]

However, the frequent and enthusiastic citation of this approach has not always been matched by its application in the process of interpreting the Constitution.

In a number of cases, mechanical and technical rules of statutory interpretation have been applied, despite a solemn invocation of the Sowah pronouncement.

2. For many Supreme Court Judges, the starting point in the process of interpreting the Constitution is to determine the intent of the framers of the Constitution. In such an exercise, they rely substantially on relevant documents such as the Report of the Committee of Experts (Constitution) on Constitutional Proposals and sometimes the reports of the various Committees of the Consultative Assembly.

It is gratifying to note the extent to which the Supreme Court has relied on the Report of the Committee of Experts in elucidating the meaning or rationale of various provisions of the Constitution.

A liberal approach to the interpretation of the Constitution however demands a lot more than a determination of original intent of the framers.

Alexander Bickel[32], a renowned American constitutional lawyer, has said that the search for Congressional intent should properly be two-fold. One inquiry should be directed at the congressional understanding of the immediate effect of the constitutional provision on conditions then present. Another should aim to discern what, if any, thought was given to the long-range effect under future circumstances of provisions necessarily intended for permanence.

Other scholars of the US Constitution espousing the interpretative historian's approach see three stages of the interpreter's task. First, the interpreter must immerse himself in the world of the adopters of the Constitution to try to understand the constitutional concepts and values from their perspective. Second, in seeking the original intent, he must ascertain the framers' interpretative intent and the intended scope of the provision in question. Third, he must often translate the framers' concepts and intentions into our time and apply them to situations that the framers did not foresee.

So far, Ghanaian judges have not yet explicitly articulated any such principles of constitutional interpretation although they may be implicit in what they are doing now. In any case, the comparatively short span of constitutional experience in Ghana has not raised the more challenging issues of interpreting the Constitution to accommodate areas not foreseen by the framers of the Constitution.

3. The precise connotation of a "broad and liberal spirit" in interpreting the Constitution is yet to emerge. Some have maintained that the Constitution should be interpreted as a whole, and that no part can be meaningful unless interpreted in the light of other parts. Others have stressed the importance of invoking the core values of the Constitution, in particular, the fundamental rights and freedoms and the Directive Principles of State Policy. Yet others have invoked the liberal approach in advancing an interpretation that makes sense of or gives effect to a constitutional provision or ensures fairness.

4. A substantial number of the Judges have invoked the "spirit of the Constitution" in interpreting the constitutional provisions. This approach was crucial in the outcome of the majority decision in the 31st December Case. Others have been sceptical about the import of the "Spirit" of the Constitution raising questions as to whether this was a metaphysical phenomenon. The Constitution itself refers to the Spirit of the Constitution. The term provides liberal jurists with a potent idea for giving broad effect to the core values of the Constitution where a particular situation is not explicitly covered by the letter of the Constitution.

5. In the early phase of constitutional adjudication, our Supreme Court judges relied copiously on English decisions a surprising technique since these had little guidance to provide for the interpretation of a written Constitution, imbued with a robust concept of constitutionalism. At a later stage, the juristic horizons of the Bench have widened with the citation and analysis of numerous American and a few Indian and Canadian cases. However, the learned judges have been cautious in adopting US principles of constitutional interpretation.

Ghanaian Judges have held, for example, relying on the language of the Constitution and its "legislative history", that the American requirements of "standing" and "legal dispute" do not apply in Ghana. They have also rejected the American doctrine of "political question" and "non justiciability" as inappropriate for our constitutional system. They have enunciated the general approach that principles of constitutional interpretation must be shaped by our circumstances and that reliance should be placed substantially on the Directive Principles of State Policy[33].

6. There has been a lively debate on the legal effect of Directive Principles of State Policy[34]. While the learned judges agree on the cardinal importance of these principles and their constitutional status as a guide to all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet and

political parties in the application or interpretation of the Constitution or any other law, there is no unanimity in the Judiciary on the legal effect of these principles. Some consider them non-justiciable. Others maintain that there is nothing in the Constitution to preclude their justiciability. In this regard, Mr. Justice Adade has criticised the Committee of Experts for suggesting in its report that Directive Principles of State Policy are traditionally non justiciable, and has argued that every constitutional provision is justiciable unless otherwise stipulated in the Constitution.

Perhaps a useful approach to resolving this controversy is to consider the meaning of justiciability.

Several Ghanaian Supreme Court Judges have dismissed non-justiciability as an American importation which has no place in our constitutional system. They maintain that the Constitution invests the Supreme Court with express power to interpret and enforce the Constitution, and no constitutional issue has been exempted from this plenary jurisdiction on the ground that it falls within the exclusive competence of a coordinate branch of Government. They therefore do not consider themselves inhibited by any self-imposed restraints which the US Supreme Court has adopted. Some judges have argued that the US notion of restraint is traceable to the lack of express power of judicial review under the US Constitution.

However a close look at the American doctrine of justiciability and its application shows that although the Federal Structure of Government and the US Constitution's insistence on the requirement of "legal disputes" or cases as pre-requisite to constitutional litigation have contributed to the shaping of the concept of justiciability, the policies that inform the US Supreme Court's refusal of jurisdiction in "political questions" are many and varied. In the words of Lawrence Tribe, the eminent constitutional lawyer, "The stated bases for declining to adjudicate, reflecting the Court's conception of its role in the Constitutional system, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, the comparative finality of its consequence, the considerations due to the judgment of other constitutional powers concerning the scope of their authority for each to keep within its power including the courts, and the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement[3] [4].

Justiciability raises the question as to how a particular issue or matter can appropriately be determined or enforced by the Supreme Court. Some pertinent questions are: Does it pose precise rights which might appropriately be determined by the Court, having regard to the inherent limitations of the judicial process arising especially from its largely negative character and its limited resources of enforcement? In American constitutional parlance: Are there judicially discoverable and manageable standards to be applied by the Court? Is judicial determination appropriate, having regard to the separation of powers and the considerations due to other repositories of constitutional power?

We shall revert to the justiciability of the Directive Principles of State Policy in the 2nd Lecture.

d. Performance of the Supreme Court since 1992

The performance of the Supreme Court's constitutional functions within the nine years after the promulgation of the 1992 Constitution has been the subject of much comment. Some decisions of the Court have been criticised as unduly deferential to the Executive. The late Chief Justice's practice of empanelling a select number of Judges to adjudicate constitutional cases has been castigated as facilitating the "packing" of the Bench for particular cases and, accordingly, subversive of the independence of the Judiciary.

However, I would submit that on the whole the Supreme Court has, except in one or two cases, performed creditably and that it has made a significant contribution to the protection of the core values of the Constitution and to the deepening and consolidation of democracy and constitutionalism. The following points may be noted in this regard.

1. The Supreme Court appreciates its constitutional power of judicial review and has asserted its role in interpreting and enforcing the Constitution with alacrity. It has not hesitated to exercise this power with respect to any agency of state, nor is it inhibited by the restraints emanating from the concept of parliamentary sovereignty. Indeed, some Supreme Court Judges appear to have gone further than their American counterparts by rejecting any notion of judicial self-limitation or restraint on the ground that their power of judicial review is expressly stipulated in the Constitution, unlike the position in the US.

2. It is simplistic to assess the Supreme Court adherence to core constitutional values by a mechanical count of its rulings for or against the Executive in a comparatively short period. A ruling against the Executive may not necessarily be actuated by fidelity to core values or conducive to sound administration of justice. However, the Supreme Court has consolidated fundamental human rights by ruling that:

   (i) State-owned media have a duty to provide opposition parties with equal access to their facilities and fair opportunities for the parties to express their view point NPP v. GBC (unreported)

   (ii) Persons may organise or participate in processions and demonstrations without the prior approval of the Police NPP v. IGP (unreported) Writ No. 4/93

   (iii) Public funds may not be used in celebrating a coup-de-tat, or an unconstitutional or illegal act NPP v. AG (31st December Case) (1994) 1 WASC 1

   (iv) The intended holding of elections to the office of district chief executives between 18th and 30th April 1993 of persons nominated as district executives by the President was inconsistent with and in

in contravention of Articles 242-243 of the Constitution. NPP v. President Rawlings and Attorney General (Unreported) Writ No, 15/93

(v) A corporate person is entitled to invoke Article 2 of the Constitution to institute an action in the Supreme Court for the interpretation and enforcement of the Constitution. NPP v. Attorney General (CIBA Case)[35]

(vi) Section 4(1) of the Council of Indigenous Business Associations Law, 1993 (PNDCL 312) which compelled listed organisations to register with the Council was inconsistent with and contravened article 21(1)(e) that protects freedom of association. See (CIBA Case).[36]

(vii) Regulations 3(1) and 21 of the Manufacture and Sale of Spirits Regulations 1962 (LI239) made under the Liquor Licensing Act, which made it mandatory for an akpeteshie distillery company to join a registered distillers co-operative and to sell its products to specified persons and bodies contravened the company's fundamental right of freedom of association guaranteed under Article 17(4)(a), 214 (c) and 24(4) of the Constitution. Mensimah v. Attorney General. [1996 97] SCGLR 676

(viii) Any citizen is entitled to invoke Article 2 of the Constitution for interpretation or enforcement of the Constitution without the requirement of establishing a special personal interest in the outcome of the case. Every citizen has an inherent right to enforce the Constitution. Sam (No. 2) v. Attorney General [2000] SCGLR 305

(xi) The National Media Commission, not the President, is the appropriate authority to appoint in consultation with the Council of State, the chairmen and other members of the governing bodies and chief executives or managing directors of state-owned media. National Media Commission v. A.G. [2000] SCGLR 1

The above is an impressive demonstration of the Supreme Court's fidelity to the basic principles of our Constitution.

However, not all decisions of the Supreme Court may be so applauded. For example, its refusal to grant a declaration on the constitutionality of certain sections of the Passport and Travel Certificates Decree 1967 NLCD 155 on the ground that the plaintiff should have sought relief in the High Court seems to have been unduly influenced by a narrow technicality. (See Edusei v. Attorney General [1996-97] SCGLR 1 and Edusei (No.2) v. Attorney General [1998-99] SCGLR 753)

The Supreme Court's ruling on the constitutionality of criminal libel laws generated considerable controversy which seems to have been put to rest by the repeal of the criminal libel law by Parliament.

e. The Tsikata Cases

The High Court's recent decision dismissing the charge against Mr. Tsikata on

grounds of unconstitutionality seems proper and does not raise any troubling Constitutional questions. However, the Supreme Court decision declaring the so called Fast Track Court (FTC) unconstitutional may have far reaching implications for the administration of justice and public confidence in the judicial process. I am unable to comment on the substantive grounds for the Supreme Court's decision, since these are yet to be announced. Nevertheless, one cannot, in all candour, avoid confronting some nagging and troubling pertinent questions about the judicial process that are raised by this ruling.

In a democratic system, no organ of State is immune from scrutiny and while constitutionalism is normally interpreted as the imposition of constraints on the Executive and Parliament under our Constitution, the Supreme Court's sensitive and central role in ensuring the rule of law imposes a grave duty on that institution and the honourable members of the Bench to be above reproach. The awesome power of judicial review has to be exercised with some circumspection and with due regard to all the consequences of the decision.

If the Supreme Court decision in the Tsikata case has the effect of invalidating not only the criminal proceedings instituted in the Fast Track Court against Tsikata, but also all the previous decisions and proceedings, whether criminal or civil, of that forum, with detrimental implications for all vested interests and consequential steps, then a legitimate question must be raised as to whether the decision has performed the primary judicial function of assuring certainty and order in the administration of justice or whether the Judiciary has itself unleashed uncertainty and unsettled vested rights and consequential steps. The function of the judicial process and the legal system is to clarify, protect and sustain rights and other interests and not to unsettle or disturb them. The ordinary person looks up to the law as reliable and predictable system of protecting and not upsetting rights and other interests.

In short, the Supreme Court judges should heed the oft-quoted admonition of Sowah CJ: "Our interpretation should match the hopes and aspirations of our society and our predominant consideration to make the administration of justice work"

Some members of the public have raised the perfectly legitimate question as to whether, prior to the Supreme Court's decision, there was no opportunity or mechanism for the Judiciary to identify and rectify the constitutional defects if any in a system installed by the head of the Judiciary, operated by some members of the Judiciary and ostensibly endorsed by the entire Judiciary.

The public is entitled to expect that a judicial machinery installed by the Judiciary will be a legal and dependable process of adjudication. It is not particularly reassuring to counter with the technical point that judges can only pronounce on the constitutionality of matters brought before them. In this case, the act which was challenged was not an act of the Legislature or the Executive or of any other party

but of the head of Judiciary assisted by some members of the Judiciary.

In these circumstances what prevented any member of the Judiciary from expressing reservations about the constitutionality of the Fast Track Court to his o r her colleagues before or after the installation of that system but prior to the institution of a constitutional challenge from without.

If however, the Judiciary was prevented by law and tradition from reviewing or advising on the constitutionality of a machinery introduced by the head of that institution, then perhaps we should reappraise the entire system of constitutional litigation. The issue is whether we cannot institute a system that enables us to test the constitutionality of a proposed measure before such a measure becomes an accomplished fact. This is what was substantially proposed by the Committee of Experts in its Report.

The suggestion was that apart from the traditional system of reviewing the constitutionality of acts within the meaning of Article 2, a mechanism should be instituted (the Judicial Committee of the Council of State or an appropriate body) for the express purpose of raising or testing the constitutionality of a proposed measure of the Executive, or a bill to be passed by Parliament and, in view of our own experience, a proposed administrative measure by the Judiciary. This would have pre-empted any prospect of invalidating a whole system after it has been installed, with all its disruptive implications.

In the instant case, there is no reason why any questions whether constitutional or legal about the installation of a machinery welcomed by all parties, i.e., computerisation of the court proceedings, could not be resolved in a non-contentious manner without recourse to a confrontational litigation inherent in the adversarial system.

The Supreme Court's failure to give reasons together with its decision was again unsettling. Expeditious disposition of the case with full reasons would have calmed the atmosphere. One assumes that no judgement had been written before the announcement of the decision. If so, then, the learned Judges may have denied each other an opportunity to reflect on their colleagues' opinions and to exchange ideas in a collegial atmosphere, an important technique for building consensus.

My criticism of the above process does not detract from my high respect for the Supreme Court and its work which I publicly proclaimed during the recent New Year School and the Luncheon in honour of the Hon. Chief Justice a few months ago.

Such a discourse or debate is the stuff of constitutionalism and is meant to enhance the work of the Court, not to denigrate it.

Conclusion to Lecture One

In evaluating the performance of our constitutional organs, we should have a long-range or historical perspective. The proper question is not whether the current performance is impeccable but whether the proper foundation has been laid for effective government and constitutionalism. On that criterion, we are doing reasonably well. The authority of the State has not disintegrated; neither has it degenerated into authoritarianism. Despite some pitfalls and occasional set-backs, we are consolidating and deepening our tenets of constitutionalism. The basic levers of restraint on the Executive, namely the Legislature and the Judiciary, are operating with varying degrees of success. The Legislature needs to be strengthened as an effective watchdog, and appropriate remedial action is being taken. The Judiciary is steadily building its jurisprudence on the rule of law and the consolidation of human rights and fundamental freedoms and acts as appropriate constraint on the Executive, despite the occasional aberration. But it may profit from the experience of its counterparts in other jurisdictions in developing its own conventions as to the appropriate restraints on the exercise of judicial power.

LECTURE II

THE CONSTITUTION: SOME SOCIAL AND ECONOMIC DEVELOPMENT ASPECTS

A. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

This Lecture addresses human rights and fundamental rights, in particular, human rights and economic development, political parties and the ethnic factor, and freedom and independence of the Media. It also reviews the Directive Principles of State Policy and specific socio economic issues, such as administration of land, and reforming traditional cultural practices.

a. The Scheme of Human Rights under the 1992 Constitution

The Constitution guarantees a most elaborate system of human rights and fundamental freedoms.[1]

The first fundamental right enshrined in the Constitution is the right to life. This is appropriate since human rights and freedoms revolve around the concept of the dignity and worth of the individual human being. It is followed by the protection of personal liberty which is assured by specific restraints on the power of the State to deprive a person of his liberty and elaborate procedures to be followed when a person is lawfully arrested. The Constitution goes on to proclaim the inviolability of the dignity of all persons, the prohibition of torture or other cruel inhuman and degrading treatment or punishment; and the abolition of slavery or servitude. Elaborate procedures for fair trial are also stipulated in the Constitution.

Other human rights enshrined in the Constitution are:

1. equality of all persons before the law and freedom from discrimination on grounds of gender, race, colour, ethnic origin, creed or social or economic status;
2. protection of privacy;
3. emphatic protection of private property from deprivation.

The general fundamental freedoms are fully guaranteed. These include freedom of expression, freedom of the press, freedom of thought, conscience and belief, freedom of religion, freedom of association and freedom to form or join political parties.

But the Constitution goes beyond the classical model to protect certain economic rights, educational rights and cultural rights. Full attention is paid to the rights of vulnerable groups such as women's rights, children's rights, the rights of the disabled persons and the rights of the sick.

The formulation of the above rights and freedoms is not in absolute terms: Appropriate qualifications and limitations are stipulated on grounds of public interest. Furthermore, these rights may be suspended in emergency situations.

b. Human Rights and Development

The contention that adherence to human rights precepts is an impediment to rapid economic development unfortunately persists today, and the South East Asian models are often cited in support of this view. The short answer to this thesis is that whatever may have fuelled economic development in South East Asia, our experience on the African continent amply demonstrates that authoritarianism and denial or abuse of human rights have not ensured development in any form. As I said in my article in the Cornell Journal of International Law as far back as 1969:

> "The short history of independent Africa is replete with stories of regimes which, having amassed unlimited powers in the interest of public welfare, have proceeded to abuse state powers in furtherance of their personal interests and in total disregard of every concept of legality.
>
> The concentration of excessive power, unrestrained by legality and respect for human rights, has not led to prosperity; on the contrary governments intoxicated with power have proved themselves woefully incapable of discipline or rational analysis of development needs and have consequently unleashed economic chaos."[2]

However, even if economic development were achieved at the expense of human rights, the critical issue is whether such development can be sustained. Some of the recent developments from South East Asia suggest the upsurge of considerable political unrest despite their impressive economic gains. If this unrest derives from the people's attempt to assert their human rights, more precisely, political and civil rights, then the jury is still out as to whether the Asian model assures stability or sustainable development in all senses. Economic development could be disrupted in the face of political turmoil unleashed as a reaction to years of human rights deprivation. The political unrest that erupted in some Eastern and Central European countries is a perfect example of this kind of lopsided development.

Even from the parochial dimension of economic development, our experience in Ghana and Africa is that we cannot have an enabling environment for economic development when open and free discussion of economic strategies and their implications is stifled by a monolithic and authoritarian system which discourages full utilisation of our intellectual resources. Nor can the true potential of the citizenry be realised if individuals may be picked up, arbitrarily detained, their investment in economic activities obliterated or seized, and their property and privacy violated

with impunity. But a more serious objection to the so-called Asian or Eastern European model is the unduly narrow concept of development implicit in this model. As the theme of this series connote, the concept of development is a comprehensive and multifaceted idea encompassing political, social, spiritual as well as economic dimensions. Development is only meaningful to the extent that it impacts upon and enriches quality of life of individuals. In the perceptive words of the late British socialist politician, Aneurin Bevan:

> "There is no test for progress other than its impact on the individual. If the policies of statesmen, the enactments of legislatures, the impulses of group activity do not have for their object the enlargement and cultivation of individual life, they do not deserve to be called civilised."[3]

The concept of human-centred development was endorsed in the UN Declaration on Human Rights to Development in 1986. Article 3 of this Declaration affirmed the critical principle that "The human person is the central subject of development" and the "beneficiary of the right to it."

If this premise is accepted, then development cannot be seen only in terms of impressive growth rates or productive projects but also in terms of the cultivation and the enhancement of political rights, the enjoyment of fundamental freedoms, the assurance of a congenial environment for the development of one's spiritual and intellectual potential and all the other factors that enrich the quality of individual life. Viewed in this perspective, political and social development cannot be divorced from economic development. Development must be seen as a holistic concept dedicated to the overall improvement of the quality of life. That approach is the best guarantee of sustainable development. Freedom of expression on an empty stomach may well be deplored. But when a person with a full stomach is subjected to sustained repression, his frustration may find an eloquent expression in revolt. Affluence may be the first step to revolution in a repressive environment. Recall the current developments in East and Central Europe and to some extent, South East Asia.

This is not to deny that human rights regimes may not pose some difficulties in the way of some development strategies. Take, for example, the constitutional protection of private property and also the requirements for settlement of displaced persons in consequence of large economic development projects. Article 20 contains assurances against expropriation of property except where this is in the public interest and is effected under a law which provides for prompt payment of fair and adequate compensation and access to the courts to challenge the quantum of compensation awarded. Paragraph (3), of article 20 states:

> "Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement

> of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values."

The proponents of "strong government" may be unhappy about these provisions for a number of reasons.

A development strategist impatient with our cumbersome land tenure systems may conceive of a bold solution in terms of compulsory acquisition of large tracts of land for purposes of major agricultural or industrial development. Such a strategy would be unsympathetic to elaborate negotiations for compensation and ultimate recourse to court for final determination of the quantum of compensation. The courts may invoke market value concepts adopted by the Courts of other jurisdictions resulting in astronomical figures as compensation. If the project requires the resettlement of displaced inhabitants, what happens if the inhabitants resist?[4] Supposing they agree that the land to be acquired is sacred to them and is really not replaceable, should they be compulsorily and unceremoniously carted away to another site? What are the government's responsibilities after resettling them? Should the economic value of the project prevail over all these objections? What if the new project is an industrial complex of critical importance to the country's industrialisation programme, but potentially disruptive socially? A number of World Bank projects have encountered such difficulties. Although the above factors are likely to delay the implementation of the project, the constitutionalist has no alternative but to meticulously observe every constitutional requirement, supplemented by a process of persuasion as follows: All the constitutional requirements of land acquisition should be scrupulously adhered to namely the existence of a public interest, the enactment of the necessary legislation for acquisition, the issuance of appropriate notice; discussions with affected inhabitants about the impact of the project; elaboration of the procedure for paying compensation and actual payment of compensation; willingness to accept judicial determination on the quantum and actual payment of compensation; steps to ensure the inhabitants' participation in the decisions regarding resettlement, persuading the inhabitants to accept resettlement and the modalities for resettlement, engaging them in determining the site of resettlement and taking appropriate steps to ensure that their economic welfare and the social and cultural values are protected in the resettlement process. A project implementation which satisfies the above criteria is likely to be more enduring in the long run than an implementation which defies these sensitivities.

Freedom of Association, Political Parties, Nation-building and the Ethnic Factor

And now I would like to turn to the implications of freedom of association and the derivative right to form political parties for nation-building and national unity. There has been much public discussion of ethnicity or tribalism or unhealthy sectionalism in the wake of political campaigns and elections in several African countries (Nigeria, Kenya, Zimbabwe, Madagascar and, to some extent, Ghana). This raises t he critical

issue as to whether a multi-party system in Africa inevitably degenerates into a tribal or ethnic conflict as asserted by Presidents Yoweri Museveni of Uganda and Arap Moi of Kenya. We cannot deny that party-politics in certain African countries has fanned intense tribal or ethnic rivalry, e.g. Kenya and Nigeria or the beginnings of religious tensions e.g. Tanzania.

We in Ghana have prided ourselves on a certain measure of ethnic harmony since independence. But the issue is whether we have sufficiently recognised the possibility of the phenomenon of ethnic or religious divisiveness emerging in our body politic, and if so, whether we have adequately addressed this issue in the Constitution or other laws of the land.

We start with the obvious proposition that freedom of association carries with it the right to form political parties. The purist would argue that once freedom to form parties is guaranteed, no limitations should be imposed on the ideological or doctrinal underpinnings of such parties. In theory, therefore, freedom of association and the derivative right to form political parties could take on a religious or tribal coloration. But this is where the public interest comes in as a limitation on the constitutionally guaranteed freedom of association and right to form political parties. Article 21 (3) assures all citizens the right and freedom to form or join political parties and to participate in political activities, subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with the Constitution. We in Ghana can hardly deny the existence of a national consensus that deplores political activity that fans ethnic, religious or other sectional divisiveness or conflict. This is embodied in article 55 (4) of the Constitution which stipulates that:

> "Every political party shall have a national character and membership shall not be based on ethnic, religious, or sectional divisions"

This is reinforced by one of Directive Principles of State Policy (Article 35 [3]) which enjoins the State to "actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs."

Article 17(2) of the Constitution expressly prohibits discrimination on grounds of ethnic origin as follows:

> "a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status"

However, to revert to political parties and sectionalism, the question is whether beyond these broad declarations, the Constitution has instituted adequate mechanisms against the contamination of multi-party system with the scourge of sectionalism.

Under Article 55 (7) a political party cannot be registered unless:

1. it has a founding member in each district in the country;

2. it has branches in all regions of Ghana and is organised in not less than two thirds of the districts in each region; and

3. the party's name, emblem, colour, motto or any other symbol has no ethnic, regional, religious or other sectional connotation or gives the appearance that its activities are confined only to a part of Ghana.

This provision obviously attempts to translate the concept of nationally-based political parties into concrete requirements. But it is not a particularly potent device for proscribing "ethnic divisiveness." The first two criteria only refer to regional or geographic diversity and not ethnic diversity. Founding fathers of political parties may be resident in different districts without necessarily belonging to different ethnic groups. And party branches may well be established in all regions and a majority of all districts without satisfying the criterion of ethnic balance. The important point to stress here is that our Constitution reflects the national trait of only addressing ethnicity or tribalism obliquely. True, the last requirement of paragraph (7) proscribes the use of any party name, emblem, colour, motto or any other symbol with ethnic, regional, religious or other sectional connotation. But this test can easily be satisfied without assuring ethnic balance.

A potent legal device against ethnicity or sectionalism is to be found in the Avoidance of Discrimination Act of 1957 whose avowed object was to "prohibit organisations using or engaging in tribal, regional, racial or religious propaganda to the detriment of any other community or securing the election of persons on account of their tribal, regional or religious affiliation and for other purposes connected therewith. Under the Act it was a criminal offence for:

> "any organisation whose membership is substantially connected to one community or religious faith to have as one of its objects the exposure of any other organisation, however constituted or any part of the community, to hatred, contempt or ridicule on account of their community or religion."

Although the above legislation is theoretically more potent than the above-mentioned constitutional provisions, it is doubtful whether all aspects of the legislation have any practical significance. For example, how can one establish that an organisation secured the election of persons on account of their tribal, regional or religious affiliation when the election of MPs must necessarily be held in constituencies which are located in regions? Furthermore, some of these provisions come dangerously close to intruding into the citizen's freedom of thought and conscience. Can one properly separate a person's integrity from his religious beliefs? Is it wrong to vote for a God-fearing citizen who belongs to the Christian or Muslim faith?

On the issue of ethnicity, the more critical question is whether such legal devices can effectively instil a sense of nationhood in the citizenry? Clearly, legal or constitutional

provisions may posit the ideal, but they are not effective guarantees against ethnicity or sectionalism. If multi-partyism is not to degenerate into sectionalism, then something more fundamental and basic than the enactment of laws or the promulgation of constitutional norms is called for. We need a fundamental or radical philosophical orientation which sees political parties as a mechanism for truly national ideologies for political, economic and social programmes of national character, far removed from parochial, ethnic and sectional interest. Tribalism will fill the vacuum created by the absence of national political ideology. The creation of this ideology calls for intense education and orientation of our political leaders and their followers.

In countries such as Ghana, Kenya and Uganda, apart from the attempts of the colonial authorities to address the ethnic factor indirectly by fashioning independence constitutions that enshrined substantial regional autonomy, post independence constitutions have studiously avoided any reference to the ethnic factor or its equivalent as a basis of constitutional structures on the ground that any constitutional arrangement that expressly recognises ethnic diversity for each purpose is subversive of national unity and therefore retrogressive. The colonial constitutional legacies emphasising regional autonomies have all been dismantled by succeeding African governments.

On the whole, it can hardly be contested that orthodox political thinking in most African states has shied away from openly acknowledging and addressing ethnicity in constitutional arrangements beyond a platitudinous proscription of discrimination based on ethnicity or other heterogeneous factor. Such thinking is predicated on the comfortable and fashionable illusion that ethnicity is irrelevant to nation building, that the independence movement has created a new community of an integrated nation where individuals, not groups, are the principal subjects of political rights, and that political parties, the Legislature, the Judiciary and Executive all operate purely on the basis of individual merit, and that national resources are allocated on objective criteria without reference to ethnic consideration or the question of heterogeneity. The same thinking underscores the concept of "Winner take all." Arthur Lewis[5] rightly pointed out some thirty-six years ago that the winner take all scenario, which awards political benefits exclusively to the victorious political party in an election on the basis of its majority support, is most inappropriate in Africa where national integration is in its infancy and ethnic identity and consciousness are facts of life. This is because the logical consequence of this scenario is to exclude from the decision making process and economic benefit minority ethnic and other groups which are not associated with the majority group. The minority ethnic group instead of accepting defeat in these circumstances often feels cheated and alienated.

Arthur Lewis's prescription is that African constitutional arrangements should ensure the effective participation of all diverse ethnic groups, including minority groups, in the political and economic benefits of the African state.

That is the only guarantee of stability and unity in the nation states of Africa. Where such participation is denied or the security of one group is perceived as threatened, the

likely consequences are a festering resentment often translated into armed resistance or even secession.

What then are the practical mechanisms for assuring such participation?

Between the two extremes of virtual denial of ethnicity and constitutional provision for secession for ethnic groups from the state, as in the Ethiopian Constitution (1995), I would submit that African states could usefully employ consociational concepts and institutions as a means of ensuring meaningful and effective participation of all diverse ethnic and other groups in the political and economic life of the state. Consociational mechanisms are deliberate procedures to ensure that the component ethnic and other groups in a pluralistic society are represented in decision-making bodies such as the Executive, the Legislature and the Judiciary and other institutions without reference to the principle of winner takes all.

Consensus is preferred to the logic of confrontation and minorities are accorded adequate protection through such elaborate mechanisms of participation. With respect to the electoral process, proportional representation provides a more equitable system for minority groups than the system of "first past the gate". Pluralistic countries, such as Malaysia and Switzerland, have employed consociational principles in their constitutional arrangements to assure participation of the diverse ethnic groups comprising the states.

d. The Constitution and Ethnicity

How does our own Constitution deal with "ethnicity", or if you prefer the old-fashioned word "tribalism?". Ghana has never explicitly recognised the ethnic factor as a basis of constitutional arrangements. We pride ourselves as a progressive unitary state divided into ten regions, in which ethnicity, tribalism or religion as such is generally recognised as immaterial to the composition of our decision-making bodies, the distribution of national resources, the allocation of political power and the sharing of economic benefits. We acknowledge the relevance of regionalism to the structuring of political arrangements and the sharing of national resources; but we recognise ethnicity, tribalism and religions only within the context of protecting fundamental human rights of individuals. The guaranteed constitutional rights and protections are conferred on individuals, not ethnic groups

Thus article 17(2) for example prohibits discrimination against any person on grounds of "gender, race, colour, ethnic origin, religion, creed or social or economic status."

Again, the Directive Principles of State Policy enjoin the State to "actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or

religious creed or other beliefs." [Article 35(5)]When it comes to equitable distribution of national resources or equitable principles of development, the operative reference point is "region", not ethnicity. Thus Article 35(6) elaborating upon Article 35(5) provides:

> "Towards the achievement of the objectives stated in clause (5) of this article, the State shall take appropriate steps to...."
>
> (a) foster a spirit of loyalty to Ghana that overrides sectional, ethnic and other loyalties;
> (b) achieve reasonable regional and gender balance in recruitment and appointment to public offices;(
> (c) provide adequate facilities for, and encourage, free mobility of people, goods and services throughout Ghana;
> (d) make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts and by affording all possible opportunities to the people to participate in decision-making at every level in national life and in government; and
> (e) ensure that whenever practicable, the headquarters of a Government or public institution offering any service is situated in an area within any region, taking into account the resources and potentials of the region and the area".

The same approach is reflected in Article 36(2)(d) which proclaims that the State shall take all necessary steps to establish a sound and healthy economy whose underlying principles shall include inter alia "undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular improving the conditions of life in the rural areas, and generally redressing any imbalance in development between the rural and urban areas."

Ghana has no proportional representation in its electoral system, something which has been adopted in some European countries as a means of accommodating minorities or smaller political groupings. Although the Committee of Experts raised the issue of proportional representation[6], there was little support for it in the Consultative Assembly.

In theory, the "winner take all" concept prevailed. Although our Constitution glosses over the ethnic factor in our formal constitutional arrangements, it will be evident to all keen observers that political and economic realities in Ghana are affected by the ethnic factor or the perception of an ethnic dimension. From time to time, there have been manifestations of a festering resentment in certain ethnic groups against the perceived hegemony of other ethnic groups, or undue favours to members of a particular ethnic group in terms of public appointments, access to government contracts, concentration of political power and the like. The decision-makers and actors in the political arena sometimes implicitly acknowledge the importance of the ethnic factor by quietly introducing ethnic balance into public appointments and political alignments for

purposes of elections. There are certain constitutional provisions which facilitate ethnic or regional balance, if this is considered necessary.

An example is the provision allowing the President to appoint a certain proportion of state ministers from outside Parliament. This was to correct the unfortunate situation in the Second Republic where the logic of the Westminster model resulted in the exclusion of representation of one region and indeed one ethnic group from Cabinet, because no member of the ruling party from that ethnic group or region had been elected into Parliament.

The Council of State, as originally envisaged by the Committee of Experts that drafted the constitutional proposals for the current (1992) Constitution of Ghana, was supposed to be an enlarged and effective deliberative body playing a role analogous to a second chamber to temper the rigours of the winner take all principle.[7]

The idea was to create avenues for regional or ethnic balance beyond the results of elections held solely on party political lines. That concept of the Council of State was however substantially rejected by the Consultative Assembly which sharply reduced the size of the membership of the Council of State.

The issue before us is whether this formal glossing over the ethnic factor is feasible or whether African states should go further and explicitly recognise and address it by devising some constitutional mechanisms which ensure ethnic balance and equitable treatment of ethnic groups in all aspects of our political and economic life, having regard to the acute sensitivity of Africans to any perceived hegemony of one ethnic group over another. In other words, should we go further and elaborate and formalize what is in any effect a de facto practice? I would respectfully suggest that we explore the second option if we are to avoid a Rwanda catastrophe in future. The Soviet experience teaches us that the ethnic problem may erupt into an explosion even after 70 or more years of being submerged under fashionable ideological concepts if it is not effectively addressed.

e. Freedom and Independence of the Media

Our Constitution does not only stipulate the traditional guarantees for freedom of expression and thought, but expressly protects the freedom and independence of the mass media. It thus makes clear that the mass media's constitutional guarantees are a lot more than implied rights from the general concept of freedom of expression or thought. Indeed the Constitution goes further to assign an explicit constitutional role of oversight to the mass media as follows:

> "All agencies of the mass media shall, at all times, be free to uphold the principles, provisions and objectives of this Constitution and shall uphold the responsibility and accountability of the Government to the People of Ghana." [Article 162(5)]

There could be no more eloquent and unequivocal expression of the notion that the press is the fourth estate. The Press therefore plays a critical role in exposing corruption and other forms of official malfeasance and holding officials to account. This constitutional role imposes on the mass media a corresponding duty to maintain the highest standards of integrity. Like the Judiciary, the Press is not immune from accountability itself. It is not without significance that the Constitution devotes an entire chapter to "Freedom and Independence of the Media."[8] Under this Chapter, a Media Commission is established and charged with the following functions[9] inter alia:

(a) to promote and ensure the freedom and independence of the media for mass communication or information;

(b) to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media;

(c) insulate the state-owned media from governmental control.

The prohibition against any impediments to the establishment of private press and media, in particular, the prohibition of the requirement of a licence as a prerequisite to the establishment of such press or media, has dramatically liberalised the environment for the operation of the media leading, to the proliferation of newspapers, radio stations and other media houses throughout the country. The impact of these developments on the freedom of expression has been phenomenal.

Government officials have been subjected to the searching scrutiny of the media, and the electoral process has not escaped the penetrating oversight of the media. Indeed the media's role in the December 2000 election has been generally acknowledged as positive.

However, all has not been rosy for the media in the period under review. Until recently, they ran the risk of incurring the chilling sanctions imposed under criminal libel law. These intimidating laws have now been repealed.[10]

While celebrating the growth of media freedom and the emergence of a more liberal environment, we should not be insensitive to certain potentially harmful developments.

The phenomenal growth of the private press is to be welcomed and the demolition of the virtual monopoly formerly enjoyed by the state owned press has not only generated keen competition but also assured a viable mechanism for discharging the media's constitutional role of holding the Government to account.

Nevertheless, most objective observers would agree that the journalistic standards of some of the newly established media houses are anything but high. This has been accentuated by reported cases of venality on the part of some individual media personalities. Freedom of the press should not be prostituted into an instrument of blackmail or intimidation. Nor should a person's reputation be savaged on grounds extraneous to the exacting demands of honest reporting. The fear of the knock on the door by security men in the early hours of the morning in despotic regimes should not be replaced by the fear of encountering groundless attacks on a person's character whenever he or she opens a newspaper under a constitutional dispensation. In short, the media should not be turned into an instrument of personal vendetta or abuse.

Another issue worth debating is whether the fascination of the public with ventilating their views on radio talk shows does not detract from a more serious engagement with the development process either in the form of more rigorous analytical work or more practical oriented activities. One sometimes gets the uneasy impression that the profusion of talk on radio exhausts one's meaningful endeavour and that some really enjoy freedom of expression on an empty stomach.

Freedom of the press and the abolition of the censorship must necessarily raise the issue of unrestricted importation of foreign cultural values and behaviour. How can we resist the invasion of injurious cultural material without raising the spectre of censorship which is expressly prohibited by article 162(2).

Karikari[11] argues that the application of unbridled market forces in the media would facilitate the absorption of the mass media by powerful private foreign concerns, which would have no inhibition in saturating the mass media with foreign material, some of which would be repugnant to our cultural values. He therefore advocates the retention of state ownership of Ghana Broadcasting Corporation (GBC) to serve as a countervailing force in protecting the public interest against cultural adulteration. He concedes, however, that public ownership of GBC has not prevented it from undiscriminating embrace and propagation of offensive foreign culture in the interest of commercialism.

The solution may well lie in the exercise of self-censorship by the media.

In this regard one cannot overemphasize the importance of the National Media Commission's constitutional responsibility "to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media." This mandate should be translated into concrete regulatory norms and mechanisms.

f. Restricting Press Freedom

Press freedom in fact raises the critical issue of limitations on grounds of public interest. Article 21 guarantees:

"freedom of speech and expression, which shall include freedom of the press and other media"

However, like other fundamental freedoms enshrined in the Constitution, this right is subject to the following limitations:

1. the general qualification stated in Article 12(2) which provides that the entitlement to the fundamental human rights and freedoms of the individual contained in the Human Rights Chapter is subject to respect for the rights and freedoms of others and to the public interest;

2. the stipulation in Article 21(4)(e) that sanctions a limitation on the fundamental freedoms "that is reasonably required for the purpose of safeguarding the people of Ghana against the threat of propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems and incites hatred against other members of the Community."

These limitations are sometimes referred to as clawback clauses because they appear to claw or take away with one hand human rights which the Constitution has given with another.

Some advocates of human rights consider these clauses subversive of human rights provisions and have called for their abolition. They nevertheless form part of our Constitution and pose the crucial issue as to what is an admissible limitation on freedom of the press.

It is my view that every society should define what constitutes its public interest for the purposes of appropriate restraints on press freedom.[12] We all applaud the new phenomenon of a vibrant press which fearlessly subjects all authorities to searching scrutiny. That is the surest guarantee of liberty. But the press, in my humble opinion should set their rights beyond the ventilation of titillating tittle-tattle!! Furthermore, there may be areas where self-restraint may be dictated by the harsh realities of limited sophistication among certain sections of the public. Take the hypothetical case of a paper propagating a false alarm that a certain immunisation programme is vitiated by some dangerous contamination or that efforts to eliminate a certain pestilence, like swollen shoot in cocoa, are actuated by a diabolical political intention to destroy the cocoa industry. In a mature democracy with a

scientifically sophisticated public, such a press campaign would be easily dismissed as ludicrous. Not so in our societies. Should press freedom be abridged to eliminate such false propaganda? Can one impose such a limitation in the public interest without undermining press freedom? This is a judgement which our courts will eventually have to make in due course. But prior to that, I think the press has a responsibility to impose some self-restraint. Having lived in America for more than a decade, I sincerely hope that our Press will avoid some of the excesses of the media in the US which are ostensibly in the interest of public's right to know. I have seen outrageous intrusion into the privacy of victims of a plane crash when they have barely recovered from their operating table, or newspapers literally invading the house of an embattled politician with secret cameras. Such practices appear to me to be actuated by crass sensationalism and commercialism and not a solemn duty to satisfy the people's right to know.

B: SOME SOCIAL AND ECONOMIC DEVELOPMENT OBJECTIVES OF THE CONSTITUTION

1. DIRECTIVE PRINCIPLES OF STATE POLICY

The 1992 Constitution departs from the traditional pre-occupation with distributing powers among the main organs of the State and prescribing appropriate constraints on governmental powers. It also articulates fundamental principles for promoting social and economic development.[13]

The underlying philosophy was expounded as follows by the Committee of Experts:

> "In preparing the constitutional proposals, the Committee went beyond the traditional notion that a constitution is essentially a static instrument for the distribution of powers between the organs of state and for distinguishing between public power and private right. The committee endorsed the current philosophy of constitution-making in several developing countries, that a Constitution is also an instrument for promoting development. We accordingly propose directive principles of State policy with respect to the management of the economy and have examined the structuring of institutions of economic significance such as the financial institutions, administration of land, and economic planning. While the Committee recognises that particular economic programmes cannot be institutionalised in the Constitution, the experience of other constitutions, such as Brazil and India, demonstrates that a constitution can articulate basic principles of sound economic management that command the consensus of the nation.[14]"

(a) The legal effect of Directive Principles

We have already referred to interesting juristic debate on the legal effect of Directive Principles of State Policy.[15]

Let us examine some of the Directive Principles of State Policy in the light of this debate.

Article 35 states:

(2) "The State shall protect and safeguard the independence, unity and territorial integrity of Ghana and shall seek the well-being of all her citizens."

(3) "The State shall promote just and reasonable access to all citizens to public facilities in accordance with law"

(6) "The State shall foster a spirit of loyalty to Ghana that overrides sectional, ethnic and other legalities."

Article 36

(2) "The State shall take all necessary steps to establish a sound and healthy economy whose underlying principles shall include:

(a) the guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity.

(b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role."

These provisions impose constitutional obligations on the State and could properly be interpreted if they were properly presented to the Supreme Court for interpretation.

However, beyond interpretation, how can they be properly or meaningfully enforced by the Supreme Court? Supposing a citizen invoked Article 2 to allege that a particular person or authority had contravened any of the above provisions, could the Supreme Court properly superintend the taking of all necessary steps to establish a sound and healthy economy without invading the territory of the Executive or Parliament?

What consequential orders would the Supreme Court make to give effect to a declaration that the President, a Minister, Parliament or any organ of State had contravened or done something inconsistent with Article 36 (2) (a), without second guessing the functions of such organs or functionaries?

I submit that the issue of justiciability is not peculiar to the American constitutional system but arises in any system which allocates discreet functions to various organs of state. This is not to deny that Directive Principles impose mandatory obligations on the State.

The Constitution does indeed impose a duty on appropriate organs of State to perform the functions listed above. But the proposition that the Supreme Court is empowered to enforce these broad political and economic obligations would transform the Supreme Court into a super organ of State superintending the discreet functions of Parliament or the Executive, functions which it is not equipped to perform. The Judiciary is simply not competent to manage the economy or perform the political role, of the peoples representatives.

Judicial power is essentially negative in character. It may restrain, it may even order action sometimes, but not all constitutional issues can appropriately be resolved by the Supreme Court. A matter is non-justiciable if it cannot be properly or satisfactorily disposed of in a court of law. With respect, the mere circumstance that the Courts'

power of judicial review has been expressly granted by our Constitution, unlike the US Constitution, does not alter the delicate nature of the judicial function or erase the issue of justiciability

It is submitted that the pragmatic approach of Bamford Addo JSC and Sophia Akuffo JSC is eminently sound in analysing the legal effect of these principles. To quote Bamford Addo JSC:

> "There are particular instances where some provisions of the Directive Principles form an integral part of some of the enforceable rights either because they qualify them or can be held to be rights in themselves. In these instances, they are themselves justiciable also.
>
> This present case provides a good example of the special case where a provision under chapter 6 can be said to be an enforceable right. Article 37 (2) (a) and 3 regarding associations, read together with Article 21(1)(e) undoubtedly mean that every person in Ghana has the freedom of association free from state interference. The words "rights" of people to form their own association free from state interference" in Article 37(2)(a) can only mean what they clearly say. In effect, they create a "right" and can be held as a qualification of article 21(1)(e) in respect of freedom of association protected under Article 33, though it does not come under Chapter 5."[16]

(b) <u>The significance of Directive Principles</u>

Whether one takes the view that the Directive Principles of State Policy are justiciable or not, there is no dispute that they embody a set of political, economic and social objectives and goals that command a national consensus and have the imprimatur of the Constitution as a guide to all organs of state, including the Judiciary, in the application and interpretation of the Constitution and any other law or policy decision for the establishment of a just and free society. (Article 34(1)).

The significance of these principles is reflected in the solemn constitutional duty imposed on the President to:

> "report to Parliament at least once a year all the steps taken to ensure the realisation of the policy objectives contained in this chapter, and in particular, the realisation of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education."

It is worth reminding ourselves, amidst the clamour of acrimonious debates on economic strategies, that the Constitution has stipulated certain basic economic objectives to be realised by the nation as a whole. Thus the State is enjoined to "take all necessary actions to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of

every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy" Article 36(1). To achieve this general goal, the State is required by the Constitution (Article 36) to take all necessary steps to establish a sound and healthy economy based on core underlying principles including:

- "undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular improving the conditions of the rural areas and generally redressing the imbalance in development between the rural and urban areas";
- "affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy";
- "The recognition that the most secure democracy is the one that assures the basic necessities of life for its peoples as a fundamental duty."

It is not often realised that one of the economic objectives expressly sanctioned by the Constitution is the encouragement of foreign investment in Ghana, subject to any law for the time being in force regulating investment in Ghana, [Article 36(4)].

For the purposes of implementing these economic objectives, the President of the Republic is required to present to Parliament, within two years of assuming office, a co-ordinated programme of economic and social development policies, including agricultural and industrial programmes at all levels and in all the regions of Ghana.

It will be interesting to consider the extent to which these Directive Principles are reflected in the manifestos of political parties.

Among the social objectives prescribed by the Constitution is a broad obligation imposed on the State to endeavour to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of the Constitution, and, in particular, to direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law (Article 37).

The Directive Principles of State Policy address educational and cultural objectives, international relations and the duties of citizens.

A few examples of these will illustrate the comprehensive nature of the national goals stipulated in the Constitution. Thus Article 38(1) requires the State to provide educational facilities at all levels in all the regions of Ghana and to the greatest extent feasible, make these facilities available to all citizens.

Article 39(1) ordains that the State "shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of

Society as a whole; and in particular, that traditional practices which are injurious to the health and well-being of the person are abolished."

The Directive Principles of State Policy also enunciate the basic norms of Ghana's international relations. Article 40 commits Ghana to the following principles inter alia in its dealings with other nations:

- promote and protect the interests of Ghana
- seek the establishment of a just and equitable international economic social order
- promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means
- adhere to the principles of the UN Charter The Charter of the OAU, ECOWAS, Commonwealth and other relevant international organisations.

(c) Duties of the Citizen

Among the duties imposed on citizens, as a corollary to rights and freedoms enjoyed by them, are the following:

- to uphold and defend the Constitution and the law
- to foster national unity and live in harmony with others
- to respect the rights, freedoms and legitimate interests of others and generally refrain from doing acts detrimental to the welfare of other persons.
- To work conscientiously in his chosen occupation
- To protect and preserve public property and expose and combat misuse and waste of public property.

(d) Other Provisions on Economic Governance

Apart from prescribing Directive Principles of State Policy, the Constitution specifically addresses key economic sectors such as Finance, Lands and Natural Resources. One of the critical areas of economic management specifically regulated by the Constitution is the raising and granting of loans by the Government and the conclusion of an international business or economic transaction by the Government. I propose to discuss, at some length, the negotiation and conclusion of international business or economic transaction later in Lecture III.

At this juncture, I would like to turn my attention to the tension between the Constitution and some selected areas of our economic and social institutions and Practices.

2. THE CONSTITUTION AND THE ADMINISTRATION OF STOOL LANDS

(a) The new dispensation under the 1992 Constitution

Although the prevailing economic philosophy proclaims a contraction of the State's involvement in direct productive activities, this is not reflected in the administration of land. The immediate post-independence era was characterised by a marked increase in the land capacity of the Central Government. A rapid succession of statutes armed the Republic with far reaching powers to expropriate land, to control land use and to administer a considerable sector of landed property. With respect to stool lands, the legislation conferring sweeping powers on the Republic revolved around four themes: the conservation of natural resources, the control of land use, enhanced powers of expropriation and the assumption of the managerial and fiduciary powers of stools in respect of unencumbered stool lands.[17]

Although the formal trappings of ownership of stool lands were left in the hands of stools, the management of the stool lands was expressly vested in the Government. Management in this context consisted of an impressive array of regulatory powers such as the power to approve dispositions of stool lands for valuable consideration, the power to grant concessions affecting stool land, the power of the President to intervene in litigation concerning stool lands, the power of eviction, the power to collect and distribute all revenues from stool lands, and the power of summary expropriation and appropriation of use in the public interest. (Administration of Lands Act, 1962 Act 123).

The 1992 Constitution, however, has inaugurated a more liberal regime with respect to stool lands. First article 267(1) unequivocally affirms stool ownership of stool lands as follows:

> "All stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for, the subjects of the stool in accordance with customary law and usage."

Second, the Constitution does not vest the management of stool lands in the Government or the Lands Commission or any other public office or body. The managerial jurisdiction of the Lands Commission is limited to public lands [Article 258(1)]. True, the Constitution establishes the office of Administrator of Stool Lands which is responsible for collecting all revenues accruing from each stool and distributing them in accordance with a formula explicitly stipulated by the Constitution [Article 267(1)]. But the Stool Lands Administrator does not have a general constitutional mandate to manage stool lands.

Third, beyond the above powers of the Administrator of Stool Lands, the only managerial planning certification from the appropriate Regional Lands

Commission as a prerequisite planning certification from the appropriate Regional Lands Commission as a prerequisite for the disposition or development of any stool land which is stipulated in article 267(3) as follows:

> "There shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned."

This provision is a significant departure from the previous plenary power of the Government to veto the disposition of stool lands on any grounds.

Finally, the summary powers of expropriation vested in the President under the 1962 enactment are superseded by the emphatic guarantees against expropriation or deprivation of property under Article 20 of the Constitution which stipulates that "no property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the State" unless certain conditions are satisfied namely; the acquisition is in the public interest, the necessity for such acquisition is clearly stated and that the acquisition is effected by a law which makes provision for the prompt payment of fair and adequate compensation.

The President's power to acquire stool land under Act 123 was not encumbered with the conditions stipulated in the above mentioned provisions of Article 20.

Section 7(1) of Act 123 authorised the President to vest any stool land in him in trust by executive instrument if it appeared to the President to be in the public interest to do so. Subsection 2 of this section provided that any moneys accruing from this trust was to be paid to a Stool Land Account administered by the Central Government. There was no provision for the payment of compensation to the stool so deprived. The nearest approximation to indemnification for such deprivation consisted in the indirect benefit which might accrue from the moneys paid to the stools out of revenues standing to the credit of the Stool Lands Account.

(b) Repugnant Legislation and Regulations

Although the new constitutional dispensation promises a more liberal regime for stool lands, particularly, with respect to the unequivocal vesting of stool lands in the appropriate stools in trust for their subjects, the incidents of this ownership are blunted not only by the persistence of the old intrusive legislation and administrative practices but also by the enactment of new legislation which appears to contravene the constitutional protections for stool lands. Apart from the enactment of the Lands Commission Act pursuant to the Constitutional provisions on the Lands Commission, the Administration of Lands Act and a host of other laws regulating stool lands which were promulgated in the early 1960s still remain

on the statute books.

These laws are not only repugnant to the Constitution but are inimical to sound economic management of stool lands. Many years ago, I ventured this opinion in my book *Property Law and Social Goals in Ghana*

> "It is pertinent to point out that the nature of the Central Government's involvement in this area is not conducive to maximum productivity. As we have seen, recent statutes, while not overtly proclaiming state ownership of stool lands have nevertheless divested stools of all significant incidents of ownership. The stools have thus been deprived of any incentive to develop the lands. But although the Administration of Lands Act, 1962, boldly proclaims that the management of stool lands is vested in the Central Government, the actual implications of this management have no positive productive significance. The Government has paralysed the stools and inaugurated a regime of rigid controls but has not actually assumed productive responsibilities.
>
> The Government has not set up development agencies to cultivate or otherwise develop stool lands or to supervise and advise the development"

What is more, any notion that the 1992 Constitution has established a more liberal legal regime for stool lands has been shattered by the recent spate of statutes and regulations governing the utilisation and management of forestry resources on stool lands.[18] Royalties from the utilization of timber formerly constituted the bulk of stool land revenues. Recent legislation and regulations affecting timber exploitation have expropriated the bulk of these revenues as much as 60% of these royalties ostensibly as management fees charged by the Forestry Commission. When this exorbitant charge is added to the constitutionally sanctioned administrative fee of 10% payable to the Administrator of Stool Lands, and the mandatory 55% of the remaining revenues allocated to District Assemblies, then it is no exaggeration to assert that recent legislation and regulations constitute expropriation of stool property without compensation, and a grave violation of the Constitution.

To examine this serious charge of unconstitutional expropriation, let us start with the fundamental premise that the Constitution vests the ownership of stool lands in the appropriate stools in trust for their subjects.

The Constitution defines stool land as:

> "any land or interest in, or right over, any land controlled by a stool or skin, the head of a particular community or the captain of a company for the benefit of the subjects of that Stool or the members of that community or company."[19]

There can be little doubt that forests on stool land form part of the landed resources of the stool and stool revenues include royalties from the exploitation of timber.

Thus unless the Constitution explicitly authorises some institution to deal with forestry and stool lands in a manner inconsistent with stool ownership of the forests, there is no constitutional basis for the exercise of ownership rights in respect of stool lands by any authority other than the stools.

Article 269 of the Constitution provides for the establishment of a Forestry Commission by Parliament to be responsible for the management and regulation of forestry.

It is submitted that "regulation and management" does not constitute ownership. It is significant that unlike minerals, which are formally vested in the State [Article 257(6)], forestry is not vested in the State. Thus the managerial and regulatory powers conferred upon the Forestry Commission do not, strictly speaking, imply the right of the Commission or the responsible Minister to grant timber rights or any rights in respect of the exploitation of the forestry resources without the concurrence of the owners, i.e., Stools.

Government assumption of the power to grant timber rights therefore does not seem to have any constitutional basis, and the analogy with Government's power to grant mineral rights is flawed by the fundamental constitutional difference that minerals are vested in state while forestry is not, notwithstanding the Government's power to manage forests and to create forests reserves. Management is not divestiture of ownership.

However, even if the right to grant timber rights were conceded as a necessary incident of management, it is clearly unconstitutional for the Forestry Commission or any Governmental authority to appropriate the bulk of royalties accruing from timber exploited from forestry on stool land, whether from within or outside of forest reserves, as so-called management fees, without the consent of the stools and without prompt, fair and adequate compensation to the stools.

No provision of the Constitution empowers the Forestry Commission or the responsible Minister to appropriate such a substantial part of the forestry revenues of the stool. This constitutional breach is accentuated by the fact that the said appropriation is not in the general public interest but for the Forestry Commission's own purposes. Apart from the contention that any such appropriation of the Stool's revenues is unconstitutional, the question may be raised as to the propriety of the Commission, a body charged with the fiduciary responsibility of managing forestry, appropriating revenues from forestry for its own purposes without any prior agreement with the appropriate stools. This would be analogous to the Lands Commission appropriating 60% of the revenues accruing from public lands on the basis that it is constitutionally mandated to manage public lands. It constitutes a flagrant violation of the basic principles of fiduciary responsibility or the duty of loyalty in the law of trusts.

(c) <u>Managing Land and Forestry Resources</u>

I have taken some time to discuss the involvement of the State in land administration

because for years our land policy has been inspired and informed by a number of assumptions which, I submit, need to be re-examined in the light of the empirical evidence.

They are as follows:

(1) Stools are incapable of administering stool lands and stool revenues efficiently and in the interests of their subjects. Chiefs and traditional authorities are not enlightened enough to be entrusted with rational administration of the land.

(2) The real solution to our land problems lies in entrusting land administration, whether in respect of public lands or stool lands, to Government Departments or other public institutions such as the Lands Commission or the Forestry Commission.

The fundamental issues confronting us are:

1. To what extent have government departments and public institutions administered stool lands and their revenues in the interests of the beneficiaries, namely stools and their subjects;

2. Is the assumption that government departments and public institutions better placed to administer stool lands honestly and efficiently than the traditional authorities necessarily valid?

3. Have public institutions proved efficient and productive even in the administration of public lands?

4. Is the excessive reliance on the State in the administration of landed resources justified by empirical evidence?

In addressing the above issues, it has to be conceded that the administration of stool lands by the traditional authorities in the past has not been unblemished. There has been some incidence of breach of trust or inept administration on the part of some traditional authorities in the past. But it is naïve to proceed on the basis that the solution lies in the administration of lands by state bureaucracies. The frustrations encountered by domestic and foreign investors in processing land acquisitions at various state agencies will dispose of any facile assumptions about the efficacy of state management of lands. As Professor George Benneh said in his recent lecture on "Land Tenure Reform and Sustainable Agriculture" as follows;

> "The administration of public lands has not inspired much confidence among the general public since access to such lands has generally been limited to the privileged in society." [Lecture delivered to the Ghana Academy of Arts and Sciences, 1999].

District Assemblies have notoriously failed to expend their portion of stool revenues on development in the traditional areas concerned.

State administration of land has proved to be one of the most inefficient and unproductive undertakings in the public sector. Nor can it be confidently asserted that the management of forestry by state officials has enhanced our forestry resources. The degradation of forestry and the environment, the indiscriminate exploitation of timber without a corresponding re-afforestation and the wanton destruction of crops or other agricultural products by timber operators have been the hallmark of state control of forest resources. State agencies should not only desist from depriving stools as landowners of their legitimate revenues but should consult them for appropriate inputs in the management of these natural resources.

What traditional authorities need from state agencies with respect to the administration of stool lands generally is not deprivation or stifling controls but sound technical advice and support in harnessing the resources for the benefit of the entire community.

The deprivation of stool resources diminishes the capacity of chiefs to deliver the social and economic services expected of them.

3. REFORMING CULTURAL PRACTICES AND INSTITUTIONS

One of the challenges of our constitutional order is the adaptation and modernisation of our customary and cultural values and the abolition of traditional practices which are injurious to the health and well-being of the person pursuant to Article 39(2) of the Constitution. This process of evaluating and reforming our traditional heritage is complex and difficult.

First, there can be no evaluation without a national consensus as to what constitutes "injurious traditional practices." There is a tendency to evaluate tradition on the basis of western individualistic values. For example, as Dr. Agbosu[20] has pointed out, the proposition that a man's estate must benefit his conjugal family to the exclusion of his extended family reflects the preferences of a narrow urban elite without reference to the positive and beneficial aspects of the extended family, particularly, in a rural setting. Where a man has benefited from collectivist or communal endeavour of his extended kinsmen and other investment in his education and training, social justice requires some return on the extended family's investment, which is incompatible with their total exclusion from participating in his estate.

Secondly, the experience of numerous African countries, including Ghana, has demonstrated the limitations of law as a technique of reforming and restructuring deep-seated cultural values and practices.[20A]

In Kenya, for example, despite the enactment of the Succession Act 1981 to assure equal rights of inheritance to women and men, ingrained cultural attitudes have persisted, leading to very rare incidence of women inheriting land and other property in their own right. Pervasive cultural ideas about the subordinate position of

women are reflected in the widespread practice of registering women's property in the names of their husbands, even through this does not seem to be a strict legal requirement.

In Ghana, although the trokosi system of enslavement, female circumcision and the brutalisation of elderly women accused as "witches" have been proscribed[21], pursuant to prescriptions of the Constitution, the various practices still persist to some extent.

Widowhood rites would strike most fair-minded people as injurious to the health and well being of the widows concerned and were criminalized by Criminal Code (Amendment) Law 1984, PNDC Law 90 in 1984. Yet they continue to be practiced and ironically at the insistence of the female members of the deceased man's extended family. Akua Kuenyehia has pointed out that the enactment of Intestate Succession Law 1985, PNDC Law 111 has not noticeably affected the ingrained culture and practices affecting intestate succession and that the enactment has largely been ignored.[22]

The overwhelming observation and advice of social scientists is that legal prohibition has to be reinforced by sustained educational campaigns to dismantle the deep-rooted cultural beliefs and values that sustain the offending practices.

Notwithstanding these difficulties, we cannot shirk our constitutional responsibility to reform our traditional practices that are injurious to a person's well-being and health or are otherwise repugnant to the maintenance of human dignity.

As intimated above, some of the offending practices are as follows:

1. Trokosi System

   The Trokosi system is a form of slavery or involuntary servitude and exploitation of women. This is offensive to the fundamental rights and freedoms guaranteed in the Constitution. Through the laudable efforts of the Commission on Human Rights and Administrative Justice, the system has formally been criminalized.[23] However, the full effect of this measure cannot be realised without a further campaign of education and rehabilitation.

2. Brutalisation of "witches"

   The practice of condemning and brutalising old women accused of witchcraft has provoked a social outrage. However, it remains to be seen whether appropriate legal steps and other measures will be taken not only to abolish this pernicious system which violates the women's dignity, but also to protect the victims against these practices.

3. Widowhood Rites

   These rites are not only discriminatory but are also demeaning and dehumanising. They violate the human rights of the victims and the cultural

objectives stipulated in the Directive Principles of State Policy. These rites have already been criminalised[24]. But the more formidable task is to educate our women to appreciate the compelling case for abolishing this practice which abuses other women.

4. Women's Property Rights

Article 22 of the Constitution seeks to redress the unequal relationship between husband and wife by enunciating two basic principles, namely;

(a) that spouses shall have equal access to property jointly acquired during marriage; and
(b) that assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon the dissolution of the marriage.

Parliament was required by the Constitution to enact legislation to realize the above rights as soon as practicable after the coming into force of the 1992 Constitution. This has not yet been done, raising the question whether Parliament attaches priority to the promulgation of legislation to regulate the property rights of women. Mensah-Bonsu's comment is instructive.

> "As a matter of urgency, the various forms of contribution that the parties make to the acquisition of matrimonial property must be recognised, particularly, in the event of dissolution or death. A legal system that fails to recognise the direct or indirect joint contribution of the spouses to the family assets would remove the incentive of such co-operation which is vital to the survival of the nuclear family.....If marriage is to continue to have value for women in this country, married women must suffer no disadvantage as opposed to unmarried or otherwise single women in matters of access to property acquired partially by their effort. Thus it is essential that property relations be regulated in such a way as to defuse such situations as would be disruptive of family stability."[25]

However, as indicated above, a programme of law reform has to be launched against the background of a realistic appreciation of the limitations of formal legislative changes as an effective instrument of social change. The empirical evidence in African countries demonstrates the tenacity of deep-seated cultural practices and values even in the face of the most progressive and liberal legislative reform. This points to the need to reinforce legislative programmes with a sustained educational campaign to ensure that the public generally and women in particular realise and embrace the legal changes designed to assure equality of status to all segments of society.

LECTURE III

LAW AND DEVELOPMENT

This Lecture focuses on the impact of law on private sector development and the relationship between international negotiations and transactions and development. In the first part we consider the enabling legal environment for private sector activities, while in the second part we examine the importance of negotiations for realising maximum benefits from international business transactions.

A. LEGAL FRAMEWORK FOR PRIVATE SECTOR DEVELOPMENT

In the 1970's, the legal literature was replete with abstruse jurisprudential exposition on law and development. There was in fact a "Law and Development Studies School" in the US, led by eminent legal scholars such as David Trubek, Marc Gallanter and Kenneth Kaist who pontificated on the relationships between law and social change and prescribed programmes of law reform towards the modernisation of developing countries. After a profusion of learned tracts, some of these scholars, to their credit, acknowledged that they had a limited appreciation of the complex phenomenon of the impact of law on development in practical terms.

In the sobering words of Trubek[1]:

> "What we need is a new intellectual approach. Up until now, we have pretended that we had answers to all the big questions about law and development. The basic relationships between law and social change were charted out. The only open matters were questions of technique. It is not surprising that little empirical or historical research has come out of the modern law school. We must learn to see law as simply one variable in a more complex general theory of society, and learn how legal phenomenon correlates with a wide range of other social and economic factors. In a word, we must stop being reformers and start being scholars."

Indeed, we need hardly invoke jurisprudence to establish the linkage between law and development. Leaders of Government and business as well as international development institutions no longer contest the relationship between law and development.

Not long ago, a discussion of the determinants of foreign or domestic investment tended to concentrate on economic, political and financial factors, such as appropriate macro-economic policies, market size, natural resource endowment, sophisticated

labour force, developed physical and social infrastructure, political stability, the strength of the local private sector and so on.

There was hardly any reference to the legal infrastructure or the regulatory and legal framework as a crucial ingredient. Now the role of law in private sector development is increasingly being appreciated.

Within the past few months, the Hon. Attorney General, Nana Akufo Addo has called for a review of the mining laws and corporate laws of Ghana to stimulate investments and promote private sector development.

Mr. K. Abeasi, the Chief Executive of the Ghana Investment Promotion Centre, has announced the commencement of a project to review our investment code towards the establishment of a more congenial climate for investment. His Excellency President J. A. Kufour, in his recent sessional address, identified legal sector reforms as one of the key ingredients of Government's strategies for promoting business and private sector activities. Prior to that, the President had called for a review of our land tenure system to enhance agricultural productivity. Finally, we have all been treated to a fascinating exposé by Dr. De Soto[2] on the exciting possibilities of employing the legal system to empower the poor by creating wealth.

It is hardly surprising, then, that the World Bank has launched programmes of technical assistance for legal sector reforms in numerous countries as a vital complement to economic and financial reforms generally.

My own experience as Director at the United Nations Centre on Transnational Corporations (UNCTC) in New York is instructive in establishing the linkage between legal and economic reforms in developing countries and economies in transition, that is, the republics of the former Soviet Union and other Eastern and Central European countries.

Prior to 1990, UNCTC had concentrated its efforts on technical assistance to Eastern and Central Europe in this field on the narrowly circumscribed area of devising an appropriate regime for admitting foreign capital and technology.

Later on, the rapid pace of developments in the various republics of the Soviet Union, and in other Central and Eastern European countries, demonstrated the need for a much more comprehensive approach to the problems of legal and economic reforms. There could be no meaningful reform for the introduction of a market economy if the reform effort was confined to the establishment of a narrow legal enclave for the admission of foreign capital, without introducing basic reforms which would establish the necessary legal infrastructure, as well as the broad legal environment, for institutions of a market economy. Many of these countries did not have comprehensive laws dealing with commercial law, corporate law, bankruptcy law, banking and securities law, and the law

for the transfer and protection of property rights, which are basic to the inauguration of a market economy and the operation of a viable private sector. In short, privatisation of the economy is impossible without a regime of private rights.

We therefore broadened the scope of our legal technical assistance. In addition to providing legal technical assistance on specific areas such as joint ventures, foreign investment, banking, privatisation, petroleum and mining, increasing attention was paid to broad legal reforms to create the appropriate legal environment for the market orientation of economies in transition.

As far as legal reforms in developing countries, like Ghana, were concerned, the reforms were not that radical because the legal framework was basically compatible with a market economy. What was needed was a sharpening of the concepts, a reinforcement of the institutions and a refocusing of the legal traditions and orientation.

In his instructive book, *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa*, Paatii Ofosu Amaah, the Deputy General Counsel of the World Bank, informs us that African leaders and industrialists recognised the linkage between law and private sector development at a Conference on the Private Sector in June 1995 at Gaborone, Botswana, in the following recommendation:

> "Governments should promulgate clear, coherent and stable laws and regulations, especially relating to the private sector, which should be widely disseminated. In addition, governments should establish the appropriate institutional framework to administer, implement and to ensure transparent and orderly enforcement of these laws and regulations."

The Conference Report also advocated a holistic approach to legal sector reforms as follows:

> "Comprehensive legal reform is a long-term process which requires the commitment from government and continuous and sustained effort over time. It also requires development, after an appropriate diagnosis, of a coherent series of activities to be undertaken in a phased manner over a period of time. For instance, a country might decide to improve the functioning of the courts, registry and libraries and reform development as a first phase to spur on this sector, which is recognised as the engine of growth in Africa"

As to the substance of the law which should create an enabling environment for development, we can do no better than begin with the perceptive remarks of James Wolfensohn, President of the World Bank Group[3];

> "Without the protection of human and property rights and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has a system of property, contract,

Labour, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively impartially and cleanly administered by a well-functioning impartial and honest judicial and legal system."

Law reform to create a congenial environment for business is not new to Ghana. The immediate post-independence era was marked by a substantial programme of reform of the corporate and commercial laws to promote sophisticated business activities and foreign investment.

The distinguished authority on commercial law, Professor L. C. B. Gower of the London School of Economics was commissioned to review our corporate law. The recommendations contained in Gower Report, 1961 provided the basis for the enactment of Companies Code 1963 (Act 179) and the Incorporated Private Partnership Act (Act 152). These were followed by other pieces of legislation to strengthen the legal infrastructure for business namely, the Apprentices Act (Act 45), the Insolvency Act (Act 153) which was never implemented, the Sale of Goods Act (Act 137), the Bills of Lading Act (Act 42), the Capital Investment Act (Act 172), the Bills of Exchange Act (Act 55) and the Copyright Act (Act 85)

Within the past decade, substantial legal reforms have been undertaken in connection with private sector development.

In 1991, the Government of Ghana established a Private Sector Advisory Group to review the legal and regulatory framework for private investment and make recommendations for the revision or repeal of existing laws and regulations affecting private investment in consonance with the spirit of deregulation, liberalization and exchange rate reforms. The Advisory Group was also charged with the task of strengthening the institutional framework. In this regard the Group examined the following areas inter alia:

- Legal and regulatory framework relating to investment flows;
- Labour policies;
- Price control;
- Investment and Export Promotion;
- Business Establishment Procedures;
- Institutional Reforms; and
- Tax, Financial and Fiscal Policies

In consequence of the above review, the Advisory Group identified a number of enactments and regulations as impediments to the growth of a robust private sector and the development of indigenous private enterprises. Following the recommendations of the Advisory Group, the legal and regulatory regime was reformed and liberalised by the repeal in 1993 of inter alia, the Manufacturing Industries Act 1971 (Act 356), Price Control (Amendment) Decree, 1978 (SMCD 146); Wealth Tax Law 1984 (PNDC L93); Prices and Incomes Regulations,

1973 (L.I.805); Commercial Houses and Supermarkets (Sale of Specified Goods) (Extension of Application) Investment 1976 (L.I. 1066). Some of the key reform measures were the abolition of the Investment Policy Licence and the replacement of the Ghana Investment Code 1985 with a more liberal Ghana Investments Promotion Centre Act, 1994 (Act 478).

The work of the Private Sector Advisory Group was also complemented by the recommendations of the Private Sector Roundtable in 1993, which also addressed some legal constraints on the development of the private sector. These recommendations dealt with general problems in the Ghanaian Legal System, such as the under-developed legal information culture, as manifested by poor documentation of principal and subsidiary laws and judicial decisions; insufficient publication of subsidiary legislation; intimidatory use of discretionary and interpretative powers by bureaucrats in the administration of such laws as tax laws, customs laws and laws governing the incorporation and registration of enterprises and deficiencies in the legislative process, and in the settlement of disputes.

There has been in fact a highly focused stream of enactments in recent years specifically geared towards the reform and improvement of the financial sector and the environment for investment. Among these are the Security Industry Law, 1993, (PNDC Law 333), the Stock Exchange (Ghana Stock Exchange) Listing Regulations 1990, the Stock Exchange (Ghana Stock Exchange) Membership Regulations 1991, the Banking Law 1989, (PNDC Law 225), the Insurance Law 1989 (PNDC Law 227), the Bank of Ghana Law, 1992 (PNDC Law 291), the Social Security Law 1991 (PNDC Law 247), the Financial Institutions (Non-Bank) Law 1992 (PNDC Law 328) the Home Mortgage Finance Law 1993, PNDC Law 329, the Ghana Investment Promotion Centre Act 1994 (Act 478), the Free Zones Act 1995 (Act 504) and specific permissions granting exemption from the operation of the Exchange Control Act 1961 as amended.

The reform has by no means been confined to the revision of substantive law. Efforts have also been directed at the reform and strengthening of the major legal institutions the courts, the Ministry of Justice and other Government legal departments such as the Registrar General's Department, the Legal Aid Board, the Law Reform Commission and Council for Law Reporting, Legal Education, mechanisms for ADR, law libraries and the Registries of the Courts.

These measures underscore the truism that the reform of the substantive law would be ineffectual without the appropriate revitalisation of the institutions that apply and administer the substantive law.

As Ibrahim Shihata[4], the late General Counsel of the World Bank lucidly explained.

"...For the most part, the discussion of legal reform has hitherto concentrated on the most effective ways in which law must be modernised; that is the introduction of changes in the rules (both substantive and procedural, primary and secondary, etc.) to enable them to meet the constantly evolving needs of the societies they are meant to regulate. This approach assumes that once appropriate changes are

introduced in the rules, the legal system as a whole will be more responsible to the demands of modernisation and development. Rules, however, are seldom self-executing and even when they are, they need appropriate institutions to ensure their correct application and enforcement and to settle disputes which inevitably arise in the course of their application. A legal system, in order words, consists not only of applicable rules but also of the processes through which these rules are to be applied and of the institutions in charge of these processes. Without such processes, rules may remain abstract concepts, which do not always reflect the law in force."

All the above measures have not exhausted all possible or potential legal sector reform in Ghana. Indeed in 1996, a team from the Commonwealth Secretariat, led by Dr. S. K. Date-Bah, conducted a diagnostic study of the laws affecting private sector development in Ghana and submitted recommendations for further reforms of such laws, in particular, certain aspects of company law, such as discretionary powers of the Registrar General, insolvency and prospectuses of companies.

There were other areas of legal reform to be addressed such as establishing the appropriate policy and legal framework for enhancing the participation of institutional investors such as pension funds, mutual funds, unit trusts, real estate investment trusts, insurance companies in the securities market.

Two months ago, Dr. Date-Bah[4] ^addressed some of these issues in an illuminating lecture, and I have no desire to traverse the same path. Furthermore, Kwasi Prempeh[5] has recently published a series of highly perceptive essays on reforming corporate governance.

I propose to devote the greater part of the time available to me today to discussing the process of negotiating and concluding international business or economic transactions and their development implications.

However, before doing so it might be helpful to put the required legal reforms already mentioned in the right perspective by drawing your attention to the key criteria for evaluating a legal system to determine that it has the appropriate framework for private sector development. These criteria have been developed by international organisations such as the World Bank and the United Nations that have been involved in advising on the establishment of legal frameworks in emerging market economies.

These criteria will assist in identifying the essential ingredients of the kind of legal reform that will usher in and sustain the golden age of business.

We start with the basic proposition that the legal framework in a market economy has at minimum four basic economic functions:

- to define the universe of property rights in the system;
- to set a framework for exchanging those rights;

- to set the rules for the entry and exit of the actors into and out of productive activities; and
- to oversee market structure and behaviour and to promote competition.

These four basic tasks of a legal system can be loosely related to specific and well-recognised areas of the law. Property rights are defined in the Constitution of a country and in more specific laws dealing with real, tangible and intellectual property. Exchange is covered generally by contract law. Entry is governed by company and foreign investment law, while bankruptcy laws govern exit. Finally, antimonopoly and unfair competition laws are intended to promote competition. These basic areas of the law are joined by many other important ones such as labour, taxation and banking, to name just three - in the rich and intricably interconnected web of laws that comprise the complex legal frameworks for private sector activity in advanced market economies[6].

The following are the pertinent questions that may be raised with respect to the various areas of the laws of an emergent market economy: They provide some criteria for assessing the adequacy of domestic law for promoting private sector activities.

Constitutional Law

i. What fundamental tenets and structures for the political and economic system are embedded in the Constitution?;

ii Does the Constitution provide for the independence of the judiciary and for judicial review?

Real Property Rights

i. How are rights to property defined?
ii How are rights to property currently assigned to specific owners?
iii Who is the public owner?
iv What are the rights of owners and how are competing claims decided?
v How are property rights registered?
vi Are there limits on who can own property?
How is the freedom to use property limited by law?

Rights to Intellectual Property

i. How are rights to intellectual property defined?
ii. How are rights to intellectual property enforced?

Company Law and Foreign Investment law

i. What forms of private companies are recognised by law?
ii Do special rules apply to foreign firms?

i What type of corporate governance is envisioned in the company law and related legislation?

ii How are voting rights distributed?
iii What other laws limit the activities of directors and managers?

Contract Law

i. Are there clear rules and standards governing exchange of property through the market?

Bankruptcy Law

i. Who is bankruptcy designed to serve
ii How broad is the bankruptcy law? Does it allow for reorganisation as well as liquidation?
iii Are rules of priority reasonable?
iv How onerous are the procedural barriers to bringing bankruptcy cases?
v Are there alternatives to bankruptcy for debt collection and exit?

Anti-monopoly Law

i. What behaviour is forbidden by anti-monopoly legislation?
ii What institution is charged with enforcing anti-monopoly legislation?
iii Might a narrower definition of forbidden behaviour be appropriate given scarce administrative resources?

Judicial Institutions

i. What is the role and competency of formal legal institutions?
ii What alternative avenues exist for enforcement and dispute settlement?

From business activities in the domestic setting we now turn our attention to international business transactions.

B. INTERNATIONAL TRANSACTIONS AND DEVELOPMENT

1. International Negotiations and development strategies

In determining the priorities of a developing country confronted and buffeted by stark economic and social problems, there is an understandable tendency to relegate expertise in handling international agreements to the background. Officials grappling with the exacting demands of such national crises like drought, famine, acute shortage of revenues or foreign exchange, sudden collapse of electric and water supply, deteriorating health conditions and a flawed educational system, may be forgiven for paying scant attention to what may be perceived as the esoteric business of negotiating international agreements. Yet a brief reflection will demonstrate the vital relevance of international transactions to key aspects of a country's development strategies.

The attainment of political independence in Africa and elsewhere did not mean insulation from the international economic system. Indeed, independence has highlighted the hard fact of international economic interdependence. The internationalisation of production and services is a salient feature of the modern world economy, and international negotiations, whether they are of a bilateral or multilateral variety, whether they are with governments, international institutions or transnational enterprises, whether they are for trade, investments, technology, finance, debt rescheduling or for procurement of goods and services, are now essential aspects of the dynamics of international economic interdependence. Furthermore, and more importantly, the efficacy and viability of many development strategies, development plans, industrial and agricultural projects, structural adjustment, international financial and commercial arrangements, are all contingent on effective, competent and honest negotiations.

Development projects may be permanently flawed, national revenues may be scuttled, a country's balance of payments may be thrown into disarray, entire development plans may be aborted and indeed a government overthrown and political instability unleashed in consequence of scandalous and lopsided agreements inimical to the national interest. A few random examples selected from around the developing world will illustrate this point.

An African country which embarked on an ambitious programme of industrialization in the late 1950's and early 1960s was persuaded by a horde of foreign concerns, some not too scrupulous, to undertake numerous projects with supplier credits. The procurement of the contracts was induced by illicit payments. The prices of goods and services were grossly inflated, the Government having dispensed with the "luxury" of feasibility studies or thorough and painstaking negotiations. Most of the equipment supplied under these arrangements was defective, and the projects never proved viable to amortize the huge investment under the financing arrangements. In the meantime, the foreign companies

took the precaution of securing from the Government negotiable instruments representing the bulk of the Government's indebtedness to them. They then discounted these instruments with foreign financial institutions, such as ECGD of U.K., Cofface of France, Hermes of West Germany and Eximbank of the U.S., which thus assumed the status of holders in due course, and consequently, were not liable for the transgressions of the original contractors. Many of the original contractors went into liquidation after their escapades in this African country. Upon the overthrow of this Government, there was a bunching of the maturities on these negotiable instruments and the country found itself saddled with what in those days was a huge external debt in the amount of $300 million, with no viable projects to show for it. This indebtedness, which involved numerous debt rescheduling sessions with the creditors, was a pervasive and corrosive factor in the country's economic and political development for the following two decades.

An Asian country's bitter experience in the construction of a nuclear power plant is another instructive lesson. This project, which was initiated some thirty (30) years ago, had the benefit of a feasibility study. But the award of the turnkey contract to a foreign company for the construction of the plant, the engagement of consulting engineers for the project, the negotiation of the terms and conditions of the contract, the pricing of various components for the plant, the design of key areas of the plant, the siting of the project, and the management of the entire contract were so flawed that the country was confronted with a dubious facility costing some $2 billion, which attracted interest charges of $360,000 per week. Investigations disclosed that the award of the contract was not preceded by international tender, that the negotiating team was ordered by the then President to award the contract to a certain foreign company against professional advice and that this intervention was procured by illegal consideration, that the provisions of the turnkey contract did not assure the national agency responsible for the project any effective supervisory powers over the execution of the project, that payments made to the contractor at various stages of the project were not tied to specific phases of satisfactory completion of the project, that variations attributable to the negligence and mistakes of the contractor were improperly charged to the Government agency, and the project which was originally estimated to cost some $500 million, finally escalated to $2 billion. All this constituted a major constraint on the country's desperate efforts at economic recovery after the fall of that President.

The Government of a Caribbean country sought to avoid the pitfalls of international contract negotiations by resorting to the expedient of bilateral economic co-operation agreements with supposedly friendly governments of industrialized countries. The Caribbean Government was engaged in a gigantic programme of constructing industrial plants and other projects with considerable petroleum revenues. It recognised the need for foreign contractors and consultants, but instead of selecting and negotiating with these firms directly and bargaining hard for beneficial terms and conditions, it chose to carry out such negotiations under the umbrella of bilateral agreements with governments of industrialized countries, which constituted a framework for the provision of services and goods by the companies from these countries. The Caribbean Government proceeded on the assumption that the Government of an industrialized country, that was party to such a

Be properly executed and, in effect, that such a government would collaborate in executing viable projects in a developing country. The assumption, alas, proved-ill-founded. The position of governments of the industrialized countries was that the costing and execution of specific projects were purely a matter of negotiations between the Caribbean Government and the company concerned. The result was that over a period of years, the Caribbean country dissipated huge amounts of its petroleum revenues on over-priced projects.

What lessons can we draw from these examples? First, the conduct of international negotiations is now an essential ingredient of the management of the economy of a developing country. Effective negotiations are, therefore, an important dimension of sound economic management. Second, there is no substitute for the inculcation of sophisticated negotiating skills and expertise and the mobilization of the requisite information and data for such negotiations. Third, the acquisition of bargaining skills and other technical expertise would be ineffectual in ensuring viable and profitable projects unless the negotiation process were characterized by the highest integrity in safeguarding the national interest. Fourth, appropriate mechanisms should be established to ensure the highest professionalism in negotiating and concluding international business transactions and in eliminating the incidence of corruption in this regard.

Before considering the negotiating process, let us first examine the concept of a long term transnational development agreement.

2. The Concept of Contract in the Transnational Investment Process

In addressing transnational investment, it is helpful to have some idea, however rudimentary, of a transnational corporation (TNC).

To quote the definition of the Organisation for Economic Development (OECD), transnational corporations usually comprise companies or other entities established in more than one country, and are so linked that they may co-ordinate their operation in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one TNC to another. Ownership may be private, state or mixed.

The relations between developing countries and transnational corporations are often embodied in long-term agreements which may be concessions, economic development agreements, management agreements, joint ventures, service contracts, sales or purchasing contracts, production-sharing agreements and the like. Conceptually, each of these agreements is classified by Western jurists as a species of a private contract, and therefore subject to all the traditional folk-lore on this subject, notwithstanding the fact that such transactions are concluded with

governments and may involve the bilateral agreement, would intervene actively to ensure that the companies it identified for specific projects would be of good standing, that the terms and conditions, in particular, the cost of goods and services would be reasonable, that the contracts would exploitation of a major natural resource or the use of a vital national utility, such as electric power or telecommunications, which is bound up with the development strategies of the country concerned. The critical question here is whether the traditional concepts and rules applicable to a private contract are admissible in respect of these special arrangements between governments and transnational corporations.

To answer this, let us first consider the philosophical, economic and sociological bases of the modern idea of contract. We are assured by Professor Kessler[7], a distinguished Yale Law School Professor, that, in the Anglo-American conception, a contract is the most convenient tool of capitalism, inspired by a proud spirit of laissez-faire individualism. The classical idea of a contract is a private bargain struck by parties of equal bargaining strength and firmly rooted in the free will of the parties. It is an institution of the market place in everyday capitalist society -indeed, an indispensable instrument of the entrepreneur. With the development of a free enterprise system based on division of labour, capitalist society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Since a contract is the result of free bargaining of parties who are brought together by the interplay of the market forces and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole. The highest philosophical manifestation of this theory is that rational behaviour within the context of Western culture is only possible if agreements are respected. Oppressive bargains can be avoided by careful shopping around since everyone has complete freedom of choice with regard to his partner.

Such a concept of contract clearly militates against the idea of judicial intervention in contractual arrangements. Courts are extremely hesitant to declare contracts void as against public policy or to readjust the bargain struck by the parties, because it is in the supreme interest of the social order that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.

Tracing the evolution of the Will Theory of Contract in the nineteenth century, Professor Atiyah[8] of Oxford had this to say:

> "Contractual obligations came to be treated as being almost exclusively about promises, agreements, intentions and acts of will. The function of the law came to be seen as that of merely giving effect to the private autonomy of contracting parties to make legal arrangements. It is of course well known, indeed has become part of modern orthodoxy, that the private autonomy, this extreme freedom of contract, came to be abused by parties with greater bargaining power, and has been curtailed in a variety of ways both by legislative activity and by the judges."

"Yet", continues Atiyah,

> "despite the increasing attacks on freedom of contract the conceptual apparatus which still dominates legal thinking on these issues is the apparatus of the 19th century. It goes indeed far beyond the law itself. Our very processes of thought, our language in political, moral or philosophical debate, is still dominated by this 19th century heritage.
>
> "I want to suggest further that this conceptual apparatus is not based on any objective truths, it does not derive from any eternal verities. It is the result quite specifically of a nineteenth century heritage, an amalgam of classical economics, of Benthamite radicalism of liberal political ideals of the law, itself created and moulded in the shadow of these movements. The result is that our basic conceptual apparatus, the fundamental characteristics and divisions we impose on the phenomena with which we deal do not reflect the values of our own times, but those of the last century."

In this connection, it is worth remembering that the Anglo-American theory of contract has not remained static or fossilised over the years. Professor Horowitz[9] of Harvard Law School has pointed out that the modern Will Theory of Contract, which is a robustly individualistic idea, did not appear until the 18th Century and early 19th Century when the spread of markets forced jurists to attack equitable concepts of exchange.

Prior to that, the courts applied an objective theory of contract which enabled them to intervene actively to rectify contractual provisions on grounds of equity. In more recent years, we have witnessed a pronounced legislative intervention to cure the excesses of standard or adhesion contracts on the same theory. Professor Kessler has ably demonstrated that such intervention makes nonsense of the Will Theory of Freedom of Contract. It follows that there is no immutable doctrine of contract, and that developing countries are perfectly entitled to invoke ideas of fairness and equity in reviewing contracts which are inimical to their national interests.

The philosophical ideas and concepts of contracts of the 19th Century have nevertheless provided a basis for a formidable array of traditional legal and business concepts which have been applied in their pristine purity to transnational transactions. One of the consequences of this approach is that transnational corporations regard such a transaction as a static model representing a definitive "deal" a fixed regime of obligations, rights, impositions and benefits which does not admit of variation or modification throughout the term of the agreement. Any departure from such a transaction is deemed repugnant to "*sanctity of contract*". The conception of an investment agreement as a static model derives from the bargaining traditions associated with a market exchange. In colloquial language, once a party had made his "*killing*" in a deal, the transaction cannot be re-opened. The operative word here is the "*killing*", because it denotes that a good bargain struck at a particular time represents a set of advantages and benefits which must be preserved and adhered to. Inadequacy of consideration is no basis for upsetting the bargain, and the fact that such an investment agreement is concluded with a state, has a duration of 30 or 40 or

even 80 years and is in respect of major natural resource should not detract from the integrity of the deal. In short, an investment agreement is not a general relationship which admits of a process of accommodation and adjustment of the benefits and imposition but a definitive bargain in which one party "wins" and the other "loses".

However, the barest acquaintance with the actual circumstances surrounding the conclusion of concessions between metropolitan companies and African chiefs or investment agreement or transnational contracts between transnational corporations and governments of developing countries will dispose of these individualistic assumptions. The hollowness of the pretence that colonial transactions with illiterate chiefs are freely negotiated transactions between parties of equal bargaining strength will be evident to all of you. Even the modern variant of these transactions, that, is the investment agreement between the government of an underdeveloped country and a multinational corporation, cannot be truly described as an arms-length transaction rooted in the freewill of parties of equal bargaining power because of the superior negotiating skills, knowledge and more favourable bargaining position which the multinational corporation usually commands at the inception of the relationship. Thus, in the negotiations between Ghana and Kaiser and Reynolds of America in respect of the Volta River Project of Ghana in the early 60s, President Nkrumah is reported to have been so anxious to conclude a deal that, while urging his officials to negotiate for the best terms, he firmly directed them to come to some terms at all cost! This, not surprisingly, gave the foreign companies a superior negotiating position.

In any case governments of less-developed countries would certainly dismiss laissez-faire ideas as totally inappropriate to this category of transactions. A long-term investment agreement spelling out comprehensively the relations between the government and the corporation in respect of the development and marketing of a natural resource and specifying all relevant fiscal arrangements is anything but a private contract - an institution of the market place. Governments of less-developed countries quite properly regard these agreements as major instruments of public policy - a prominent feature of their development strategies, hardly distinguishable from a development plan. These transactions are a framework for a joint public enterprise in which the government, and the foreign partner are engaged in the development of a strategic public resource or the operation of a vital public utility. In short, they lie more in the domain of public law than in the province of private contract, and consequently the traditional individualistic doctrines as well as the speculative rules devised for the exchange of fungible commodities in a market regime are clearly inapplicable to them. It follows that these transactions cannot be insulated from the pressures which impinge on public institutions such as political changes in the country, changed economic conditions and the general expectations of the public. Furthermore, having regard to the peculiar nature of these transactions, there is no reason why they should not be governed by the objective theory of contract which admits of the rectification of contractual provisions on the grounds that they are unfair or inequitable to one of the parties.

The Negotiating Process

I would like to address the need for technical competence in negotiations. As I have already intimated, few countries appreciate the highly technical and sophisticated nature of the negotiating process and the need to invest resources in training negotiations or in planning carefully for negotiations. Some countries may acknowledge such a need, but exhibit a marked complacency as to the availability of such expertise.

With respect to negotiating contractual arrangements with transnational corporations, international experience shows that a lot more can be done in many developing countries to prepare adequately for negotiations with respect to capital intensive and complex projects.

Deficiencies in this crucial area cover almost the entire gamut ranging from the selection of projects, the analysis of their costs and benefits, the evaluation of their techno-economic viability, the selection of transnational corporations, the pattern of financing and the structuring of contractual arrangements, to the preparations for and conduct of the negotiations.

More particularly, in many developing countries, especially those with comparatively limited experience and expertise in this area, insufficient attention has been paid to the selection of projects and determination of their scope and objectives from the viewpoint of the country's overall development goals. Scant attention is paid to the preparation of the pre-investment and feasibility studies, proper evaluation of the direct and indirect benefits and costs of projects, a realistic assessment of their returns and viability, the best pattern of financing them, ways of enhancing domestic participation in the establishment and operation of projects, and the alternative contractual arrangements that could be negotiated to suit national interests. Very often host countries react passively to projects and contractual arrangements that are proposed by transnational corporations or foreign enterprises and conceived from their vantage point and that often involve not only the management, control and supply of capital equipment, supplies and services by transnational corporations, but also substantial host government finance and government guaranteed foreign borrowings. Comparatively few developing countries take the initiative in identifying their own priority projects, formulating the scope and objectives of the projects and locating potential investors or foreign partners. The selection, scope and priority of projects are seemingly determined by the aggressive salesmanship of the companies and not necessarily the national interest.

Equally serious inadequacies in the preparation for and conduct of negotiations still persist in some countries. In the first place, often no thorough appraisal is made of the negotiating power of the country vis-à-vis the transnational corporation and the obligations to be stipulated or the trade-offs to be conceded in order to realize the priority objectives of the projects. Secondly, there is a lack of information both on the industry in question, especially its international structure and trends, and on the particular transnational corporation with which negotiations are to be conducted, especially its experience, expertise and reputation, its mode of operations and performance in other countries and its motivations and expectations from the project. Thirdly, inadequate attention is paid to the composition of the negotiating team, its

negotiating brief, the powers and responsibilities of the chief negotiator and appropriate political support for the negotiating team.

I would like to emphasize that the burden of my message is not one of antipathy to foreign companies or TNCs. On the contrary, my earlier remarks on the reality of international interdependence clearly show that interaction with these companies whether in trade, investment, technology or services is inevitable. Dealings with TNCs transcend ideological barriers. Thus, for example, during the latter phase of the cold war era, Western transnationals were engaged in active industrial co-operation with state enterprises in the former Socialist countries of Eastern Europe. Special legislation was introduced in numerous Socialist countries, including China and the Soviet Union, to permit equity investments by Western transnationals in these countries. Furthermore, the world economic recession compelled many developing countries to turn to TNCs or foreign companies as possible sources of capital and technology flows. Most developing countries have now liberalized their foreign investment regimes and adopted other strategies to attract foreign investment and technology.

However, in our attempt to induce investment and technology flows from the industrialized world, we must understand that transactions with foreign companies, which are private business enterprises actuated by the profit motive, are essentially business arrangements predicated on hard bargaining or sophisticated negotiations. It cannot be overemphasized that benefits do not flow inexorably from the mere involvement of a TNC in a host country. As business enterprises which make hard-nosed decisions on international transactions on the basis of rigorous financial projections and other business criteria, TNCs will not surrender a benefit which has been conceded by the other party, nor will they volunteer an advantage where none has been stipulated in the agreement. There are some who hold that one can rely on the magic of market forces to induce TNCs to engage in socially beneficial and profitable investments. But another view, which is buttressed by our experience, is that while TNCs have the potential for contributing to the development of host countries, their objectives are not necessarily congruent with the development objectives of host countries, and that a conscious effort has to be made by the host country through the mechanism of regulations or negotiations to ensure that the operations of TNCs conform to the economic and social goals of such host country. Let us consider a few examples of this potential conflict.

TNCs can inject much needed capital into the economy of the host country, but the host country should ensure through negotiations or regulations that it does not experience negative resource flows through the cumulative impact of repatriation of dividends, profits, fees, royalties and other outgoings and, in particular, through the device of abusive transfer pricing. Joint ventures with foreign investors can be beneficial if the equity structure with other financial arrangements is such as to assure the host country a genuine return on its investment. TNCs can act as catalysts for the modernization of local production, generate backward and forward economic linkages, and inspire the introduction of efficient management techniques by domestic enterprises. But unless appropriate precaution is taken during the negotiations, the operations of TNCs could have a depressing effect on domestic enterprises and sometimes even lead to their elimination. As to efficiency, the grant of monopolistic rights to TNCs and the erection of other protective barriers for TNCs could operate as a disincentive for efficiency.

TNCs could be effective instruments for the transfer of technology provided the relevant agreement is not encumbered with restrictions that impede the genuine transfer of technology and the technology in question is, in any case, appropriate. TNCs have a great potential for training local personnel, but the issue is whether the agreement stipulates specific training obligations to ensure that a targeted number of local personnel is trained at specific levels within a defined time-frame.

TNCs can be retained as effective managers of projects or enterprises. But the question is: does the management agreement provide adequate incentives for effective management by relating the management fees to the profitability of the enterprises? Is the management agreement a self-liquidating mechanism that ensures that the management is transferred to duly trained local personnel within the specified period, or is it a self perpetuating system? Financial arrangements with foreign lending institutions are useful instruments for financing projects, but the experience of many developing countries, particularly Latin America and Africa, raises a crucial question as to whether the projects to be financed under these arrangements will generate enough resources to amortize the loan capital.

Time constraints will not permit me to cite further examples.

I have endeavoured to highlight the importance of the negotiating process and the question may well be raised as to whether my message is misdirected. After all, this country is by no means lacking in technical expertise, whether legal, engineering, economic, business, or industrial. The availability of such expertise in this country, as in many of the advanced developing countries, is undeniable. However, it has to be appreciated that a potent factor in conducting effective negotiations is access to international market data, to trends and developments not only in the particular industry in question but in the form and substance of contractual arrangements. Thus, the fact that a successful petroleum production-sharing agreement was negotiated some 10 years or even 5 years ago, does not necessarily dispense with the need for keeping up with highly fluid developments with regard to the fourth generation production-sharing agreements. Similarly, one cannot negotiate a power contract with an aluminium company or an alumina contract without the most up-to-date data on the state of the aluminium industry, international market situation in this regard, and its impact on prices and the prevailing tariffs charged by utilities around the world. Those who are involved in negotiating debt rescheduling arrangements would surely be well equipped if they had access to the grant element in other debt resettlements concluded elsewhere. Indeed, access to the substance of the contractual arrangements made between governments and TNCs in comparable situations is crucial to the negotiating process. Very often fiscal aspects of negotiations revolve around computer runs of various fiscal projections. This mass of elaborate information and techniques may not be available locally and will have to be obtained from international sources.

4. Institutional Arrangements for Negotiations

I now wish to turn my attention to institutional arrangements that are conducive to high standards of competence and integrity in negotiating international business transactions to which the Government or its agency is a party.

I have already alluded to the fact that there are Ghanaians with considerable expertise in international business transactions. But the sober reality is that this expertise has, for a number of reasons, not been effectively mobilized by the governmental machinery or is otherwise not available to the governmental system. The factors accounting for this are the usual turnover of experienced officers, ineffective utilization of trained manpower with expertise in this field, failure to appreciate the importance of such negotiations and, most critically, what seems to me to be the lack of an effective system or mechanism for negotiating these transactions or for coordinating and superintending the negotiation of international business transactions that have grave economic and social implications for the entire country.

This is a bold assessment and I can only hope to sustain it by giving it an empirical reference based on some thirty years of my personal involvement, both direct and indirect in the process of international negotiations in Ghana and elsewhere.

(a) Negotiating Procedures: A historical perspective

I was appointed Solicitor General of Ghana in 1969 after $3^1/_2$ years of service as Attorney in the Legal Department of the World Bank in Washington DC. As Solicitor General, I had departmental responsibility for the legal aspects of the Government's international business transactions.

In 1969, the economic strategies of the Government were dominated by the legacy of Ghana's external indebtedness arising from the notorious supplier credits mentioned earlier.

Impressed by the World Bank concept of a working party approach to the appraisal, negotiation, implementation and supervision of development projects, I secured the Government's consent to establish formal procedures for negotiating public , agreements particularly international agreements.

These consisted of elaborate procedures governing-

(i) Prior approval of projects by Government before negotiations;

(ii) Composition of an inter-ministerial negotiating team consisting of representatives of Finance, External Aid Division, Bank of Ghana, Solicitor General, Accountant General and the Ministry or Department responsible for the project;

(iii) Approval of negotiated transactions by Cabinet;

(iv) The formal issuance of authority to sign the agreement on behalf of the Government.

Furthermore, the Loans Act 1970, was passed to regulate government borrowing. Numerous agreements were negotiated under this rationalized system and some order was brought to the process.

Prior to these reforms, these procedures were not unknown to the system but they were not applied systematically and were sometimes replaced by the procedure of passing on a draft or negotiated agreement from ministry to ministry for comments and to the Solicitor General for "vetting". The latter procedure was particularly unsatisfactory since it did not provide for teamwork or a multidisciplinary approach in the negotiation process.

In 1971, the Government of the Second Republic established a Cabinet Committee on Public Agreements to scrutinize negotiated transactions before Cabinet approval. It consisted of a number of key Cabinet Ministers with the Solicitor General, as the ex-officio Secretary.

It had a comparatively short span of life - barely six months before the overthrow of the Government in January 1972.

The establishment of this Committee was a laudable idea but it did not have time to develop into an effective system. A major flaw was that Cabinet Ministers rarely had the time to scrutinize the agreements in depth. The most that they could do was to review the Solicitor General's analysis or critique of the agreements.

After the coup in 1972, the issue of Ghana's external indebtedness and the legacy of defective international negotiations was thrown into sharp relief.

The February 5, 1972 statement issued by the National Redemption Council (NRC) regime on external debt inter alia challenged the validity of international transactions that had been vitiated by bribery or other forms of illegality and attacked transactions that had saddled Ghana with a substantial external indebtedness that however did not establish viable projects.

The Government also established a committee to scrutinize all pending transactions to ensure that only those transactions that were in the best interest of the country would be endorsed by the new regime. The composition of the Committee was:

- Solicitor General, Chairman
- Principal Secretary, Economic Planning (H. P. Nelson) - Member
- Principal Secretary, External Aid Division (Mary Chinery Hesse) - Member

The Committee recommended the endorsement of a number of agreements that met the above criteria.

Thereafter, upon the recommendations of this Committee, a permanent mechanism, known as the Public Agreements Review Committee (PARC) was established to review and scrutinize all negotiated agreements between governmental agencies and corporate, international and other entities which involved the commitment of substantial budgetary or foreign exchange resources, prior to their approval by the governing National Redemption Council.

This was an inter-ministerial committee chaired by the Solicitor General with the following top officials as members:

- Deputy Governor of Bank of Ghana
- Senior Principal Secretary of Ministry of Finance
- Principal Secretary of Economic Planning, External Aid
- Senior Principal Secretary of Trade & Industry
- Accountant General

- Commissioner of Income Tax
- A member of the Law Faculty, University of Ghana
- A Secretary from the Ministry of Justice

This meant that the procedure of concluding an agreement, international or domestic, with substantial budgetary or foreign exchange implications was as follows:

i The constitution of the negotiating team to negotiate the transaction

ii The negotiation of the transaction by such a team

iii The review of the negotiated transaction by the Public Agreements Review Committee and the submission of its report with recommendations to the ruling Council - NRC or later Supreme Military Council (SMC).

iv Approval of the negotiated agreement by the ruling NRC or SMC.

From 1972 to1974, these procedures worked well. The Governor of the Bank of Ghana, Dr. Amon Nikoi was highly supportive and the Military Authorities substantially heeded PARC's advice then. The process subsequently encountered difficulties as the PARC's role was increasingly perceived as "obstructive", "unduly protracted" and "a usurpation of the Government's prerogatives". Some observers thought that the ruling Council's growing antipathy had more to do with PARC's rigorous review of transactions in which certain individuals and officials had illegitimate interests. Nevertheless, some major international agreements were negotiated and launched within the first few years. Among these were the rescheduling of Ghana's debt on a long term basis - Treaty of Rome 1974, acquisition of majority equity interest in AGC, CAST and foreign-owned timber companies; acquisition of GHAIP, GOIL, Joint Venture Agreements with Unilever in respect of Oil Palm and Textiles.

Major financing arrangements with International lenders e.g. financing of the Kpong Hydro-electric Project; Procurement of Fokker 28 Planes for Ghana Airways; Petroleum Exploration Agreement with Shell; Tono Irrigation Project in the North; and Integrated Rural Development Projects with the IDA.

Some bad examples, where PARC's advice was rejected included:

- A deal to import Swiss trucks to haul luggage from Accra to Lagos during the Lagos Port congestion in the mid 1970's;

- Procurement of naval boats where the German manufacturing company went into liquidation before production;

- Purchase of airplanes for the Air Force with inflated prices which attracted adverse comment and attention in the US Senate.

A permanent Minerals Negotiating Committee was established based on the experience gained in this sector.

A rigorous training scheme was launched in this area for the benefit of public officials with responsibility for international business transactions.

I left the scene in July 1977 for the United Nations, with these procedures increasingly under attack.

But after the events of June 4, 1979, there appeared to be a renewed interest in sustaining probity and integrity in public agreements. The major development after 1980 was the re-negotiation of the VALCO agreements in the early 1980's. This exercise involved the establishment of an elaborate negotiating team headed by Professor Akilakpa Sawyerr of the University of Ghana. The team comprised experts from within and without the public sector and was supported by two international agencies, namely, the Commonwealth Secretariat and the UN Centre on Transnational Corporations, New York, where I was Director.

This team did an excellent job. But unfortunately some of its key figures were not public officials and their experience has not been effectively fed into the public institutional memory and capacity.

After this major exercise, expertise was developed in certain pockets of the public sector such as the VRA, Minerals Commission, Ghana Investment Promotion Centre, a section of the Ministry of Finance, but never fully and effectively mobilized into the general governmental system. Some officers from the Ministry of Justice who were specially trained in this area were transferred to other schedules after training or left for other institutions.

It is, however, significant that the Public Agreements Review Committee survived, having been re-designated as the Public Agreements Review Board, until 1992 when it was abolished, with the promulgation of the Constitution. This was ironic since the reason for scrapping the review mechanism, as far as I have gathered, was that the constitutional provision for parliamentary approval of international economic agreements dispensed with the need for the Agreements Review Committee or Board within the Executive Branch.

I believe, however, that this reasoning is faulty. The existence of an effective review mechanism in the Executive Branch is not inconsistent with this constitutional provision, particularly in the absence of an effective staff support to provide a critique of these agreements for MPs. The review mechanisms, at least, assist the Cabinet in scrutinising transactions prior to Parliamentary approval.

(b) **Critique of Current Procedure for Negotiating Transactions**

My diagnosis of defects in the current system is as follows:

i) There are no laid down procedures for negotiating international business transactions.

ii) While officials in individual Ministries and Departments or agencies may be competent negotiators, there is no effective system of coordinating negotiations or bringing an interdepartmental perspective to bear on them

iii) There is no interdepartmental mechanism for reviewing or scrutinizing negotiated agreements prior to both Cabinet approval, and ultimately, Parliamentary approval.

iv) Parliament is not equipped with staff who have the necessary expertise to review or scrutinize these transactions prior to parliamentary approval. MPs do not have the facilities for conducting the analysis themselves.

v) Parliamentary debate is not the appropriate procedure for in depth critique of agreements, with the result that the constitutional provision for the approval of international business or economic agreements is ineffectual.

vi) In any case, although international loan transactions are regularly submitted to Parliament for approval in accordance with article 181, few international business or economic agreements have been similarly submitted for approval pursuant to Article 181 (5) of the Constitution.

This provision stipulates that Article 181, dealing with loan transactions, shall with necessary modifications by Parliament, apply to international business transactions. It would seem that Parliament has not exhausted its legislative powers of enacting an appropriate legislation to govern the process of ratifying international business transactions on the lines of the Loans Act, 1970. Such legislation could be introduced to regulate the procedure of concluding and ratifying international business transactions, for classifying the categories of transaction which are subject to the whole process of Parliamentary approval, and those which may be disposed of by a parliamentary committee or the Minister of Finance, and for regulating any other relevant matters. Such legislation would address the issue of clogging the parliamentary process with indiscriminate requests for ratification of minor transactions, as defined by Parliament.

These glaring deficiencies in our negotiating mechanisms account for the defective transactions which are currently the subject of much public anguish. We do not appear to have learned our lessons of history. Indeed, there does not seem to be any policy on acquiring and retaining expertise in negotiating international transactions although our entire development strategies revolve around such transactions.

(c) **Proposed Reforms**

The foregoing analysis suggests the following reforms:

(1) To ensure the rigorous scrutiny of international business transactions involving governmental agencies, procedures should be clearly established for the conduct of negotiations, as instituted some thirty years ago.

(2) An inter-ministerial mechanism for a thorough and in depth scrutiny of international business transactions should be introduced on the lines of PARC for the executive branch of government.

(3) The Finance Committee of Parliament should be provided with the necessary staff support to critique international business transactions before the consideration of such transactions by Parliament

(4) Parliament should introduce legislation to implement the provisions of Article 181(5), as suggested above.

(5) A continuous and sustained training programme should be instituted for officials of the responsible economic ministries and Ministry of Justice.

(6) After such training, appropriate steps should be taken to provide the necessary incentives to retain personnel with the necessary expertise.

(7) The importance of inculcating expertise in handling international business transactions should be underscored in the public sector.

I have reason to believe that these reforms will equip our country with the capacity to participate effectively in the global economy and realize maximum benefits from transacting international business.

CONCLUSION

For the past three days, I have attempted to expose you to a "kinder and gentler" face of law - a perspective far removed from a code of stern prohibitions and impositions, enforced by a system of punitive sanctions. I hope I have succeeded in demonstrating to you that law is indeed an instrument for development, providing a framework for good governance, political stability and social and economic betterment.

Law is not only a technique for engineering a just and productive society within

national frontiers but a mechanism for fashioning a more equitable international political and economic order.

Indeed, law permeates every human endeavour. It facilitates industrial and agricultural ventures and social and economic reforms. It provides the critical underpinning for such diverse activities as engineering and construction, environmental protection, town planning, mining, artistic works, sports, settlement of disputes; in short, it is indispensable to nation building.

One of the major challenges of our time is strengthening, deepening and refining our legal system to respond to the exacting demands of development in the 21st Century. I have no doubt that we have the capabilities and experience to come to grips with this challenge with success.

Lecture One: End Notes

1. See [1961] GLR 523, See also arguments of Counsel in Gyandoh and Griffiths: *A Sourcebook of the Constitutional Law of Ghana* (Vol. 2) p. 160

2. See 1969, 1979 and 1992 Republican Constitutions of Ghana
3. See for example Article 2 and 130 of the 1992 Constitution
4. Chapter 5 Article 12-33 of the Constitution, 1992.
4A. The writer is the Paramount Chief of Asante Asokore
5. S. K. B. Asante: *Property Law and Social Goals* - 1975. Published by Ghana University Press
6. The writer was the Chairman of the Committee of Experts that drafted the proposals for the 1992 Constitution.
7. Membership of the Committee of Experts was as follows:

a.	Dr. S. K. B. Asante	-	Chairman
b.	Osagyefo Oseadeeyo Dr. Agyeman-Badu	-	Member
c.	Mrs. Justice Annie Jiagge	-	Member
d.	Mr. L. J. Chinery-Hesse	-	Member
e.	Mr. Ebo Bentsi-Enchill	-	Member
f.	Dr. K. Afari Gyan	-	Member
g.	Dr. Charles D. Jebuni	-	Member
h.	Dr. E. V. O. Dankwa	-	Member
i.	Mrs. S. Ofori-Boateng	-	Member/Secretary

8. See article 125 of the 1992 Constitution.
9. Discussed below and relates to the requirement of consultation with the Council of State in the appointment of some public officers.
10. Prof. Mike Ocquaye: The Process of Democratisation in Contemporary Ghana A Study, 2001.
11. Kwasi Prempeh: Eight Years of Constitutional Rule in Ghana 1992 2001, Challenges and Prospects, 2001.
12. Richard Sandbrook and Jay Oelbaum: Reforming Political Kingdom: Governance and Development in Ghana's Fourth Republic.
13. Prempeh (supra).
14. See Chapter 1 of the Proposals
15. John D. Nogle and Alison Mahr: *Democracy and Democratisation: Post Communist Europe in Comparative Perspective* (1999).
16. Arend Lijphart: *Patterns of Democracy: Government Form and Performance in thirty six Countries (1999). Also Democracy in Plural Societies: A comparative Exploration (1977)*
17. Donald L. Horowitz: *Comparing Democratic Systems in Parliamentary versus Presidential Government (Arend Lijphart ed. 1992)*
18. Nwabueze B. O.: *Constitutionalism in Emergent States (1973).*

19. See Article 144 of Constitution.
20. Article II Clause 2 of U.S. Constitution.
21. [1996 97] SCGLR 320
22. Prempeh (supra)
23. *Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution, July 31, 1991, paragraph* 337.
24. 5 US (1 Cranch) 137 (1803)
25. See Bimpong-Buta S. Y.: Inaugural Lecture at Ghana Academy of Arts & Sciences (1999)
26. Korsah CJ. Van Lare and Akiwumi JJ.S.C.
27. See discussion of concept in Shalabi v. A. G. [1972] 1 GLR 259 at 264-268
28. H. W. R. Wade and C. F. Forsyth: *Administrative Law* (Oxford: Clarendon Press, 1994)
29. [1942] AC 206
30. Secretary of State for Education & Science v. Temeside Metropolitan Borough Council [1977] AC 1014
31. Nana Akufo-Addo: "Human Rights and Constitutional Litigation in Ghana A Critical Appraisal" Speech Delivered on 17th January 1995 at GBA/British Council Joint Seminar.
32. [1980] GLR 637 at pp 647-648
32A. Alexander Bickel: ***The Least Dangerous*** *Branch* (1962)
33. See dicta by Acquah JSC in Republic v. Tommy Thompson [1996-97] SCGLR at 486 and per Bamford Addo JSC in Sam (No.2) v. AG [SCGLR] at 305.
34. Lawrence Tribe: *American Constitutional Law* p.55
35. See CIBA Case [1996-97] SCGLR 729
36. CIBA Case Supra at 745

Lecture Two: End Notes

1. See Chapter 5 of the 1992 Constitution.

2. S. K. B. Asante: "Nation Building and Human Rights in Emergent African Nations" *Cornell Journal of International Law,* Vol. 2, Spring 1969.
3. Aneurin Bevan, In Place of Fear; p.299 (1964).
4. See recent agitation over the acquisition of Land at Kwabenya for the disposal of waste.
5. Arthur Lewis: *Politics in West Africa* (1965).
6. See Chapter Seven of the Proposals for a Draft Constitution of Ghana (1991)
7. See Chapter Two of the Proposals for a Draft Constitution of Ghana (1991)
8. See Chapter 12 of the 1992 Constitution
9. See Article 167 of the Constitution.
10. See Criminal Code (Repeal of Criminal Libel and Seditious Libel) (Amendment) Act 2001 (Act 602)
11. Kwame Karikari: "In Defence of Public Service Media in Ghana" *In Six Years of Constitutional Rule in Ghana 1993-1999 Assessment and Prospects*, pp. 83-95
12. See definition of "public interest" in Article 295(1) of Constitution
13. See Chapter 6 of the Constitution
14. See Proposals for Draft Constitution of Ghana (1991): General introduction paragraph 7
15. See discussion in Lecture I
16. See CIBA Case [1996-97] SCGLR 729 at 745
17. See S. K. B. Asante: Property Law and Social Goals in Ghana, (1975), Ghana University Press.
18. See for example Timber Resources Management Act [1997] Act 547 and Timber Resources Management Regulations [1998] LI 1649
19. See Article 295(1) of the Constitution
20 *Legal Composition of the Akan Family* (Vol. 15 !983-86 Review of Ghana Law at p. 96.). Published by the Council for Law Reporting.
20A. The inability of the Government to effectively deal with the questions of female circumcision, widowhood rites, Trokosi etc. in spite of legislation outlawing same is a case in point.
21. See Section 69A and 88A of Criminal Code 1960 Act 29 being provisions inserted by Act 484 and PNDCL 90 respectively

22. Akua Kuenyehia "Fostering Rights Awareness Among Women The Ghanaian Experience" *Proceedings of the Third Annual Conference of the African Society of International and Comparative Law* (1991). P. 73

23. See Section 314A of the Criminal Code 1960 Act 29 Inserted by S. 17 of Act 554

24. See Section 17 of Act 554 Supra

25. H. J. A. N. Mensa-Bonsu: "Family Law Policy and Research Agenda" in *The Changing Family in Ghana,* Ed. Elizabeth Ardayfio Schandorf

Lecture Three: End Notes

1. Trubek and Gallanter: *Scholars in Self-estrangement. Some Reflections on the Crisis in Law and Development Studies in the United States* 4 Wisconsin Law Review 1063 [1974]

2. Dr. De Soto: Public Lecture at Accra International Conference Centre (2002)

3. James Wolfensohn, President, The World Bank Group Address to the Board of Governors, September 28, 1999

4. Ibrahim Shihata: *Judicial Reform in Developing Countries and the Role of Banks* A paper submitted to the Seminar on Justice in Latin America Feb. 1993, Costa Rica, organised by the Inter-American Development Bank.

4A Dr. Date-Bah: "Law and Private Investment in a Developing Country" Inaugural lecture delivered to the Ghana Academy of Arts and Sciences.

5. See Centre for Democracy and Development Publications

6. See World Bank Discussion Papers Evolving Legal Framework for Private Sector Development in Central & Eastern Europe

7. Professor Kessler , Yale Law Reporter, 1976

8. Professor P. S. Atiyah, *"Contracts, Promises and The Law of Obligations" Law Quarterly Review* Vol. 94 (1978) p. 193

9. Professor M. J. Horowitz, *Harvard Law Review*, Vol. 87 (1973-74) P. 1.