

# GOVERNANCE

NEWSLETTER

A Publication of The Institute of Economic Affairs

Vol. 23 No.4 July/August 2016

## AN EFFECTIVE COUNCIL OF STATE AS SOLUTION TO THE WINNER-TAKES-ALL POLITICS IN GHANA

RANSFORD GYAMPO<sup>1</sup>

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### Summary

*This paper discusses the key dangers of the “Winner-Takes-All” (WTA) politics to Ghana’s fledgling democracy. It highlights the role of an effective Council of State as one possible solution to the problem of the WTA politics. The paper undertakes a thorough review of the contributions and performance of Ghana’s Council of State as a potential countervailing authority, expected*

*to bridle the excessive powers of the executive and promote inclusive politics. It finally makes practical policy recommendations to strengthen the Council of State, as an effective check on the powers of the executive, and more importantly, as a mechanism for dealing with the polarizing effects of the WTA politics and promoting inclusivity in Ghana’s body politic.*



Governance Newsletter is a bi-monthly publication of The Institute of Economic Affairs, Ghana, an independent public policy institute. This edition is sponsored by the Danish International Development Agency (DANIDA). Subscriptions to the Governance Newsletter are made available to those who make contributions to The IEA. Address all correspondence to: The Editor, The Institute of Economic Affairs, P. O. Box OS 1936, Accra. Tel. +233-302 244716/ 226333 / 226359 / 226388 / 030 7010713/4. Email: [iea@ieagh.org](mailto:iea@ieagh.org) Website: [www.ieagh.org](http://www.ieagh.org)

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## Introduction

The Winner-Takes-All (WTA) politics<sup>2</sup> poses a severe threat to Ghana's fledgling democracy and efforts aimed at consolidating it. Political elites have expanded the interpretation of the WTA formula for selecting leaders to include situations where political parties that win elections exercise enormous powers, antagonize and completely exclude all and in particular, the political opposition from national governance (Abotsi, 2013). In this regard, a major feature of WTA politics is that it confers excessive powers on the ruling elite or the executive arm of government. However, given that "power corrupts and absolute power corrupts absolutely",<sup>3</sup> the framers of the 1992 Constitution made provision for the Council of State as a possible check on the excessive powers of the executive in order to deal with one of the key manifestations of WTA politics.

The Council of State as provided for in Ghana's Fourth Republican Constitution was a borrowed idea from the traditional conception of the Council of Elders (Oquaye, 2014). In the traditional setting, members of the Council of Elders were the various lineage and clan heads who represented their people in the chief's palace and played a key role in checking the political excesses of the chief (Busia, 1951). The chief in the traditional setting had no hand in the selection of members of the Council and he was bound to follow whatever advice given him by them. Indeed, a chief could be destooled if he failed to comply with the wise counsel of his elders in the palace (ibid). Therefore, the Council of Elders in the traditional setting played a countervailing role to the powers of the chief in a manner that limited the exercise of his powers and authority (ibid). However, Ghana's current Council of State, which has been

established under the 1992 Constitution, seems to be "a watered-down" replica of its counterpart in the traditional setting. It is therefore incapable of checking the exercise of powers by the executive and dealing with WTA politics.

Against this backdrop, this paper critically examines the evolution, composition, role and effectiveness of the Council of State in checking the powers of the executive and promoting inclusive governance. It makes policy recommendations to strengthen the Council of State to play a more effective role in checking the powers of the executive and, more importantly, reducing the WTA politics. Data for the paper was generated from a series of nationwide public consultations on the WTA politics held by the Institute of Economic Affairs (IEA) between 2013 and 2014. Other secondary sources such as library research were used to augment information from the public consultations.

## The Council of State

### Brief Historical Note

The Council of State was perceived with Ghana's traditional political system in mind as an advisory and countervailing authority to the powers of the chiefs. As indicated earlier, members of the traditional Council of Elders were the respective clan or lineage heads who assisted the chief in the day-to-day administration of the traditional political community. They were in the chief's palace as of right and proffered authoritative advice on all governance and developmental issues which had binding effect on the chief (Busia, 1951). Members of the traditional Council of Elders held permanent positions in the chief's palace

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2 WTA politics entails "state capture" and the extremely partisan control of power, opportunities and resources of the state to the marginalization of all other Ghanaians who do not belong to the ruling political party.

3 See Lord Acton @ <http://www.brainyquote.com/quotes/quotes/l/lordacton109401.html>

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and in this regard, their tenures overlapped that of the chiefs. Per their permanent positions, they were the repositories of traditional customs, values and conventions which imbued them with enough wisdom and positioned them as credible sources of advice to the chief (Oquaye, 2014). The Akans say, “*ye wo ohene no, na obrempon te ase*”, meaning, “before the chief was born, the elders were already in existence”. This makes it imperative for the chief to listen to wise counsel from the elders (ibid). Furthermore, an Akan chief who, for instance, attempted to disobey the advice of members of the Council of Elders was quickly reminded that “*nana, wo be to yen*”, to wit, “you came to meet us here in the palace”. The position and role of the Council of Elders in the traditional political setting were therefore an exalted position that made them a powerful check on the powers of the chief (Busia, 1951).

In Ghana’s attempts at constitutional democracy, there was the recognition of the validity of the case for a non-partisan body comprising eminent personalities to counsel and aid the President and other principal organs of state in the discharge of their functions (Committee of Experts Report, 1991). Therefore, in Ghana’s 1969 Constitution, a Council of State was established to “aid and counsel”<sup>4</sup> the President. However, there was no further elaboration of this function (Afari-Gyan, 1995). The 1979 Constitution, however, gave more explicit mandate to the Council to consider and advise on bills; consider and advise the President or any other authority on certain appointments,

where such advice was mandated by the Constitution or any other law; and make recommendations, upon request or at its own initiative, on any matter being considered by the President, Parliament, Minister or any other authority (Constitution of the Republic of Ghana, 1979; Committee of Experts Report, 1991). Unfortunately, the role and impact of the Council of State could not be felt much as both the 1969 and 1979 Constitutions were short-lived because of military coups.<sup>5</sup> However, given the invaluable role the Council could play, its existence was provided for in the 1992 Constitution. It is instructive to note that the Committee of Experts on the 1992 Constitution made a number of recommendations, which go to the root of the Council’s powers.<sup>6</sup> Some of them include the membership of the Council; the role of the Council in Ghana’s law-making process to ensure properly thought-through and quality legislations to aid governance, as well as its role in serving as a countervailing authority to the powers of the executive (Committee of Experts Report, 1991). Unfortunately, these were not included in the 1992 Constitution. The non-inclusion of some of the recommendations go to confirm the view of some people that the 1992 Constitution was fashioned to suit former president Rawlings because he did not want a countervailing force to the exercise of his powers as executive president.<sup>7</sup>

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4 See the page 27 of the Report of the Committee of Experts that led to the drafting of the 1992 Constitution

5 It must however be pointed out that unlike the Council of State as provided for in the 1969 Constitution, the Council of State under the 1979 Constitution 1979 actually did some work. Chaired by Mr. William Ofori-Atta, It issued at least two annual reports, which detailed the activities of the Council.

6 See Committee of Experts’ Report on Ghana’s 1992 Constitution, pp. 199-208

7 I am grateful to Professor Atsu Ayea, Professor of Political Science, University of Ghana for this view.

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## The Council of State under the 1992 Constitution

Article 89(1) of Ghana's 1992 Constitution provides for a Council of State to "counsel the President" in the performance of his function in a manner akin to what pertained in the traditional setting. However, the Council is perceived as weak in terms of its composition and mandate. Generally, the Council of State in Ghana has not been able to work effectively to counter the exercise of power by the President. Three main reasons account for this challenge. In the first place, the President has an overriding power of appointment in terms of the composition of the Council. The fundamental principle underscoring the membership of the Chief's Council in the traditional setting has been ignored. In the traditional Ghanaian society, no chief appoints any member of his Council of Elders. The Council members are heads of the various groups or lineages in the society and are sub-chiefs themselves (Busia, 1951; Odotei, 2006). They come to the Council as of right and are independent of the chief. The members of the Council normally support the chief to rule. Indeed, in all cases, chiefs rule or govern their societies with the assistance of the Council of Elders who for the most part also occupy their positions by virtue of their family or clan origins and status (Arhin, 1985; Arhin, 2002).

It is worth emphasizing that this mechanism ensures that the chief does not rule arbitrarily. Although the chief has the final word, he does not wield absolute powers (Arhin, 1985; Odotei, 2006). He is bound to consult very regularly, and decisions are reached by consensus without formal votes (ibid). If a chief abuses his position, the Council members will take a bold stand against him.

To disregard an advice from the Council of Elders is, indeed, a ground for removal of the chief (Busia, 1954; Arhin, 1985).

However, Ghana's current constitutional arrangements give the President the powers to appoint either directly or indirectly some members of the Council of State. It is also possible for the President to influence the selection of the other members of the Council from the regions. Most invariably, the President ends up appointing or having an influence over the appointment of almost all members of the Council of State.<sup>8</sup> Indeed, there are three categories of members of the Council appointed by the President as follows:

- Ten (10) People elected from the Regions by the various Metropolitan, Municipal and District Assemblies (MMDAs). Even though the President cannot override this process, he has enormous influence in determining who is elected by the various MMDAs in view of his direct appointment and control over the chief executives who head the MMDAs.
- Four (4) persons who come through institutional representation – one former Chief Justice; one former Chief of Defense Staff (CDS); one former Inspector-General of Police (IGP) and President of the House of Chiefs. Here too, the President may have a choice if more than one former occupant is alive.
- Eleven (11) other persons to serve as members of the Council, who are directly appointed by the President.

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<sup>8</sup> See article 89 clauses 2 to 4 of Ghana's 1992 Constitution

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This power of appointment of members of the Council of State by the President seems alien to the Ghanaian culture as no chief selects/appoints members of his Council. They are sub-chiefs who come as of right. This results in a countervailing authority and avoids despotism (Oquaye, 2014). Therefore, the appointment of members of the Council of State by the President certainly undermines the independence of the Council of State and renders it deficient in delivering on its mandate in a manner akin to what pertains in the traditional setting where members owe their office as of right.

The second issue relates to the mandate of the Council which is presently purely advisory and with regards to the President only. Unlike what pertains in the traditional setting, the President is not bound to follow the advice of the Council of State. The Council of State does not also play any role in the day-to-day administration of the state as the Council of Elders do in the traditional political setting. Article 90(1) of the 1992 Constitution provides: “A bill which has been published in the Gazette or passed by Parliament shall be considered by the Council of State if the President so requests”. The Committee of Experts provided differently and more broadly under section 4(1) as follows: A bill which has been published in the Gazette or passed by Parliament shall be considered by the Council of State –

- (a) If the President requests;
- (b) If the chairman of the Council of State determines;
- (c) If no less than five members of the Council of State so demand; or
- (d) If the bill was passed under a certificate of urgency.

Unfortunately, this was not captured in the 1992

Constitution. The Committee of Experts also provided for a Judicial Committee of the Council of State akin to the Privy Council in the U.K. Five eminent Judges who are qualified to be Supreme Court Judges under the Constitution and four other experts will be invited to assist the Council of State in a variety of ways and assume membership by dint of their expertise. Among other things, they will assist in determining the constitutionality of a bill, any important measure proposed by the Executive, any appointment or vital issue of State whatsoever. Unfortunately, this was also watered-down in the 1992 Constitution in a manner that has rendered the Council of State a pliable tool in the hands of the President (Oquaye, 2014).

The third issue of relevance is the term of office of the Council of State. Members of the traditional Council of Elders hold their office so long as they live. They are already in the chief’s palace before the chief is installed and they remain when the chief is no more. However, by article (89) (6) of the 1992 Constitution of Ghana, the appointment of a Member of the Council of State can be terminated by the President with the prior approval of Parliament. In the view of Oquaye (2004), this is enough to tame an independent mind because any person can be removed by a President since the President can easily obtain a majority through his/her majority party in Parliament.

### **Effectiveness of the Council of State**

Given the above challenges, the ineffective role of the Council of State in bridling the powers of the executive and checking WTA politics is clear. Indeed, in the IEA-WTA public consultations held in 2014, as well as the Constitution Review Commission’s Report (2011), the Council was variously described by a cross-section of Ghanaians as *“superfluous”* *“toothless bull dog”* *“unnecessary”* *“wasteful charge on public expenditure”* *“too much attached to the President”*, *“not capable of*



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***giving independent or meaningful advise***”. It was in demonstration of the lack of confidence in the Council of State that many well-meaning Ghanaians called on the President to broaden consultations beyond the Council of State in appointing a new chairperson of the Electoral Commission in June 2015 following the retirement of Dr. Kwadwo Afari-Gyan, the chairman of the Electoral Commission.<sup>9</sup> Indeed, civil society organizations such as the Institute of Economic Affairs (IEA-Ghana), Ghana Centre for Democratic Development (CDD-Ghana), Institute for Democratic Governance (IDEG) and other seasoned statesmen including the national chairmen of the four main political parties with representation in parliament were unanimous in calling on the President not to only rely only on the advice of the Council of State (which he is not bound to follow) but to also consult key stakeholders in Ghana’s democracy to promote inclusive politics and ensure easy acceptance of the appointee.

These calls arose as a result of the dent on the mandate, credibility and effectiveness of the Council of State. Professors Daniel Adzei-Bekoe and Kofi Nyidevu Awoonor, former Chairmen of the Council of State during the administration of the respective regimes of Kufuor and Atta Mills recounted their frustrations as chairs of the Council at one point in time or the other. Whiles Kofi Awoonor lamented the appointment of party faithfuls and sycophants to the Council in a manner that compromised their sense of objectivity and complained about the presidency

not being easily accessible to the Council<sup>10</sup>, Adzei-Bekoe noted that “...the Council has really no powers. Even though the President is obliged to consult us on certain appointments, he was not bound to take our advice...”<sup>11</sup> The comments from these eminent statesmen speak volumes about the ineffectiveness of the Council and reinforce the Akan adage that “when the toad comes from the sea to tell you the crocodile is dead, you don’t challenge it”.

## **Recommendations**

In addressing the weaknesses of the Council of State, some Ghanaians including the IEA-WTA Advisory Committee have recommended the need for the Council of State to be transformed into a Second Chamber of Parliament with oversight responsibilities beyond their current advisory role. However, there are clear cut conditions that countries must satisfy in order to opt for bicameralism.<sup>12</sup> The two most important of these conditions include the size of a country’s population and the nature (homogenous/heterogeneous) of the population (O’Neill, 2006; Ball and Peters, 2005; Chazan, 1982). In terms of size, Ghana is a relatively small country of just about 25 million people compared to countries like Nigeria, the United States (US) and other populous countries that have Second Chambers. In addition, research and empirical studies on the nature of Ghana’s population point to a fairly homogenous population compared to the heterogeneous nature of the Nigerian, United Kingdom (UK) or US population. In other words,

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9 See more details here: <http://www.graphic.com.gh/news/politics/appointment-of-new-ec-boss-broad-stakeholder-consultation-is-in-our-enlightened-interest.html>

10 Author interviewed Prof Kofi Awoonor on 11<sup>th</sup> September 2011 in Accra.

11 Interview with Prof Daniel Adzei-Bekoe on 23<sup>rd</sup> September 2015 in Accra.

12 A bicameral legislature is a Two-Housed Legislature, divided into a Lower House or First Chamber and an Upper House or Second Chamber.

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even though Ghanaians seem to be polarized, the population is homogenous. There are about 92 ethnic groups in with the major ones being the Akan (49.1%), Ga-Adangbe (8.0%), Ewe (12.7%), Grunsi (2.8%), Guan (4.4%), Gurma, (3.9%), Mande-Busanga, (1.1%) and Mole Dagbani (16.5%).<sup>13</sup> The ethnic diversity of the country has nevertheless not seriously dented and compromised the homogenous nature of its population (Frimpong, 2006; Handelma, 2006). Furthermore, in spite of the fact that recently ethnic-voting seems to be rearing its ugly head in voting patterns, the kind of divisive ethnic cleavages and divisions in the population of the magnitude that warrants the adoption of a Second Chamber has not been witnessed in Ghana today (Shillington, 1992; Chazan, 1982; Frimpong, 2006). It is even more significant to note that even though Nigeria's population is heterogeneous with over 250 ethnic groups<sup>14</sup>, the country's adoption of a Second Chamber has not solved the fragmentation and feeling of marginalization by some ethnic minorities (Handelma, 2006). In this regard, for Ghana to transform its Council of State into a Second Chamber as a solution to WTA politics may be simplistic.

To give more teeth to Ghana's Council of State the following proposals may be helpful when considered:

## Functions

First, the entire architecture captured in the 1992 Constitution should be reframed in line with the recommendation of the Committee of Experts which drafted the Constitution. Article 89 (1) of the 1992 Constitution says: "There shall be

a Council of State to counsel the President in the performance of his functions". By Section 3(1) under Council of State, the Committee of Experts provided: "The Council of State shall aid and counsel the President, the Council of Ministers, Parliament and other organs of State in the performance of their functions under this Constitution or under any other law".

The Council of State should be free to operate and advise all State bodies. Hence, Article 92 (8) should be amended. It reads: "The Council of State may, with the approval of the President, commission experts and consultants to advise it or assist it in dealing with any specific issue". In the view of Oquaye (2014), this is tragic as it makes it difficult for the Council to investigate any controversial application of public funds and corruption associated with the President or his ministers. The question is, will the President approve such a request? The Council should be empowered to independently engage experts to help it arrive at "scientific" conclusions in all its investigations. The Council of State should be strengthened to become so inquisitorial that it can even advocate impeachment process against the President where necessary.

Another anomaly, as pointed out earlier, is found in Article 90(1) of the Constitution: "A bill which has been published in the Gazette or passed by Parliament shall be considered by the Council of State if the President so requests". This was not what the Committee of Experts recommended. Indeed, under section 4(1) of the Committee's recommendations, it was noted: A bill which has been published in the Gazette or passed by Parliament shall be considered by the Council of

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<sup>13</sup> Ghana Statistical Service Report (2000)

<sup>14</sup> Nigeria, Africa's most populous country, has more than 250 ethnic groups. The most populous and politically influential ones are the: Hausa and Fulani 29%, Yoruba 21%, Igbo 18%, Ijaw 10%, Kanuri 4%, Ibibio 3.5%, and Tiv 2.5%. See more details at <http://start.csail.mit.edu/startfarm.cgi?query=How+many+ethnic+groups+exist+in+Nigeria>.

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State –

- (a) If the President requests;
- (b) If the chairman of the Council of State determines;
- (c) If no less than five members of the Council of State so demand; or
- (d) If the bill was passed under a certificate of urgency.

Ghana must opt for this to strengthen the Council of State. Again, the Judicial Committee provided for by the Committee of Experts to assist the Council of State in *inter alia*, determining the constitutionality of a bill, may be reintroduced in the 1992 Constitution in order to make the Council more useful in countering the exercise of power in a WTA regime.

## Composition

Secondly, in terms of composition the Committee of Experts provided for “all former Presidents able and willing to act as members of the Council of State”. President Rawlings rejected this because he did not want former President Hilla Limann to be a member of the Council (Shillington, 1992, Oquaye, 2014). However, the era of personal idiosyncrasies should be over and as a people, we should include former Presidents and Vice Presidents on the Council except those who left office on impeachment. The Constitution Review Commission (CRC) recommended the number of appointees by the President to the Council of State to be reduced from eleven to five and make more room for institutional representation (CRC Report, 2011). This is problematic because in the traditional setting where the idea of Council of State was borrowed, no chief has a hand in

the selection of his Council of Elders (Oquaye, 2013). The government, however, rejected the CRC recommendation on the grounds that “...the President must have a significant say on who can best counsel him...” (Republic of Ghana, 2012: 16). Even though the government in its White Paper rejected the CRC proposal for an increase in institutional representation on the Council of State, the IEA Winner-Takes-All Advisory Committee following its nation-wide public consultations on the WTA politics recommended that membership of the Council of State should emphasize institutional representation without a single nomination from any serving President. Mike Oquaye’s (2013) list of institutional representation may provide some useful guidance:

- (i) Every former Chief Justice;
- (ii) Every former Chief of Defense Staff or General Officer Commanding the Armed Forces;
- (iii) Every former Inspector General of Police;
- (iv) Every former Governor of the Bank of Ghana;
- (v) Every former Speaker and Deputy Speaker;
- (vi) Every Former Majority and Minority Leader of Parliament;
- (vii) Every Former Auditor-General;
- (viii) The Secretary General of TUC;
- (ix) 10 chiefs, each from the 10 Regional Houses of Chiefs;



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- (x) 10 women, nominated by the Regional Queen mothers, though nominees need not be Queen mothers; and
  - (xi) Representatives of identified Civil Society groups - The Christian Council, The Catholic Secretariat, The Muslim Council, the Ghana Bar Association/ Professional Bodies Association, the Ghana Journalists Association, Women Groups, Student Groups, TUC, Association of Ghana Industries etc.

## Tenure

Furthermore, the term of office of members of the Council should be six years and separate from that of the President. By Article 89 (6), the appointment of a Member of the Council can be terminated by the President with the prior approval of Parliament. As argued earlier, this is enough to tame an independent mind because any person can be removed by a President since the President can easily obtain a majority through his/her majority party in Parliament. It is recommended that once a person is brought to the Council by an institution, only that body can recall the member by a prescribed method devoid of political manipulation.

## Publication of Annual Reports

The Council of State must regularly publish Annual Report of its activities as done by the Council in 1979 under the chairmanship of William Ofori-Atta. This would create awareness of the work of the Council and build the needed trust, respect as well as public confidence in the Council.

## Conclusion

Ghana's current Council of State is deficient in serving as a countervailing authority to the powers of the executive president. In this regard, the president continues to wield extensive powers and control over all state apparatus and institutions of restraint including the Council of State itself. A way should certainly be found to promote the independence of the Council of State and ensure that even if its advice would not be binding on the executive president, such advice may not be easily ignored by the latter. Indeed, to be able to fortify the Council to deliver on its mandate effectively, policy makers should consider returning to the well-thought through proposals on the Council of State by the Committee of Experts which drafted Ghana's 1992 Constitution. Again, policy makers should rethink the possibility of boosting the effectiveness of the Council of State by drawing on the provisions of the 1979 Constitution with respect to the Council of State. These recommendations would help strengthen the Council and enable it deliver on its mandate in a manner that checks the excesses of the executive and reduces the WTA politics.

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1 Ransford Gyampo is an Associate Professor, Department of Political Science of the University of Ghana. He is also a Research Fellow at the Governance Unit of The Institute of Economic Affairs.



