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ANALYSIS OF THE PROPOSED AMENDMENTS TO THE CONSTITUTION

by

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Part Two

This issue of Legislative Alert reviews the remaining clauses of the proposed amendments.

1. Dual citizenship
2. Vacancies in the membership of parliament
3. The compulsory retirement age of Public Servants
4. Chairmanship of the Police Council, Prison Service Council and the Armed Forces Council.
5. Participation of Chiefs in Politics
6. The definition of a Minister
7. The Exercise of discretionary power.

1. Dual Citizenship

This was a subject which was debated fully in the Consultative Assembly. The reason for proposing an amendment to permit dual citizenship are stated in the memorandum of the Bill as follows:

"Following the numerous petitions to government on the issue of dual citizenship, particularly from Ghanaians resident outside the country, coupled with the known sizeable contribution towards national development made by these Ghanaians, government considers it appropriate that the constitutional provision which prohibits dual citizenship for Ghanaians should be repealed"

I do not find these vague reasons convincing. How numerous are the petitions which have come from

Ghanaians resident outside the country? What is the extent of the known sizeable contributions made by these Ghanaians towards national development? What form has the contribution taken? If it has been in the form of remittances to parents and relatives dual citizen is not a necessary prerequisite. If it is in the form of capital investment what is the evidence of its size. If foreigners who are not even of Ghanaian origin can invest in Ghana what stops Ghanaians who have become citizens of another country from investing in Ghana? The truth is that Ghanaians who are for the most part resident abroad and have acquired citizenship of the countries in which they live resent being treated as aliens when they come to Ghana which they still consider their home. To permit dual citizenship will not benefit the country as a whole but a relatively small number of individuals.

An important question to be considered is how this amendment will affect aliens who wish to acquire Ghanaian citizenship in addition to their existing citizenship. Does it mean that an alien who wishes to acquire Ghanaian citizenship will not need to renounce his previous citizenship. I do not see the need for this amendment. I think the benefits of it to the country are exaggerated. We must not forget that a Ghanaian who voluntarily acquires the citizenship of another country and there by ceases to be a Ghanaian can

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always regain his Ghanaian citizenship by renouncing the alien citizenship he took on.

2. Vacancies in Membership of Parliament

The rationale for this amendment as stated in the memorandum is thus stated: *"It is considered that when the vacancy is occasioned by the death of a member, a respectable interval of time ought to elapse before the holding of the by-election. Clause (5) of Article 112 is being therefore replaced to permit the holding of any such by-election within sixty days after the death. For practical reasons, the clerk can only inform the Electoral Commission when he becomes aware of the occurrence of the vacancy"*.

This amendment presumably takes notice of the tendency in recent times to delay the burial of persons for several weeks. There have been three by-elections since the present Parliament came into being. These appear to have gone without serious hitches. There is no compelling reason for this amendment now although it is really harmless.

3. Compulsory retirement age for Public Service

"The Constitution provides in Article 199 (1) for the compulsory retirement of public officers at age sixty, unless otherwise provided in the Constitution. The provision was made, amongst other reasons, to ensure that other officers also have the opportunity to move to the top whilst they are still relatively young and in good health. The provision is laudable. However, the realities of the situation is that often, some units of the service can ill-afford to dispense with services of some retiring officers who have specific expertise. The reasons and the need to keep on a retiring officer in any particular area of the public services for a limited period are varied, suffice it to say that many real cases have occurred which justify the modification of the mandatory provision. A new clause (4) is therefore being inserted to make the modification. The limited engagement should not in any event exceed a total of five years".

I do not think that there can be any argument that a time must come when persons in the public service must retire. There are good reasons for this. In the first place old age with its infirmities necessarily reduces effectiveness and productivity of the vast majority of persons. The exceptional few who main-

tain a measure of intellectual and bodily vigour into old age should not be used as the rationale for such an amendment. The reasoning in the memorandum gives the impression that some individual persons may be indispensable in certain public positions. No one is indispensable. After all if a person dies he is readily replaced and life goes on and the affairs of state do not cease.

An even more important argument against the amendment is that it blocks the way of advancement for the younger generation. At a time when unemployment is a serious problem among the younger generation it is surely not in the public interest to allow those who have had a full career in the public service to hang on by giving them contracts when they reach the age of retirement. If a person has retired let it be so. Let those in line to take his place do so. Open opportunities for advancement for those already in the service and places for new entrants. There is no need to extend the retiring age by any artifice. Those who have special skills and experiences can take them into the private sector. The younger generation should not be left frustrated and unemployed because persons who have had their day do not want to go away.

4. Chairmanship of the Police Council, Prison Service Council and the Armed Forces Council

This amendment is obviously directly motivated by the conflict between the incumbent President and his Vice-President. The reasons as stated in the memorandum cannot conceal this fact. To quote *"These clauses seek to amend the Police Council, the Prisons service Council and the Armed forces Council in paragraph (a) of articles 201, 206 and 211 respectively, to enable the President appoint the chairmen of the said councils in accordance with the proposed amendments. Under the existing provisions, the Chairman of each of these Councils is the Vice-President. It is the considered view of government that, the President as the chief executive should be enabled to determine in consultation with others who should best chair these vital bodies. The amendment here is that the Chairmen of the Police and Prisons Councils shall be appointed by the President in consultation with the Council of State and the Armed Forces Council should be chaired by the President or his nominee"*.

What is over looked in proposing this amendment is that the Vice President is a potential President and

that in day to day constitutional practice he should in many areas be the President's alter ego. The Vice-President is not described as the President's "running mate" for nothing. It is expected that the President and the Vice president should work closely and in harmony. This is the reason why a Presidential candidate is given the prerogative of choosing and naming the person who should be his running mate. Political prudence would suggest that a presidential candidate should choose a person with whom he has close political affinity and personal rapport. A candidate who names as his running mate a person who is not a member of his own political party and has no personal commitment to him is bound to have the clash of principles and personalities which we have witnessed with the incumbent President and Vice-President.

The Constitution is not to blame for the President/Vice President crisis. The crisis is the result of political miscalculation and the incompatibility between the two personalities. There is no good reason whatever for making this amendment which many will see as being made to spite the present Vice President. The reality is that the present incumbent will not hold office forever. In the next elections the incumbent President if he seeks re-election need not choose the same person again as his running mate. He would certainly, I am sure have realized the importance of making the right choice. Why amend the Constitution because of a problem which could be solved automatically by the election?

5. Participation of Chiefs in Politics

The memorandum has this to say on this subject. *"This clause repeals partially the prohibition on the non participation of chiefs in party politics. The government is of the view that the extent of the exclusive as now exists under article 276 of the constitution is unduly wide, bearing in mind the fact that a chief is not a full time public officer whose active participation in politics in any form could compromise his duties to the government of the day."*

Chieftaincy is one of the special indigenous institutions of Ghana. Our chiefs have ceased to be the "kings" of history. They do not wield any executive or legislative powers, nevertheless they have considerable influence and command respect and even reverence among Ghanaians who appreciate tradition. The

chief whether he is a "big" chief or a "small chief" should not get involved in partisan politics. If a chief dabbles in partisan politics he will be treated like a politician and this may undermine not only his position but ultimately the institution of chieftaincy.

One may hoot at a politician. Politicians see all this as an occupational risk. You cannot do the same to a chief unless you are destooling him. Our chiefs should keep out of politics. The issue is not whether a chief is a public officer whose active participation in politics in any form could compromise his duties to the government of the day. The important issue is that active participation by a chief in politics in any form will certainly compromise his duties to the stool he occupies and the persons who owe allegiance to the stool and to whom he has sworn the customary oath on his enstoolment. The subjects of a stool cannot in a multiparty democracy, all belong to the same party. If the occupant of the stool becomes an active politician he cannot belong to all the parties. If he chooses one of them he is creating division among his people. We must never think, in this context, of the obligations of a chief to the government of the day but rather of his obligations to his stool and his people. If we do, then we must necessarily conclude that the chief is better out of active politics than in it. Active politics can only mean partisan politics as a member of a political party.

6. The Definition of a Minister

This amendment seeks to amend the definition of Minister in Article 295 of the Constitution. The proposal is based on a technicality of doubtful validity. Article 295 defines minister as minister appointed under article 78 or 256 of this Constitution. The argument is that Article 256 in the memorandum covers both the Regional and Deputy Minister therefore by necessary inference a Deputy Regional Minister is a Minister whereas in the case of central government the Minister and the Deputy Minister are dealt with under different articles i.e Article 78 and Article 79. Since Article 79 is not referred to in Art 295 it means that a Deputy Minister of Central government is not a minister whereas a Regional Deputy Minister is a Minister. A careful reading of the relevant article shows that this reasoning is fallacious. Article 78(1) provides for the appointment of Ministers of State. Article 79 provides for the appointment of Deputy

Ministers. Article 256 (1) provides for the appointment of a Minister of State for a region and 256 (2) for the appointment of a Deputy Minister for each region. It is quite clear that the word Minister as defined in Article 295 is meant to cover a Minister of State. The reference in Article 295 to Article 256 is obviously to Article 256(1) which provides for the appointment of a Minister of State for a region. It does not and would not include Art. 256(2). In effect Art. 79 and 256(2) are the same. What this amendment seeks to do is to abolish the distinction between a Minister of State and a Deputy Minister. This is unnecessary and will create confusion. A Deputy Minister is not a Minister of State.

II. Exercise of Discretionary Powers

The reason for this amendment is that Article 296 (c) is "superfluous" because there is extensive common law jurisprudence on exercising discretionary powers. What Article 296 (c) seeks to establish is to provide some precise guidelines by way of statutory instrument for the exercise of discretionary powers by non judicial officers. These non judicial officers would not be expected to be familiar with the extensive common law jurisprudence on the exercise of discretionary power. The blunt assertion is made in the memorandum that the numerous areas where discretionary powers by non judicial officers should be governed by statutory instruments has proved impracticable since its introduction in this country. No examples have been given and no reason or explanation provided why this has proved impracticable. Is it not better for non judicial officers to have clearly stated guidelines than to leave them to fall into error and be challenged. Such challenges must obviously take the form of court action and will fuel litigation which could well be avoided.

Article 296 (c) is not superfluous. It is necessary. I do not see anything impracticable about making constitutional or statutory instruments to guide non judicial officers.

There is one final observation I must make. The Bill proposing amendments to the Constitution was published in the Gazette of 28th February 1996. Article 291 (1) of the Constitution provides;

1. A bill to amend a provision of this Constitution which is not an entrenched provision shall not be introduced into Parliament unless:
 - a. It has been published twice in the Gazette with the second publication being made at least three months after the first.
 - b. At least ten days have passed after the second publication.

The proponents of an amendment need do no more than comply with these provisions in the matter of giving publicity to the amendment. It is common knowledge that very few people read the Gazette. Indeed it is often difficult if not impossible to procure copies. We have therefore the disturbing situation in which the Bill to amend the Constitution has been published in the Gazette as required by the constitution but very few people know about. I believe that a vigorous and extensive public debate must be generated about these amendments otherwise they will be passed by Parliament as a mere formality. So far the media and even the political parties do not appear to have paid any serious attention to the proposed amendments so as to educate the public as to their implication. I hope that this serious lapse will promptly be corrected.

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