IN THE SUPERIOR OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: WOOD (MRS), CJ PRESIDING
DOTSE, JSC
YEBOAH, JSC
BONNIE, JSC
GBADEGBE, JSC
BENIN, JSC
AKAMBA, JSC

WRIT NO: J1/15/2015
14TH OCTOBER, 2015

PROFESSOR STEPHEN KWAKU ASARE …… PLAINTIFF
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VRS

THE ATTORNEY-GENERAL …… DEFENDANT
MINISTRY OF JUSTICE
ACCRA

JUDGMENT

WOOD (MRS), CJ:

These are the reasons for my decisions dated 15th of October 2015. Under the new order of constitutional democracy in Ghana, the 1992, the Constitution, in conformity with the cardinal democratic principle of separated powers of government, has vested the legislative authority in Parliament. A Constitution is not meant to be static. It is a living political document capable of growth. Consequently, the framers of the Constitution, under Chapter 25, have designed a process, albeit an arduous and stringent process, by which necessary amendments to it may be effected.

The rigorous processes and procedures provide the safeguards needed to check and prevent arbitrariness and abuse. Of particular significance is the article 289, clause (1) which stipulates that:

"Subject to the provisions of the Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.

289 (2) provides:

"This Constitution shall not be amended by an Act of Parliament or altered directly or indirectly unless-

(a) the sole purpose of the Act is to amend this Constitution

and

(b) the Act has been passed in accordance with this Chapter.

The Chapter 25entrenched provisions of the 1992 Constitution, thus sanctions alteration of constitutional provisions effected in strict conformance, with the Chapter 25, titled “Amendment of the Constitution”, that is, the processes and procedures carefully circumscribed under it.

The legitimate question is what triggered this instant constitutional litigation? Invoking the powers invested in him pursuant to article 289 of the 1992 Constitution, the President set up a ten member Constitution Review Commission (CRC), under the Constitution Review Commission of Inquiry Instrument, 2010, C.I. 64. The CRC was mandated to do the following:

a. To ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution;

b. To articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and

c. To make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

In June 2012, the Government issued a white paper on the report of the CRC, in which most, if not all of the recommendations were accepted by the President.

In October 2012, the Government set up yet another body, a five-member Constitution Review and Implementation Committee (CRIC), which according to the Plaintiff's statement of case was, "to implement, in strict compliance with chapter 25 of the Constitution on "Amendments to the Constitution," the recommendations that have been accepted by Government.

The CRIC is said to have taken a number of actions, fuller details which will shortly be set out, and which in the view of the Plaintiff are clearly inconsistent with Parliament's role as the legislative authority exclusively vested with power to effect constitutional amendments.

In this action, which invokes the original jurisdiction of this court, pursuant to articles 2(1) (b) and 130 (1) of the 1992 Constitution, the Plaintiff, questions the constitutionality of these Executive branch sponsored activities, and prays for the following reliefs:

"1 A Declaration that the Constitution Review Commission of Inquiry Instrument, 2010, C.I. 64 is null, void and of no effect as it contravenes the letter and spirit of Article 289(1) of the 1992 Constitution, in that the

effect, if not the intended purpose, of C.I. 64 is to usurp powers that the 1992 Constitution expressly, exclusively and specifically conferred to Parliament.

2A Declaration that the powers granted to the President under Article 278(1) to "appoint a commission of inquiry into any matter of public interest" does not include the power to establish a commission to review and propose amendment bills to the Constitution where such powers to review and propose amendment bills to the Constitution have been expressly, exclusively and specifically conferred to Parliament.

3A declaration that Article 278(1) does not grant the President an all-purpose commissioning power but only gives him the power to commission an independent inquiry to investigate and establish the truth relating to an entity's affairs, activities or some specific occurrence that is in the public interest.

5A declaration that the Constitution Review Implementation Committee (CRIC) set up by the President to finalize amendment bills for both the entrenched and non-entrenched provisions is alien to the Constitution and any and all of its activities directed at finalizing amendment bills that touch on any and all aspects of the Constitution, whether entrenched

or non-entrenched, are unlawful, unconstitutional, impermissible, null, void and of no effect.

5A declaration that the 1992 Constitution can be amended only in accordance with the express provisions of Chapter 25 of the Constitution and that the President's role in any such constitutional amendments is limited to the ministerial tasks stipulated in Article 290(6), 291(4) and 292(a).

5 A declaration that Parliament's power to amend the Constitution as stipulated in Article 289(1) is plenary and exclusive.

6 A declaration that Parliament's power to amend the Constitution as stipulated in Article 289(1) cannot be delegated to or usurped by the President.

7 An order directing the President, the Chairman and Members of the Constitution Review Commission (CRC), the Chairman and Members of the CRIC, the Attorney General, their deputies, agents, or employees or any other servant or agent of the Republic to permanently cease and desist from taking any actions that seek to amend or otherwise disturb the Constitution in so far as such actions are inconsistent with Chapter 25 of the Constitution."

It bears emphasis that it is these facts, as disclosed per the Plaintiff's pleadings, filed pursuant to rule 46 of the Supreme Court Rules, C.I.16,which provoked the issue of this writ. Tritely, they constitute the factson which this action is predicated, not additional new facts that Plaintiff may have alluded to in his legal arguments. Those substantial and relevant facts on which the Plaintiff's action is grounded include the following:

1. "Pursuant to the instructions from the President, the CRIC has issued a draft bill for the amendment of 34 entrenched provisions of the Constitution. In addition, the draft bill will introduce 7 new entrenched provisions along with consequential and transitional provisions.

2. According to the unelected Chairman of the CRIC, Ghanaians must decide in a referendum by voting either "Yes" or "No" on all changes to the 34 entrenched provisions and the addition of the 7 entrenched provisions rather than vote on each proposed amendment.- views, nothing more as the referendum must be conducted / organised by EC, not the CRIC

3. The CRIC has also announced the preparation of the Armed Forces Amendment Bill and has proposed amendments to several non-entrenched provisions on matters ranging from the abolition of regional tribunals, election of district chief executives from a slate of candidates

provided by the President and revision to the retirement age subject to the exigencies of a particular profession."

The Plaintiff's writ and pleadings demonstrate that he has two broad complaints against the Defendant. This action thus raises two main issues for consideration, namely, the issues (i) and (iii) of his memorandum of issues, details of which I will provide in due course. Other subsidiary questions flow from these two central issues, but, as may be clearly gathered from the summary of his pleadings, which is neatly captured under the concluding paragraph 30 of the verified statement of case; his main grievances are two- fold. The essential parts of his pleadings, from which this conclusion is drawn, is captured in the following paragraphs of his legal arguments:

15"The Plaintiff's case is that the President's article 278(1)(a) powers to appoint commissions of inquiry do not extend to setting up commissions to review the Constitution or to make such breathtaking changes to the Constitution…

20 The plaintiff's case is that the power to amend the Constitution conferred to Parliament in Article 289(1) is plenary and exclusive in that the Article separately identifies, defines and completely vests the

amendment power in Parliament and only Parliament. That authority can neither be delegated to nor usurped by the President.

21 The plaintiff says that consistent with Article 297(c) the power vested in Parliament to amend the Constitution under Article 289(1) includes any and all incidental powers necessary for the accomplishment of the express power so conferred, including but not limited to the power to initiate amendment bills, hold hearings in committee, pass legislation to guide any review or reform of the Constitution or to deploy such other methods or processes as Parliament may deem necessary that are not inconsistent with the Constitution…

25 The plaintiff's case is that it is impermissible for the President to misappropriate his Article 278(1) powers to undo the carefully designed amendment architecture in chapter 25 of the Constitution…

26 The plaintiff's case is that not having the powers to set up a commission to review the Constitution, the President's purported appointment of the CRC and the CRIC are of no legal effect and any actions ensuing from the CRC and CRIC are also null, void, unlawful and unconstitutional…

30 In brief, the Plaintiff's case is that the Constitution can only be amended by its terms. Parliament is the sole body that can initiate, consider and propose amendments to the Constitution. Parliament's power to amend the Constitution is not only plenary and exclusive but also cannot be delegated to or usurped by the President, the Commission (CRC) or the Committee (CRIC). ...The President has no power to set up a commission to initiate amendments or draft amendment bills to the Constitution… To the extent that the President has usurped Parliamentary powers and misappropriated Article 278(1) to traverse the amendment architecture emplaced by Chapter 25 of the Constitution, it is the Plaintiff's case that C.I. 64 setting up the Constitution Review Commission, all actions taken by the Commission, the establishment of the Constitution Review and Implementation Committee and all its actions are unlawful, unconstitutional, impermissible, null, void and of no effect."

The parties identified and separately filed the following memorandum of issues for determination.

PLAINTIFF'S MEMORANDUM OF ISSUES

i) Whether the power granted to the President under Article 278(1) to "appoint a commission of inquiry into any

matter of public interest" includes the power to establish a commission of inquiry to review and propose amendment bills to the Constitution where the power to review and propose amendment bills to the Constitution has been expressly, exclusively and specifically conferred to Parliament?

ii) Whether the President has any power under the Constitution to set up a Constitution Review Implementation Committee (CRIC) with the mandate to implement, in strict compliance with Chapter 25 of the Constitution, the recommendations of the Constituition Review Committee (CRC) that have been accepted by the government?

iii) Whether Parliament's power to amend the Constitution in conformance with the processes stipulated by chapter 25 of the Constitution is plenary and exclusive and therefore cannot be usurped by or even delegated to the President?

iv) Whether processes and procedures not explicitly specified by the Constitution, including wholesale review of the

Constitution, can be used to amend the 1992 Constitution?

v) Whether the President's role in any such constitutional amendments is limited to the ministerial tasks stipulated in Article 290(6), 291(4) and 292(a)?

DEFENDANT'S MEMORANDUM OF ISSUES

1. Whether the Constitution Review Commission of Enquiry Instrument, 2010 C. I. 64 contravenes the letter and spirit of article 289 (1) of the 1992 Constitution and therefore must be declared as null and void.

2. Whether under article 278(1) of the Constitution, 1992, the President has the power to establish a commission to review and propose amendments bills to the Constitution.

3. Whether or not the Constitution Review Implementation Committee and all its activities relating to finalizing amendment bills for the Constitution are impermissible, unlawful, unconstitutional and null and void.

4. Whether Parliament is the only intuition that can amend the constitution.

I start off with what perhaps appears to be the one non- controversial and thus narrow point of convergence between the parties. It accurately reflects the correct constitutional position under our system of democratic governance. It is this: the 1992 Constitution vests the legislative power of government in Parliament. Thus, in conformity with the well-known doctrine of separation of powers, among the three separate and yet inter-dependent organs of State, Parliament is the repository of legislative authority. This means that the core legislative function, namely, the actual implementation of the mechanics, namely, the processes and procedures for carrying through, and effectuating and bringing into being legislation, including constitutional amendments, as envisaged under Chapter 25, is vested in Parliament.

The Chapter 25, titled “Amendment of the Constitution”, thus lays down the detailed framework for constitutional amendment as noted. It is the true and proper interpretation to be placed on the Chapter 25, within the context of other constitutional provisions, viz a viz the impugned actions of the President, that sharply divides the parties.

It is the case of the Plaintiff that this Chapter 25“amendment architecture”, implies that the initiation, collating of views, forming proposals, indeed every single activity that could kick-start Parliament’s

core legislative function of closely following the constitutional processes and procedures outlined, to effect a valid constitutional amendment, is also the exclusive preserve of Parliament. Amending a constitution is not an event, but a whole process, which may include, information gathering, discussions among various interest and stakeholder groups, public engagement, coalition and consensus building, legitimate grassroots or direct lobbying, and advocacy efforts, formulating draft amendment bills etc. These are included in activities that I would for the sake of brevity describe as the pre- amendment or pre-legislative activities, or to some extent, frontend activities going by the Plaintiff's labeling of such core pre-legislative amendment function.

The Plaintiff argues that the frontend activities are exclusively vested in Parliament and consequently the President lacks constitutional authority to collate views from the citizenry, make proposals to Parliament for constitutional amendment, as he sought to do through the activities of the CRC and the CRIC and in any event, has no power to stampede Parliament into amending the Constitution in the manner he sought to do.

DETERMINATION

I propose to deal first with the issue relating to the exclusive vesting of the pre-legislative function in Parliament. The issue is whether or not the

fact that, legislative authority is vested in Parliament- based on the separation of powers doctrine, implies that the authority to engage in pre- legislative or frontend activities, which activities may include initiating proposals for constitutional amendment, is plenary and exclusively vested in the legislature. I re-produce issue (iii) of the Plaintiff's memorandum of issues, which is not substantially different from Defendant's version as captured under their paragraph 2, reinforcing the rationale behind the rule 46 of the Supreme Court Rules, C.CI.16, which advocates the filing of joint memorandum of issues by parties in actions to invoke the exclusive jurisdiction of this court and its utility. The centrality of the issue (iii) to the entire action does not admit of argumentation. An affirmative answer would end this entire debate, as the actions of both the CRC and CRIC would out rightly, without more, be rendered null, void and unconstitutional. It reads:

iii) "Whether Parliament's power to amend the Constitution in conformance with the processes stipulated by Chapter 25 of the Constitution is plenary and exclusive and therefore cannot be usurped by or even delegated to the President."

The Plaintiff's comprehensive legal arguments in expatiation of his case rest on three foundations. These are the (i) common law implied power

doctrine; (ii) predicate-act canon of interpretation; and (iii) the text of the 1992 Constitution.

It would be prudent to produce the relevant portions of his extensive arguments under paragraph C.

"5.Considering this carefully designed amendment architecture, it is the Plaintiff's case that the power granted to Parliament under Article 289(1) is therefore the power to propose and pass amendments to the provisions of the Constitution in the form of amendment bills. However, in the case of entrenched provisions, the power to pass an amendment bill is merely a ministerial power. It is also the plaintiff's case that the Constitution does not grant the President any constitutional role in the frontend (initiation to passage) of the amendment process. The President's sole role in the amendment process is at the backend and even here he only wields the ministerial power of assent…

5. Plaintiff further submits and emphasizes that Parliament's power to amend the Constitution does not derive from its general legislative authority under Article 93(2) but from the specific grant of authority in Article 289(1).[1]Further, Parliament has no obligation to amend the Constitution. Nor can the President, or other Constitutional bodies, conscript Parliament into amending

[1]See e.g., (State v. Cox (1848), 3 Eng. (Ark) 436, 443) where it was said that "As such, Parliament, in amending the Constitution does not act in the exercise of its ordinary legislative authority of its general powers but it possesses and acts in the character and capacity of a convention and is quoad hoc a convention expressing the supreme will of the people."

the Constitution. The power granted under Article 289(1) is the power to choose to amend or not to amend the Constitution.

7…Without doubt, Parliament's amendment power under Article 289(1) includes the power to frame constitutional changes, initiate amendment bills, hold hearings in committee, pass legislation to guide any review or reform of the Constitution or to deploy such other methods or processes as Parliament may deem necessary that are not inconsistent with the Constitution. This proposition is supported by the (i) common law implied power doctrine; (ii) predicate-act canon of interpretation; and (iii) the text of the 1992 Constitution.

8.The implied powers doctrine is a very long established constitutional law principle, which provides that the specific grant of power to a person or a body must be construed to include any and all incidental powers necessary for the accomplishment of the express power so conferred(See, McCulloch v. Maryland, 17 U.S.316 (1819); Livermore v. Waite (1894), 102 Cal. 113, 118) "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines

should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves" (McCulloch at 407).

9. Similarly, the predicate-act canon of interpretation provides that "where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.[2] Thus, this canon of interpretation will indicate that the specific and discretionary power granted to Parliament to amend the Constitution necessarily includes the power over all the steps incidental to and necessary for the amendment of the Constitution, especially the initiation of amendment bills.

10 But the Constitution of Ghana has not left the right of Parliament to employ the necessary means for the execution of its amendment power to doctrines, canons of interpretation or general reasoning. To its express grant of amendment power to Parliament in Article 289(1) is added the "necessary powers" in Article 297(c), which provides that "where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are

[2]Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 63 (1868).

necessary to enable that person or authority to do or enforce the doing of the act of thing."

11.It is Plaintiff's case that the combined effect of Article 289(1) and 297(c), the implied powers doctrine and the predicate-act canon of interpretation is that Parliament's power to amend the Constitution includesany and all the incidental powers necessary for the accomplishment of the express power so conferred, including but not limited to the power to initiate amendment bills, hold hearings in committee, pass legislation to guide any review or reform of the Constitution or to deploy such other methods or processes as Parliament may deem necessary that are not inconsistent with the Constitution…

13… Plaintiff further submits that Parliament's power to propose amendment bills to the Constitution is plenary. A plenary power or plenary authority is the separate identification, definition, and complete vesting of a power or powers or authority in a governing body or individual, to choose to act (or not to act) on a particular subject matter or area.[3]Parliament's power to propose constitutional amendment bills under Article 289(1) is plenary and exclusive in that the Article

[3]See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 10 (2002) (tracing plenary power doctrine to the 1880s).

separately identifies, defines and completely vests the amendment power in Parliament and only Parliament….

14.It is a well established constitutional principle that "the assignment of a plenary power to one body ***divests all other bodies*** from the right to exercise that power, and where not otherwise entitled; also, the right to substantively review the exercise of that power in a particular instance or in general" (see, Lone Wolf v. Hitchcock, 187 U.S.553 (1903).

15…The Constitution has vested only executive authority in the President (Article 58, 1992 Constitution). That authority extends to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution but does not include any authority to review or put in motion a machinery to amend or rewrite the Constitution.

16. Plaintiff respectfully submits that Parliament's amendment power is discretionary rather than mandatory. Parliament may amend the Constitution. This also means that Parliament may not amend the Constitution… the President cannot by executive action conscript Parliament to exercise its amendment power. It is also Plaintiff's case that the President cannot exercise any or part of the amendment powers

reserved for Parliament thereby stampeding Parliament to take actions that it would not have taken *suo moto*.

17.Given that Parliament's power to propose amendment bills to the Constitution is plenary and exclusive, Plaintiff further submits that this amendment power can neither be delegated to nor usurped by the President. In fact, plaintiff respectfully submits that Parliament's plenary power to propose amendment bills to the Constitution divests the President and all other governmental bodies or constitutional organs, including the CRC and CRIC, from the right to exercise the amendment power, or part thereof, whether by way of proposing or preparing amendment bills, implementing draft bills, whether or not it purports to be in accordance with chapter 25 of the Constitution, sending draft amendment bills to the Speaker to be forwarded to the Council of State, coordinating with the EC to prepare the country for a referendum to vote on the entrenched provisions, and all such actions that are necessary and incidental to amending the Constitution."

THE RESPONDENT'S ARGUMENTS AT LAW

These are not asdetailed as the Plaintiff's, but nonetheless clear on its face, as borne out by the written statement. They argue while Parliament, which is the body clothed with legislative authority may self-generate amendments, and carry out the pre-legislative activities,

nothing in our Constitution forbids the Executive from making legislative proposals to Parliament. The following is their brief answer to the Plaintiffs detailed arguments:

“18 It is our submission that Article 289 (1) does not confer on Parliament the exclusive mandate to amend any provision of this Constitution. It is the right of the President to constitute a Commission of Inquiry to undertake the preparatory work towards the amendments of certain parts of the Constitution, especially, when the President is satisfied that it is in the interest of the Public to do so. It is our view that the Constitution Review Commission of Inquiry was a lawful Institution so is its offshoot, the Constitution Review and Implementation Committee.

19 . It is our position that both provisions of the Constitution, Articles 278(1)(a) and 289(1) complements each other regarding the amendments of some of the provisions of the Constitution. Article 278(1)(a) of the Constitution, 1992, enable the people of Ghana to partake in the amendment process by submitting memoranda or articulating their views on some provisions of the Constitution. These pieces of information put together become the building blocks of the Bill, which initiate the amendment process. It is to be noted that the national Constitution is a framework and it cannot take care of every activity in this Country.

Provided the steps being taken are in tandem with the law, the same is lawful. The establishment of the CRIC is just one of the processes of putting up a Bill for amendment following the information gathered by the CRC."

It is trite learning that it is the legislative branch of government that makes laws. In today's modern and complex world, it is generally believed that the strictly rigid and absolute application of the separation of powers doctrine is impracticable. The difficulty confronting us in this case is that, although the article 289 of the1992 Constitution expressly vests the legislative authority to amend the Constitution exclusively in Parliament, it is silent on who is clothed with power, whether exclusively or otherwise, to engage in or undertake those frontend or pre –legislative activities that precede the actual constitutional amendment processes and procedures outlined in Chapter 25. In construing the relevant article 289 and other constitutional provisions, in a bid to unlock mind of the framers of the 1992 Constitution, I have been guided by the basic well-established constitutional principles that have influenced constitutional interpretation in this court. These include the need for a purposively broad, liberal and benevolent interpretation of the Constitution as a whole, so far as the language of the constitution would admit, having due regard to the underlying values and principles that need to be promoted to safeguarded our system of participatory

democracy, the principle that the constitution is a document sui generis, and allied to this, the principle that the constitution must be interpreted in the light of its own words, and not words found in some other written constitution. Cases which emphasise this interpretative principle include Kuenyehia v Archer [1993-94] GLR 525, at 562 Kwakye v Attorney – General [1981]GLR [1993-94] 2 GLR 35, at 63 SC and Sam (No2) v Attorney –General [2000] SCGLR at 315 and Attorney- General (No2) v Tsatsu Tsikata (No 2) [2001-2002] SCGLR620, at 639. I found these cases relevant and instructive having regard to the Plaintiff's reliance on the wording in other written constitutions, notably, the State of Florida Iran and Kenya, to press the argument that, a fortiori, the Chapter 25 be interpreted in the light of the constitutional positions that obtain in these other countries and be construed as vesting the pre-legislative or frontend activities exclusively in Parliament and no other person, group of persons or organisation. This argument if carried to its logical conclusion would exclude all other individuals, bodies, or organisation from engaging in any pre-legislative activities.

The reason why I am not minded to accept this proposition is because while the constitutions of those countries expressly delineate how and by whom these frontend activities are to be carried out, ours does not. Thus, as the Plaintiff himself confessed, the Kenyan 2010 Constitution expressly provides amendment by Parliamentary initiative per article

256, and popular initiative per article 257, in the form of a“general suggestion or a formulated draft Bill”, and again as regards the popular initiative mode, with the Constitution expressly delineating the number of registered voters who must sign a proposed amendment to qualify it for consideration or trigger the next stage of the actual amendment process. Thus, article 257 (1)-(3) of the 2010 Kenyan Constitution provides:

257(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.”

We do not have similar express provisions in our Constituion.

I do not question the validity or indeed the soundness of the theory that the framers of the Constitution are at liberty to settle on the modes of initiating amendment proposals. And also that once a mode is specified, it is that which must be complied with strictly to effect a valid amendment. The implied powers doctrine, and the related predicate-act canon are, indeed salutary constitutional principles. My difficulty with the Plaintiff’s arguments relative to these doctrines is his contention that we invoke them in relation to the Chapter 25 provisions and having

regard to what his comparative analysis of what obtains in other jurisdictions, impliedly read the exclusive vesting in Parliament of all frontend activities into the Chapter 25.These are not inflexible constitutional doctrines. Their indiscriminate and wholesale application of these doctrines to all cases under all circumstances is clearly not to be countenanced in constitutional interpretation. These are doctrines, which, like all other principles ought to be applied in the context of each given case, specifically in the context of the power conferred. Thus, I would for example, apply the implied powers doctrine strictly within the narrow compass of the Chapter 25 proper, with the result that the specific and express grant of power to Parliament to amend any provision of the Constitution, must be construed impliedly to include any and all incidental powers necessary for Parliament to effectuate all constitutional amendments in the express manner provided under Chapter 25. I would not invoke these doctrines to restrict or limit pre-legislative initiatives exclusively to Parliament alone, the reason being that the Constitution does not expressly restrict the pre –legislative activities exclusively to the legislature. A conferment of this fundamental authority on the legislature exclusively, would have justified an implied inclusion of all the necessary incidental powers.

Chief Justice Marshall explained the implied doctrine thus:

"We must never forget that it is a Constitution we are expounding." "A constitution, to contain an accurate detail of all subdivisions of which its great will power admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the human mind. It would probably never be understood by the public. Its nature, therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves" (McCulloch at 407).

The second point I wish to make in relation to this doctrine is this. A well –recognised principle in constitutional interpretation is that every national constitution, and a fortiori, its provisions is suis generis, and thus calls for principles of its own or suitable to its peculiar character. The land mark case of Tuffuor v Attorney- General [1980] GLR 637 at 647, per Sowah JSC and Kuenyehia v Archer [1993-94] 2GLR525 at 561, per François JSC, are two local cases which recognised this principle and gave due weight to its application.

When Chief Justice Marshall's implied power doctrine, is examined in the light of the suis generis principle, it would be recognised that every national Constitution and for that matter each provision, being suis generis in character, has what constitutes its own peculiar "great outlines

that should be marked", those "important objects" that need to be designated, as opposed to those that may properly be categorised as "minor ingredients" which compose those objects. Thus, in constitutional adjudication, in any given case, a just application of the doctrine requires first that a distinction be drawn between those matters which constitute "great outlines" or "important objects" and those which do not, and may aptly be described as constituting "minor ingredients", and so deducible from the great outlines or objects. In other words, what constitute great outlines as opposed to minor ingredients are issues that merit a case- by- case determination, based no doubt on therelevant factors.

And so I ask the question. Under the article 289 (1) of the 1992 Constitution, those pre-legislative or frontend activities and initiatives of formulating proposals etc, that need to be carried out, to enable Parliament in the exercise of its express powers of amendment, conferred on it by the Constitution, effectuate a valid amendment applying strictly the Chapter 25 processes and procedures, do they constitute great outlines or objects or are they minor ingredients or fine details, as understood in the context of the implied powers doctrine? I am of the view that they are great or important objects that would have been expressly marked or designated by the framers of our Constitution, in the manner they wanted, to suit their intentions, if they were minded

to. The point I wish to emphasise given the factual context of this specific case and the issues for determination is that, in my respectful view, if the framers of our Constitution had desired to designate and mark out in specific and clear terms, the mode by which and by whom amendment initiatives, which constitute a most important frontend or pre-legislative activity were to be exclusively limited to Parliament and Parliament alone, they would have done so, as did their counterparts in Florida or Kenya respectively under Article XI, sections 3, 4 of the Constitution of the State of Florida, or Articles 256 and 257 of the Kenyan 2010 Constitution, which allows amendments by both parliamentary and popular initiatives. To be more specific, I hold the view that reposing pre-legislative amendment activity in Parliament alone, to the total exclusion of any other person, or group of persons or organisation is, employing the implied doctrine theory or the predicate-act canon, cannot be justified in the circumstances of this case.

On the Plaintiff's own showing, in the Florida, Iran, and Kenyan examples he referred to, their respective Constitutions expressly provide the method, or the mode, by which amendment proposals may be initiated. When such a great object conferring exclusive power on Parliament has not been expressly designated in a written Constituion, as in our case, I find it difficult to invoke the implied powers doctrine or the predicate –act canon. To read the exclusive vesting of the pre-

legislative functions to Parliament into our Chapter 25, in the absence of any express provisions to that effect, would, in my view, amount to a clear usurpation of the principle that courts must avoid importing into written constitutions words which are not found therein. This caution was sounded by Acquah JSC (as he then was) in the case of Attorney-General (No 2) v Tsatsu Tsikata (No2) [2001-2002]SCGLR 620 and more lately, Republic v Fast Track High Court Accra; Ex Parte Daniel [2003-2004] SCGLR 364, in which Kludze JSC stated:

"We cannot, under the cloak of constitutional interpretation, re write the Constitution of Ghana. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the law giver was mistaken or unwise. Our responsibility is greater when we interprete the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution."

Plaintiff himself admits the following crucial matters in his legal arguments:

"5 In jurisdictions that allow a review of the Constitution, the Constitution is clear on the timing of the review (e.g., every 20 years), the membership of the Commission (including representation by identifiable groups as well as the size of the Commission), the scope of the review, and the process by which the Commission's proposals ripen

into constitutional amendments...

9. The Committee of Experts recommended that the "fabric and essential character of the Constitution must be preserved by excluding (sic)hasty and ill-considered amendment of the fundamental provisions of the Constitution." The Committee suggested that "such changes should only occur through procedures which would ensure adequate support and desire for the changes."[4]

10.It was because of the above recommendation that some provisions of the Constitution were entrenched. Further, it was because of this recommendation that Article 290(2) commands the Speaker to refer "a bill for the amendment of *an entrenched provision*" to the Council of State for advice before Parliament proceeds to consider it."

My thinking is this no doubt Parliament has power to self-generate these pre-legislative activities. But, if with the full knowledge of our peculiar needs, and the various options by which amendment proposals may be initiated, the framers of the Constitution, nevertheless failed to expressly provide for these specific objects or the body or bodies entrusted with specific authority to undertake pre-legislative activities, as obtains in other jurisdictions, by what authority can we claim that these activities are the exclusive preserve of Parliament? Is it not the proper inference that matters were, for good reasons left open?

[4]Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. (July 31 1991).

Finally, Plaintiff argues that the text of other1992 Constitutional provisions support the view that the framers clear intention is to exclude from pre-legislative activities, other non-Parliament groupings, including "we the people" as opted for by Kenya, in the exercise of their legitimate democratic rights to make suggestions or proposals to Parliament for amendments to be effectuated in strict compliance with Chapter 25.

His legal arguments are quoted hereunder, in extenso.

"22. While the plenary and implied power doctrines settle the question of who has the power to initiate constitutional amendments, other important constitutional considerations support the same conclusion. In particular, the Constitution is always explicit and quite clear when the intention is to have the President, and only the President, originate particular kinds of legislation.[5]

23. This is the case, for example, with bills relating to public finance. Thus, for instance, in Article 174(1), the Constitution states that, "no taxation shall be imposed otherwise than by or under the authority of an Act of Parliament." To forestall disputation as to when and by whom a bill of taxation is to be originated, Article 179(1) specifically empowers

[5]We highlight that these examples are not meant to suggest that legislation and constitutional amendments are on the same procedural footing. They are not (Ellingham v. Dye, 178 Ind. 336). The procedures for amending the Constitution are unique and must be strictly complied with.

and commands the President to “cause to be prepared and laid before Parliament at least one month before the end of the financial year, estimates of the revenues and expenditure.”Similarly, in Article 108, the Constitution clearly bars Parliament from proceeding on bills that impose charges on the consolidated or other public funds, “unless the bill is introduced by, or on behalf of the President.”

24. The express delineation in the Constitution of those specific instances where legislative initiative belongs to the President implies, following the maxim “expressio unius est exclusio alterius,” that in all other cases the origination of legislative action must remain with the legislative body itself (see Hatch v Stoneman [1885], 66 Cal. 632 [6 Pac, 734] where it is held that the legislature in proposing amendments to the constitution is not exercising legislative power and the governor has nothing to do with such proposals).

25. Thus, when Article 289(1) expressly designates Parliament as the body that “may amend any provision of the Constitution,” and does not designate the President as the one who must introduce a bill of amendment, it must be understood that the origination power in matters of constitutional amendment remains with Parliament. Not only that, but also no extra-parliamentary body is empowered to do any preparatory work for Parliament.”

My answer to this argument is that the specific mention of the President's role viz a viz that express general legislative power, under articles 108, and 179(1), does not imply an ouster in other roles or areas; including frontend or pre-legislative activities which may lead to possible constitutional amendments. I think it means he is the specific authority that must attend to those prescribed matters. Had the framers been intent on limiting the President to only these important financial matters of State in the legislative affairs of the nation, the Constitution would have explicitly made provision to that effect. As succinctly expressed by Kludze JSC in Asare v. Attorney-General [2003-2004]SCGLR823 at 847:

"expressum facit cessare tacitum. It means when a "when a thing is expressly stated, it ends speculation as to whether some-thing inconsistent may be implied." It also means that express enactment shuts the door to further implication and speculation: see Whiteman v Sadler [1910]AC 514 at 517."

I would accept the argument that the role of the President, is limited solely to the ministerial tasks stipulated in article 290 (6), 291 (4) and 292 (a) in the following limited sense only. The statement is accurate in so far as it pertains in the context of the actual legislative core processes carefully designed under Chapter 25. But I would not advocate a narrow

and rigid construction of these relevant laws, to constitutionally exclude the Executive President, who is invested with constitutional authority to maintain and execute the Constitution of Ghana, from engaging in any pre-legislative activity, such as the work he commissioned the CRC and the CRIC to carry out, which resulted in the submission of proposals to the legislative branch. I do not think our current Constitutional arrangement, justifies this interpretative approach that would deny a Presidentthe right to set in motion any pre-legislative activities that may or may not eventually result in a valid constitutional amendment. Such engagements, including the submission of proposals, are in my view clearly distinct from Parliament's core functions, conferred by direct express authority of effectuating amendments in line with Chapter 25. I would hesitate to characterize such interventions as a usurpation of Parliament's distinct exclusive legislative authority under Chapter 25 or a calculated attempt to undo the carefully designed architecture under it. Indeed, Parliament, the Council of State, the Electoral Commission, the body empowered under the Constitution to hold referenda, in strict accordance with the electoral laws of this country, as well as the citizens, who at one stage or the other are entitled to express their opinion on a President's proposals, through various means, including the active participation of their representatives in Parliamentary debates, are under no obligation to accept such Presidential initiated proposals

without question. To borrow Plaintiff's words, no President can stampede Parliament or the people into amending.

It does seem to me that the Plaintiff's other concerns relates to the number of amendments. Essentially, these are questions outside the purview of the courts adjudicative authority, more so because of the absence of express constitutional provisions on the scope of the review, for example, the number of amendments that may be proposed at any given time or even made, and how often these may be effectuated. The stringent mandatory constitutional requirements under Chapter 25, the respective the Council of State, Parliament, and the citizens via a referendum are expected to play, should provide a strong buffer against unwarranted interferences and arbitrariness, and provide the internal mechanisms to check abuse. Conventions should be allowed to develop in this area of our constitutional law. But, even more crucially, the necessary constitutional amendments that would tighten all the loose or open ended constitutional provisions, and provide for such critical matters as who is qualified to engage in front end activities, who may initiate and propose draft amendment bills are perhaps called for. In the words of the Plaintiff, the "**when who, how, how often and by whom"**, are crucial matters that should not be left to chance, conjecture or speculation.

One other concerns also in relation to what he describes as the “bundling of unrelated entrenched provisions in an amendment bill…” , which in any event are not part of the grounds on which this action is predicated, are matters that, on the given facts of this case, are best addressed by the legislature and the amendment process.

The work of the CRC, whose terms of reference was to: collate views, on the operations and workings of the Constitution, identifying its strengths and weaknesses, articulate concerns from the Ghanaian people, on amendments that may be required, and make recommendations for possible amendments, which essentially constitute free expression of views, a healthy democratic public engagement, and which were to a large extent implemented by the CRIC, are not unconstitutional. The recommendations and the preparation of draft bills etc should be recognised as nothing more than proposals or suggestions for amendment; that are not automatically set to ripen into amended provisions of the Constitution. Parliament’s acceptance of these as the raw material, in a manner of speaking, and the deployment of its full panoply of powers- express, implied and incidental-under the Chapter 25 Constitutional framework, marks the real beginning of its crucial exclusive legislative role in the actual amendment process, as ordained under Chapter 25 of the Constitution and the Parliamentary oath.

Following from the answers that I have provided, the next important question for determination is set out in paragraph (1) of the Plaintiff's memorandum of issues, namely,

"Whether the Whether the power granted to the President under Article 278(1) to "appoint a commission of inquiry into any matter of public interest" includes the power to establish a commission of inquiry to review and propose amendment bills to the Constitution where the power to review and propose amendment bills to the Constitution has been expressly, exclusively and specifically conferred to Parliament?"

This firstly calls for the true and proper construction of the expression "public interest", within the context of article 278(1), secondly, a determination of whether the work assigned to the CRC, per its terms of reference, qualify as, or constitute matters of "public interest", and thirdly, an examination of the scope and ambit of Commissions of Inquiries as envisaged under Chapter 23 of the 1992 Constitution, devoted to Commissions of Inquiry. In other words, we are going to explore the nature and character of Commissions of Inquiry.

On the first issue, article 295 (1) of the 1992 Constitution has provided a definition of the term "public interest". It states:

"In this Constitution, unless the context otherwise requires "public interest" includes any right or advantage which ensures or is intended to

inure to the benefit generally of the whole of the people of Ghana."

The Defendant has also referred us to two cases in which this Honourable Court has examined and adjudged the meaning of the expression. These are the cases of the Republic v Yebbi & Avalifo [2000] SCGLR 149, cited with approval, the case of R V Sussex Confirming Authority; Ex Parte Tamplin & Sons Brewery (Brighton) Ltd. (1937) 4 All ER @ page 108, where Lord Hewart observed,

"If the condition is in the interest of a considerable part of the public, then it is true to say that it is in the interest of the public of which that is a part. It would, I think, be fantastic to argue that a condition cannot be in the interest of the public unless it is in the interest of every part of the public ... if it is in the interest of the Public concerned, then it is in the interest of the public as a whole."

Again, in the case of The Republic v Avalifo (supra) money belonging to the National Democratic Congress (NDC) was stolen and one of the issues that arose for determination was "whether or not the stealing of the moneys belonging to a political party is a crime against the state or the public interest."

This Court concluded that;

" The stealing of moneys belonging to a political party was an offence against the public interest as defined in article 295 (1) of the 1992

Constitution, namely, 'public interest' includes any right or advantage which ensures or is intended to inure to the benefit generally of the whole of the people of Ghana." It was significant that the word used in defining public interest was "includes" and not "means." The word "means" when used in defining a word usually implied that the meaning of the word was restricted to the scope indicated in the definition section. However, the word "includes" was often used in order to enlarge the meaning or phrase occurring in the body of the statute; and when it was so used those words or phrase must be considered as comprehending not only such things which the interpretation clause declared that they should include. Therefore, the word "includes" used in defining public interest in article 295 (1) did not restrict the meaning of public interest as to the scope indicated in the definition but also to the interest of only a section of the population."

On the second question, I have no doubt that the matters the CRC sought to interrogate under the Constitution Review Commission of Inquiry Instrument, 2010, C.I. 64, upon a true and proper construction of the article 278 of the 1992 Constitution, fall within the definition of "public interest". In actuality, I think that they are matters of extreme public importance. I think in all honesty, on the available evidence, that the matters the CRC were invited to and did attend to, which matters have already been spelt out, were intended for altruistic purposes- the political

and social benefit of the whole of the people of Ghana-, whose national Constitution, their main governing political document, has been in operation for some two decades. I have no evidence of any ulterior motive, in other words, that the assignment was, contrary, to the noble ideals enshrined in the preamble to our national Constitution, not intended to secure and solidify for us, "we the people of Ghana", that "framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity."

On the third and final issue, I found the Plaintiff's painstaking arguments at law so pertinent I have again decided to quote them in extenso.

1. "A careful reading, not merely of article 278(1)(a), but the entire Chapter 23 (devoted to 'Commissions of Inquiry'), reveals the character of commissions contemplated by the Constitution.

a. With respect to a commission's *inquiry procedure*, Article 281(2) states, "The Rules of Court Committee established under article 157 of the Constitution shall, by constitutional instrument, make rules regulating the practice and procedure of **all commissions of inquiry** and for appeals from commissions of inquiry."

b. With respect to the *nature* of the commission, Article 278(2) stipulates that,

c. On the *powers* of a commission, Article 279(1) provides that, "A

commission of inquiry shall have the powers, rights and privileges of the High Court or a Justice of the High Court at a trial, in respect of (a)enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise; (b) compelling the production of documents; and(c) the issue of a commission or request to examine witnesses abroad."

d. Regarding the ***functions*** of a commission, Article 280(1) provides that: "A commission of inquiry shall (a)make a full, faithful and impartial inquiry into any matter specified in the instrument of appointment; (b) report in writing the result of the inquiry; and (c)furnish in the report the reasons leading to the conclusions stated in the report."

e. Regarding the ***effect*** of a commission's findings, Article 280(2) states that, "Where a commission of inquiry makes an adverse finding against any person, the report of the commission of inquiry shall, for the purposes of this Constitution, be deemed to be the judgment of the High Court; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal."[6] Further, "the right of appeal so conferred by Article

[6]A finding of a Commission of inquiry shall not have the effect of a judgment of the High Court as provided under Article 280(2); "unless (a) six months have passed after the finding is made and announced to the public; or (b) the Government issues a statement in the Gazette and in the national media that it does not intend to issue a White Paper on the report of the Commission whichever is the earlier" (Constitution 1992, Article 280(5)).

280(2) on a person against whom a finding has been made, "shall be exercisable within three months after the occurrence of either of the events described in clause (5) of this article or such other time as the High Court or the Court of Appeal may, by special leave and on such conditions as it may consider just, allow."

f. Regarding *witnesses* before a commission, Article 283 states that, "A witness before a commission of inquiry is entitled to the same immunities and privileges as if he were a witness before the High Court."

A careful evaluation of the commission's inquiry procedures, nature, powers, functions, the effect of its findings as well as the immunities and privileges of witnesses appearing before it, described *supra*,reveals that what is contemplated in Chapter 23 of the Constitution is not an all-purpose commissioning power but the power to commission what is, in effect, an independent inquiry to investigate and establish the truth relating to a specific occurrence, affair or the activities of an entity. Such an inquiry would be considered judicial or quasi-judicial in nature.[7] This is why the rules of procedure applicable to **all** Article 278 commissions are determined by the Rules of Court Committee, a constitutional body chaired by the Chief Justice with a membership drawn from the judiciary and the bar. This is why adverse findings made against a person by an Article 278 commission are deemed to have the same juridical status as

[7]Asare and Prempeh at note 11.

a judgment of the High Court, an appeal from which lies with the Court of Appeal. This is why witnesses are entitled to privileges and immunities.

Plaintiff also respectfully draws the Court's attention to the Commissions of Inquiry (Practice and Procedure) Rules, 2010 C.I. 65 drawn by the Rules of Court Committee. Therein, a commission is characterized as having the powers of the police for the purposes of entry, search, seizure and removal of a document or an article relevant to the inquiry of the Commission (section 3). The rules discuss the establishment of investigation units (section 7(1)(a)), notice of hearing to a person whose conduct is the subject of the inquiry (section (8)(c)), compellable witnesses, admission of incriminating evidence (section 14), etc. This supports the proposition that the commissions contemplated by chapter 23 are quasi-judicial in nature. In fact, it is hard, if not impossible, to see how any of these rules are relevant for a Constitution Review Commission. Suffice it to say the C.I. 65 does not contemplate a commission to review the Constitution. How could it?

Plaintiff further submits that the prevailing jurisprudence also supports the characterization that chapter 23 commissions are quasi-judicial in nature."

The Plaintiff further contended that Justice Marful Sau's decision in the case of *Republic v Wereko-Brobbey and Mpiani* [2010].[8] settles firmly,

[8]Republic v Wereko-Brobbey and Mpiani [2010] (Case No. ACC 39/2010).

the question of the character, i.e. nature, functions of Commissions of inquiry as contemplated under Chapter 23 of the 1992 Constitution.

Plaintiff further argued:

" In that case, Justice Samuel Marful-Sau (Justice of Appeal) traced the constitutional history and development of Commissions of Inquiry by analyzing the *Memorandum on the Proposal for a Constitution of Ghana, 1968* and the *Proposals for the Establishment of a Transitional (Interim) National Government for Ghana, 1978*…

Justice Marful- Sau described the rationale behind the establishment of Commissions of Inquiry as stated in paragraph 301 of the 1978 proposals as follows: "In sum it is to accord the President the opportunity to cause investigations into certain matters of public importance by an impartial and independent body. And because the findings of such a body can have serious legal consequences for the persons affected thereby including adverse impact on their reputation in society, such persons should be able to challenge the soundness or legality of such finding in the courts of law, hence the arrangement that such findings be deemed to be a judgment of the High Court, from which an appeal shall be as of right to the Court of Appeal."[9]

[9] Justice Sau-Marful indicates that "the proposal that findings of Commissions of Inquiry, established under the Constitution should be deemed to be a judgment of the High Court and the acceptance thereof by the framers of our Constitutions has changed the legal effects of such findings or reports. Before the 1969 Constitution, Commissions of Inquiry were appointed under the Corrupt Practices (Prevention) Act,

The learned Justice then recites the Commissions of Inquiries that had been established thus far under the 1992 Constitution as: (1) The Commission of Inquiry (International Transfer of Football Players) Instrument, 1999 established under C.I. 22 of 12th March, 1999; (2) The Commission of Inquiry (Accra Sports Stadium Disaster) Instrument, 2001 established under C.I. 34 of 11th May, 2001; (3) The Commission of Inquiry (Yendi Events) Instrument, 2002 established under C.I. 36 of 26th April, 2002; (4) The Commission of Inquiry (Ghana@50) Instrument, 2009 established under C.I. 61 of 1stJune, 2009.[10]

The learned Justice then highlights the importance of understanding the nature and character of Commissions of Inquiry as well as their consequences and legal effect: "Indeed by Article 280 of the Constitution the reports of all the above commissions were deemed to be judgments of the High Court and persons affected by the adverse findings had the constitutional right of appeal to the Court of Appeal. It is however a matter of judicial notice that persons against whom adverse findings were made by the Commission of Inquiry into the Yendi events

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1963 (Act 230). The findings of such Commissions were prima facie evidence of the facts found and the persons affected suffer no liability until the Attorney General decided to prosecute and secured a conviction." Ibid.

[10]Other Commissions that have been established subsequent to Jusice Sau-Marful's insightful analysis include: The Commission of Inquiry (Judgment Debt) Instrument, 2012 established under C.I. 79 of 8th October, 2012; The Commission of Inquiry (Brazil Fiasco) Instrument, 2014 established under C.I. 82 of 11th July, 2014. The Speaker of Parliament, Edward Doe Adjahoe, decried the issuance of C.I. 82, accused the President of showing bad faith and alleged that the hurriedly issued C.I. was an attempt to interfere in the workings of Parliament, which is prohibited by law. Available at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=316926

and the Commission of Inquiry into the Accra Sport Stadium Disaster were prosecuted in the High Court, notwithstanding the clear provisions of Article 280 of the Constitution, which clearly represent the aspirations of the great men and women who engineered our 1969, 1979 and the 1992 Constitutions; the aspiration being that findings of commissions of inquiry should never develop into criminal trials."[11]

The learned Justice concludes his judgment by emphasizing "the need for us as a nation to develop and advance our constitutional dispensation. I have tried to show in this ruling the wisdom behind the establishment of Presidential Commissions of Inquiry under our Constitution. It is to enable the President appoint citizens of the required expertise to impartially and independently investigate matters of national importance, to evaluate the performance of our public institutions with a view of ensuring and maintaining efficiency and a high standard in our public administration. That exercise as rightly stated in the constitutional proposals of 1968 and 1978 could have serious negative consequences on the reputation of public office holders in such institutions investigated by such Commissions of Inquiry, hence the need to give such affected people the right to challenge the soundness of the findings. A citizen's right of appeal has always been respected since ancient times."[12]

[11]Ibid.

[12]*Republic v Wereko-Brobbey and Mpiani* [2010].

I do not think the President envisaged that in that purely civic public engagement, as ordinarily pertains in Commission hearings, persons would be compelled to appear to express their views and opinions on the workings of our Constitution, or that adverse findings would be made against persons who appeared before the Commission or that some would exercise their right of appeal in respect of the Commission's findings and conclusions. Also, that the conclusions and recommendations were to be equated to a judgment of the High Court.

Consequently, speaking for myself, a Commission of Inquiry, qua Commission of Inquiry under article 278 (1) does not, in my respectful view, appear in strict senso, to be the most appropriate channel for executing the task assigned to the CRC. My opinion on the impropriety of the use of a Commission of Inquiry arises purely from the true and technical nature and character of these Commissions, as earlier analysed. In which regard, impropriety, inappropriateness or unsuitability, must not be confused or equated with unconstitutionality. I find that all the relevant mandatory legal requirements were fully met, in respect of the setting up of the CRC.

Thus, on the facts, I would not declare as unconstitutional, the C.I. 64 and the work executed there under, based on the Plaintiff's main charge and argument that the C.I. 64 avenue was "misappropriated", and

effectively and purposely deployed “to usurp the powers that the 1992 Constitution expressly exclusively and specifically conferred to Parliament,” and to undo the carefully designed Chapter 25 architecture. This comes against the backdrop of my earlier finding that pre-legislative actions are not the exclusive preserve of Parliament, especially, when I have not identified any evidence, express or implied, in support of these grave charges. No doubt, the Commission was entrusted with a national assignment of extreme importance and sacredness. The members appointed to this task, among other things, per article 278 (3), were men and women of high moral character, this being the mandatory Constitutional requirement. But, in my respectful opinion, all these matters per se, plus the findings, recommendations and indeed the work of the CRIG, I have classified as pre-legislative only, does not place the work on a higher footing than what I have earlier tried to explain. The use of C.I. 64, did not and does not exempt the proposed amendments, draft Bills, etc., from being taken through the full rigours of the Chapter 25 laws, neither does it usurp or whittle down Parliament’s core legislative functions under Chapter 25. They remain valid and sacrosanct. As already noted, the draft Bills etc., which I have classified as pre-legislative, have not transformed into amendments. They will have to be taken through the Parliamentary amendment mill. The evidence available, and all findings made and conclusions I have drawn in this action, does not support the Plaintiff’s case.

Finally, the President's constitutional authority under article 278(1) involves the exercise of discretionary power. I find no breaches or violations of constitutional or other legal requirements proven in the exercise of this lawful authority. Thus, once the President, in the lawful exercise of his discretionary authority under article 278 (1), was satisfied that the work of the CRC, were matters of public interest, was well-suited to be addressed by a Commission of Inquiry, I do not think I can legitimately question the exercise of that executive discretionary decision in the manner and terms requested, in much the same way that in our jurisprudence, the exercise of judicial discretionary authority cannot be interfered with, except in those extreme or exceptional cases, which have been carefully circumscribed by the decisions of this court. The setting up of the CRC and subsequently the CRIC, to fully implement in strict accordance the recommendations of the CRC, in my respectful view, passes the constitutionality test.

(SGD) **G. T. WOOD (MRS)**

CHIEF JUSTICE

BAFFOE-BONNIE JSC.-

on 14/10/2015, this court by a majority of 5 to 2, dismissed the claims of the plaintiff, except for the first part of claim 5 and the entirety of claim 7, but reserved its reasons for today. I have had the benefit of reading the illuminating opinion of the Honorable Chief Justice, and my very able brother Benin JSC and, and I am in agreement with their reasoning and conclusions. For emphasis, however, let me add a few thoughts of my own.

The facts of this case are fairly simple and generally uncontroverted.
On 11th January, 2010, under the hand of John Evans Atta Mills, President of the Republic of Ghana CI 64, was gazetted. The preamble to the CI read as follows

"Whereas the President is satisfied that it is in the public interest that there should be appointed a Commission of Inquiry into the operations of the 1992 Constitution.

Now therefore in exercise of the powers conferred on the President by paragraph(a), clause(1)of article 278 of the Constitution, this Instrument is made this 8th day of January, 2010."

The terms of reference for this Commission were given in paragraph 3 of the CI as follows:

(a) to ascertain from the people of Ghana, their views on the operations of the 1992 Fourth Republican Constitution

and, in particular the strengths and weaknesses of the Constitution;

(b) to articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution, and

(c) to make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

After a long period of public sittings in Ghana and elsewhere, and the receipt of a number of memoranda, the ten member commission submitted its report to the President on 20th December 2011. In June 2012 the President issued a White Paper on the CRC's report. In the said White Paper, the President accepted most, but not all, of the recommendations made by the CRC.

In October 2012, the President appointed a 5 member Constitution Review Implementation Committee (CRIC), to as it were, ensure the implementation of the recommendations of the CRC that the President had accepted in its White Paper including the drafting of appropriate bills.

In March 2014 the CRIC submitted a DRAFT bill for the amendment of the constitution to the Attorney General.

Flowing from the work of the CRIC, the Attorney General has submitted 2 Bills to parliament to kick start the processes for the amendment of some entrenched and non-entrenched provisions of the constitution. These are,

(a) Constitution (amendment)(non-entrenched provisions) bill, 2014, and

(b) Constitution (amendment)(entrenched provisions) bill 2014.

The claim of the plaintiff (9 in all), details of which has been given in the CJ's opinion, in sum, question the constitutionality of the CRC and the CRIC, accuses the President of usurping Parliament's exclusive power to amend the Constitution provided by Article 289 of the Constitution and calls for the nullification of the two bodies and their works.

THE CRC.

I am of the view that the plaintiffs beef with the setting up of the Constitutional Review Commission (CRC) as being unconstitutional comes from a very narrow and restrictive reading of Article 278 of the Constitution and therefore misplaced.

The article permits the President to set up a committee to inquire into any matter which the President feels is of public interest. Amending the Constitution definitely falls under this category as it is a matter of public

interest. This has been adequately addressed by the Benin JSC in his opinion and so I will not spend any time on it.

THE CRIC.

The CRC's mandate included

> 3. **To make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution,**

And the CRIC's mandate included

> **To undertake the preparatory steps, including drafting the appropriate bills necessary to implement those CRC's recommendations.**

These two mandates have been construed by the plaintiff as a blatant usurpation of the role of Parliament in the whole process of amendment of the Constitution and therefore unconstitutional.

Again, I find the construction put on the Articles 290 and 279 on the amendment process very narrow and restrictive. And I believe plaintiff's wrong conclusion is based on a mis-appreciation of the whole architecture of the making and amending of constitution. This mis-appreciation is borne out by plaintiff's submission on page 4 paragraph 6 of his process filed on 22/6/2015. The plaintiff submitted thus;

"It is therefore useful to bifurcate the amendment process into the frontend activities that culminate in the passage of an amendment bill and the backend assent activity, which is a mere formality to promulgate the amendment bill. Clearly, the frontend process entails monitoring the effects of constitutional provisions, interacting with citizens and other civil society groups, crystallization of ideas, originating and drafting bills, referring the bills from the speaker of Parliament to the Council of State for advice, notice (gazette), time, reading, and passage requirements. By careful, deliberate and explicit design, the President is not assigned any constitutional role in this frontend amendment process. Indeed, the President's only constitutional role in the amendment process is at the backend, where he performs a mandatory assent assignment. Plaintiff believes, as argued infra, that the framers had compelling governance, democratic, prudential and historical reasons for excluding the president from a frontend, engineering role in the amendment process."

The plaintiff got it right with the President's role in what he describes as the backend assent activity but lumping the process of monitoring constitutional provisions, interacting with citizens and other civil society groups, crystallization of ideas, originating and drafting bills, referring the bills from the Speaker of Parliament to the Council of State for advice,

notice (gazette), time, reading and passage requirements as frontend, just to exclude the President, is disingenuous.

Using plaintiff's analogy, the amendment process should be divided into frontend, middle end, and backend. The requirement of presidential assent is obviously backend. But what the plaintiff refers to as frontend should be further divided into frontend, and, for want of better expression, middle end. The frontend would be the activities leading to the drafting of the bill and the middle end will be the activities that take place in Parliament after the bill has been sent there. To expatiate further, while the frontend will involve (again using the plaintiffs own words) the monitoring of the effects of constitutional provisions on the citizenry, interacting with citizens (and this could be done by parliamentarians interacting with their constituents) and other civil society groups, crystallization of ideas, originating and drafting bills, the middle end will be the activities in Parliament like introduction of the bill, reference to the Speaker, notification i.e. gazetting, reading and observance of time etc.

It is true that Parliament has exclusive jurisdiction over the activities of the middle end and any attempt by anybody, including the presidency or executive, to interfere in these will be resisted by this court. However, the activities described as frontend in this piece are not reserved to Parliament as the plaintiff will want us to rule. The activities leading to the drafting of bills and placement of same before Parliament to signify the beginning of the middle end process are administrative and do not form part of the

amendment process spelt out under Articles 289,290 and 291 of the Constitution.

Article 93(2) of the Constitution provides

> **Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution.**

Article 106 provides

> **(1)The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President**
>
> **(2)No bill, other than such a bill as is referred to in paragraph(a) of article 108 of this Constitution, shall be introduced in Parliament unless....**
>
> (a) **It is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill. The defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction**

108 provides

Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of the President…..

The cumulative meaning of these provisions and even more, is that Parliament, is the only institution charged with the making of laws and for that matter the amendment of the constitution. However, this exclusive duty is called into action with the introduction of Bills onto the floor of Parliament. Collation of views, crystallization of ideas and the drafting of proposed bills, are not part of the exclusive duties of Parliament so as to attract the accusation of usurpation of the powers of Parliament.

As stated earlier the CRC's 3rd mandate was;

(c) To make recommendations to the GOVRNMENT for consideration and provide a draft bill for possible amendments to the 1992 constitution.

The CRIC on the other hand had the mandate to **undertake preparatory steps, including drafting the appropriate bills necessary to implement those CRC's recommendations that the President had accepted.**

In his submissions filed on22/6/2014, at page, 6 paragraph (vi) the plaintiff wrote

"In March 2012, it was reported that the CRIC had submitted a draft bill for the amendment of the Constitution to the Attorney General"

Reading the mandates and plaintiffs own submission, I seriously do not see what the plaintiff is complaining about. The use of words and phrases like "*to provide a draft bill for possible amendments*" and *"undertake preparatory steps including drafting the appropriate bills",* should inform the plaintiff that the activities of the CRC and the CRIC are preparatory and administrative and do not infringe on the exclusive power of Parliament to amend the Constitution.

Historically, under the 1992 constitution, all bills that have been passed into laws, including the bills that led to the two previous amendments of the Constitution, have been sent to Parliament under the hand of the Attorney General. And the current bill for the amendment of the Constitution went to Parliament under the hand of the Attorney General. They may or may not have taken into consideration the "recommendations" of the CRC or the "draft bill" from the CRIC, but it is still the Attorney General's handiwork, and is subject to the amendment procedure as provided in the Constitution. The bills for the amendment of the entrenched and non-entrenched provisions of the Constitution are going to be subjected to the very rigorous amendment procedure as provided. Some or all of the recommendations as found in the Bill sent to Parliament under the hand of the Attorney General shall stand or fall based

on the debates that take place in Parliament pursuant to their exclusive jurisdiction granted them by article 289 of the Constitution. And it would not matter whether or not they form part of the recommendations of the CRC or CRIC.

To conclude, I am of the considered opinion that the steps taken by the President so far, i.e. the appointments of the CRC and the CRIC, can only be said to be preparatory and has not in any way interfered with Parliament's exclusive legislative power granted by Article 93(2) and exclusive power to amend the Constitution under article 289. I will therefore dismiss plaintiff's claim, save the first part of relief 5 and the entirety of relief 7.

(SGD) P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

GBADEGBE JSC:

On October 14, 2015 we pronounced judgment in the matter herein with our reasons therefore being reserved. I now proceed to provide the reasons for which I came to that view of the matter which was announced in open court on the said date.

I have had the advantage of reading beforehand in draft the reasons about to be read this morning by my worthy brother, Benin JSC and I am also in agreement for the reasons therein provided that the action herein be dismissed save for the first part of relief 5 and the entirety of relief 7. I also acquiesce with him regarding the issues for our determination in the matter herein. As the action herein raises issues of public interest, I wish to add a few words of my own by way of concurrence.

In my view, the plaintiff's action substantively touches and concerns matters which are preparatory to the exercise by Parliament of its legislative power to amend provisions of the 1992 Constitution. The facts on which this action turns, which are not in dispute relate to the establishment by the President of a Commission of Inquiry under CI 64 for the purpose of among others receiving from the public proposals for amendments to the constitution and his subsequent acceptance of some of the recommendations of the said body as well as the setting up of a committee, Constitutional Review Implementation Committee, (CRIC) to draft appropriate bills necessary to implement the recommendations accepted by him in order to have them laid before Parliament.

It appears from a consideration of the above steps put in motion by the President that they do not come within the scope of article 289(1) and other provisions in chapter 25 of the constitution by which power is conferred on Parliament to amend provisions of the constitution. Although the end result of the cumulative endeavours initiated by the President is the formulation of bills for the

consideration of Parliament under article 289(1) such acts do not in my opinion have the effect contended by the plaintiff of constituting a usurpation by the President of the power of Parliament to amend provisions of the Constitution.

The plaintiff has in these proceedings pressed on us the view that because by the provisions of article 289(1) the power to amend the provisions of the constitution is conferred exclusively on Parliament without any mention of the executive, the steps herein before alluded that were initiated by the President resulting in the preparation of bills to be laid before Parliament for consideration in the exercise of its power to amend the constitution constitutes interference with the work of the legislature and must be nullified. But that view seems to construe article 289(1) in isolation instead of reading it as part of a functioning whole document. The approach that should be employed when considering questions of interpretation of the constitution was set out by this court in the case of *NMC v Attorney General* [2000] SCGLR 1 at 11 when Acquah JSC (as he then was) expressed himself in the following words:

> "But *to begin with it is important to remind ourselves that we are dealing with our national Constitution, not an ordinary Act of Parliament. It is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It gives certain rights to persons as well as bodies of persons, and imposes obligations as much as it confers privileges and powers. All these privileges and powers must be exercised and enforced not only in accordance with the letter, but also with the spirit, of the Constitution. Accordingly, in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form a rational, internally consistent framework. And because the framework has a purpose, the parts are also to*

work together dynamically, each contributing something towards achieving the intended goal. Each provision must therefore be capable of operating without coming into conflict with any other."

It is therefore clear that in interpreting article 289(1), we should not be limited only to the words by which it is expressed but go through the entire constitution to find out if there are other provisions that affect it particularly when the power conferred on Parliament is expressed as follows:

"*Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution."*

The meaning of the opening words of article 289(1) namely "*subject to"* have been authoritatively pronounced by this court in previous decisions of this court including *Edusei (No2) v The Attorney-General* [1998-99] SCGLR 753at 791. Examining the words "*subject to* "in the context of article 289 (1) on the point, the power conferred on Parliament to amend the constitution must be read to mean that the scope of the power conferred by the article cannot be construed without reference to other parts of the constitution. It is indeed, a recognition that there are other parts of the constitution which are concerned with the power to amend the constitution. As the words by which the power to amend is conferred on Parliament itself begins with a caveat, so to say, one must read the entire constitution in order to find out whether there are any limitations on the power granted to Parliament before deciding if that power is exclusive in nature. A careful reading of the constitution reveals that the President is enabled by article 106(14) to have bills introduced on his behalf in Parliament. This power is separate from the power conferred on him under articles 108 and 179 in regard to the initiation of financial bills. As the power conferred on him under article 106 (14) is general in nature, it can be utilized by the President for the purpose laying

proposals for constitutional amendment in the nature of bills before Parliament for consideration. In taking any such step, the President will be utilizing a legitimate means to achieve an end that is within the scope of the constitution. It repays to say that the power conferred on Parliament under article 289(1) is part of its legislative power and should not be read as though it is a provision that exists on its own. When so read as part of a single document whose several provisions have to work together to achieve a common purpose then there appears to be no force in the invitation urged upon us by the plaintiff to accept the position that the power conferred on Parliament by article 289(1) and indeed, Chapter 25 is excusive to Parliament. To accede to the contention of the plaintiff would have the effect of various parts of the constitution singing not in harmony but discordantly like a choir without a leader and lead to absurdity.

I think that a careful consideration of the complaint which forms the basis of the plaintiff's claim reveals that there has so far not been any step taken by the President that can remotely be said to have an attribute that comes within the designation of the exercise of legislative power within the scope of the existing constitutional framework. On the other hand, what has happened is that views have been collated by the Commission of Inquiry set up under CI 64 by virtue of the power conferred on the President under article 278 to "*appoint a commission of inquiry into any matter of public interest*" and steps subsequently taken thereon to formulate the recommendations accepted by the constituting authority into bills for the consideration of Parliament. I do not think for a moment that there can be any controversy over the fact that the constitution being the fundamental law of the land from which not only the powers of government are derived but provides the means by which such powers are to be exercised, any step taken for the purpose of bringing about amendments to the existing provisions is a matter which comes within the definition of "public interest" in article 295 of the constitution, which definition we are bound to give effect to.The determination of the question whether or not the President is "….*satisfied that a*

commission of inquiry should be appointed" once the issue to which it relates is in the public interest is a political question that we cannot inquire into.

Then there is the question about the commission of inquiry appointed under CI 64 not exercising powers that are quasi-judicial in nature and therefore unconstitutional. Reliance in this regard is placed on articles 279, 280, 281 and 283 of the constitution by the plaintiff, but the contention urged on us loses sight of the fact that reading chapter 23 in its entirety, it is plain that the power conferred on commissions of inquiry recognizes that not all such commissions would make adverse findings against persons and for that matter are not quasi-judicial in nature. Reference is made to article 280 (2) which provides:

> "*Where a commission of inquiry makes an adverse finding against any person, the report of the commission of inquiry shall, for the purpose of this constitution, be deemed to be the judgment of the High Court; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal."*

In view of the words by which the above provision is expressed, the contention urged on us to the contrary by the plaintiff for the purpose of declaring the commission of inquiry set up under CI 64 as unconstitutional is in my opinion not derived from a fair reading of the constitution and must be rejected. The recognition by the constitution itself requires us to reject any narrow approach that will defeat the clear legislative intent that is clearly a departure from the historical antecedents regarding commissions of inquiry that were set up before the coming into being of the 1992 Constitution. We cannot suppress the intention of the lawmakers by calling in aid previous constitutional arrangements which are inapplicable within the framework of the 1992 Constitution.

The correct interpretation is that where the proceedings of the commission of inquiry set up by the President are not adversarial in nature as no doubt is the situation in regard to the commission of inquiry set up by the President under CI 64, then the provisions relating to the right of appeal, the power to compel attendance before it and immunity of witnesses and compelling the production of documents and the like which are characteristics of a quasi-judicial tribunal will be inapplicable. In coming to this view of the matter, I have not disregarded the decision of the High Court in case Number ACC 39/2010 entitled *The Republic v Charles Wereko Brobbey and Another*, an unreported judgment of Marful Sau (JA) dated 10 August, 2010 which was cited to us in the written brief submitted by the plaintiff. Although the said decision is of persuasive effect, I am unable to agree with the statement of law contained in the said judgment for there as on that the learned judge did not advert his mind to the clear effect of article 280 (2) before reaching his opinion on the nature of commissions that may be constituted by the President under article 278 of the Constitution, a default which brings the judgment within the category of judgments that are "*per incuriam*".

I may pass onto add that as the constitution has not specifically prohibited the steps which have been taken by the President for the purpose of laying before Parliament bills for constitutional amendment (what may be referred to as the "letter" of the constitution), the question that arises there from is whether such steps have impliedly usurped the power to amend the constitution which is the exclusive preserve of Parliament? I think this question relates to the "spirit" of the constitution. If it does then it is an affront to the constitution in that it erodes the doctrine of separation of powers which is at the heart of our constitutional democracy, and only then can we accede to the demands contained in the writ before us for their nullification. In view of the matters discussed earlier in this delivery, the said question receives a negative answer and I think that the situation that we are confronted with in this action may be likened to that which

the Supreme Court of the United States had to determine in the case of MC CULLOCH v STATE OF MARYLAND, 17 U.S. 316 (1819), which raised for the determination of the Supreme Court of the United States, the question whether Congress had the power to establish a national bank and if it had the power so to do, whether the state of Maryland could levy taxes on the bank. In its decision, the court held that Congress did have the power to make the law and that the state of Maryland did not have the power to levy taxes on the bank. This case appears to have provided the court with the opportunity to pronounce on what implied as opposed to specific powers meant. Delivering the judgment of the court, Marshall CJ made a speech, which provides us with some useful guidance when he observed as follows:

> "*We admit as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional*."

See also: *US v Gettysburg Electric Railway Co, 160 US 668, (1896)*

I think that if, indeed the President can cause bills to be laid on his behalf in Parliament as provided for in articles 106(14), 108 and 179 then he has the implied and necessary power as provided for in article 297(c) to have an informed opinion on any matter to which such a bill might relate and merely

collating views and presenting them in the form of bills to amend the constitution to the body properly clothed with the power so to do under the constitution cannot by any stretch of imagination be said to be in breach of article 289(1). In my opinion, collating views from the public and stakeholders enhances participation in the processes leading to law-making by persons other than politicians and is good for democracy. It is important also to observe that the President has a responsibility under article 58(2) of the constitution for the "*execution and maintenance*" of the constitution and the steps taken so far by him, which may be described as in their nature only preparatory to the exercise by parliament of its legislative power under article 289(1) come within the scope of article 58(2). The recommendations which might be merged in bills are merely proposals to the legislature and are just like any other bill which might be placed before it in relation to any subject matter as has been the case in many instances where bills laid before the legislature have been the product of deliberation by stake-holders.

Before bringing this delivery to a close, I wish to make reference to a brief submitted by Alexander Hamilton in 1791 entitled "*Opinion on the Constitutionality of the Bank of the US."*

> "*That every power vested in a government is in its nature sovereign, and includes, by force of them, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.*
>
> *This principle, in its application to government in general, would be admitted as an axiom, and it will be incumbent upon those who may incline to deny it, to prove a distinction, and to show that a rule*

which in the general system of things is essential to the preservation of social order is inapplicable to the United States."

The above words in my opinion provide us with a proper understanding of what is meant by implied powers as provided for in article 297(c) of the constitution in the following words:

"In this Constitution and any other law-
(c) where a power is given to a person or authority to do or enforce the doing of an act or thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing"

The above provision is substantially re-enacted in the Interpretation Act, (Act 792) of 2009 in section 21 (3) thus:

"Where *a power is given to a person or an authority to do an act or a thing, or enforce the doing of an act or a thing, that power includes any other powers that are reasonably necessary to enable that person or authority to do that act or thing, or to enforce the doing of that act or thing, or are incidental to the doing or enforcement of that act or thing."*

Turning to the claim before us for determination, I am of the view that as the question on what particular provisions of the constitution should be amended is purely a matter for Parliament to decide, it does not appear that the letter and spirit of the constitution on which this action has been planked has been violated in any manner to warrant the exercise of the jurisdiction conferred on us under article 2(1) of the constitution.

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(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

BENIN, JSC:-

This case raises questions that border on the principle of separation of powers, whether in terms of amendment to the 1992 Constitution the President and for that matter the Executive branch of Government has any right to initiate moves or take steps to amend the Constitution, and whether such initiative by the President violates the exclusive right that the Constitution has given to Parliament to enact an Act to amend the Constitution. If the plaintiff's argument is stretched to its logical limits, it means that apart from Parliament exercising the power conferred on it by Article 289 of the Constitution, no other person or institution has any right to initiate or commence steps to amend the constitution.

The said Article 289 provides:

(1) Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.

(2) This Constitution shall not be amended by an Act of Parliament or altered whether directly or indirectly unless-

(a) the sole purpose of the Act is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter.

The plaintiff is saying that all the steps taken by the President of the Republic of Ghana aimed at amending the Constitution are contrary to the letter and spirit of the Constitution especially Article 289, supra. In short, the plaintiff is saying the President is usurping, if he has not already usurped, the power exclusively

conferred upon Parliament by the Constitution. The various steps taken by the President with the view to amending the Constitution are the following:

(i) The President invoked the power conferred upon him by Article 278(1) of the Constitution and set up a Commission of Inquiry,hereafter called the Commission, to gather views from Ghanaians on proposals to amend the Constitution. The enactment under reference is the Constitutional Review Commission of Inquiry Instrument, 2010, (C.I. 64). The terms of reference of the Commission were the following: (***a) to ascertain from the people of Ghana their views on the operations of the 1992 Constitution and, in particular the strengths and weaknesses of the Constitution; (b) to articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and (c) to make recommendations to the Government for consideration and provide a draft bill for possible amendments to the 1992 Constitution.***

(ii) The Commission completed its task and submitted its report to the President. Upon receipt of the report, the President caused a White Paper to be issued in accordance with the provisions of Article 280(3) of the Constitution, signifying a general acceptance of the report, with some changes though.

(iii) In order to implement the recommendations covered by the White Paper, the President set up a Constitution Review and Implementation Committee (CRIC), hereafter called the Committee. The Committee has since submitted some draft bills to the Government whch in turn has passed them on to Parliament to commence the amendment process envisaged by Articles 289(1), 290(2) and 291(1) of the Constitution.

The plaintiff contends that none of these steps could be said to be legal having regard to the provisions of Chapter 25 of the Constitution which deals with amendments to the Constitution, whereby Parliament is given sole responsibility to initiate and take all steps it deems necessary aimed at amending the Constitution in its own appointed time. The President can neither decide when an amendment to the Constitution should take place, nor dictate the pace or steps to follow to achieve the purpose. It is largely for these reasons that the plaintiff came to this court seeking these reliefs:

(1) A declaration that the Constitution Review Commission of Inquiry Instrument, 2010, C.I.64 is null, void and of no effect as it contravenes the letter and spirit of Article 289(1) of the 1992 Constitution, in that the effect, if not the intended purpose, of C.I. 64 is to usurp powers that the 1992 Constitution expressly, exclusively and specifically conferred to Parliament.

(2) A declaration that the powers granted to the President under Article 278(1) to 'appoint a commission of inquiry into any matter of public interest' does not include the power to establish a commission to review and propose amendment bills to the Constitution where such powers to review and propose amendment bills to the Constitution have been expressly, exclusively and specifically conferred to Parliament.

(3) A declaration that Article 278(1) does not grant the President an all-purpose commissioning power but only gives him the power to commission an independent inquiry to investigate and establish the truth relating to an entity's affairs, activities or some specific occurrence that is in the public interest.

(4) A declaration that the Constitution Review Implementation Committee (CRIC)set up by the President to finalize amendment bills for both the entrenched and non-entrenched provisions is alien to the Constitution and any and all of its activities directed at finalizing amendment bills that touch on any and all aspects of the Constitution, whether entrenched or non-entrenched, are unlawful, unconstitutional, impermissible, null, void and of no effect.

(5) A declaration that the 1992 Constitution can be amended only in accordance with the express provisions of Chapter 25 of the Constitution and that the President's role in any such constitutional amendments is limited to the ministerial tasks stipulated in Article 290(6), 291(4) 292(a).

(6) A declaration that Parliament's power to amend the Constitution as stipulated in Article 289(1) is plenary and exclusive.

(7) A declaration that Parliament's power to amend the Constitution as stipulated in Article 289(1) cannot be delegated to or usurped by the President.

(8) An order directing the President, the Chairman and Members of the Constitution Review Commission, the Chairman and Members of the CRIC, the Attorney-General, their deputies, agents or employees or any other

servant or agent of the Republic to permanently cease and desist from taking any actions that seek to amend or otherwise disturb the Constitution in so far as such actions are inconsistent with Chapter 25 of the Constitution.

(9) An immediate order directing the President, The Chairman and Members of the CRC, the Chairman and Members of the CRIC, the Attorney-General, their deputies, agents, oe employees or any other servant or agent of the Republic to cease and desist from taking any actions that seek to amend or otherwise disturb the Constitution, in so far as such actions are inconsistent with chapter 25 of the Constitution, during the pendency of this litigation.

The plaintiff neatly summed up his case in paragraph 30 of his statement of case in these words: ***'In brief, the Plaintiff's case is that the Constitution can only be amended by terms. Parliament is the sole body that can initiate, consider and propose amendments to the Constitution. Parliament's power to amend the Constitution is not only plenary and exclusive but also cannot be delegated to or usurped by the President, the Commission (CRC) or the Committee (CRIC). The President's role in constitutional amendment is limited to the ministerial task of giving assent to bills properly passed by Parliament. The President has no power to set up a commission to initiate amendments or draft amendment bills to the Constitution. To the extent that the President has usurped Parliamentary powers and misappropriated Article 278(1) to traverse the amendment architecture emplaced by Chapter 25 of the Constitution, it is the Plaintiff's case that C.I. 64 setting up the Constitution Review Commission, all actions taken by the Commission and all its actions are unlawful, unconstitutional, impermissible, null, void and of no effect.'***

I intend to discuss the issues raised under two broad headings, namely:

a. Whether the President has the right or power to propose or take steps, including draft bills, for the amendment of the Constitution.
b. If the answer to the above is positive, whether such steps may include the setting up of a commission of inquiry under Article 278(1) of the Constitution, and yet another committee to implement the conclusions contained in the White Paper issued following the commission's report.

We should not lose sight of the fact that Parliament's power to pass an Act to amend the Constitution is subject to other provisions of the Constitution. I take note of the plaintiff's interesting argument that *"**when Article 289(1) provides that 'Subject to the provisions of the Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution', it simply means the Constitution has conferred a discretionary power to amend the Constitution to Parliament subject to Parliament exercising that power in conformance to the amendment architecture stipulated by the Constitution and in a manner that is not inconsistent with the Constitution."***

I consider plaintiff's argument on this too narrow and restrictive, and it does not accurately express the purpose of the provision. The first part of Article 289(1) is very clear that the exercise of this legislative function of Parliament is subject not only to the provisions of Chapter 25 but also to all other provisions of the Constitution. Subject to other provisions of the Constitution embraces not only those which bear on the internal workings of Parliament in the exercise of its legislative power which are exclusive to Parliament, but also matters that are preparatory to the passage of bills by Parliament, in which others outside Parliament may partake. This is not to say that the provision is silent or equivocal about Parliament's exclusive right to pass Acts. What it entails is that there are aspects of law-making process which are not necessarily in the exclusive domain of Parliament. The most immediate and relevant one that one may recall is the power conferred on the President under Article 106(14) to propose bills to Parliament either by himself or by somebody else on his behalf.This power is a general one vested in the President to introduce bills in Parliament. Besides, Article 107 also enables the President to introduce finance bills to the house. These are all examples of the inter-institutional collaboration and framework that exist under the Constitution. Therefore one is put on the inquiry when Article 289(1) makes the passage of an Act to amend the Constitution subject to other provisions of the Constitution.

In my opinion the framers of the Constitution did not intend to curtail the President's right to introduce bills into Parliament under Chapter 25 of the Constitution. The reasons are not far to seek. Article 289(1) gives the power to Parliament to pass an Act to effect a constitutional amendment. The Constitution duly acknowledges that an Act of Parliament is not the first step in the process of

amending the Constitution. Article 290(2) and Article 291(1)provide that a bill may be introduced into Parliament proposing amendment to an entrenched and non-entrenched provision respectively before Parliament may proceed with the process of amendment. Whilst the Constitution is unequivocal in stating in Article 289(1) that only Parliament may pass an Act to amend the Constitution, it is completely silent as regards who has the right to introduce an amendment bill to Parliament under Article 290(2) and 291(1). In my opinion, the framers of the Constitution left this open and fluid, so that Parliament should be able to receive an amendment bill from various sources, especially from the President who in other parts of the Constitution has that working relationship with Parliament. And in such an important assignment or exercise which affects all the sovereign people of Ghana, it is not unreasonable that these provisions leave room for other groups or persons to make an input, as part of the preparatory steps, including draft bills, in the constitutional amendment process. If it was intended that any bill for amendment should only come from Parliament itself, clear words to that effect would have been used in Articles 290(2) and 291(1), just like in Article 289(1).

In my opinion, in the context of proposing bills for consideration of Parliament to amend the Constitution, Article 289(1) should be read in conjunction with Articles 290(2) , 291(1) and 106(14). In reading provisions of the Constitution, the Court should take account of twilight zones where two persons or bodies, for instance the President and Parliament, may act concurrently. Article 289(1) does not, expresslyor even by necessary implication, say that only Parliament may propose bills to amend the Constitution, it only empowers Parliament to enact Actof Parliament to the exclusion of all others to amend the Constitution. And Article 106(14) places no limit on the types of bills the President may introduce to Parliament; the only limitation of course is a bill that Parliament itself is prohibited from passing into law. However, in order to give full effect to the amendment procedure, the President may invoke the provisions of Article 290(2) and 291(1) to introduce a constitutional amendment bill to Parliament, in order that Parliament may deal with it under Chapter 25.There is no provision which directly or indirectly prohibits the President from introducing a constitutional amendment bill to Parliament, so the court should not import one into Chapter 25.

The plaintiff’s argument is founded on technical and insubstantial points which do not advance the purpose of the Constitutional provision under consideration. As

observed by Justice Louis D. Brandeis in his dissenting opinion in the case of **Milwaukee Social Democratic Publishing Co. vs. Burleston 255 U.S 407 at 431 (1921)*"the Constitution deals with substance, not shadows".*** The plaintiff's argument was largely influenced by what he perceived to be the attempt by the President, and for that matter the Executive branch of government to usurp the power conferred exclusively on Parliament to legislate amendment to the Constitution. Such an action, in his opinion, was contrary to the doctrine of separation of powers which should not be countenanced by the Court for fear the President might become despotic.

The Constitution of the United States of America appears to be the first in which the doctrine of separation of powers was actualized. The renowned American, Madison wrote in **The Federalist No. 48** in 1787 this significant piece on the doctrine of separation of powers as conceived under the American Constitution: "…….**the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers……..The most difficult task is to provide some practical security for each, against the invasion of the others……."** The 1992Constitution has sought carefully to preserve this doctrine, whilst at the same time ensuring that there is a certain amount of co-operation between the key institutions of state to ensure good governance through some form of checks and balances. That ensures the beauty of our democratic governance under the Constitution.

Under the 1992 Constitution, a violation of the doctrine could be said to haveoccurred in one of two situations: firstly, where one branch interferes with the other's performance of its constitutionally assigned function; and secondly, where one branch assumes a function that more properly is entrusted to another. In both instances exclusivity of the function must be clear and certain. Thus where the function is widely distributed or may be performed concurrently by two organs, there is no violation of the doctrine of separation of powers if the function or activity is performed by either of them. That is the situation here, whereby the President may introduce any constitutionally permissible bill to Parliament under Article 106(14), and a bill to amend the Constitution under Articles290(2) and 291(1) in his capacity as Head of State and Government elected by the entire

people to represent their aspirations both within and outside the country. Parliament may equally introduce a bill to amend the Constitution under Articles 289(1), 290(1) and 291(1). No provision under the Constitution, including Article 106(14) confers legislative power on the President. The President's right ends upon introduction of the bill to Parliament; he plays no further part in the passage of the bill which is the exclusive function of Parliament. The President comes in again after the passage of the bill which he signs into law under Articles 290(6) and 291(4). So all through the various steps taken by the President, it has been made clear they are aimed at a possible amendment of the Constitution. In my view both the President and Parliament are empowered to initiate steps to amend the Constitution.Thus no step taken by the President has the effect or intention of usurping the power of Parliament when he initiated moves and introduced bills to amend the Constitution to Parliament. The first broad relief set down above is thus answered in the affirmative.

I will next consider the legality or more aptly in the context of this argument, the propriety of C.I. 64.This was enacted pursuant to Article 278(1) of the Constitution, which provides:

Subject to article (5) of this Constitution, the President shall, by constitutional instrument, appoint a commission of inquiry into any matter of public interest where-

- ***(a) the President is satisfied that a commission of inquiry should be appointed; or***
- ***(b) the Council of State advises that it is in the public interest to do so; or***
- ***(c) Parliament, by a resolution requests that a commission of inquiry be appointed to inquire into any matter, specified in the resolution as being a matter of public importance.***

The plaintiff argues that the setting up of the Commission with the aim of collating the views of Ghanaians towards a constitutional amendment is not one of the purposes of Article 278. I will consider his arguments in some detail shortly. For now let me refer to Article 295(1) which defines 'public interest' to include ***'any right or advantage which ensures or is intended to ensure to the benefit generallyof the whole of the people of Ghana'*** This definition is not exhaustive

by the use of the expression or word ‘includes’. My understanding of this definition is that in considering what public interest entails in a given context of the Constitution, one has to look at the object sought to be accomplished in order to decide whether the matter qualifies to be one in the public interest. Article 1(1) of the Constitution says that the Sovereignty of Ghana resides in the people of Ghana. Article 3(4) imposes a duty on all citizens of Ghanato defend the Constitution. Even from a cursory reading of these two provisions, it is unquestionable that every attempt to amend any provision of the Constitution is a matter that concerns the entire people of Ghana and undoubtedly qualifies as a matter of public interest. Therefore the President would be justified in invoking the provisions of Article 278(1) in order to reach out to the people of Ghana for their views on Constitutional amendments.

The plaintiff thinks otherwise. He argues forcefully that this mode employed by the President is illegal as same is unconstitutional. He talks about procedural issues affecting the operation of a commission of enquiry. He talks about the status of such a commission, the same as a High Court, with the right of appeal to the Court of Appeal against any adverse findings. A commission of inquiry is also a quasi-judicial body. He submits all these do not apply to the type of commission established by C.I. 64.

I would simply say that not every commission of inquiry is set up to investigate some wrongdoing or acts or omissions of some person, both human and corporate. It may be employed even in situations where it is considered necessary to help the President or the body advising the President, in this case the Council of State and Parliament, to set up a commission of inquiry to seek views of citizens to help in the formulation of a national policy,for example on education,in the overall interest of the people.It should be stressed that not every commission of inquiry is expected to make adverse findings, per Article 280(2). The status of a commission of inquiry equivalent to that of a High Court ensures that it has the optimum liberty to perform its task and it underlies the importance the Constitution attaches to matters of public interest or public importance as the case may be. It is not the status or outcome of the commission’s work that determines what is a matter of public interest or public importance. On the contrary it is after a determination by the President or Council of State that a matter is of public interest or if Parliament has by resolution determined that a matter is of public importance that will inform a

determination that a commission of inquiry be set up. Once these persons or institutions have made the initial determination, the President may set up a commission of inquiry. It is not open to the court to interfere with the exercise of this discretionary power unless it is clearly established that the matter to be investigated is not in the public interest as defined by Article 295 of the Constitution, or if it was at the instance of Parliament that the appropriate resolution was not passed on a matter of public importance.

It is reasonable to draw a distinction between an unconstitutional or illegal act or function per se and a constitutional or legal act or function that is performed through inappropriate or unsuitable or procedurally expensive and time-consuming manner in order to achieve the ends sought. I consider the plaintiff's complaint to fall into the latter category. For so long as amendment to the Constitution is a matter of public interest, which the plaintiff does not and cannot indeed deny, the President commits no illegality by invoking Article 278(1) towards the purpose. May be a less expensive and time-consuming approach could have been employed to collate the views, but that per se does not render the process adopted unconstitutional.

The final arguments relate to the setting up of the CRIC. The plaintiff argued that ***"the President did not cite the source of his but power for setting up this five-member Implementation Committee. Nor does the President explain the basis of electing those five members, two of whom he subsequently replaced without any reasons….the Committee is not clothed with any semblance of legality. An alien body cannot be set up by the President to implement, in strict compliance with Chapter 25 of the Constitution, the recommendations accepted by Government where such recommendations are also not recognizable under Chapter 25 or any part of the Constitution……..To the extent that the CRIC is not cognizable at law and is the fruit of a poisoned tree the plaintiff respectfully submits that the purported establishment of the…….Committee and all its actions are unlawful, unconstitutional, impermissible, null void and of no effect."***

This argument is not sustainable on the facts and law applicable in this case. When the President purports to implement a decision which he has lawfully taken, there are several administrative avenues open to him. These are not written in a Constitution for no document can contain administrative directives or instructions.

Besides, there are some powers that the President exercises which are necessarily inherent to the office, for efficient and effective functioning of the office. And there are some powers too that are incidental to the performance of some tasks; such powers are not expressly stated in the Constitution but they are necessary to carry out some task or purpose expressed in the Constitution. And in caseswhere the President has been given an express power to do something, it is permissible to assume some implied power that is necessary to carry out the express power.The law makes room for the application of all these types of power for it is admitted that no amount of writing can contain or take care of every situation that may arise in the course of implementing the express provisions of the Constitution.

As the Constitution permits the setting up of a Commission of Inquiry, it is implied that recommendations arising out of the report of such a Commission may be acted upon after the White Paper has been issued. The modes of implementation cannot be the subject of a constitutional provision, for they are varied and many depending on the subject under investigation; hence the powers of implementation are implied from the original or enabling text, and need not be enumerated within the text. The President may choose to employ administrative process to implement the recommendations, like in the instant case. Such administrative actions are inherent in the general powers assumed by the President in his office as Head of State and Government. It does not require a separate law to authorize the exercise of his mandate administratively. It is derived from Article 58(1) and (2) of the Constitution which state that

(1) ***The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution.***

(2) ***The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution.***

In performing these constitutional duties the President may issue administrative instructions which may include the appointment of advisors, the setting up of advisory committees or groups to advise him or to carry out aspects of his work provided such instructions ,advisors, committees or groups do not violate any law.But these are not written in the Constitution. As rightly observed by a former President of the United States, W. H. Taft in his work titled *Our Chief Magistrate*

and His Powers, 1925 at 139-140: ***"The true view of the Executive function is……that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary to its exercise."***

In the case of **Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case) 343 U.S. 579 (1952)** the US Supreme Court took the position that the President's power to issue orders must be founded on the constitution or an act of Congress, or be fairly implied there from.

The plaintiff is saying that he does not find any law under which the President acted in setting up the CRIC, therefore the actions by the CRIC are null, void and of no effect. Counsel's arguments centre on the fact that he cannot figure out the position of the CRIC within Chapter 25 or anywhere else of the Constitution, hence his claim that it is unconstitutional. This argument is not valid because it is unreasonable to expect that a small document like the Constitution will set out every committee or any ad hoc body that is required to be set up to prepare the path towards a constitutional amendment. It is left to the discretion of constitutional bodies like Parliament and the Presidency to exercise the power incidental to their function or power under Chapter 25 to set up anad hoc body if it is considered expedient and necessary. In the absence of such discretion implied from or incidental toor inherent in their powers and functions it would be virtually impossible to operate the Constitution without bringing governance to a halt. Touching on constitutional interpretation in the case of **Springer vs. Philippine Islands, 277 U.S 189 at 209-210 (1928)** Justice Holmes, whilst dissenting, said that "**…….the machinery of government would not work if it were not allowed a little play in its joints."**Thus former US President Theodore Roosevelt would say that once the act is not forbidden by the Constitution, the President, as a steward of the people could do it; see his Autobiography, 1914 at pg 372.

I would say that once the action is not forbidden by the constitution or any Act of Parliament, and is incidental to the purpose of the action or inherent in the office or implied from the function or power already given under the Constitution it is permissible in law to apply it even in the absence of such express words in the Constitution.

It is observed that the CRIC was not set up in a vacuum or in the air. It was made clear that its object was to implement the recommendations of the Commission which the Government had accepted in the White Paper. Thus the setting up of the CRIC was founded on the impliedor incidental power derived from Articles 278 and 297(c) of the Constitution in order to give full effect to the commission's recommendations particularly by way of preparing draft bills for consideration of Government and subsequently by Parliament.

It is to be noted that before any bill for amendment is introduced to Parliament under Articles 290(2) and 291(1) some administrative work may have been done outside of Parliament. The body or person that performs this task will derive legitimacy by implication from these provisions. It is repeated for emphasis that the framers of the Constitution could not be expected to make detailed provision for every conceivable situation hence some amount of power or authority to act is implied from the original provisions. Even if Parliament itself were to collate the views through external bodies or even through an investigative team for the purpose, this would not be expressly found in the Constitution, but it would nonetheless be legitimate as being implied from their power to legislate an amendment under Article 289(1). It is in this vein that the setting up of the CRIC should be considered as having legitimacy.

I would like to wind down on this opinion by making reference to the source of implied powers under the American Constitution which crystallized into law in the USA when Marshall CJ accepted and applied it in the US Supreme Court case of **McCulloch v. Maryland 17 U.S 316 (1819).** The first President of the USA requested Alexander Hamilton to defend the constitutionality of the First Bank of the United States. Hamilton produced the opinion in 1791 arguing that the sovereign duties of a government implied the right to use means adequate to its ends. That although the United States government was sovereign only as to certain objects, it was impossible to define all the means which it should use, because it was impossible for the founders to anticipate all future exigencies. That argument in defence of the constitutionality of implied powers under the US constitution was valid then as it is valid today under our constitution, under the executive power conferred on the President under Article 58(1)(2) and more importantly and relevantly under article 297(c) where it extends to other persons or institutions besides the Presidency. Article 297(c) provides:

where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing.

This provision embodies all what I have said previously about powers which are implied from, inherent to or incidental to the power or function specifically provided for. Thus all the steps embarked upon by the President in a bid to submit bills to Parliament to undertake a possible amendment of the Constitution were fully backed by the Constitution in Articles 278(1), 58(1)(2), 297(c) 290(2)and 291(1).It is for these reasons that on 14th October 2015 I dismissed all the reliefs, save the first part of relief 5 and the entire relief 7, sought by the plaintiff.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

AKAMBA, JSC:

On 14th October 2015 this court, by a majority of five to two decision dismissed the above writ, but we reserved our reasons to be delivered on 29th October 2015. I have since had the privilege of a fore reading of the draft reasons for this decision by my respected brother Benin, JSC, and I am in agreement that the plaintiff's action be dismissed except for the first part of relief 5 and the whole of 7. I however wish to express myself briefly on two key areas for emphasis since this action raises issues of great public interest.

BRIEF FACTS

The Plaintiff herein who describes himself as a concerned, private citizen of the Republic who is interested in upholding the respect for and compliance with the

1992 Constitution and the Rule of Law, and in ensuring that the laws in question do not infringe the letter and spirit of the 1992 Constitution, filed a writ on 5th March 2015 invoking this court's original jurisdiction, pursuant to Articles 2 (1) (b) and 130 (1) of the 1992 Constitution and Rule 45, of the Supreme Court Rules, 1996, CI 16, seeking eleven reliefs set out in the decision by Benin, JSC.

The defendant Attorney General, not only denies that the Plaintiff is entitled to any of the reliefs claimed, but maintains that the Plaintiff has also failed to establish the basis of his action, hence the same must fail.

ANALYSIS OF ARGUMENTS

This writ is founded upon the Plaintiff's contention that the President of the Republic, by his establishment of a ten member Constitutional Review Commission of Inquiry under CI 64, 2010 to "(a) ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution; (b) articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and (c) to make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution", as well as certain steps taken, based upon the outcome thereof are contrary to the letter and spirit of the Constitution 1992.

A cardinal principle in the interpretation of Constitutional provisions and also acts of parliament is that the entire constitution must be read as an integrated whole and no one provision should destroy the other but each should sustain the other.

The key issues to be resolved in this constitutional stalemate are twofold, namely ,whether in the light of chapter 25 of the Constitution, the President has power to initiate any process for amending the Constitution and what is the legitimacy of the Constitutional Instrument CI 64 vis a vis article 278 (1) (a) of the Constitution for the purpose of reviewing the constitution.

AMENDMENT OF CONSTITUTION

Without any doubt, chapter 25 of the Constitution deals with the broad subject of amendment of the Constitution. In particular, article 289 (1)under Chapter 25 of the Constitution 1992 the following is encapsulated:

"289 (1) **Subject to the provisions of this Constitution**, Parliament may, by an Act of Parliament, amend any provision of this constitution."

The legislative power is vested in Parliament as provided by article 93 (2) thus: "93 (2) **Subject to the provisions of this constitution**, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this constitution."

Article 289 (1) thus vests in Parliament the power to legislate amendments of the Constitution. The plaintiff appears to pitch his strength upon the above quoted provision to state that Parliament is thus granted exclusive power to legislate amendments. However, while it is correct to state that Parliament has the power to legislate amendments, no effort has been made to distinguish between the initiation of the amendment process and the passing of theamendment legislation itself. This distinction is necessary, because whereas the initiation of amendment may involve other players outside Parliament, the latter is solely within Parliament. The article 289 (1) of the Constitution is a qualified provision in the sense that the power to amend, vested in Parliament, is granted 'subject to the provisions of the Constitution'. It is obvious from a full reading of the article that Parliament's power to legislate amendments is circumscribed by the constitution itself hence the qualification '**subject to the provisions of the Constitution. '**The expression "subject to" makes it clear that the power granted Parliament to amend provisions of the constitution is not without regard to other provisions of the constitution. This court has had occasion to consider the phrase "subject to" in the context of interpreting article 130 (1) of the Constitution 1992 which is relevant for determining the present issue. In the case of **Edusei (No 2) v Attorney General (1998-1999) SCGLR753, especially 762,**the minority opinion on the meaning ascribed to the phrase "subject to" was espoused by Charles Hayfron-Benjamin, JSC as follows: "In my respectful opinion, the expression "subject to" is not coterminous with "exclusively". The English and foreign legal

learning on the expression "subject to" would seem to suggest a proviso or a condition without which in this context, a jurisdiction may not be assumed. But this is not so. …… In my respectful opinion, therefore, the expression "subject to" within the context of article 130 (1) of the 1992 Constitution, means that if there is no other provision in the Constitution by which a remedy may be obtained, then the High Court will have specific jurisdiction to grant redress in matters involved in breaches of the provisions of chapter 5 of the Constitution. The power thus conferred by article 130 (1) is complementary to and not an ouster of any jurisdiction conferred on the Supreme Court by the Constitution. Nor would article 2 of the Constitution make sense."

Acquah, JSC (as he then was) at page 790 of the Edusei case, highlights the majority view when he stated as follows:

"*Now it must be noted that the expression "subject to' appearing at the beginning of article 130 (1) of the 1992 Constitution is generally used in legislation to serve as a warning and thereby avoid an apparent conflict between different provisions of the same enactment or between different enactments: see Clark (CAJ) Ltd v Inland Revenue Commission [1973] 1 WLR 905, affirmed [1975] 1 801 CA, and Addo v Sarbah [1968] 154. In the latter case, which dealt with the original jurisdiction of the High Court in rent disputes, the relevant paragraph 27 of the Courts Decree, 1966 (NLCD 84) provided:*

"27. Subject to and in accordance with provisions of this Decree and any other enactment for the time being in force, the High Court shall have-

(a) Original jurisdiction in all matters…"

In explaining the purpose and effect of the expression "subject to" at the beginning of paragraph 27 of NLCD 84, Charles Crabbe J (as he then was), the acknowledged authority in legislative drafting, said at page 158:

"The expression "subject to" is used in legislation to serve as a warning. It is used to indicate a modification and thereby point out that the particular provision in which it is used is not complete by itself. It is used to avoid an apparent conflict between enactments or between different parts of the same enactment. To

resolve a conflict that would otherwise be apparent, it was, in my view, desirable that a warning should be given. It is therefore clear to me that paragraph 27 of the Courts Decree is incomplete as it stands, for the whole of that paragraph cannot be read and construed without looking at other provisions of the Decree with which it might be in conflict. Not only that. It has to be read in conjunction with 'any other enactment for the time being.' ……..

His lordship the proceeded at page 159 to state the effect of the "subject to" part of paragraph 27 thus:

"The effect of this is that if there is any enactment which confers specific jurisdiction on any court or authority or body, the High Court is precluded from dealing with that matter save perhaps on an appeal". (The emphasis is mine)….

Article 129 (3) in respect of which 136 (5) is subject to, also reads: "The Supreme Court may while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

Now, it can be seen from the above two provisions, ie articles 129 (3) and 136 (5) that, had it not been for the "subject to" part of article 136 (5), there would have been a dilemma for the Court of Appeal whenever that court is faced with a choice between its decision that is in conflict with that of the Supreme Court on a question of law. But by virtue of the "subject to" part of article 136 (5), whenever such a situation occurs, the main part of article 136 (5) gives way to the "subject to" part, to enable the Court of Appeal follow the decision of the Supreme Court as provided in 129 (3) instead of its previous inconsistent decision. The Court of Appeal is thereby, in effect, precluded from following its own previous inconsistent decision because of the "subject to "part of article 136 (5). The net result of the above analysis is that where a statutory provision is expressed to be subject to another statutory provision or statute, this generally makes the "subject to" provision prevail over the main provision, whenever there appears to be a conflict or an incongruity in reading the two provisions together".

Thus in the context of the power granted to Parliament under article 289 (1) of the Constitution to amend by an act of Parliament, the same must be exercised with due regard to the provisions of the Constitution. Also, while it is generally true to state that a general provision must yield to a specific power to amend, this cannot be wholly so when the specific provision itself stipulates that the exercise of that power, is itself, subject to other provisions of the constitution which do not derogate from the core objective of article 289 (1) of the Constitution.

Article 106 (1) stipulates the mode by which Parliament shall exercise its legislative power which is by passing bills to be assented to by the President.Apart from financial bills, which under article 108 must be introduced by or on behalf of the President, the Constitution is silent on who should initiate other bills. However all other bills must comply with article 106 (2) by the provision of explanatory memorandum detailing the policy and principles behind the bill and must have been published in the Gazette for at least fourteen days. Bills may be initiated within Parliament itself, in the form of private members bills, which are scarce or from outside the house by other key players which appears to be the standard practice as most bills are tabled at the instance of the Attorney General. These preparatory initiatives by the other key players outside the house culminating in draft bills presented by the Attorney General are clear 'front-end' activities that fall outside the mandate reserved only for Parliament.

Article 106 (14)provides that:

"*A bill introduced in Parliament by or on behalf of the President shall not be delayed for more than three months in any committee of Parliament." [Underlined for emphasis].*

The article does not distinguish between types of bills to be introduced by or on behalf of the President hence it encompasses all bills. This is a clear recognition by the Constitution, granting power to the President to either introduce bills by himself or on his behalf, which is a far cry from the outright dismissal by the plaintiff of any such role by the President. Another significant provision is article 179 by which the President shall cause to be prepared and laid before Parliament at least one month before the end of the financial year, estimates of the revenues

and expenditure of Government for the following financial year. To my mind these provisions, read together with article 108 of the Constitution, provide a tacit indication of the power conferred on the President to either, by himself, or on his behalf to introduce bills before Parliament.

Article 108 enacts:

"108. Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of, the President-

(a) proceed upon a bill including an amendment to a bill, that, in the opinion of the person presiding, makes provision for any of the following-

(i) the imposition of taxation or the alteration of taxation otherwise than by reduction ; or

(ii) the imposition of a charge on the Consolidated Fund or other public funds of Ghana or the alteration of any such charge otherwise than by reduction; or

(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 composition or remission of any debt due to the Government of Ghana; or

(b) proceed upon a motion, including an amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any of the purposes specified in paragraph (a) of this article."

The plaintiff's contention that the "the Constitution endows Parliament with the discretionary power to initiate amendments to the Constitution" and that "this power to initiate amendments to the Constitution is exclusive, specific and, therefore plenary" is based upon a linear consideration of certain provisions only rather than considering the Constitution as an integrated whole as demonstrated above. The Constitutional does not restrain the President from any 'front end' role in initiating amendment/s or bills. Articles 106 (14), 108and 179, read together with article 297 [c] clearly empower his initiation role except for those

specifically excluded by the Constitution itself such as the instances specified in articles 56, 107 and 270 (2) to cite but a few. From the written arguments, the impression one gets is that the Plaintiff envisions, in the Constitution 1992, a complete separation of powers between the three arms of government, a situation which exist more in theory than in reality for there is hardly any Constitution that has succeeded in attaining such purity. In the words of **Prof Kludze, JSC in Asare v The Attorney General, [2003-2004] SCGLR 823, at 860:** "Looking at our own Constitution, there is express provision directly negating the doctrine of the separation of powers. We do not go as far as the British, whom Montesquieu apparently misunderstood, in insisting on a parliamentary executive." Thus the Constitution 1992 is replete with instances of cross relationship roles between the three arms of government – the executive, legislature and the judiciary - as and when necessary, in an attempt to check exclusivity, and encourage co-operation between them .A few instances in the Constitution to illustrate the point will suffice. Article 60 (11),provides that where the President and Vice President are both unable to perform the functions of the President, the Speaker of Parliament shall perform those functions until the President or the Vice-President is able to perform those functions; Article 78 (1) stipulates that majority of Ministers of State shall be appointed from among members of Parliament. A person shall not be appointed a Deputy Minister unless he is a Member of Parliament or is qualified to be elected as a member of Parliament in accordance with article 79 (2) of the Constitution; Article 111 of the Constitution entitles the Vice President or a Minister or Deputy Minister who is not a member of Parliament to participate in the proceedings of Parliament and shall be accorded all the privileges of a member of parliament except that they will not be entitled to vote or hold office in the house. Article 144 regulates appointment of the Chief Justice and other Justices of the Superior courts; In the case of the Chief Justice the appointment is made by the President acting in consultation with the Council of State and with the approval of Parliament; Supreme Court Justices are appointed by the President acting on the advice of the Judicial Council and with the approval of Parliament. Justices of the Court of Appeal and the High Court are appointed by the President acting on the advice of the Judicial Council. The Supreme Court as per article 130 (1) has exclusive

original jurisdiction in all matters as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the constitution.

In the light of the provisions referred above, and as observed by Prof Kludze, JSC at page 861 of the *Asare*case, supra, "we need not appeal to the doctrine of the separation of powers to resolve constitutional issues which are capable of being decided by the plain reading of the text of our Constitution."

The sovereign people of Ghana have ordained Parliament with the power to make laws, subject to the Constitution (Article 94 (2). Parliament has also been granted the power subject to the provisions of the Constitution, to amend any provision of the Constitution. (Art 289 (1). It is not permissible for this court to construe these provisions differently simply because it would violate the doctrine of separation of powers. The articles of the Constitution that allow for the President, either by himself or on his behalf, to initiate bills, including bills for amendment, in Parliament for its consideration are an integral part of the Constitution approved and adopted by the people of Ghana. Activities prior to those initiatives such as collation of material are an integral part of the mandate of the outside players as provided by article 297 (c). They are distinguishable from the core mandate to legislate which latter is reserved for Parliament.

POWER TO SET UP COMMISSIONS OF INQUIRY

Does article 278 (1) of the Constitution grant the President the power to set up a Commission of Inquiry for the purpose of reviewing and proposing amendment bills to the Constitution?

Article 278 (1) grants to the President the power to appoint a commission of inquiry by constitutional instrument into any matter of public interest. The exercise of this power is however subject to article five of the Constitution which deals with fundamental human rights and freedoms. The power to appoint a Commission of Inquiry into any matter of public interest is exercisable where:

(a) the President is satisfied that a commission of inquiry should be appointed; or

(b) the Council of State advises that it is in the public interest to do so; or
(c) Parliament, by a resolution requests that a commission of inquiry be appointed to inquire into any matter, specified in the resolution as being a matter of public importance.

In the present exercise the President invoked item (a) above, to set up the Commission of Inquiry into the operations of the 1992 Constitution by the Constitution Review Commission which was to ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and in particular, the strengths and weaknesses of the Constitution; to articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and to make recommendations to the government for consideration and provide a draft bill for possible amendments to the 1992 Constitution. To invoke this power under article 278 (1) (a), all the President needs is to be satisfied that the matter is of public interest such as warrants the setting up of a commission of inquiry. Article 295 (1) defines public interest to include any right or advantage which enuresor is intended to enure to the benefit generally of the whole of the people of Ghana. The sovereignty of Ghana resides in the people of Ghana who adopted and enacted this constitution for ourselves. Thus an exercise aimed at ascertaining from the very people of Ghana their views on the operation of the Constitution as to its strengths and weaknesses with the view to propose amendments would enureto the benefit generally of the people of Ghana. The President having thus satisfied himself was within his power under article 278 (1) in setting up the Commission of Inquiry. The article does not require any unique or peculiar circumstances apart from the President satisfying himself that the issue is of public interest as defined under the Constitution.

The plaintiff argues that “a careful evaluation of the commission’s inquiry procedures, nature, powers, functions, the effect of its findings as well as the immunities and privileges of witnesses appearing before it, described supra, reveals that what is contemplated in chapter 23 of the Constitution is not an all-purpose commissioning power but the power to commission what is, in effect, an independent inquiry to investigate and establish the truth relating to specific

occurrence, affair or the activities of an entity. Such an inquiry would be considered judicial or quasi in nature." Plaintiff also refers to the requirement for rules of procedure for all commissions of inquiry to be determined by the rules of court committee under article 281 as indicative of derogation from the concept of an all purpose commissioning power for the President.

In my consideration of this issue I must point out as did **Acquah, JSC** (as he then was) in **National Media Commission vs Attorney General [2000] SCGLR 1**, (supra) that "*in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form rational, internally consistent framework. And because the framework has a purpose, the parts are also to work dynamically, each contributing something towards accomplishing the intended goal."*

It is necessary to discount the assertion that the power to invoke article 278 is limited to specific occurrences and activities of specific entities because that is not borne out by the Constitution itself. The article 278 (1) quoted supra is not carved in any restrictive language. It provides the President an all purpose commissioning power provided he is satisfied that a commission of inquiry should be appointed or the Council of State advises that it is in the public interest to do so or Parliament by a resolution request that a commission of inquiry be appointed into any matter specified in the resolution as being a matter of public importance. So that in any of the three instances listed above, the President is clothed with the authority to set up a commission of inquiry. Article 280 (1) elaborates on the functions of Commissions of Inquiry which are to:

"1 (a) Make a full, faithful and impartial inquiry into any matter specified in the instrument of appointment;

(a) Report in writing the result of the inquiry; and
(b) Furnish in the report the reasons leading to the conclusions stated in the report.

2. Where a commission of inquiry makes an adverse finding against anyperson, the report of the commission of inquiry shall, for the purposes of this

constitution be deemed to be the judgment of the High Court; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal."

The primary function of commissions of inquiry is to inform Governments. Historically, commissions of inquiry have been classified into two groups based upon the methods used to ascertain the facts. The first category are those charged with gathering information which is to be used for policy formulation or review or the assessment of the function-ability of a public entity. They are referred to as the Investigatory inquiries. These types of commission play the same role as a researcher. Examples include the Davy Koech Commission, which investigated the question of the appropriateness of Kenya's education system. Article 5 (4) of the Constitution provides for the appointment of a commission of inquiry for the purpose of ascertaining the need and substantial demand for the creation, alteration or merger of regions in Ghana. This type of commission of inquiry could only be the investigatory type.

The second category of commissions of inquiry are those charged with ascertaining the facts of a particular issue. Their role has been equated with that of an inquisitor and they are referred to as inquisitorial inquiries. This type of inquiry usually investigates the facts surrounding a scandal or allegations of wrongdoing. The Miller inquiry which investigated allegations of wrongdoing against former Attorney General of Kenya Charles Njonjo is such an example. The Jiagge Assets Commission under NLCD 72 which made adverse findings against Gbedemah is a local example. (see Awoonor Williams v Gbedemah (1970 2 G &G 442)

It is therefore not a correct statement of the present Constitutional position to limit commissions of inquiry, set out under article 278 (1) to only those that make adverse findings. The wording of article 280 (2) (supra) is a pregnant reminder that the outcome of commissions of inquiry do not necessarily have to result in adverse findings being made against any persons. It is also obvious from articles 280 (2) and 5 (4)(supra) that where the outcome of the commission of inquiry has resulted in the gathering of facts to be used for

policy formulation or review, that outcome is not envisaged as a decision of the High Court as distinct from those which make adverse findings and are deemed to be decisions of the High Court.

The President was therefore within his mandate in the setting up of both the Constitution Review Commission of Inquiry (CRC) pursuant to CI 64 as well as the Constitution Review Implementation Committee (CRIC) being initiatives prior to or preparatory to any bills for the purpose of initiating amendments.

It is for the above reasons and those articulated by my respected and able Honourable Lady Chief Justice (Presiding) and the three brothers that I concurred in the dismissal of the plaintiff's writ save for the first segment of relief 5 and the whole of relief 7.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

DISSENTING OPINIONS

DOTSE JSC:

On the 14th day of October 2015, judgment was delivered by this court in a 5-2 majority decision, with Dotse and Anin-Yeboah JJSC dissenting. The court did not give reasons for the said judgment. I now proceed to give my reasons for the decision I gave.

By his action, the plaintiff herein, who described himself as a concerned citizen of the Republic of Ghana and is interested in upholding the respect for and compliance with the Constitution 1992, is seeking **this court's intervention to stop the Defendant's herein, and by necessary implication, the Chairman and members of the Constitutional Review Implementation Committee, their agents, privies and or servants to desist from taking any steps or actions that are inconsistent with chapter 25 of the Constitution 1992 to wit, the amendment process of the Constitution and declare all such actions or processes unlawful, unconstitutional, null, void and of no effect.**

In my opinion, because of the importance which I attach to this particular case, I deem it expedient to set out in particular details, the nature of the reliefs the

plaintiff claims against the Defendant and the basis of such claims. This is because, in my opinion, the instant action, constitutes one of the most serious challenges to infringements under the Constitution 1992, since its inception.

What then are the reliefs which the plaintiff claims against the Defendants' in this Court?

RELIEFS WHICH THE PLAINTIFF CLAIMS AGAINST DEFENDANTS' BEFORE THIS COURT

These are:

1. "A declaration that, the Constitution Review Commission of Inquiry Instrument, 2010, C. I. 64 is null, void and of no effect as it contravenes the letter and spirit of Article 289 (1) of the 1992 Constitution, in **that the effect, if not the intended purposes, of C. I. 64 is to usurp powers that the 1992 Constitution expressly, exclusively and specifically conferred to Parliament.**

2. A declaration that the powers granted to the President under Article 278 (1) to **"appoint a commission of inquiry into any matter of public interest"** does not include the power to establish a commission to review and propose amendment bills to the Constitution where such powers to

review and propose amendment bills to the Constitution have been expressly, exclusively and specifically conferred to Parliament.

3. A declaration that Article 278 (1) does not grant the President an all-purpose commissioning power **but only gives him the power to commission an independent inquiry to investigate and establish the truth relating to an entity's affairs, activities or some specific occurrence that is in the public interest.**

4. A declaration that the Constitution Review Implementation Committee (CRIC) set up by the President to finalize amendment bills for both the entrenched and non-entrenched provisions is alien to the **Constitution and any and all of its activities directed at finalizing amendment bills that touch on any and all aspects of the Constitution, whether entrenched or non-entrenched, are unlawful, unconstitutional, impermissible, null, void and of no effect.**

5. A declaration that the 1992 Constitution can be amended only in accordance with the express provisions of Chapter 25 of the Constitution and that the President's role in any such constitutional amendments is limited to the ministerial tasks stipulated in Article 290 (6), 291 (4) and 292 (a).

6. A declaration that Parliament's power to amend the Constitution as stipulated in Article 289 (1) is plenary and exclusive.

7. A declaration that Parliament's power to amend the Constitution as stipulated in Article 289 (1) cannot be delegated to or usurped by the President.

8. An order directing the President, the Chairman and Members of the Constitution Review Commission (CRC), the Chairman and Members of the CRIC, the Attorney General, their deputies, agents, or employees or any other servant or agent of the Republic to permanently cease and desist from taking any actions that seek to amend or otherwise disturb the Constitution in so far as such actions are inconsistent with Chapter 25 of the Constitution.

9. An immediate order directing the President, the Chairman and Members of the Constitution Review Commission (CRC), the Chairman and Members of the CRIC, the Attorney General, their deputies, agents, or employees or any other servant or agent of the Republic to cease and desist from taking any actions that seek to amend or otherwise disturb the Constitution, in so far as such actions are inconsistent with Chapter 25 of the Constitution, during the pendency of this litigation.

10. Such further or other orders as the honourable Supreme Court will deem fit to make.

11. Costs for court expenses and counsel fees." Emphasis supplied

BRIEF FACTS

The plaintiff in an incisive 30 paragraphed affidavit, stated his statement of case which set out with clarity, the reasons why he is seeking the reliefs already referred to supra against the Defendants'.

The facts of this case admit of no controversy whatsoever. In January 2010, the late President Atta Mills set up a Constitution Review Commission under the Constitution Review Commission of Inquiry Instrument, 2010 C. I. 64 with terms of reference aimed basically at collating views from the people of Ghana on the weaknesses inherent in the workings of the Constitution 1992 **with a view to review and or comprehensively amend the said Constitution as the case might be.** The Constitution Review Commission was set up pursuant to article 278 (1) of the Constitution 1992.

Even though the Defendants have stated quite clearly in their statement of case that it was not the mandate of the C.R.C to amend the Constitution 1992, from a critical reading and analysis of the terms of reference of the C.R.C as is manifest in C. I. 64, it is obvious that, the end result of their work was going to result into

amendments of the Constitution 1992. This is evident in terms of reference no (c) of the CRC, which states as follows:

> ***"to make recommendations to the Government for consideration and provide a draft bill for possible amendments to the 1992 Constitution"*.**

Be that as it may, the C.R.C was duly set up with the membership appointed by His Excellency The President.

The C.R.C presented its report to the President, and Government issued a White Paper on the report of the C.R.C, in June 2012.

Whilst the government claimed to have accepted most of the recommendations of the C.R.C, it nevertheless rejected some. In pursuance of the White Paper, Government subsequently set up a five member Constitution Review Implementation Committee (CRIC) to, as it were, implement in strict compliance,the recommendations that have been accepted for amendment, pursuant to chapter 25 of the Constitution 1992, which deals with amendments.

The Plaintiff therefore considers all the processes initiated from the setting up of the CRC to that of the CRIC as unconstitutional and captures it as follows in paragraph 11 of his statement of case.

"Infact, the process by which the government accepted or rejected the commission's recommendations, as is the process by which members of the Commission (CRC) and Committee (CRIC) were appointed, remains invincible to the plaintiff and people of Ghana. Moreover, the process described in point 9 supra, where an unelected CRIC implements government white paper recommendations cherry picked from recommendations of an unelected CRC, is completely alien to Chapter 25 of the Constitution and antithetical to constitutionalism, separation of powers and democratic governance."

The plaintiff therefore contends that, following instructions received from the President, the CRIC has issued draft bills for the amendment of thirty four (34) entrenched provisions of the Constitution, whilst introducing seven (7) new entrenched provisions.

The Plaintiff also contends that the CRIC has also announced the preparation of several non-entrenched provisions to the preparation of new draft bills on the Armed Forces and other related matters.

The plaintiff further contends that the Chairman of the CRIC has announced the procedure which Ghanaians are to vote in the referendum by marking either

"yes" or *"no"* on all the changes to the thirty four (34) entrenched provisions and the additions of seven (7) new entrenched provisions.

The plaintiff however contends that article 278 (1) (a) of the Constitution does not grant the President an all purpose commissioning power. He contends that, the power therein only gives the President the power to commission what is, in effect, an independent inquiry to investigate and establish the truth or otherwise relating to a specific occurrence, affair or the activities of an entity. Such an inquiry is considered a judicial or quasi judicial in nature.

Thus, article 280 (2) of the Constitution is emphatic that adverse findings made against a person by an article 278 commission, are deemed to have the same judicial status as a judgment of the High Court from which an appeal lies to the Court of Appeal. **The plaintiff therefore is of the contention that the CRC is of a radically different nature than the type of Commissions of enquiry envisaged under article 278 (1) (a) of the Constitution 1992.**

Whilst the Defendant admits the facts stated supra, it controverts the plaintiff's assertion that the CRC and the CRIC cannot be said to take their mandate from article 278 (1) (a) of the Constitution 1992. In essence, what the Defendants' contend is that, the President was within his powers when he set up the CRC using the article 278 (1) (a) procedure and that everything done therein up to

the CRIC stage and the preparation of draft bills for the proposed amendments of the entrenched provisions and non entrenched provisionusing the provisions in Chapter 25 of the Constitution 1992 are all constitutional.

What this court has been asked to decide basically in this case is **whether the framers of the Constitution 1992,vested the power to initiate constitutional amendment solely and exclusively in the hands of Parliament and only a ministerial role to the President, or that the President has the role he has played in the present scenario through the work of the CRC i.e. C.I. 64 and that of the CRIC.**

STATEMENT OF CASE OF PLAINTIFF IN SUPPORT

The Plaintiff's statement of case state's in part as follows:-

"In January 2010 President John Atta Mills set up the Constitution Review Commission under the Constitution Review Commission of Inquiry Instrument, 2010, C. I. 64 with the following terms of reference:-

a. To ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution.

b. To articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution;

c. To make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

SUBMISSIONS ON THE WHITE PAPER ON CRC REPORT

9. "In the said white paper, Government claims to have accepted most of the recommendations of the Commission and set up **a 5-member Constitution Review and Implementation Committee (CRIC) to implement, in strict compliance with chapter 25 of the Constitution on "Amendments to the Constitution" the recommendations that have been accepted by Government."**

WORK OF THE CRIC

12. "Pursuant to the instructions from the President, the **CRIC has issued a draft bill for the amendment of 34 entrenched provisions of the Constitution. In addition, the draft bill will introduce 7 new entrenched provisions along with consequential and transitional provisions.**

14. The CRIC has also announced the preparation of the Armed Forces Amendment Bill and has proposed amendments to several non-entrenched provisions on matters ranging from the abolition of regional tribunals, election of District Chief Executives from a slate of candidates provided by the President and revision to the retirement age subject to the exigencies of a particular profession."

THE CRUX AND CORE ELEMENTS OF PLAINTIFF'S CASE

15. "The Plaintiff's case is that the President's Article 278 (1) (a) powers to appoint commissions of inquiry do not extend to setting up commissions to review the Constitution or to make such breathtaking changes to the Constitution.

16. The Plaintiff's case is that the phrase "any matter of public interest" cannot be read literally to empower the President to establish a commission at his pleasure to undertake any and every conceivable assignment that the President deems to be in the "public interest". **Such a literal reading of article 278 (1) (a) would grant the President license to appoint commissions to take on the full range of functions constitutionally assigned to other bodies outside the executive branch, and thus undermine the independence and credibility of**

such institutions and make nonsense of the Constitutional scheme of separation of powers.

17. The Plaintiff says that the CRC, whose task is to undertake a comprehensive review of the Constitution and draft a bill of proposed amendments to the Constitution, **is of a radically different kind than the commission contemplated under article 278 (1) (a).**

18. The plaintiff's case is that a comprehensive review of the Constitution is an act sui generis, not just "any" matter of public interest to be governed by the generic provisions relating to ad hoc commissions of inquiry.

19. The plaintiff's case is that any review of the Constitution whose purpose is to amend the Constitution must be governed solely and exclusively by the express requirements of chapter 25 of the Constitution.

20. The Plaintiff's case is that the power to amend the Constitution conferred to Parliament in Article 289 (1) is plenary and exclusive in that the Article separately identifies, defines and completely vests the amendment power in Parliament and only Parliament. That authority can neither be delegated to nor usurped by the President.

21. The Plaintiff says that consistent with Article 297 (c) the power vested in Parliament to amend the Constitution under Article 289 **(1) includes any and all incidental powers necessary for the accomplishment of the express power so conferred, including but not limited to the power to initiate amendment bills, hold hearings in committee, pass legislation to guide any review or reform of the Constitution or to deploy such other methods or** processes as Parliament may deem necessary that are not inconsistent with the Constitution." Emphasis supplied.

PLAINTIFF'S STATEMENT OF CASE ON PERCEIVED VIOLATIONS OF THE CONSTITUTION BY THE DEFENDANT

25. The Plaintiff's case is that it is impermissible for the President to misappropriate his Article 278 (1) powers to undo the carefully designed amendment architecture in chapter 25 of the Constitution.

26. The Plaintiff's case is that not having the powers to set up a commission to review the Constitution, the President's purported appointment of the CRC and the CRIC are of no legal effect and any actions ensuing from the CRC and CRIC are also null, void, unlawful and unconstitutional.

27. The plaintiff's case is that the government, through the CRIC, proposes to impermissibly place before the people of Ghana in a referendum a slate of unrelated proposals seeking to change 34 entrenched provisions and add seven new entrenched provisions together with consequential and transitional amendments.

28. The plaintiff says that bundling of unrelated items under a single amendment bill is contrary to Parliament's standing orders. Section 117 (1) of Parliament's standing orders says that, "matters with no proper relation to each other shall not be provided for in the same bill." This "single subject" clause requires that a bill's provision only relate to one subject, and in some cases that the bill's title likewise relate only to one subject.

PLAINTIFF'S CLOSING REMARKS IN HIS STATEMENT OF CASE

30. In brief, the Plaintiff's case is that the Constitution can only be amended by its terms. Parliament is the sole body that can initiate, consider and propose amendments to the Constitution. Parliament's power to amend the Constitution is not only plenary and exclusive but also cannot be delegated to or usurped by the President, the Commission (CRC) or the Committee (CRIC). The President's role in constitutional amendment is limited to the

ministerial task of giving assent to bills properly passed by Parliament. The President has no power to set up a commission to initiate amendments or draft amendment bills to the Constitution. To the extent that the President has usurped Parliamentary powers and misappropriated Article 278 (1) to traverse the amendment architecture emplaced by Chapter 25 of the Constitution, it is the Plaintiff's case that C. I. 64 setting up the Constitution Review Commission, all actions taken by the Commission, the establishment of the Constitution Review and Implementation Committee and all its actions are unlawful, unconstitutional, impermissible, null, void and of no effect."Emphasis supplied.

As can be read from paragraph 30 supra, the Plaintiff has with some degree of clarity and brevity summarized the facts and particulars that support his case in favour of the reliefs which he seeks against the Defendant.

THE DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF CASE

The Defendant acting through Mr. Sylvester Williams, learned Chief State Attorney, in a well articulated 25 paragraphed statement of Defendant's case, set out in detail it's response as follows:-

OPENING RESPONSE BY DEFENDANT

"From the outset, it is clear that the mandate of the Commission was not to amend the Constitution 1992. Their mandate was to gather information from the people of Ghana regarding their views of the operations of the Constitution, bearing in mind sections that needed to be amended. The Commission was also required to provide a draft Bill for consideration by all stakeholders for possible amendments to the Constitution". Emphasis supplied.

DEFENDANT ANCHORS IT'S CASE ON ARTICLE 278 (1)

3. "In accordance with the provisions of C. I. 64, the President established the Commission in the exercise of powers conferred on him by *Article 278 (1) (a) of the 1992 Constitution.*

4. It is the contention of the Plaintiff that C. I. 64 is null and void and of no legal effect as it contravenes the letter and spirit of Article 289 (1) of the 1992 Constitution, since by the Article supra, it is Parliament that has the exclusive and specific power to amend the Constitution.

5. Article 278 (1) (a) of the 1992 Constitution provide as follows:-

Appointment of Commission of Inquiry

(1) "Subject to Article 5 of the Constitution, the President shall, by Constitutional Instrument, appoint a Commission of Inquiry into" any matter of public interest" (my emphasis) where

(a) The President is satisfied that a Commission of Inquiry should be appointed …"

DEFENDANT'S SUBMISSION ON WHAT CONSTITUTES PUBLIC INTEREST

6. What then constitutes ***"any matter of Public Interest"*** and whether any issue concerning the provisions of the Constitution can be classified as matters of Public Interest?

Article 295 (1) of the Constitution, 1992 provides the definition of public interest, in the following manner,

"In this Constitution, unless the context otherwise requires-

"Public interest" includes any right or advantage which inures or is intended to inure to the benefit generally of the whole of the people of Ghana."

INTRODUCTION OF ARTICLE 1 PRINCIPLES OF THE CONSTITUTION

8. The impression one gets from reading **article 1 of the Constitution is that, it is the people of Ghana who have surrendered their sovereignty to the Government to rule in accordance with the provisions of the Constitution**.

9. The Plaintiff contends that, Parliament has the exclusive and specific mandate to amend the Constitution pursuant to Article 289 (1). The said article reads as follows:-

289 Amendment of the Constitution

(1) "Subject to the provisions of this Constitution (my emphasis), Parliament may, by an Act of Parliament, amend any provision of this Constitution."

It is to be noted that in the language of the provision, Parliament in exercising its powers of amending the Constitution is "subject to" the other provisions of the Constitution. In the case *of Edusei v Attorney-General [1998-99] SCGLR 753,* his Lordship Charles Hayfron-Benjamin JSC, said of the phrase "subject to" at page 762 in the following manner.

"In my respectful opinion, therefore the expression, "subject to" within the context of article 130(1) of the 1992 Constitution, means that, if there is no other provision in the Constitution, by which a remedy may be obtained, then the High Court will have specific jurisdiction to grant redress in matters involved in breaches of provisions of chapter 5 of the Constitution."

Learned counsel for the Defendant continued his submissions in the Defendant's statement of case thus:-

"Similarly, it is my candid view that, the proper interpretation of article 289 (1) of the Constitution is that the amendment of the Constitution should be undertaken by Parliament alone, ***provided there is no provision in the Constitution dealing with amendment to the Constitution.*** *Unfortunately, that is not the case. In amending the Constitution, the procedures and the processes mentioned in articles 289, 290 and 291 are to be complied with. That is not all. The President of the Republic of Ghana is empowered by article 278 of the Constitution to appoint a commission of inquiry to go into any matter of public interest. And as we have already demonstrated amendment to the Constitution is a matter of great public interest; and if a commission of inquiry is set up by the President to collect and collate views from the people of Ghana geared*

towards amending the Constitution, then there is no gainsaying the fact that article 278 of the Constitution is a provision to take into consideration when it comes to amending the Constitution.

In other words, the provision for amending the Constitution will undoubtedly include article 278 (1) (a) which in effect allows the broad masses of the people of Ghana to have a say in amendment of the provisions of the Constitution.

Additionally, My Lords, the amendment process itself is neither the preserve nor exclusive territory for Parliament. The amendment involves the people, Council of State, Parliament and President. If the framers of the Constitution were minded to cloth Parliament with exclusive power to amend the Constitution, they would have done so in plain language; (sic) and article 289 (1) of the Constitution would not have preceded with the words "subject to the provisions of the Constitution…"

DEFENDANT'S SUBMISSIONS ON AMENDMENT PROCESSES OF THE CONSTITUTION

10. "Pursuant to Article 290 under chapter 25 of the Constitution, the procedures for the amendment of entrenched and non-entrenched provisions of the Constitution are discussed. It is worthwhile to note that

the amendment of an entrenched provision of the Constitution does not involve Parliament alone."

PROCEDURE FOR AMENDMENTS OF ENTRENCHED PROVISIONS

11. Pursuant to clauses 2, 3, 4, 5 and 6 of the Article 290, the following steps are followed in amending entrenched provisions of the Constitution.

    i. Speaker refers a Bill for amendment to Council of State who renders the advice within 30 days.

    ii. Bill is published in the Gazette and shall be introduced into Parliament after 6 months of the Gazette notification.

    iii. After first reading in Parliament, a referendum shall be held to be voted upon by at least 40% of people entitled to vote and at least 75% of people who voted, voted in favour in passing of the Bill."

Continuing further his submissions, learned Chief State Attorney stated partly in paragraph 13 of the Defendants statement of case as follows:-

13. "Once again, My Lords, with non-entrenched provisions, it is not only Parliament that can amend it. The Council of State, Parliament and the President are all involved."

No amendment can be valid if the President refuses to assent to a Bill approved by Parliament. A Bill assented to by the President can be declared as unconstitutional, null and void by this Honourable Court in an action for such a declaration, if it is proved that the Council of State was not given the opportunity to advice on it.

15. Article 106 of the Constitution 1992, spells out the manner in which our Parliament can exercise its legislative powers in cases of ordinary Bills, Urgent Bills and Financial Bills. **However, when it comes to entrenched provisions, the procedure thereof is provided for under Chapter 25 of the Constitution 1992. One would notice that, when it comes to entrenched provisions of the Constitution 1992, Parliament is not clothed with the same powers as it is with ordinary Bills of Parliament. In article 106 of the Constitution 1992, provisions are made for the Bill to be read for the first time and then referred to the appropriate committee for examination**. Thereafter it is reported to Parliament for a full debate. At this stage, Parliament has power to make amendments or pass the Bill into law.

16. The procedure narrated in paragraph 15, supra, cannot be applied to entrenched provisions. In fact, the combined effect of article 290 (2), (3) and (4) suggests that when it comes to the amendment of entrenched

provisions of the Constitution 1992 Parliament has no role to play by way of debate as it is the case with other Bills of Parliament in article 106 of the Constitution 1992.

17. **Paragraph 28 of the Plaintiff's statement of case is totally false.** Section 117 (1) of the Standing Orders of Parliament does not deal with matters which has no proper relation to each other. It is rather section 118 (1) of the Standing Orders of Parliament that deals with that subject. The section states as follows:-

"Matters with no proper relation to each shall not be provided for in the same Bill."

The contention of the plaintiff that the Bill is offensive to the Standing Orders of Parliament because they are unrelated is unsustainable. This is because all the matters in the Bill are related as they all deal with the amendment to the Constitution."

POSITION OF DEFENDANT ON THE CASE BEFORE THIS COURT

18. It is our submission that article 289 (1) does not confer on Parliament the exclusive mandate to amend any provision of this Constitution. **It is the right of the President to constitute a Commission of Inquiry to undertake the preparatory work towards the amendment of**

certain parts of the Constitution, especially when the President is satisfied that it is in the interest of the public to do so. It is our view that, the Constitution Review Commission of Inquiry was a lawful Institution so is its offshoot, the Constitution Review and Implementation Committee.

19. It is our position that both provisions of the Constitution, Articles 278 (1) (a) and 289 (1) complement each other regarding the amendment of some of the provisions of the Constitution. Article 278 (1) (a) of the Constitution 1992 enables the people of Ghana to partake in the amendment process by submitting memoranda or articulating their views on some provisions of the Constitution. These pieces of information put together become the building blocks of the Bill, which initiates the amendment process. It is to be noted that a national Constitution is a framework and it cannot take care of every activity in this country. Provided the steps being taken are in tandem with the law, the same is lawful. The establishment of the CRIC is just one of the processes of putting up a Bill for amendment following the information gathered by the CRC.

21. This notion of construing national Constitutions broadly, have been settled in many cases including the landmark case of ***Tuffour v Attorney General [1980] GLR 637.*** In the judgment of the Court of Appeal sitting

as the Supreme Court, the notion that with National Constitutions, the courts ought not to narrowly construe its provision but rather construe provisions of a National Constitution liberally and broadly was stressed by Sowah JSC at page 647-648 thus:-

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

A 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 would not do. We must take account of its principle and bring it into conformity with the needs of the time."

22. Also Apaloo JA (as he then was) in ***Sallah v Attorney-General***, Supreme Court, 20th April 1970; digested in (1970) CC 55 said

"We shall fail in our duty to effectuate the will of the Constituent Assembly if we interpreted the Constitution 1969, schedule 1, section 9 (1), not in

accordance with its letter and spirit but in accordance with some doctrinaire juristic theory."

23. Sowah CJ, in the ***Republic v High Court, Accra: Ex- Parte Adjei***, Supreme Court 23rd June 1968: digested in [1984-1986] GLRD 130 said,

"The narrow rules of construction applicable in the cases of contracts, Will's, statutes and ordinary legislations may or may not be adequate when it comes to the interpretation of a constitution or law intended to govern the body politics. **Our interpretation should therefore match the hopes and aspirations of our society and our predominant consideration is to make the administration work." Emphasis supplied.**

CLOSING REMARKS OF THE DEFENDANT IN HIS STATEMENT OF CASE

24. It is in the light of the above exposition that we wish to indicate that articles 278 (1) (a), 289 (1), 290 and 291 must all be read together to achieve the purpose in relation to the amendment of the Constitution.The mention in article 289 (1) of "Parliament may, by an Act of Parliament amend any provision of the Constitution" constitutes the letter of the Constitution. The spirit of this provision is gathered if one reads this provision in addition

to the other provisions mentioned supra. This enables one achieve the real purpose for the amendment of the Constitution."

With the above closing remarks, the Defendant invited this court to dismiss the Plaintiff's action.

MEMORANDUM OF ISSUES

It is to be noted that after the setting out of their respective statements of case as has been referred to in extenso, the parties filed separate memorandum of issues. Accordingly, the court on the 9th day of July 2015 set down and agreed to the respective memoranda of issues. I will therefore set these out in detail, commencing with the memorandum of issues of the Plaintiff.

ISSUES FOR THE PLAINTIFF

i. Whether the power granted to the President under Article 278 (1) to "appoint a commission of inquiry into any matter of public interest" includes the power to establish a commission of inquiry to review and propose amendment bills to the Constitution where the power to review and propose amendment bills to the Constitution has been expressly, exclusively and specifically conferred to Parliament?

ii. Whether the President has any power under the Constitution to set up a Constitution Review Implementation Commission (CRIC) with the mandate

to implement, in strict compliance with Chapter 25 of the Constitution, the recommendations of the Constitution Review Committee (CRC) that have been accepted by the government?

iii. Whether Parliament's power to amend the Constitution in conformance with the processes stipulated by Chapter 25 of the Constitution is plenary and exclusive and therefore cannot be usurped by or even delegated to the President?

iv. Whether processes and procedures not explicitly specified by the Constitution, including wholesale review of the Constitution, can be used to amend the 1992 Constitution?

v. Whether the President's role in any such constitutional amendments is limited to the ministerial tasks stipulated in Article 290 (6), 291 (4) and 292 (a)?

THE FOLLOWING ALSO CONSTITUTE THE DEFENDANT'S MEMORANDUM OF ISSUES:

1. Whether the Constitution Review Commission of Inquiry Instrument, 2010 C. I. 64 contravenes the letter and spirit of article 289 (1) of the 1992 Constitution and therefore must be declared as null and void.

2. Whether under article 278 (1) of the Constitution 1992, the President has the power to establish a commission to review and propose amendment bills for the Constitution.

3. Whether or not the Constitution Review Implementation Committee and all its activities relating to finalizing amendment bills for the Constitution are impermissible, unlawful, unconstitutional and null and void.

4. Whether Parliament is the only institution that can amend the Constitution.

In considering the separate memorandum of issues filed by the parties, I have observed some repetitions and similarities.

For example, Plaintiff's memorandum of issues number I is similar in context and content to issue number IV. These two can therefore be taken together. Furthermore, Plaintiff's issue number II is also similar to issue number V.

In real terms therefore, the Plaintiff's issues could have been subsumed under three issues, issues I and IV are one, whilst issues II and V are also one. It is only Plaintiff's issue number 3 which stands out distinctly on it's own.

On the Defendant's memorandum of issues, numbers 1 and 2 are similar in content and context. What should be noted here is that, these two issues 1 and 2 of the Defendant's are therefore similar and encompass plaintiff's issues numbers I and IV already referred to. Defendant's issue number 3 is similar in

content to the Plaintiff's issue II and V. Finally, Defendant's issue number 4 is similar to plaintiff's issue III.

I will therefore narrow the issues to the above permutations and discuss them as such.

CONSTITUTIONAL POSITION OF RULES OF COURT COMMITTEE AND C.I. 16

In the exercise of the powers conferred on the Rules of Court Committee by clause (4) of article 33, clause (3) of article 64 and clause (2) of article 157 of the Constitution 1992, the Supreme Court Rules, 1996, C. I. 16 had been made. It is also to be noted that, it is these rules which regulate procedure in the Supreme Court.

FILING OF MEMORANDUM OF ISSUES – RULE 50 OF C.I. 16

I have been minded to write this particular comment because of what I consider to be breaches or non-observance of some of the specific rules of procedure germane to this case in this court.

Since the plaintiff has invoked the original jurisdiction of this court, Rule 50 of C. I. 16 is applicable. This rule provides as follows:-

50 (1)"The parties may agree to file, or shall file, if so ordered by the court, file a memorandum specifying the issues agreed by them to be tried at the hearing of the action.

(2) The memorandum of agreed issues shall be signed by the parties and may, with the leave of the court granted upon such terms as the court may determine, be amended upon the application of the parties.

(3) Where the parties cannot agree on the issues each party, may file his own memorandum of issues."

In this court, parties and learned counsel have taken the view that they are at liberty to file separate and distinct memorandum of issues. However, a close reading of the above rules as has been stated supra gives the clearest indications that, after the close of pleadings, the parties are expected to exploit the possibility of filing agreed issues of memoranda as the marginal notes to Rule 50 (1) of C. I. 16 puts the matter beyond doubt when it states emphatically that the memorandum of agreed issues shall be signed..."

It is therefore clear that the following steps must be followed by parties and their counsel in suits invoking the original jurisdiction of this court in the formulation and filing of memorandum of issues pursuant to rule 50 of C.I. 16. These are

(1) Agreement by the parties to file joint memorandum of issues.

(2) The parties may be mandatorily ordered by the court to file agreed memorandum of issues, and if so ordered, shall comply.

(3) This memorandum of agreed issues shall be signed by the parties, and if acting by counsel, it follows logically that they are to be signed by their respective counsel.

(4) The agreed issues may upon leave granted by the court be amended upon application made by the parties.

(5) It is only when the parties cannot agree on the issues before the court that they can go their separate and distinct ways to file same.

I have however observed that in this case, there was no serious attempt by the parties to file agreed issues before the court.

Whilst the plaintiff filed his separate issues alongside his arguments of law pursuant to Rule 51 of C. I. 16, on the 22nd of June 2015, the Defendants on the other hand filed their memorandum of issues on 24th June 2015.

I am however of the opinion that, once the filing of the memorandum of issues before this court is regulated by statute, to wit, Rule 50 of C. I. 16, parties and counsel must as far as is practicable, endeavour to comply with the steps stated supra in the Rule.

Even though as a court, there has been some laxity in the compliance to the said Rule 50 of C. I. 16, I think the time has come for us to ensure strict compliance. This is because, it is not for nothing that the framers of the law provided an avenue for agreed memorandum of issues. This is perhaps an opportunity for the parties to narrow down their differences, and reach consensus.

However. Since compliance with this Rule 50 has been honoured more in the breach than in its observance, it should not be held against the parties herein.

THE PROVISO FOR ARGUMENTS OF LAW – RULE 51 OF C.I. 16

I have also observed that, Rule 51 of C. I. 16 is also another rule to which there is no uniformity of compliance in this court. This rule provides as follows:-

51 "The court may, after the memorandum of issues has been submitted to it, order any of the parties to clarify or state fully in writing any further argument of law with a list of the decided cases and the statute law in support of his case not already dealt with in the statement of his case, or in the memorandum of issues."

My understanding of the above rule of procedure is that, it is the Supreme Court, that may after the memorandum of issues has been filed order the parties to file their "further arguments of law "by clarifying any matters that it may deem fit."

My further understanding of this rule of procedure is that, after the memorandum of issues has been filed, the court may request any party to explain fully by clarifying any points of law already canvassed or raised in the respective statements of plaintiff's case or defendant's case in this arguments of law. The further argument of law is expected to be a presentation that will fully deal with any doubts raised in the minds of the court as well as present statutory law as well as decided cases in support of any propositions of law earlier on submitted. The further arguments of law as provided for in this rule 51, is not expected to be a repetition or rehash of issues of law already dealt with in the statement of case of either party, but an avenue for the explanation and support of all legal arguments that were not stated with clarity or certainty.

My further understanding is that, parties and counsel do not have an automatic right to file this further arguments of law without an invitation by the court. These arguments are designed to fill vacuum or lacuna in the statement of the law in their respective statements of case with legal authorities in support.

Once again, this particular rule has been honoured more in the breach than in the observance.

In the instant case, even though the plaintiff was not ordered by the court to file it, he has gone ahead to do so. I have also observed that, the court has in many

instances in the past, acquiesced in parties and counsel who filed their further arguments of law without an order by the court with kid gloves.

Even though the plaintiff appears to be in breach of this rule, I have found his further arguments of law very useful and elucidating.

I believe that in order to fashion out unanimity in the enforcement of the rules of procedure in the Supreme Court, there should be some uniformity and certainty in the applicability of these rules. That is the only way that the court can have the benefit of this rule 51 of C. I. 16.

For example, when the court as it were legitimized the plaintiff's unilateral decision in filing his further arguments of law and therefore requested the Defendant's to file same if so minded, the request, was however not heeded. It is to prevent incidents like the instant where one party files further arguments of law without an order whilst the other which is duly requested to file in response, in order to balance the equation declines our request and by so doing relies solely on their statement of Defendant's case, that it is necessary for the court to intervene.

Before proceeding to discuss the issues stated in the separate memoranda of issues referred to supra, there are some basic fundamental constitutional issues

or principles which I consider as preliminary and therefore germane to the real constitutional issues raised in the memorandum of issues referred to supra.

I therefore intend to deal with these preliminary principles which I hope will unravel the real and genuine issues involved. I also believe that a discussion of these preliminaries will afford a better understanding of the Constitution 1992 and basically the doctrine of the separation of powers which is the bedrock of the Constitution 1992.

PRELIMINARY CONSTITUTIONAL ISSUES

Preamble to the Constitution 1992

These provide as follows:-

"THE CONSTITUTION OF THE REPUBLIC OF GHANA "IN THE NAME OF THE ALMIGHTY GOD, "**WE THE PEOPLE OF GHANA",(**IN EXERCISE of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity:)

(IN A SPIRIT OF friendship and peace with all peoples of the world:

AND IN SOLEMN declaration and affirmation of our commitment to Freedom, Justice, Probity and Accountability.

The Principle of Universal Adult Suffrage

The Rule of Law

The Protection and Preservation of fundamental Human Rights and Freedoms, Unity and Stability for our Nation;)**DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."**

What should be noted is that, the preamble can be taken to be in two parts, the *operative* and *subordinate* parts.

What I consider to be the operative and constitutive parts are the words **"we the People of Ghana ... Do hereby adopt, enact and give to ourselves this Constitution".**

The subordinate parts will be from the words: "In Exercise of our natural and inalienable right to establish ...up to and including all the words therein to "The protection and preservation of fundamental Human Rights and Freedoms, Unity and Stability for our Nation."As has been put in brackets.

If the above preambular statements are considered alongside Article 1(1) of the Constitution 1992, which provides thus:-

(1) ”The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.”

Then a full understanding of the philosophical underpinnings upon which the framers of the Constitution 1992 fashioned it out will be clearly seen.

This article 1 (1) of the Constitution raises three basic principles.

1. The first is that, **sovereignty resides in the people,** and this is manifested throughoutall the principles enshrined in the constitution that power resides in the people. Article 125 (1) on the judiciary for example, also provides that “Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.”

The people, i.e. the citizenry are the source of all powers in the Constitution 1992. That is why, in the operative parts of the preamble, it is clear that, it is the people of Ghana, who have adopted, enacted and given to themselves this power which is then delegated as directed in the Constitution.

2. The second is the **thrust of representative government**. This finds expression in the words *"in whose name and for whose welfare the powers of government are to be exercised".*

It is therefore clear that sufficient indications and intentions have been given in this article 1 (1) of the Constitution 1992 that the said sovereignty of Ghana which resides in the people will be exercised on their behalf by the government and for their welfare and

3. Thirdly, the **principle of constitutionalism.** This simply connotes the fact that the said powers of government are to be "exercised **in the manner and within the limits laid down in this Constitution.**"

Briefly stated, it means that, any of the arms of government and institutions of state created by and under the authority of the Constitution 1992 are limited in the powers that it has and that, the said institutions of state can only exercise those powers that have substantively and procedurally been granted them.

The Constitution 1992 does not give absolute power to any of the arms of government or of the many institutions of state created therein. The people have been recognized as the source of all power, which they exercise through a representative government which in turn exercises those powers within constitutional limits, on their behalf, be it by the President, the legislature

through their elected representatives in Parliament and by the Judiciary on behalf of the people.

The above principles have to be considered alongside the provisions in article 289 (1) of the Constitution 1992 which provides thus:-

289 (1) "Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.

(4) This Constitution shall not be amended by an Act of Parliament or altered whether directly or indirectly unless

(a) the sole purpose of the Act is to amend this Constitution; and

(b) the Act has been passed in accordance with this chapter"

It does appear that by the provisions of article 289 (1) of the Constitution 1992 referred to supra it is only, Parliament, which has legislative authority under the Constitution 1992 that has been given power to amend the Constitution.

Parliament as the duly elected representatives of the people has been granted this sacred power to amend this Constitution. The meaning of this is that, the people of Ghana have delegated their power which was vested in them when they adopted and enacted the Constitution and re-enforced in article 1 (1) of the Constitution 1992 to their elected representatives in Parliament. **The people as**

the constituent power have therefore delegated this power to the elected representatives of the people in Parliament to amend the Constitution 1992 in clearly laid down procedures.

Before I proceed any further with these discussions, it is also noteworthy to refer to article 93 (2) of the Constitution 1992 which vests legislative power of Ghana in Parliament. This provides as follows:-

> *"Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution."*

The Legislative power which is vested in Parliament is not without restrictions and subject to many rules and procedures. For example, it is provided in article 106 (1) of the Constitution 1992 as follows:-

> *"The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President."*

The other provisions of article 106 (2) through to clause 14 sets out in detail the procedures that have to be followed from the presentment of a bill in Parliament, through to its publication in the Gazette, to its reading for the first time, to the Committee State, to its second and third readings by which time all amendments to the bill would have been made making the bill ready for Presidential Assent.

The other provisions also deal with the procedure when the President refuses to assent to the bill, the reference to the Council of State and reconsideration by Parliament including the comments of both the President and Council of State.

There are also provisions in article 106 (13) for a bill to be considered under a certificate of urgency where the Committee of Parliament considers that it is necessary so to do and in such a case the President can assent to it upon it's presentation.

Parliament however before considering any bill affecting the institution of chieftaincy must ensure that the bill has been referred to the National House of Chiefs for consideration before it is introduced in Parliament.

Article 107 (1) restricts Parliament from passing any law that has the powerto alter the decision or judgment of any court as between the parties to that decision and sub-clause (2) restricts Parliament from passing any retroactive legislation which has the effect of adversely affecting the personal rights and liberties of any person etc. except in cases of bills affecting withdrawals from public funds as provided in articles 178 to 182 of the Constitution 1992.

Furthermore, the Constitution 1992 provides in article 108 as follows:-

> "Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of, the President:-
>
> (a) proceed upon a bill including an amendment to a Bill, that, in the opinion of the person presiding, makes provision for any of the following:-
>
> i. the imposition of taxation or the alteration of taxation otherwise than by reduction; or

ii. the imposition of a charge on the Consolidated Fund or other public funds of Ghana or the alteration of any such charge otherwise than by reduction; or

iii. the payment, issue or withdrawal from 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 composition or remission of any debt due to the Government of Ghana; or

b. proceed upon a motion, including an amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any of the purposes specified in paragraph (a) of this article.

What is clear from the provisions of article 108 and 289 of the Constitution 1992, is that, whilst there is a clear distinction on the powers of Parliament in considering bills touching settlement of financial matters including the raising of taxes and withdrawals from the consolidated fund which cannot be made without it being introduced for and on behalf of the President, **there is infact no such restriction on the power of Parliament to amend any of the provisions of this Constitution in article 289 of the Constitution 1992, already referred to supra.**

What is the rationale behind these limitations? It is safe to conclude that, the intendment of the framers of the Constitution is to ensure that the passage of ordinary Acts of Parliament under the article 108 situations have intentionally been made to be different from passage of amendments to the Constitution.

In my opinion, it is very important to make very clear distinctions here. **Under amendment process in article 289 of the Constitution 1992, the power to amend the Constitution has been reserved solely to Parliament and as will soon be discussed, since the President, with respect has no discretion to refuse to assent to any amendment bills passed by Parliament, (see article 291 (4) of the Constitution 1992 which provides as follows:-**

(5) "where the bill has been passed in accordance with this article, the President shall assent to it.")

It follows that, the letter and spirit behind article 289 (1) provisions of the Constitution must be followed.

This is in contra distinction to passage of ordinary bills into Acts of Parliament where, as has already been discussed briefly, the President may refuse to assent to a bill passed by Parliament and may request Parliament to reconsider their decision in the light of the comments by the President and the Council of State respectively. There is however no such restriction on the amendment powers of parliament under article 289 of the Constitution.

It is therefore certain that roles and discretion if any of Parliament and the President in the passage of ordinary bills into Acts of Parliament and the passage of an amendment bill into law under article 289 of the Constitution are different.

ARTICLE 278 PROVISIONS AND EFFECT

This then brings into focus, the heavy reliance by the Hon. Attorney General, the Defendant herein on article 278. Article 278 of the Constitution 1992 which deals with appointment of Commissions of Inquiry providesthus:-

(1) "Subject to article 5 of this Constitution, the President shall by constitutional instrument, appoint a commission of inquiry into **any matter of public interest where**

(a) The President is **satisfied** that a commission of inquiry should be appointed; or

(b) The Council of State **advises** that it is in the **public interest** to do so; or

(c) Parliament, by a **resolution requests** that a Commission of inquiry be appointed to inquire into any matter, specified in the resolution as being a **matter of public importance."** Emphasis supplied

From the above, what is certain is that the President in the appointment of the Constitution Review Commission pursuant to Constitution Instrument, 2010 C. I. 64 acted under the provisions of this article 278 of the Constitution 1992.

The powers of the President to set up Commissions of Inquiry to inquire into any matter of public interest if he is satisfied, under article 278 of the Constitution are not in doubt.

The crux of this case is whether the procedure adopted by the President in appointing the C.R.C to collate views from the public and

making recommendations as set out supra and the subsequent work of the CRIC are in conflict with article 289 provisions of the Constitution 1992 and therefore unconstitutional?

Is there really a contradiction between article 278 and 289 of the Constitution 1992?

In my opinion, I do not think there is any contradiction between the two provisions. This is because,

1. Changes to the Constitution, in the form of constitutional amendments of the Constitution should be considered only in respect of the specific provisions made there under in the Constitution for amendment and this has exclusively been captured and reserved to chapter 25 procedure.

2. The matter of public interest has to be considered objectively to determine whether it is constitutional or unconstitutional in the first place for the President to decide subjectively that he is satisfied that the :

> *"Public interest" includes any right or advantage which enures to or is intended to enure to the benefit generally of the whole of the people of Ghana."*

What this means is that, the provision in article 278 states in no uncertain terms that the sole qualification for the appointment of Commissions of enquiry is for the President to be satisfied that is in the public interest so to do.

COMMISSIONS OF INQUIRY UNDER ARTICLE 278 (1) OF CONSTITUTION 1992

Under article 278 (1) of the Constitution 1992, the President is mandatorily expected to appoint a Commission of inquiry into a matter of public interest in any of the following conditions:-

a. If the President is satisfied that a commission of inquiry be appointed.
b. Upon advise by the Council of state that it is in the public interest so to do, and
c. Upon a resolution passed by Parliament to the effect that it is of pubic importance to inquire into any matter specified therein.

My understanding of the above provisions is that, the President is enjoined to appoint a Commission of Inquiry under any of the above conditions.

The first condition really does not pose much problem, however it is that which has raised concerns herein in the instant case.

The second and third conditions are quite straight forward. This is because, when the Council of State gives an advise on a matter of public interest requiring an investigation, the President is to respond. The entity and the reasons for requesting the inquiry would have been stated in the advisory opinion.

My only problem therein is that, the activities of the Council of State are somehow shrouded in secrecy and unless press releases are issued out, one does not really know what the Council of State is doing much more to know what informed their decision.

Thirdly, the passage of a resolution by Parliament admits of no controversy. Reason being that, the activities of Parliament are always covered by

Parliamentary debates called the Hansard, and from this, all proceedings can be verified.

Can a Commission of Inquiry be appointed by the President to inquire into

i. any matter in respect of which he is satisfied to be in the public interest?

ii. any matter in respect of which the Council of State offers advise that it is in the public interest so to do? And

iii. any matter in respect of which Parliament passes a resolution as requiring the appointment of a Commission of Inquiry pursuant to article 278 (1) (c) of the Constitution 1992?

Reading the Constitution literally, one is tempted to answer the above questions in the affirmative. However, if article 1 (1) of the Constitution 1992, especially the principle of constitutionalism which was discussed in the earlier pages of this judgment are considered, **then it is clear that to every step or right given in the Constitution 1992, limitations imposed therein must equally be respected and complied with.**

With those basic constitutional principles in view, it is clear that, for example the President even if he is satisfied that it is in the public interest to appoint a Commission of Inquiry to inquire into the issues of replacement or revision ofthe voters register may not do so because the Constitution 1992 has reserved those functions to another constitutional body created under the Constitution 1992, and that is the Electoral Commission. More on this issue later in the judgment.

It is therefore safe to conclude that even though the President has been given very wide powers under article 278 (1) of the Constitution to appoint commissions of inquiry under the conditions stated therein, the appointment of

the Commission to inquire into a specific matter must itself be constitutional such that it does not infringe any of the constitutional provisions in the Constitution. The fact that the President was satisfied that a matter is of public interest does not necessarily make the appointment of the Commission constitutional. The test applicable by the President is subjective and not capable of any assessment. But once the basis of the power is from the Constitution, it must be assessed under the provisions of the entire Constitution.

However, when issues of unconstitutional conduct have been raised by the Plaintiff herein into the appointment of the CRC vis-à-vis and their terms of reference and the further works attributed to the CRIC, then it becomes necessary for a court such as this Supreme Court to use an objective test. I find persuasive support in this line of thinking from Lord Atkin's dissenting opinion in the case of**Liversidge v Anderson &Anr. [1942] A.C 206**, where he took the view that a statute which gave sweeping powers to a Minister of State to cause the arrest and detention of persons during war times when he was satisfied or had reasonable cause to believe that such a person to be of hostile association was too subjective and not objective, and thus held that, in such circumstances, the actions of the Minister ought to be reviewed by the courts for the criteria used by the Minister to be assessed on objective basis.

I am therefore of the very humble and respectful opinion that this court has the power to inquire into the constitutionality of the appointment of the CRC in the terms of the Plaintiff's complaint, drawing some parallel lessons from Lord Atkin's dissenting opinion in the **Liversidge v Anderson** casa, referred to supra.

Lord Atkin stated in part as follows:-

> "*I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to*

the Minster… If it be true, as for the foregoing reasons, I am profoundly convinced it is, that the Home Secretary has not been given an unconditional authority to detain,… The appellant's right to particulars, however, is based on a much broader ground, a principle which again is one of the pillars of liberty in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act…"

I am minded to adopt the persuasive words of Lord Atkin and apply them to our own situation in this case and hold and rule that this court can indeed inquire into the reasons if any as to why the President was satisfied in establishing the CRC pursuant to C.I. 64 and determine the constitutionality or otherwise of that action.

In my candid opinion, the use of the C.I. 64 to seek toamend the constitution is a distraction. Why do I say so? I say so because whilst the power granted the President in article 278 is exclusive to the President, and limited in scope and content that in article 289 is exclusive to Parliament, and relevant on the issue of amendment which is germane to the action herein.

If one is minded to favourably consider the procedure used by the President in C. I. 64, then one can safely conclude that the work of the CRC should have been handed over to Parliament to adopt and implement those portions of their work that they intend to use.

In my view, the above procedure could have been adopted if there is or was a vacuum. But, there has not been established any vacuum and it is therefore certain that the appointment of the CRC pursuant to C.I. 64 was an unconstitutional conduct which must therefore not be allowed to fester under our constitutional scheme of things unless the work of the CRC is used as a basis of

the introduction of the amendment bill into Parliament without any reference to the CRC and CRIC. In other words, Parliament takes control of the work of the CRC entirely without any limitations.

ARGUMENTS ON SEPARATION OF POWERS

As is evident in article 1 (1) of the Constitution 1992, the supremacy of the Constitution 1992, has been established. Furthermore, the said article states that the powers of government are to be exercised only **in the manner and within the limits laid down under the Constitution.**

For example, it is trite knowledge that there are basically three arms of government, i.e. the tripod.

These are the **Legislature, Executive** and the **Judiciary**. All the above constitutional arms of government even though inter relate and overlap sometimes have very distinctive roles, such that, one cannot usurp the powers and roles of the other.

In the Constitution 1992, whereas chapter eight deals exclusively with the Executive, chapter ten deals with the Legislature and chapter eleven with the judiciary.

Just for purposes of emphasis and clarity, article 57 (1) and 58 (1) of the Constitution 1992 vest governmental authority and that of the Executive in the President.

Article 58 (1) provides thus:-

> *"The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution."*

On the other hand, article 93 (2) provides as follows:-

"Subject to the provisions of this constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this constitution."

Finally, article 125 (3) provides that

"The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power".

It can therefore be seen that every organ or arm of government has by the special architecture of the Constitution its own powers which cannot be usurped by any other arm. Even though the various arms of government have precedence in the scheme of things, none can usurp the powers of each other. See article 57 (2) of the Constitution 1992.

For example, whilst the Constitution 1992 allows some of the other arms of government to participate in the activities of the other arm of government, it does so by a carefully and well calculated procedure that does not create tension, chaos or confusion.

Whilst the President can be said to participate in the passage of bills into Acts of Parliament by introduction of bills into Parliament, by assenting to such bills into Acts, and can sometimes delay the passage of ordinary bills into Acts, no such participatory role is granted the President in procedures envisaged under article 289 of the Constitution where the President is just mandatorily required to assent to an amendment motion.

Secondly, even though both the President, who is the head of the Executive and Parliament all have roles in the appointment processes of especially the Supreme Court Justices, where there is a mandatory Parliamentary vetting and approval

process, there is however no role reserved for them thereafter in the performance of the judicial functions of the Justices of the Supreme Court.

Looking basically at the provisions of the Constitution 1992, I am of the opinion that, the Constitution 1992 has been so carefully crafted as to prevent the usurpation of the roles and functions of each arm of government and or constitutional body. The turf of each arm of government is so very well protected as can be seen in the following illustrations by analogy.

1. See article 290 (6) where the President is mandatorily required to assent to a bill that has been duly passed in accordance with an amendment process of an entrenched clause. The President has no delay powers in this respect. Provided a bill has been accompanied with the certificates mentioned in article 292 (a) and (b) by the speaker and the Chairman of the E.C respectively, the President has no discretion in the matter. He is bound to assent to it.
2. Furthermore, article 291 (4) also provides that the President shall assent to the bill if the amendment bill of the Constitution has been passed in accordance with the Constitution.

The indication for me here is very clear. And this is that, an Act, amending the Constitution has been put a notch higher than the passage of an ordinary bill introduced into Parliament. The lesson here is clear. The power given by the people to their constitutional representatives, in Parliament cannot just be wished away by the controlling powers of the President. Once it has been established that the President's role in the passage of an amendment bill is just peremptory, it means that, the powers of the people in article 1 (1) of the Constitution which have been delegated to the members of Parliament is not to be shared with the President in the way of ordinary bills of Parliament.

It is in this respect that I agree with the plaintiff when he states in his paragraph 25 of the statement of case that it is impermissible for the President to misapply his article 278 (1) powers to undo what the framers of the Constitution have taken so much skill to design.

ISSUES FOR DETERMINATION

Having discussed the facts and some basic underlying constitutional principles in this case so far, I think the time is ripe for the issues identified and isolated be dealt with in line with the facts and principles of law.

1. Whether the setting up of the Constitutional Review Commission CRC, Pursuant to C.I. 64 With its Terms of Reference already stated supra which is basically to collate views on proposals to amend the Constitution 1992 is unconstitutional vis-à-vis article 278 (1) of the Constitution 1992 and chapter 25 of the Constitution 1992.

2. Whether the President has further powers to set up the Constitutional Review Implementation Committee with the mandate to implement the amendment agenda embarked upon by the CRC under the provisions contained in chapter 25 of the Constitution 1992 already referred to supra.

3. Finally, whether Parliament's role and power to amend the Constitution 1992 as provided generally in chapter 25 of the Constitution is exclusive to it and cannot be delegated even to the President.

ISSUE ONE

1. **WHETHER THE SETTING UP OF THE CONSTITUTIONAL REVIEW COMMISSION (CRC), PURSUANT TO C.I. 64 WITH ITS TERMS OF REFERENCE ALREADY STATED SUPRA WHICH IS BASICALLY TO**

COLLATE VIEWS ON PROPOSALS TO AMEND THE CONSTITUTION 1992 IS UNCONSTITUTIONAL VIS-À-VIS ARTICLE 278 (1) OF THE CONSTITUTION 1992 AND CHAPTER 25 OF THE CONSTITUTION 1992.

There is no doubt that, the Constitutional Review Commission (CRC) was established by the late President Atta-Mills pursuant to article 278 (1) (a) of the Constitution 1992 which for purposes of emphasis provides as follows:-

> "Subject to article 5 of this Constitution, the President shall, by constitutional instrument appoint a Commission of Inquiry into any matter of public interest where:-
>
> **(a) The President is satisfied that a commission of inquiry should be appointed; or"**

1. I have already pointed out that, a court such as this court reserves the right to inquire into the reasons for the President's satisfaction to determine whether it is subjective or objective, and therefore constitutional or unconstitutional.

2. Secondly, it has to be determined by this court whether the said action in setting up the CRC to undertake its terms of reference bearing in mind what it actually did and it's off shoot the CRIC are doing, are unconstitutional the provisions in chapter 25 of the Constitution.

MarfulSau J.A, sitting as an additional Judge of the High Court Accra, (Fast Track Division) had the opportunity to address relevant issues which I consider to be germane to the instant case in case No. Acc 39/2010 dated 10th August 2010 intitutled **The Republic v Charles Wereko Brobbey and Kwadwo Okyere Mpiani.**

It is instructive to set out some brief and salient facts of this case.

FACTS

Charles Wereko Brobbey was the Chief Executive Officer of the Ghana @ 50 secretariat. Kwadwo Okyere Mpiani was the Chairman of the National Planning Committee of the Ghana @ 50 celebrations and was also the former Chief of Staff and Minister for Presidential Affairs under the Kufuor administration.

The two were charged before the High Court with four counts of willfully causing financial loss to the State contrary to section 179 A (3) (a) of the Criminal Offences Act, 1960 (Act 29). The two pleaded not guilty to all the charges and before prosecution could start adducing evidence the two accused persons filed applications which challenged the jurisdiction of the court.

In substance, the accused persons challenged their prosecution on the criminal charges arising from adverse findings made against them by **a Commission of Inquiry under article 280 (1) (2) (3) (4) (5) and (6) of the Constitution and basically asked that the charges against them be stayed or struck out and the action dismissed.**

ARGUMENTS BY COUNSEL FOR APPLICANTS

At the court, learned counsel for the accused persons/applicants argued strenuously that the prosecution mounted against them violated articles 278 and 280 of the Constitution 1992.

The main thrust of their arguments was that the charges preferred against the applicants by the Attorney-General was wrong because the case originates from the adverse findings of the Ghana @ 50 Commission of Inquiry.

The Applicants also argued that they have a right of appeal against the said findings. Counsel also traced the constitutional history of Commissions of Inquiry in Ghana before the 1969 Constitution and submitted that the framers of the 1969, 1979 and 1992 Constitutions accepted the proposal that the findings of Commissions of Inquiry should no longer form the basis of criminal trials.

After the arguments of the learned Attorney-General were considered by the Court and dismissed as not raising any issues of substance, Marful-Sau J.A, stated in his very erudite, and incisive ruling setting down the issue for determination as follows:-

> "Having heard counsels for the accused persons and the Republic, and having examined and studied the process and exhibits filed in this application I am of the view that the application raises one fundamental issue to be resolved. **That issue is whether or not the adverse findings or the report of the Ghana @ 50 Commission constitute a judgment as defined by Article 280 of the Constitution and if so whether or not the Republic acting through the Attorney-General can mount this prosecution in the circumstances of this case having regard to the provisions of Article 278 and 280 of the 1992 Constitution."**

The Plaintiff also greatly relied on the decision of Marful-Sau J.A, in the case just referred to, in support of his contention that, the provisions in article 278-280 of the Constitution 1992, i.e., **chapter 23 provisions do not grant the President an all purpose commission power. In view of this, I will refer in detail to the salient issues raised by my respected brother Marful-Sau J.A in his ruling**. But before I do so, it is pertinent to observe that, I am aware the case relates to the institution of criminal charges against persons

arising from the findings of a Commission of Inquiry under article 278 (1) (a) of the Constitution. Despite the seeming differences, the value is the same and the ratio in the case is consistent with the issues at stake in this case.

For example, in paragraphs 17, 18, 19, 20, 21 and 22 of the Plaintiff's Arguments of Law, pages 13, 14 and 15 the Plaintiff stated as follows:-

> "Plaintiff further submits that the prevailing jurisprudence also supports the characterization that chapter 23 commissions are quasi-judicial in nature, not Constitution reviewing nor drafters of amendment bills. The most erudite and elaborate analysis on this issue is provided in ***Republic v Wereko-Brobbey and Mpiani [2010].*** In that case, Justice Samuel Marful-Sau (Justice of Appeal) traced the constitutional history and development of Commissions of Inquiry by analyzing the memorandum on the proposal for a Constitution of Ghana, 1968 and the proposals for the Establishment of a Transitional (Interim) National Government for Ghana, 1978. The analysis explains the reasoning behind the establishment of Commissions of Inquiry and underscores that the proposals in those documents formed the basis of chapter 23 of the extant (1992) Constitution on Commission of Inquiry."

18. Justice Marful-Sau described the rationale behind the establishment of Commissions of Inquiry as stated in paragraph 301 of the 1978 proposals as follows:-

> **"In sum, it is to accord the President the opportunity to cause investigations into certain matters of public importance by an impartial and independent body.** And because the findings of such a body can have serious legal consequences for the persons affected thereby including adverse impact on their reputation in society, such

persons should be able to challenge the soundness or legality of such findings in the courts of law, hence the arrangement that such findings be deemed to be a judgment of the High Court, from which an appeal shall be as of right to the Court of Appeal."

19. Justice Marful-Sau also notes that

"This case for me reveals a very important constitutional development in this country, regarding the legal effects of findings or reports of Commissions of Inquiry appointed under the Constitution. **It is clear from my findings herein that such Commissions of Inquiry as established have undergone remarkable constitutional development from the 1969 Constitution which ought to be recognized, registered and sealed with judicial stamp of this country. This is a solemn and sacred duty that the courts are established to do".**

20. The learned Justice then recites the Commissions of Inquiries that had been established thus far under the 1992 Constitution as

(i) The Commission of Inquiry (International Transfer of Football Players) Instrument, 1999 established under C. I. 22 of 12th March, 1999, (2), The Commission of Inquiry (Accra Sports Stadium Disaster) Instrument, 2001 established under C. I. 34 of 11th May 2001 (3), The Commission of Inquiry (Yendi Events) Instrument 2002 established under C. I. 36 of 26th April 2002 (4), The Commission of Inquiry (Ghana @ 50) Instrument, 2009 established under C. I. 61 of 1st June 2009."

21. The learned Justice then highlights the importance of understanding the nature and character of Commissions of Inquiry as well as their

consequences and legal effect. Indeed by Article 280 of the Constitution the reports of all the above commissions were deemed to be judgments of the High Court and persons affected by the adverse findings had the constitutional right of appeal to the Court of Appeal. It is however a matter of judicial notice that persons against whom adverse findings were made by the Commission of Inquiry into the Yendi events and the Commission of Inquiry into the Accra Sports Stadium Disaster were prosecuted in the High Court, notwithstanding the clear provisions of Article 280 of the Constitution, which clearly represent the aspirations of the great men and women who engineered our 1969, 1979 and the 1992 Constitutions, the aspiration being that findings of Commissions of Inquiry should never develop into criminal trials."

22. The learned Justice concludes his judgment by emphasizing the need for us as a nation to develop and advance our constitutional dispensation. I have tried to show in this ruling the wisdom behind the establishment of Presidential Commissions of Inquiry under our constitution. **It is to enable the President appoint citizens of the required expertise to impartially and independently investigate matters of national importance, to evaluate the performance of our public institutions with a view of ensuring and maintaining efficiency and a high standard in our public administration**. That exercise as rightly stated in the constitutional proposals of 1968, and 1978 could have serious negative consequences on the reputation of public office holders in such institutions investigated by such Commission of Inquiry, hence the need to give affected people the right to challenge the soundness of the findings. A citizen's right of appeal has always been respected since ancient times."

This is why I am of the considered view that, at best the work of the CRC can be said to be a report of the Commission on the weakness of the Constitution and handed over to the appropriate agency, Parliament to consider if there is a need for amendments. It is unconstitutional to establish the CRC with the sole agenda to usurp Parliament's powers.

23. The foregoing analysis of Chapter 23 of the Constitution, the Commissions of Inquiry (Practice and Procedure) Rules 2010 C. I. 63 and the case law provides compelling evidence that chapter 23 does not grant the President an all-purpose commissioning power. It is manifestly evident that the commissions contemplated under chapter 23 are quasi-judicial in nature. As highlighted in the memorandum on the Proposal for a Constitution for Ghana (1968) the progeny of Commission of Inquiries, a Commission is "an impartial and independent body charged with the duty of finding facts," in a matter of public interest where political considerations are apt to bedevil an issue". This means that the procedure of such an inquiry is bound to be inquisitorial rather than accusatorial as is the case with criminal trials. This will be so since the inquiry will be fact finding and at worst censorial. We do not think that public inquiries should ever develop into criminal trials".

24. Plaintiff submits that the primary function of these Commissions is to **"make a full, faithful and impartial inquiry into matters specified in the instrument of appointment", not to ascertain from the people of Ghana, their views on the operation of the Constitution, (whatever that means); nor "to articulate the concerns of the people of Ghana on amendments that maybe required for a comprehensive review of the Constitution, and certainly not to, "make recommendations to the Government for consideration**

and provide a draft bill for possible amendments to the 1992 Constitution." It is Plaintiff's contention that ascertaining the views of Ghanaians on the operation of the Constitution and drafting possible amendments to the 1992 Constitution fall beyond the scope of Article 278 Commissions."

I have spent a considerable length of time on the decision of Marful-Sau J.A in the ruling and how the Plaintiff has articulated that decision to support his arguments. Even though the defendant's did not respond to the Plaintiff's Arguments of Law, I reckon that the Defendant's have already addressed same in their statement of case to which I have already copiously referred to supra.

However, by the very arguments contained therein, wherein the Defendants anchored their defence as follows:-

On the preamble to the Constitution 1992, the Supremacy of the Constitution and the vesting of the power of the people in the Government, thereby clothing the Government with power to effect amendment processes to the Constitution all in the name of the people; all thesein my opinion are not convincing, lack substance and inconsistent with sound constitutional principles already discussed supra.

For example, when one considers the supremacy of the Constitution, then it behoves that, the cardinal principle of the Constitution 1992 which is separation of powers, then it is clear that each arm, institution and or constitutional body must take it's source of function, power and activity from the Constitution 1992.

Juxtaposing these principles with the facts in this case as well as the relevant constitutional provisions in Chapter 23, to wit article 278 to 280 and chapter 25,

to wit articles 289 to 292, it goes without saying that the President cannot appoint a Commission and a Committee to draft amendment bills for Parliament to consider thereby usurping entirely the constitutional mandate of Parliament. It should at this stage be made clear that procedure rules in the standing orders of Parliament are subordinate to constitutional provisions, reference article 11 of the Constitution. Those rules on introduction of bills into Parliament cannot supersede clear constitutional provisions especially where there is no such provision empowering the President to introduce amendment bills into Parliament.

It is clear from the Constitution 1992 that the President for example cannot establish a Commission of Inquiry to investigate every matter in respect of which he is satisfied that it is in the public interest so to do. A few examples will suffice here.

1. The revision of the voters register is undoubtedly a very important matter in any advanced democracy, and Ghana is no exception. Some notable political parties and other Civil Society groups have called for the total replacement of the voters register. This very important matter has recently generated into violence when a group of persons under the aegis of (LMVCA) Let my vote count alliance, organised a protest march. They were met with some alleged Police brutalities according to confirmed news reports. Whilst the President can establish a Commission of Inquiry into the Police handling of the protest march, I am not so certain with the main request, that of the total replacement or revision of the voters register. What must be noted is that, even if the President is satisfied that the replacement or revision of the voters register is a matter of public interest which it is anyway, he is not allowed by article 45 of the

Constitution 1992 to do so. Those functions are exclusively reserved for the Electoral Commission. That is my candid opinion on this matter.

2. Secondly, the recent alleged Judicial Bribery Scandal which has hit the Judiciary as a result of the expose of the ace investigative Journalist, Anas Aremeyaw Anas to me is a matter so grave and important that the President ought to be satisfied that it is in the public interest to establish a Commission of Inquiry to investigate. However, even if the President is minded so to do, he is not permitted by the Constitution 1992. This is because, the Constitution 1992 has very elaborate provisions in articles 146 (3) through to 146 (11) on how to deal with stated misbehavior of Superior Court Judges. I believe it is in compliance with those constitutional provisions that the President in his wisdom referred the alleged acts of misbehavior captured on video to the Chief Justice for her to determine whether a prima facie case has been established to kick start the process.

All these examples go to prove the point that where a specific constitutional provision has provided a procedure for the doing of an event, or has reserved a function for a specific arm of state or institution for that matter, it is to that arm, or institution of state that compliance will be expected from. Any attempt to cede this power and function to any other body or institution will be deemed as unconstitutional.

Issue one as captured above will be determined on the basis that the President acted unconstitutionally in establishing the CRC to collate views from the public with a further r**mandate to propose draft amendment provisions to the**

Constitution, using the procedure in article 278 (1) (a) of the Constitution 1992.

As has been incisively pointed out, that article does not clothe the President with an all purpose commissioning power to do what he did. The establishment of the CRC pursuant to C. I. 64 with its terms of reference in (c) is therefore unconstitutional. At best, Parliament can use the work of the CRC but not as a reference point.

2. Whether the President has powers to set up the Constitutional Review Implementation Committee with the mandate to implement the amendment agenda embarked upon by the CRC under the provisions contained in chapter 25 of the Constitution 1992 already referred to supra.

The plaintiff's case in respect of the above issue really admits of no controversy whatsoever. This is that, after the Government issued the White Paper accepting some of the recommendations of the CRC, it then set up the CRIC, to implement in strict compliance with chapter 25 of the Constitution, Amendments to the Constitution, in respect of those recommendations that have been accepted. Pursuant to the instructions that have been given them, the CRIC has presented a draft bill for the amendment of 34 entrenched provisions of the Constitution in addition to the introduction of new entrenched provisions.

It is the plaintiff's case that all these are contrary to the provisions of chapter 25 of the Constitution 1992 which deals with the procedure for the amendment of the Constitution. By the provisions of article 289 (1) of the Constitution 1992, it is provided thus:-

"Subject to the provisions of this Constitution, Parliament may by an Act of Parliament, amend any provision of this Constitution.

(2) This Constitution shall not be amended by an Act of Parliament or altered whether directly or indirectly unless-

(a) the sole purpose of the Act is to amend this Constitution, and

(b) the Act has been passed in accordance with this chapter.

If one considers the above provisions literally, it can easily be concluded that all amendments of any provisions of the Constitution must be initiated in Parliament and concluded therein by following all the steps laid down in articles 290 (1)(2) (3)(4) (5) and (6) and article 291 (1) (a) (b) (2) (3) and (4) and article 292 of the Constitution 1992.

As has already been stated supra, the procedure for the amendment of entrenched and non entrenched provisions are separate and distinct.

What is of particular importance is the fact that, in all cases, where the Amendment process of either an entrenched or non-entrenched provisions has been adopted and passed by Parliament, the President has only a ministerial role to play, he shall assent to the bill. Articles 290 (6) and 291 (4) provide as follows:-

"Where a bill for the amendment of an entrenched provision has been passed by Parliament in accordance with this article, the **President shall assent to it."**

In respect of a non-entrenched provision, article 291 (4) provides thus:-

"Where the bill has been passed in accordance with this article, the **President shall assent to it**".

The Defendants raise a very important point, that is to say that, once the amendment processes especially of entrenched provisions does not involve only Parliament, it follows that the amendment process is neither the preserve nor an exclusiveterritory for Parliament. They argue that the President is one of the stake holders in the passage of any such amendment. The Defendants continue their arguments further by asserting that if the framers of the Constitution had intended to cloth Parliament alone with the amendment process, they would have done so in very clear terms by using appropriate language.

I have considered the use of the words "subject to the provisions of this Constitution" in article 289 (1) of the Constitution 1992 and am not impressed with the Defendants arguments that the use of the said proviso gives the President the power to use the article 278 (1) (a) provision of the Constitution to set up the CRC and by necessary implication the CRIC.

However, as I have already set out in extenso in the resolution of issue one supra, the article 278 (1) (a) provisions does not permit the President to set up a Commission of Inquiry to collate views with the view to amending of the Constitution. This is because the Constitution has made elaborate provisions on that process by which it is Parliament, which exercises that role as one of it's legislative functions. This is therefore consistent with the Constitution 1992.

Having considered the facts, the Constitution, case law as well as canons of interpretation, I am of the opinion that a comprehensive review of the Constitution as is being implemented by the CRIC is an act sui generis, not just "any" matter of public interest to be taken care of by the generic provisions relating to adhoc Commissions of Inquiry.

However, even if one considers and construes article 278 (1) broadly as the Defendant's contend, one must ask whether any specific articles of the Constitution derogate from that broad power. The canon of interpretation "generalia specialibus non derogant" which "generally means general things do not derogate from special things", and this canon has been used by our courts. See the opinion of Twum JSC in the case of ***In Re Parliamentary Election for Wulensi Constitutency; Zakaria v Nyimakan [2003-2004]SCGLR 1*** where, Twum JSC speaking for the majority stated thus:-

> *"In order that the clear intention of the framers of the Constitution may not be aborted, we are convinced that this is a proper case to apply the maxim* ***generalia specialibus non derogant.*** *We hold that the appeal provision in article 99 (2) supersedes the general appellate jurisdiction of the Supreme Court under article 131 (1) (a)."*

In real terms what this means is that, when two articles of the Constitution or statute are in apparent conflict, the provisions of the general statute must yield to the specific statute(but there is no conflict even in this instant).

In further consideration of this matter, one must find out if there are any specific articles in the Constitution dealing with Constitutional Amendment for which the general Article 278 (1) must succumb to?

The answer is a big yes, since there is a whole chapter in the Constitution dealing exclusively with constitutional amendment, i.e. how to amend the Constitution. This express and exclusive power has already been referred to in article 289 (1) supra.

Chapter 25 of the Constitution 1992 has categorised the amendment processes into two.

As I have already stated supra, the procedure for amending an entrenched clause is very rigorous with the Council of State and the general public all involved in addition to Parliament.

Whilst an amendment of an entrenched clause must secure the approval of 75% of voters in a national referendum with a minimum voter participation rate of 40% of registered voters, that of a non-entrenched clause requires the approval of only a majority of 2/3 of all members of Parliament.

In conclusion, I am of the considered view that the President, even though he is the Chief Executive Officer of the State and the first Gentleman for that matter, has only a nominal role in the passage of an amendment bill by Parliament.

The President is mandatorily required to assent to a bill that has the speaker's certificate to the effect that a bill for amendment has been taken through all the required procedures necessary and stipulated in articles 291 and 292 of the Constitution 1992 as well as certification by the E. C. Chair.

In the premises, I am of the view that the work of the CRIC, who have been hand picked by the President to initiate and virtually implement the various amendment bills as if Parliament did not matter in the equation is not only wrongful, unlawful but is also unconstitutional considering articles 289 to 292 of the Constitution.

ISSUE THREE

FINALLY, WHETHER PARLIAMENT'S ROLE AND POWER TO AMEND THE CONSTITUTION 1992 AS PROVIDED GENERALLY IN CHAPTER 25 OF THE CONSTITUTION IS EXCLUSIVE TO IT AND CANNOT BE DELEGATED EVEN TO THE PRESIDENT

When the provisions of Article 289 are compared with article 278 (1) under which the C.R.C was established, it gives the clearest indications that it is only Parliament that has specifically been given the power to effect amendments to the Constitution.

This is because, even though article 278 (1) (a) gives power to the President to appoint a commission of inquiry into any matter of public interest where the President is satisfied that a Commission of Inquiry should be appointed, reading the provisions in context to the other provisions in the rest of chapter 23 of the Constitution 1992 gives very clear indications that the intendment of article 278 (1) (a) is definitely not to usurp, or share the amendment process of the Constitution 1992 with Parliament. In any case the intendment of article 278 of the Constitution was not what it was put to use in the establishment of the CRC.

From the contents of the entire chapter 23, I am of the considered opinion that the matters in context therein are issues of public importance or interest in respect of which some wrong doing has been suspected, or loss or damages suffered by the state as a result of which the need to inquire into them and make findings therein aimed or directed at finding solutions therein arises. I believe that, this way of thinking is justification for the provisions equating the findings of the Commission of Inquiry established under Article 278 (1) (a) to the decision of a High Court, from which an appeal automatically lies to the Court of Appeal.

In any case, as has been discussed elsewhere in this judgment, the criteria stated in article 278 (1) (a) of the Constitution 1992 is for the President to be satisfied. Once the President has initiated action under that provision by establishing a Commission of Inquiry, it follows that he is satisfied that it is in the public interest so to do.

However, if in expressing that satisfaction, he veers into areas reserved for other arms of government or constitutional bodies established under the Constitution 1992, then afortiori, an objective test and appraisal will have to be undertaken to ensure that the sanctity of the Constitution 1992 is not compromised.

Construing the entire provisions of chapter 23 and those of chapter 25 purposively, I come to only one irresistible conclusion that Parliament's role and power to amend the Constitution 1992 contained in article 289 is exclusive and cannot be delegated to any other organ or arm of government, including even the President.

In this respect, the decision of Sowah J.A as he then was in *Tufuor v Attorney General*, already referred to supra that a Constitution is not an ordinary Act of Parliament but a sacred document which embodies their will as well as mirror's their history. Such a document cannot be subject to the amendment processes initiated by one person, the President. In circumstances like this, the latter and spirite of the relevant articles must be considered. When this is done, article 278 (1) becomes irrelevant and of no consequence.

I have stated elsewhere in the judgment that the amendment architecture of the Constitution 1992 has been so carefully crafted and designed to ensure that it is the elected representatives of the people in Parliament representing various shades of political interests that have been endowed and given the power to commence the amendment process, tele guide it through all the other processes

to completion, after which the President is mandatorily required to assent. To me, this makes it quite clear that the power granted to Parliament is therefore exclusive. It is for good reason that these have been provided to ensure that no President shall hijack the amendment process of the Constitution 1992.

Drawing parallels from the observations and analysis made in respect of the other issues raised supra and considering the pleadings of the parties in this case, I am of the considered view that this issue three (3), like the other issues be resolved thus, that Parliament's role in chapter 25 on amendment process of the Constitution is exclusive to it, and cannot be delegated even to the President.

CLOSING REMARKS

As I move gradually to the closing pages of this judgment, two related issues have been stirring at me in the face. These are

i. Is it too late in the day for this court to intervene in the matter?

ii. Is this court competent enough to grant the reliefs which the plaintiff seeks?

What the Defendants intend to do by their proposals is to place before Ghanaians through the introduction of amendment bills of entrenched provisions to Parliament for the process of amendment to start. Secondly, they intend the electorate to do block voting on the issues presented to the people in a referendum. To me, this procedure being embarked upon by the CRIC is a real danger to the Constitution 1992. It is dangerous to allow such a massive amendment of the Constitution 1992 to be undertaken without the active involvement of the duly appointed institution for that purpose, Parliament. This is what Chief Justice Marshall frowned upon in his locus classicus decision in the

case of **Marbury v Madison, 1 cranch 137, 2 L.E.d. 60 (1803)**. I shall return to this case shortly.

1. The question can be askedas to why the Plaintiff waited all this while for the processes of the CRC to have been completed before commencing his action? That of the CRIC has itself reached an advanced stage before the suit was filed leading to the implementation process being stalled.

I have observed that, the Court of Appeal, sitting as the Supreme Court in the celebrated case of ***Tuffuor v Attorney-General*** already referred to had to make pronouncements on estoppel. This arose because it was contended on behalf of the A.G. in the Tuffuor case that, it was the Chief Justice himself who elected by accepting the nomination and appearing before Parliament to be vetted for re-appointment to the position of Chief Justice, a position he held before the coming into force of the Constitution 1979. It was further argued on behalf of the A.G. that the Chief Justice should be deemed to have any immunity provided under the Constitution waived and that he should accept the consequences of his own conduct.

It was however held by the court that

> *"The argument founded on estoppel by election would be dismissed because the constitution 1979, article 1 (2) has provided that the "Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency, be void and of no effect."*

From the above decision, it is clear that the Supreme Court dismissed this estoppel argument basically because of the principle of the supremacy of the

Constitution. And this principle as I have stated in the basic principles are the core underlying principles in article 1 (1) of the Constitution 1992, on constitutionalism.

In that respect, such an argument, even if it had been made would have been dismissed. I have raised and discussed it entirely out of abundance of caution.

It should be noted that, article 1 (2) of the Constitution 1979 are the same provisions in article 1 (2) of the Constitution 1992 and therefore have the same effect.

2. The second related issue of whether this court is competent to deal with the plaintiff's reliefs has from time immemorial been pronounced upon by Supreme Courts with written Constitutions. In this respect, even though there are quite a number of notable pronouncements, from the courts in Ghana, I deem it expedient to take some persuasive guidance from the words of Marshall C. J, in the locus classic us case of Marbury v Madison, already referred to supra.

This is what the Court decided on the issue of supremacy of the Constitution and the role of the Judiciary to say what the law is.

> *"To what purpose are powers limited and to what purpose is that limitation committed to writing if these limits may at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution control any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act."*

Continuing further, Marshall C. J. expounded the law thus:-

> *"It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."*

The principles stated so beautifully by Marshall C. J. in the Marbury v Madison case have been applied in the following Ghanaian cases just to mention a few:-

1. **Amidu v President Kufuor [2001-2002] SCGLR 86, at 154-155**
2. **Brown v A. G. (Audit Service case) [2010] SCGLR 183, at 237**
3. **Appiah-Ofori v A. G. [2010] SCGLR 484, at 549**

The essence of the principle of Constitutionalism which has been specifically embedded in article 1 (1) of the Constitution 1992 and also dealt with in some of the above cases is that, states with written constitutions, such as Ghana and the U.S, intend those Constitutions to be their basic and paramount law. It therefore follows that, the concept of those governments is that, all the powers of the arms of government and indeed of any constitutional body or institution set up by or under the constitution is subject to the limitations contained therein. Such that, the Supreme Court, in Ghana's case for example has the jurisdiction to declare any act or conduct by any of these arms of government or constitutional bodies found to be repugnant or inconsistent with any provision of the Constitution as void, ab initio and a nullity and subject to be struck down or set aside. This is the scenario in which the conduct of the President in setting up the CRC and the CRIC must be respectfully considered in strict terms of my mandate under the Constitution 1992 and the judicial oath I ascribed to upon assumption of office to uphold and defend the Constitution.

CONCLUSION

In the premises, there will be judgment for the plaintiff in terms of the reliefs which he claims as follows:-

1. Save that the President is entitled under articles 278 (1) (a) of the Constitution 1992 to appoint Commission of Inquiry into any matter of public interest in which he is satisfied, however the appointment of the CRC pursuant to C.I. 64 is null and void as it contravenes the letter and spirit of Article 278 (1) (a) of the Constitution 1992, to that extent, relief (1) is accordingly granted.

2. Flowing from the grant of relief 1 as stated above, relief 2 is accordingly granted.

3. Flowing from relief 1 supra relief 3 is accordingly granted.

4. In granting relief 4 we are of the view that the CRIC set up by the President to finalise amendment bills for both entrenched and non-entrenched provisions has no constitutional basis and offends the letter and spirit of Article 289 of the Constitution and accordingly same is null, void and of no effect whatsoever.

5. Relief 5 is accordingly granted as it flows from relief 4 supra

6. Save that the President has a limited mandatory role granted him in Articles 290 (b), 291 (4) and 292 (a) and (b) of the Constitution, relief 6 is granted.

7. Flowing from the above, relief 7 is accordingly granted.

8. Save that the defendants herein are directed to stop forthwith all steps that are being taken towards the amendment of the Constitution flowing from the amendment process embarked upon by the CRIC the remaining averments in relief 8 are dismissed.

9. In view of the grant of relief 8 in terms as stated above, relief 9 is accordingly struck out as superfluous.

10. We direct that in view of the relief granted above Parliament must assume full control of the amendment process flowing from the work or proposals of CRC.

11. Since it is the convention that this court does not grant costs in constitutional cases, relief 11 is refused.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH JSC:-

I had the opportunity of reading the draft opinion of my esteemed brother Dotse, JSC. I agree with him that the plaintiff has made a case for this court to grant him some of the reliefs as clearly set out in his dissenting opinion.

As this court is being called upon for the first time in the relatively short period of the life of the 1992 Constitution to determine the issues bothering on the amendments to the constitution, I have decided to add a few words in support of the dissenting pinion of my brother, moreso, when we are dissenting from the opinions our respected colleagues. Secondly the issues raised are of vital importance for our democratic governance.

The reliefs set out are clearly captured in the dissenting opinion and it would serve no useful purpose for same to be repeated in this delivery. The facts of this case also appear not to be in any controversy whatsoever.

What triggered the commencement of this action for the reliefs sought by the plaintiff is that, the Constitution Review Commission established by the President by C.I 64 of 2010 as Constitution Review Commission of Inquiry Instrument, was to usurp powers that the Constitution has exclusively vested in the Parliament of Ghana. This assertion by the plaintiff is controverted by the defendant that the mandate given to the C.R.C did not in any way usurp the powers of the Parliament of Ghana.

One cannot answer or resolve this issue without a careful study of the terms of reference of the C.R.C which my brother Dotse JSC has gone at length to discuss. I do not think that any of the parties herein would quarrel with the power exercised by the President in the performance of his constitutional powers under Article 278(1) (a). However, one may ask whether the C.R.C ought to have been a Commission of Inquiry envisaged under Articles 278, 279 and 282 of the Constitution. From historical perspective, a Commission of Inquiry is usually established to perform functions spelt out under Article 280 of the Constitution

and make some findings out of the inquiries. Our Constitutional law is replete with several cases dating back after the end of the First Republican Constitution of 1960. The only case in which the nature and scope of the Commission of Inquiry should take was the case of: THE REPUBLIC v CHARLES WEREKU BROBBEY & or unreported decision of the High Court in case № ACC39/2010 dated 10/08/2010 which my brother Dotse JSC has adequately dealt with in his delivery.

I am of the opinion that under Article 280(1) a Commission of Inquiry should not necessarily make adverse findings against an institution or a person who may be the subject of the inquiry. The C.R.C to me appears to be quite different from the Commission of Inquiry which under Article 280(2) would vest some rights in individuals and institutions to challenge any adverse findings made against them in a court of law.

The C.R.C indeed collated opinions and views from the public. This could have been done by a committee set up by the president not under Article 278. Article 278 when read with other articles under chapter twenty-three of the Constitution vests in a Commission of Inquiry special powers like a High court of Justice under Article 280(2). The President, I will freely concede, has wide powers to gather public opinion and views on a particular subject by resort to several other

means but under Chapter Twenty-three of the Constitution, a Commission of Inquiry was not the appropriate means. The Constitution has placed limitations on every individual and institutions vested with authority to exercise power within the constitutional limits. One great feature about written constitution such as ours is the predictability of it. Executive power and all other powers are governed by the constitution and it is within the scope of those powers that they operate.

A careful reading of the Constitution as a whole will reveal that the Constitution has placed checks on powers exercised by the Executive, Parliament and the Judiciary. Care must be taken not to expand the powers so granted to any organ of State or an institution when exercising powers under the Constitution. I agree with the opinion of SOWAH JSC (as he then was), when he said in TUFFOUR v A-G [1980] GLR 637 as follows:

> "The ideals which the framers of the Constitution were at pains by the letter and spirit of the Constitution to establish ought to be respected and adhered to"

For in as much as one should not stifle the Constitution as a 'living organism capable of growth', we must guard against the expansive powers of one of the

most powerful arm of government when dealing with the very Constitution from which it derives its powers. In AMERICAN COMMUNICATIONS ASSOCIATION v DOUDS 339 US 382, 439 (1950) Robert H. Jackson said:

> "Our protection against all kinds of fanatics and extremists, none of whom can be trusted with unlimited power over others, lies not in their forbearance but in the imitation of our Constitution"

I do not in my respectful opinion think that the setting up of the Constitution Review Commission under Article 278 of the Constitution was right for the reasons I have added in support of the lead opinion in dissent offered by my worthy brother Dotse JSC, and as the Commission set up does not satisfy the Constitutional requirements under Article 278 and 279 they had no mandate to perform the task under terms of reference.

Another area which I wish to express my opinion in support of the delivery by my brother Dotse JSC bothers on the role of Parliament in amending the Constitution. In the same constitution fetters are placed on our Parliament under Article 107 to prevent it from passing any law to change a decision of any court and also to pass retrospective laws. It also has no power under Article

270(2) to pass certain laws on Chieftaincy. However, powers exclusively vested in Parliament to amend the constitution is under Article 289.

The plaintiff, to me, is not complaining that the President has no role to play at all in the amendment of the Constitution. For it would be contrary to Article 106 which makes it clear that the President must assent to every bill passed by Parliament. As my brother Dotse JSC has pointed out, that "no amendment can be valid if the President refuses to assent to a Bill approved by Parliament". All amendments to the constitution are effected through Acts of Parliament assented to by the President.

The role of the President in effecting an amendment to the provisions of the Constitution, however, appears to be limited. The President may through the Attorney-General introduce a bill in Parliament as has been the practice. A careful reading of the constitution shows that a bill may even be introduced by an individual or an institution.

The plaintiff's complain is that the President has no power to set up a Constitution Review Implementation Committee (CRIC) and vest it with the mandate to implement the recommendations of the Constitution Review Committee (CRC). Articles 289,290,291 and 282 read together as the only

articles under chapter Twenty-five which deal with amendments to either the entrenched provisions or non-entrenched provisions clearly spelt out the powers of Parliament in the exercise of constitutional amendments.

It appears that the framers of the Constitution in preserving separation of powers in the constitution has limited the role of the Executive and indeed the Judiciary has no role to play at all in the exercise. The only role of the Judiciary is to be called upon to declare whether an enactment runs counter to any provisions of the constitution. Subject to the very limited role the Presidency may play in constitutional amendments, Parliament's role is paramount.

My brother Dotse JSC has extensively considered the limited role of the President in effecting amendments to the Constitution. I do not intend to repeat the same reasoning on this mandate of CRIC as entrusted to them by the President. The constitution has not sanctioned this procedure under any of the articles referred to above under chapter twenty-five of the constitution and any other law for that matter. As said earlier, a constitution could not anticipate every conceivable matter and therefore gives room for interpretation that would meet the test of times. As far back as 1788 Alexander Hamilton in a speech in the United State senates some few years after the birth of the American Constitution said as follows:

"Constitutions should consist only of general provisions; the reasons is that they must be permanent and they cannot calculate for the possible change of things"

If the constitution has not made elaborate procedure for its amendments I would readily concede the argument advanced by the Attorney-General in this case. However, there exist elaborate and comprehensive procedures for amending both the entrenched and non-entrenched provisions of the Constitution. It is a fact of Constitutional history of this 4th Republic that on 16th December 1996, Article 8 of the constitution was repealed and other articles like articles 9, 112, 114, 166, 19, 201, 206 and 211 were amended by Parliament after following the strict procedure laid down in the constitution. The novelty procedure which we have been called upon did not arise for our attention and consideration to decide.

Nothing prevented the Constitution Review Commission from presenting the views and opinions of the citizenry to Parliament to effect the amendment of the provisions which called for the amendment. I agree with my brother Dotse JSC that the CRIC has no such role to play in our constitution when it comes to amendments of both entrenched and non-entrenched provisions.

The President in exercising his executive powers may appoint a committee or body to push his agenda forward but in a serious matter like an amendment of an entrenched and non-entrenched provisions of the constitution, care must be taken not to expand the powers of the President in a matter, which to me, should be the preserve of Parliament under the Constitution.

With the above reasons, I agree with my worthy brother in dissent; and accordingly grant the reliefs he has also granted.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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