REALIZING THE CONSTITUTION BEYOND ELECTIONS: CITIZENSHIP, PUBLIC GOODS & INCLUSIVE GOVERNANCE

Introduction

I begin this lecture with a quote from the great American president, Abraham Lincoln, who addressing the place of citizenship and limited government rather aptly noted, *that we the people are the rightful masters of both congress and the courts, not to overthrow the constitution but to overthrow the men who would pervert the constitution.* That this quote sets the tone for this lecture is clear and straightforward. For it addresses the role of the citizen in governance and the place of government relative to the constitution.

It is rather not unusual in the life of a country for it to experience a twilight moment in its governance history; Something of a midlife crisis when the follies of its own glory and failings creates moments of political depression. Ghana like many countries have restlessly struggled in search

of a system of government that best serves its people and delivers the good things of life to its citizens. One that ensures the practical responsibility of government and its officials to the limits imposed by law. After suffering four debilitating coup d'états, our country settled in 1993 on the current constitution in one final act of democratic experimentation.

The fact that this Constitution, unlike the 6-year duration of the 1960 constitution or the barely 2 year experience of the '79 constitution, has lasted already for nearly 30 years is a testament to the resolve of Ghanaians to see this governance project through and to shut the door perpetually on authoritarian and undemocratic rule. But the hopes of constitutional rule that greeted the adoption of the 1992 Constitution some 29 years ago appear to have dampened and some will argue, faded. Many are those who already despair at the future in light of the failed promises of hope and opportunities presented when we turned that history-making page in 1993. Rather unsurprisingly, commentators find the reasons for the stunted growth in constitutional development rather self-imposed. A kind of voluntary self-harm in which actors charged with the primary obligation of upholding the constitution lead the way in its

abuse. Yet history teaches us that democratic experiments the world over have always come at a cost, sometimes in blood but also in endurance, with consequences that are sometimes irredeemable and sadly destructive. The abuse of the powers of majorities, ethnocentric tensions that gets played out, and entrenched power blocks that crowd out equitable considerations in the distribution of public entitlements have led to bloodshed in other countries and present us with learning opportunities for our own situation here in Ghana.

The failures of democracy and constitutional rule has led many to raise questions bordering on whether the deficits of democracy outweigh the dividends. For critics, democracy is expensive and tends concentrate too much power in the hands of majorities. This is not helped by officials who respond to any incidence of profligacy with the cryptic quote that "democracy is expensive" a point I will come to later in this presentation. Others chide constitutional democracies for their claim to representation of the common man while being hijacked by vested interests. But just to ease some anxiety, our generation is not alone in this cynicism to the good old governance model of democracy. As was lucidly stated by the great

wartime leader of the UK Sir Winston Churchill, " *democracy is the worst form of government except all the others that have been tried*".

This mind-set and indeed approach to the pitfalls of democracy helps in not only looking at the gains of democracy in comparative terms but also enables us to appreciate the history of authoritarianism and human suffering that have been perpetrated under the myriad of various government systems across the centuries. Having lived and led his country against fascist and murderous regimes of Hitler and Mussolini, it is understandable that Churchill will view with deep suspicion other governance systems that seek to dislodge democracy. Regrettably, the changing fortunes of democracy in the world with the rise of populist governments in Europe and elsewhere may seem to have further deepened the distrust and doubts of many in the promise of democracy. Everywhere you turn these days, democracy appears to be in turmoil and pressures on established institutions have been mounting.

Ghana on the other hand, is experiencing a peculiar evolution. Having chosen the path of an open, liberal, and accountable system of government under the 1992 Constitution, we embraced a system of

government that placed power in the hands of the people and in which political leadership will be subservient to the electors and the will of the people. For the opening words of the constitution contained in the preamble, "We the People" sum up the ideals embedded in the constitution in which the framers intended that the Ghanaian people, and nothing else, will be at the pinnacle of things affecting government and governance. "We the People" constitute government and legitimize it by entrusting it with authority. "We the People" place limitations on government through the Constitution and should expect that accountability will be exacted for the exercise of power. "We the People" have stated our broad policy blueprint and preferences under chapter 6 and our aspirations as a people for the future. "We the people" have established institutions to deliver public goods and shape the public administration of Ghana.

These abiding words of the Constitution speak to a vision of government and outcomes intended by the framers of the Constitution and the values which should light and illuminate the path towards an intended glory. The fact that nearly 30 years after its adoption there has been failures to attain core goals of constitutionalism and accountability and of delivery

of critical public goods to the broader satisfaction of the Ghanaian people, speaks to deeper factors that go beyond the text and even spirit of the constitution. Illustrating this view, Nana Dr. S.K.B Asante, the chairman of the committee of experts who drafted the constitution hinted that contrary to the position of the supreme court on the issue, it doesn't seem that presidents have been limited by the restraints that have been placed on the powers of the office relative to the obligations to consult and act on the advise of bodies and agents. Like many others, he has therefore joined calls for the review and reform of the constitution to promote constitutionalism. But is the Constitution really flawed or are the actors just good at elusive behaviour that renders an otherwise functional document impotent in the face of exploitative application? With the heavy weights behind this call being made, I dare say that the situation is vexed. But as will be repeatedly seen in this lecture, actor commitment and not prefect texts is what makes the difference in constitutionalism. Indeed Nana SKB Asante himself seem to have recognized this reality when he stated rather emphatically in relation to Parliament's failures to exercise its oversight powers that that failure *cannot be attributed to defects in the Constitution*. Perfect texts can be abused or underused by bodies and officials with the wrong mission.

The eroding confidence in democratic governance by many arising from the increasingly desperate standards of public life and corruption, minimal sense of nationhood and sectionalism, the othering and exclusion of political opponents (actual or perceived) from access to public resources, and the general departure from the core values of regime goals remain a major threat to the stability of our governance system established under the constitution. Being honest with ourselves should lead us to the admission that the two leading parties which have alternated in leading this country have not developed the spirit and ethos of constitutionalism in Ghana. If I ask for a politics that promotes constitutionalism and the ethos of good governance, I do so not oblivious of the fact that politics is about the preservation and advancement of interests—self-interest. But whereas the heedless pursuit of self-interest destroys a polity and weakens our collective resolve as a country, enlightened self-interest is the stuff that sustains a country. Whenever individual self-interest dominates, clashes are inevitable and exploitation for selfish interests becomes the norm.

I will at this stage spend a minute of this lecture to reflect on the very idea of constitutional governance, the adoption of written constitutions and the philosophical reasons that informs the implementation of the 1992 Constitution. I find this important for at least two fundamental reasons; First, this will provide context for our discussion of the sub-themes of the lecture and, secondly, an understanding of the bases of written constitutions affords the needed connecting thread for evaluating the reasons for the *status quo.* So examined, written constitution becomes a veritable prism for understanding the fortunes of governance in Ghana and indeed the way forward.

The adoption of constitutions in Africa have been said to be a part of the third wave of democratization on the continent. Seen for what it is however, constitutional rule has been viewed as higher systems of governance in which power is invariably subordinated to ideal principles embodied in a written constitution. But the idea of constitutional rule has also been equally criticised by those who think we accord too much to a document which in fact is an act of human construction. The American founding father, Thomas Jefferson famously criticizing the enduring nature of constitutions and their tendency to outlive generations,

remarked, "*the dead should not rule the living*". Therefore, while universally embraced as the most superior model of governance ever devised by man, constitutional democracies have had some powerful critics and I dare say that responses to these criticisms have at best been unconvincing and at worst, lame. For the fact is, any trans-generational document that binds the future will remain hard to justify from a legitimacy standpoint, because after all, future generations should in principle have the right and capacity to enact for themselves whatever they please. To have, as the constitution does, a document which imposes itself on future generations simply because a constituent group and people adopted it some decades back, is in theory, hard to justify. But this known criticism has not assailed the onward march of constitutional democracy in our time.

The past decade has however seen increasing calls for constitutional reforms in Ghana arising out of concerns over the failure of the constitution to rein in the actions of officials and achieve the goals for which specific provisions are adopted. But it bears pointing out also that these calls may just have provided a ready pretext to shift blame for the actual failings at constitutional development. Indeed, the bi-partisan consensus on this subject resulted in the establishment (albeit by the then

NDC government) of a commission to compressively investigate the need for review and submit proposals for the review the constitution. While I am not by any stretch of imagination suggesting that our Constitution is a perfect document which needs no review, I argue that the subject and necessity of constitution review has been overstated and overblown and the mechanism of review has been exploited to explain failings which in fact remain attributable to officials of state. The fact that the architecture and complexity of our Constitution compares favourably with any standard or model constitution in the world makes the case for aggressive review of the constitution counterintuitive.

For all the calls of review, advocates of constitution review are indeed blinded to one dangerous prospect of any exercise in reform and that is the fact that constitution review itself can be used to water down liberties and enhance the powers of government given that majorities who vote on these amendments are not necessarily adequately enlightened in the changes being introduced. Again, the centuries old wisdom of Abraham Lincoln speaks for the ages on this and his assertion that maintaining provisions of adopted constitutions *is the only safeguard of our liberties* holds true for Ghana's 1992 Constitution. So, while reviews may indeed

be necessary to reflect the dynamics of human societies, too often the failings of constitutional governance do not arise from the internal imperfections of the structure and even mores of the constitutions involved, as much as it is with factors external to the Constitution itself. For the reality of life is that human foresight is simply too short to deal with all new developments of the future and accordingly the determining factor is not a perfect constitution as much as it is the dynamic adaptation of the constitution to the vagaries of current circumstances and any future society.

So, if the constitution is not the problem, what has been or what could be the issue with constitutional governance in Ghana? The distorted application of various aspects of the constitution has resulted in the application of what may aptly be called a "shadow constitution"-rules of the constitution that may have been reinterpreted in ways that enhance executive and administrative power or undermine the very value for which these rules were incorporated into the constitution in the first place. The shadow constitution may explain the reason Parliament is prepared to concede ground and interpreted article 108 to imply that the institution lacks legislative authority to initiative legislation without executive input

or consent. The shadow constitution is the reason why the debate on the number of ministers to be appointed has become hotly politically contested. It is the shadow constitution that gets Parliament illegally arrogating unto itself developmental functions and allocating moneys to its members for projects. The shadow constitution is alive whenever the constitution is interpreted by Parliament and the executive in ways that depart from the original and purposive intent behind the provisions of the Constitution. Given that the shadow constitution is what gets in fact implemented, this constitution, and not the actual document is effective and overriding. The risk and danger of implementing a shadow constitution lies among others in the fact that the interests, trade-offs and compromises that are contained in the fold of the official Constitution become trumped in favour of entrenched but often self-serving preferences of political and constitutional actors implementing the shadow constitution.

This has resulted in a situation in our country in which we have come experience constitutional development without growth. This conclusion will strike many as odd; For after all we are the country that has done well with establishing constitutional bodies; built a modicum of constitutional

culture; run many elections and have had stable changeovers of government; We have been touted as having led the rule of law enterprise in the sub-region and generally excelled where our counterparts have floundered. Yet as I will argue in this lecture, growth entails more than a semblance of compliance with constitutionalist culture or demands. Growth entails realizing the values and aspirations of the Constitution beyond the text and superficial actions demanded by the Constitution. For the textual compliance by actors or officials have been optimal since the coming into force of the Constitution but speaking substantively, this is really tokenism. Indeed, it is the frustrations with the textual dynamics that has led to calls for changes in the text in the first place. The problem has never generally been the text. For as every constitutional law student knows, the text is dead until life breathed into it through implementation. The jurist Oliver Wendell Holmes says it best when he asserts that *the life of the law is not logic but experience*. Far from being the text thus, the problem has been exploitative use. Indeed given that there are "permanent texts" in the Constitution which cannot be changed through reforms (one calls to mind the transitional provisions in this regard), the tendency to overemphasize development through reforms become clearly problematic in this vein. Changing the text through reform will be a futile

exercise in the absence of commitment on the part of the political class to fully implement the text and ideals inspiring them, for human ingenuity has constantly been ahead of the best possible text ever adopted.

The fact that ours have become a highly divided country has resulted in elections becoming perhaps the main indicia of constitutional governance in Ghana. From election to election, we seem to have become obsessed with the phenomenon and have essentially reduced governance to that exercise. So for example, core governance policies have become the subject of political spat between parties thrust into the vortex of electoral politicking within the intervening period from one election to the next. Elections have come to distort governance as government policies have had to yield to the pressures of politics. Elections can be a barometer for gauging public preferences on given subject or policy of governance, but as has been shown in our experience, elections can become problematic and can indeed serve as the very obstacle to real and sustainable development.

It is clear from the Constitution, that the framers intended that elections serve the 3 three key functions of enabling the exercise of the right of

choice by the electorates when candidates present themselves for public office. In the same vein therefore, elections provide an avenue for accountability and ensuring that constitutional trusteeship is maintained. That, public office is an avenue for service in respect of which there must be accountability. And finally, elections under the Constitution provides a means for participation by the citizen in the life of the Republic. So conceived, elections constitute a means reinforcing the sense of ownership by electors. Elevating elections to the center and dislodging the order of things treat elections as an end in themselves and badly distorts the picture originally intended by the framers. This calls for a reset.

THE CONSTITUTION AND PUBLIC GOODS

If elections are not the intended end goal, then what is/are? To answer this question, one can view the Constitution as a machine or piece of equipment engineered to produce certain finished materials. While machine or equipment itself is not the desiderata, its output will determine the extent to which the intended products are produced to

satisfaction. I argue that the Constitution (the machine) is fundamentally designed to help attain the delivery of public goods and help provide the environment and nurturing for the attainment of private enterprises and liberty. Like many aspects of the Constitution, the provision of public goods have been on the decline over the last 29 off years.

According to one definition, public goods are commodities or services which are made available to all and paid for by the state secured through taxation. Examples of public goods are law enforcement and policing, national defense and security, and the rule of law. At the micro level, public goods include education, water, roads and general infrastructure, and so on. The provision of public goods within the constitutional framework eases the impact of inequality and ensures the cross-subsidization of services for all. In respect of the provision of public goods, the constitution establishes dual structure in which institutions like the Ghana Police Service, the Ghana Armed Forces, and CHRAJ are directly tasked with the mandate of providing public goods for the benefit and consumption of Ghanaians. On another level, Parliament and other institutions are designed to ensure that these goods are delivered in tandem with the mandate of their establishment. The duality of the system on public goods reflects the features of constitutional trusteeship and responsibility impressed on these bodies.

Many agree that the level and quality of public goods delivered under the constitution have depreciated over the years. Some will go as far as to assert that the standards of public goods delivered have never been of par value. In this vein, the police have been singled out for the harshest criticism and the two leading parties have taken turns to chide the institution. But rather curiously, the response one gets on the institutional neutrality and competence of the Ghana police service depends on which of the parties one asks and further depending on which party is in power and which one is out or in opposition. The fact that the two parties have tended to show suspicion and scepticism of the work of the police when in opposition implicates concerns on how these parties behave towards the police when in power.

Parliament's work through its public Accounts Committee betrays a deep failure to deal with the wanton waste and misappropriation of public resources within the failing standards of delivering public goods. One would have expected ordinarily that as the representative chamber, Parliament would have exacted higher standards of behaviour of agencies, departments and institutions to ensure that the delivery of services are optimal within the scope of public complaints. The fact that many institutions have justified their failures to deliver on their mandates on grounds of the lack of resources further justifies the need to ensure that Parliament's oversight through the PAC should have

been more efficacious. The situation as it stands, and the growing disillusionment of the public with the PAC's work from the point of view of outcome remains both puzzling and worrying.

CITIZENSHIP

Democracy depends on citizenship and participatory democracy is exactly what the name says it is. For it is the activist Marian Wright Edelman, who aptly opined that *democracy is not a spectator sport*. Indeed, the fact that the franchise is for all who qualify, implies that all are and should be actors.

According to the historian Jeoffrey King, citizenship which arose in ancient Greece was a legal status which separated the free from the slave. In his assessment therefore, citizenship conferred the fundamental quality

of freedom on the bearer and empowered him to partake in the governance of the polis or state. The fact that citizenship of ancient Greece conferred a higher status reflects the benefits of citizenship and the gains of being considered one. The rights conferred by citizenship in Greek society notwithstanding, the notion of citizenship was deeply duty laden in the individual's obligations towards the state. Aristotle put it rather starkly when he asserted *that "To take no part in the running of the community's affairs is to be either a beast or a god"*. This view of citizenship defines the individual not only as a unit of a given polity, but more importantly as a standard duty bearer who task it is contribute towards the management of the affairs of the state. This view of the citizen created a dual dynamic, namely rights that enable the bearer to participate in the affairs of state and to own property in general, on the one hand, and correlative duties to contribute to the management of the state and civic life. Louis Brandeis, the early 20th century American judge says it right when he opines that the "*most important political office is that of the private citizen"*. The powers and duties of citizenship are in this wise self-evident. The citizen is the very essence of the state.

The constitution embraces this model of citizenship and under various provisions including article 41, the citizen is tasked with a multitude of obligations including upholding and defending the Constitution. This singular obligation mandates the citizen to participate in the civic life of the state and to ensure that persons who are charged with constitutional duties are held to account for their stewardship in the extent to which they uphold the mandates of their offices. From the overall design of the constitutional framework, citizenship provides the glue that holds the system together if it is to be effective. The citizen's role in elections enables the constitution of government and renewal of mandate. By availing himself for elections, the citizen makes possible choices to be made between competing and alternative candidates. His feedback through Parliament is a means of constant information for the political system. His pecuniary contribution through the payment of taxes enables the treasury to be filled to fund development. So central is the citizen that he truly is the difference between limited government and authoritarianism, a functional state and a failed one, development and retrogression.

Yet experience over the last near thirty years has shown that the central position of the citizen has been rendered peripheral and even back-end.

While political activism has seen an increase among the ardent followers of political parties and the rhetoric charged, the truth is that the citizen has grown weaker in his assertion of influence and authority in governance. Some will correctly argue in my view, that the this has partly arisen due to the prevalent toxic political culture leading to the withdrawal of the citizen from public and civic life altogether. This reality while tragic represents a continuing failure of duty on the part of the citizen. For the framers understood the competing dynamic that exists between the citizen's guardianship role and the selfish interests of state institutions to maximize power at the expense of constitutional norms and injunctions. Therefore, the expectation by the citizen of (if it ever existed) "a smooth sail" or that his right of place will be accorded with no tensions involved, is not only misplaced but also unrealistic. Claiming the citizen's space and asserting control over institutions and actors is crucial for the effective and functional operation of the system. The default option has led to the situation we have been in for the past 30 years in which the role of citizens have been reduced to elections.

In this role, the citizen has been exploited, used and abused. Rather than be the object of appeal to whom political actors direct their programs with

the view to wooing them with superior arguments and policy preferences, the citizen has become a tool applied towards many indignities. With the loss of decent civic engagements between political parties, the citizen has become a handy but prized tool for political thuggery and the use of illegal violence during and in-between elections. Having clearly failed to agree on common premises for running our country, the ensuing heated politics have become marked by citizen political vigilantism-a veritable corruption of his role as a defender of the Constitution and for that matter protector of the realm. In his new role, as he sees it, the citizen is taught to love his party beyond his fidelity to the state. He is socialized to prize his sectional affiliation over and above the commonwealth of Ghana. Citizenship has come to mean group solidarity signified by the party. When his party is in government, it is the moment of opportunity for the members of the party and for the citizen who is a member to maximize the benefits of party membership. For this is seen as returns on investment for membership and support. When out of government, the citizen member deems it an obligation to support the efforts of the party against the establishment through fair and foul means for the ultimate selfish goal.

While some will pin this miserable state of affair to the absence of deep and critical thinking in our public space relative to politicking and policy, the it is a truism that in a country of rampant poverty, the citizen is easy picking for political actors desirous of winning elections and also maximizing political power at all costs. In other words, it is virtually axiomatic to assert that power being the name of the political game, politicians will leverage on every available tool to win elections or entrench themselves when in it. Therefore, while the concept of citizenship as constructed by the Constitution is a repository of power, the transition between constitutional guarantees and actual manifestation and enjoyment thereof can be tenuous. The reality has shown the average citizen weak and exploited in the face of mobilized political power, left adrift the chaos of raucous political environment. Within the last near 30 years, this dynamic has witnessed the effective marginalization of the citizen from mainstream governance not to mention the politicization of his contributions, whenever offered. As earlier mentioned, a rather drastic side effect of this has been the perpetual electioneering cycle thrust upon us arising from the constant politicization of all things national in our public discourse. From diplomacy to the economy, all issues affecting our national development is fair political game for divisive public

conversation. And the purveyors and fixers of this agenda of division and rancour has been the citizen--- the youthful citizen.

The problem with the citizen leading the charge of what I call "corrosive politics" does not lie so much in the exercise of the citizen's right of dissent, difference and indeed preference for alternative government and policies as it were, as much as it is for his uncritical support for a group even against the ideals of the system. It is this kind of loyalty that gets the citizen calling and threatening journalists who do not disseminate favourable information or opinions. It is the kind of politics that survives on loyalty and patronage and eschews any dissent. It is the politics of the "other" in which all groups which do not subscribe to the visions and actions of the citizen's group are not only discounted but attacked---- literally! This version of politics is not centric and there is no place for the state, and all who profess fidelity to the state are looked upon with suspicion by party faithfuls. Division is virtue and proclaimed non-aligned nationalism is scorned and sometimes comes with a price.

Until and unless the problem of the dormant and exploited citizenship is resolved, our constructional democracy will remain troubled. For if the

whole cannot be greater than its part as universally agreed in mathematics, the malady of citizens will surely be transferred to the larger entity being the state. The citizen must therefore seize control of his/her constitutional destiny. He must recognize the plain but painful reality that in this fray, the game is really zero sum in which by-standing is not rewarded but comes at a heavy price. The citizen who is duty bound to defend the constitution is by a parity of reasoning, empowered to p to take such steps to ensure that constitutional actors comply with the law.

When in 2017 President Nana Akufo Addo charged Ghanaians to become citizens and not spectators, I personally took it as a clarion call for active citizenship. The citizen who defends the Constitution and strives to uphold its central tenets. The citizen with an active sense of duty. A patriot in tune with the hopes and values of his country. A citizen who cherishes and prizes the "national" over the sectional. Experience since 2017 however does little to inspire confidence in the fact that the call was heeded. The norm seems to have trumped the call. Perhaps a reminder is called for.

INCLUSIVE GOVERNANCE

An unfortunate but significant by-product of elections in Ghana has been regimes which exclude all others not deemed members of the winning political party. Under this system, political parties have seen their very election as signalling a moment of opportunity for the exercise of power and distribution of resources to party 'faithfuls' and loyalists. Under this practice, political opponents, perceived or actual, are deliberately excluded from the governance process and deprived of public resources. Regrettably events characterizing the negotiating process of the constitution and elections thereafter set the tone and tempo of political division that have come to characterize the exclusion of persons deemed to be opponents from the governance process. This phenomenon has come to be known as the winner-takes all system—a practice I dare say may have been rather bandied around confusingly sometimes. So at this stage, I will set out a multi-layered operational definition of inclusive governance and in the process hopefully clarify the nature of the practice of winner-takes-all.

First, inclusive governance for this purpose is captured as governance that embraces divergent groups and actors. At this level, inclusive governance is one in which deliberate efforts are made to share and distribute power among persons and groups who do not all subscribe to the same political party. It is the antithesis of winner takes all whose *modus operandi* is the exclusion of other persons or groups in its exercise of power and distribution of resources and entitlements.

Second, inclusive governance can be conceived of as governance which promotes merit and advances same as a basis for inclusivity and entitlement. Merit when used as an index of inclusivity provides an objective basis including those who may for terminological convenience be called "third parties". Meritocratic inclusivity promotes qualitative governance and enables all shades of competence to be brought on board the government. This indeed is an ideal which while it challenges the view of many about the essence of party political governance system, advances the values of good governance.

The third and final operational definition of inclusive governance focuses on broad-based consultations and inclusion of identifiable political

interests with the view to ensuring that policies reflect the variety and complexity of interests. This dynamic of inclusive governance seeks to deal with a core deficit of the winner takes all in which only the ruling group are worthy of consideration. If the effect of policies of state are generally felt by all, then there is both a moral and pragmatic basis for consulting all who are affected.

It is significant to state that the complexity and problematic dimensions of the practice have been worsened by its expansive scale. Laws like the Presidential Transitions Act and practices which have tended to add the civil service to the winner-takes-all phenomenon have truly enlarged the benefits of winning and heightened the cost of losing an election. In a paper I presented to the IEA some six years ago at the request of that entity, I stressed that the practice of winner takes all is perhaps the most dangerous threat to our constitutional stability given the heightened costs it introduces into our politics. In other words, where citizens feel threatened in employment, resource allocation or contracting by changes in government, resort to violence become inevitable. The increasing incidence and intensity of electoral conflict may just be a reflection of the

growing frustrations with the practice and the yawning divide in our politics.

There is therefore a practical basis to doing away with the winner-takes-all model of governance and I say this without being naïve about the pressures from political party extremists and ideologues who will fight tooth and nail to maintain it and protect their privilege of being in government. I urge and virtually plead for a doing away with the practise not out of a sense of ivory tower romanticism, but inspired by the significant deficits of continuing to promote a winner-takes-all system of governance. Reducing the stakes through inclusive governance is a strategic way of reducing the costs and thereby the threatened instability to Ghana's governance.

The issue with winner takes all is further complicated by the rather dysfunctional preference for majoritarian rule. This system of governance or *lex majoris has* thrived in Ghana given the lack of consensus from which broad policy blueprints can spring. Majoritarian rule tends to, in practice, equate the might of majorities to right and this typifies the definition of justice by Thrasymachus in the dialogue between him and Socrates in

Plato's republic. Majorities have tended to exploit their power without appealing to the moral qualms moderating the exercise of power. It has virtually been the norm in Parliament that the minority can have their say as the majority bid their time to have their way. Majoritarian rule deprives the country of qualitative leadership as arguments win nothing but loses all grounds to majorities and their preferences. Majoritarian rule also destroys any chance of comprises and the preservation and protection of the interests of minorities.

It is arguable that if the constitution is based on majoritarian principles, then the decisions of the majority should fundamentally be good. After all there should surely be wisdom in numbers. From a purely practical standpoint however, heedless majoritarianism flies in the face certain logic given that majorities don't have to be persuasive. They do not have to worry about the strength of their argument or the cogency of their actions. They simply have to count numbers and in the end it is all well for them. In this regard, majoritarianism undermines the market place of ideas theory as in the end it is numbers, not ideas that carries the day.

But majoritarianism deprives us not only of national unity and the cross-fertilization of ideas in governance, but also national positions on things that require consensus and unanimity. For example, a failure of bi-partisanship on key issues as foreign policy presupposes that the international system is in the kind of flux that reflect our domestic politics and changes in government in Ghana. The truth is, our enemies or friends do not change with elections in Ghana.

Many will find it both true and disturbing the fact that Parliament is the leader in promoting a practice of winner-takes-all in Ghana's governance. Parliament's obsession with numbers stems from the institution's desire not so much to assert its independence more than it is its willingness to do business with or obstruct the executive (depending on which party secures the majority in Parliament after elections). The ongoing heated attempt by both parties to lead in the house is largely borne out of the desire to exploit the powers of the institution to the benefit or detriment of the executive. Should the ruling party secure the majority in Parliament, government will anticipate a free ride in its business with the institution(if history is anything to go by), and should the opposition party gain the most seats, the government can expect frustrating

obstructions. In short, Parliament has become a tool for the pleasure or pain of the executive and its core functional purpose has been lost on us. Parliament's preference for majoritarianism has fragmented that institution for so long and the conventional explanation that backchannel dealings by MPs is the linchpin of their work affords little assurance to a sceptical public who have come to view Parliament with growing doubt and even suspicion. The bright lines drawn between the parties on key issues of government policy presented to the House for approval crowd out objectivity and principle and reinforce the essence of might over right!

THE SUPREME COURT

In establishing a framework of government that assures against majoritarian tyranny, the framers created a Supreme Court with the jurisdiction and authority to handle with finality contested matters affecting the constitution. Given the highly politically charged nature of

constitutional cases, supreme court is clearly a policy chamber whose work as a court is expected to be tampered by considerations of policy impacting their decisions. As an institution, it is perhaps the most enduring of the lot. Perhaps it is because they follow in the words of Alexander Bickel, the " ways of the scholar". Unlike the more political branches of the executive and Parliament, the judiciary is a professionalized body that is structured to be insulated from the pressures of politics. Throughout its life, the supreme court has handed down some important decisions that have helped shape the life of the constitutional democracy established under the 1992 constitution. Decisions determining the legal efficacy of the directive principles of state policy (CIBA), determining the boundaries of executive authority in law making (31st December), public financial administration (Occupyghana), and the role of Parliament in executive appointments are but a few of some of the notable decisions of the court.

While not the subject of this lecture, we are living witnesses to the pending petition before the court challenging the results and outcome of the recently held general elections.

Significantly, this is the second time in a decade the court is being called upon to decide the question of who the lawful winner (if any) of a general presidential election is. This is a matter sub-judice on which I do not intend to comment. The importance of a court as ours exercising a power so important as constitutional adjudicating notwithstanding, this jurisdiction has not been without its critics. Indeed Abraham Lincoln again says it best when he cautioned that "*The candid citizen must confess that if the policy of the government on vital questions affecting the whole people is to be irrevocably fixed by decisions of the supreme court, the people will have ceased to be their rulers and practically resigned their government to that eminent tribunal*". Issues affecting judicial review has always been controversial. Luckily for us in Ghana, the issue is settled in law and the legal authority of the supreme court to make binding pronouncements is accepted without question.

From a general standpoint however, our Supreme Court, like similar bodies elsewhere is intended to balance the operation of the constitution against key fault lines through its power of interpretation. Some of these faultlines in our constitution include majoritarian extremisms,

institutional appropriation of key constitutional bodies including parliament as well as advancing the "policy constitution" through the Directive Principles of State Policy. In this vein, the court sits at the pinnacle of resolving contested governance problems. The court has accordingly come to be thrust in the fray of hotly contested. With all the exceptional competences of the justices who have manned that court over the years, not even the supreme court can steer us out of the problems of our constitutional development in the absence of other real efforts elsewhere. The famous American judge Learned Hand was more blunt when he stated *This much I think I do know, that a society so riven that the spirit of moderation is gone no court can save. That a society where that spirit flourishes no court needs save, that a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit will in the end perish.*

The importance of the supreme court cannot be understated but the court can only do so much. The process of building an enduring constitutional culture and ethos inspired by time tested requires work and a tradition of bi-partisan consensus. Litigation destroys that consensus and only creates superficial resolution devoid of universal commitment. Our situation

demands all hands on deck. The commitment of all sides and the sustained effort directed at ensuring that the values and principles that animate the constitution are respected and upheld.

In light of the things said above about the need to develop the Constitution through practice and not rapid reforms, I plead the Court and indeed justices of the court to adopt a more friendly approach to constitutional litigation. Mindful of the enormous progress made by the court to relax constitutional litigation over the years including the move away from the award of costs in constitional litigation, I would ask for me and pray the Court to sustain and speed up reform in this vein. Being the terminal chamber beyond which no further appeal is possible, the Court can perhaps become more pro-substantive in its jurisprudence. The epistolary process adopted in such jurisdictions like India enables easy access to the Court and the policy of the Indian Supreme Court to substantially discount the impact of procedural rules in constitutional litigation can be replicated in ours. The Ghanaian Supreme Court has demonstrated its capacity in this vein through such decisions as its expansive definition of who a person is for purposes of standing in constitutional cases. I plead for more.

THE SPIRIT CONSTITUTION

Constitutions the world over are deemed special documents. Special because they are not merely legal documents. In fact, the enacting process, power dynamics, trade-offs and concessions and the many historical factors shaping and affecting their adoptions invariably makes constitutions unique-a sort of sanctimonious document comparable only unto themselves-what lawyers in their classic tendency towards distinctiveness refer to as a document *sui generis*. Our 1992 Constitution claims that specialty of place and in addition to the document describing itself as supreme, the Constitution is a document with a spirit. The spirit of the constitution animates the document and provides true meaning to the letter. The spirit to the constitution has been described as elastic, unknown and perhaps unknowable but that is a far cry from denying its existence as former Chief Justice Archer tried to do in the now famous Sallah case. While obviously humbled by the enormity of the task of defining the spirit, I shall say at this stage for the purposes of this lecture

that the spirit is the policy underbelly of the letter. It is the intent of the letter, the veritable philosophy informing the operation of the letter. From a functional standpoint thus, the spirit controls the letter and renders it meaningful.

A true commitment to constitutionalism can only be achieved if there is fidelity to the spirit in a manner that sees institutions and actors force themselves under the discipline of its restraints. Yet I dare say that while the spirit is the only true and sustainable means to ensuring an enduring constitutional framework, this is the most problematic aspect of the constitution's operation. It is far too common to have actors boast of having complied with the letter of the law-damn what was intended in the spirit of the constitution. We will not make progress with our constitutional development unless we overcome the deficit of the spirit. Parliament's continued failure to allow or promote private members with its narrow interpretation of article 108, its failure to take intimations from other branches including the judiciary and pass appropriate laws including legislations on international commercial transactions, coupled with the continuing controversies between the two leading parties as to the acceptable size of government per the number of ministers appointed

remain telling on the approach to the spirit of the constitution in governance.

There is a reason constitutions are said to be living. Constitutions live because they define things for all eternity. Otherwise they cannot claim the prophetic quality they claim to have. Otherwise, constitutions cannot solve the emerging and unforeseen problems of society. Applying the constitution mechanically as we so often have can only lead to stagnation and retrogression. The spirit provides the prism for dealing with emerging problems and for planning beyond our generation. Focusing on the text and not the spirit reduces the Constitution to the quality of a common statute bereft of its sanctity and position.

CONCLUSION

We have come a long way but with an even greater distance to go. We have endured division, corruption, want, and the scourge of excluding large numbers of our own from governance. Yet we stand. We stand under the banner of a constitution which is perfect in many ways and

whose imperfections are often so intended to be improved upon by practice and experience. This is perhaps the time to reiterate the time tested quotation of the jurist Oliver Wendell Holmes earlier quoted that" *the life of the law is not logic but experience."* For in truth there is never going to be a perfect constitution. Perfection in constitutional law comes with experience and it is the character of that experience that determines whether progress is made. The events of the recent elections speak to a country in need of soul searching. As our politicians do the usual post election ritual and political pin pong, the usual problems confronting our people persist. The constitution has been designed as a document to deliver critical public goods and promote the progress and happiness of all. Divisions borne of politics and exclusion from governance only fosters animosity and fractures the democratic spirit. Rather than see the spaces of discretion contained in the constitution as empowering an actor towards taking decisions that promotes sectional or parochial interests, I urge a new era of constitutionalism in which self-imposed restraint will become the defining feature for the exercise of power and one in which the spirit of the constitution ceases to be a back-end consideration but fundamentally informs decisions and actions taken under the constitution. What I am pleading for here is the triumph of constitutional

policy over politics and this is the only way to truly arrive at the state of the living constitution that we have all so craved for. This lecture therefore departs from recommending structural and substantive changes to be made to the constitution as this has been well flogged in many writings and papers presented over the years by many a learned folk. This lecture recommends actor behavior and attitudinal change-the one big missing part of the cog in the constitutional machine.

I wish to thank you for your kind audience.