

# Abeyance of the President's Power: An Exposition of the Power of the President Outside the Territory of Ghana

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## ABSTRACT

Since the decision of the Supreme Court in *Asare v Attorney-General*, which declared that the President is “unable to perform his functions” within the meaning of article 60(11) of the 1992 Constitution whenever he is out of the jurisdiction, a pertinent constitutional issue was birthed: “Does the President possess the Executive Power in its entirety when he is outside the territory of Ghana. In other words, “Is the President competent constitutionally, to bind Ghana to any action of his, anytime he is physically absent from the shores of Ghana?”

This article discusses the undulatory nature of the Executive Power, between the President and the Speaker of Parliament in the light of the two *Asare v Attorney-General* decisions. This discussion is preceded by an excursion into the historical antecedents of article 60(11) of the 1992 Constitution. The article analyses whether it can be said that a situation of dual presidency is created between the President and the Speaker of Parliament, in the absence of the President and the Vice President from the airspace, land space or territorial waters of Ghana. Lastly, the focus of the article is narrowed to the capacity of the President to represent Ghana at international conferences to make or sign treaties, resolutions and declarations.

**Keywords:** Presidential Powers, Territorial Powers, Constitution, Foreign Jurisdiction

## INTRODUCTION

*“The pronouncements of the Supreme Court are final, but final only in the sense that it is the final appellate court, the last court to which anyone can take any grievance. There is no adjudicating authority over and above, or beyond it. But our decisions are not final in the sense that they are ipso facto correct, or that after the Supreme Court has spoken, nobody else should. Some of the decisions may be atrocious, not deliberately so, but because we are human and liable to err.”* [i]

Since independence, Ghana's constitutional rule has been interspersed with military interventions. The 1960 Republican Constitution was overthrown by a coalition of the Police and the Military. A new constitution was drawn up in 1969 but was brought to an abrupt end by a military action led by Lieutenant Colonel Ignatius Kutu Acheampong. The same can be said of the 1979 Constitution which was buried by the 1981 Revolution. The result of 1981 Revolution is the 1992 Constitution, born with the scars of the battered Constitutional order and padded with the ideals of the Revolution.

The observation by the esteemed K. C. Wheare that “[if] we investigate the origins of modern Constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned” is indeed confirmed by the history of the Ghanaian constitutional rule (Wheare, 1966)[ii]. “The desire or need for a fresh start arose ... because ... a revolution had made a break with the past and a new form of government on new principles was desired” [the ideals of the Revolution] (Wheare, 1966)[iii].

The 1992 Constitution, our means of a fresh start, establishes the arms of government and other agencies, regulates the relationship between them and sets out the manual for governance. It allots powers and functions to the arms and agencies of government with certain limitations, checks and balances to avoid the emergence of a dictator or despot and to ensure the smooth administration of the State.

Judicial power has been conferred on the Judiciary<sup>[iv]</sup> “to say what the law is.”<sup>[v]</sup> The power is indeed exercisable by a court in accordance with the jurisdiction allotted to it. It is trite knowledge that the power to declare what the law in the 1992 Constitution is, is reserved only to the Supreme Court of Ghana. <sup>[vi]</sup> In that capacity, the Supreme Court declared in *Asare v Attorney-General*<sup>[vii]</sup> that the President is “unable to perform his functions” within the meaning of article 60(11) having the effect that the Speaker of Parliament must be sworn in to take the reins of governance anytime the President and the Vice President are physically located outside the shores of Ghana. This begets the question: in the instance where the President is in Geneva to sign a treaty, will that treaty, if signed, be binding on Ghana? Simply put, “*Is the President still President when he is in Geneva?*” This article focuses on providing a plausible solution to the seeming constitutional chaos rooted in the Supreme Court’s decision.

## The Facts

“The facts of the case may briefly be stated as follows: On 21 February 2002, the President of the Republic wrote to the Speaker of Parliament, informing the Speaker that the President would be travelling to Australia to attend the Commonwealth Heads of Government Meeting, scheduled to take place from 2<sup>nd</sup> to 5<sup>th</sup> March 2002 and that he would be away from Ghana from 24<sup>th</sup> February until 10<sup>th</sup> March. He further informed the Speaker that during that period, because the Vice-President would also be absent from the country from the 24<sup>th</sup> to 27<sup>th</sup> February, the Speaker was, pursuant to article 60(11) of the Constitution, to act as President for those four days. Accordingly, on 24 February, the Speaker swore the Presidential oath and acted as the President from the 24<sup>th</sup> to 27<sup>th</sup> February. The plaintiff invoked the original jurisdiction of the Supreme Court seeking a declaration that upon a true and proper interpretation of article 60(11) of the 1992 Constitution, the purported swearing-in of the Speaker of Parliament, the Right Honorable Mr Peter Ala Adjetey, as President of Ghana, on or about Monday 24 February 2002, was inconsistent with, or was in contravention of the said provision of the Constitution and was therefore unconstitutional, void and of no effect.”<sup>[viii]</sup>

## The Decision of the Court

The Court noted that “Although this case, at first sight, appears to require the interpretation of only a specific clause in the Constitution, it in fact requires an examination of aspects of the underlying scheme of the Constitution. Separation of powers is at the heart of the 1992 Constitution and is a doctrine which, the plaintiff contends, has to be taken into account in interpreting the relevant provision of the Constitution.”

The Court considered the genesis of article 60(11) of the 1992 Constitution and settled with the aid article 47(7) of the 1979 Constitution provided. The court held that “Article 47(7) of the 1979 Constitution provides stronger evidence, than the current provision, that absence from Ghana is regarded by the drafters of the Constitution as constituting inability to perform the functions of the President. For, whereas the current article 60(8) speaks in terms of the Vice-President performing the functions of the President, “whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office” “until the President *returns* (my emphasis) or is able to perform his functions”, the 1979 provision lumps the two situations into one, providing that the Vice-President is to perform the functions “until the President is able to perform his functions.” The 1979 provision is thus a stronger statement that absence from Ghana is a subset of inability to exercise the functions of the President. Is the change in language in the 1992 Constitution to be regarded as a clarification or a change in policy? Given the declaration by the Committee of Experts referred to above, it is more likely to have been a clarification than a change in policy. *In other words, it would seem that the drafters of the Constitutions of Ghana since 1969 have taken the view that the absence of a President from Ghana renders him unable to perform the functions of his office. Accordingly, the Vice-President, or in his absence, the Speaker, is to exercise his functions whilst he is thus disabled.*” [Emphasis added]

## HISTORY OF ARTICLE 60(8) AND ARTICLE 60(11) OF THE 1992 CONSTITUTION

“A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature.”<sup>[ix]</sup> Indeed, past experience is the very foundation of the present. Thus, the understanding of the provisions of the 1992 Constitution is cloistered in the webs of the past constitutions. As earlier stated, the 1992 Constitution is a combination of the scars of the battered Constitutional rule and padded with the ideals of the 1981 Revolution. This view is supported by the Report of the Committee of Experts which drafted the 1992 Constitutions. Paragraph 3 of the *Report* states that:

“The Committee operated on the cardinal principle that we should not *re-invent the wheel*. Accordingly wherever we found previous constitutional arrangements appropriate, *we built on them*. In this connection, *with appropriate modifications*, we relied substantially on some of the provisions of the 1969 and 1979 Constitutions of Ghana to the extent that they are relevant to the general constitutional structure proposed in this report.” [Emphasis added]

The understanding of the Constitution therefore lies in the original nature of “the wheel” and its development, taking into account the “appropriate modifications” referred to above. We shall examine article 60(8) as it existed under the 1957 Ghana Constitution Order in Council, 1960 Constitution, 1969 Constitution and finally the 1979 Constitution.

### The 1957 Ghana Constitution

Under this constitution, the Executive power was vested in the Queen, to be exercised on her behalf by the Governor-General.<sup>[x]</sup> However a portion of that Executive power was ceded to the Cabinet who were in charge of the direction and control of government of Ghana.<sup>[xi]</sup> Thus it can be said that the Queen, represented by the Governor-General, in actual terms, functioned only as a Head of State. The Head of Government was the Prime Minister appointed by the Governor-General by Instrument under the Public Seal.<sup>[xii]</sup>

As stated above, the Cabinet was responsible for the day to day administration of the country. They were collectively responsible to the Legislature and as such, their life span was tied to the satisfaction of the Legislature with their administration. However, the tenure of the Ministers of Cabinet was hooked up to that of the Prime Minister. Section 8(1) provides that:

“Whenever the office of the Prime Minister has become vacant and a person has been appointed to be Prime Minister in accordance with the provisions of section 7 of this Order, the offices of all other Ministers shall become vacant.”

Hence, any ground for removal of the Prime Minister was directly a ground for removal of the Ministers of Cabinet. The consequence is that the power of governance was really vested in the Prime Minister.<sup>[xiii]</sup>

It would seem that the underlying philosophy of the 1957 Order In Council was that the Prime Minister was always to be physically located within the territory of Ghana. Thus a ground for removal of the Prime Minister was his absence from Ghana without the written permission of the Governor-General.<sup>[xiv]</sup> Section 8(4) stipulates that “Whenever by reason of illness or absence from Ghana with the written permission of the Governor-General, the Prime Minister is *temporarily prevented from discharging his functions in Ghana*, the Governor-General may, by Instrument under the Public Seal appoint another Minister to discharge such functions of the Prime Minister until such time as the Prime Minister is capable of again discharging those functions or has vacated his office.” [Emphasis added]

Absence from Ghana was recognized by the 1957 Constitution as temporary inability of the Prime Minister to perform the functions of his high office only if it was with the written permission of the Governor-General. Where that permission was not obtained, it would be deemed that the Prime Minister had forfeited his office.[\[xv\]](#)

The question then is, what was the original “wheel”? The original wheel is simply that absence from Ghana was considered to be incapacity of the Prime Minister to perform his functions. He was required to obtain a written permission from the Governor-General before he leaves the shores of Ghana otherwise, he would be deemed to have vacated his office. He is temporarily prevented from discharging his functions in Ghana on such occasions. The next question is, if he is prevented from discharging his functions *in Ghana*, does it mean he cannot exercise any governmental power on Ghana’s behalf during that incapability? Simply put, does the prevention in Ghana also operate to bar any exercise of power outside Ghana?

The Constitution is silent on this issue but from considering the Constitution as a whole, the impression is that the Prime Minister lacked the constitutional mandate to exercise any governmental power anytime he was outside Ghana. This is because if he is temporarily prevented from discharging his functions in Ghana, the effect thereof is that he is, during that period, not recognised as the Prime Minister. This conclusion is inescapable due to the fact that a Minister is appointed during such periods to perform the functions of the Prime Minister.[\[xvi\]](#) Hence the Prime Minister on such occasions is the Minister appointed to perform the functions of the travelling Prime Minister.

This is the genesis and the original “wheel” of article 60(8) and article 60(11) of the 1992 Constitution.

## 1960 Constitution

After gaining Republican status on 1<sup>st</sup> July 1960, the next step in Ghana’s constitutional rule was to promulgate a new constitution on different principles “befitting” of a Republican State.

This Constitution established a President in whom Executive Power was vested. He was the Head of State[\[xvii\]](#), Commander-in-chief of the Armed Forces and the Fount of Honor.[\[xviii\]](#) The Constitution declared Dr Kwame Nkrumah as the first President[\[xix\]](#) of Ghana and further stated the procedure for the election of future Presidents.

The Constitution established new principles but was not entirely a novelty. Certain fundamental principles contained in the 1957 Constitution were maintained. One such principle was the philosophy of the 1957 Constitution that the Prime Minister (in this case the President) was always to be physically located within the territory of Ghana. Hence provision was made for a Presidential Commission to execute the functions of the office of the President in his absence. Article 18(1) provided that “There shall be a Presidential Commission consisting of three persons appointed by the President to execute the office of the President in accordance with the advice tendered by the Cabinet in the event of –

- a. The death or resignation of the President before the assumption of office by his successor; or
- b. The illness of the President or *his absence from Ghana during which he cannot conveniently perform the functions of his office*; or
- c. The President being adjudged incapable of acting:

*Provided that nothing in this section shall be taken to prejudice the power of the President, at any time when he is not adjudged incapable of acting, to delegate any exercise of executive power to some other person.”*  
[Emphasis Added]

Did this constitution maintain the original wheel, develop, modify or re-invent it? The obvious answer is that the Constitution did not make any substantial alteration to the original wheel. The insertion of the words “cannot conveniently perform the functions of his office” is just an affirmation and explication of the philosophy which was contained in the 1957 Constitution.



But three points are worth noting: Firstly, although under the 1957 Constitution, the power to appoint who acts as Prime Minister was a function of the Governor-General, the 1960 Constitution established a Commission comprising of 3 persons appointed by the President to always execute functions of the President anytime the three specified situations occur. [xx] The reason for this is because the President was the Head of State as well as the Head of Government, unlike under the 1957 Constitution where the Queen was the Head of State, and therefore, it was necessary to have another body to either appoint the acting President or act as the President.

Secondly, the punishment of the Prime Minister, under the 1957 Constitution, for leaving without the written permission of the Governor-General is forfeiture or vacation of his office. This punishment and the requirement for a written permission were not maintained under the new Constitution.

Thirdly, the proviso of Article 18(1) of the 1960 Constitution may create the impression that the power of the President is unaffected by his absence from the country. It states that “*Provided that nothing in this section shall be taken to prejudice the power of the President, at any time when he is not adjudged incapable of acting, to delegate any exercise of executive power to some other person.*”

A holistic reading of article 18 reveals however that the proviso regulates just the incapability on medical grounds. Article 18(4) provides that “The President shall be deemed to be adjudged incapable of acting if the Speaker in pursuance of a resolution of the National Assembly –

- a. has declared that, *after considering medical evidence*, the National Assembly is satisfied that the President is, *by reason of physical or mental infirmity*, unable to exercise the functions of his office, and
- b. has not subsequently withdrawn the declaration on the ground that the President *has recovered his capacity.*” [Emphasis added]

This means that, in the context of incapacity on medical grounds, unless the Speaker, declares pursuant to a resolution of the National Assembly that the President is incapable of acting, the

President has the power to delegate any exercise of executive power to some other person. In the context of “his absence from Ghana”, the Presidential Commission was required to execute the office of the President if the President cannot conveniently perform the functions of his office. As to who decides whether the President cannot conveniently perform the functions of his office, the Constitution is silent.

Thus, the original wheel survived the new constitutional dispensation scathed with few modifications.

## 1969 Constitution

After a tyrannical rule under the 1960 Constitution and the military intervention, a new Constitution was promulgated once again to set afresh the journey of democracy, rule of law and constitutionalism. [xxi]

The 1969 Constitution was a development of the 1960 Constitution containing elaborate provisions with the main aim of diffusing the power of the President to avoid the emergence of another despot. Like the previous constitution, it vested Executive Power in the President. [xxii] The President was the Head of State and Commander-in-chief of Ghana. [xxiii]

This constitution also rubber-stamped the philosophy which served as the bedrock of Executive Power under 1957 Constitution, as elucidated in the 1960 Constitution with certain modifications. It may be recalled that under the 1957 Constitution, the Prime Minister was deemed to have vacated his office if he left the country without the written permission of the Governor-General, while under the 1960 Constitution that requirement for a written permission as well as the punishment was abrogated. Under the 1969 Constitution, the President was required to obtain the consent of the Cabinet before leaving. This modification is very important in that it restored the requirement for a written permission from the Governor-General as it existed under the 1957

Constitution in the form of consent of the Cabinet. Article 38(2) provides that: “The President shall not leave Ghana without the consent of the Cabinet.”

Thus, it would have been unconstitutional for any President under this constitution to leave Ghana without the consent of the Cabinet. Such an act may arguably even be a ground for his removal under article 47(1) of the Constitution[xxiv].

What happens when the President has obtained the consent of the Cabinet and is out of the jurisdiction? A novelty emerges: Article 38(3) states that;

“Whenever the President dies, resigns, is removed from office or is absent from Ghana or is by reason of illness unable to perform the functions of his office, the Speaker of the National Assembly shall perform those functions until the assumption of office of the President or the President is able to perform those functions.”

For the first time, the Speaker of the National Assembly is required to act as the President in his absence from the jurisdiction. Article 38 required the Speaker to take and subscribe to the Presidential Oath before commencing to perform the functions of the President.

The Constitution omitted to state what happens to the power of the President when he is outside the jurisdiction. Article 44(3) provides the grounds when the office of the President becomes vacant. It states that “The office of the President shall become vacant on the expiration of the period specified in clause 1 of this article; or

- a. if the incumbent dies or resigns from the office or ceases to hold office pursuant to the provisions of article 47[xxv] of this Constitution.”

Thus, for the first time the effect of the absence from Ghana was not provided. But on the strength of the argument that the 1969 Constitution was a build-up of the previous constitutions, it is plausible to state that the President will be in the same position as would have existed under the 1957 Constitution. For clarity sake, he will be “*temporarily prevented from discharging his functions in Ghana*” with the effect that he will be barred constitutionally from exercising any governmental power in the name of Ghana outside the jurisdiction since the Speaker of the National Assembly will be recognized as the President during that period of the temporary suspension.

In conclusion, the wheel was altered but the philosophy was approved. The Executive Power was always to remain in Ghana, but the acting President was changed from the Presidential Commission under the 1960 Constitution to the Speaker of the National Assembly.

## The 1979 Constitution

“In the Name of the Almighty God, We the people of Ghana

IN EXERCISE of our natural and inalienable rights to establish a framework which shall secure for ourselves and our posterity the blessings of liberty and prosperity

DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”[xxvi]

After years of military rule, with these words a new constitutional course was set in motion;

“IN SOLEMN declaration of ... Faith in Freedom and Justice

The Principle that all powers of Government spring from the Sovereign Will of the People...”[xxvii]

This Constitution also established the office of a President who was to be the Head of State, Head of Government and the Commander-in-chief of the Armed Forces of Ghana.[xxviii] Executive authority was vested in the President[xxix] to be exercised by him either directly or through officers subordinate to him.[xxx]

This Constitution maintained a large portion of the 1969 Constitution with certain provisions being in *pari materia* [\[xxxix\]](#). Under the 1979 Constitution, the President was required not to leave

Ghana without prior notification issued under his hand and addressed to the Speaker of Parliament. [\[xxxix\]](#) This modified the provision under article 38(2) of the 1969 Constitution which required the consent of the Cabinet. The 1979 Constitution did not require consent but just a notification issued under the President's hand.

Never in the history of Ghana was there a Vice President, but the 1979 Constitution established the office of the Vice President. [\[xxxix\]](#) The functions of the Vice President were determined largely by the President aside from a few ones stipulated by the Constitution. One of the constitutionally conferred duties of the Vice President was to act as President whenever the President was absent. Article 47(7) stipulates that:

“Whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office the Vice-President shall perform the functions of the President until the President is able to perform his functions.”

The Vice President is required to take and subscribe the Presidential oath before he can proceed to perform the functions of the President. [\[xxxix\]](#) In the situation that both the President and the Vice President are absent from the jurisdiction then the Speaker of Parliament is required to perform the functions of the President. [\[xxxix\]](#) As a prerequisite, the Speaker of Parliament is also required to swear the Presidential oath before he can perform the functions of the President. [\[xxxix\]](#)

After examining the original nature of “the wheel” and its development, taking into account the “appropriate modifications”, article 60(8) and 60(11) as it existed under the 1979 Constitution operated as follows:

- Executive Power must always remain within the territory of Ghana.
- Where the President intends to leave the jurisdiction, he was required to notify the Speaker of Parliament.
- The Vice President was to perform the functions of the President on such occasions after taking and subscribing to the Presidential Oath.
- In the absence of both the President and his Vice, then the Speaker of Parliament performs the functions of the President after taking and subscribing to the Presidential Oath.
- From the historic antecedents and the underlying philosophy of the above, the President was not vested with Executive Power anytime he was outside the territory of Ghana.
- The acting President is vested with the Executive power.

## The 1992 Constitution

Since there has been a pronouncement by the Supreme Court on the state of the law as it exists under the 1992 Constitution, I shall refer only to that pronouncement as it confirms the excursion into the history of article 60(8) and article 60(11). The court held in *Asare v Attorney-General*, [\[xxxix\]](#) the facts of which has already been stated above:

“Article 47(7) of the 1979 Constitution provides stronger evidence, than the current provision, that absence from Ghana is regarded by the drafters of the Constitution as constituting inability to perform the functions of the President. For, whereas the current article 60(8) speaks in terms of the Vice-President performing the functions of the President, “whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office” “until the President *returns* (my emphasis) or is able to perform his functions”, the 1979 provision lumps the two situations into one, providing that the Vice-President is to perform the functions “until the President is able to perform his functions.” The 1979 provision is thus a stronger statement that absence from Ghana is a subset of inability to exercise the functions of the President. Is the change in language in the 1992 Constitution to be regarded as a clarification or a change in policy? Given the declaration by the Committee of Experts referred to above, it is more likely to have been a clarification

than a change in policy. In other words, it would seem that the drafters of the Constitutions of Ghana since 1969 have taken the view that the absence of a President from Ghana renders him unable to perform the functions of his office. Accordingly, the Vice President, or in his absence, the Speaker, is to exercise his functions whilst he is thus disabled.”

“Some thorny issues arise from holding that the Speaker may carry out the functions of the President whilst he is abroad. If the Speaker is exercising the functions of the President pursuant to article 60(11), does this imply that the President no longer has executive authority whilst travelling abroad? Can he not execute agreements and other documents on behalf of the Republic? Would he need authorization from the Speaker to act on behalf of the Republic? If the answer to these questions were that the President no longer had authority to act on behalf of the Republic, would this not fly in the face of the expectation of ordinary Ghanaians? If, on the other hand, the President whilst abroad retains the authority to carry out at least some of his functions, how are the respective roles of the President and the Acting President to be co-ordinated and reconciled? These are all questions which were raised by the express provision in the 1969 Constitution which has been referred to above (article 38) and yet it provided no answers to them. Given the absence of express provision in article 60(11), should it be so construed as to obviate the need to address these questions, in spite of the previous constitutional history on the matter?”

“The open questions posed above relating to whether the President continues to share the executive power while the Speaker is acting for him, and if so the extent of the sharing of the power, do not need to be answered in this case. They should be reserved for future cases whose decision requires the determination of those questions.”

This leads us to the second *Asare v Attorney General* case. I must state however that it was a consolidation of two cases, *Samuel Atta Mensah v Attorney General* and *Rt. Hon. Edward Doe Adjaho; Asare v Attorney General*[\[xxxviii\]](#).

## The Facts

The facts were brief and uncontroverted. The actions were issued by the plaintiffs following the refusal by the Speaker of Parliament to subscribe to the oath of the President when both the President and the Vice- President were out of the country on November 5, 2014 and November 7, 2014 respectively.

The material part of the plaintiffs’ contention for our purposes was that, following the decision in the first **Asare** case, the Speaker was obligated on each occasion that the President and his Vice President are out of the jurisdiction to subscribe to the oath of

President since that is a condition precedent to the exercise by the Speaker of the functions of President which he assumes by virtue of article 60 (11) of the Constitution. The plaintiff in the *Asare* case contended that the refusal of the Speaker to take the oath prescribed in article 60 (12) of the constitution, constitutes a violation of his oath of office.

The defendant, on the other hand, contended that the framers of the Constitution did not intend the Speaker to subscribe to the oath of the President each time that he assumes the functions of the President under article 60(11) of the constitution and that in particular, the previous decision of the Court in the case of **Asare v Attorney – General** was not correctly decided and consequently urged the Court to depart from the said decision.

The Court however held that, “We have had the advantage of very detailed arguments upon what seemed to be an important question in this case relating to the previous decision of this court in the *Asare* case (supra) and have come to the opinion in relatively few words that the learned justices expounded the law correctly in that case (supra) and find no reason to yield to the invitation urged on us by the learned Attorney - General to depart there from ... *In our opinion, the absence of both the President and Vice-President from the jurisdiction*



*triggers the requirement imposed on the Speaker upon whom power is then conferred to assume the office of President until such time that he is relieved from such a responsibility by the return to Ghana of either the President or the Vice-President. The assumption of the office of President by the Speaker is intended to avoid a vacuum being created by the absence of both the President and the Vice - President from the country and to ensure that the organizational machinery of the state is kept on-going at all times.*

In order to better appreciate the question raised under article 60 (12), it is important to understand that the office of the Speaker as created by the 1992 constitution relates to the functions of the legislature and accordingly when the occupant of the office is required by the Constitution under article 60(11), to assume the functions of the President, he *temporarily occupies* an office which is outside the purview of the legislature. Therefore, in order to assume that new office, which he assumes by operation of law, he must for such assumption to be effectual subscribe to the oath of the President.

*When the Speaker is either not sworn in or refuses to be sworn in as the circumstances of this case point to, then notwithstanding his assumption of office as contemplated by article 60 (11), he cannot exercise any function that pertains to the office of the President.*

The position, which the learned Attorney-General has pressed on us to the contrary, has the effect of inviting us to shut our eyes to the essential differences in the nature and functions of the office of the President and that of the Speaker.

*In reaching this opinion, we have given careful consideration to the arguments canvassed before us by the learned Attorney- General that to require the Speaker to take an oath whenever he assumes the high office of President will create a situation in which we have two Presidents, one exercising his functions extra territorially and the other exercising his functions within the jurisdiction. That argument, however disregards the fact that by the decision in the **Asare** case (supra), the presence in Ghana of the President is a condition precedent to the exercise of the functions conferred on him under the constitution. But that is not all. When article 60(12) of the constitution is read together with article 60 (11), it is quite clear that the requirement to swear to the oath of the President relates to each occasion that both the President and the Vice – President are out of the country and indeed, to accept the position of the learned Attorney - General will constitute the Speaker into an alternate president.” [Emphasis added]*

First of all, the decision of the Supreme Court in the first Asare case was approved by the Court unequivocally. The Court noted that *“The assumption of the office of President by the Speaker is intended to avoid a vacuum being created by the absence of both the President and the Vice - President from the country.”* In other words, the office of the President becomes vacant when the President and his Vice are outside the country. The court proceeded to emphasize the essence of the Speaker taking the oath of the President before proceeding to perform the functions of the high office. The court rejected the proposition of the Attorney General that, it has been the convention that if the Speaker swears the Oath once, then he is not required to swear the oath every time he is required to act as President. If the Court had given blessing to the convention, the implication would have been that a situation of dual presidency is created. In order words, once the Speaker swears the Oath for the first, he is a joint-president with the elected President albeit in abeyance. The Court in no uncertain terms held therefore that *“it is quite clear that the requirement to swear to the oath of the President relates to each occasion that both the President and the Vice – President are out of the country and indeed, to accept the position of the learned Attorney - General will constitute the Speaker into an alternate president.”*

Thus the Supreme Court in this case rejected a system of dual presidency. However, another issue was created. The Court held that *“In reaching this opinion, we have given careful consideration to the arguments canvassed before us by the learned Attorney- General that to require the Speaker to take an oath whenever he assumes the high office of President will create a situation in which we have two Presidents, one exercising his functions extra territorially and the other exercising his functions within the jurisdiction. That argument, however disregards the fact that by the decision in the **Asare** case (supra), the presence in Ghana of the President is a*

*condition precedent to the exercise of the functions conferred on him under the constitution.*” [Emphasis added]

Undoubtedly, the Supreme Court expressly held that the President lacks the constitutional authority to perform his functions when he is outside the jurisdiction. This means that the Oath of the President is suspended for the time being that he is outside the jurisdiction and that translates into his inability to exercise his functions. This is because to say otherwise will mean that when the Speaker swears the Presidential Oath and the oath sworn by the President is also in subsistence, then the situation of dual presidency is created. So when the Speaker assumes the role of acting President, the President ceases to be President for the time being, because it will even be logically inconsistent to have one person as the incumbent President and another as the acting President. The Oath the Speaker swears to become acting President ceases immediately the President or the Vice President returns. The President will not be required to swear the Presidential Oath again because, as stated above, his Oath is merely suspended for the period that he is out of the country. But in the case of the Speaker, the oath he swore terminates automatically with the arrival of the President or the Vice President and this is the reason why he has to swear the Oath each time both the President and his Vice are out of the jurisdiction.

However, Dr Date-Bah, a member of the panel in the first Asare case, in his book, *Reflections on the Supreme Court*, argues that “It is clear, however, that ... Ghana can have only one President at a time. The President remains President when he is absent from Ghana, however he shares some of his functions with an acting President when he is abroad at the same time as his Vice President. This is the import of the Asare case.”

The contention of the distinguished legal luminary is highly problematic and theoretical. First of all, it runs counter to the express decision of the Supreme Court in the second Asare case.

The position of Dr Date-Bah fails to account for the role of the Speaker when he acts as President. What capacity will the Speaker occupy when he subscribes to the Presidential Oath? He contends further that the President shares some of his functions with an acting

President when he is abroad, which is clearly inconsistent to his previous statement that Ghana can only have one President at a time. His position requires a power sharing which is un-rooted in the Constitution. In fact, he fails to provide the distribution of power between the President and the acting President. The contention of the Law Lord fails to take cognizance of article 57(1) of the 1992 Constitution which provides that “There shall be a *President* of the Republic of Ghana who shall be the Head of State and Head of Government and Commander-in Chief of the Armed Forces of Ghana.” [Emphasis added]

Thus, clearly, the framers had in mind a single President in whom the whole and not a part of the Executive power is vested. [xxxix] It must be stated, in all fairness that, Dr Date-Bah’s book was published before the second Asare case.

On this footing, we shall aver our minds to the vexed question: **Does the President have the capacity to represent Ghana at international conferences to make or sign treaties, resolutions and declarations in the name of Ghana.**

Article 75(1) provides that “The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.” This provision must be looked at in the light of the situation that both the President and his Vice are out of the jurisdiction and the Speaker has duly been sworn in as acting President. In that event, which President does article 75 authorize to execute the treaty, agreement or convention: The President or the Speaker acting as President?

It will clearly be logically incoherent, if the preceding arguments have been accepted, to contend that the President who is deemed to be incapable of performing his functions is nevertheless constitutionally authorised to execute the treaty when he is outside the jurisdiction.

This is however undesirable and will fly in the face of democracy. In the words of Dr. Date-Bah JSC in the first Asare case, this will fly in the face of the expectation of ordinary Ghanaians. Ghanaians elected the President to represent them both internationally and domestically. Hence it is undemocratic to deprive the elected President of his power to execute treaties by vesting the power in the “non-elected” Speaker of Parliament.

Graciously, the framers provided in article 58(3) that “Subject to the provisions of this Constitution, the functions conferred on the President by clause (1) of this article *may be exercised by him either directly or through officers subordinate to him.*” To resolve the constitutional impasse, we contend that the President, whenever he is out of the jurisdiction will require the authorization of the acting President to act in the name of the Republic. However this authorization must be deemed to be constitutionally conferred and must not be dependent on the whims of the Speaker, acting as President. Put more simply, the President shall be deemed to be executing the treaty under the delegated power of the acting President as is made possible by article 58(3) of the 1992 Constitution as a state official.

## CONCLUSION

On 21<sup>st</sup> January 2018, Parliament was convened for the swearing into office of the Speaker of Parliament, Prof. Aaron Mike Oquaye as acting President. The President had left the country for the investiture of President George Weah in Liberia and the Vice President was on a medical leave in United Kingdom. The President returned two days later and as a result, the “presidency” of the Speaker ended. Three days later, the President left the country for Ethiopia to participate in the 30<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the African Union (AU), hence Rt. Hon. Mike Oquaye was re-sworn as acting President with a three-day tenure because the President was scheduled to return on the third day. This situation is undoubtedly undesirable.

Our recommendation may be assailable on several grounds, but this rather highlights the difficulty created by the first Asare case. To help the President of Ghana carry out their duties while outside the jurisdiction of Ghana, several constitutional and legislative reforms, as well as technological enhancements, should be considered. Firstly, we would thus recommend that in the light of the technological advancements, the decision in the first Asare case must be revisited. Even if it was the intention of the framers that the absence of the President from Ghana renders the President incapable of performing his functions, modern developments dictate otherwise and obviate the underlying fear. “To construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and adaptability to serve succeeding generations.”[\[x1\]](#)

Secondly, lawmakers must consider changing Article 58(1) of the 1992 Constitution to clarify that the President’s authority isn’t limited by geographical location. A possible revision could say, “The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution, regardless of the President’s geographical location.”

Thirdly, it is necessary to revise the Presidential Office Act of 1993 (Act 463) to allow the President to carry out their functions from outside the jurisdiction of Ghana. For example, Section 12 could be amended to read: “The President may perform their duties while outside Ghana, with the help of designated staff to ensure the smooth running of government.” Additionally, we could introduce a new Section 12A stating, “The President may, through an instrument in writing, delegate certain powers to officials to act in their stead while they are abroad.”

Furthermore, to support these changes, it’s crucial to set up a secure communication system using encrypted networks and protocols, like VPNs and secure emails. Specific personnel should be assigned to manage this infrastructure. It should also be considered to enter into international agreements that respect the president’s authority while they are outside the country, which will help manage any legal conflicts that may arise.

Additionally, in the event that the President cannot perform their duties while abroad, Article 60(12) of the 1992 Constitution should be amended. The amended provision could state: “If the President is incapacitated or unable to fulfil their role while abroad, the Vice-President will take over these responsibilities until the President’s return or recovery.”

Moreover, the state could look into technological solutions that allow the President to participate remotely in important government functions. This could involve secure systems for attending parliamentary and cabinet meetings virtually, sharing documents safely and holding online meetings.

It is also needful to pass supporting legislation to prevent legal conflicts, ensuring that Ghanaian laws apply even when officials are outside the country, along with transparent processes for resolving any disputes. Relevant laws to revise include the Electronic Communications Act of 2008 (Act 775), the Data Protection Act of 2012 (Act 843) and the Public Records and Archives Administration Act of 1997 (Act 535).

Another important measure is to develop a solid regulatory framework to ensure secure communication, data protection, and remote work practices. It would be wise to establish a task force to supervise these reforms, with input from key figures such as the President, Vice-President, Cabinet, Parliament, Judiciary, Ministry of Communications and the National Security Council.

The proposed implementation timeline for these recommendations is as follows:

Short-term (6-12 months): Establish a task force, conduct stakeholder consultations and draft and follow due processes for both constitutional and legislative amendments.

Medium-term (1-2 years): Present proposals to Parliament and pass the necessary constitutional and legislative amendments into law.

Long-term (2-5 years): Implement technology integration, secure communication systems and international agreements.

By taking this gradualist approach, Ghana could ensure a smooth transition and enable the President to lead the nation, even from outside Ghana, effectively.

## REFERENCES

[i] Adade, N.Y.B. (1993-95). The 1992 Constitution, Challenges and Prospects. *Review of Ghana Law*, XIX, 28-40

[ii] Wheare, K. C. (1966), *Modern Constitution*. Second Edition, Third Impression. London: Oxford University Press

[iii] Ibid

[iv] Article 125(3)

[v] *Marbury v Madison* 1 Cranch 137, 2 L. Ed. 60 (1803) per Marshall CJ at 7

[vi] Article 130

[vii] [2003-2004] SCGLR 823

[viii] [2003-2004] SCGLR 823, Headnotes

[ix] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Per Justice Frankfurter

[x] Section 6 of the 1957 Ghana Constitution Order in Council

[xi] Section 7(1) of the 1957 Ghana Constitution Order in Council

[xii] Section 7(2) of the 1957 Ghana Constitution Order in Council

[xiii] This view is supported by section 7(3) which provides that “Any Minister (other than the Prime Minister) may be removed from office by the Governor-General acting on the advice of the Prime Minister, by instrument under Public Seal.” Section 4(3) also provides that “Where the Governor-General is, by this Order or any other law for the time being in force in Ghana, directed to exercise any power, authority or function on the advice of any person or authority other than the Cabinet, he shall exercise such power, authority or function in accordance with such advice.” Thus it is so evident that the rein of government was held by the Prime Minister because he who has the power to revoke the appointment of a person undoubtedly has unimpeded influence over the performance of the functions of that other person.

[xiv] Section 8(2) of the 1957 Ghana Constitution Order in Council - The office of a Minister shall in any case become vacant - (a) If he shall cease to be a Member of Parliament, or

(b) If he shall be absent from Ghana without written permission given by the Governor-General acting on the advice of the Prime Minister:

Provided that, if a Minister shall cease to be a Member of Parliament by reason of a dissolution of the Assembly, he shall not on that account vacate his ministerial office until such time as the Governor-General shall have appointed a Prime Minister in accordance with the provisions of section 7 of this Order.

[xv] Section 8(2) of the 1957 Ghana Constitution Order in Council

[xvi] Section 8(4) of the 1957 Ghana Constitution Order in Council

[xvii] Article 8(1) of the 1960 Constitution

[xviii] Article 8(3) of the 1960 Constitution

[xix] Article 10 provides that “Dr Kwame Nkrumah is hereby appointed first President of Ghana, having been chosen as such before the enactment of the Constitution in a Plebiscite conducted in accordance with the principle set out in Article One of the Constitution”.

[xx] Article 18(1) of the 1960 Constitution

[xxi] See Preamble of the 1969 Constitution

[xxii] Article 37(1) of the 1969 Constitution

[xxiii] Article 36(1) of the 1969 Constitution

[xxiv] Article 47(1) The President shall be removed from office if he is found, in accordance with the provisions of this article,

- (a) to have acted in willful violation of any provision of this constitution; or
- (b) to have conducted himself in any manner
  - (i) which brings or is likely to bring the high office of President into hatred, ridicule or contempt, or
  - (ii) prejudicial or inimical to the security of the State; or

to be incapable of performing the functions of his office by reason of physical or mental incapacity.



[\[xxv\]](#) Ibid

[\[xxvi\]](#) See Preamble of the 1979 Constitution

[\[xxvii\]](#) Ibid

[\[xxviii\]](#) Article 44(1) of the 1979 Constitution

[\[xxix\]](#) Article 45(1) of the 1979 Constitution

[\[xxx\]](#) Article 45(3) of the 1979 Constitution

[\[xxxi\]](#) On the same subject or matter

[\[xxxii\]](#) Article 46 of the 1979 Constitution

[\[xxxiii\]](#) Article 47(1) of the 1979 Constitution

[\[xxxiv\]](#) Article 47(8) of the 1979 Constitution

[\[xxxv\]](#) Article 47(10) of the 1979 Constitution

[\[xxxvi\]](#) Article 48(11) of the 1979 Constitution

[\[xxxvii\]](#) [2003-2004] SCGLR 823

[\[xxxviii\]](#) CONSOLIDATED WRITS: NO: J1/4/2015 and J1/20/2015

[\[xxxix\]](#) Article 58(1) The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution.

[\[xl\]](#) Theophenous v Herald Weekly Time Ltd (1994) 182 CLR 104 (at p 106)