Federal Law Review
2023, Vol. 51(4) 399–421

DOI: 10.1177/0067205X231206622
journals.sagepub.com/home/flr

Developmental Constitutionalism and the Fourth Branch: Ghana's Independent Constitutional Bodies and the Redress of Poverty and Inequality

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Abstract

Ghana's Constitution has long emphasised the importance of equality, democracy, human rights and development. These principles are entrenched in a separation of powers framework that includes independent constitutional bodies that operate semi-autonomously from the tripartite executive, legislative and judicial branches. As part of a symposium on so-called 'fourth branch' institutions that provide redress for poverty and inequality, this article explores two institutions: the Commission on Human Rights and Administrative Justice and the National Development Planning Commission. The first is a 30-year-old national human rights institution, which monitors and investigates alleged violations of human rights, corruption and the misappropriation of public moneys, and provides redress, partly through its increasing focus on economic and social rights and the claims of the most vulnerable, including women, children and persons with disabilities. The second, currently executive body, is the subject of current calls for constitutional reform in Ghana. These reforms would entrench national development planning to enhance features of autonomy, technical capacity and partisan independence. As such, these proposals offer a distinctive and yet also paradigm-defying model of fourth branch arrangements in developmental constitutionalism, raising questions about the usurpation of policymaking and the deficits of democracy that are commonly raised against courts, international financial institutions or other international economic arrangements.

Accepted 25 September 2023

* The authors thank the symposium organisers and participants, as well as Sannoy Das, Beverly Moran, Zim Nwokora, and the participants of the Boston College Law School summer faculty workshop. In addition, we thank the anonymous FLR reviewer and the excellent research assistance of Heather Odell.
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I Introduction

Fourth branch institutions are considered by some comparative commentators as the most important constitutional design innovations of the last two decades. As Rosalind Dixon and Mark Tushnet acknowledge, such institutions, which feature in many constitutional democracies across the world, seek to combine the independence, or insulation, from ordinary politics, that is familiar to courts, with the specialized expertise of government agencies.[1] Just as such arrangements unsettle the law-politics divide, they bring inevitable complexity to constitutional democratic arrangements; a democratic tension which may be increased when such institutions are addressed explicitly to the guarantee of welfare, equality or the redress of poverty (the subject of this symposium).[2] Moreover, in the context of a long-standing national commitment to 'development', as a stand-in teleology of welfare, economic growth, equality or anti-poverty, this complexity may be all the more compounded.

In 2020, a self-titled 'National Interest Movement' emerged in Ghana, calling for a constitutional reconstructing that would put particular emphasis, and pressure, on its 'independent constitutional bodies'.[3] Together with a #FixTheCountry campaign,[4] the movement sought to entrench a National Development Plan that would bind successive governments to the development projects and budgets initiated by previous governments. Such a plan would alter the role of the National Development Planning Commission ('NDPC'), an executive body currently appointed by, and responsible to, the President.[5] By appointing the NDPC as the guarantor for the publicized plan, the proposal would shift the setting and levers of governmental power, creating new and uncertain arrangements for socio-economic policy and democratic accountability. In the best case, the proposal would initiate direct forms of democracy in planning decisions, and a negotiated and more accountable backdrop of technical expertise, leading in turn to more responsive, sustainable and equitable development projects. In its worst case, however, the reforms would lead further away from such goals and create new enclaves of insulated power in economic and political decision making in its reimagined fourth branch.

What explains this enthusiasm? A decade earlier, a Constitution Review Commission had reported on overwhelming support for restructuring the NDPC as an independent constitutional body, after a nation-wide consultation on constitutional reform.[6] The Constitution Review Commission proposed to enhance the 'fourth branch' autonomy, technical capacity and partisan independence of the NDPC. The proposal notably sought increases in both the insulation of the

1. See Rosalind Dixon and Mark Tushnet, 'Democratic Constitutions, Poverty and Economic Inequality: Redress through the 4th Branch Institutions?' (2023) 51(3) *Federal Law Review* 285.
2. For exploration of the 'chronic debate' about constitutional socioeconomic guarantees, and the focus of the debate in institutionalized procedure, especially courts, see Frank I Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (Oxford University Press, 2022) ch 10; see also Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012).
3. These proposals are detailed below. See, eg, Salifa Abdul-Rahaman, 'Ghana: National Interest Movement People's Charter … We Are Promoting Prosperity for All, Not for a Few-Dr Abu Sakara' *Ghanaian Times* (Press Release, 23 September 2020) <https://allafrica.com/stories/202009240369.html>.
4. See further 'Home Page', *Fix the Country* <www.fixthecountrygh.com> (describing 'a non-partisan and non-political civic movement by Ghanaian youths for Ghana') ('fixthecountry').
5. *Ghanaian 1992 Constitution* (Ghana) ss 86–7 (establishing the NDPC and outlining its advisory, monitoring, evaluative and coordinating functions) ('*Ghanaian Constitution*'). A short glossary within this paper may assist: alongside the National Development Planning Commission ('NDPC'), this paper also makes mention of the Commission on Human Rights and Administrative Justice ('CHRAJ'), as well as the United Nations Development Program ('UNDP') and Sustainable Development Goals ('SDGs').
6. Constitution Review Commission of the Republic of Ghana, *Report of the Constitution Review Commission: From a Political to a Developmental Constitution* (December 20 2011) 68–9 [158] <https://constitutionnet.org/sites/default/files/crc_research_report_final.pdf> ('Constitution Review Commission').

NDPC from partisan politics, and in the coverage of its mandate. Indeed, the Constitution Review Commission Report made findings that 'Ghanaians would like virtually every aspect of national life covered in the national development plan'.[7] Concerns grounding these submissions had emphasised the need for a public blueprint for sustainable development, a framework for accelerated growth and actual reduction in poverty levels among Ghanaians, and the assurance that national development would not be made hostage to sectional political party manifestos.[8]

Such proposals present a model of redress for poverty and economic inequality that may reposition so-called 'fourth branch' or 'guarantor' institutions[9] in constitutional democracies to a considerable, perhaps almost paradigm-defying, degree. Indeed, they raise profound questions about the compatibility of such institutions with Ghana's hard-won democratic arrangements. Nonetheless, the proposals join longstanding commitments within Ghana's Constitution to alleviate poverty and address inequality. Its 1992 Constitution sets out equality guarantees and a number of express fundamental rights; in addition, Directive Principles of State Policy outline broad socio-economic objectives. These include a just and free society, a democratic state, the securing of basic necessities and effective participation in development processes.[10] These principles are intended to guide all citizens, with an emphasis on the actions of government officials and political parties in formulating laws and policies.[11] The President is required to report to Parliament once a year on all the steps taken to ensure the realization of these objectives, particularly of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.[12] They are also, in principle, justiciable. It is arguably a short step from such extensive Directive Principles to entrench development planning and new fourth branch institutional arrangements.

This article examines this proposal, against the backdrop of the current system of redress for poverty and inequality in Ghana, and its present array of independent constitutional bodies. The main comparator to the proposed role of the NDPC is Ghana's Commission on Human Rights and Administrative Justice ('CHRAJ'). Established in 1993, the CHRAJ is an internationally regarded independent constitutional body,[13] and performs relatively effectively and autonomously, particularly as compared with the institutions that are directly responsible to the executive branch.[14] Functioning as a national human rights institution ('NHRI'), an ombudsperson and a national anti-corruption commission, the CHRAJ works to investigate complaints as well as to promote and prevent violations of human rights, inclusive of economic and social rights, and particularly claims raised by vulnerable populations, such as women and children. In a country with widespread poverty and rising economic inequality — with 2022 estimates recording a number of 14.4 million multidimensionally poor in the population (ie 46.7 per cent)[15] — the goal of the CHRAJ is both central and diffuse. Other independent constitutional bodies also assist in the overall project of

7. Ibid 48 at [49].
8. Ibid 40 at [36].
9. For relevant features of independence, expertise and accountability, see Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021); Tarunabh Khaitan, 'Guarantor Institutions' (2021) *Asian Journal of Comparative Law* 1–20 (mapping a variety of independent constitutional institutions and determining, contra Tushnet, their functions beyond democracy protection).
10. *Ghanaian Constitution* (n 5) ch 6.
11. Ibid s 34(1). See discussion below (n 27).
12. Ibid s 34(2).
13. Ibid ch 18; *Commission on Human Rights and* Administrative Justice Act 1993 (Ghana); see further 'Human Rights Mandate', *Ghanaian Commission on Human Rights and Administrative Justice* (Webpage) <https://chraj.gov.gh/human-rights-mandate/>.
14. Constitution Review Commission (n 6) 69, [155].
15. See discussion below (n 37).

advancing development, reducing poverty and/or addressing broader measures of inequality, by keeping government spending accountable (such as the Office of the Auditor-General) or supporting the public's knowledge of and defence of the rights and obligations established in the Constitution (such as the National Commission on Civic Education ['NCCE']). These and other relevant working agencies are also described below.

In highlighting the role of the NDPC and the CHRAJ in Ghana, the article's aim is threefold. Firstly, as with other articles in this symposium, our research is addressed to the constitutional arrangements that de-centre courts and re-centre alternative institutions under separation of powers formulations.[16] Secondly, our article seeks to describe, and raise questions about, the under-studied constitutional arrangements of Ghana, as well as contribute to the growing literature on African constitutionalism, and Global South innovations, more generally.[17] One of us has close knowledge and has acted as a constitutional adviser to constitutional reform processes in Ghana, as well as other countries in Africa.[18] A third aim is to underline the complexity of institutional arrangements that would alleviate poverty and address inequality in democratically accountable and economically effective ways, that remain nevertheless attuned to longer-term commitments.[19] Indeed, connecting the goals of 'developmental constitutionalism' to fourth branch reforms reinforces the familiar constitutionalist paradox of democratic responsiveness and pre-committed restraint, even when falling (ostensibly) outside of courts.

II Ghana's Constitution and Context

In a symposium on fourth branch institutions that surveys a distinctive set of countries, it is important to give some context and history to Ghana's current constitutional arrangements and campaigned-for reforms. This context sheds light on the unique aspects of Ghana's Constitution, the complex linkages of development objectives with alleviating poverty and inequality, and the Constitution's long-time emphasis on democracy and decentralization. 'Developmental constitutionalism' is here used as a shorthand for an anti-poverty and pro-economic self-determining philosophy of government that is given a public, and institutionally entrenched, form. We note the special relevance of these goals in postcolonial, Third World, and/or Global South contexts, as well

16. See Dixon and Tushnet (n 1) as well as other contributions to this symposium. See also Charles Fombad, *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016); David Bilchitz and David Landau (eds), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar Publishing, 2018).
17. See, eg, Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (Oxford University Press, 2021); H Kwasi Prempeh, 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5(3) *International Journal of Constitutional Law* 469.
18. Dr Raymond A Atuguba served as Executive Secretary and Principal Researcher to the Commission: see Constitution Review Commission (n 6) 10 at [10]. The views of this paper do not represent the views of the Commission. Katharine Young has previously researched and participated in human rights activism in Ghana: see Jeremy Perelman, Katharine G Young & Mahama Ayariga, *Freeing Mohammed Zakari: Rights as Footprints,* in Lucie White and Jeremy Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford University Press, 2011).
19. This answers the observed gap in comparative constitutional studies: see Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22(3) *Stellenbosch Law Review* 482 (asking why, under paradigms of transformative constitutionalism, 'the relationship of constitutionalism to the eradication of poverty is' not addressed: at 483); see also Solange Rosa, 'Transformative Constitutionalism in a Democratic Developmental State' (2011) 22(3) *Stellenbosch Law Review* 542. For call for 'balance' in the development of state capacity, and state institutions, see Daron Acemoglu and James A Robinson, *The Narrow Corridor: States, Societies and the Fate of Liberty* (2019).

as the readiness to experiment with fourth branch arrangements in these contexts, even as such arrangements differ considerably.

Firstly, it bears repeating that Ghana's constitutional history is one of violence and struggle.[20] As is well known, Ghana was the first country in sub-Saharan Africa to be returned to independence from colonial rule, in 1957; its precolonial spaces encompassed ethnic groups with diverse political formations, with some close-knit and administratively specialized (such as the States of Ashanti and Dagbon) and others loose and kinship-governed; traditional Chiefs were often assisted by a council of elders.[21] British rule of the then-Gold Coast had imposed a series of colonial constitutions (some six in total), and the formal tripod of the separated executive, legislative and judiciary, and the institutions of the common law. In 1960, Dr Kwame Nkrumah spearheaded great expectations when Ghana, by constitutional referendum, became a republic, with a strong plan for pan-African independence and freedom.[22] A rapid period of investment in infrastructure followed (including the building of schools, universities, hospitals, roads and dams) along with a development strategy of import substitution industries.[23] These plans were rapidly undone through a range of challenges, including internal miscalculations, the swift and irresponsible process by which the British colonial power departed and the destabilizing effect of the Cold War.[24] High inflation and the significant abuse of the state's formal monopoly on violence were to follow, with a number of coup d'états, tracking several military regimes and autocratic rule, between 1966 and 1981.

Since the (elaborately detailed) Constitution of 1992, however, the Constitution has been stable and largely democratic.[25] A 'hybrid' with presidential and parliamentary features,[26] the Constitution entrenches a number of civil and political rights and equality guarantees, alongside the right to work and the right to education, and women's, children's and differently abled persons' rights, enforceable by Ghana's independent courts; in addition the Directive Principles of State Policy outline ambitious political, social and economic objectives, which are justiciable (where linked to fundamental rights) and also amendable by Parliament.[27] The Constitution has accompanied several peaceful transfers of government, with fair and credible elections overseen by the independent Electoral Commission, and two major political parties closely matched (the National Democratic

20. See, eg, Martin Chanock, 'African Constitutionalism from the Bottom Up' in Heinz Klug and Sally Engle Merry (eds), *The New Legal Realism: Volume II, Studying Law Globally* (Cambridge University Press, 2016) 13, 18.
21. This setting provided diverse arrangements in what we would now describe as the exercise of executive, legislative and judicial power: see Constitution Review Commission (n 6) 82. For historical study, see, eg, RS Rattray, *Ashanti Law and the Constitution* (Clarendon Press, 1929); see further Acemoglu and Robinson (n 19) 18–24.
22. Phyllis Taoua, *African Freedom: How Africa Responded to Independence* (Cambridge University Press, 2018) 2.
23. See Robert Darko Osei and Henry Telli, 'Sixty Years of Fiscal Policy in Ghana' in Ernest Aryeetey and Ravi Kanbur (eds), *The Economy of Ghana* Sixty *Years after Independence* 66 (Oxford University Press, 2017).
24. Ravi Kanbur, 'W Arthur Lewis and the Roots of Ghanaian Economic Policy' in Aryeetey and Kanbur, (n 23); see also, in general terms, Chanock (n 20) 13, 16–17; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 2018).
25. The Constitution was amended in 1996. Its textual coverage is expansive: it runs to 54,000 words, amongst the lengthiest in the world. Constitute, *Countries: Ghana* (Webpage) <https://www.constituteproject.org/countries/Africa/Ghana?lang=en>.
26. Ransford Edward Van Gyampo and Emmanuel Graham, 'Constitutional Hybridity and Constitutionalism in Ghana' (2014) 6(2) *African Review* 138 (noting US Presidential and Westminster features).
27. *Ghanaian Constitution* (n 5) ch 6. These principles may be amended by Parliament alone: ch 25. The debate on the justiciability of Directive Principles has tracked those in other systems with such guarantees, such as Ireland and India, and they enjoy limited enforcement in conjunction with express rights: *New Patriotic Party v Attorney-General* [1997–98] 1 GLR 378 (Supreme Court of Ghana) (*'CIBA case'*); *Ghana Lotto Operators v National Lottery Authority* [2007–08] SCGLR 1088 (Supreme Court of Ghana); see Raymond Atuguba, 'Constitutional Economic and Social Rights in Africa: The Case of Ghana' (manuscript on file with author).

Congress ('NDC') and the New Patriotic Party ('NPP').[28] Nonetheless, the executive enjoys far greater power than both the legislature and judiciary, with predictable failings of checks and balances and oversight.[29] Moreover, the (often narrowly) victorious party tends to govern without fetters until its near-complete exclusion when out of power, in a system that one of us has described (with Michael Kpessa-Whyte) as 'winner-takes-all' in Ghana.[30] Dissatisfaction remains high, particularly amongst youth movements and others whose economic frustrations are expressed as constitutional in nature.[31]

Secondly, Ghana's commitments and measurements of 'development' are never far from anti-poverty measures. Unlike many constitutions of the Global North, the objective of 'development' has long been made an express undertaking by the state and conveys a complex teleology, encompassing the elimination of poverty, the pursuit of industrialization and/or structural transformation, and the attainment of ever greater economic growth.[32] Under these conditions, it is important, if unconventional in public law analysis, to embrace an analysis of the independent constitutional bodies whose core task may be to provide redress for poverty and inequality (along many vectors), alongside those that are established to pursue or foster development. These mix the distinctive functions of what Martin Loughlin has described as a rising independent, expertise-led, 'ephorate'.[33]

This assessment thus takes an expansive approach to the prevention of poverty and inequality as a constitutional concern, by including both social and economic features of development. As a long critical literature notes, neither ending poverty nor inequality is synonymous with development, and each calls for distinctive interventions and approaches. While neoliberal economic policies largely considered development as synonymous with economic growth (measured by gross domestic product, or GDP) alongside certain poverty reduction strategies, such policies often foreseeably increased economic inequality.[34] In recent decades, however, a more capacious measure of *human* development has been promoted, which allows for human indicators of literacy or life expectancy and national income over time (thus implicitly

28. John Mukum Mbaku, 'The Ghanaian Elections 2016', *Brookings* (Online Commentary) 15 December 2016, <https://www.brookings.edu/blog/africa-in-focus/2016/12/15/the-ghanaian-elections-2016/>.
29. See, eg, Van Gyampo and Graham (n 26).
30. Michael Kpessa-Whyte and Raymond A Atuguba, 'Getting to the Roots: Constitutional Rules and the Zero-Sum Politics of Winner-Takes-All in Ghana' (2020) 99 *Journal of Law, Policy and Globalization* 75 (noting also the effects of 'monied democracy, the militarization of political parties, political vigilantism, ethnicity, opportunity hoarding' and other related practices at 83).
31. See fixthecountry (n 4); Mark Nartey and Yating Yu, 'A Discourse Analytic Study of #FixTheCountry on Ghanaian Twitter' (2023) 9(1) *Social Media + Society,* 1–11.
32. The Directive Principles of State Policy set out development objectives in several places, eg s 36–7 (the State is to 'maximise the rate of economic development', redress urban/rural imbalance, integrate women into economic development, promote agriculture and industry and ensure effective participation in development processes). For provocative treatments of the past and present and highly elastic meaning of development, which remain salutary, see Gilbert Rist, *The History of Development: from Western Origins to Global Faith* (Zed Books, 1997); Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, 1995).
33. Martin Loughlin, *The Foundations of Public Law* (Oxford University Press, 2010) 448–9 (categorizing as distinct the roles of (i) service providers, such as the Bank of England, (ii) risk assessors, such as medicines or food safety bodies, (iii) boundary watchers, such as anti-monopoly regulators or privacy and data watchdogs, (iv) auditors, such as those that monitor the use of public funds, and (v) adjudicators, such as tribunals or ombudspersons, who offer alternatives to traditional methods of legal or political redress. 650 public bodies in the United Kingdom form the basis of Loughlin's analysis: at 449).
34. See, eg, S M Ravi Kanbur, Akbar Noman & Joseph E Stiglitz (eds), *The Quality of Growth in Africa* (Columbia University Press, 2019). The omissions were deep-seated: see Charles Gore, 'Stuctural Transformation and Economic and Social Rights' in Malcolm Langford and Katharine G Young, *The Oxford Handbook of Economic and Social Rights* (forthcoming) (on file with author).

measuring the provision of schools or hospitals, and hence wider or multi-dimensional measures of poverty and/or inequality) and increasingly factors in additional measures such as economic inequality, broader inequalities (such as gender or rural/urban divides) or environmental considerations.[35] For the 2019 UNDP Human Development Index, Ghana scored 0.611 — a 'medium human development category' — placing it at number 138 of 189 total countries and territories.[36] Similarly, multi-dimensional poverty indexes now factor in non-monetary indicators in measuring household wealth, making poverty redress a more express, but also more institutionally expansive, concern, and highlighting greater deprivation among Ghanaians.[37] As for the Gini coefficient, which tracks economic inequality directly, Ghana's score revealed an increase in inequality from 0.324 in 1988 to 0.409 in 2013 and 0.43 in 2023.[38] The Palma ratio also offers additional information about the richest 10 per cent and the poorest 40 per cent of the population — its current ratio for public sector workers is 0.82, meaning that the top 10 per cent earns 82 per cent of the total earnings of the bottom 40 per cent in Ghana.[39]

Ideas about development, poverty, human rights and equality have long been siloed by economists and lawyers, for reasons that are both epistemological and institutional.[40] For the first 30 years since independence, Ghana lacked data on which to assess poverty and inequality; per capita GDP, however, suggested stagnation from 1960–74, a sharp decline until 1984 and a return to its 1960 level by about

35. See Amartya Sen, *Development as Freedom* (Anchor Books, 1999) and *Inequality Reexamined* (Oxford University Press, 1995) (directing the question 'inequality of what' beyond purely economic (resources or welfare) measures and into capabilities, which can be more attentive to disadvantages of, eg, gender). For current examples, see UN Resident Coordinator's Office Ghana, *UN Nations Sustainable Development Partnership with Ghana* (UNSDP) 2018–22 (United Nations Publication) <https://ghana.un.org/sites/default/files/2019-07/UNCT-GH-UNSDP-2018.pdf> ('*UNSDP 2018–22*') (committing UN support for 'inclusive, sustainable and equitable development for all in Ghana', with reliance on the NPDC and Statistical Services: at i).The attempts, particularly by states in the Global South, to disaggregate development from economic growth have been long-standing, as evidenced, eg, by the Declaration on the Right to Development (adopted in 1986 by the United Nations General Assembly (Resolution 41/128)), and recognised in the African Charter on Human and Peoples' Rights). This impetus now orients a Draft Convention on the Right to Development (A.HRC.WG.2/23/2).
36. UNDP, *Human Development Report 2020, The Next Frontier: Human Development and the Anthropocene — Briefing Note for Countries on the 2020 Human Development Report Ghana* (Report, 2020) 3, <https://www.undp.org/ghana/publications/2020-undp-human-development-report>. In the three decades, Ghana's life expectancy at birth increased by 7.3 years, mean years of schooling increased by 2.4 years and expected years of schooling increased by 3.9 years: at 3. Ghana's GNI per capita increased by about 127.6 percent between 1990 and 2019: at 3. The Human Development Index goes on to report that, between 1990 and 2019, this value increased in Ghana from 0.465 to 0.611, an increase of 31.4 percent: at 3.
37. 2022 estimates record 14.4 million multidimensionally poor in the population (46.7 per cent) with rural areas recording a far greater rate (of 66.2 per cent), see Ghana Statistical Service, *Quarterly Multidimensional Poverty Report* (Report, 2022) 12 <http:statsghana.gov.gh>.
38. Andy McKay and Eric Osei-Assibey, 'Inequality and Poverty in Ghana', in Aryeetey and Kanbur (n 23). The Gini index records a 0 for perfect equality and a 1 for perfect inequality.
39. Ghana Statistical Service, Ghana 2022 *Earnings, Inequality in the Public Sector* (Report, 2023) <https://statsghana.gov.gh/gssmain/fileUpload/pressrelease/Earnings_Inequality_Report_14-02-2023.pdf>.
40. For criticisms, see, eg, Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford University Press, 2005) (pointing to gaps in human rights and development projects); Dan Banik, *Poverty and Elusive Development* (2010) 122–40 (examining the 'human rights based approach to development' (HRBA)); see also Katharine G Young, 'Inequality and Human Rights: Review of Samuel Moyn, Human Rights in an Unequal World' (2019) 5(1) *Inference* (testing Moyn's criticism of gaps in human rights and equality objectives). This includes the rule-of-law development efforts, which were focused on courts: Arpita Gupta, 'Law and Development: A History in Three Moments' in Ugo Mattei and John D Haskell (eds), *Research Handbook on Political Economy and Law* (Edgar Elgar, 2015) 327, 333, 339; see also *The New Law and Economic Development: A Critical Appraisal*, David M Trubek & Alvaro Santos (eds), New York (Cambridge University Press, 2006).

2004.[41] During the era of structural adjustment (in Ghana, the World Bank's Economic Recovery Program), further cuts were made to statistics offices, exacerbating this deficiency.[42] Nonetheless, by 1987, Ghana was the second country in Africa to conduct a survey of Living Standards Measures Study with the World Bank; and national household surveys are conducted regularly, partly supported by donors.[43] These, along with the UN Sustainable Development Goals, and other international efforts, insist on directing development towards poverty alleviation or reduction, and certain equality measures.[44] Indices on gender, for example, that account for differences between men and women in the HDI dimensions, and others on inequalities in empowerment and well-being, increase such connections. Still, certain forms of inequality and deprivation are missed by such scores — the lack of access to indigenous languages of instruction, for example,[45] or the protection of women from domestic violence.[46] Protections for labour rights, so classically integrated into models of economic equality, have also become less central within conditions of widespread informal work and pressures for flexibilities.[47]

Thirdly, Ghana's constitutional democracy has long emphasised decentralization and participation. While creating a parliamentary system which relies on the shaming or loss of prestige of representatives if they fail to 'bring public goods home',[48] the system was also designed to devolve considerable power to local communities. A signature feature of the 1992 Constitution is the structuring of District Assembles, within population units tied to geography,[49] in some 10 regions and 216 districts, with Metropolitan, Municipal and District Assemblies ('MMDAs') responsible for development planning, service delivery and revenue collection. Today, there are 16 regions and 261 districts. Taking steps to redress any imbalance between rural and urban areas is also among the economic objectives of the Directive Principles of State Policy.[50]

Those designing this decentralised system had been intent to secure ties with local areas and were averse to political parties: a structure which has inadvertently increased, rather than decreased, the executive's power.[51] Such units have been funded through the District Assemblies Common Fund,

41. McKay and Osei-Assibey (n 38).
42. Such information-gathering activities are also essential for reducing poverty and inequality — these would fall under the knowledge institutions reported by Vicki C Jackson, 'Knowledge Institutions in Constitutional Democracies: Preliminary Reflections' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 156.
43. McKay and Osei-Assibey (n 38) 284; for present surveys see, eg, *UNSDP 2018–22* (n 35) at 6.
44. That said, neither the *2022 World Development Report* by the World Bank or *the 2021/2022 Human Development Report* by the UNDP provide data on economic inequality in Ghana, although they make mention of COVID-19's adverse impact on inequality in general, and the general position of disadvantaged groups.
45. Akosua Anyidoho, 'Shifting Sands: Language Policies in Education in Ghana and Implementation Challenges' (2018) 7(2) *Ghana Journal of Linguistics* 225.
46. Christine Dowuona-Hammond, Raymond A Atuguba & Francis Xavier Dery Tuokuu, 'Women's Survival in Ghana: What Has Law Got to Do With It?' (2020) 10(3) *SAGE Open* 1.
47. Dzodzi Tsikata, 'Employment Agencies and the Regulation of Domestic Workers in Ghana: Institutionalizing Informality?' (2011) 23(1) *Canadian Journal of Law and Women* 213; see also Dzodzi Tsikata, 'Understanding and Addressing Inequalities in the Context of Structural Transformation in Africa: A Synthesis of Seven Country Studies' (2015) 58 *Development* 206.
48. Diana Cammack, 'Understanding Local Forms of Accountability: Initial Findings from Ghana and Malawi' in Danwood M Chirwa and Lia Nijzink (eds), *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (United Nations University Press, 2012).
49. Benjamin Bewa-Nyog Kunbuor, 'Decentralisation and Land Administration in the Upper West Region of Ghana: A Spatial Exploration of Law in Development' (PhD Thesis, University of Warwick, August 2000).
50. See, eg, *Ghanaian Constitution* (n 5) s 36.
51. Kofi Quashigah, 'Decentralisation for Participatory Governance under Ghana's 1992 Constitution: The Rhetoric and the Reality' in Charles M Fombad and Nico Steytler (eds), *Decentralisation and Constitutionalism in Africa* (Oxford University Press, 2019) 291.

whereby the Parliament is required to set aside not less than 5 per cent of the total national revenues of the country to pay in quarterly instalments into the fund.[52] Several obstacles, however, have led to the charge that most of the District Assemblies are unable to achieve the financial autonomy intended for them, and that would be essential for their success.[53] Inequalities have thus been maintained or exacerbated across regional and ethnic lines; moreover, women and marginalized groups have low participation in such processes.[54] This under-funding of nominated institutions also occurs with respect to Ghana's Ministries, Departments and Agencies, when they are reliant on the Executive and Parliament for resources, as indeed are its courts.[55]

This overview of Ghana's constitutional system and goals, including its history of colonization and decolonization, and the country's stated objectives of development, human rights and decentralization, is necessarily brief. Nonetheless, the frustration expressed by the National Interest Movement, which has been channelled towards creating independence and a greater insulation of the implementation of such goals from partisan politics, lies within these parameters. The next Section turns to the role of Ghana's independent constitutional bodies.

III Independent Constitutional Bodies and Redress

As this symposium makes clear, 'fourth branch' institutions occupy a distinctive role in constitutional democracies. Their 'fourth branch' status separates them from executive agencies, in the degree of insulation from day-to-day politics, and their general independence from the three branches. Independence is a complex matter, but tends to be supported by their express constitutional status, as well as other features (a guaranteed budget, alongside high salaries, restrictions on post-service employment, a transparent or otherwise mediated appointments processes, conditions on termination or term limits, and informal enforcement of independence by a critical mass of observers).[56] Nonetheless, the line between formal 'fourth branch' institutions, and other executive agencies with enhanced procedures and norms of independence, is not clear cut. Moreover, given the variety of roles that such independent bodies perform, it is worth noting that 'independence' may look distinctive for bodies which assume the role of guardians (an investigative, monitoring or adjudicative role), and those with more service-oriented, welfarist objectives.[57] This line is all the more complicated in exploring 'fourth branch institutions which provide redress for poverty and inequality, the subject of this symposium.

In Ghana, there are no independent constitutional bodies that provide express and direct redress for complaints related to poverty or economic inequality, although the Commission on Human Rights and Administrative Justice (the 'CHRAJ') provides monitoring and accountability for human rights,[58] including economic and social rights, in which claimants are most often

52. *Ghanaian Constitution* (n 5) s 252(2). See further Commonfund.gov.gh (temporarily unavailable).
53. Quashigah 'Decentralisation for Participatory Governance under Ghana's 1992 Constitution' (n 51) 293.
54. Ibid 291 (noting parallels with the Kenyan experience, in M Damdinjav et al, 'Institutional Failure in Kenya and a Way Forward' (2013) Spring Issue *NYU Journal of Political Inquiry* 2); Dowuona-Hammond, Atuguba and Tuokuu (n 46).
55. And also, it is worth noting, with respect to courts and law enforcement agencies: Constitution Review Commission (n 6) 204–5 [38].
56. For extended analysis, see Tushnet (n 9).
57. See, eg Loughlin's list of the ephorate (n 33). See also see Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press, 2018) (distinguishing between electoral commissions, as fourth branch guardians of democracy, and central banks, which operate as trustees with delegated and constrained, rather than alienated, power); see also Khaitan (n 9); Tushnet (n 9).
58. *Commission on Human Rights and Administrative Justice Act* (n 13) Act 456.

experiencing poverty and other forms of vulnerability and marginalization. In addition, a range of other independent constitutional bodies play an indirect role, which is discussed below.

Those who describe 'fourth branch' arrangements often emphasise different aspects of direct democracy, whether direct or representative, or permanent or electoral. As will be seen below, 'fourth branch' arrangements can emphasise 'democratic experimentalism', in which peer review, benchmarking and information exchange can ground democracy in processes operating beyond the ballot box.[59] Indeed, constitutional theories of 'permanent democracy', which emphasise distinctive forms and functions of accountability, suggest distinctive selection processes that might bolster the democratic legitimacy of a body like the CHRAJ or NDPC, discussed below. These include appointments based on technical competence, to random selection (for equality) and members of citizen groups (for representativeness).[60] Yet as other commentators have noted, it is the often technical, rather than democratic, competences of such institutions that ground their effectiveness, which works at considerable distance from democracy or its legitimation.[61] In the place of central departments headed by ministers, a coordinated network of policy and service bodies both formulate policy and implement it, in spaces without electoral authorization or accountability.

In the burgeoning recent scholarship, a distinction is drawn between entities that serve to protect constitutional democracy through an integrity function — by ensuring elections, and protecting against corruption — and those that are more aspirational or programmatic in form.[62] Tarun Khaitan, for example, distinguishes between 'integrity' institutions that provide checks and balances reactively and 'guarantors' that may shoulder primary duties, by producing and disseminating knowledge, from a standpoint of constitutional independence.[63] The CHRAJ, discussed in this Section (Section IIIA), engages both these functions, in providing a complaints mechanism and engaging in educative functions about human rights. The NDPC, on the other hand, discussed in the next Section (Section IVA), is programmatic in character, purporting to provide an enduring and transparent guarantee for Ghana's (purportedly anti-poverty, anti-inequality) development trajectory. The challenges that are raised for development planning are discussed in the final Section, below.

A *The CHRAJ*

The CHRAJ is a notable and celebrated example of independence.[64] Established under Chapter 18 of the 1992 Constitution, its three members are appointed by the President: the Commissioner (equated to the level of an Appeal Court Judge) and two Deputy Commissioners (equated to High

59. Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Columbia Law Review* 267, 439.
60. Pierre Rosanvallon, *Good Government: Democracy Beyond Elections*, tr Malcolm DeBevoise (Harvard University Press, 2018).
61. Loughlin (n 33) 448.
62. Bruce Ackerman, 'The New Separation of Powers', 113 *Harvard Law* Review (2000) 113(3) 633, 694; Khaitan (n 9) 10.
63. Khaitan acknowledges Hans Kelsen's warning, that 'no institution is less suitable to perform [the guaranteeing] task than the one upon which the constitution confers the exercise … of the power to be controlled, and which therefore has the best legal chance as well as the strongest political motive to violate the constitution': Khaitan (n 9) at 5.
64. Joseph R A Ayee, 'Notes on the Commission on Human Rights and Administrative Justice under the 1992 Ghanaian Constitution' (1994) 27(2) *Law and Politics in Africa, Asia, and Latin America* 159.

Court Judges) enjoy the security of tenure equivalent to such justices.[65] They are supported by an extensive professional and administrative staff, who are located throughout regional or district branches.[66] Evolving from an ombudsperson template, the CHRAJ's functions include the investigation of complaints about violations of human rights, injustice, corruption and the misappropriation of public moneys, abuse of power and unfair treatment.[67] The CHRAJ has complied closely with the UN Paris Principles, which require independence from government to be set out in legislation or the Constitution; these principles help to coordinate and bolster national human rights institutions.[68] The CHRAJ has also been assessed by Amnesty International as among the best three human rights institutions in Africa.[69]

Although its earlier reports made no mention of poverty or inequality, since 1998 the CHRAJ's Annual Reports have expressly conceptualized human rights to include economic and social rights; by 2004 they had included such rights as a separate category for redress; and more advanced monitoring has occurred since 2008.[70] The linkages between human rights and the theme of poverty were also addressed explicitly in 2006 and 2011; the 'feminization of poverty' was a focus in 2000, and a 2019 Report on 'decriminalising poverty' noted a campaign to remove criminal sanctions from petty offenses.[71] In 2014 and 2018, the Annual Reports also addressed specific instances of economic and social rights, through examinations of public education in Ghana and exploitative child labour in the fishing industry.[72]

65. Reginald Nii Odoi, 'The Commission on Human Rights and Administrative Justice in Retrospect' (Report, April 13 2021) 1, 8 <https://ssrn.com/abstract=3825712>; *Ghanaian Constitution* (n 5) art 221, 223; *Commission on Human Rights and Administrative Justice Act* (n 13). Other independent bodies with this structure include the Auditor-General; the District Assemblies Common Fund Administrator; the Chair and other members of the Public Services Commission; the Lands Commission; the governing bodies of public corporations; and a National Council for Higher Education.
66. See Commission on Human Rights and Administrative Justice, *CHRAJ News*, <http://chraj.gov.gh> (detailing principal officers and regional directors). The present Commissioner is Mr Joseph Akanjolenur Whittal.
67. Raymond A Atuguba, 'The Fight Against Poverty and the Right to Development: The Ghana National Chapter' in Mads Adenas, Jeremy Perelman, and Christian Scharling (eds), *The Fight Against Poverty and the Right to Development* (Springer, 2021) 145; Kofi Quashigah, 'The Monitoring Role of the Ghana Commission on Human Rights and Administrative Justice ('CHRAJ') in the Protection of Economic, Social and Cultural Rights', in Eva Brems, Gauthier de Beco and Wouter Vandenhole (eds), *National human rights institutions and economic, social and cultural rights* (Intersentia, 2013) 107, 109 ('The Monitoring Role').
68. These are certified by the Global Alliance of National Human Rights Institutions ('GANHRI'). See GANHRI (Webpage) <ganhri.org>.
69. Odoi (n 65) 43. For a useful account of the 1993 Paris Principles, and other 'diffusion' initiatives, see Katerina Linos and Thomas Pegram, 'Architects of Their Own Making: National Human Rights Institutions and the United Nations', 38 (2016) 38 *Human Rights Quarterly*, 1109, 1116; see also Redson Edward Kapindu, 'Separation of Powers and the Accountability Role of NHRIs: the Malawi Human Rights Commission through the Courts' in Bilchitz and Landau (n 16) 206 (observing role of the *National institutions for the promotion and protection of human rights: resolution/adopted by the General Assembly* (UN GA Res 48/134, UN Doc A/RES/48/134 (4 March 1993) ('Paris Principles') on credibility, independence and effectiveness of such institutions).
70. Between 1998–2010, the Annual Reports included a State of Human Rights Report. Commission on Human Rights and Administrative Justice Ghana, Annual Report 1998*;* Commission on Human Rights and Administrative Justice Ghana, Annual Report 2006*,* Commission on Human Rights and Administrative Justice Ghana, Annual Report 2011. Monitoring became a key focus in 2005: Quashigah, 'The Monitoring Role' (n 67).
71. Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2000;* Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2004;* Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2006;* Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2011;* Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2014;* Commission on Human Rights and Administrative Justice Ghana, *Annual Report 2018*.
72. *Annual Report 2014* (n 71); *Annual Report, 2018* (n 71).

The parallels of the CHRAJ to the 'fourth branch' institutions that resemble ombudspersons are clear. Between 1993 and 2018, the CHRAJ received over a quarter of a million complaints and is reported to have resolved the vast majority of them.[73] An annual review in 2013 indicates the breadth of this undertaking, if not their assessed impact: from promoting a National Human Rights Action Plan, increasing the enrolment of pupils in elementary schools, monitoring health institutions and the National Health Insurance Scheme, securing the rights of people living with HIV/AIDS, the assessment of 22 orphanages in light of international and national standards, and public education and outreach in commemoration, for example, of the UN Day in Support of Victims of Torture.[74] Kofi Quashigah has documented a case study of the CHRAJ's investigation into communities affected by mining, with the CHRAJ leveraging the financial support of the United Nations Development Program ('UNDP') and other international groups.[75] In addition, the CHRAJ made a distinct contribution to the enforcement of economic and social rights in select employment disputes, across issues such as unfair dismissal, arbitrary treatment of a whistle blower, unfair treatment in pensions, sexual harassment and discrimination on the basis of pregnancy.[76]

The state's efforts to provide redress for poverty and inequality are complex, as discussed above, but several pathways can be discerned within the monitoring and reporting process of the CHRAJ. The first is the Annual Reports' regular focus on women's and children's rights. Other vulnerable groups included in this analysis include prisoners, persons living with disabilities, refugees and persons living in slums. A second feature is the emphasis on international standards and economic and social rights. Indeed, in its report to the Universal Period Review of the United Nations Human Rights Council, the CHRAJ drew attention to both the successes and failures in the realization of rights to education, health care and the SDGs. The CHRAJ also reported on both multidimensional and income poverty levels in Ghana, noting the importance of social protection programmes, and recommending an increase in the stipend and coverage of Ghana's Livelihood Empowerment Against Poverty ('LEAP') program.[77] A third pathway is clear from the geographical spread of the CHRAJ's work, given the significant urban/rural economic disparities that remain in Ghana. Significantly, the CHRAJ is established to extend redress to regions, districts and other parts of Ghana, that are notably distant from the capital and its courts.[78] A fourth is a focus on certain employment protections, in parallel to the National Labour Commission ('NLC'). (The statute-based NLC receives complaints related to unfair termination, unpaid salaries and poor

73. Atuguba, 'The Fight Against Poverty and the Right to Development' (n 67) (noting 256,049 complaints and the resolution of 252,990 of them: at 164).
74. Ibid.
75. Quashigah, 'The Monitoring Role' (n 67) 119–22. Others included Department for International Development ('DFID, UK') and Danish International Development Agency ('DANIDA').
76. See cases documented Atuguba, 'The Fight Against Poverty and the Right to Development' (n 67) 164–9.
77. *Report of the Commission on Human Rights and Administrative Justice to the Universal Period* Review (2022) 5–6 (copy on file with authors). LEAP is a cash transfer program introduced in 2008. For more information, see Ministry of Gender, Children and Social Protection, *Livelihood Empowerment Against Poverty Programme* (Webpage) <https://www.mogcsp.gov.gh/projects/livelihood-empowerment-against-poverty-leap/>.
78. Quashigah, 'The Monitoring Role' (n 67) 110.

conditions of service, and lapses in maternity protection and leave,[79] and claims a large cumulative reach).[80]

The CHRAJ is also tasked to enforce its decisions in the courts; and to educate the public on the Fundamental Human Rights of the 1992 Constitution. A large mandate is afforded to remedy, correct and reverse instances of human rights violations, through fair, proper and effective means.[81] This has been undertaken by allowing negotiation and compromise between disputing parties, bringing proceedings in a competent court, in order to end the offending action or restrain the enforcement of legislation. It is also a site for contentious politics: for example, in a challenge to the 'cash and carry' user fee system of health care financing in Ghana (in which community organizing and public petitions and protests were notable features), the CHRAJ was considered as the institution in which to lodge a complaint and later listed as a defendant in litigation against the government.[82]

B *Other Independent Constitutional Bodies*

A number of other independent constitutional bodies in Ghana are relevant to poverty and economic inequality, although their role in relation to redress is even more indirect than the CHRAJ. This includes the Office of the Auditor-General (which seeks to ensure accountable government spending) and the Ghana Statistical Services.[83] The National Commission on Civic Education ('NCCE') is an independent constitutional body whose independence is guaranteed through security of tenure of its members and its mandate under the 1992 Constitution.[84] The NCCE has worked on a wide number of campaigns to engage with Ghanaians about issues of constitutional law and their rights and obligations as free people. This engagement — supportive of constitutional literacy even when challenged by general literacy — has included community workshops on areas such as discrimination against persons with disability, and the rights of Ghanaian children. One powerful example is the townhall meetings organised in six districts in which small-scale mining (*galamsey*) was taking place. Such mining, which destroys farmlands and water bodies, increases the poverty index in Ghana, and an awareness campaign was initiated to curb these trends.[85]

Other important independent constitutional bodies include the Electoral Commission of Ghana and the National Media Commission. In addition, institutions dealing with monetary policy — the Central Bank — and with abuses of public office are relevant and may be considered more as

79. *Labour Act 2013* (Ghana) Act 615.
80. See, eg, National Labour Commission, *Medium Term Expenditure Framework for 2017–2019: Programme Based Budget Estimates for 2017* (Report, 2017), <https://www.mofep.gov.gh/sites/default/files/pbb-estimates/2017/2017-PBB-NLC.pdf>. It has applied to the High Court to enforce its decisions: Atubuga, 'The Fight Against Poverty and the Right to Development' (n 67) 172–4.
81. *Ghanaian Constitution* (n 5) s 218(d); see further Atuguba, 'The Fight Against Poverty and the Right to Development' (n 67) 163. Its mandate does not extend to matters pending before a court, or intergovernmental disputes.
82. This complaint by the Legal Resources Center (in which one of us, Raymond Atuguba, was a Director) was later withdrawn, but also listed a public hospital, Ministry of Health and Ministry of Finance, in the habeas corpus claims against hospital detention: see Perelman, Young and Ayariga, (n 18). Other fourth-branch institutions in Africa have also been a site for contentious action: see, eg, Ruth Buchanan, Helen Kijo-Bisimba and Kerry Rittich, 'The Evictions at Nyamuma, Tanzania: Structural Constraints and Alternative Pathways in the Struggles over Land' in Perelman and White, (n 18) 91, 95–6 (noting the decision to bring a case before the Tanzanian Commission on Human Rights and Good Governance rather than a civil, criminal or constitutional complaint).
83. Statistical Services Board, and its Government Statistician, *Ghanaian Constitution* (n 5) s 186.
84. *Ghanaian Constitution* (n 5) art 233.
85. Atuguba, 'The Fight Against Poverty and the Right to Development' (n 67) 176.

trustees, rather than guardians, of constitutional commitments.[86] Other independent bodies in Ghana include the Economic and Organised Crimes Office,[87] the Internal Audit Agency,[88] the Public Procurement Authority,[89] the Office of the Special Prosecutor and the Public Accounts Committee of Parliament. The Constitution Review Commission, discussed below, spelt out the need for an expanded list of such bodies, as well as for a special fund to support such bodies in addressing their ineffectiveness, and in enhancing their independence and professionalism. This article now turns to the notable — and drastic — recommendation to include development planning as a fourth branch concern.

IV Development Planning as a Fourth Branch Concern

Development planning is a stand-in for many constitutional ambitions. Like 'modernity' itself, 'development' is sourced in a hegemonic, western episteme that assumes a teleology of progress, one grasped quickly by western educated elites in Ghana and one that can create silences about the inequalities that may be perpetuated, but also legitimized, by its framing.[90] From a postcolonial perspective, the call for constitutionalized development remains an ambiguous gesture for Ghana's political economy. It is perhaps this very ambiguity that feeds its popularity.[91] The Constitution Review Commission in 2010 concluded that '[t]hroughout the length and breadth of the country, and even beyond the borders of Ghana, Ghanaians of all walks of life have asked for such a plan to be instituted in order to avert the historical developmental vacillations and retrogressions we have experienced as a nation'.[92] The inclusion of the Plan would transform the Constitution from 'essentially a Political Constitution to a Developmental Constitution', curbing the patronage of election promises by supporting 'an all-inclusive programme for ensuring social and economic progress'.[93]

In 2020, the proposal became a major plank in a 'National Interest Movement' eclipsing other issues such as the COVID-19 pandemic. As with the #FixTheCountry campaign, the movement drew from both minority and majority parties and other institutions of 'civil society'; both gravitated to the issue of constitutional reform, although the National Interest Movement put more store on a constitutionalized National Development Planning Commission.[94] As a petition notes, constitutional restructuring must guarantee 'prosperity for all,

86. For helpful distinctions of these roles, see Tucker (n 57).
87. *Economic and Organised Crime Act 2010* (Ghana) Act 804.
88. *Internal Audit Agency Act 2003* (Ghana) Act 658.
89. *Public Procurement Act 2003* (Ghana) Act 663.
90. Michael W Kpessa and Raymond A Atuguba, 'Grounding with the People: Participatory Policy Making in the Context of Constitutional Review in Ghana' 6(1) (2103) *Journal of Politics and Law* 99, 106 (highlighting both innovations as well as the challenges in equalizing participatory processes, particularly regional (urban/rural), gender and language inequalities and bias). See also Rist (n 32).
91. Constitution Review Commission (n 6) '[a] constitutional provision for a national development plan provides the contentment and assurance urgently required and desired for institutional certainty on an issue around which the entire nation's sense of direction and survival revolves' at 41–2, [37]–[38].
92. Ibid 41 at [37].
93. Ibid 42 at [37].
94. Recent studies on constitutionalism in Africa have emphasised that public participation, especially youth movements, tend to emphasise 'material and livelihood' rather than 'constitutional' concerns, without noting their complex entanglement, as a theoretical and practical matter: See, eg, H Kwasi Prempeh, 'Does Participation Help to Foster Constitutionalism in Africa?' in Tonia Abbiate, Markus Böckernförde and Veronica Federico (eds), *Public Participation in African Constitutionalism* (Routledge, 2018) 296, 300–1.

not for a few'.[95] Other parts of the proposal called for sweeping reforms, that are worth assessing alongside the reform of the fourth branch (although that assessment is beyond the scope of this Article). These included, for instance, proposals to increase presidential term limits (to 6 years, from 4); to allow coalition governments to form, rather than continue the winner-take-all system; to provide for a Council of State with representatives of stakeholder groups; and to create a more robust and independent Public Services Commission to recruit and promote public officials.

Leaving aside the additional constitutional reform proposals, it is nevertheless notable that the fusion of development with constitutionalism goes beyond Ghana and is part of a clear trend in Africa, borrowing from other Global South constitutions. For example, notions of a 'developmental state' are drawn from East Asia and emphasise the role of the state in plans to address poverty, with implications that range from soft authoritarianism, a technical public sector bureaucracy and free market alliances.[96] The constitutionalization of developmental planning also invokes the structural ambitions of Latin American constitutionalism, that call attention to the 'engine room' of governmental power and its consequences, rather than merely rights recognition and judicial review.[97] Developmental constitutionalism thus implicates (and clearly risks unseating) distinctive versions of constitutional democracy, in which fourth branch institutional design becomes a key mediator.[98] There are high stakes for committing to *both* prosperity and freedom, which the constitutional histories of these regions also make clear.

A *An Entrenched National Development Plan?*

The current proposal in Ghana calls for both the entrenchment of a national development plan and the conferral of an independent constitutional status to its NDPC.[99] As recommended by the Constitution Review Commission, the Constitution should be amended to require parliamentary approval of a National Development Plan ('NDP') by a two-thirds majority, before it becomes operational and for any subsequent amendment.[100] This calls for a heightened degree of public participation, consultation and public support, for the initial commitment. The Plan would then be 'binding in nature and enforceable at the instance of any person or institution',[101] including in the courts or within the institution of a parliamentary inquiry.[102] Its contents should be 'scripted with the full participation of the people … through a decentralised, bottom-up approach'.[103] After its initial negotiation and development, the implementation of the Plan would fall to the Ministries, Departments and Agencies, as well as the Metropolitan, Municipal and District Assemblies.

95. Abdul-Rahaman (n 3); fixthecountry (n 4).
96. Rosa (n 19) 543 (seeking to draw out democratic aspects).
97. Roberto Gargarella, *Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution* (Oxford University Press, 2013) 200–4.
98. John M Ackerman, 'Understanding Independent Accountability Agencies' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing, 2010) 265, 266 (noting that '[o]lder democracies would do well to learn from their younger cousins' at 266); see also Matthew C Stephenson, 'Corruption and Democratic Institutions: A Review and Synthesis' in Susan Rose-Ackerman and Paul Lagunes (eds), *Greed, Corruption and the Modern State: Essays in Political Economy* (Edward Elgar Publishing, 2015).
99. *Ghanaian Constitution* (n 5) art 86–7.
100. Constitution Review Commission (n 6) 52, 57, at [68], [99].
101. Ibid 43 at [44]–[45].
102. Ibid 60 at [118].
103. Ibid 51 at [65].

Importantly, its monitoring would fall to the National Development Planning Commission, with procedures for investigation and complaints.[104]

For the Constitution Review Commission, this striking proposal was aimed to deliver durability and reliability in Ghana's large-scale development decision making. Submissions to the Constitution Review Commission sought to emphasise (1) the economy, including import and export regulation and tax policy; (2) lands and natural resources, including land acquisition and equitable and sustainable use of natural resources; (3) agriculture, including cocoa sector deregulation, agricultural incentives and fishing regulation; (4) physical infrastructure, including an infrastructure policy for roads, railways and housing; (5) environment and sanitation, including stronger regulation; (6) information and communications technology; (7) health, including through support by funding transfers from Ghana's oil and gas discoveries; (8) education, including an at-school meal program; (9) due focus on the youth; and (10) the North-South Development Gap. Such an expansive focus would seem to encompass the current role of many distinctive regulators and agencies; reflecting an observation that 'Ghanaians would like virtually every aspect of national life covered in the national development plan'.[105]

The role of the National Development Planning Commission ('NDPC') is clearly key to the proposal. Under the 1992 Constitution, the NDPC is tasked to ensure improved fiscal performance, decentralised planning and enhanced capacity for policy formulation and coordination, and to monitor and evaluate the current administration's NDP. Established as a successor to the National Development Commission of 1979,[106] the NDPC advises the President on national development policies and strategies and is composed of a minimum of 14 members, currently appointed by the President, with expertise in development, economic, social and spatial planning.[107] In proposals to incorporate the NDPC as an independent constitutional body,[108] the Constitution Review Commission ultimately endorsed a membership inclusive of the Minister of Finance, the Governor of the Bank of Ghana, the Government Statistician, regional planning officers, major political party-nominated experts, and two representatives from the National House of Chiefs, the private sector, organised labour and civil society.[109] It recommended that the NDPC be subject only to the Constitution in the performance of its functions. Members would be appointed for a maximum of two 5-year terms, which may not be held in succession.[110] Its independence would be ensured, not simply by constitutional direction, but by financial support. A special fund for all independent constitutional bodies was suggested,[111] but not through a dedicated tax.

104. Ibid 55 at [82].
105. Ibid 48 at [49].
106. *Ghanaian Constitution* (n 5) art 73.
107. Ibid art 86(2); see also *National Development Planning Commission Act 1994* (Ghana) Act 479.
108. Constitution Review Commission (n 6) 68 at [154].
109. Ibid 67 at [147].
110. Ibid 75 at [188]. Prior to this, every President under the 1992 Constitution had appointed a new Commission. Ibid [184].
111. Constitution Review Commission (n 6) [206]. A guaranteed budget, along high salaries and restrictions on post-service employment, are all central to independence of such bodies: Tushnet (n 9) 2.

The proposal scrambles many of our assumptions about guaranteeing social minimums or antipoverty redress in constitutional democracy, in seeking durable, and obdurate, planning arrangements. As the Commission reported: 'Only a long-term plan may be incorporated into a National Constitution, since Constitutions are crafted as long-term documents'.[112] In a further notable departure, a collection of submissions called for the Plan to be binding on all successive governments, in order that projects initiated by previous governments would not be abandoned, and that national resources and budgets would be appropriately directed to upholding past commitments, and that any Ghanaian would be empowered to enforce adherence to the Plan. Although jarring to the precepts of constitutional democracy, it is worth noting that this proposal bears certain parallels with the rights of international investors to enforce adherence to the plans that accompany their original investments;[113] parallels ripe for further research.[114]

B *Precursors*

The proposal to entrench a National Development Plan for Ghana is drastic and striking. Yet there are precursors: four are mentioned here. Firstly, the interest in national development planning has been longstanding in Ghana, from independence to the 1992 constitutional drafting process. Upon independence, Nkrumah had instituted a 7-year accelerated development plan (planning as primary, constitution as secondary)[115] and each successor government, whether military or civilian, engaged in short to medium term planning. Drafters of the 1992 Constitution also sought a national and long-term development plan from which 'the budgets of all public institutions, including ministries, would be drawn'.[116] The Constitution's eventual entrenchment of the Directive Principles of State Policy, which set out political,

112. Constitution Review Commission (n 6) 41 at [36]. Nonetheless, some proposals were more specific: Proponents of the National Interest Movement has made specific calls to cap interest rates for commercial lending and create a special window for agriculture lending at a maximum of 8 per cent per annum, within an entrenched plan, thus invoking the ambitions of a 'fiscal constitution' (that sees proponents from right of centre and left of centre movements, invoking issues such as debt ceilings and other proposals in the US and elsewhere.). See Abdul-Rahaman, 'Ghana: National Interest Movement People's Charter' (n 3).
113. See, eg, Jeremy Perelman, 'Human Rights, Investment, and the Rights-ification of Development', in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019); David Schneiderman, 'Global Constitutionalism and International Economic Law: The Case of International Investment Law' (2016) *2016 European Yearbook of International Economic Law* 23–43.
114. See, eg, Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) (opening up a field of study of how the rights (and legal codes) of capital override the protections of self-governance).
115. The plan was seen as primary and the Constitution was seen as a secondary matter: Prempeh, 'Does Participation Help to Foster Constitutionalism in Africa?' (n 94) 296 (noting the impetus for the development plan in Nkrumah's Ghana and Nyerere's Tanzania).
116. Constitution Review Commission (n 6) 42, citing *Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana* (Report, July 31 1991) app M.

economic, social, educational and cultural objectives, are set out above.[117] Indeed, the limited enforcement of these Directive Principles was cited as a reason to support new fourth branch arrangements.[118]

Secondly, the Ghanaian administration maintains an emphasis on planning: its current (non-constitutional) 7-year NDP outlines both anti-poverty and equitable goals and publicizes a 'pragmatic', market-friendly, but interventionist approach.[119] The Co-ordinated Programme of Economic and Social Development Policies 2010–2016, developed by the previous administration, sought to create 'a just, free and prosperous society'. The successor Plan of 2017–2024, developed under the current administration, incorporated the Sustainable Development Goals, which were also mapped onto Ghana's 2018 budget. Each administration has also undertaken to make public longer-term commitments: a 40-year plan was publicized in 2016; and a new plan has been projected until 2057. It is worth noting that these planning precursors have attracted neither great success nor popularity; one clue to the popularity of the present proposal is that their failures have been lodged in the public imagination as failures of durability and commitment rather than expertise.

Thirdly, there are discrete examples of planning in important sectors; most notably after the 2007 discovery of crude oil offshore. Alert to the 'resource curse' and inspired by programmes in Norway, a Fundamental Policy and Master Plan was adopted in July 2008 in Ghana to manage oil revenues, envisaging legislative oversight, although with limited citizen input.[120] By 2011, a statutory Public Interest and Accountability Committee ('PIAC') was established to 'ensure transparency and accountability in the management and use of petroleum revenue and investments'.[121] Participatory surveys had revealed an overwhelming call for a 'separate oversight mechanism, independent of Parliament, with full access to all information regarding the use and management of oil revenues'.[122] This implicit challenge to Ghana's Parliament incorporated a 'citizens-based independent oversight body' in charge of monitoring of the management and use of petroleum resources. This process brought in new demands from traditional leaders from the Western Region and other community-based organizations.[123] While many demands were rejected, the fallout may have swung the results of the national elections and contributed to other, more localized, democratic engagements.[124]

Finally, at the time of exploring the proposal in 2010, the Constitution Review Commission was informed by comparative precursors of national development planning success (including Hong Kong, South Korea, Taiwan, Singapore and Malaysia in Southeast Asia,[125] as well as Botswana,

117. *Ghanaian Constitution* (n 5) ch 6; see also ch 25 (amendment by Parliament). See discussions above (n 12, 27).
118. Constitution Review Commission (n 6), at [57]; *Local Government Act 1993* (Ghana) Act 462, s 47; *National Development Planning (Systems) Act 1994* (Ghana) Act 480.
119. Commonwealth Governance, *National Development Plan of Ghana* (Webpage) <https://www.commonwealthgovernance.org/countries/africa/ghana/national-development-plan/>. With goals that: '• Extreme forms of deprivation, such as hunger, homelessness and poverty, are eliminated • Economic growth is environmentally sensitive and public policy will ensure that it is equitable across sectors, administrative regions and socio-economic groups • The economy is driven by industrial production with full participation of Ghanaians in a stable macroeconomic environment • Health care is available and affordable, and education prepares people for purposeful life • Science, technology and innovation underpin development • All citizens participate in and share equitably the benefits of development'.
120. Nelson Oppong, 'Between elite reflexes and deliberative impulses: oil and the landscape of contentious politics in Ghana' (2020) 48(4) *Oxford Development Studies* 329–44.
121. Nelson Oppong, 'Ghana's Public Interest and Accountability Committee: An Elusive Quest for Home-Grown Transformation in the Oil Industry' (2016) 34(3) *Journal of Energy and National Resources Law* 313.
122. Ibid 319 (citing 83 per cent of respondents).
123. Ibid 338.
124. Ibid.
125. Constitution Review Commission (n 6) ch 3. The process was quick to point out that the Soviet Union's experience of rigid, state-centred, centralized planning was 'just one way of developing and deploying a national development plan': at 8 [3], 33.

Kenya, Uganda and Zambia in Africa). Most were based in statute.[126] China's National Development and Reform Commission, operating as a 'mini-state council' with broad administrative and planning control, presents a model of economic control that eschews many of the democratic goals of Ghana's own Constitution; its role, however, was not discounted by the Constitution Review Commission.[127] Indeed, historical precursors of a so-called 'integrity' branch in China offer distinctive governance models for fourth branch arrangements that go beyond the bounds of this present study.[128] For present purposes, it is worth stating that the Commission was notably outward-looking in exploring these jurisdictions.

Influential examples included a statutory National Planning Authority (in Uganda)[129] and a National Development Plan (in Ireland),[130] which would be directed to short-term (and budgetary) directives, as well as medium and long-term planning. All of these examples were national in character, but there were additional processes for widespread consultation with more direct and regional features.[131] In addition, examples of national plans were cited for innovations around the need for inclusive growth (India); pillars of, for example, 'a moral and tolerant … and a compassionate, just and caring nation' (Botswana); redress over land contestations (post-apartheid South Africa);[132] and designated institutions for periodic monitoring and evaluation (Timor Leste and Nepal).[133] Subsequent to the Constitution Review Commission, many newer formulations have been established: a 24-member National Planning Commission in South Africa, for example,[134] as well as institutions which protect sustainable development and long-termism, such as institutions for future generations.[135]

C *Challenges*

Fourth branch institutions may remain an 'embarrassment' to traditional liberal constitutional theory, notwithstanding their centrality to modern government.[136] They incorporate features that are intended to contain the threat of self-aggrandizement of any one branch of government (the central concern within separation-of-powers doctrine), as well as assist in the administration of an effective government. The proposals to entrench the NDP and constitutionalize the independence of the NDPC are borne of frustration of widespread deprivation and inequality, and the enervating experience of

126. Ibid 42 [40].
127. Ibid 77 [198] (Chinese National Development and Reform Commission).
128. Tucker (n 57) 276 (exploring comparative models of integrity and examinations branches).
129. *National Planning Authority Act 2002* (Uganda) s 7.
130. *National Development Plan of Ireland (2007–2013) — Transforming Ireland: A Better Quality of Life for All* (Report, 2007) 99 <https://planipolis.iiep.unesco.org/sites/default/files/ressources/ireland_national_development_plan_2007_2013.pdf>.
131. Constitution Review Commission (n 6) 51, [66].
132. Constitution Review Commission (n 6) 49, [52] citing the National Alliance of Women, *Engendering — The Eleventh 5 Year Development Plan of India (2007–2012)* the Botswana National Vision Council, Vision 2016 and the (now repealed) *Development Facilitation Act 67 1996* (South Africa) (repealed 2013).
133. Constitution Review Commission (n 6) 59–60, [112]–[116] (citing Botswana, Timor Leste and Ireland) 77 [198] (citing Nepal, amongst others).
134. Rosa (n 19) 562 (noting expertise drawn from finance, industry, telecommunications, biotechnology, energy, education, food security and climate change). Its first draft plan was released in 2011.
135. See, eg, Network of Institutions for Future Generations (Webpage) <https://futureroundtable.org/en/web/network-of-institutions-for-future-generations/roundtable> listing commissions, advisory councils and committees which seek to protect future generations (in Finland, Germany, Canada, Wales, New Zealand, Israel, Norway, Hungary and Australia).
136. Dorf and Sabel (n 59).

partisan reversals and the regular abandonment of previous projects. Like other fourth branch arrangements, the proposals are deliberately intended to insulate certain policies from party politics and thus 'de-partisanize' certain political questions or outcomes.[137] They seek to entrench both a constitutional norm — we might call it stable, equitable or sustainable, development — and its enforcer body.[138] Yet the breadth of any proposal to address poverty, inequality and development — in a country with such widespread poverty, inequality and development ambitions — pressures the democratic framework of the independent constitutional bodies to a large, perhaps almost paradigm-defying, degree.

This article gestures to this new paradigm as developmental constitutionalism — and yet its tensions with constitutionalism are obvious. So far, we have offered an account of a restructured NDPC in its best light — a result, in part, of the insider perspective of one of us and the academic/outsider perspective of the other.[139] In that light, a fourth branch model for national development planning, when accompanied by due professionalism, expertise, accountability and partisan insulation, holds out the promise of delivering on equitable and poverty-alleviating goals. Yet considerable challenges exist at every point of the proposal — from the institution's credibility, likely channels of expertise, democratic compatibility and economic feasibility. Such challenges go beyond the usual tunnel vision of 'development' teleology[140] and are only summarized here; fuller answers are left to subsequent research.

Firstly, we have not addressed in this Article the present reputation, and credibility, of the NDPC. Such features, key to the effectiveness of its potential fourth branch status, are only partly created by design — they rely on matters of political culture that are part of the historical legacy of previous plans.[141] And indeed past failures of national development planning, which ground the present demands for reform, ironically decrease the likelihood of present success. This irony might not be unusual in Global South constitutionalism — as Roberto Gargarella has noted, great failures often lead to an appetite for more radical reforms, at risk of ever greater failure.[142] Nonetheless, the desire for de-partisanizing the NDPC does not address where, or how, its source of credibility may lie, which are only indirectly established through the appointment, expertise requirements, funding and professional constraints of formal independence.

Secondly, the treatment of development planning as a fourth branch concern involves great faith in experts and expertise (a common predicament of development goals in general).[143] The entrenchment of a NDP assigns a large, probably unwarranted, weight to the promise of an administratively proficient developing state,[144] placing trust in elites to devise, in good faith, reliable

137. Tushnet, *The New Fourth Branch* (n 9); Khaitan (n 9).
138. For the wisdom of doing both (and avoiding the pitfall of erasure of constitutional norm by weakening its enforcer), see Khaitan (n 9) 14.
139. We acknowledge the gloss that can result from 'internal' perspectives, seeking academic or participants justifications, see Tushnet (n 9) 167.
140. For summary, Rist (n 32). See current application to the call for 'sustainable development' planning and action, see Frank Biermann et al (eds), *The Political Impact of the Sustainabile Development Goals* (2022).
141. Khaitan (n 9).
142. Gargarella (n 97) ch 10.
143. See, eg, Davis et al (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford Academic, 2012). Courts which enforce economic and social rights face similar predicaments when deferring to expertise: see Young, *Constituting Economic and Social Rights* (n 2).
144. For descriptions of these visions, see David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2018).

and public blueprints for national progress and sustainable development.[145] Although international development measures are increasingly engaged with and help to circulate important knowledge and assistance on equitable, environmental and multidimensional poverty concerns,[146] there is no magic bullet for alleviating poverty and inequality, and much disagreement about fitting 'best practices' in different contexts; moreover, the track record of Ghana's national experience has not produced expected outcomes, even with the deep internalization of certain measures of development 'common sense'.[147] Where experts fail to deliver on development guarantees, they may impugn the credibility of other independent constitutional bodies that work indirectly to reduce poverty and inequality, such as auditing or anti-corruption institutions. They can also diminish the strength of other constitutional norms, including democracy, which is the third challenge;[148] and overestimate that possibilities of economic self-determination, which is our fourth.

Hence, thirdly, the proposal to entrench national planning presents obvious challenges for Ghana's hard-won democracy. Proponents of entrenchment wish to destabilize the partisan capture of executive power, and the ineffectiveness of the legislature as an institution of ongoing oversight for development projects. Instead, they emphasise the participatory democracy of the initial planning process, the ratification of the plan by the elected legislature, the representative qualities of NDPC appointees (who represent distinctive geographical/traditional authority/political party groupings) and the escalated legislative requirements for any amendments to the plan.[149] In its best light, the proposal thus invites a radical plan to mobilize and leverage new forms of political power and disturb the institutional inertia, and ineffectiveness, of the status quo. At the same time, the proposal is accompanied by predictable (and currently trending)[150] flaws for democracy, which are, as yet, unaddressed in its design. For example, a constitutionalized NDP relies on a heightened, contentious politics that is itself vulnerable to capture and/or gridlock.[151] Due to the proposed requirement of a two-thirds majority for any amendment to the Plan, partisan control could be reasserted in order to veto any amendment. In addition, contestations between right- and left-wing NGOs and the increasing influence of a Traditional Authority with varied interests (such as the Western Region Chief's petition in our oil example) would raise additional veto points for any revisions, or encourage political brinkmanship that might sabotage unrelated government activity. Moreover, the courts that are significantly de-centred in the proposal for constitutional reform nevertheless presumably retain the last-resort power of judicial review, thus implicating a judicial power to intervene in development arrangements.

Fourthly, the proposal to constitutionalize development planning as a fourth branch concern may pay insufficient heed to the complex contemporary landscape of the global economy, and with it the web of economic relations that exist between multiple public, private, multinational and international economic actors, who all endeavour to exert control and influence on Ghana's economic

145. Sénit and Okereke et al, 'Inclusiveness', in Biermann (n 140), 116; Constitution Review Commission (n 6) 40 at [36].
146. See examples of such development measures and expertise, above (nn 34).
147. See, eg, Constitution Review Commission (n 6) 39 at [31] (describing an overemphasis on physical infrastructure, for example, to the detriment of social services and human development).
148. For statement of the predicament, see Jon Elster, 'Arguments of constitutional choice: reflections on the transition to socialism', in Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 1988) 303, 307–16; for broader analysis of these dynamics, see Acemoglu and Robinson (n 19).
149. These recall the expansive treatment of democracy in distinctive forms: See, eg, Rosanvallon (n 60); Dorf and Sabel (n 59).
150. See, eg, David Landau, 'Abusive Constitutionalism' (2013) 47(1) *University of California, Davis Law Review* 189.
151. Prempeh, 'Does Participation Help to Foster Constitutionalism in Africa?' (n 94) 301.

outputs and thus indirectly on the experience of poverty and inequality. Ghana is a significant participant in the global economy, particularly (as with many other countries in Africa) with respect to its natural resources, and changes to the formal independence of the NDPC or to the entrenchment of a National Development Plan cannot, by fiat, change the power imbalances or potentially oppressive strategies that may attend interactions.[152] Even as a formal matter, the proposed NDP does not incorporate methods of revisions or updating as against the free trade or investment agreements that it has reached with the EU, US, China and recently the Africa Continental Free Trade Area Agreement ('AfCFTA'). In addition, large multinational corporations often prefer flexibility in their investments or other agreements that may be jeopardized by an inflexible National Development Plan. This challenge, which often attends proposals for national constitutional reform, may sometimes be overstated, particularly as the current terms of globalization and economic growth are currently being resettled.[153] Yet, as the standard criticism would have it, such inflexibility may dissuade potential investors or trading partners or prompt other forms of capital flight, which are crucial for sustaining the current form of Ghana's economy.

Ironically, many of these objections lie precisely in the proposal's popularity. The experience of Ghana's petroleum sector suggests that certain national benefits may derive from creating a more robust institutional oversight and defined planning process. In that case, the control that was exerted over the property rights that had been earlier sought by multinational corporations, international financial institutions and donors was beneficial to many national groupings, contrary to the predictions of the 'resource curse'.[154] A distinctive trajectory of what Jeremy Perelman has called the 'rights-ification' of investment was to follow: the 'rights-ification' of planning transferred a certain control back to Ghanaian citizens.[155] Nonetheless, a more granular account of how the NDPC works within a network of other agencies and regulators and within Ghana's own cultural norms of civic virtue and professionalism, is needed. At worst, the proposal risks reinscribing a new form of elite power and capture, paradoxically galvanized by the movements expressing economic frustration and a dissatisfaction with government arrangements.[156] Even the most basic question remains unstated: who would be represented in a planning fourth branch — economists? lawyers? rural or urban planners? environmental scientists? traditional landowners? community groups? women's groups? youth groups? unions? business leaders? investors? multinational corporations? These accounts, which lie beyond the scope of this article, must occur before any evaluation of this striking proposal can be made.

152. For succinct summary, see Odette Lienau, 'The Multiple Selves of Economic Self-Determination' (2020) 129(1) *Yale Law Journal Forum* 674, 682.
153. The current moment rests on uncertain geopolitics and post-2008 trends: Dan Banik and Emma Mawdsley, 'South–South Cooperation and global development in a multipolar world: China and India in Africa' 35(4) (2023) *Journal of International Development*, 539–48. For rapid shifts in tax policy, which are illustrative for other trends, see Shu-Yi Oei, 'World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership' 47 (2022) *Yale Journal of International Law* 199.
154. The hasty passage of the *Petroleum (Exploration and Production) Act 2016* (Ghana) Act 919, reflected a return to vague promises. For lengthy analysis of the 'resource curse', see Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (2015).
155. Perelman (n 113).
156. For description of this path, see Lienau (n 152) 688.

V Conclusion

In a collection which canvassed distinctive separation of powers arrangements in Africa, Charles Manga Fombad observed the strong intent, within its contemporary constitutions, to 'free the state and the people from the authoritarian and repressive logic of the colonial state which post-independence leaders perpetuated', and thus to pursue a 'never again' attitude towards the nation's past.[157] And yet, as Michaela Hailbronner detected in the same volume, this traditional, negative and reactive understanding of the separation of powers does not accord with the aspirational and positive guarantees set out within many African constitutions, and the impulse to guide governments (including the executive) towards an effective or even transformative state.[158] Such forms of constitutionalism include a 'constitutional teleology of social change, focus on socio-economic rights/equality, active role for the state, activist judiciaries, innovative legal procedures/remedies, civil society activism, [the] horizontal effect of rights among private parties [and] the constitutional inclusion of integrity institutions such as independent electoral commissions, auditor generals and public protectors/ombudspersons as a fourth branch of government'.[159] Ghana's independent constitutional bodies epitomize this reformulated separation of powers and are established to restrain government in both reactive and action-forcing directions.

This article has demonstrated how Ghana's CHRAJ provides an independent, if limited, space, for poverty and inequality redress, in its inclusion of economic and social rights with its human rights mandate, and it its experiments with different forms of monitoring, education, and accountability. And yet demands for a more proactive constitutional framework are pressing. The contemporary National Interest Movement and #FixTheCountry campaign in Ghana have both expressed profound economic grievance in capital-C constitutional terms. All constitutions are, in effect, legal plans for the future. Nonetheless, proposals to entrench a National Development Plan, monitored by an independent National Development Planning Commission, would transform the fourth branch role. These proposals, only briefly opened up for analysis here, present a distinctive formulation of developmental constitutionalism and crystallize both dramatic ambitions and challenges.

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157. Charles Fombad, 'The Evolution of the Modern African Constitutions: A Retrospective' in Fombad, *Separation of Powers in African Constitutionalism* (n 16).
158. Michaela Hailbronner, 'Constitutional Legitimacy and the Separation of Powers: Looking Forward' in Fombad, *Separation of Powers in African Constitutionalism* (n 16); see also Gebeye (n 17) 157, 170; Vicki Jackson and Yasmin Dawood (eds), *Constitutionalism and a Right to Effective Government* (Cambridge University Press, 2021).
159. Heinz Klug, 'Transformative Constitutionalism as a Model for Africa?' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020).