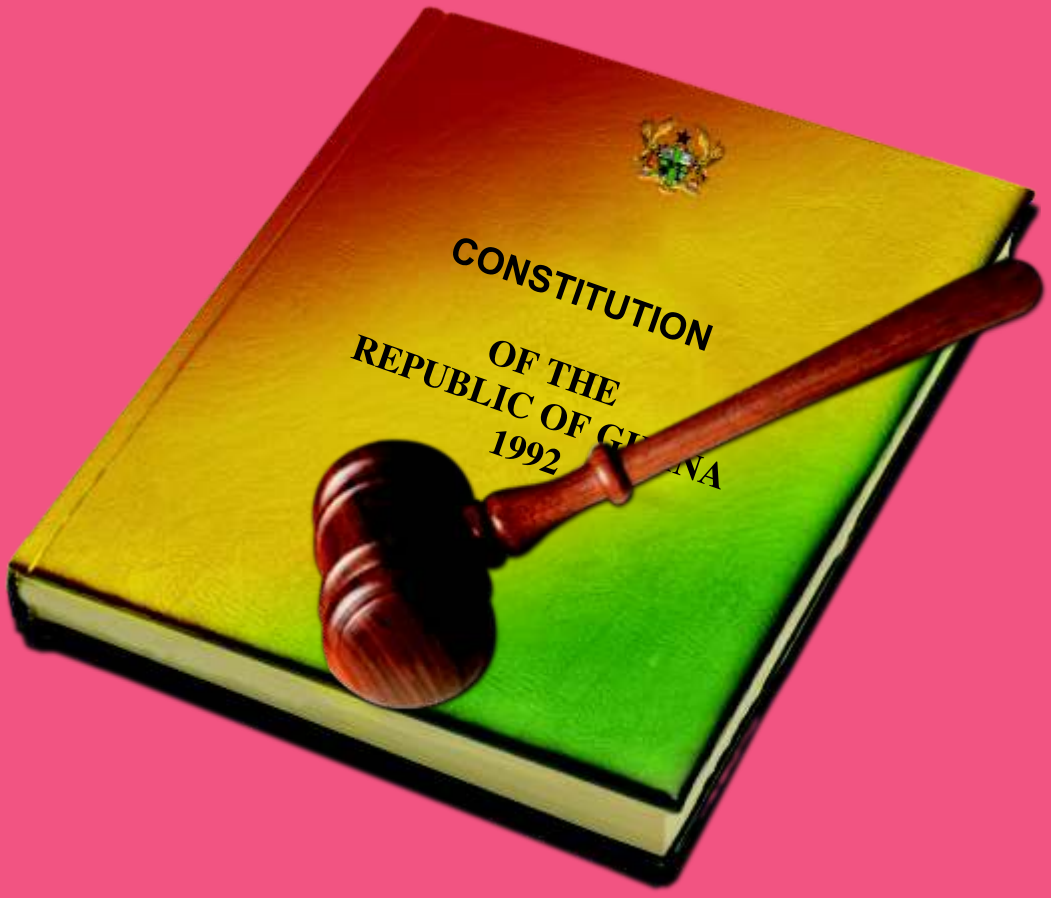
Constitutional Review Series 4

TO CAP OR NOT TO CAP: THE SUPREME COURT OF GHANA



IEA Ghana
THE INSTITUTE OF ECONOMIC AFFAIRS

IEA
GHANA

THE INSTITUTE OF ECONOMIC AFFAIRS

To Cap or Not To Cap:
The Supreme Court of Ghana.

By
Prof. Justice A. K. P. Kludze

This work was carried out with the aid of a grant from
The Netherlands Institute for Multiparty Democracy (NIMD).

Publication of this work signifies that The Institute of Economic Affairs regards it as a competent treatment worthy of public consideration. The findings, interpretations and conclusions of this paper are entirely those of the author and should not be attributed to The Institute of Economic Affairs or any organizations that support it.

The Institute of Economic Affairs (IEA) Ghana was founded in October 1989 as an independent public policy institute dedicated to the establishment and strengthening of a market economy and a democratic, free and open society. It considers improvements in the legal, social and political institutions as necessary conditions for sustained economic growth and human development.

The IEA supports research and promotes and publishes studies on important economic, socio-political and legal issues in order to enhance understanding of public policy.

Further information may be obtained from:

The Institute of Economic Affairs,
P.O. Box OS1936, Osu, Accra, Ghana.

Tel:+233-302244716 / 307010714
Fax:+233-302222313
Email: iea@ieagh.org
Website: www.ieagh.org

ISBN: 988-584-49-0
ISSN: 0855-3238

Preface

Ghana's 1992 Constitution sets no ceiling to the number of Justices that may be appointed to the Supreme Court. Article 128(1) only prescribes a minimum number of nine Justices in addition to the Chief Justice. This leaves room for a determined President to seek to appoint his cronies to the Supreme Court, a practice known as “packing the Court”. “Packing the Court” is designed to ensure that decisions of the Supreme Court are acceptable to a sitting President. The strongest argument for setting a ceiling on the number of Supreme Court Judges is to prevent the appointment of new judges unless a vacancy occurs on the bench through death or retirement. Reference is often made to the United States’ example where the maximum number is nine.

Prof. Kludze argues that, notwithstanding the advantage of restricting new appointments, a constitutional limit on the number of Supreme Court Judges has inherent difficulties. A large number of Justices facilitates expeditious disposal of cases in panels. The United States’ Supreme Court declines to hear large numbers of cases without assigning reasons. This practice, backed by law, ensures that the US Supreme Court's calendar is not clogged. He makes the case that in Ghana, the rigid three tier appointment process limits the power of the President to appoint his favourites to the Supreme Court. The process requires the recommendation of a candidate by the Judicial Council, consultation between the Council of State and the President on the Justice recommended by the Judicial Council, and finally the vetting and approval of the Justice by Parliament. He advocates a strengthening of the institutions involved in the appointment process. He chides our Parliament for performing this grave function perfunctorily. Prof. Kludze is certain that if the Judicial

Council, made up of eminent judges and lawyers assesses candidates on merit and Parliament effectively exercises its power of approval, the Presidential power of appointment of Supreme Court Justices cannot be exercised capriciously.

He strongly argues that packing of the Supreme Court cannot always determine the outcome of cases, as history shows that judges, whoever appoints them, have demonstrated high levels of judicial independence and fidelity to legal principles.

We look forward to receiving your feedback and hope you find this publication useful.

Thank you.

Jean Mensa
Executive Director

Introduction

There are fears that our present Constitutional provision leaves room for the eventuality that a determined President of the Republic may or can deliberately use his appointive power to increase, unduly, the number of Supreme Court Justices with the sinister motive of manipulating the Supreme Court. In particular, in certain quarters there have been concerns expressed that the Supreme Court may already be too large, whilst there is the temptation to add more judges to the Court on occasions to advance the political agenda of a sitting President or government. The addition of more Judges may result in the manipulation of the Supreme Court by appointing favourites with a predetermined agenda. Therefore, it has been suggested that there should be a constitutional limit on the total number of Supreme Court Judges.

This phenomenon of unjustifiably adding extra Justices to the Court is often referred to in political jargon as "packing the court." This happens when incompetent persons are, primarily for party political reasons, elevated to the Supreme Court in furtherance of a political agenda. To the extent that our Constitution does not expressly prescribe a limit on the number of Justices of the Supreme Court, that possibility cannot be entirely discounted. However, I am of the opinion that the present concerns are unjustified, and nothing since 1992 can be construed as lending credibility to such concerns. It is always possible to imagine or fabricate improbable hypothetical fact patterns to whip up arguments in support of otherwise unsubstantiated alarm bells.

Textual Reading of the Constitution

The hypothetical argumentation which expresses fears about the possibility that a President, under the Constitution, may wish to enlarge the membership of the Supreme Court, is based on the textual reading of the constitutional provisions on the Supreme Court. That is what makes it difficult to persuade the pessimist that the theoretical fears are not well grounded. While the Constitution provides that the Supreme Court shall be constituted by the Chief

the theoretical fears are not well grounded. While the Constitution provides that the Supreme Court shall be constituted by the Chief Justice with a minimum of nine other Justices, it has prescribed no upper limit or ceiling on the number of Justices that may be appointed to the Court. Article 128 (1) of the Constitution says that:

> "The Supreme Court shall consist of the Chief Justice and not less than nine other Justices of the Supreme Court."

I concede that this provision allows for the possibility that the number of Supreme Court Justices may be increased to any figure, even as many as twenty or forty or even a hundred Justices. I hope that I will not be accused of reducing the argument to a *reductio ad absurdum*. In my opinion, this is a highly improbable scenario.

Packing the Supreme Court

Typically, it is said that the court has been "packed," when the appointing authority appoints favourites or cronies to the Supreme Court in the expectation that they would render decisions in accordance with the wishes of the political head, usually the executive in power. Such appointees are unqualified for the high judicial office. They lack the requisite professional experience and the judicial temperament. They can be expected to be pliable enough to pander to the wishes of the President or Chief Executive of the day. Where necessary, a dictator would simply dismiss all or some of the incumbent Justices and then appoint his lackeys to do his bidding. In some cases the result may be the same, whether extra Justices are appointed or the existing ones are arbitrarily removed to be replaced with party faithful of doubtful professional or moral antecedents. In other cases, the Judges are cowed through intimidation and threats.

This has happened in a number of countries. These are unstable countries where the President or the Executive Branch has been rattled by unpleasant decisions handed down by the Court. Where the Executive Branch is displeased with the decision of the Court on a matter which may have unpleasant constitutional ramifications, the Executive may seek a reversal of the Court's judgment. It also happens even in cases without constitutional

implications when nevertheless, the decision causes displeasure or political embarrassment to the Government of the day. This happens particularly in cases of show trials and persecution of political opponents. In such cases when the prosecution is unable to secure a conviction, the Government is inclined to accuse the Courts of political bias, even though the real justification for the acquittal is that there is not enough evidence to sustain a conviction or to support a ruling in favour of the Government. The temptation for the Government in many such cases is to seek a review of the decision. While a review is usually legitimate, so that the Court may re-examine its reasons for the decision, it also provides the occasion for the Government to contrive to add its favourites to the Court in order to secure a reversal of the previous decision. In some cases, especially when the appointment of additional judges is not feasible, the Government may seek constitutional or legal powers to undermine, if not wholly remove, the security of tenure of the Judges, thus posing to them the threat to dismiss the judges in order to replace them with those whose decisions are predicted to be favourable. If the threat to the security of tenure is not enough to frighten the Justices, the threat may actually be carried out in order to demonstrate the resolve of the Government.

Not too long ago, in Pakistan, the President, General Pervez Musharraf, dismissed the Chief Justice and the other members of the Supreme Court and replaced them with Justices who were prepared to dance to the tune of his music. The Bar of Pakistan expressed its unqualified displeasure and demonstrated for the upholding of the independence of the Judiciary. The dismissed Judges were eventually reinstated and General Musharraf himself was removed from office.

In our own country, in 1964, under a spurious constitutional amendment, Kwame Nkrumah arrogated to himself the power to dismiss the Justices of the Superior Courts, including the Justices of the Supreme Court, if he was displeased with their decisions.

This was not vain or hollow power, because Nkrumah did actually exercise that power. He quickly dismissed the three Justices who acquitted persons accused of detonating a bomb at Kulungugu with the intent to assassinate him. The three accused persons, Tawia Adamafio, Ako Adjei and H.H. Cofie-Crabbe, were members of Nkrumah's own ruling Convention People's Party and not of the opposition; but that did not matter. When it

happened in Nkrumah's Ghana, the Ghana Bar Association (I was not a member at that time), unlike the Bar in Pakistan, maintained a deafening silence. I recollect that only the National Union of Ghana Students sent a resolution to Nkrumah in protest. You can imagine the result. The leaders of the National Union of Ghana Students were quickly arrested. That was in 1964, but revisionist politicians are now saying that the N.U.G.S. was not formed until 1966! God help Ghana!!

The same result may be achieved by legislation or constitutional amendment to remove such sensitive legal matters from the jurisdiction of the courts. Kwame Nkrurnah, to a large extent, achieved this through the passage of the notorious Preventive Detention Act. Because Nkrumah's arbitrary decisions to imprison his political opponents under the Act were not justiciable, it was not necessary to remove particular Judges. The matter was simply not cognizable by the courts. Therefore, the writ of habeas corpus would not lie, since imprisonment under such pernicious legislation was "lawful" custody under that repressive regime.

In any case, it appears that the demand for a ceiling on the number of Supreme Court Justices is founded upon the concern for the independence and impartiality of the judiciary. If the Supreme Court is diluted with the appointment of persons with perceivable agenda, the result would be that the independence of the judiciary will be compromised. In that case, the Judiciary cannot be trusted to be an independent Branch of Government which can protect and defend the rights of the citizenry. That would be bad for our democracy. It would also erode public confidence in the administration of justice, especially when those rights are invaded or threatened by the President or the Executive Branch. That is why every endeavour and every device must be employed to insulate the judiciary against improper executive pressure of any form.

Unfortunately, however, the packing of the courts with spineless Justices is not the only means by which the courts can be manipulated. We all remember the decision of the then Supreme Court in the Re: Akoto case. That Court decided that, notwithstanding his constitutional declaration to uphold the liberty of the subjects and to guarantee a right of access to the courts for all citizens, President Nkrumah was not in violation of his constitutional obligations when he arbitrarily ordered the indefinite imprisonment of innocent citizens without trial and without a right of appeal

to the courts. When that happened, President Nkrumah did not "pack" the Supreme Court with special appointees. They were regular appointees who sat on that case. Nkrumah was able to achieve that result because he had effectively intimidated the courts to the extent that they had to succumb to the whims of the man who described himself as "Osagyefo the President". If they defied President Nkrumah, to assert the independence and impartiality of the Judiciary, the Justices of that Supreme Court appreciated fully the predictable consequences to themselves. They could be removed from the Bench, as later happened, and could be imprisoned without trial under the very Preventive Detention Act whose constitutionality was being called into question. The Re: Akoto Judges, therefore, adopted a line of least resistance. Maybe it was indeed a prudent course of self-preservation. It is true that Chief Justice Korsah eventually faced his day of reckoning and was removed from office; but he was spared imprisonment without trial. This and other cases show that "packing" the court is not the only means of intimidating or manipulating the Judiciary. If another Nkrumah should arise today, he can be expected to attempt to subvert judicial independence without necessarily appointing pliant Judges. A determined dictator like Kwarne Nkrumah can impose his will and undermine the independence of the judges. Therefore, we should perhaps pay enough attention also to the cultivation of democratic awareness of the population to resist any incipient encroachment upon our rights. With a Preventive Detention Act of the Nkrumah era, a President can bend the will of the Justices to ensure that the Court legitimizes even arbitrary and unconstitutional usurpation and arrogation of power.

The United States Example

Advocates for setting a limit on the numerical strength of our Supreme Court may be drawing on the example of the United States of America. There, the number of Supreme Court Judges may not now exceed nine. As a member of the United States Supreme Court Bar, perhaps I understand some of the workings of that Court. What is not well known is that the Supreme Court of the United States has not always consisted of nine Justices. In the 19th century, the size of the Supreme Court, which is set by the United States Congress, varied from 6 to 10. Eventually the number was settled at nine in 1869.

This brought in its train a number of problems for the U.S. Supreme Court. One relevant feature of the United States Supreme Court is that all the nine Justices sit on every case adjudicated by that Court. Considering the volume of appeals to that court, this feature delays the work of the Court, as too few Justices are available to be assigned to write opinions delivered by the Court. That was why the number of Justices was subsequently raised from seven to the present nine. This higher number makes available more judges to be assigned the responsibility of writing the Court's opinions. This, however, did not solve the problem of the exploding case dockets. Therefore, at the behest of the U.S. Supreme Court itself under the leadership of Chief Justice William Howard Taft, the Judge's Act of l3th February, 1925, was enacted to statutorily establish the principle of the discretion of the Supreme Court in selecting cases that it will hear on appeal.

The 1925 legislation gave statutory support for the Supreme Court of the United States which then formalized and developed a system under which it can and does decline to hear certain appeals. If at least four of the nine Justices are not disposed to hear arguments on the case, it will not be heard. It is then said that certiorari is denied. The expression “certiorari denied” is not a dismissal of the appeal on the merits. It does not constitute affirmation of the decision of the intermediate appellate court, although that appeal court's decision prevails as between the parties to it. It also does not constitute a Supreme Court precedent. This reduces the clutter on the calendar of the United States Supreme Court which hears only appeals that it decides to hear, based primarily on the significance of the legal issues arising from the case. It has been estimated that out of about 5,000 cases filed annually for review by the Supreme Court of the United States, less than 5% are actually selected by the Court for hearing. Ghana, the United Kingdom and many other countries do not have that system. Every appeal properly lodged in the Supreme Court of Ghana must be decided on the merits, even if by way of its dismissal as frivolous or unmeritorious.

Even in the United States, there is no pretence that politics does not play a part in the appointment of Supreme Court Justices. It is expected, and it is the norm, that the President nominates Judges who share his political views. In other words, a Republican President can be expected to nominate a Republican for a vacancy on the United States Supreme Court. This does not mean that the President of the United States would nominate an incompetent party member for the high judicial office. He is fully aware that the

nomination requires the confirmation of the Senate. And the Senators take their power and responsibility of confirmation of nominees very seriously. A nominee who does not possess the minimum of professional competence and the requisite level of moral rectitude will be rejected by the Senate. What is regarded in this respect as a mere formality in Ghana is a rigorous process in the United States. Several nominees have been rejected in modern times.

The Need for More Judges in Ghana

Every appeal to the Supreme Court of Ghana must be decided by the Court even if that means that the appeal will be dismissed with all the uncomplimentary comments of the Court. For this reason, it is desirable that there should be a sufficient number of Supreme Court Judges to facilitate the expeditious dispatch of the work of the Court. That is one of the reasons for the hearing of cases in our Supreme Court by ordinary panels of five Justices. With a total of only 12 Justices, it is sometimes difficult to conveniently empanel five Justices. An increase in the number of Supreme Court Judges may not, therefore, be inherently wrong. Some Justices may be excused because they were counsel in the case many years earlier, or because as judges they had taken decisions in the matter in the courts below. If their number is larger, the empanelling of a court would be easier. Indeed, when the requisite expertise can be found on the Supreme Court, the panels may reflect the subject area specialisation to ensure the authoritativeness of the decisions of the Court. In the days of Ollennu, J., as he then was, when there were only a handful of Supreme Court Justices, he was frequently invited to sit as an additional Judge in the Supreme Court to decide land cases in which his expertise was undoubted. This practice has now been discontinued, perhaps because of the present appointment process for Supreme Court Justices.

This brings me to a little historical excursus. The Supreme Court of Ghana was initially constituted by only a small number of Justices. In 1960 there were only 5 Justices of the Supreme Court, inclusive of the Chief Justice. The number was increased to 8 in 1962, to 9 in 1965, to 11 in 1992 and reduced to 10 in 1994. As can be seen, the number was neither constant nor fixed. In both the 1969 and 1979 Constitutions, as in the present one, only a floor was set for the number of Supreme Court Justices. I think that this was

intended to allow for flexibility. As the volume of work increases, the Chief Justice may consider that the number of Justices should be increased to enable the Court cope with the mounting volume of work. There is nothing sinister about such an arrangement. It can be expected that both the Chief Justice and the Judicial Council will responsibly exercise their functions in determining when the volume of work of the Supreme Court necessitates the appointment of additional Justices. An arbitrary constitutional limit on the number may constitute a fetter on the proper exercise of the judgment of the Chief Justice, in particular, in recommending the enlargement of the membership of the Supreme Court. The historical reference above suggests that the number of Supreme Court Justices has been increased as the exigencies of the volume of work have mandated them. Ghana's present population stands at about 22 million, and it continues to rise. Furthermore, Ghanaians are becoming increasingly litigation conscious, if not downright litigious. It can be legitimately expected, therefore, that appeals and cases filed in the Supreme Court registry will phenomenally increase in the next few years. It is impossible at this time to gaze into a crystal ball and correctly determine the number of Supreme Court Justices that would be adequate to cope with the anticipated volume of work.

The Justice Afreh Case

In discussing the question of the absence of a limit on the number of Supreme Court Justices, reference is occasionally made to the appointment of the late Mr. Justice Dixon Kwame Afreh. The appointment of Justice Afreh to the Supreme Court may have struck some raw nerves. However, much of the criticism is based on both misconceptions and distortion of facts. The scenario is often presented as if it was a personal decision of President J. A. Kufuor to appoint Mr. Justice Afreh to the Supreme Court to serve the specific purpose of obtaining a majority to reverse the decision of the earlier panel of the Supreme Court which had held that the creation of the Fast Track Division of the High Court was unconstitutional.

At the time of the appointment of Mr. Justice Afreh to the Supreme Court, the Court required an extra member to secure an odd-member panel to review its earlier decision. The Chief Justice, Mr. Justice E. K. Wiredu, had taken the unusual step of empanelling virtually the whole membership of the Supreme Court to decide if the Fast Track High Court had been constitutionally

created. He took this step because of the gravity of the issues that were implicated in the challenge of the constitutionality of the Fast Track High Court. At that time, there were ten members of the Supreme Court, including the Chief Justice himself. As Mr. Justice Lamptey had travelled out of the country, eight Justices sat with the Chief Justice. That gave a panel of 9. That panel decided by 5 to 4 that the Fast Track High Court was an illegal court. If the original panel had been of 5 Justices, normally two more would have been needed for a review, which the Government had sought. As the original panel was made of 9, the addition of Mr. Justice Lamptey would have brought it to 10, with the possibility of a tie by the review panel. As at this time, Mr. Justice Afreh's elevation was already being considered and the conclusion of the process, if favourable, would make available Justices Lamptey and Afreh to constitute a review panel of 11. Even that fell below the full complement of the Supreme Court which then stood at 12, as there had been retirements. It is this feature of the case that has often been unappreciated, embellished and even deliberately distorted.

Even in these circumstances, the appointment of Mr. Justice D. K. Afreh to the Supreme Court followed exactly the procedures stipulated in the Constitution. It was the Judicial Council, in the performance of its constitutional role, which advised President Kufuor to appoint Mr. Justice Afreh, then a Justice of Appeal, to the Supreme Court.

President Kufuor, in conformity with Article 144 of the Constitution and after consultation with the Council of State, nominated Mr. Justice Afreh for consideration by Parliament.

A duly constituted Parliament approved of the nomination before President Kufuor could make the formal appointment of Mr. Justice Afreh to the Supreme Court. President Kufuor could not know in advance how Mr. Justice Afreh would decide when he sat on the review panel of the Supreme Court. Neither could the Judicial Council, the Council of State nor the Parliament of Ghana anticipate the decision of Justice Afreh in the matter.

I may perhaps be permitted to add a few words on this matter. Mr. Justice Dixon Kwame Afreh was my former teacher at the Law Faculty at Legon. He also became my friend when I joined him as a Lecturer in my Alma Mater. He had a brilliant legal mind and was a worthy addition to the Supreme Court. He was a fine gentleman, a man of principle who would not sacrifice

them on the altar of political expediency to serve a nebulous political agenda. He was, before his elevation to the Bench, an excellent and superb public servant who served with distinction. I would not allow his otherwise unalloyed reputation to be soiled by innuendos and fabrications for which there is no evidence. After a distinguished public service, Mr. Justice Afreh was appointed under the National Democratic Congress government to be the Deputy Electoral Commissioner. Thereafter he was appointed by President Jeremiah J. Rawlings to become a Justice of the Court of Appeal. It was from that position that he was further elevated to the Supreme Court Bench. If he was considered by President Rawlings and his N.D.C. Government to be a fit and proper person to be a Deputy Electoral Commissioner, and fit enough to be appointed to the Court of Appeal, I can find no basis whatsoever for now assuming that, because he was further promoted by President Kufuor as Head of the New Patriotic Party Government, Mr. Justice Afreh was a spineless pawn to serve a political agenda. That appointment did not even, in the remotest sense, approximate to an attempt to "pack" the Supreme Court. If any people think so, it is respectfully submitted that this is a misconception, when shorn of its untenable political ramifications and propagandist undertones.

I invite you, particularly those of you who are lawyers, to read the brilliant judgment of Justice Afreh in holding that the Fast Track High Court is constitutional. After reading this, please read also the opinions of the original five Justices who held that the Fast Track High Court was unconstitutional. Mr. Justice Afreh's judgment was carefully researched, well articulated and persuasively presented. You will be proud of Justice Afreh.

The Present Appointment Processes

I do not believe that our Supreme Court has been packed by any President since the promulgation of the 1992 Constitution. If it is determined that a particular President has packed the Supreme Court with his cronies, meaning without regard to qualification and experience, that determination is a serious slur on our institutions. Under Article 144 of the Constitution, the President cannot, on his own initiative, appoint a Supreme Court Judge. I repeat that the President of Ghana has no constitutional authority to nominate, let alone appoint to the Supreme Court, any person of his choice.

The constitutional provision is explicitly clear on this point. According to Article 144 (2) of the Constitution, the President can only nominate a person for appointment as a Justice of the Supreme Court, if, but only if, that person has been recommended by the Judicial Council. The Article says that the President, "acting on the advice of the Judicial Council," may nominate a person for appointment as a Justice of the Supreme Court. The President cannot act on his own. He cannot also act contrary to the advice of the Judicial Council. The role of the Judicial Council in this context is not merely consultative. It is a sine qua non for the valid appointment of a Justice of the Supreme Court that, that person must be recommended by the Judicial Council. The Judicial Council is an independent body consisting of some of the most senior Justices of the Supreme Court and other superior courts, lower court judges, and representatives of the Ghana Bar Association, among others. If a body so constituted cannot properly and responsibly exercise its constitutional function to control the number of appointments to the Supreme Court and decide on the suitability of prospective appointees, that must be a sad day for Ghana. It would be a serious indictment of the Judicial Council.

When the Judicial Council has recommended a person to the President for appointment as a Justice of the Supreme Court, the President cannot straightaway make a formal nomination of that person. The Constitution requires that the President must consult the Council of State. The role of the Council of State is consultative. The President need not take the advice of the Council of State in this regard, because that Council is only to be consulted. However, the consultation gives additional opinion on the candidate, even as it provides the time for reflection on the choice.

After consultation with the Council of State, the President must submit the name of the nominee to Parliament for approval. Article 44 (2) of the Constitution makes it clear that the appointment of a Justice of the Supreme Court can only be made by the President "with the approval of Parliament." Parliament has its own Appointments Committee which holds a public hearing on the suitability of the nominee for the high judicial office. If the nominee is unsuitable, Parliament can withhold its approval, and the appointment is thereby scuttled. In addition to that, Parliament has a duty to consider whether the new appointment of a Supreme Court Judge would result in the packing of the Court by the President with his favourites. In other words, Parliament has a constitutional obligation to ensure that the

President makes wise recommendations for the Supreme Court Bench, and that the new appointment is desirable to achieve the full complement of the Court.

To put it another way, whenever there is an appointment to the Supreme Court, the Judicial Council, Parliament and the President bear full responsibility for the appointment. The Council of State, because of its consultative status, has a complementary role. The President cannot, under our present Constitution, pack the Supreme Court with his favourites; nor can he arbitrarily make an appointment to the Supreme Court when there is no vacancy in the Court.

The position may be re-stated. The appointment of Supreme Court Justices requires an elaborate process under our current Constitution. The institutions deliberately created by the Constitution are to make it difficult to exercise arbitrary power in the appointment of Supreme Court Justices, with a view to insulate them from improper political pressures. If indeed it is nevertheless the case that a President has exercised an arbitrary power in appointing a Justice of the Supreme Court, I would lay the blame on the other institutions which would have failed to effectively control the process. The Judicial Council should rein in the President if he attempts to appoint his unsuitable favourites or party faithful, or if he proposes to increase the number of Supreme Court Justices for a political or other purpose not justified in the circumstances. This, the Judicial Council can and must do by declining to advise the President to make the proposed appointment. Even after the Judicial Council has tendered its advice to the President with respect to a particular candidate, the Council of State should prove its mettle to dis-recommend an unsuitable nominee when consulted by the President.

The final stage of the process is parliamentary approval. Parliament should assert itself as the third arm of government, and be bold to reject a nominee for the Supreme Court if unsuitable or is one too many. The record since 1993 is that Parliament has not been very critical in exercising its approval power. The parliamentary vetting sessions for all Presidential nominees have been rather perfunctory, and practically all nominees of all Presidents have received the approval of Parliament. Where there have been rejections, most of the grounds have been related to technical matters like the citizenship status of nominees, issues which could have been resolved administratively in the office of the President before seeking Parliamentary

approval.

On its part, Parliament has routinely approved Presidential nominees for various positions. Several factors explain this. Parliament usually reflects the strength of the political parties, and the President usually commands a majority in Parliament. Another reason is that Parliament does not have the research staff to assist members of Parliament to adequately investigate the candidates nominated for positions. In other countries, the vetting of Presidential nominees by the Legislature is a grueling process and searching questions are expected. Our experience so far has been to the contrary. At the Appointments Committee of Parliament, the process of vetting is badly skewed to become a battle between the major political parties. Only superficial questions are asked to elicit information to determine the suitability of the nominee. The rest of the session usually consists of sparring between the parties in Parliament with the objective of scoring political points. Naturally, the government usually has its way.

I think that, instead of hastily amending the Constitution to set an arbitrary limit on the number of Supreme Court Justices, we must concentrate on improving and empowering the various state institutions involved in the process to exercise their functions with responsibility and a proper appreciation of the gravity of their roles. The Appointments Committee of Parliament should be strengthened and empowered to perform its role and discharge its functions effectively. This means, inter alia, that it should be provided with competent and adequate research staff and proper logistical support to conduct proper investigations on the nominees for any office which under the Constitution requires Parliamentary approval. Above all, members of the Appointments Committee must be committed to their responsibilities and be prepared to discharge them with due diligence and dedication in the supreme interest of the nation.

I have mentioned that nominees for the United States Supreme Court have been rejected in modern times. In the case of Mr. Justice Clarence Thomas, an African-American nominee for the United States Supreme Court, it was a grueling fight. It was a cliff-hanger and the nomination was approved by only a single vote in the senate. Judge Robert Bork was not even that lucky. He was already a Federal Judge of the Circuit Court, which is the United States' equivalent of the Court of Appeal. He was a brilliant lawyer and performed admirably at his confirmation hearing. However, the Senate, after

a lengthy hearing, declined to approve his nomination. This was because the Senate had thoroughly investigated the Judge and had subjected him to close scrutiny to decide on his suitability for appointment to the Supreme Court of the United States.

In Ghana, the Appointments Committee, and Parliament as a whole, have not exercised such a level of vigilance, and consequently they have routinely approved nominees for our Supreme Court. If this had been done, the same politicians will not today be expressing fears about the prospects of packing the Supreme Court with the favourites of a sitting President. If at any time there is good reason to believe that an additional nomination to the Supreme Court was motivated by the desire to manipulate the Supreme Court, the attempt can be derailed by Parliament rejecting the nominee as one too many. It is for this reason that Parliament as an institution, as well as its honourable Members, must assert and fiercely guard their independence as the third arm of Government. So far, such independence has not been manifested enough, and Parliament is increasingly being perceived as an appendage to the Executive branch of Government.

Conclusion

I do not feel that the fears about "packing" the Supreme Court with the President's favourites are justified. History has shown that Judges, especially Supreme Court Justices, have exhibited considerable independence in decision-making and have in many cases disappointed the Presidents who appointed them. A well known case is that of Judge Sirica, who had been appointed by President Nixon to the Federal Bench in the United States. Because Judge Sirica was a Republican, the President had hoped that the Judge would demonstrate bias in his favour. It was a shock to him when Judge Sirica ordered that the Watergate tapes be released. With the release of the tapes, President Nixon knew that the game was lost, and he tendered his resignation from the high office of President of the United States. President Nixon was later reported to have stated in utter disgust that the appointment of Judge Sirica was one of the greatest mistakes of his life. Most Judges anywhere show judicial independence, based on their judicial oath and fidelity to the established principles and doctrines of the law. A Supreme Court Judge would also be concerned about how history would assess his tenure on the Bench, where every word falling from his mouth

would be in printed reports for posterity. The suggestion that Judges, because of who appointed them, would ignore the tenets, dictates and established principles of the law and play politics with legal issues is nurtured primarily by persons, whether lawyers or not, who think that the law has no meaning. These are persons who conceptualise the law as an idiosyncratic body of non-rules which can be molded into any form according to the individual predilections of the moment. Happily, as the Supreme Court usually sits in panels of five, it can be hoped that an errant Judge will be a dissenting voice over which the majority opinions will prevail.

It follows, in my view, that there is not the need to amend the Constitution by setting a maximum limit on the number of Supreme Court Judges. Without putting ourselves into a constitutional straitjacket, the institutions and bodies currently in place, if properly performing their assigned constitutional roles, are adequate to scrutinise the qualifications of nominees, and also to control the numbers on the Supreme Court Bench. Some measure of flexibility in this matter may be advisable.

I have already said that it would be difficult to gaze into a crystal ball or consult an oracle to ascertain what would be the appropriate maximum number of Supreme Court Justices for Ghana at any time. If we should amend the present Constitution, what should be the ceiling to be set on the number of Justices? An attempt to fix a maximum number would not be the result of any acceptable scientific research but an arbitrary estimate. In the United States, the size of the Supreme Court, as I have said, has varied from the original 6 members to a maximum of 10. It took the laborious process of Congressional actions to fix the current number at nine. That is not a magic number and it may be subject to subsequent variation. I do not think that it would be wise at this time to amend our Constitution by writing into it a maximum number for Justices of the Supreme Court, when that figure may not even be an educated guess with respect to the exigencies of the Judiciary now or in the unforeseeable future. We may well find that, like the United States, we may have to experiment with different maximum numbers in different stages of our legal history. If a maximum number of Supreme Court Justices is today fixed by constitutional amendment, the predictable irony may be that, when an increase in the number of Justices is sought in future, the effort may be misinterpreted as an attempt by the proponents to create

vacancies for the purpose of "packing" the Supreme Court. We ought to be wary of this.

Too often in this country, when institutions fail in the discharge of their proper roles, we seek a solution in amending legislation rather than requiring the proper bodies and authorities to discharge their functions. We must stop that. Ultimately, the citizens must be the watchdogs of our liberty and must send the proper political message to a President who would attempt to manipulate the courts. That is the path to true democracy and protection and advancement of our liberties and rights, individually and collectively.

Constitutional Review Series Also Available

The Hybrid Constitution and Its Attendant Difficulties

Hon. Prof. Mike Oquaye.

Constitutional Dilemmas: The Omission of Provisions on a Defecting President Or an In-operative Vice President

Dr. Vladimir Antwi-Danso

Rethinking the Size of Government:

A Case For Constitutional Amendment.

Nana Ato Dadzie