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TOWARD JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN AN EMERGING DEMOCRACY: THE COURTS AND THE CONSOLIDATION OF DEMOCRACY IN GHANA

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K. PREMPEH

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Table of Conten..

Preface

The IEA is pleased to publish under its series of Occasional Papers, *Toward Judicial Accountability in an Emerging Democracy: The Courts and the Consolidation of Democracy in Ghana* by H. Kwasi Prempeh, an attorney in the law firm of O'Melveny & Myers in Washington D.C. U.S.A.

The essay focuses on the role of the courts, particularly the Supreme Court, in the ongoing search for democracy and constitutionalism in Ghana. Mr. Prempeh notes that the Supreme Court's power of judicial review makes it a vital institutional watchdog in the Fourth Republic. He cautions, however, that the power vested in the Supreme Court to determine the constitutionality of legislative and executive decisions may not always serve the interests of democracy, and that judicial review could undermine, rather than promote, democracy *if* it is used to lend judicial imprimatur and legitimacy to undemocratic actions of the government. Mr. Prempeh argues that because of this double-edged character of judicial review, it is critically important to make the judiciary not only independent of the government, but also accountable to the people.

He explains that besides contributing to a peaceful and orderly evolution of constitutionalism and the rule of law in Ghana, an independent judiciary is also essential to the creation of an enabling environment for business investment and private sector-led development. He argues that though the 1992 Constitution attempts to secure judicial independence, more remains to be done, by way of constitutional interpretation or amendment, to insulate judges from partisan politics. Mr. Prempeh proposes, among other things: (1) abandoning the current practice whereby the Chief Justice chooses which justices of the Supreme Court should hear a particular case, and adopting, in its place, a system of blind case allocation, using predetermined criteria: (2) placing a maximum number on the size of the Supreme Court; and (3) requiring all constitutional cases to be heard by the bench of the Supreme Court, instead of having panels of five justices decide such cases. He also calls for a reassessment of the respective roles of the President, the Judicial Council and Parliament in the appointment of judges.

While Mr. Prempeh believes these and other proposed changes are necessary to make the judiciary independent *as a matter of law*, he points out that constitutional provisions alone cannot guarantee judicial independence and that it is the actions of judges themselves that ultimately will determine whether the judiciary is, *in fact*, independent. However, because so much is at stake, Prempeh believes that what judges do and how they exercise their power cannot be left to chance. He argues that because judges are not legally liable for their official actions and also cannot be voted out of office, constant scrutiny and criticism, by the bar, academia, the media and the public, remain practically the only viable avenue for exposing and correcting judicial misconduct, inefficiency or incompetence. In this regard, Prempeh believes that Ghana's existing law of criminal contempt obstructs efforts at promoting judicial accountability and must, therefore, be reformed.

Though the product of a lawyer's pen, the essay is written with a wider public in mind. It is particularly rich in historical analysis, taking the reader through a review of the experiences of Ghana's judiciary from independence to date. Along the way, it examines a number of landmark cases in Ghana's legal history, including some of the leading constitutional cases decided under the present Constitution. Finally, the article provides a universal dimension to the Ghanaian experience by using, where appropriate, illustrative cases and examples from other democracies and jurisdictions.

I wish to place on record the gratitude of The Institute of Economic Affairs to the Danish Government, through the Royal Danish Embassy in Accra and DANIDA, whose generous funding made the research and publication of this Occasional Paper possible.

Dr. Charles Mensa
Executive Director
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Accra, February 1997.

K. Prempeh

Toward Judiciary Independence and Accountability in an Emerging Democracy: The Courts and the Consolidation of Democracy in Ghana.

• Introduction

Ghana's current transition to Constitutional Democracy, which began with the April, 1992 referendum to ratify a new constitution[1] and with the holding, later that same year, of multi-party elections, has crossed a major milestone. In December 1996, Ghanaian voters went to the polls for the second time in four years to choose a President and a 200-member National Assembly.[2] Though the pre-election day politicking was attended by some tense moments and by opposition complaints of an unfair (and arguably unlawful) use of state resources by the ruling party, the vote casting and counting generally proceeded smoothly and were pronounced free, fair and transparent by domestic and international election monitors.

[1]The constitution approved in the April 1992 referendum came into effect on January 7, 1993. (Nonetheless, it is officially referred to as the 1992 Constitution of Ghana)

[2]Voter turnout in the 1996 elections was an impressive 73 percent.

The elections resulted in a renewal of the mandate of Jerry J. Rawlings as President of Ghana[3] and of his National Democratic Congress (NDC) as the majority party in Parliament, but with a more formidable opposition to contend with.[4] The return to power of the incumbent government means, obviously, that "the crucial test - a peaceful and orderly transfer of power to a new government that beats the incumbent in multiparty elections - remains to be passed."[5] However, the simple fact of a Rawlings-led government now aggressively canvassing the country for votes, and even contemplating the possibility of electoral defeat, is a hopeful sign that the idea of the ballot box as the source of political legitimacy may be finding favor with a segment of the Ghanaian political elite that, until now, had shown little, if any, inclination toward political pluralism or constitutionalism.

The December 1996 election indeed represents a major step forward in Ghana's bid to join the world's growing community of democratic nations. Notably, the election marked the first time in Ghana's forty-year post-colonial history that an elected government had been able to serve out its constitutional term without the intervention of a *coup d'etat*. This "feat" is made all the more remarkable by the fact that it occurred at a time when the effects of Ghana's much-touted "structural adjustment" economic reforms had begun to bite deep into the budgets of most Ghanaian households, particularly in the urban centers.

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[3]Rawling won 57% of the vote int he presidential polls. The leading opposition candidate, John A. Kuffuor, secured 50% of the vote, with the remaining 3% going to John Mahama, a lesser known candidate.

[4]The opposition parties, led by the National Patriotic (NPP), won 66 of the 200 seats in the National Assembly in the 1996 elections. In contrast, an opposition boycott of the parliamentary elections in 1992 gave the ruling National Democratic Congress (NDC) no organized opposition to contend with int he National Assembly.

[5]E. Gyimah-Boadi, "Ghana's Encouraging Elections: The Challenges Ahead," Journal of Democracy (April, 1997), at 85.

Still, it is too soon to speak of democracy becoming "consolidated" in Ghana. Much remains to be done[6] before one can safely say of Ghana's democracy that it has become "so broadly and profoundly legitimate, and so habitually practiced and observed, that it is very unlikely to break down."[7] In order to extend and entrench the democratic gains made so far, the role and independence of certain watchdog institutions must be jealously and securely guarded. Prominent among such institutions is the judiciary.

The popular agitation for a return to constitutional democracy that culminated in the adoption of a new democratic constitution and in the elections of 1992 was more than simply a demand for political pluralism. A major plank of that movement was the re-institution of a unified and independent judiciary and, with that, the elimination of the parallel and generally compliant "public tribunals" created after the Rawlings-led *coup d'etat* of December, 1981, to dispense "revolutionary justice." The inquisitorial character of the tribunal's proceedings, their disregard for due process safeguards, the unfettered discretion of the PNDC in determining the composition of the tribunals, and the generally selective and "political" nature of the cases prosecuted before them, all made the tribunals the object of unyielding opposition from civil libertarians and the traditional legal establishment. Indeed, the Ghana Bar Association's public opposition to these tribunals immediately upon their establishment may be said to have marked the beginnings of organized domestic opposition to PNDC rule.

With the coming into force of the 1992 Constitution the country has reverted to a unified judiciary, with the Supreme Court at its head. Among other things, the new Constitution enumerates the powers and duties of the various branches and institutions of government,[8] and the limitations on the

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[6]For a discussion of some of the critical challenges that still face Ghana's democratic transition, see *ibid*, at 85-91

[7]*Ibid* (quoting Larry Diamond, Juan J. Linz, and Seymour M. Lipset (ed.), *Politics in Developing Countries: Comparing Experiences with Democracy* (Boulder, colo.: Lynne Reinner, 1995, at 53).

exercise of such powers, including a catalogue of individual rights and liberties that government is commanded to respect. But the Constitution does not simply enumerate powers, duties and rights, trusting the government and other institutions of State to respect them. Rather, the 1992 Constitution, like the 1969 and 1979 Constitutions before it, establishes an institutional enforcement mechanism – *judicial review* - which vests the Supreme Court with the power and duty to enforce the letter and spirit of the Constitution against the government and all other institutions subordinated to the Constitution, including political parties. This power of judicial review, by which acts of Parliament and actions of the executive may be overruled as unconstitutional, makes the Supreme Court a uniquely powerful watchdog institution within Ghana's present constitutional order. To complement the Supreme Court's role in this regard, the High Court is also empowered to issue appropriate prerogative writs (*e.g.*, habeas corpus, mandamus, certiorari and prohibition) to enforce the fundamental rights and liberties guaranteed by the Constitution.

Taken on its face, the power of the courts under the 1992 Constitution, and in particular the Supreme Court's power of judicial review, seems unmistakably good for the survival of democracy and constitutionalism in Ghana. In reality, however, this widely-held perception, that judicial review is good for democracy, is only *conditionally* true. For one thing, judicial review can neither predict nor guarantee that judges will indeed use their power for the intended purpose of upholding constitutional and democratic standards. Judicial review will promote democracy and constitutionalism only if the judges in whose hands such power is placed actually exercise it to restrain and overrule actions of the legislature and the executive that run afoul of democratic and constitutional principles. But "judicial review means not only that the Court may strike down a legislative [or executive] action as unconstitutional, but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations. Thus, there is always the risk that the power of judicial review, especially in the hands of a weak or compliant judiciary, would be used to legitimate, rather than to

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[8]For a general survey and analysis of the structure of the 1992 Constitution, see Professor E.A. Boateng's Government and the People: Outlook for Democracy in Ghana (IEA, Accra, 1996).

check, abuses of governmental power. In short, judicial review is a double-edged sword that can be used to advance or to impede the cause of democratic constitutionalism. To what end the Ghanaian courts, or more specifically the Supreme Court, will put this critically important power is a question of immense consequence for the ongoing process of democratization in Ghana.

This paper will examine this all-important question through a critical analysis of the twin issues of "judicial independence" and "judicial accountability" in contemporary Ghana. The paper begins in Chapter I with a largely theoretical defence of the idea of an independent judiciary. This is followed, in the second half of Chapter I, with a discussion of why, in this author's view, judicial independence, though necessary, is not sufficient, unless it is coupled with an appropriate measure of judicial accountability. The discussion will include an analysis of some of the institutional and ideological reasons that might incline judges, despite constitutional "guarantees" of independence, to "take sides" with the government in matters that come before the courts. Chapter II is devoted to a review of the experiences of the Ghanaian judiciary from the country's independence in 1957 to date. In Chapter III we return to the issue of judicial independence, this time focusing on how Ghana's 1992 Constitution attempts to insulate judges from political control, and what more needs to be done, by way of constitutional independence. Finally, in Chapter IV, the focus shifts back to judicial accountability, with a discussion of the various ways in which the Ghanaian public and other watchdog institutions, primarily the news media but also the bar and the legal academy, can hold the courts publicly accountable for their conduct and decisions.

See Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986), at 29

CHAPTER I

A. *Judicial Independence: Origins and Justification*

In the history of constitutionalism, the idea of a judiciary separate and apart from the political branches of government and with exclusive power to interpret and apply superseding constitutional precepts is credited to the eighteenth century framers of the United States Constitution. The case for placing the judicial function of the state in a separate branch of government had been articulated earlier by the French philosopher Montesquieu.[10] But the framers of the U.S. Constitution were the first to translate the concept of separation of powers from the realm of political theory into constitutional law and practice.

Writing in *The Federalist Papers*,[11] Alexander Hamilton, a member of the Constitutional Convention that drafted the U.S. Constitution, argued for institutional safeguards on behalf of the judiciary; safeguards which, he believed, would go beyond a "nominal and apparent separation" to make the judiciary truly independent of the executive and legislative branches. Hamilton reasoned that "the judiciary, from the nature of its functions, will

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[10]Baron de Montesquieu, The Spirit of the Laws [1748] 201-02 (D.Carrithers ed. 1977) ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers...Were the power of juding joined with teh legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor")

[11]The Feeralist Paper is a collection of some eighty-five essays written by Alexander Hamilton, James Madison and John Jay - under the collective pseudonym "Publius" - and originally published as a series in certain New York newspapers between October 1787 and the summer of 1788. The purpose of the essays was to defend the new Constitution fo the United States that had been drafted int he summer of 1787 by the Constitution of the United States that had been drafted in the summer of 1787 by the Constitutional Convention, and to persuade voters of the New York state ratification convention to ratify the document. The brainchild behind The Federalist was Alexander Hamilton, who also wrote 51 of the essays int he series.es Madison contributed 29 essays to the series, while John Jay wrote 5. The Federalist is an invaluable source material for discerning the principles and "original intent" behind the key provisions of the United States Constitution (as originally adopted).

always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." At the same time, he was convinced that "the judiciary is beyond comparison the weakest of the three departments of power." The Legislative branch, he explained, controls "the purse" and prescribes the rules that regulate the lives and activities of the citizenry, while the Executive has command over "the sword." "The Judiciary, on the contrary, has no influence over either the sword or the purse." Indeed, the Judiciary "must ultimately depend on the aid of the executive arm [of government] even for the efficacy of its judgements." Hamilton feared that this "natural feebleness of the judiciary" placed it "in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches." His proposed solution, which was adopted by the Constitutional Convention, was to make provision in the text of the U.S. Constitution to guarantee an independent judiciary.[12]

The framers of the U.S. Constitution did not expressly grant Federal judges the power of judicial review. Judicial review made its way into U.S. constitutional jurisprudence through textural interpretation and judicial fiat in the celebrated case of *Marbury v. Madison*.[13] In that case, the Supreme Court of the United States, speaking through Chief Justice John Marshall, declared unconstitutional an Act of Congress that sought to expand the original jurisdiction of the Court. The Court held that the scope of its original jurisdiction had been spelt out exhaustively in the Constitution itself[14] and so could not be expanded or diminished by statute. By this decision, a

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[12]See, e.g., U.S. Const., art. III & 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.")

[13][1803] 5 U.S. (1 Cranch) 137.

[14]U.S. Const,, art III.& 2[2] ("In all cases affecting ambassaodrs, other public ministers and consuls, and those in which a State sahll be a Party, the Supreme Court shall have original jurisdiction. In all other cases...the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.")

court of nine appointed judges invalidated a statute properly passed by the fully elected representatives of the people.[15]

Chief Justice Marshall defended the Court's assertion of the power of judicial review on the theory that the Constitution, being "the superior, paramount law" of the land, is binding on courts and all other branches of government. And since it is empathically the province and duty of the judicial department to say what the law is, the courts are duty-bound to set aside any governmental act or law (or a part thereof) that is in conflict with the Constitution.

Considered revolutionary at its inception, the concept of judicial review has since supplanted the idea of parliamentary supremacy[16] in many common-law jurisdictions, and is now considered an important, if not a necessary, ingredient in the making of an independent judiciary. Many democratic constitutions today, Ghana's included, contain provisions expressly affirming the power of the courts to rule on the constitutionality of

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[15]The fact that a court of unelected judges can overturn the wishes of democratically-elected public officials has been singled out as the most difficult challenge, both philosophical and political, with which judicial review must contend in a representative democracy. See Bickel, The Least Dangerous Branch, at 17. This "counter-majoritarian difficulty," however, seems less problematic and more easily defended where, as in Ghana, the courts exercise judicial review pursuant to power explicity granted them in a constitution adopted by popular referedum. Thus, judicial review in Ghana today is arguably less vulnerable to the charges of judicial usurpation and counter-majoritarianism that are frequently levelled against the courts of the United States, where judicial review is not expressly provided for in the Constitution but, rather, was asserted by teh Supreme Court sua sponte (i.e., on its own accord) in Marbury v. Madison.

[16]Under a system of parliamentary or legislative supremacy, laws duly enacted by the legislature are not subject to substantive review by the courts. However, under that system the courts still have power to construe the meaning of statues in specific cases, and can also invalidated legislation enacted in violation of the constitutionally mandated procedure for passing statutes. See, e.g. Ware v. Ofori Atta & others, [1959] GLR 81 (Murphy, j:) (declaring invalid an Act of Parliament affecting the traditional functions of a chief, on the grounds that the Act was not enacted in compliance with procedural requirements provided in 1957 Ghana Constitution for all legislation affecting the traditional functions and privileges of a chief. The 1957 Constitution did not provide, explicitly or implicitly, for substantive judicial review.)

disputed laws or actions of the executive branch.[17] Indeed, alongside a freely elected Legislature and Executive, and a free media, an independent Judiciary with the power of judicial review counts among the list of institutions that would be considered "not negotiable" by most framers of modern democratic constitutions.

Part of the impulse behind the universal effort to safeguard judicial independence is rooted in that famous dictum attributed to Lord Acton: "Power tends to corrupt; and absolute power corrupts absolutely." Allocating the powers of government among the Legislature, the Executive, and the Judiciary, instead of concentrating all governmental power in a single branch, is considered necessary to check the totalitarian tendencies that come with absolute power. But besides this separation-of-powers rationale, the primary justification for having an independent judiciary can be found in the distinct role and function of the Judiciary.

Courts are set up primarily to adjudicate and resolve disputes and conflicts between litigants. And it is only when judges are impartial and free from external manipulation and partisan or personal bias that the public can be expected to accept and respect the courts' decisions as legitimate. Therefore, from the public's perspective, judicial independence is central to the legitimacy and institutional authority of the courts. If public confidence in the independence and impartiality of judges is destroyed, citizens may be less inclined to turn to the courts for resolution of their disputes,[18] resorting instead to self-help and other extra-judicial avenues to "settle scores." Such a development would have disruptive consequences for civil order and social peace.

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[17]For a discussion of judicial review in Ghana (up to 1980), see C.E.K. Kumado, "Judicial Review of Legislation in Ghana since Independence," 12 *Review of Ghana Law* 67 (1980).

[18]Besides a loss of confidence in the judiciary, other factors that could cause citizens to resort to self-help and other extra-judicial modes of conflict resolution include a lack of access tot chc ourts (duc, for example, to high costs of litigation) and an overburdened and, thus, inefficent judiciary (leading to delays int he administration of justice).

Judicial independence is particularly important when a court is presented with a dispute involving parties of vastly different political, social or economic power. The paradigmatic case is a dispute involving a lone citizen and the State. Without judicial independence, it is reasonable to expect that the outcomes in such cases will reflect not the merits of the parties' competing claims, but the power gap between them. Of course, an independent judiciary alone cannot equalise the disparity between the disputants in such cases. Still, an independent judiciary can, at least, assure citizens with legitimate claims or defences against the State that they can expect to receive a fair and impartial adjudication of their case. In this regard, judicial independence promotes governmental accountability and respect for the rule of law, while protecting the rights of the citizen. It is for this reason that the courts are often regarded and described as guardians of the rights of the citizen. But that label can only be true if judges are in fact independent of the Executive and Legislative branches.

Another important role of an independent judiciary is in its contribution to the economic life of a society. In his widely acclaimed book *The Other Path,*[19] Peruvian economist and entrepreneur Hernando de Soto shows, on the basis of a comprehensive study of the legal environment of the informal economy in Peru, how insecurity of property rights, a lack of contract enforcement, and an inefficient and weak judiciary have conspired to impede private investment and economic development in much of the under-developed world. In a radical departure from conventional thinking on the causes of (under) development, de Soto concludes that, "All the evidence suggests that the legal system may be the main explanation for the difference in development that exists between the industrialized countries

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[19]Hernando de Soto, The Other Path: *The Invisible Revolution in the Third World* [1989] (Harper & Row ed. 1990).

and those... which are not industrialized... The debate about development will therefore have to be reformulated to take the importance of legal systems into account."[20]

The primacy of law in economic development is now well recognized by lender and multilateral development institutions, as evidenced by the attention increasingly being given by the World Bank to the issue of legal reform in developing countries.[21] While such reforms tend to take the form of the repeal of regressive laws and their replacement with more liberal legislation, it is important to emphasize that reform of the substantive law alone, without attention to the *personnel* and the *institutions* that must interpret and apply such new laws, falsl short of what is required to create an enabling legal environment for private investment and commerce. Thus, a programme of legal reform, to be effective, must necessarily include a "judicial reform" component, and judicial reform means nothing if it does not, above all, seek to create an efficient and independent judiciary.

An independent judiciary is especially important in an emerging economy, such as Ghana's, that is in the throes of a transition from a command-and-control regime to one in which private domestic and foreign capital are expected to play a significant role. Rational investors do not commit

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[20] *Ibid.* at 185. To illustrate his point, de Soto asks rhetorically:

"How many investments could people in the United State and Western Europe have made without clearly defined and secure property rights, a system of extra-contractual civil liability, and a system of justice which protected their property? How many innovations would they hac made without patents or royalties? How many assets, long-term projects, and incentives for investment would they have managed to creat without enforceable contracts? How many risks would they have run without limited liability systems and insurance policies?...How often would they have gone bankrupt and had to start all over again if they had not been able to convert their debts into shares?"

Ibid, at 186

[21] *See* Ibrahim F.I. Shihata, Judicial Reform in Developing Countries and the Role of the World Bank (Feb., 1993) (Paper presented at the Seminar on Justive in Latin America and the Caribbean).

significant capital resources to an enterprise or enter into major contracts unless they have some prior assurance that disputes, when they arise (as they likely will), will be resolved in a fair and impartial manner. As Ibrahim Shihata, the Word Bank's General Counsel, has rightly pointed out, "serious investors look for a legal system where property rights, contractual arrangements and other lawful activities are safeguarded and respected, free from arbitrary governmental action and from pressure by special interest groups or powerful individuals."[22] The primary avenue to which such investors would look for necessary assurance and protection is the judiciary.

A demonstrable absence of judicial independence diminishes a country's economic and business attractiveness in other respects. International law recognizes the right of the courts of a given country to refuse to enforce, under certain circumstances, a judgement rendered against persons or property within their jurisdiction by the courts of a foreign jurisdiction. For example, the laws of the various states of the United States provide that courts in their jurisdictions may not recognize or enforce a foreign judgment that has been "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law."[23] In practice, this means, among other things, that where a country's judiciary "is dominated by the political branches of government" judgements rendered by the courts of that country may not be recognized or enforced by courts in the United States.[24] Similar rules of non-recognition of foreign judgements obtain in other countries. The existence and application of such rules are illustrative of the economic costs which a government-controlled or corrupt judiciary can impose on a country's citizens,

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[22] *Ibid.*

[23] "Restatement (Third) of Foreign Relations Law of the United States, & 482 (1987). For a clear and early articulation of this principle in American law, see Hilton v. Guynot, [1895] 159 U.S. 113.

[24] *See* Restatement, ibid, at & 482, comment b. For recent case denying recognition to a forcign judgement on the basis of the absence of judicial independence int he courst of the forcign country, see Bank Melli Iran v. Shams Pahlavi, [1995] 58 F.3d 1406.

particularly in their legal and business dealings with nationals of other countries.[25]

Besides adversely affecting the enforceability abroad of a domestic judgement, the absence of impartiality in a country's judicial system is also likely to cause foreign entities who enter into commercial transactions with domestic parties to insist on resolving all contract disputes outside the domestic court system. Typically in such cases, the jurisdiction of the domestic courts is ousted contractually through the inclusion of arbitration clauses stipulating an alternative mechanism for dispute resolution that avoids recourse to the domestic courts. Although a preference for arbitration over litigation may be motivated by considerations unrelated to the performance and independence of the domestic judiciary, [26] there is no question that a biased judiciary instills little confidence in the legal system especially among potential foreign investors, and thereby makes arbitration an infinitely more attractive alternative. In the end, pervasive or routine avoidance of the domestic courts, particularly when it comes to international commercial and investment disputes, would tend to impede the development of domestic legal precedents in new and evolving areas of the law. In short, an independent judiciary must be valued not only because it assures the

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[25]The U.S. Department of State reports that, "The [1992 Ghana] Constitution provides for an independent judiciary, but in practice the judiciary is subject to executive influence." *See* U.S. Dep't of State, *Ghana Country Report on Human Rights Practices for* 1996 (Jan. 1997), at 4. The same report alleges that "a recent survey revealed that 66 perent of the citizens believe that money influences the judicial system." While these observations concerning the Ghanaian judiciary seem overblown, and certainly cannot be deemed conclusive as a matter of law or even of fact, U.S. courts would take "judicial notice" of the Country Report if a case were to come before them in which a Ghanaian plaintiff in whose favour a money judgement had been rendered by a Ghanaian court sought to enforce that judgement against the American defendant in a U.S. court.

[26]There are a number of other mutually beneficial reasons why parties to international contracts would wnat to include an arbitration clause in their contract. For example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards makes it relatively easy to enforce arbitration awards in signatory countries, which include Ghana and most of the major trading nations. Moreover, even where the domestic courts are fair, honest and independent, a user-friendly arbitration regime complements the courts by helping to ease the burden on them and by filling, in certain instances, a domestic void in judicial expertise in novel or technically complex legal matters.

peaceful resolution of social conflicts and the protection of citizens' rights against an overbearing State, but also because it constitutes a part of the infrastructure necessary for the promotion and growth of private investment and economic activity within a country.

Why Judicial Accountability?

Judicial independence cannot, of course, be taken for granted. Judges may be independent *as a matter of law* – and this can be accomplished by appropriate constitutional provision. But whether judges are independent and impartial *as a matter of fact* is quite another matter. Even in the face of constitutional safeguards designed to give judges the freedom to decide cases without fear of political or other external reprisal, there are a number of countervailing forces and considerations – some of which are discussed below – that can (and do) intrude and influence judicial conduct in ways that distort a judge's decision-making.

Of the factors that could easily undermine judicial impartiality, the most obvious is "human nature" – that is, the fact that judges are, after all, also human. In his classic work *The Nature of the Judicial Process*, the famous jurist and Justice of the U.S. Supreme Court from 1932 to 1938, Benjamin Cardozo, notes that "[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Cardozo observes that though judges present themselves as "coldly objective," they are, in fact, subject to the same "likes and dislikes" predilections and prejudices, [and] and the complex instincts and emotions and habits and convictions" that effect all humans.[27]

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[27] Recently, a judge of the Ghana Court of Appeals, Mr. Justice D.K. Afreh, is reported to have said, in remarks made at a public forum, that considerations of economic security, including post-retirement income earning opportunities and the desire for promotion (to a higher judicial office), may have some influence on how judges decide certain cases. Assuming his remarks were accurately reported, Justice Afreh was merely stating what "legal realist" would hardly find surprising. Still, the remarks generated some heat in the local press. *See* "The Justice Afreh Shocker," The *Online Independent* (May 7-13, 1997), avilable in www.uta.fi/~csfraw/ghana/gh_news.html. The judge was criticized simply for making that observation, even though there was no suggestion in his remarks that he was in any way tryung to defend or justify judicial decision-making that might be motivated by such expectations of private gain.

Still, the fact that judges are human and, thus, susceptible to subjective and other extraneous influences does not excuse judicial error or malfeasance. To the contrary, that judges are equally vulnerable to human failings and foibles provides a primary reason why judicial conduct and decisions must be subject to public vigilance and scrutiny. The point here is not that judges are or must be superhuman. It is merely to recognize the fact that judges are charged with a crucial public responsibility, the proper discharge of which is necessary for the social, political, and economic health of the society. Furthermore, judicial decisions, especially in criminal cases, often have "flesh and blood" consequences for those who are commanded to obey and live by them. Therefore, judges cannot escape public scrutiny and accountability for their actions merely on the grounds of "human nature."

Subjective and other personal influences are not, of course, the only factors that make judicial accountability necessary. There are also institutional considerations relating to the intrinsic character of the judiciary and of the judicial function itself that militate against judicial independence and, thus, further strengthen the case for judicial accountability. One of such factors is the nature of the relationship between the judiciary and the other branches of government.

The judiciary may be a separate branch of government; but it is a branch of government nonetheless. Judges are also part of the governing elite, and often share with other members of the political elite a certain class affinity and perspective, not to mention the usual perquisites that come with high public office. Moreover, judges depend on the cooperation of the executive to carry out their orders and sanctions. Practically speaking, this dependence places judges in a position of relative weakness when

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Indeed, the judge must be commended, not chastised, for acknoledging publicly that judges are susceptible tosuch influences and considerations. Such statements, by de-mustifying the judiciary, promote judicial accountability or, at least, reveal the neef ro public vigilance over judicial conduct and decisions. Fortunately, the honorable judge took advante of his constitutional right of rejoinder to explain the essence and context of his remarks in subsequent issue of the same newspaper that had taken him to task for making the remarks in the first place. *See* D.K. Afreh, J., "I Never Intended to Disparage Judiciay," *The Online Indepdent* (May 14-20 1997), *Ibid.*

confronted with an uncooperative or intimidating executive. For instance, a judge may be reluctant to issue certain orders or judgements that require compliance by the government, if he or she anticipates or believes that the order will be disregarded. This limitation on judicial power was clearly on the mind of Ghana's former Chief Justice Philip Archer when, in his dissenting opinion in the *31st December Case*,[28] he asked rhetorically "[S]uppose notwithstanding the Orders of this Court, the members of the governing party and their allies choose to celebrate 31st December with picnics, processions and dances, *who can stop them?*"

Embedded in Chief Justice Archer's rhetorical question is a pragmatic judge's concern that the Executive might disregard an adverse ruling from the Bench and that, if that were to occur, the Judiciary would be powerless to coerce obedience from the Executive. The point here is that judges may sometimes decline to assert their lawful jurisdiction over a matter out of a concern or fear that the Executive might ignore any adverse judicial order and, thereby, expose the relative powerlessness of the courts.[29] In short, notwithstanding constitutional guarantees of judicial independence, in practice certain pragmatic considerations may compel judges to take sides, even if passively, with the Executive or the Legislature in disputes involving those branches of government.

Institutional self-preservation aside, the tendency for judges to be deferential to the government also stems from the dominant philosophy that shapes judicial attitudes towards "the law." In terms of their concept of what constitutes "law," judges (like most practicing lawyers) are, generally speaking,

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[28] New Patriotic Party v. Attorney-General, Suit No. 18/93, 29 Dec. 1993 (opinion delivered 8 March, 1994).

[29] "Only the weight of public opinion and the likelihood of organized public reaction may serve to forestall fragrant executive disregard on an adverse judicial order.

positivists. Positivists recognize "law" by its authoritative source and form, rather that by its substantive or moral content.[30] To the positivist judge, the judicial enterprise primarily consists in applying a set of presumably "closed" rules to a given factual situation, without regard to the moral content or social consequences associated with the law.[31] Fidelity to a tradition of positivism therefore causes judges to be overly text-bound, literal, and formalist in their approach to the judicial task. As a result, they tend to privilege "authority" over "justice," and the "the letter" of the law over "the spirit."[32]

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[30] *See* Thomas Hobbes, Levathian [1668] (E. Curely ed. 1994), at 173. The theoretical foundations of modern positivism can be found in Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* [1802] (Burns & Hart, eds., 1970) and John Austin, *The Province of Jurisprudence Determined* [1832] (Library of Ideas ed. 1954). *See also Hans Kelsen's The General Theory of Law and State* (1961) and The Pure Theory of Law (1967).

[31] Positivists defend this rule-bounded view of the law on the theory that it is the duty of judges merely to *say* what the law is, and not to *make* law. Under this view, all a judge has to do is to find and then declare what the law says - which law is supposed to pre-exist the case before the court. In reality, judges are more than mere automatons that must simply find and apply predetermined rules. Judges always make choices among competing understandings or interpretations of the relevant law, whey they are called upon to decide a case. See H.L.A. Hart, The Concept of Law [1961] ELBS ed. 1971), at 12 ("all rules have a penumbra of uncertainly where the judge must choose between alternatives").

[32] It has been noted that this Austinian view of law - which, simply put, is that law is the command of a sovereign - is informed by the English constitutional system, which is based on parliamentary sovereignty and no written constitution. See A.V. Dicey, Introduction to the Study of the Law of the Constitution (8th ed. 1915), at 27 ("Austin's analysis of the term 'law' is at bottom an analysis of a typical law, namely, an English criminal statute,") But under a written constitution, the language of which is often couched in broad generalities, the process of interpretation generally necessitates that the judge look beyond the letter to the grand purpose and ideas (i.e., the spirit) that undergrid the text. Therefore, it is difficult to reconcile a "strict constructinist" approach with a constitutional system based on a written constitution, and especially one which recognizes the power of judicial review.

Judicial capitulation to positivism practically makes judges defenders of the status quo. [33] Indeed, because modern positivism teaches judges to be concerned primarily with "legality," and not with "justice" or the "moral content of law," it impels judges to acquiesce in and, thereby, give tacit approval and legitimacy to oppressive uses of state power. [34] It is partly on account of the dominant influence of positivism on judicial thinking that judges often become complicitous in abuses of state power and in violations of individual rights by repressive regimes.

Furthermore, quite apart from the influence of positivism on judicial action, judges, especially judges of the courts of last resort, generally tend to be conservative. This stems partly from the influence of the judicial principle of *stare decisis* (or keeping to precedents), but may also stem from the pool of possible candidates from which such judges are normally selected.

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[33] Positivism was not originally conceived as a defense of the status quo. Rather, the positivist conception of law was postulated as a rebuttal to the notion of natural law, which equated "law" only with certain divinely-inspired norms and moral precepts presumed to be accessible to all humans. Natural law therefore invested law with considerable moral, even theological, power, making it almost sacrilegious to challenge the legitimacy of certain laws. Bentham and the school of analytical positivists, on the other hand, saw law as deriving no legitimacy from any source other than by its own creation and observance. To Bentham, the view of "the law" as something "natural" was a stumbling block to a legilative agenda of social reform, because under a natural law conception of law the propriety of any such social reform legislation would be measured by some imprecise notion of "the law of nature." Thus, in defining law only as *positive law* (i.e., as that which is *posited* by the State through the exercise of sovereign power), Bentham sought to emphasize the human agency behind all laws as a way of de-mystifying law by liberating it from theology, divinity or other such metaphysical foundations. Only then could bad laws be attacked without affront to some preordained "natural" order; and only then could law be used to serve the interests of radical social reform. Paradoxically, the desire for positive change which gave birth to positivism is no longer the criterion by which positivism is defined today. Instead, contemporary positivism is identified with power, authority and, above all, with the status quo. In short, the notion of positivism to which most of today's lawyers and judges subscribe is, in large measure, a perversion of the ideal.

[34] Robert G. Vaughn, "Proposals for Judicial Reform in Chile," 16 *Frodham Int'l L.J.* 578, 607 n. 154 (1993) ("When a judicial power loses its vision of its historical mission as guarantor of fundamental rights and considers its job to be simply the application of positivist norms, violations of human rights such as those that occured during the military regime [of General Pinochet] will occur").

Whatever the reason, judicial conservation may operate to frustrate peaceful and progressive socio-political transition, especially from an authoritarian era to a democratic one.

In short, it must not be assumed that all that is necessary to "guarantee" an "independent judiciary" is to make ample provision in a Constitution to insulate judges from executive *cum* legislative interference or reprisal. Constitutional provisions are important, but only as a starting point. At best, constitutional provisions can only ensure that judges are *legally* independent. Whether judges are also *factually* independent "depends as much on institutional arrangements as it does on the actions of judges."[35] Therefore efforts to secure judicial independence through constitutional provision must be supplemented (and complemented) by an appropriate degree of judicial accountability calculated to ensure that judges do not become lords unto themselves.

"Accountability" is not, however, a concept one often associates with the Judiciary. Rather, accountability is something we have come to associate with the demand from the Executive and the Legislature, not from judges. This is somewhat understandable. Historically, it is the Executive (in collaboration with a compliant Legislature), and not the judiciary, that has been primarily responsible for human rights violations in most societies, including Ghana. Recognizing this fact, democracy activists and constitutionalists have concerned themselves mainly with placing legal and institutional limitations on the powers of the executive and legislative branches, not on the Judiciary. Indeed, the Judiciary is generally regarded as one of the institutions that may be counted upon to restrain and check possible abuses of power by the other branches of government. Rarely is the judiciary itself perceived as a power that also needs to be reined in; a result, no doubt, of the widespread belief that the judiciary is indeed "the least dangerous" branch.

Obviously, because judges do not control the sword, they are not, by them-

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[35] *Drew Days, et al., Justice Enjoined: The State of the Judiciary in Kenya (1992), at 15.*

selves, likely to initiate abuses of human rights. However, courts are not quite as harmless or as innocent as Alexander Hamilton's characterization of them as the "least dangerous" branch would seem to suggest. Judicial decisions that affirm oppressive legislation or acts of the executive lend to such acts not only legitimacy but also *longevity*.[36] Moreover, where, as in Ghana now, the courts have the power of judicial review, their decisions in key constitutional cases, if erroneous or ill-considered, may have the effect of impeding, instead of advancing, the cause of democracy. It is this double-edged character of judicial power that makes the case for judicial accountability all the more critical in an emerging democracy.

Later in this essay, we shall examine the issue of judicial accountability within the context of Ghana's current experience, focusing on what roles the Bar, academia, the media, and the lay public must play in the process. As a backdrop to this discussion, and to the discussion on judicial independence in the Fourth Republic that will precede it, we will now take a retrospective look at the trials and tribulations which the Ghanaian courts have endured since the country's founding in March of 1957.

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[36] For example, though the courts of the United states did not invent the practice of racial segregation and discrimination in that country, it is beyond question that the decision of the United States Supreme Court in *Plessy* v. Ferfuson [1896] 163 U.S. 537 - to name just one - - reinvigorated pre-existing State laws and practices that denied Blacks in America and the same rights and liberties which their white counterparts took for granted. In *Pessy*, the Court endorsed the so-called "separate but equal" doctrine, under which Blacks were by law denied access to, or allowed access only to substandard substitutes of, the same public facilities and amenities to which whites had unrestricted access. By that decision, the Supreme Court of the United States gave Constitutional approval to the practic of consigning Blacks to the back of buses, to the section of tains designated for smoking, and to separate the inferior public schools. It was not until *Brown v. Board of Education of Topeka*, [1954] 347 U.S. 483, that a more enlightened generation of Supreme Court justices unanimously repudiated *Plessy* and set in motion the continuing process of dismantling the legal structures of racism and racial injustice in the United States. Still, the fact remains that by its shameful decision in *Plessy*, the U.S. Supreme Court sanctioned and encouraged official disregard of the diginity and humn rights of Blacks in America for at least another *62* years!

CHAPTER II

The Ghanaian Judiciary In Retrospect

Like most public institutions, the Judiciary tends to mirror the large socio-political and economic environment within which it is situated. In particular, the state of the Judiciary or the administration of justice in a State at a given historical period is directly affected by the configuration of political power and the nature of the Constitutional structure within the country during that period. Therefore, a retrospective look at the Ghanaian judiciary necessarily invites a review of the major political events and developments in Ghana since independence.

Over the course of its post-colonial history, Ghana has been ruled by five different military-led regimes, one *de jure* one-party (civilian) regime, and four democratically-elected civilian administrations, beginning with the first Westminster-style government under then Prime Minister Kwame Nkrumah. In all, members of the Armed Forces of Ghana have ruled the country by decree for a total of about 23 years. During nine (1957-66) of the remaining 17 years of its post-colonial history, the country was under the tight grip of *Osagyefo* Kwame Nkrumah and his Convention People's Party (CPP). Under Nkrumah, Ghana became first a *de facto* (1957-1964) and, then, a *de jure* One-party state (1964-66). That era ended with the country's first *coup d'etat.*, on February 24, 1966. The new military government of the National Liberation Council (NLC) ruled the country by decree until October, 1969, when a new civilian administration led by Prime Minister Kofi Abrefa Busia was elected into office under a democratic constitution. Twenty-seven months into its term, the Busia administration was overthrown and the Second Republican Constitution abrogated by the coup *d'etat* of January 13, 1972.

Between January, 1972 and September, 1979, Ghana was ruled by a succession of military-led administrations: [37] The Acheampong-led National

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[37] For a comprehensive account of military rule in Ghana during this period, see Mike Ocquaye, *Political in Ghana 1972 - 1979* (1980).

Redemption Council (NRC) and, later, the Supreme Military Council (SMC(I), from 1972 to 1978; Akuffo's Supreme Military Council (SMC (II), from 1978 to June 1979; and Rawlings' Armed Forces Revolutionary Council (AFRC), from June to September 1979. Constitutional democracy was again restored in late September, 1979, with the promulgation of a new Constitution and the election and inauguration of a new civilian administration headed by President Hilla Limann.

As with the Second Republic, the Third Republic of Ghana was short-lived. After only 26 months in office, the Limann Administration was overthrown, and the Third Republican Constitution abolished in another *coup d'etat* led, yet again, by Rawlings. For the next decade (1982-1992) Ghana was ruled by Rawlings and his Provisional National Defence Council (PNDC).[38] In 1992, under mounting pressure from the domestic opposition and international lender institutions, Rawlings and the PNDC submitted to contested elections,[39] which returned Rawlings to power as President under a new Constitution – the 1992 (Fourth Republican) Constitution of Ghana.

From this historical overview, it is clear that Ghana's experience with constitutional democracy has been sparse and punctuated, at best. Predictably, the fortunes of the judiciary over the course of the country's post-colonial history have also oscillated, following the alternating cycle of democratic and non-democratic regimes.[40]

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[38] For a critical review of the PNDC era, see E. Gyimah-Boadi (ed.), *Ghana Under the PNDC Rule* (Codesria, 1993)

[39] Upon losing the 1992 presidential election to incumbent Rawlings, the opposition parties charged massive fraud in the conduct of the election and boycotted the subsequent legislative elections in protest. Independent international observees, however, acclaimed the presidential elections substantially free and fair, although it is generally admitted that the PNDC government used its incumbency and, thus, control over state resources and the state-owned broadcast media, to unfair advantage.

[40] For an earlier article discussing the state and experiences of Ghana's judiciary, see A.N.E. Amissah, "The Role of the Judiciary in the Government Process: Ghana's Experience," 12 Afr. L. Stud. 4 (1976).

Executive interference with the judicial function began with the abandonment of the Independence Constitution of 1957 [41] and the promulgation, in its place, of the First Republican Constitution of 1960. In an act almost without precedent in the annals of constitution-making, President Nkrumah was personally *named* in the text of the 1960 Constitution as the "First President" of Ghana, with wide-ranging powers some of which were co-terminus with the life of Nkrumah. The Constitution also vested judicial power in the High Court and the Supreme Court and in several Inferior Courts established by law. However, Article 20(6) provided that "the power of Parliament [consisting of the National Assembly and the President] to make laws shall be under no limitation whatsoever," except in regard to the entrenched clauses of the Constitution, which cold not be amended by a simple Act of Parliament.

The 1960 Constitution contained no formal Bill of Rights. But Article 13(1) of the Constitution required the President, immediately upon assuming office, to subscribe to certain "fundamental principles" by making a "solemn declaration" that "subject to such restriction as may be necessary for preserving public order, public morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law." In *Re Akoto*, [42] the Supreme Court of Ghana was asked to determine whether the President's declaration in Article 13 was the functional equivalent of a

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[41] Ghana's pre-independence judiciary was, of course, anything but independent. As Fui Tsikata, of the University of Ghana law faculty, has pointed out, the colonial judiciary "began as a key weapon for the extension of colonial rule [and] remained for practically all its life an active part of the machinery of colonial government, and did not pretend to be a controlling arm against the administration - it enforced colonial legislation untrammeled by constitutional restraints, save, rarely, determinations of the consistency of local legislation with Orders of the crown in Council; its members were active int eh formulation of colonial policy and legislation; they depended for their career development on reports of the colonial bureaucracy; and many of their members as District, Provincial and Chief Commissioners performed at the same time judicial, executive and police roles." Fui S. Tsikata, "Towards an Agenda of Constitutional Issues under the Kwame Nkrumah Regime," in The Life and Work of Kwame Nkrumah (Kwame Arhin ed. 1993), at 210. In short, the colonial example the judicial appendage of the colonial administration. Needless to say, the political attractiveness and expedience of this colonial arrangement have not been lost on post-colonial governments in Africa.

[42] [1961] GLR 523

Bill of Rights which gave the citizen certain rights that could be enforced by the courts. Specifically, the plaintiffs in *Re Akoto* sought a declaration (and a writ of habeas corpus) to the effect that the Preventive Detention Act of 1958, which gave the Executive power to arrest and detain a person without trial for up to five years, and under which the plaintiffs had been detained, was unconstitutional by virtue of Article (13(1). But the Supreme Court, presided over by then Chief Justice Arku Korsah, held that the declaration contained in Article 13(I) did not impose on the President an obligation that could legally be enforced in a court of law. At best, the declaration imposed on the President only "a moral obligation and provide[d] a yardstick by which the conduct of the Head of State [could] be measured by the electorate." A breach of Article 13 (1) therefore could be remedied only through the ballot box, not through the Courts. To borrow A.V. Dicey's terminology,[43] Article 13(1), as construed by the Supreme Court, formed part of the "constitutional morality" but not the "constitutional law" of Nkrumah's Ghana. By this interpretation, the Court effectively ousted the Ghanaian judiciary of all jurisdiction in matters pertaining to the conduct of the President.

The impact of *Re Akoto* on civil and political liberties in Nkrumah's Ghana was far-reaching. The power of extra-judicial detention, which in its early years (*i.e.,* 1958-1961) was directed against essentially the leadership of the Opposition (politicians such as R.R. Amponsah, Modesto Apaloo, Attoh Quarshie, Henry Thompson, Attoh Okine, and Ashie Nikoi) and thereby affected only a small section of the political elite, became after the Court's decision on 1961 an instrument of mass repression. By the time of the 1966 coup, there were well over 1,000 political detainees in Nkrumah's prisons, which had also in 1963 and 1965 witnessed the tragic deaths, respectively, of Obetsebi-Lamptey and J.B.. Danquah, both pioneering figures in Ghana's struggle against British colonialism. [44] In short, the

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[43] Dicey, Introduction to the Study of the Law of the Constitution (8th ed. 1915), cxl-clxi.

[44] Obetsebi-Lamptey and Danquah were among the "Big Six" nationalist leaders who were arrested and detained in 1948 by the British colonial authorities in the then Gold Coast, on charges of instigating and organizing the protest march of returning Gold Coast World War II veterans and the nationwide anti-colonial riots that it triggered. The other members of the group were Nkrumah, William Ofori-Attah, Ako Adjei and Akuffo-Addo.

judicial imprimatur which the Korsah Court gave the Preventive Detention Act by its decision in *Re Akoto* emboldened the widespread (ab)use of that law.[45]

In one respect, *Re Akoto* represented the judicial affirmation of what by 1961 was politically indisputable: that President Nkrumah was above the law. The trend of events following *Re Akoto* lent even greater credence to this assessment. In late 1961, the Nkrumah-controlled Parliament passed two bills, following labour unrest in the railway industry. The first imposed criminal penalties on anyone convicted of publishing defamatory or insulting matter which might bring the President into hatred, ridicule or contempt. The second created a Special Criminal Division of the High Court to hear cases of treason, sedition, rioting and unlawful assembly, from which there could be no appeal.

In December, 1963, following the acquittal of the three primary defendants (Tawia Adamafio, Coffie Crabbe, and Ako Adjei) charged with conspiring and attempting to assassinate President Nkrumah at Kulungugu (in northern Ghana) in August, 1962, Nkrumah summarily dismissed the Chief Justice (Arku Korsah), who had headed the three-judge panel that rendered the "Not Guilty" verdicts. The President also demanded that Parliament overturn the acquittals, an order which the Legislature dutifully obeyed by declaring the Court's ruling "null and void". Following that, and in clear disregard of the common law rule against "double jeopardy,"[46] Nkrumah

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[45] In 1993, the Ghana Supreme Court (per Justice Hayfron-Benjamin), speaking of the court in Re Akoto, stated that it "missed the opportunity to designated article 13 of the 1960 Constitution as a Bill of Rights." The Korsah Court is certainly vulnerable to a charge of literalism, for making the legal import of a constitutional provision turn on the drafters' use of the word "should" instead of the more obligatory "shall." But, in fairness to the Court, it must be conceded that when provision is intended to be legally obligatory proper draftmanship dictates the use of words connoting obligation, such as "shall" or "must", rther than words of discretion or option, like "may" and "should." Moreover, it must not be forgotten that the 1960 Constitution was the product of the Nkrumah/CPP-dominated Parliament; therefore, the construction which the Korsah Court gave to article 13 in Re Akoto more likely mirrored the intent of the drafters of that provision - that is, that Nkrumah was no to be legally bound by the provision.

had the defendants re-tried by a newly-constituted court headed by the new Chief Justice (Sarkodee-Addo) appointed by the President to replace the dismissed Chief Justice Korsah. Predictably, the new court convicted the defendants of the charges of treason, and sentenced each of them to death. (Nkrumah later commuted the death sentences to life imprisonment).

Contemporaneously, Nkrumah rushed through Parliament a bill that gave the President power, in the name of "the national interest," to set aside any judgement of a court. What nominal independence the rest of the Judiciary still retained was also abrogated by an amendment to the Constitution passed by the CPP Parliament in 1964. Under Section 6(c) of the Constitution (Amendment) Act of 1964, the President now had power to dismiss other Superior Court Judges "at any time for reasons which to him appear sufficient." With the adoption of the 1964 amendment, which also made Ghana a *de jure* one-party state, Nkrumah now had complete control of all three branches of government.

In his book *Nkrumah and the Ghana Revolution*, the famous West Indian pan-Africanist and intellectual, C.L.R. James, a longstanding friend of Nkrumah, described the President's 1963 dismissal of Chief Justice Korsah as the one act which "showed the degeneration not only of the regime, but of [Nkrumah's] own conception of government." In James' view, Nkrumah's sacking of the Chief Justice in reaction to an unfavourable ruling from the bench "destroyed at one stroke the juridical, political, and moral structure of the Ghanaian state, and automatically placed on the agenda a violent restoration of some sort of legal connection between government and population." Indeed, Nkrumah's assertion of personal control over judicial tenure and decisions, at a time when political protest and opposition had also been outlawed, effectively sealed off all avenues for civil and peaceful political change in Ghana, a fact that was cited in justification of the February, 1966 *coup d'etat* that overthrew the Nkrumah government. [47]

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[46] The rule against "double jeopardy" emobodies the principle that "no man shall be tried or punished twice for the same offence." This principle bars the re-prosecution and conviction on the smae charges of a person who has been properly tried and acquitted by a duly consituted court exercising lawful jurisdiction.

[47] See Akwasi A. Afrifa, *The Ghana Coup* (1966).

In *Republic v. Akosah*, the High Court was presented with an opportunity to test this possibility. The defendant in that case objected to the admission into evidence of certain statements on the grounds that he had not, prior to making those statements, been informed of his right to consult counsel of his choice, in contravention of Article 15(2) of the 1969 Constitution. In rebuttal, the State argued that with NRC's suspension of the 1969 Constitution, the provision upon which the defendant had predicated his objective must be deemed to have been suspended, along with all the other provisions of that Constitution protecting the rights of criminal defendants. The High Court (Justice Taylor at the helm) however rejected the State's argument, holding, instead, that Article 15(2) of the 1969 Constitution was a *rule of law* saved by the NRC Proclamation and not specifically abrogated by the suspension of the 1969 Constitution.

Although the High Court's holding represented a bold use of judicial power in defence of citizens' rights under a military dictatorship, its impact beyond the immediate case was limited by the fact that the military regime retained the power to nullify any judicial decision by subsequent decree, including the power to make such nullification retroactive. Indeed, the NRC/SMC had power legally to do with the courts and with judges as it pleased. And as later developments were to show, the military government did not shy away from showing the courts where Power ultimately resided.

The NRC/SMC set up military tribunals, which were vested with original jurisdiction over a host of newly-minted crimes as well as other offenses over which the regular courts hitherto had original jurisdiction. Defendants who appeared before these military tribunals, membership of which typically comprised both military and civilian person appointed and removable solely by the government, were accorded little, if any, due process.[53]

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[53] "Due process" in criminal or administrative proceedings entitles defendants to a bundle of rights and presumptions, including (i) a rebuttable presumption of innocence; (ii) the right to know the offence of which one is charge; (iii) the right to a fair hearing before an impartial body; and (iv) the right to be represented by counsel.

Besides transferring jurisdiction over certain matters to its military tribunals, the NRC/SMC also *ousted* the regular Courts of Appellate and Supervisory Jurisdiction over matters tried by the tribunals.[54] As originally promulgated, decrees like NRC Decree 90 provided only that there shall be "no appeal" from decisions of a military tribunal. In *R. v Military Tribunal, ex parte Ofosu-Amaah*, [55] the High Court held that the words – "shall be final and no appeal shall lie from such a decision" – in section 4(7) of NRC Decree 90 denied the courts only appellate, but *not supervisory*, jurisdiction over decisions of the military tribunal. Thus, NRC Decree 90, in its original form, did not affect the traditional power of the High Court to issue prerogative writs upon proper application by an aggrieved person.[56] Accordingly, the High Court concluded that it still had power to consider an application for an order of certiorari to quash the decision of the military tribunal.[57] Following this ruling, the NRC amended the Subversion Decree expressly to oust the regular courts of both appellate and supervisory jurisdiction in respect of "any action or proceedings of any Military Tribunal."

From the outset, the Ghana Bar Association registered its opposition to the military tribunals. However, these tribunals remained firmly in place, holding mostly political trials involving charges of "subversion," a crime that was so vaguely defined as to encompass conceivably every protest against the government. In mid-1977, the government dismissed a number of

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[54]For a comprehensive discussion of the legal effect of "ouster clauses," see chapters six and seven of S.Y. Bimpong-Buta's The Law of Interpretation in Ghana: Exposition & Critique (1995).

[55][1973] 2 GLR 445

[56] In reaching this conclusion,t he presiding judge, then Justice Abban (now Chief Justice), invoked the time-honoured common law principle that the jurisdiction of the High Court to issue prerogative writs is not to be taken away by a legislature without express words to that effect.

[57]The High Court ultimately dismissed the appliction for certiorari on substantive grounds. This dismissal was affirmed on appeal. See Ex parte Ofosu-Amaah, [1978] GLR 328.

high-level public servants, including the Chief Justice (Azu Crabbe), in a series of reprisals directed against the professional and academic community for initiating a campaign of urban protests and strikes to back demands that the SMC government handover power to a transitional administration to be presided over by the Chief Justice.

In addition to military tribunals, the NRC/SMC also established an investigative unit, the Special Action Unit, which arbitrarily and sometimes forcibly interrupted or, in other ways, interfered with lawful judicial processes and orders of the courts. Indeed, disregard of judicial process and authority by soldiers became quite rampant during the NRC/SMC period and, in time, gave rise to the practice among the civilian population of summoning the aid of one's soldier-friends or relatives to "settle" private disputes extrajudically, or to shield one from criminal prosecution or civil liability for otherwise actionable conduct. The combination of a dual judicial system, the ouster of the regular courts' original and supervisory jurisdiction over a range of important matters, the removal of security of tenure for judges, and the extra-judicial actions of individual soldiers left the judiciary under the NRC/SMC with no real autonomy, except presumably in cases in which the government took little or no interest.

The general state of paralysis into which the entire country was plunged in the four-month interregnum following the fall of the SMC also affected the functioning of the courts. In a public broadcast on June 17, 1979, Flt-Lt Rawlings, Chairman of the AFRC, assured Ghanaians that his junta would not interfere with the independence of such institutions as the Electoral Commission and the Judiciary, stating that "[a]ny government which interfered with the affairs of these independent institutions is an enemy of truth."[58] Nonetheless, the Rawlings-led AFRC established its own "People's Courts" to try such persons as were brought before it. These trials were not open to the public; convictions were predictable and sentences harsh and often unorthodox. Eight former military officers, including three past military Heads

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[58] "Flt-Lt. Rawling's 17th June Address to the Ghana Nation," BBC Summary of World Broadcast, June 20, 1979, available in LEXIS, News Library, BBC File.

of Government (Acheampong and Akuffo of the NRC/SMC, and Afrifa of the NLC), were publicly executed by firing squad after they were presumably tried ("presumably," because the "trials" were secret), convicted and sentenced to death by the AFRC's "courts" on the charges of corruption and abuse of office.

The AFRC ousted the regular courts of supervisory or appellate jurisdiction over the proceedings and decisions of the People's Courts, and reserved for itself the power to approve or modify the decisions of its courts. Moreover, the practice, which had begun during the NRC/SMC era, of soldiers extra-judicially meting out punishment and "settling" private disputes without lawful authority grew exponentially and assumed more draconian proportions during the AFRC period. This, coupled with the general atmosphere of fear, intimidation and harassment by soldiers, undermined the rule of law and pushed the regular courts farther to the margins.

With the coming into force of the 1979 (Third Republican) Constitution, the Supreme Court of Ghana was re-established to replace the full bench of the Court of Appeal as the highest Appellate Court. The Supreme Court was again vested with power to review (upon application of an aggrieved party) the constitutionality of an Executive or Legislative act. In *Tuffuor v. Attorney-General,*[59] the Court of Appeal sitting as the Supreme Court exercised its power of judicial review to rule that under Article 127(8) of the 1979 Constitution, the holder of the office of Chief Justice upon the coming into force of the Constitution "was deemed to have been appointed" Chief Justice under the Constitution and, therefore, did not have to be renominated to that office by the President or be required to submit to Parliamentary vetting and approval. By this ruling of the Supreme Court, President Limann was prevented from carrying through with his announced intention to re-nominate the then Chief Justice (Apaloo) to the same office- an act which would have required the incumbent to go before Parliament for confirmation and, thereby risk being rejected by that body. Judicial independence did not otherwise come under any real threat from the executive or from Parliament during the abbreviated tenure of the Third Republican government.

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[59] [1980] GLR 637.

Upon the forcible overthrow of the Third Republic on 31st December, 1981, all the powers of government were vested in the new PNDC by the PNDC (Establishment) Proclamation. The 1979 Constitution was suspended; but all pre-existing courts and incumbent judges were to remain in place, subject to the proclamation and all other decrees (now called "Laws") of the PNDC. In a departure from past practice of military administrations, the PNDC did not abolish the Supreme Court, despite the suspension of the 1979 Constitution. This gesture did not, however, imply that the PNDC government had a favourable opinion of the Supreme Court or of the pre-existing judiciary, for that matter. Quite the contrary. While it permitted the courts to continue operating (albeit at its sufferance), the PNDC established (by PNDC Law 78) its own parallel "judicial" system, known as the Public Tribunals, to which it transferred jurisdiction over several new and broadly-written criminal offenses.

In announcing the establishment of these "people's tribunals," Chairman Rawlings, this time at the head of the PNDC, stated that the purpose of the tribunals was to dispense "revolutionary justice" to persons charged with "crimes against the people.[60]" Proceedings of the tribunals were to be "generally held in public" and defendants were to be entitled to Counsel of their choice and to an opportunity to cross-examine witnesses. But the tribunals, in the words of PNDC Chairman Rawlings, were "not [to] be fettered in their procedures by technical rules which in the past prevented the course of justice and enabled criminals to go free."[61] Thus, the burden of proof at the trials held by the public tribunals were generally weighted against the defendants, who often were arraigned before these tribunals with a presumption of guilt and, therefore, practically bore the burden of proving their innocence beyond reasonable doubt.

The PNDC public tribunals were given the discretion to seek the interpretative opinion of the Supreme Court on questions of law. These opinions

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[60] See Pranay B. Gupte, "Ghanaian Rulers Shake Up Courts," New York Times, Jan. 7, 1982 & A, at 11 (quoting Ghana radio).

[61] *Ibid*

were, however, to be merely advisory and of no binding effect on the public tribunal. Needless to say, no such opinion was ever sought by a public tribunal. A Public Tribunals Board was established and charged, *inter alia*, with selecting the members of a public tribunal. Members of the Public Tribunals Board were appointed by the PNDC, which also had unfettered discretion to remove a member of the Board.

Section 9(1) of the Public Tribunals Law[62] provided that "no court or tribunal shall have jurisdiction to entertain any action or proceeding whatsoever for the purpose of questioning any decision, judgement, finding, ruling, order or proceeding of a Public Tribunal set up under this Law." The courts of Ghana were specifically barred from entertaining any application for, or issuing, a writ of habeas corpus, mandamus, prohibition, or other prerogative writs in respect of any action taken by a public tribunal. By subsequent decree, the PNDC established a National Appeals Tribunal, members of which had no guaranteed tenure, to hear and determine appeals from the decisions or orders of the various Regional Public Tribunals and Commissions of Inquiry established by the PNDC. A decision of the National Appeals Tribunal was to be final.

The Ghana Bar Association saw the new system of public tribunals as an attempt by the PNDC to marginalize and eventually eliminate Ghana's regular judiciary. As a result, the Ghana Bar announced a boycott of the public tribunals. The already chilly relations between the Bar and Judiciary, on the hand, and the PNDC, on the other, reached their lowest point when, in July of 1982, three High Court judges and a retired Army Officer were abducted and later found executed. Suspicion immediately turned on PNDC insiders and their allies. A Special Commission, established to investigate these extra-judicial murders, implicated certain key government insiders, including some members of the PNDC itself. Later, five persons, among them a member of the PNDC at the time of the murders, were tried, found guilty, and sentenced to death by a public tribunal for the abduction and murder of the three High Court judges and the retired Army Officer. These sentences, however, were not sufficient to dispel rumours, or allay widespread public suspicion, of more direct complicity and culpability on the part of the PNDC.

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[62] PNDC Law 24 (later superseded by PNDC Law 78).

In June 1983, militant supporters of the PNDC marched on the judicial district of Accra, announced a takeover of the Supreme Court, the dismissal of the Judicial Council, the abolition of the post of Chief Justice, and the indefinite closure of the Ghana Law School, as part of a process of establishing a so-called "people's judicial system."[63] Though these actions were later reversed (but not repudiated) by the PNDC, supporters of the government had clearly indicated that they were prepared to use extra-legal methods, including physical intimidation, to cow the regular judiciary into obeisance. Pro-PNDC "people's defence committees" (PDC's) joined soldiers once again, in administering extra-judicially their own brands of social justice. The *de facto* privatization of law enforcement by PDCs was especially widespread during the early years of the PNDC. Needless to say, the schism between the legal community and the PNDC remained unmended, and public tribunals remained firmly in place throughout the remainder of the PNDC's eleven-years control over governmental power.[64]

With the reintroduction of constitutional democracy, the judiciary no longer exists at the sufferance of President Rawlings and his government. To the contrary, the regular judiciary has emerged constitutionally, once again, as the ultimate repository of the judicial power of the State. Although "public tribunals" have been retained, in name at least, their procedures have been regularized to conform with constitutional due process standards. In addition, the tribunals have now been subordinated to the supervisory and appellate jurisdiction of the regular courts.

It seems remarkable indeed that the Ghanaian judiciary has survived relatively intact, at least structurally, in spite of the efforts of successive military regimes to push-aside the regular courts in favour of their own "courts" and tribunals. Ironically, the judiciary's seeming resilience might be the unintended consequence of the very same attempts by past military juntas to sidestep that institution. The habit among Ghana's past military rulers of

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[63] Ghana Moves to Create 'People's Judicial System'," New York Times, June 26, 1983 & 1, at 5.

[64] For a brief survey of the PNDC's overall agenda and actions in the area of law and social justice, see Mike Ocquaye, "Law, Justice and the Revolution," in ghna under the PNDC (E. Gyimah-Boadi ed., Codesria 1993), at 155-175.

ousting the regular courts of jurisdiction over a host of matters, and channeling "political cases" to their own tribunals, rather than through the regular courts, may be said to have marginalized the courts in some respects. Yet, on the positive side, that practice also spared the courts the ordeal of practically being forced to legitimize the arbitrary laws and actions of the military rulers.

The institutional integrity and professional ethos of the judiciary would have been severely, and perhaps irreparably, damaged had successive military governments not created parallel and compliant tribunals, and had they chosen, instead, to make the regular courts pass off on all manner of oppressive laws and actions. In some isolated instances, the courts of Ghana could not escape being placed in that position. But, on the whole, the various decrees ousting the courts of jurisdiction over a number of actions sanctioned by the military saved the courts generally from having to lend their imprimatur to the action of the military governments.

The 1992 Constitution now gives the judiciary renewed stature and independence within a system of separation of powers. Under the 1992 Constitution, as under the 1969 and 1979 Constitutions, the Supreme Court has the all-important power of judicial review, which places the Court in a position to restrain and check unconstitutional acts even of the President. In fact, since the new Constitution came into effect in January 1993, private plaintiffs, including notably, the opposition New Patriotic Party (NPP), have prevailed against the government in a number of politically significant cases decided by the Supreme Court.[65]

The spate of initial "defeats" suffered by the government in these constitutional cases, prompted an aggrieved President Rawlings to register publicly

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[65] See, e.g., *New, Patriotic Party v. Electoral Commission*, Sup. Ct., Suit No.11/93, 17 Aug. 1993 (op. delivered 16 Sept., 1993) (enjoining outgoing district assemblies from approving government-nominated district chief excutives ahead of impending district assembly elections); *New Patriotic Party v. Ghana Broadcasting Corp.*, Sup. Ct., Suit No. 1/93, 22 July, 1993 (op. delivered 30 Nov, 1993 (ordering state-owned broadcasting station, pursuant to articles 55(11) and 163 of the Constitution, to grant the opposition party "fair and equal access to its facilities within two weeks," to enable the party to present publicly its views on the government's budget); *New Patriotic Party v. Inspector General of Police*, Sup. Ct., Suit

his disapproval of the enhanced power of the Supreme Court and to accuse the court (in his State of the Nation address in 1994) of using its power of judicial review as an excuse to stage a "judicial *coup d'etat*" of sorts by supposedly usurping the authority of the elected branches of government.[66]

By this and other statements, President Rawlings made it clear that he remained distrustful of an impatient with the judiciary he had inherited. The Ghana Bar, on the other hand, also doubted Rawlings' democratic *bona fides*, and suspected that given an opportunity the President would attempt to "pack the courts" and thereby bend the judiciary to his wishes. Thus

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No. 3/93, 22 July, 1993 (op. delivered 30 Nov., 1993) (striking down as unconstitutional sections of the Public Order law requiring organizers and participants of protest marches and demonstrations to obtain prior police permission); *New Patriotic Party v. Attorney-General* (the "31st December Case"), Sup. Ct., Suit No. 18/93, 29 Dec. 1993 (op. delivered 8 March, 1994 (enjoing as unconstitutional the planned celebration by the government of the anniversary of the Rawlings-led coup of 31st December, 1981, as a public-funded national holiday). For a brief, but insightful, discussion of these and other cases decided by a Supreme Court, see chapter ten ot *Bimpong-Buta's The Law of Interpretation in Ghana.*

66 The one case, above all, which clearly was a thorn in the flesh of the Rawlings government is the *31st December Case*, a suit brought by the leading opposition party to enjoin the government's planned celebration from public funds of 31st December, 1993 as a public holiday to mark the date of the 1981 Rawlings-led coup d'etat tht toppled the constitutionally elected Third Republican government of Dr. Limann. The plaintiffs argued that the mandatory, tax-funded celebration of an event such as the 31 December, 1981 *coup d'etat*, which was a forcible and extra-constitional removal of a lawfully and democratically constituted government, was inconsistent with the spirit of the 1992 Constitution, several provisions of which are designed to prevent future coups and to encourage Ghanaians to resist attempts to forcibly overthrow a constitutionally constituted government. In a 5-4 decision, the Supreme Court granted the injunction sought by the plaintiffs, holding that a tax-funded celebration of an event marking the extra-constitutional removal of a constitutional government was indeed inconsistent with the anti-coup and pro-democracy spirit of the 1992 Constitution.

Following the Supreme Court's issuance fo the injunction prohibitingthe public-funded celebration of 31st December, 1993 as a public holiday, the government released a statement promising compliance with the Court's ruling. Accordingly, the government cancelled the planned celebration of the anniversary of the 31st December coup. But it went ahead with a hastily-arranged and public-funded celebration of a substitute anniversary (the first anniversary of the Fourth Republic of Ghana), from December 31, 1993 to early January, 1994. This move was interpreted in certain quarters as an indirect way of celebrating the 31st december coup, in disregard of the Supreme Court injunction. See The Independent, Vol.3 No.55 (Jan. 12-18, 1994).

when in 1995, Justice Isaac Abban, then a Judstice of the Supreme Court, was appointed by the President (with Parliamentary approval) to the head of the judiciary as Chief Justice of Ghana, the Ghana Bar Association swiftly and publicly opposed the nominations.[67]

The Bar Association claimed that the appointment of the Chief Justice had been rushed through Parliament without sufficient time for debate or public comment. In addition, the association charged that the new Chief Justice had, during his tenure as a Justice on the Supreme Court, privately retracted and revised his opinion in a politically-sensitive case after an article appeared in a newspapers alleging that he had committed an embarrassing error of attribution which sought to cast former Prime Minister Busia, an icon of the Rawlings' opposition, in bad light. The Bar Association stated that this incident called into question Justice Abban's integrity and rendered him "unfit" for the high office of Chief Justice.[68] In fact, the Bar Association filed suit in the Supreme Court, asking the Court to declare Justice Abban "unfit" for the office of Chief Justice, and to nullify his appointment to that office. The association based its claim, *inter alia*, on a provision of the Constitution limiting high judicial office to seasoned

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[67] One might wonder why the bar association would protest the appointment as Chief Justice of a person who is a sitting justice of the Supreme Court. The explanation lies in the additional powers which are exercised by the Chief Justice not only in his capacity as administrative head of the judiciary, but also *vis-a-vis* his peers on the Court. Because of a constitutional omission, it is the Chief Justice that selects five-member panels of the Supreme Court to hear particular cases. As the discussion on pages 63-65, *infra*, will show, this places too much power in the hands of the Chief Justice and potentially undermines the decisional independence of the other justices on the Court. Unless the procedure for empaneling the Supreme Court is consitutionally revized in a manner that takes away the power of a Chief Justice, acting alone, to determine which judges hear which cases, appointments to the office will inevitably be politicized.

[68] The bar association's opposition was reinforced by the fact that the Supreme Court (at about the same time) had sentenced, among others, a lawyer and columnist for the Free Press, an avowedly anti-Rawlings newspaper, to serve a one-month prison sentence (with hard labour) for criminal contempt arising out of the publication in the newspaper of the article which called attention to Justice Abban's error of attribution and castigated him in no uncertain terms for the mistake. See pages ___-___, *infra*, for a discussion of this case and its implications for judicial accountability in Ghana.

lawyers of "high moral character and proven integrity."[69] The case, *Ghana Bar Association v. Attorney-General & Justice Abban* (the "*Abban Case*"), was however dismissed by a five-member panel of the Supreme Court, [70] which had also earlier dismissed an application by the Bar Association requesting that the challenge to the Chief Justice's appointment be heard by the full bench of the Supreme Court.

Although the Bar Association did not publicly state so, it appears that its opposition to Justice Abban's appointment as Chief Justice stemmed largely from its belief that the judge might be unduly beholden to President Rawlings; a belief that no doubt stemmed from the details of Justice Abban's judicial career.

Justice Abban first came to public notice and attention when, as a judge of the High Court, he was appointed Electoral Commissioner to oversee the conduct of the ill-fated "Union Government"[71] referendum called by the Acheampong-led SMC in March of 1978. Perhaps in recognition of the transparent and incompliant manner in served his abbreviated tenure as Electoral Commissioner,[72] Justice Abban later was appointed, during the

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[69] See Const. of Ghana (1992), art 128(4).

[70] In a four-to-one decision, the Supreme Court (per Justices Kpegah, Bamford-Addo, Hayfron Benjamin, and Adjabeng) upheld a preliminary objection by the defendants that the plaintiffs' claims raised a nonjusticiable "political question." Justice Edward Wiredu dissented on this isse. However, he agreed with the majority that the Court could not properly assert jurisdiction over the matter. Unlike the majority, however, Justice Wiredu based his opinion on Article 146 of the Constitution, which sets forth the basis and procedure for the removal of a Chief Justice. For a discussion of the political question in doctrine in the context of constitutional adjudication under the Fourth Republic, see discussion in footnotes 90, 91 and 92, *infra*.

[71] "Union Government" (*Nkabom Aban*) was a proposal for a new form of elected "no party" government with formal institutional representation for the military and the police. The representation of civilians, soldiers and police personnel in the formal structures of government was touted as a kind of "holy trinity" that would unite all sections of the Ghanaian political elite in the running of the State. Whatever its intuitive appeal, *Nkabom Aban* was perceived by most Ghanains as a pretext for the constitutionalisation and, thus, perpetuation of military rule in Ghana. For a thorough discussion of the Union Government debate and events surrounding the campaign and referendum see chapter 7of Mike Ocquaye's *Politicis in Ghana 1972-1979*.

brief AFRC interregnum, as Chairman of the AFRC Social Tribunal established to complete the outstanding docket of the AFRC People's Courts, upon the country's return to constitutional rule in September 1979. Justice Abban acceptance of this role must have, no doubt, strained his ties to the traditional legal establishment, but at the same time it must have earned him the personal trust of Rawlings (then Chairman of the outgoing AFRC junta).

During the Third Republic, Justice Abban was nominated to the Supreme Court of Ghana by President Limann, but his nomination was rejected by a majority vote of Parliament. Later, when Rawlings came to power again, this time at the head of the PNDC, it was revealed in testimony before the PNDC created National Investigations Committee (NIC) that Justice Abban's nomination to the Supreme Court in 1980 had been rejected by Parliament because he had refused to implicate Rawlings in the November 1979 "Usher Fort jailbreak" incident, in which a number of soldiers convicted by the AFRC "courts" forcibly freed themselves from the Usher Fort Prison in Accra. As proof that Rawlings 'confidence in Justice Abban's integrity had not wavered, the PNDC Chairman appointed the judge to the Court of Appeal, and ordered that the appointment take retroactive effect from July, 1981, six clear months before PNDC itself became, by decree, the *de jure* government of Ghana. (Later during the PNDC administration, Justice Abban took a leave of absence to serve as Chief Justice of the island African nation of Seychelles, a position he vacated in May 1993).

Once Rawlings' 1995 appointment of Justice Abban as Chief Justice of Ghana is placed in its proper historical context, it becomes apparent why the Ghana Bar might have harboured suspicions and doubts about the judge's ability to stay independent of his political benefactor. But despite the Bar Association's opposition, which was also backed by a two-week boycott of the courts, Justice Abban has remained as Chief Justice.

No matter what political motivations may have been behind Rawlings' choice of Justice Aban as Chief Justice or behind the Bar Association's opposition

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[72] See Mike Ocquaye, *ibid*, at 97-105

to the appointment, there is no gainsaying that the open and decidedly partisan fracas that attended that appointment was a setback to the cause of judicial independence in Ghana's Fourth Republic. Since Justice Abban's appointment, there have been other less-publicized, but also controversial appointments to, and departure from, the Supreme Court. At the same time, the government's earlier trail of defeats before the Supreme Court seems to have abated, lending anecdotal support to charges that the Court, with Chief Justice Abban at the helm, is biased in favour of Rawlings' government.

Regarding the latter charge, it must be emphasized that the Supreme Court need not be antagonistic to the government or to the President in order to establish its *bona fides* as a politically independent court. Indeed, except where it must deal with an "illegitimate government" (i.e., a government that is not electorally established or electorally accountable), a court that is *a priori* antagonistic toward a particular government runs the risk of undercutting its own authority and credibility. Like every other party that appears before a court, the government *qua* litigant is entitled to impartiality and fairness (no less, no more) from the bench. Moreover, the independence of the Supreme Court (or of any court, for that matter) must not be measured by a simple arithmetic count of which or how many litigated cases the government wins or loses. The courts must be judged, instead, by the wisdom as well as the legal correctness and sufficiency of the reasoning and principled analysis which they put forth in support of their judgements. And in the area of constitutional interpretation the performance of the Supreme Court must must also be assessed on the basis of whether its decisions promote or undermine underlying constitutional principles of popular sovereignty, accountability in public life, and respect for human rights and social justice.

If the view persist, especially among members of the Bar, that the Supreme Court has become practically the judicial arm of the government in office, the future of constitutionalism in Ghana will be greatly imperilled. A loss of confidence in the Court will make plaintiff's lawyers reluctant to take constitutional cases to the Court, so as to avert the perceived risk of creating "bad" constitutional precedents. On the other hand, if palpable constitutional breaches go unlitigated, the underlying practices and behaviour will, with time, take on the force of convention. And once they achieve the

status of convention, such unlitigated constitutional breaches could become *de facto* a part of the constitutional *law* of Ghana.

In short, an appearance of bias on the part of the Supreme Court, especially toward an incumbent government, will hinder the smooth evolution of constitutionalism and democracy in Ghana. Still, it seems rather hasty to pronounce judgement on the performance and independence of the Ghanaian judiciary under the Fourth Republic simply on the basis of the "victories" scored by the government in certain cases that have been decided by the courts, and in particular by the Supreme Court. Indeed, by a purely numerical count, the Rawlings government appears, thus far, to have lost more politically significant cases than it has won in the Supreme Court,[73] including, most recently, the decision in *J.H. Mensah v. Attorney General* (the "*Ministerial Appointments Case*"), in which the Court held that all persons nominated by the President for appointment as Ministers of State, including Ministers retained from a previous term of the President, must receive the "prior approval" of the current Parliament.[74] But beyond a simplistic tally of wins and losses, what really matters is whether the decisions of the Court advance political pluralism, citizen involvement in public affairs, social justice and equity, and accountability in government, or whether they undercut these democratic values enshrined in the Constitution. Moreover, the entire judiciary should not be evaluated solely on the basis of a few high profile cases decided by the Supreme Court. Such cases, though critical to the future of democracy in Ghana, represent only an infinitesimal portion of the huge volume of judgements rendered daily in the various other courts and tribunals in the country. A fixation with high-profile constitutional cases or with the activities of the Supreme Court

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[73] See footnote 65, *supra*.

[74] Other aspect of the Court's decision in this case leave much to be desired. For example, the Court rejectcd the petititioner's argument that "consideration and vetting is a necessary incident to approval." Instead, the Court construed the term "approal" of Parliament to mean simple vote of Parliament, without a requirement of vetting. Beside its lieralism, this ruling plainly ignores the fact that Parliament is, first and foremost, a deliberative body; thus the process of parliament debate is, at least for the public, as important as, and generally more enlightening than, the vote that is taken at the end of it. Moreover, the ruling effectively leaves minority parties in Parliament without much influence int he process of confirming ministerial appointments.

robs the public of the opportunity to know what transpires in the countless Magistrate Courts and local tribunals which daily sit in judgement over the lives, liberties and property rights of most average Ghanaians, and which are infamous for the quality of justice they deliver. Indeed, public scrutiny of the judiciary must extend beyond the Superior Courts to these other obscure courts and tribunals, because, for large sections of the population especially outside the urban capitals "the judiciary" begins and ends with these "inferior courts."

CHAPTER III

Building an Independent Judiciary in the Fourth Republic

The restoration of civil authority and order to a society is a necessary first step toward creating a climate conducive to the smooth running of the courts, Judicial independence is always at risk, and often actually imperiled, whenever civil authority is subjugated to military command, no matter how self-restrained or benevolent the latter may be. As Ghana's experiences under the military bear out, the general atmosphere of fear among the civilian population that characterizes military rule, coupled with the tendency for soldiers to engage in extra-judicial law enforcement, is hardly the kind of environment within which courts can be expected to operate freely and independently. In fact, the evidence this far offers ample support for the view that military rule, or rule by decree in general, is *per se* incompatible with the independent exercise of judicial power by the courts of a country. In this regard, Ghana's return to civilian constitutional rule provides an enabling environment for the emergence of the independent judiciary contemplated by the 1992 Constitution.

The 1992 Constitution has several provisions pertaining to the judiciary. In fact, an entire chapter of the twenty-six chapter document, covering a total of thirty-seven articles, is devoted to "The Judiciary." Article 125(3) establishes the judiciary as a separate branch of government, by providing that, "The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power." It is important to note that this provision does not give the judiciary monopoly over the exercise of judicial power. What it does give the judiciary, however, is "final judicial power." This means that, although institutions like the Traditional Councils and the various regional Houses of Chiefs, the National House of Chiefs, Commissions of Inquiry, as well as certain administrative bodies, such as the Commission for Human Rights and

Administrative Justice (CHRAJ), may also perform functions that might be considered "judicial" in nature, in the end it is the regular courts that have the last word in "all matters" judicial. [75]

The Constitution creates a three-tier structure of "Superior Courts," with Parliament retaining the power to establish "lower courts and tribunals." [76] At the apex of the judicial structure[77] is the Supreme Court, and below it the Court of Appeal, the High Court and Regional Tribunals, and then the lower courts and tribunals, in that order. Being the final repository of the judicial power of the State, the Supreme Court's decisions on "questions of law" are *mandatory* authority, and, therefore, binding on all the courts below it. [78] However, while it is free to look to the decisions of other courts, including courts of other national jurisdictions, for their persuasive authority,[79] the Supreme Court of Ghana is not bound to follow the precedents of any other court. In fact, under the Constitution, the Supreme Court's is free to depart even from its own past decisions. [80]

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[75] See discussion in footnotes 88-91, infra, regarding certain limitations on the scope and exercise of the jurisdiction of the courts.

[76]Const. of Ghana (1992), art. 126, clause (1).

[77]For a more comprehensive discussion of the structure of the court system under the 1992 Constitution, see S.Y. Bimpong-Buta, *The Court System Under the 1992 Constitution - Jurisdiction & Powers of the Courts.* (Paper delivered at Ghana Bar Association First Workshop on Continuing Legal Education, March 18, 1993).

[78]Const. of Ghana (1992), art. 129, clause (3).

[79]The dominance of military dictatorship in Ghana's forty-year political history has severely hampered the smooth development and evolution of homegrown constitutional law and jurisprudence by the Ghanaian courts. Thus, during the early phases of the country's transition to a constitutional democracy, and until constitutionalism is firmly implanted, the court cannot avoid "borrowing," as and when necessary, precedents from cognate jurisdictions that are jurisprudentially more mature. Precedents from other emerging democracies are also useful, since courts in societies at roughly the same stage of democratic transition tend to be presented with similar legal and constitutional questions.

[80]Const. of Ghana (1992), art. 129, clause (3).

This latter provision is obviously intended to liberate the Justices of the Supreme Court from a rigid adherence to tradition and *stare decisis*. It is also a recognition that the Constitution is a living and evolving document, not a document etched in stone. Moreover, granting the Supreme Court the power to reverse its own past decisions is an affirmation of the fact that the Justices of the Court, being mere mortals, are susceptible to error and should be free to re-evaluate their decisions and correct their past mistakes, if need be.

Nonetheless, in order to preserve its institutional credibility, the Supreme Court must exercise its discretion in this regard sparingly, possibly limiting it to instances where a previous decision of the Supreme Court appears "manifestly erroneous" or has been rendered anachronistic by subsequent events, so that leaving the decision on the books will only serve to perpetuate a "legal injustice." A previous decision of the Supreme Court should not be overturned merely because a "faction" of the Court that was in the minority at the time the case was first decided is now in the majority as a result of changes in the membership of the Court. Changes in decisional law (that is, the law as established by judicial decision) that occur purely by virtue of changes in the faces on the Supreme Court will undermine the credibility of the Court.

In terms of the scope and distribution of judicial power, the Constitution grants the Supreme Court *exclusive original jurisdiction* in two areas.[81] First, all matters involving the interpretation or enforcement of the Constitution must commence in the Supreme Court, except matters relating to the enforcement of the Constitution's provisions on Fundamental Human Rights and Freedoms, which must be brought in the first instance in the High Court.[82] This means that the power of judicial review, which in the United States may be exercised by courts at all three levels of the federal judiciary, is, in Ghana, concentrated in the hands of the Supreme Court. Second, the Supreme Court has exclusive original jurisdiction in all matters in which it is claimed that Parliament or some other constitutional body has acted *ultra vires*.

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[81] Ibid., art, 130

[82] Ibid., art, 140, clause (2).

In addition to its limited original jurisdiction, the Supreme Court also has final appellate jurisdiction in four areas.[83] First, the Supreme Court is required to hear appeals involving matters, both civil and criminal, which began initially began at the High Court or Regional Tribunal and were subsequently appealed to and decided by the Court of Appeal. Second, if the Court of Appeal so permits, a matter that began at a lower court or tribunal (i.e., a court below the High Court or a Regional Tribunal, such as a Circuit Court), and that was then appealed to and decided by the Court of Appeal, may further be appealed to the Supreme Court. Third, in all cases decided by the High Court involving treason, an appeal must be made directly to the Supreme Court. Finally, the Supreme Court may, at its discretion or at the request of the Judicial Committee of the National House of Chiefs, hear an appeal from a judgement rendered by the latter body.

The intermediate level of the superior court system is occupied by the Court of Appeal. As its name suggests, the Court of Appeal exercises only appellate jurisdiction. The jurisdiction of the Court of Appeal covers appeals from the judgements or orders of the High Court and Regional Tribunals.[84] However, as earlier mentioned, an appeal from the High Court in a matter involving conviction or acquittal for treason must go directly to the Supreme Court. Unlike the Supreme Court, which need not consider any court's or even its own precedents as necessarily binding, the Court of Appeal is required to consider as mandatory authority all precedents of the Supreme Court of Ghana "on questions of law." And to the extent that its own past decisions have not been overturned by the Supreme Court, the Court of Appeal is equally bound by those decisions.

At the bottom of the superior court structure (but not of the judiciary as a whole) are two parallel courts: the High Court and the Regional Tribunals. Both are generally courts of original jurisdiction; but Parliament has the power under the Constitution to confer some limited or residual appellate

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[83] Ibid., art, 131.

[84] Ibid., art, 137.

jurisdiction on both courts. As with the Court of Appeal, both the High Court and the Regional Tribunals are bound to follow the relevant precedents of the Supreme Court on questions of law. In addition, the Court of Appeal's decisions on questions of law, to the extent they have not been overruled by the Supreme Court, are also binding on the High Court and Regional Tribunals.

Although it would seem that the High Court and the Regional Tribunals are co-equal, in reality the scope of the judicial power exercised by the High Court is much greater. The jurisdiction of a Regional Tribunal is *limited* to trying "offenses against the State and the public interest as Parliament may, by law, prescribe."[85] In contrast, the original jurisdiction of the High Court extends to all civil and criminal matters, except those matters over which the Supreme Court has exclusive original jurisdiction.[86] Furthermore, the High Court has exclusive original jurisdiction over all matters dealing with the enforcement of the fundamental; human rights and freedoms guaranteed under the Constitution.[87]

Besides placing the final judicial power of the State in a separate judiciary, the 1992 Constitution of Ghana also contains several provisions designed to give incumbent judges the autonomy and security they need to enable them to perform their work independently of the executive and legislative branches.

First, Article 127(1) of the Constitution provides that "[i]n the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to the th[e] Constitution and shall not be subject to the control or direction of any person or authority." As if to re-emphasize this point, the Constitution, in Article 127(2), further provides that "[n]either the President nor Parliament

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[85] Ibid., art, 143, clause (1).

[86] Ibid., art, 140.

[87] Ibid., art, clause (2).

nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions.

Second, under article 125(5), the judiciary is given jurisdiction in the "all matters, civil and criminal, including matters relating to the Constitution,"[88] which jurisdiction cannot be ousted or diminished by Parliament. This provision promotes judicial independence by denying the legislature and the executive the power to chip away at the authority of the courts by selectively ousting them of jurisdiction.[89]

The breadth of the courts' jurisdiction under the 1992 Constitution was

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[88] *Ibid.*, art. 125, caluse (5) ("The Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as Parliament may, by law, confer on it").

[89] Although article 125(5) states that the courts have jurisdiction over "all" matters, the Transitional Provisions of the 1992 Constitution, which are in fact perpetual in substance anmd effect, *oust* the courts of jurisdiction in matters in which the legality or validity of any executive, legislative or judicial action taken by or on under the authority or on behalf of the erstwhile PNDC government is called into question. In *Ekwam v. Pianim*, the Supreme Court affirmed the constitutional validity of the Transitional Provisions, when it refused to examine or question the legality of a criminal sentence handed down by a PNDC public tribunal against the respondent, Mr. Kwame Pianim. The Court held that the respondent's pre-1992 conviction by a PNDC public tribunal on charges of plotting to overthrow the Rawlings-led PNDC government operated to bar the defendant from holding national elective office under the 1992 Constitution, Articles 62(c) and 94(2) of which prohibit persons convicted, *inter alia*, of an "offence involving the security of the State" from holding the offices of President or Member of Parliament. These Transitional Provisions thus have the purpose and effect of immunizing the PNDC and its operatives against legal liability, civil or criminal, arising out of the purported acts or decisions of the PNDC. While such immunity may be a necessary price to pay in order to pave the way for a smooth transition to democratic politics and constitutionalism, a policy of *blanket* exoneration of *all* acts of the PNDC and its operatives - including, arguably even those acts that were done in the name of PNDC but in violation of the PNDC's own public laws - perverts the principles of governmental accountability and the rule of law to which the 1992 Constitution is commiteed. In addition, because the Transitional Provisions amount to to an act of self-exoneration by the PNDC, they have little value in terms of closing the chapter on the PNDC era and fostering reconciliation between the PNDC elements and other factions of the national political elite that were opposed to the PNDC regime, and whose members bore the brunt of the often arbitrary and punitive acts and decisions of PNDC operatives.

tested in the 31st December Case.[90] The plaintiffs in that case, the New Patriotic Party (NPP), challenged the constitutionality of the decision of the government of the National Democratic Congress (NDC), led by President Rawlings, to celebrate as a public-funded national holiday the anniversary of the Rawlings-led *coup d'etat* of December 31, 1981. The Attorney-General argued before the Supreme Court that the matter was a "political question"[91] and, therefore, outside the jurisdiction of the courts. However, in the 31st December Case, a majority of the justices declined

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[90] The preliminary issue in the *31st December Case* was whether a controversy over the declaration and celeberation from public funds of 31st December, 1993, as a public holiday raised a "justiciable" question or whether instead, such a controversy presented only a non-justiciable "political question." The question could have been framed alternatively as whether under the 1992 Constitution, the executive and the legislature, acting together, have plenary power to decalre and celebrate out of public funds *any event whatsoever* as a public holiday, or whether, under the Constitution, there is a certain class of events that cannot lawfully be celebrated as a public holiday from taxpayer funds? For example, can the government lawfully declare and celebrate as a public-funded national holiday the event marking the founding of the ruling party or the birthday of the incumbent President? Though there is no constitutional provision that speaks directly to the government's power in this regard, there is no question that a tax-funded public holiday declared to mark the founding of the ruling party or the birthday of the incumbent head of state would be unlawful under the 1992 Constitution of Ghana, which is committed to a republican and pluralistic democracy. If so, then the decision in the 31st December Case seems perfectlyu justifiable, given the anti-coup tenor of the present Constitution.

[91] The "political question" doctrine is a principle of constitutional adjudication which recognizes that certain issues, though framed as cases to be litigated before a court of law, are, in fact, nonjusticiable, because they are, by their inherent nature, committed or better amenable to resolution through the political process or by the politicial branches. See *Luther v. Borden*, [1849] 48 U.S. (7 How.) 1; *Baker v. Carr*, [1962] 369 U.S. 186. The political question doctrine therefore has the effect of taking certain types of cases out of judicial consideration and resolution. It is important to emphasize, however, that merely because a court decides that a case is governed by the political question doctrine does not mean that the court lacks "jurisdiction" over the matter. Rather, the doctrine recognises that, though the court's jurisdiction technically extends to the case at hand, a proper reading of the Constition would appear to suggest that another branch of government also has "jurisdiction" over the matter and, as between the court and that other branch, the latter is institutionally better suited to handle the particular issue. Among the factors that affect the applicability of the political question doctrine are (i) whether the Constitution gives another branch some power or control in handling the particular matter; (ii) the nature of the relief sought in the case; (iii) the type of factual information needed to resolve the matter; and (iv) whether the enforcement of, or compliance with, a final judgement can easily or competently be monitored by the courts. It must also be recognized that the political question doctrine does not purport to place out of the reach of the judiciary all cases that are "political," either because of the identities of the parties involved, the politics surrounding the case, or the likely impact of the case on the allocation and distrbution of political power in the state. *See Powell v. McCormack*, [1969] 395 U.S. 486. If it were otherwise, nearly all constitutional cases would be nonjusticiable, since constitutional cases tend to raise issues of immense political interest and consequence.

the invitation to apply the political question doctrine to deny judicial consideration of the plaintiffs' claim.[92]

Third, in matters of statutory interpretation, decisions of the courts cannot be overturned or nullified retroactively by the legislature. Under Article 107, Parliament has "no power to pass any law" that has the purpose or effect of retroactively altering a decision of any court (as between the parties in that case). If Parliament disagrees with the way in which the courts have construed a particular piece of legislation, Parliament is free to amend the legislation to clarify the legislature's intent. However, the amended legislation will apply only prospectively, without affecting the outcome of cases decided under the prior law.

Fourth, the right of persons to sue or initiate court proceedings against the government or public officers, whether under the Common Law, a Statute,

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[92] The majority in the *31st December Case* was not, however, in complete agreement regarding whether the political question doctrine is cognizable under Ghana's 1992 Constitution. Justice Adade, the most senior among the judges int eh majority, took the postion that the political question doctrone, which is an innovation of American constitutional jurisprudent, did not apply in Ghana. On his part, Justice Hayfron-Benjamin, who aslo voted with the majority, took a less extreme view of the matter. In his view, the doctrine had some limited application to constitutional adjudication in Ghana. Justice Hayfron-Benjamin would limit the political question doctrine only to cases "where the constitution expressly commits a particular responsibility to some [other] arm of government." As an example, he mentioned the power to appoint Ambassadors, which is expressly granted to teh President under article 74(1). Limiting the politicial question doctrine to instances where the matter in dispute has been constitutionally to resolve the matter) is consistent with the way in which the doctrine is supposed to work. *See Baker v. Carr*, 369 U.S. at 217 ("Prominent on the face of any case held to involve a political question is found a textually demonstrable a constitutional commitment of the issue to a coordinate political department"). In any case, the decision of the Supreme Court in the *Abaan Case*, in which the Court held that the question of a person's fitness for appointment to the office of Chief Justice is a political question, clearly indicates that the political question doctrine is now recofnized as part of Ghana's constitutional jurisprudence.

or the Constitution, is guaranteed by the Constitution.[93] This means that, except in cases where the government itself initiates an action in court, neither Parliament nor the Executive has control over who gets to be heard in court or what cases the judges may decide to hear.

Fifth, the salaries and other emoluments and benefits of judges are paid out of the Consolidated Fund, which means that their salaries do not depend on a year-to-year debate and vote of Parliament or the Executive.[94] These provisions are designed to prevent the political branches, which control the purse, from threatening cuts in judges' salaries and benefits as a form of putting economic pressure on the Judiciary to act in a particular manner.[95] More important, the 1992 Constitution gives the judiciary autonomy in the preparation of its annual budget. Under Articles 179(3), (4) and (5), the annual budget estimates for the Judiciary are prepared by the Judiciary itself, under the direction of the Chief Justice acting consultation with Judicial Council. The role of the Executive in this process is limited to the requirement that the President lay before Parliament, without revision but with comments or recommendations, the budget estimates submitted by the Chief Justice. [96]

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[93] Const. of Ghana (1992), art.2., clause (1) ("A person who alleges that (a) an enactment or anything contained in or done under the authority of that or other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of aprovision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect"). See alsi ibid., art 293, cl. (1) ("Where a person has a claim against the Government that claim may be enforced as of right by proceedings taken against the Government for the purpose without the grant of a fiat or use of the process known as petition of right.").

[94] Ibid., art. 127, clauses (4) & (5).

[95] Of course, because Parliament has the power to increase or not to increase judges' salaries and other benefits, it still has the ability to use the power of the purse strategically to influence the judiciary.

[96] This arrangement now resolves in favour of the judiciary a dispute that arose during the Third Republic concerning which official, the Chief Justice or the Minister of Finance, had authority to prepare the judiciary's annual budget estimates.

Sixth, the Constitution grants judges immunity form lawsuits or other legal process for acts or omissions, including utterances, which they might make in the course of performing their judicial function.[97] (It is instructive that the Constitution says nothing about judges having immunity from public or media criticism).

Finally, unless they have reached the mandatory retirement age,[98] judges cannot be suspended or removed from office except for "stated misbehaviour or incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind."[99] And even where such legitimate grounds exist, the process for removing judges, which involves an investigation and *in camera* hearing by a multi-member panel comprising other judges and lay citizens chosen independently of Parliament and the President, further insulates members of the bench from direct control by political operatives.

Taken together, these provisions should provide incumbent judges with sufficient security against Executive and Legislative muscle-flexing and incursions into the judicial domain. Concerns about judicial independence, however, do not emerge only after judges have been appointed to the bench. As a matter of fact, threats to judicial independence often begin *before* a judge gets on the bench. Thus, such issues as the process for appointing judges and the mode of constituting a court need to be carefully considered. When the issue of Judicial independence is analyzed from that angle, it becomes apparent that certain provisions of the 1992 Constitution place the independence of the Ghanaian Judiciary at significant risk of political manipulation.

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[97] Const. of Ghna (1992), art. 127, clause (3).

[98] The mandatory retirement age is 70 years for justices of the Supreme Court and the Court of Appeal, and 65 for judges of the High Court and Chairmen of the Regional Tribunals.

[99] Const. of Ghana (1992), art. 146, clause (1).

Among the most troubling of such provisions are those dealing with the size and composition of the Supreme Court. Article 128(1) provides that "[t]he Supreme Court shall consist of the Chief Justice and not *less* than nine other Justices of the Supreme Court." This means, obviously, that the Supreme Court, when fully constituted (i.e., the full bench), must have a *minimum* of ten members. But there is no telling what the *maximum* number of Supreme Court Justices could be. (Currently, there are 12 Justices on the Supreme Court). Thus, as currently written, Article 128(1) literally allows the President (with the approval of Parliament) to keep adding *ad infinitum* to the number of Justices on the Supreme Court.

The failure of the Constitution to state explicitly what the maximum number of Justices of the Supreme Court must be is quite ominous. By leaving the maximum size of the Supreme Court indeterminate, the Constitution offers a President with a parliamentary majority an opportunity, and indeed the incentive, whenever he is faced with a Supreme Court he considers "unfriendly" or "difficult," to neutralize that perceived "opposition" by appointing more "government-friendly" Justices to the Court. This open invitation to the President to engage in "court packing"[100] at the highest level of the judiciary is a major defect of the Constitution, and one that could severely undercut judicial independence.

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[100] "court packing" involves deliberate efforts by the Executive to alter or influence the outcome of cases before the courts by replacing or neutralizing judges perceived to be "too independent" or "anti--government" with judges who are known to subscribe to the philosophy or ideology of the government. A court packing plan may be implemented as judges retire or, where the size of the Court is not fixed, by appointing more and more "pro-government" judges to the Court. In 1937, after a series of Supreme Court decisions invalidating a number of mesures taken by U.S. President Franklin D. Roosevelt as part of his "New Deal" Plan, Roosevelt introduced a bill increase the number of justices on the United States Supreme Court from nine to fifteen, a move which would have allowed him to appoint six additional justices who would be favourable to "New Deal" legislation and would thus join previously appointed "New Deal" judges to outvote the conservative judges in cases involing New Deal reform legislation. Roosevelt's court-pakcing plan was, however, rejected by the U.S. Congress.

Another related problem, also stemming from Article 128, is the issue of how the Supreme Court is operationally constituted. Under Article 128(2), the Supreme Court is "duly constituted for its work by not less than five Supreme Court Justices," except when it sits to review its own earlier decisions, in which case, under Article 133, a minimum of seven justices is required. This provision raises two concerns. First, Article 128(2) does not stipulate *how* or by whom the panels of the Supreme Court shall be constituted. Second, the provision allows the business of the Court to be conducted at all times by less than a full bench of the Court.

By convention, it is the Chief Justice that selects, or at least has the discretion to select, a five-member panel of the Court to hear a case. The problem, however, really lies not with *who*, by with *how* each such panel is constituted (*i.e.*, the procedure by which the Chief Justice selects which five justices must hear a particular case). To prevent the Chief Justice from engaging in a kind of "forum shopping" (*i.e.*, trying to fix the outcome of a case through deliberate selection of which judges will heave the case), the justices who would constitute the five-member panel in a particular case must be selected on the basis of a *predetermined rotational formula* or by some other blind process. Unfortunately, the Constitution provides no guidance on this matter, thereby leaving the Chief Justice presumably with unfettered discretion to determine which five justices will hear a given case.

The Chief Justice's discretion in this regard does not augur well for the independence of the other justices. Judicial independence, it must be emphasized, does not mean simply institutional independence for the Judiciary as a whole. At a more fundamental level, it also means "decisional independency"[101] for each individual judge - that is, each individual judge must decide each case free from outside pressure or control, including pressure from his or her peers on the court.[102]

[101] See Maria Dakolias, "A strategy for Judicial Reform: The Experience in Latin Amercia", 36 *Virginia J. Int'L.* 167 (Fall, 1995), at 174.

[102] See Owen M. Fiss, "The Right Degree of Independence," in *Transition to Democracy in Latin America: The Role of the Judiciary* 55, 55-56 (Irwin P. Stotssky e d. 1993). Professor Fiss describes judicial independence as encompassing three dimensions: first, party detachment or independence from the interests of the parties in the case; second, individual autonomy or independence from one's peers on the bench; and political insulairty or independence from other governmental institutions.

As head of the judiciary, a Chief Justice is vested with constitutional authority and responsibility to oversee the administration of justice in the country. Thus, the Chief Justice is, in a *administrative* sense, superior to every member of the bench, including all the other Justices of the Supreme Court. However, when it comes to *adjudicating* cases, a Chief Justice should be no more than the titular head of the Supreme Court. This means that, when the Supreme Court sits as a court, the Chief Justice (as presiding officer of the Court) should occupy the position only of *premus inter pares* (i.e., a first among equals), in relation to the other members of the Court. Therefore all the Justices of the Supreme Court, including the Chief Justice, must have an equal opportunity and influence in determining the outcome of a case before the Court.

Nothing, of course, prevents a Chief Justice (or any other Justice, for that matter) from swaying a majority on the Court to his or her point of view on a particular matter by sheer force of argument or persuasion. Beyond that, however, it would be improper to allow the Chief Justice essentially to predetermine the outcome of cases by giving him sole discretion to choose which Justices get to hear and decide a particular case. As an eminent Common Law Jurist has observed in reference to the power of the Lord Chancellor of England to allocate cases to different panels of the Court of Appeal or the House of Lords, "[t]he power to choose (in effect) which judges will hear which cases is plainly one which can be misused, because it will often be know that a certain judge has at least a prima-facie view on the point of law to be decided on appeal."[103] A 1992 study of the Kenyan judiciary also concluded that the system of "allocation of cases" by so-called "duty judges" "effectively channels most politically sensitive cases to Judges who rather consistently decide in favor of the Kenyan Government."[104] By failing to specify a blind or random process of case allocation, Article 128(2) of Ghana's 1992 Constitution leaves a loophole that is similarly liable to abuse.

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[103] P.S. Atiyah, *Law and Modern Society* (Oxford 2nd ed. 1995), at p. 17.

[104] Drew Days, et al., *Justice Enjoined*, at 27. *See also* Geoffrey Bindman (ed.), *South Africa: Human Rights and the Role of Law* (Int'l Comm. of Jurists, 1988), at 111 (nothing that the apartheid-era practice whereby a government-appointed Judge President was responsible for alloting judges to the various courts resulted in the assignment of "security" cases to pro-government judges).

then a vote of the Consultative Assembly was taken on this issue a majority of its members voted in favour of requiring judges to submit to parliamentary vetting, and understood that requirement to be implied in the phrase "approval of Parliament."[112]

The other problem with Article 144 is that it requires only a simple majority of Parliament to approve the appointment of a Justice of the Supreme Court. The danger in requiring such minimal legislative backing for the highest judicial appointments is that it deprives minority parties in Parliament of any real influence in the appointing process. This marginalization of all but the majority party in Parliament in decisions regarding the highest judicial appointments increases the likelihood that the composition of the Supreme Court will have a decided partisan skew.

It is important, in the interest of judicial independence, that the shortcomings identified in Articles 128 and 144 be remedied. At present, neither Article 128 nor Article 144 is an "entrenched provision" of the Constitution. This should make it relatively easy, assuming the political will exists, to amend both Provisions. In the case of Article 128(1), an appropriate amendment should provide for a fixed maximum number of Justices to constitute the full bench of the Supreme Court. In addition, it is necessary to amend Article 128(2), first, to include a requirement that all constitutional cases be decided by the full bench of the Supreme Court and, second, to stipulate a transparent procedure by which panels of the Supreme Court shall be constituted to hear all other cases. With regard to Article 144, the necessary amendment must provide that Supreme Court appointments be approved by a *super-majority* (*e.g.*, a two-thirds or three further vote), rather than by a simple majority, of Parliament.

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[112] Unfortunately the Supreme Court appears to have reached a contrary conclusion with that portion of its holding in the *Ministerial Appointments Case* in which it rejected the petitioner's claim that the term "prior approval" of Parliament, as applied to nominees for ministerial appointments, necessarily included "consideration and vetting" by Parliament. The Court's construction of the term "prior approval" to mean simply a vote by Parliament to approve or reject a nominee for Minister of State clearly indicates that the Court will reach a similar conclusion with regard to judicial appointments.

made by him in the exercise of his judicial power. Like electoral immunity, judicial immunity from such legal liability is designed to promote greater judicial independence by ensuring that judges go about their work without fear of inviting litigation upon themselves. Immunity from lawsuits does not, however, preclude actions for *mandamus* to compel a judge to perform a mandatory duty or for *prohibition* to prevent a judge from acting without lawful authority. Moreover, a decision of a lower court can usually be appealed to and reviewed by the court above it. Thus, avenues still remain *within* the judiciary for some judicial errors and omissions to be corrected. However, not only are writs of mandamus or prohibition extraordinary remedies that are only infrequently issued, but also decisions of the court of last resort, even if still erroneous, are final and unreviewable. In short, while the supervisory and appellate jurisdiction of higher courts can be invoked to obtain some review of the conduct of the judges below, there are clear limitations to the use of these *intra*-judicial avenues for holding judges accountable.

Judicial Immunity under the 1992 Constitution is, of course, limited to what is necessary for the proper discharge of the judicial function. Notably, there is no constitutional provision purporting to give judges immunity from public and media criticism in respect of their official conduct. Moreover, the various provisions of the Constitution relating to the code of conduct for public officers,[113] including the requirement of periodic disclosure by public officers of their net worth,[114] and the powers of the Commissioner

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[113]See articles 284-284 of the Constitution.

[114]Article 286 (1) of the Constitution provides:

> "A person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or [*] liabilities owed by, him whether directly or indirectly (a) within three months after the coming into force of this Constitution or before taking office, as the case may be, (b) at the end of every four years; and (c) at the end of his term of office."

* Note: The use here of the conjunction "or" is clearly a drafting error. The use of "or", instead of "and", suggests that a public officer would be in full compliance with the disclosure requirements of article 286(1) if he declared only his assets (without a declaration of corresponding libailities) or, worse still, if he declared only his liabilities (without mentioning any asset). Because the import of the periodic disclosure rule must be to monitor relative changes in the public officer's *net* worth over time (see clause (4) of the same article), the correct conjunction must be "and", not "or".

CHAPTER IV

Judicial Accountability in Ghana

The foregoing proposals, if adopted, will no doubt enhance the stature of the Ghanaian judiciary and provide judges with greater constitutional protection against possible governmental intrusion in the adjudicatory process. But judicial independence, though necessary and desirable, has its downside: judges who do not have to "answer" to anyone for their conduct or decisions may pursue *self-serving* agendas and become lords unto themselves. Thus, judicial independence must not be pursued to a point where judges become *totally* unaccountable for their actions. In short, judicial independence must be balanced with an appropriate measure of judicial accountability.

In a representative democracy, the primary method by which public officers are made to account for their official conduct is by making them (or their responsible superiors) submit periodically to a public vote of confidence (*i.e.*, through elections). But the electoral test, though desirable for the Executive and Legislature, is generally inappropriate for judges. Elections necessarily imply politicking, and with politicking comes partisanship. Therefore, to put judges through periodic elections will be to inject partisan politics directly into the judicial arena. Moreover, selection of judges by popular elections would undermine the judiciary's role as a protector of the rights of *minorities*, because in order to win or retain their offices elected judges may have to pander to the wishes of the majority – which, in some cases, will mean betraying the legitimate interests and rights of the minority. For these reasons, most democracies do not extend the requirement of periodic elections to the Bench. Ghana's 1992 Constitution similarly gives judges electoral immunity by providing for the selection of judges by appointment, rather than by election.

Another mechanism by which public officers may be held to account for their actions is by granting members of the public a right to bring legal proceedings against public officers (or the government) for negligent or intentional breaches of their official duties. But here, too, judges in Ghana are granted constitutional immunity. Under Article 127(3) of the Constitution, a judge cannot be sued or held legally liable for errors or omissions

for Human Rights and Administrative Justice (CHRAJ)[115] to investigate and root out corruption among public officers apply with equal force to judges. In short, the Constitution leaves open a number of lawful avenues for holding judges accountable.[116]

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[115]This office, which is mandated by article 216 of the Constitution, incorporates aspects of the Scandinavian-originated concept of Ombudsman and the post-Watergate office of "Independent Counsel" created under the Ethics in Government Act of the U.S. Congress. (*See Morrison v. Olson*, [1988] 487 U.S. 654.) The functions of the CHRAJ include "to investigate complaints of ... corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties." The Commissioner and his deputies have the same operational independence and security of tenure enjoyed by superior court judges.

The idea behind creating an independent office of the CHRAJ, and placing it outside the chain of command of the Attorney General, is to avoid the inevitable conflicts of interest, undue influence and self-dealing that would arise if high-level public officers, typically members of the Executive branch, against whom allegations of corruption or other malfeasance have been made, were to be investigated by their subordinates or peers in the same branch of government. This purpose will be subverted if, after the CHRAJ has completed its investigations and made findings and conclusions of fact and law, action on such findings is left to the prosecutorial discretion of the Attorney General's office. Thus the Commissioner has the power and discretion, under Article 229 of the Constitution, "to bring an action before any court in Ghana" and "[to] seek any remedy which may be available from that court." In addition, Article 218 charges the Commission to use "such means as are fair, proper and effective" to correct or enjoin corruption and abuse of power by public officers. In light of these provisions, the reaction of the Rawlings government to the 1996 report of the CHRAJ (regarding the latter's investigations of allegations of corruption made against certain Ministers of State and Presidential Advisers) must be deemed legally inconsequential. In March 1997, the government issued a White Paper rebutting and declining to accept a number of findings and conclusions of the CHRAJ stemming from its investigation of the said allegations. Plainly, the government is without power to prevent the CHRAJ from independently initiating judicial proceedings, including prosecution, against the public officers found to have used their public offices for private gain.

[116]The Judicial Council, which is established and constituted under Article 153, is also charged, *inter alia*, with "propos[ing] for the consideration of Government judicial reforms to improve the level of administration of justice and efficiency in the Judiciary" and with serving as "a forum for consideration and discussion of matters relating to the discharge of the functions of the Chief Justice and thereby assist the Chief Justice in the performance of his duties..." Art. 154(1). Since it is charged, among other things, with issues of judicial reform and the administration of jutice, the Judicial Council may also address issues of judicial *accountability*, if not in individual cases, at least with respect to judges as a class. The adoption and policing of a Code of Judicial Conduct are among the things such a body might do. However, the composition of the Council raises doubts as to whether it can properly attend to matters of judicial accountability. A third of the 18-member body is made up of sitting judges and magistrates, and five members, including the Attorney-General, are appointees of the President.

Judicial accountability must not be regarded as a task to be borne solely by a particular segment or interest group in the society. A fair and impartial administration of justice is, like good government, a *public good*, because everyone, without exception, benefits when judges act fairly and impartially in the adjudication of cases. Therefore, making sure that judges exercise their power fairly, impartially, and independently of extraneous influences must be regarded as a civic duty of every members of society.

Judicial accountability is not, however, simply a matter of the citizen's duty. It is also arguably a *right* of everyone directly affected by the decisions of the courts. Any person with a direct stake in the conduct and outcome of judicial proceedings clearly has "standing" (general speaking) to check or challenge abuses of judicial power. Among such stakeholders are the *parties* to case (who, legally speaking, are the ones primarily bound by the decisions of the court), *lawyers* (who must appear before the courts professionally to represent their clients), and the *general public*, which not only pays the taxes to support the judiciary but must, above all, individually conduct their lives in accordance with the law as laid down by the courts.

As a category, the "public" obviously includes litigants and lawyers. Still, it is important to recognize that the parties to a case as well as members of the legal profession have legitimate, if self-interested, reason to be more concerned about the judicial process and judicial conduct. However, the often *case-specific* nature of their interest and concern in this regard means that lawyers and their clients cannot be left to shoulder alone the burden of ensuring accountability within the judiciary as a whole. Moreover, the parties, lawyers, and the public tend to have different degrees of interest in different aspects of the judicial function - the public tending to be less

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The rest are the Judge Advocate-General of the Ghana Armed Forces, the Head of the Legal Directorate of the Police Service, two nominees of the Ghana Bar Association, the Editor of the Ghana Law Reports, a nominee of the staff of the Judicial Service, and a chief nominated by the National Council of Chiefs. The legal academy has no formal representation on the Council. This omission, coupled with the fact that the Council has a disproportionate number of sitting judges and no independent representation for the lay public, makes that body ill-suited effectively to take up issues of judicial accountability - though the same is not true with regard to issues of judicial independence.

CHAPTER IV

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The foregoing proposals, if adopted, will no doubt enhance the stature of the Ghanaian judiciary and provide judges with greater constitutional protection against possible governmental intrusion in the adjudicatory process. But judicial independence, though necessary and desirable, has its downside: judges who do not have to "answer" to anyone for their conduct or decisions may pursue *self-serving* agendas and become lords unto themselves. Thus, judicial independence must not be pursued to a point where judges become *totally* unaccountable for their actions. In short, judicial independence must be balanced with an appropriate measure of judicial accountability.

In a representative democracy, the primary method by which public officers are made to account for their official conduct is by making them (or their responsible superiors) submit periodically to a public vote of confidence (*i.e.*, through elections). But the electoral test, though desirable for the Executive and Legislature, is generally inappropriate for judges. Elections necessarily imply politicking, and with politicking comes partisanship. Therefore, to put judges through periodic elections will be to inject partisan politics directly into the judicial arena. Moreover, selection of judges by popular elections would undermine the judiciary's role as a protector of the rights of *minorities*, because in order to win or retain their offices elected judges may have to pander to the wishes of the majority – which, in some cases, will mean betraying the legitimate interests and rights of the minority. For these reasons, most democracies do not extend the requirement of periodic elections to the Bench. Ghana's 1992 Constitution similarly gives judges electoral immunity by providing for the selection of judges by appointment, rather than by election.

Another mechanism by which public officers may be held to account for their actions is by granting members of the public a right to bring legal proceedings against public officers (or the government) for negligent or intentional breaches of their official duties. But here, too, judges in Ghana are granted constitutional immunity. Under Article 127(3) of the Constitution, a judge cannot be sued or held legally liable for errors or omissions

then a vote of the Consultative Assembly was taken on this issue a majority of its members voted in favour of requiring judges to submit to parliamentary vetting, and understood that requirement to be implied in the phrase "approval of Parliament."[112]

The other problem with Article 144 is that it requires only a simple majority of Parliament to approve the appointment of a Justice of the Supreme Court. The danger in requiring such minimal legislative backing for the highest judicial appointments is that it deprives minority parties in Parliament of any real influence in the appointing process. This marginalization of all but the majority party in Parliament in decisions regarding the highest judicial appointments increases the likelihood that the composition of the Supreme Court will have a decided partisan skew.

It is important, in the interest of judicial independence, that the shortcomings identified in Articles 128 and 144 be remedied. At present, neither Article 128 nor Article 144 is an "entrenched provision" of the Constitution. This should make it relatively easy, assuming the political will exists, to amend both Provisions. In the case of Article 128(1), an appropriate amendment should provide for a fixed maximum number of Justices to constitute the full bench of the Supreme Court. In addition, it is necessary to amend Article 128(2), first, to include a requirement that all constitutional cases be decided by the full bench of the Supreme Court and, second, to stipulate a transparent procedure by which panels of the Supreme Court shall be constituted to hear all other cases. With regard to Article 144, the necessary amendment must provide that Supreme Court appointments be approved by a *super-majority* (*e.g.*, a two-thirds or three further vote), rather than by a simple majority, of Parliament.

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[112] Unfortunately the Supreme Court appears to have reached a contrary conclusion with that portion of its holding in the *Ministerial Appointments Case* in which it rejected the petitioner's claim that the term "prior approval" of Parliament, as applied to nominees for ministerial appointments, necessarily included "consideration and vetting" by Parliament. The Court's construction of the term "prior approval" to mean simply a vote by Parliament to approve or reject a nominee for Minister of State clearly indicates that the Court will reach a similar conclusion with regard to judicial appointments.

Bill of Rights which gave the citizen certain rights that could be enforced by the courts. Specifically, the plaintiffs in *Re Akoto* sought a declaration (and a writ of habeas corpus) to the effect that the Preventive Detention Act of 1958, which gave the Executive power to arrest and detain a person without trial for up to five years, and under which the plaintiffs had been detained, was unconstitutional by virtue of Article (13(1). But the Supreme Court, presided over by then Chief Justice Arku Korsah, held that the declaration contained in Article 13(I) did not impose on the President an obligation that could legally be enforced in a court of law. At best, the declaration imposed on the President only "a moral obligation and provide[d] a yardstick by which the conduct of the Head of State [could] be measured by the electorate." A breach of Article 13 (1) therefore could be remedied only through the ballot box, not through the Courts. To borrow A.V. Dicey's terminology,[43] Article 13(1), as construed by the Supreme Court, formed part of the "constitutional morality" but not the "constitutional law" of Nkrumah's Ghana. By this interpretation, the Court effectively ousted the Ghanaian judiciary of all jurisdiction in matters pertaining to the conduct of the President.

The impact of *Re Akoto* on civil and political liberties in Nkrumah's Ghana was far-reaching. The power of extra-judicial detention, which in its early years (*i.e.*, 1958-1961) was directed against essentially the leadership of the Opposition (politicians such as R.R. Amponsah, Modesto Apaloo, Attoh Quarshie, Henry Thompson, Attoh Okine, and Ashie Nikoi) and thereby affected only a small section of the political elite, became after the Court's decision on 1961 an instrument of mass repression. By the time of the 1966 coup, there were well over 1,000 political detainees in Nkrumah's prisons, which had also in 1963 and 1965 witnessed the tragic deaths, respectively, of Obetsebi-Lamptey and J.B.. Danquah, both pioneering figures in Ghana's struggle against British colonialism. [44] In short, the

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[43] Dicey, Introduction to the Study of the Law of the Constitution (8th ed. 1915), cxl-clxi.

[44]Obetsebi-Lamptey and Danquah were among the "Big Six" nationalist leaders who were arrested and detained in 1948 by the British colonial authorities in the then Gold Coast, on charges of instigating and organizing the protest march of returning Gold Coast World War II veterans and the nationwide anti-colonial riots that it triggered. The other members of the group were Nkrumah, William Ofori-Attah, Ako Adjei and Akuffo-Addo.

made by him in the exercise of his judicial power. Like electoral immunity, judicial immunity from such legal liability is designed to promote greater judicial independence by ensuring that judges go about their work without fear of inviting litigation upon themselves. Immunity from lawsuits does not, however, preclude actions for *mandamus* to compel a judge to perform a mandatory duty or for *prohibition* to prevent a judge from acting without lawful authority. Moreover, a decision of a lower court can usually be appealed to and reviewed by the court above it. Thus, avenues still remain *within* the judiciary for some judicial errors and omissions to be corrected. However, not only are writs of mandamus or prohibition extraordinary remedies that are only infrequently issued, but also decisions of the court of last resort, even if still erroneous, are final and unreviewable. In short, while the supervisory and appellate jurisdiction of higher courts can be invoked to obtain some review of the conduct of the judges below, there are clear limitations to the use of these *intra*-judicial avenues for holding judges accountable.

Judicial Immunity under the 1992 Constitution is, of course, limited to what is necessary for the proper discharge of the judicial function. Notably, there is no constitutional provision purporting to give judges immunity from public and media criticism in respect of their official conduct. Moreover, the various provisions of the Constitution relating to the code of conduct for public officers,[113] including the requirement of periodic disclosure by public officers of their net worth,[114] and the powers of the Commissioner

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[113] See articles 284-284 of the Constitution.

[114] Article 286 (1) of the Constitution provides:

> "A person who holds a public office mentioned in clause (5) of this article shall submit to the Auditor-General a written declaration of all property or assets owned by, or [*] liabilities owed by, him whether directly or indirectly (a) within three months after the coming into force of this Constitution or before taking office, as the case may be, (b) at the end of every four years; and (c) at the end of his term of office."

* Note: The use here of the conjunction "or" is clearly a drafting error. The use of "or", instead of "and", suggests that a public officer would be in full compliance with the disclosure requirements of article 286(1) if he declared only his assets (without a declaration of corresponding libailities) or, worse still, if he declared only his liabilities (without mentioning any asset). Because the import of the periodic disclosure rule must be to monitor relative changes in the public officer's *net* worth over time (see clause (4) of the same article), the correct conjunction must be "and", not "or".

judicial imprimatur which the Korsah Court gave the Preventive Detention Act by its decision in *Re Akoto* emboldened the widespread (ab)use of that law.[45]

In one respect, *Re Akoto* represented the judicial affirmation of what by 1961 was politically indisputable: that President Nkrumah was above the law. The trend of events following *Re Akoto* lent even greater credence to this assessment. In late 1961, the Nkrumah-controlled Parliament passed two bills, following labour unrest in the railway industry. The first imposed criminal penalties on anyone convicted of publishing defamatory or insulting matter which might bring the President into hatred, ridicule or contempt. The second created a Special Criminal Division of the High Court to hear cases of treason, sedition, rioting and unlawful assembly, from which there could be no appeal.

In December, 1963, following the acquittal of the three primary defendants (Tawia Adamafio, Coffie Crabbe, and Ako Adjei) charged with conspiring and attempting to assassinate President Nkrumah at Kulungugu (in northern Ghana) in August, 1962, Nkrumah summarily dismissed the Chief Justice (Arku Korsah), who had headed the three-judge panel that rendered the "Not Guilty" verdicts. The President also demanded that Parliament overturn the acquittals, an order which the Legislature dutifully obeyed by declaring the Court's ruling "null and void". Following that, and in clear disregard of the common law rule against "double jeopardy,"[46] Nkrumah

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[45] In 1993, the Ghana Supreme Court (per Justice Hayfron-Benjamin), speaking of the court in Re Akoto, stated that it "missed the opportunity to designated article 13 of the 1960 Constitution as a Bill of Rights." The Korsah Court is certainly vulnerable to a charge of literalism, for making the legal import of a constitutional provision turn on the drafters' use of the word "should" instead of the more obligatory "shall." But, in fairness to the Court, it must be conceded that when provision is intended to be legally obligatory proper draftmanship dictates the use of words connoting obligation, such as "shall" or "must", rther than words of discretion or option, like "may" and "should." Moreover, it must not be forgotten that the 1960 Constitution was the product of the Nkrumah/CPP-dominated Parliament; therefore, the construction which the Korsah Court gave to article 13 in Re Akoto more likely mirrored the intent of the drafters of that provision - that is, that Nkrumah was no to be legally bound by the provision.

had the defendants re-tried by a newly-constituted court headed by the new Chief Justice (Sarkodee-Addo) appointed by the President to replace the dismissed Chief Justice Korsah. Predictably, the new court convicted the defendants of the charges of treason, and sentenced each of them to death. (Nkrumah later commuted the death sentences to life imprisonment).

Contemporaneously, Nkrumah rushed through Parliament a bill that gave the President power, in the name of "the national interest," to set aside any judgement of a court. What nominal independence the rest of the Judiciary still retained was also abrogated by an amendment to the Constitution passed by the CPP Parliament in 1964. Under Section 6(c) of the Constitution (Amendment) Act of 1964, the President now had power to dismiss other Superior Court Judges "at any time for reasons which to him appear sufficient." With the adoption of the 1964 amendment, which also made Ghana a *de jure* one-party state, Nkrumah now had complete control of all three branches of government.

In his book *Nkrumah and the Ghana Revolution*, the famous West Indian pan-Africanist and intellectual, C.L.R. James, a longstanding friend of Nkrumah, described the President's 1963 dismissal of Chief Justice Korsah as the one act which "showed the degeneration not only of the regime, but of [Nkrumah's] own conception of government." In James' view, Nkrumah's sacking of the Chief Justice in reaction to an unfavourable ruling from the bench "destroyed at one stroke the juridical, political, and moral structure of the Ghanaian state, and automatically placed on the agenda a violent restoration of some sort of legal connection between government and population." Indeed, Nkrumah's assertion of personal control over judicial tenure and decisions, at a time when political protest and opposition had also been outlawed, effectively sealed off all avenues for civil and peaceful political change in Ghana, a fact that was cited in justification of the February, 1966 *coup d'etat* that overthrew the Nkrumah government. [47]

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[46] The rule against "double jeopardy" emobodies the principle that "no man shall be tried or punished twice for the same offence." This principle bars the re-prosecution and conviction on the smae charges of a person who has been properly tried and acquitted by a duly consituted court exercising lawful jurisdiction.

[47] See Akwasi A. Afrifa, *The Ghana Coup (*1966).

for Human Rights and Administrative Justice (CHRAJ)[115] to investigate and root out corruption among public officers apply with equal force to judges. In short, the Constitution leaves open a number of lawful avenues for holding judges accountable.[116]

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[115]This office, which is mandated by article 216 of the Constitution, incorporates aspects of the Scandinavian-originated concept of Ombudsman and the post-Watergate office of "Independent Counsel" created under the Ethics in Government Act of the U.S. Congress. (*See Morrison v. Olson*, [1988] 487 U.S. 654.) The functions of the CHRAJ include "to investigate complaints of ... corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties." The Commissioner and his deputies have the same operational independence and security of tenure enjoyed by superior court judges.

The idea behind creating an independent office of the CHRAJ, and placing it outside the chain of command of the Attorney General, is to avoid the inevitable conflicts of interest, undue influence and self-dealing that would arise if high-level public officers, typically members of the Executive branch, against whom allegations of corruption or other malfeasance have been made, were to be investigated by their subordinates or peers in the same branch of government. This purpose will be subverted if, after the CHRAJ has completed its investigations and made findings and conclusions of fact and law, action on such findings is left to the prosecutorial discretion of the Attorney General's office. Thus the Commissioner has the power and discretion, under Article 229 of the Constitution, "to bring an action before any court in Ghana" and "[to] seek any remedy which may be available from that court." In addition, Article 218 charges the Commission to use "such means as are fair, proper and effective" to correct or enjoin corruption and abuse of power by public officers. In light of these provisions, the reaction of the Rawlings government to the 1996 report of the CHRAJ (regarding the latter's investigations of allegations of corruption made against certain Ministers of State and Presidential Advisers) must be deemed legally inconsequential. In March 1997, the government issued a White Paper rebutting and declining to accept a number of findings and conclusions of the CHRAJ stemming from its investigation of the said allegations. Plainly, the government is without power to prevent the CHRAJ from independently initiating judicial proceedings, including prosecution, against the public officers found to have used their public offices for private gain.

[116]The Judicial Council, which is established and constituted under Article 153, is also charged, *inter alia*, with "propos[ing] for the consideration of Government judicial reforms to improve the level of administration of justice and efficiency in the Judiciary" and with serving as "a forum for consideration and discussion of matters relating to the discharge of the functions of the Chief Justice and thereby assist the Chief Justice in the performance of his duties..." Art. 154(1). Since it is charged, among other things, with issues of judicial reform and the administration of jutice, the Judicial Council may also address issues of judicial *accountability*, if not in individual cases, at least with respect to judges as a class. The adoption and policing of a Code of Judicial Conduct are among the things such a body might do. However, the composition of the Council raises doubts as to whether it can properly attend to matters of judicial accountability. A third of the 18-member body is made up of sitting judges and magistrates, and five members, including the Attorney-General, are appointees of the President.

interested in the *process* than in the outcome. Therefore, in order to arrive at a comprehensive system of judicially accountability -- one that keeps an eye on the specific case (*micro*) as well as the on the aggregate (*macro*), and on the process as well as on the outcomes – it is important for litigating parties, lawyers, and members of the public collectively to play their respective roles to hold judges accountable. The discussion that follows will examine the various aspects of judicial accountability, from the respective perspectives of the parties, members of the legal profession, and the general public.

A. Judicial Accountability to the Parties In the Case

Being the ones whose rights and interests are most directly at stake in judicial proceeding and who will be most directly affected or altered by the outcome, the parties to a case are foremost among those who are entitled to a fair and impartial exercise of judicial power. From the perspective of the party, such fairness and impartiality must extend to the conduct as well as the outcome of the judicial proceedings.

Judicial accountability in the conduct of the proceedings implies a number of things. First, it calls for openness or transparency in judicial proceedings, so that other third parties can observe and bear witness to the conduct of the proceedings. Transparency also requires that the proceedings be contemporaneously recorded, which record (*i.e.*, the transcript of the proceedings) must be available for the verification of the parties. Second, each of the parties must be afforded a fair hearing: that is, each party must, at a minimum, have an opportunity to present his case, to hear the other side's story, to rebut the other's allegations and to cross-examine the other's witnesses. Third, the proceedings must be conducted by a neutral judge who must have no personal interest or stake in the outcome of the case. Taken together, these conditions (transparency, fair hearing and a neutral judge) constitute the minimum standards necessary to ensure that judicial proceedings afford each party due process of law.

Beyond the actual conduct of the proceedings, the parties also seek fairness in the outcome of the case. And here the parties expect that the court's decision will be reach on the basis of the evidence and in line with applicable precedents. In order to make certain that judicial decisions are

true to both the facts and the law in the case, parties expect judges to provide *detailed reasons* for their decisions. Thus, judges must provide written opinions, setting forth the precedential and juridical bases of the decisions they reach in particular cases.

The 1992 Constitution of Ghana affirms the right of each of the parties in a case to due process in the judicial proceedings as well as to a decision supported by reasons. First, to expose judicial conduct to public oversight, Article 126(3) provides that all judicial proceedings be open to the public. Second, to ensure judicial neutrality, Article 284 places judges (as public officers) under a duty to avoid conflicts of interests. On account of this latter provision, a judge must recuse herself from a case in which she has a personal interest or stake, whether because of her personal relationship to the matter at hand, to a party in the case, or to the outcome. Arguably the same provision also bars judges from engaging in private *ex parte* contacts with either party (*i.e.*, unofficial communication and dealings between a judge and one of the parties in a case, outside the presence and without the consent of the other party). Third, Article 296 commands persons who exercise discretionary power, which obviously includes judges,[117] to act "in accordance with due process of law," and without arbitrariness, bias or prejudice. The same Article requires such persons to be "fair and candid" in the exercise of their discretionary power.

There is authority for interpreting the latter provision to require the judges give detailed reasons for the decisions they reach in particular cases. In *People's Popular Party v. Attorney-General,*"[118] where the High Court had occasion to apply the analogous provision of the 1979 Constitution to the exercise of discretionary power by police officers, Justice Hayfron-Benjamin held that the requirement in the Constitution that persons exercising discretionary power be "fair and candid" meant that "[w]hen the police

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[117]That judges are included among public officers who exercise discretionary powers is clear from the language of section (c) of the article 296, which states that "where the person or authority is not a jugdge or other judicial officer" the exercise of discretionary power shall be governed by prior published regulations. This means that the prior sections - also dealing with teh exercise of discretionary power - apply to "judge[s] or other judicial officer[s]."

[118][1971] 1 GLR 138.

refuse to grant a permit *they must assign reasons* and if they fail to do so the court can enquire into the grounds and reasons for the police action." Thus, since judges exercise discretionary power, the provision of Article 296(a) of the 1992 Constitution imposing on them a duty to be "fair and candid" also means that judges must give reasons for the decisions they render. In the case of superior courts, which are deemed "courts of record," the duty to give reasons arguably requires that such judges deliver a *written* opinion in every case.

B. Judicial Accountability: The Role of the Legal Profession

The stake which lawyers have in judicial accountability is, first and foremost, derivative of the rights of their clients to a fair and impartial adjudication of their case. Indeed, it is fair to say that, all other things being equal, a party's ability to receive fair and impartial treatment from the bench often depends on the quality of the representation provided by counsel. Proper and dutiful representation by counsel is therefore indispensable to making judges accountable to the parties in a case.

Aside from pursuing the interests of their clients in a particular case, lawyers as a group have independent grounds to be concerned about the independence and accountability of the judiciary. First, what the courts do must matter to lawyers because a widespread public distrust of the courts (due to a perception of bias, for example) will diminish public resort to the judicial system and, in turn, decrease the demand for lawyers' services. In addition, judicial behaviour and decisions, if they turn on considerations other than the merits of the case, will adversely affect the quality of lawyering, because a lawyer' success in court will then depend less on her skill or competence and more on the biases or prejudices of the judge. Thus, a biased or corrupt judiciary will invariably undermine both the economic prospects and the professionalism of the bar at large.

Second, the law is the practicing lawyer's stock-in-trade. Thus, the practicing lawyer is entitled to know with sufficient certainty and predictability what the law is at a given point in time, so that she can properly counsel her clients or make appropriate representations on their behalf. And since it is judges who ultimately must determine what the law *is*, it is natural to expect the practicing lawyer to take a keen interest in judicial

conduct and decisions. In particular, judges owe to lawyers, as they do to the parties in a case, a duty to provide detailed reasons and analysis to support their decisions. Only then can lawyers determining whether such decisions are consistent with established precedents or whether there has been a deviation from the existing law.

Among lawyers, the group consisting of academic lawyers has a special role to play not only in ensuring that judges stay within the law, but also that they keep pace with jurisprudential innovations and trends. Because practicing lawyers are generally more concerned with winning the case on hand, their immediate focus tends to be on finding and articulating what the law *is*. This makes the practicing lawyer generally more precedent-bound and, thus, backward-looking in his approach to the law. Academic lawyers, freed from the necessity of winning the case of the moment, must approach the law differently. For them the law, whether in the form of statutes or judicial decisions, is never a "finished product" to be accepted, imbibed or disseminated as it comes. The duty of the academic lawyer is not simply to teach the next generation of lawyers and judges what the law is. Instead the academic lawyer, particularly the Constitutional scholar, must see the law, and especially the decisions of the courts, merely as raw material to be further dissected, analyzed and critiqued. The challenge for the academic lawyer indeed is to render both a *second opinion* of sorts on what the courts have already decided, and an *advisory opinion* on what they may yet decide in the future.

Obviously, it is only the published opinions of the courts that count as mandatory authority or law. In some case, however, the well-considered views and insights of academic lawyers (as well as other legal experts) may carry weight as persuasive authority. Such scholarly or expert viewpoints on specific legal matters are particularly important when the courts are called upon to resolve a case of "first impression" (*i.e.*, a case that present an entirely novel question of law not governed by any existing precedent) or to decide cases that have far-reaching and potentially lasting effects on society at large. Often such cases may have been anticipated and examined as hypothetical cases in the writings of academic lawyers, thereby shedding some light on how judges in the actual cases might proceed. Thus, in other legal cultures, the views and writings of academic lawyers and other respected jurists are often consulted by judges and frequently cited in

judicial opinions. Furthermore, even where judicial precedent seems fairly established, overwhelming and consistent scholarly denunciation or disapproval of a "bad" precedent, such as has happened with *Re Akoto*, tends to delegitimize that decision and may, in time, rob it of the force of mandatory authority. In short, the views of academic lawyers can contribute greatly to advancing the frontiers of the law, and especially of judge-made law.

Of course, for academic lawyers and other legal commentators to have meaningful impact on judicial decision-making, they must find or otherwise create publicly accessible media in which to articulate their views and critiques of the law. In other legal and academic cultures, *law reviews* (published by the leading law schools) and professional legal journals have been the standard media for academic and practicing lawyers to engage in critical and constructive discussion of contemporary legal issues and judicial decisions. Regrettably, neither the Ghana Bar nor the legal academy can presently boast of a single law journal that is published *regularly*. The onus is clearly on the Bar and the law faculties of the various universities of Ghana to rectify this untenable situation.

Furthermore, to ensure that practicing lawyers and judges keep pace with legal trends and developments, the bar and the legal academy, acting in collaboration with the judiciary, must institute *regular* continuing legal education (CLE) programmes for the members of the profession. Properly designed, such programmes will bring members of the bar and the Bench up to date with contemporary legal issues and doctrinal developments in the law, both in Ghana and in other cognate jurisdictions. As Ghana's society and economy become closely linked with the rest of the world, it is important that the Ghanaian legal profession (as well for legislators and policy makers generally) stay abreast of developments in such areas of the law as intellectual property, consumer protection, securities regulation, constitutional law, and environmental law.

Another issue relating to the fair and impartial administration of justice which presents a challenge to the legal professional is the provision of *legal aid* to the indigent. Besides democratizing access to the courts, the availability of legal aid for the poor is also critical to judicial accountability because, as earlier mentioned, the quality of legal representation provided to a party in

a case significantly affects the ability of that party to protect his legal rights (*e.g.*, to due process) from being ignored or violated by judicial negligence or abuse. Although Article 294 of the Constitution recognizes a right to legal aid, the substance of that right is a matter of legislative discretion. To meet its obligations in this regard, the State must give serious consideration to requiring law graduates to provide supervised legal aid to the poor, as part of their National Service obligations. In the end, however, no programme of legal aid will have much success without the enthusiastic and dutiful participation of the bar and the judiciary.

In sum, the bar and the legal academy have a critical role to play in ensuring that the promise of judicial independence and of a fair and impartial administration of justice become a reality for all Ghanaians.

Judicial Accountability: The Role of the Public and the Mass Media

The right of the public to an accountable judiciary is affirmed by the provision in Article 125(1) of the Constitution that, "Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary..." But it hardly requires a constitutional provision to recognize that the public have a right to demand accountability from one of the most important public institutions of all, the Judiciary. After all, it is the public that provides the resources with which the Judicial process functions, and it is to the same public that courts' decisions are ultimately addressed. More important, the Judiciary ultimately derives its legitimacy from uncoerced public acceptance of the decisions of the courts, and from widespread public belief in the idealized view of judges as fair and impartial.

In Ghana, judicial accountability to the public begins with the provision in Article 126(3) of the Constitution that "the proceedings of every court shall be held in public."[119] Opening court proceedings to the public allows interested citizens independently to observe and bear witness to the events that transpire in the courtroom. Such transparency operates as a check against judicial arbitrariness in the conduct of the proceedings.

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[119]Exceptions to the publicity requirement are allowed where there are overriding issues of "public morality, public safety or public order" at stake.

The requirement that courts sit "in public" must obviously mean more than simply giving members of the public a right to be present during the course of a proceeding. Given the obvious limitations of time, space and geography, only a tiny fraction of the interested public can physically be present in a courtroom while the court is in session. The mass of the public must depend on third parties or other sources to learn about a particular judicial proceeding. Thus, the provision requiring that court proceedings be held in public impliedly gives the media too a right to attend, cover and report on such proceedings.[120]

In addition to having the right to attend and to be informed of judicial proceedings, the public, like the parties to a case, also have a right to know the outcome of such proceedings and the reasoned basis for the court's decision. This "right to know" translates again into a judicial duty to make publicly available the judgement and opinion in a decided case. Because judicial decisions constitute a part of the law of the land, it is important that the public be timely informed of court decisions that will affect their legal rights and obligations. A failure to publish in a timely fashion judicial decisions which affect the general public is arguably a violation of a cardinal principle of the rule of law, which is that, the laws must be made known in advance to those who are required to obey them. Timely publication of judicial opinions also gives the public an opportunity to evaluate independently how and why a court reached a particular decision. In this regard, published judicial opinions help to educate the public about the law and the legal process, and thereby contribute to better public understanding of the workings of the courts.

Unfortunately, timely publication of judicial decisions is anything but the rule in Ghana. Law Reports containing decisions of the superior courts (in a representative sample of cases) are not published regularly or in a timely fashion. Though the State may, in the past, have been responsible for publishing or pre-financing the publication of these reports, there is no reason

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[120]Arguably, the same provision also entitles the public (upon payment of a reasonable fee) to a copy of the verbatim record of the proceedings. Such public access to court transcripts is important because most cases are not covered or reported by the press. And in those few cases that are the subject of press coverage, the reports are usually less than thorough, and are most certainly not a verbatim record of the proceedings.

why private publishers cannot fill the current void, with the cooperation of the Judiciary and the Bar. What is important is not *who* publishes the Law Reports, but the fact that they get published at all and on time. In countries such as Zambia and South Africa, the legal community has created sites on the World Wide Web, where key judicial decisions of the country's appellate courts are published and may be accessed worldwide. This use of the Internet should be emulated by the Ghanaian Bar and Legal Academy.

Judicial accountability also means, above all, that the public (and, therefore, the media) have a right to *comment* on decisions of the courts. It is not sufficient that the public and the media have access to the courts or to judicial opinions. In fact, access to judicial proceedings and decisions is vacuous unless it also implies the right of both the public and the media to subject the conduct and decisions of such proceedings to public scrutiny, debate, and comment *after the fact*. If, as is the case, the public and the media have a right to observe, listen to, and read about judicial proceedings and decisions, then they equally must be free to express and communicate *publicly* their views, comments, and criticisms regarding the conduct and outcome of those proceedings.

The right of the public to discuss and comment on matters of public interest is indeed expressly recognized by the 1992 Constitution.[121] And the media is given a special and enhanced role in this regard.[122] Besides Article 21, which guarantees, *inter alia,* the right to "freedom of speech," including "freedom of the press and other media," the Constitution devotes an entire chapter, twelve Articles in all, to "Freedom and Independence of the Media."

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[121] See article 21(1) of the Constitution.

[122] Under a general grant of "freedom of expression," such as is provided under article 21 of the 1992 Constitution, the media are treated on an equal footing as any ordinary citizen, no better, no worse.

The 1992 Constitution changes this and gives the media special treatment and protection through additional provisions (article 162, et seq.) to safeguard journalistic independence and editorial autonomy of the media.

Article 162(3), which forms part of the chapter on the media, prohibits the imposition on the media of *prior restraints*.[123] But since the 1992 Constitution takes a much more expansive and modern view of press freedom than does the common law,[124] the protection it extends to the media goes far beyond the basic common law prohibition of prior restraints. Thus, the same Article 162 provides, in clause 4, that "[e]ditors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial *opinions* and views, or the *content* of their publications." The breadth of this injunction is clearly intended to promote the emergence of a free and independent media in Ghana.

Clause 5 of Article 162 is even more categorical in defining a preferred constitutional role for the Ghanaian media. That clause provides that, "All agencies of the mass media shall, at all times, be free to uphold the principles, provisions, and objectives of the[e] Constitution, and shall uphold the responsibility and accountability of the Government to the people

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[123]A "prior restraint" is a legal obstacle or bar to the publication of a story or the expression of a viewpoint, which, because it is imposed *before* such opinion or story is published, has the purpose and effect of *preventing* the expression or publication form occuring. Article 162, clause 3, of the 1992 Constitutuon prohibits the use of prior restraints (such as licensing laws), by providing that, "There shall be no impediements to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information."

[124]The standard common law view of press freedomn is summed up by Sir William Blackstone thus: The liberty of the press.. consists in laying no *previous* restraints upon publications,and not in freedom from censure for criminal matter when publishcd." Under this Blackstonian view, press freedom is defined simply as the absence of prior restraints. Thus, editors, journalists, and publishers may, under the common law, still be subject to liability and punishment, including criminal penalities, *after the fact* (i.e., after a story has been published). Thanks to Article 162 of the 1992 Consitution, the Blackstonian view no longer represents the state of the law in Ghana.

of Ghana." Thus, the Constitution expressly appoints the media as watchdog[125] over the Constitution and the public institutions, and charges the media with a duty to hold public officers accountable for their actions. This duty is arguably enhanced in the case of public officers like judges, who are not subject to legal liability or electoral accountability for their official acts. In short, media criticism of judicial decisions and conduct, and of the conduct of public officers generally, is not only constitutionally protected; it is, above all, constitutionally *expected*.[126]

Despite these elegant constitutional privileges accorded the media, the Ghana media's ability to play their designated role as the Fourth Estate is severely curtailed by the persistence in the law of such archaic offenses as criminal libel and criminal defamation and, worse still, by the apparent failure of the Ghana Supreme Court to recognize the clear incongruence between such laws and new constitutional order in Ghana.

Take criminal libel, for example. This offence has its antecedents in such

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[125]In this respect, the media and the judiciary are indeed expected, under the Constitution, to play *complementary*, not antagonistic, roles. The courts, of course, can only play their watchdog role when they are called upon to adjudicate cases. However, since most issues of public interest involving the conduct of public officers do not make it to the courts or do not even take the form of legal controversies, the bulk of the watchdog function must necessarily fall on institutions other than the courts, such as the media.

[126]Under the 1992 Constitution, the right of the public and the media to comment freely and critically on matters of public interest, while clearly more expansive than the limited common law immunity against prior restraints, is of course not *absolute*. However, any law that purports to limit that right must be "reasonably required" to protect "national security, public order, public morality and for the purpose of protecting the reputation, rights and freedoms of other persons." Moreover, under Article 21(4), any limitation placed on any constitutionally guaranteed right, including the right of the public and the media to freedom of expression, must harmonize with the "spirit" of the Constitution - which includes the ideals of popular sovereignty, accountability to the people, and democratic values. Thus, although the right of the media is not absolute, a fair reading of the Constitution, in the light of its "spirit", means that the media cannot constitutionally be subject to criminal or civil penalty for expressing unflattering opinions or criticisms about public officials. In particular, *criminal* penalties against a member of the media for defamation of a public officer, judges included, cannot be justified even if the plaintiff were to prove that the defendant *knew* that it was publishing a falsehood. The existence of a civil recourse as well as the recognition by the Constitution (Art. 162(6) that any person allegedly defamed by any mass medium has a right to a published *rejoinder* in the same medium means that criminal penalities are not "reasonably required" to protect the reputations of any person.

medieval notions as "royal infallibility" and the "divine rights of kings," and made its way into the common law by way of the infamous English Court of the Star Chamber.[127] Such an offence, however, is irreconcilable with the purpose of a modern republican constitution such as Ghana's, which recognizes "the people of Ghana" as Sovereign,[128] and their elected or appointed public officers, including judges, as mere servants of the people.[129]

Indeed, laws that criminally punish members of the public for making

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[127]*See* Irving Brant, *The Bill of Rights: Its Origin and Meaning* (1965), at pp.80-181. The Court of the Star Chamber was formally established during the reign of King Henry VII (1487). It was made up of the Lord Chancellor, two common-law judges, a high prelate and an indefinite number of the king's councillors. The avowed purpose of the Star Chamber was to dispense justice swiftly and surely. Thus, it dispensed with all the procedural safeguards considered necessary to provide "due process of law" in judicial proceedings. The Star Chamber's sentences were draconian and vastly disproportionate to the alleged offences. The offence of seditious or criminal libel was invented by the Star Chamber in "The Case de Libellis Famosis," which was tried in 1606. From its inception, the truth of the allegedly offending matter was not admitted in defence of the charge. The offence quickly became an instrument for hounding down critics and opponents of the king and his ministers and allies. The Star Chamber, described as "the most iniquitous tribunal in English history," was finally abolished by Parliament in 1641. But the offence of criminal libel survived the demise of the Star Chamber.

[128]Both the preamble to the 1992 Constitution and Article 1 (1) expressly recognize the *people* of Ghana as those in whom the "soveriegnty" of the Ghanaian state ultimately resides.

[129]As the famours nineteenth century English legal historian, Sir James FitzJames Stephen, expleained:

> "Two views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and the guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken or not no censure should be cast upon him likely or designed to diminish his authority. If on the other hand the ruler is regarded as the agent and servant and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being in multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant ...To those who hold this view and carry it out to all it consequences there can be no such offence as sedition."

2 James F. Stephen, A History of the Criminal Law of Englansh (1883), at 299-300.

unflattering comments about the conduct of public officers cannot be justified in any truly democratic system[130] Thus, in *Hector v Attorney-General of Antigua & Barbuda*,[131] the House of Lords, sitting as the Judicial Committee of the Privy Council, held that a statute making it a criminal offence to publish or distribute any false statement likely to undermine public confidence in the government contravenes the right to free expression and freedom of the press guaranteed under the Constitution of Antigua and Barbuda.[132]

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[130]Dicey, the famous English jurist, recognized that "the legal definition of seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if vigorously enforced be inconsistent with prevailing norms of political agitation." Dicey, *Introduction to the Study of the Law of the Constitution*, at 150. The only reason why, despite Dicey's assessment, seditious libel is deemed "constitutional" under English law is, of course, that the English have no written consitution which would either guarantee individual rights or impose limits on the power of Parliament to pass laws. A different result is certainly warranted under a constitutional system, such as Ghana's, in which all legislation are subject to that constiution, which guarantees, *inter alia*, the rights of both the public and the media to freedom of speech and expression.

[131][1990] 2 All ER 103, P.C.

[132]Beginning with *New York Times Co. v. Sullivan* [1964] 376 U.S. 254, and *Garrison v. Lousiana*, [1964] 379 U.S. 64, the United States Supreme Court has also held that the First Amendment to the U.S. Constitution, which guarantees the right to freedom of speech and of press, presumptively immunizes the media against criminal and civil liability for publication of alleged defamatory statements about *public figures*. The media may be held civilly liable for libel of a public officer, only if the plaintiff proves by at least a preponderance of the evidence that (i) the statements published by the defendant were about the plaintiff; (ii) the statements were statements of *fact* (*i.e.*, matters that can be established as true or false, and not merely an *opinion*); (ii) the statements were defamatory; (iii) the statements were false; and (iv) the defendant published the false statements deliberately (i.e., knowing that they were false or very probably false). Thus, when it comes to an alleged libel of a puiblic official, the plaintiff has the burden of establishing not only a culpable state of mind (*viz.* malice) on the defendant's part, but also of proving the falsity of the defamatory statements.

Yet, notwithstanding Ghana's shift towards democracy and constitutionalism, the media and the public[133] in Ghana remain vulnerable to criminal penalties, [134] including imprisonment, for publishing certain stories or

[133]Criminal libel prosecutions have been pending in an Accra court since February, 1996, against the editor of the *Ghanaian Chronicle* and the editor and publishers of *The Free Press*. The defendants are charged with "publishing a false news with the intent to injuring the reputation of the State," a felony under Section 185 of the Criminal Code (1960). If convicted, each of the defendants could face a maximum sentence of 10 years in prison. *The Free Press* and the *Ghanaian Chronicle* reprinted in their January 31, 1996 and February 1, 1996 editions, respecitvely, a story publish in a New York-based weekly, The *African Observer*, that a Ghanaian diplomat (Frank Bennch) of the Ghana Permanent Mission to the UN in Geneva, had been arrested in Switzerland for selling illicit drugs. The story also implicated President Rawlings, his wife, and the ruling party in a drugs-fo-arms trade.

Journalists associated with the independent press are not the only likely targets of crimina libel and defamation laws. More ominous is the threat that these laws pose to everyday conversation or argument, as exemplified by the May 1997 arrest and arraignment before an Accra Circuit Tribunal of a foreign national resident in Ghana on charges of defaming the President of Ghana. As alleged by the prosecution, the defendant, a supervising engineer on a construction project, is said to have dismissed a worker's request for protective clothing with the remark to "go and tell your thief, bastard and crazy President to supply you." See. Expatriate in Court For Defaming President, "*Ghanaian Times* (May 23, 1997), available in www.ghana.com/republic/times/index.htm#times. The arrest and prosecution of a member of the public for "criminal defamation" on these facts illustrates the wide breadth and scope of Ghana's criminal libel and defamation laws, and highlight the danger which these laws pose to social discourse, including arguably, academic freedom. See H.J.A.N. Mensa-Bonsu, "The Freedom to Impart Ideas and the Criminal Law in Ghana," in Amos A. Anyimady (ed.), *Intellectual Freedom in Ghana* (1994).

[134]The objection here, it must be emphasized, is primarily with the *criminalization* of libel and defamantion. The criminal law is *not* the way to deal with defamation or libel. The criminal law is generally reserved for conduct (not mere "speech") of an intentional or reckless nature that causes or threatnes harm to another person's life, limb, or property and that, above all, has absolutely no redeeming social value. Murder, rape, robbery, drunk-driving, and theft, are the kinds of offences one has in mind. Libel and defamation do not belong in the same category. Yet in Ghana, libel or defamation of the powerful could earn a journalist - indeed, any *member of the public* - a 10-year prison sentence, while a person convicted of rape would spend no more than 2 or 3 years in jail, and most drunk-drivers never have to worry abut even getting arrested. This is clearly a perversion of the criminal law, and paints a sordid picture of the country's values and priorities.

It is conceded that libel may cause serious harm to a person's repuation. But even in those instances, criminal prosecution and punishment of the offender can do little to undo or repair the reputational injury that may have been caused. Especially where the libel is directed at high puiblic officers or other politically influential private persons, criminal prosecution of the offender not only gives wider circulation and currency to the story, but also gives the impression that the public figure concerned is merely using strong-arm tactics to suppress the truth. If the concern is with undoing or restoring reputational injury, much more can be achieved by making the offender retract the false story and publicy render an apology, than by dragging him through the courts. Moreover, if deterrence is the objective, the availability of compensatory and punitive civil damages renders any recourse to the criminal law unnecessary. Of course, because civil damages also have the potential to lead to self-censorship by the media, they should not be awarded easily in cases involving public figures, unless it is established that the offender published the false story knowing it to be false. Mere journalistic negligence and omissions regarding the publication of newsworty matters of public concern generally need not be punished, either criminally or civilly.

comments about the public figures, [135] including judges, or for publishing certain matters of public interest, including certain matters relating tot eh administration of justice. The primary weapon which the courts continue to use to frustrate the public's right to judicial accountability is the common law offence of "criminal contempt of court."[136]

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[135]Not surprisingly, such laws are defended by some members of the political elite in Ghna (as in other African countries) as consistent with African values, because of the respect and deference extended to elders and persons in authority in traditional African society. This is another strand of the excuse of "African exceptionalism" which posits that Africa and Africans are "different" and, therefore, must be evaluated by a "different," presumably lower, standard of civilization. Africa's ruling elites are all too quick to invoke this excuse whenever they are charged with fragrant abuses and denials of the democratic and human rights of their citizens. Besides the essentially racist assumptions it reflects, this self-serving excuse misrepresents the true nature of African or at least, of Ghanaian culture, particularly with regard to criticism of authority figures. In the first place, it must be emphasized that while chiefly authority in Africa is *presumptively* vested with great respect and adulation, the level of respect which an incumbent chief or elder is able to command from his people grows or wanes, depending on the behaviour and deeds of the particular incumbent. In other words, elders and chiefs in African society *earn* their respect, and would lose it if their behaviour did not measure up to societal norms and standards of conduct. In fact chiefs who demean their offices by their misdeed or neglest of their duties may be removed from office by the people. Moreover, incumbent chiefs are subject to criticism, reprimand, and other forms of censure if they are seen to be abusing or neglecting the people's trust. Often the limitations placed on such censure only take the form of "time, place, and manner" restrictions (i.e., restrictions as to the forum and the form in which such censure may be made). At any rate, persons who make offending statements about a chief without proof are, under the traditional rules, typically made to retract the statements and render due public apologies to the chief and elders as well as pay a fine or make other resituation to the aggrieved chief and the gods. In short, it is the offence of criminal and seditious libel, not criticisms of it, that is alien to African culture. In fact, these antidemocratic laws entered Africa's criminal law during the colonial era, when the colonial authorities relied on these same laws to fight off nationslist agitation by imprisoning outspoken nationalist leaders and journalists. See W.E.F. Ward, *My Africa* (Ghana Univs. Press 1991), at 98-99, 182-183 (recounting the debate and opposition generated in the then Gold Coast by the colonial government's introduction in 1934 of the Sedition Bill, under the pretext of fighting off "communist propaganda).

[136]The crime of contempt of court is a creation of the common law. Thus, the nature and scope of the offence are not explicitly defined in the Criminal Code of Ghana. Rather, they must be discerned from various court decisions. Ordinarily this absence of codification would be enought to invalidate the crime of contempt of court under current Ghanaian law, since article 19(11) of the 1992 Constitution requires that all criminal offenses be expressly defined in a written statute. The common crime of contempt of court is, however, saved from such constitutional invalidity by clause 12 of Article 19, which provides that "Clause 11 of [Article 19] shall not prevet a Superior Court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed." In effect, Article 19, clause 12 operates as an exception to the requirement in clause 11 of the same article that criminal offenses be codified. But it is important to note that article 19(12) does not immunize the common law crime of contempt of court against *other* constitutionalc challenges. Indeed, there is strong authority for the contention that the crime of contempt of court, when applied against members of the press who publish critical comments about a case or a judge in a matter that is not *sub judice*, would violate or contravene articles 21(1)(*a*) ("right to freedom of speech and expression." including "freedom of the press and other media") 21(1)(f) (public's "right to information"), and 162(4) (journalistic and editorial autonomy)

In its present form, Ghana's law of criminal contempt poses a serious hindrance to the freedom and ability of the press to criticize or comment on judicial conduct and decisions. This is illustrated by the *Mensah Bonsu Case*, a case decided by the Ghana Supreme Court in February 1995. In the case, the Court (by a 4-3 majority), convicted the Editor and a Columnist for The Free Press newspaper on charges of criminal contempt of court (specifically, the kind called "scandalizing the court") for publishing a column in which he criticized in rather scathing terms a judge of the Supreme Court (later appointed Chief Justice) for erroneously attributing, in one of his opinions, a politically-embarrassing statement to former Prime Minister Busia. The Supreme Court sentenced the Editor of the paper to a day's imprisonment and a fine, while the author of the allegedly contumacious column was sentenced to a month's imprisonment with hard labour. The Court also ordered the two to render a public apology to the judge in question.

In another case (the *"Ammuako-Annan Case"),* the Acting Editor of the Ghanaian Chronicle was sentenced to 30 days' imprisonment, and the paper's publishers fined ¢1 million (at the time, about US$700), for contempt of court. The newspaper's crime was that it had reported and criticized the courtroom behaviour of a judge in a high profile murder trial involving a local celebrity, the proceedings of which the judge had, without making any special factual findings or assigning reasons, ordered the media not to report.

The use of criminal contempt in instances such as these is bound to cause self-censorship by journalists and thereby chill media coverage and public comment about the judicial branch, making it even more difficult to hold judges publicly accountable for their actions. Indeed, cases like the *Mensah Bonsu* and the *Ammuako-Annan* cases are troubling in other important respects. First, there is an inherent conflict of interest involved in permitting the judiciary to use criminal contempt as a shield against public criticism of judges, because it makes judges *judges in their own cause.* Second, allowing courts to exercise the power to punish persons who publicly expose or criticize judicial malfeasance or mistakes would tend to make

judges generally more inclined to uphold similar uses of criminal libel and such other laws by the executive to punish those who report or comment negatively on the conduct of the government.[137] Third, the Mensah Bonsu and Ammuako-Annan cases create and perpetuate the myth of judicial infallibility. Judges may have the final word as to what the law is, but finality (who has "power") must not be confused with infallibility (what is "right"). The very fact that the Constitution itself, in Article 133(1), grants the Supreme Court the power to review and, if necessary, overrule its own decision is a plain acknowledgement that judges do, sometime, go wrong. Indeed, public trust in the honesty and integrity of the judiciary would suffer, rather than improve, if journalists are punished by the courts for making allegations concerning judicial conduct, without an opportunity to assert truth as a defence and without any proof by the prosecution of the falsity of such allegations. As the U.S. Supreme Court, speaking through Justice Hugo Black, rightly observed in the 1941 case of *Bridges v. California*, "concern for the dignity and reputation of the courts do not justify the punishment as criminal contempt of criticism of the judge or its decision...[A]n enforced silence...solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." [138]

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[137]Indeed the fact that prosecutions for criminal contempt of court, including for "scandalizing the court," are brought by and at the discretion of the Attorney-General allows the government to use such prosecutions politically and strategically as a way of "winning" the favour of certain judges or of the judiciary in general.

[138][1941] 314 U.S. 263, 271. In an address delievered in 1898, Justice Brewer, then a justice of the U.S. Supreme Court, also remarked that, "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and characters of its justices should be the objects of constant watchfulness by all, and its judgements subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like thier authors, devoid of good taste, but better all sorts of criticisms than no criticism at all." Lincoln Day, 1898, Address of Justice Brewer, Government by Injunction (quoted in *Bridges v. California*, 314 U.S at 290, footnote 5).

A critical appraisal of the current jurisprudence on the applicability and scope of the offence of criminal contempt would show that the *Mensah Bonsu* and *Ammuako-Annan* cases belong to a bygone era. In the past, the common law sanctioned the application of criminal contempt to a wide range of situations, including to punish harsh criticism of a judge's behaviour or of a judicial decision. However, the modern view, which is gaining wide acceptance in other common law jurisdictions, is that criminal contempt of court is justified only where it is used to punish interference with the actual conduct of court proceedings or with the administration of justice in a pending case. When used outside these contexts to punish or prohibit media *reporting* of judicial proceedings or public and *media* comment of a judicial decision or order, criminal contempt of court then becomes nothing more than an instrument used by judges to shield themselves and each other from public scrutiny and accountability.

Thus, in *R.v Kopyto,*[139] where the offending comments "were not calculated to interfere with the conduct of a specific case presently before the court, or a particular case pending before the courts," but were, rather, directed at the outcome of the case and at judge's decision, the Ontario Court of Appeal (Canada) quashed the defendant's conviction for criminal contempt ("scandalizing the court"). The Court in *Kopyto* held, instead, that the use of criminal contempt to punish public or media comment about a case or judicial proceeding after a decision has been rendered constituted an unreasonable and unjustified infringement of the provision in the Canadian Bill of Rights guaranteeing the freedom of expression. In contrast, where a newspaper published an article expressing a prejudicial *opinion* (as opposed to merely *reporting*) on a matter *sub judice*, the Supreme Court of Newfoundland, Canada, held in *R.v Robinson-Blackmore Printing & Publishing Co. Ltd.*,[140] that charges of criminal contempt of court brought against the newspaper did not, in that circumstance, violate the right to freedom of expression under Canada's bill of rights.

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[139][1987] 39 C.C.C. 3d 1 (Ont.). *See also The King v. Nicholls* [1911] 12 C.L.R. 280 (H. Ct., Australia) (holding that statements made concerning a judge of the High Court do not constitute a contempt of the High Court unless they are calculated to obstruct or interfere with the course of justice, or the due administration of justice)

[140][1989] 47 C.C.C 3d 366 (Newfld).

The rationale for limiting criminal contempt of court to disruptions of court proceedings and expressions of *opinion* regarding matters at issue in an ongoing trial is not far fetched. If, beyond factually reporting court proceedings, the media were free also to editorialize and express *critical opinion* about the guilt or innocence of persons involved in a pending case, there is a clear danger that the judge or jury in that case, and the result thereof, might be unduly influenced by such contemporaneous media comments. Such a situation might jeopardize the rights of the parties in the case, and especially the defendant's. Therefore, with regard to cases *sub judice*, criminal contempt may be justified as a necessary precaution against media *interference* in the fair and impartial conduct of ongoing judicial proceedings. But merely *reporting*, without pre-judging, an ongoing case does not amount to interference of the kind that would justify invocation of the sub *judice rule*.[141] Furthermore, the concern regarding possible prejudicial effect on the outcome of a case or on the rights of a party does not arise when the case is over and judgement has been rendered. At that point, the public is entitled to subject the case, the judge, and the judicial decision to scrutiny and criticism, if need be.

In line with the trend in other common law jurisdictions, Ghana's current law on criminal contempt of court should be reformed so as to allow journalists to subject judicial conduct and decisions to public scrutiny and comment without risking penal sanctions. Reform is needed on two fronts. First, in the interest of clarity and predictability, the offence of criminal contempt must be made a statutory, instead of a common law, crime. In this way, one can determine the elements and scope of the offence simply by reading the relevant statute in the Criminal Code of Ghana, instead of rummaging through numerous and often antiquated judicial precedents. Second, as already argued, the offence of criminal contempt of court must be limited to attempts to disturb the smooth conduct of court proceedings

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[141] As was clearly illustrated by the incessant media and public opnionising that surrounded the widely watched criminal trial of O.J. Simpson (in *People v. Simpson*, Docket No. BA09721 1 (Super. Ct. Los-Angeles Country, Calif), U.S. law allows the media to not just report but to comment and editotialise on ongoing trials. This author believes that his latitude of press freedom goes too far, because it puts the parties' - and particularly, the defendant's - right to a fair trial at risk by bring the weight of public opinion to bear on the judge or the jury.

or to influence improperly the administration of justice in a pending case. This means that the strand of criminal contempt euphemistically known as "scandalizing the court," which allows a court to punish even after-the-fact comment or criticism regarding a judge's conduct or decision, must be statutorily abolished in Ghana.[142]

In fact, the jurisprudential foundations of the particular offence have been insecure from the very beginning. In *McLeord v. St. Aubyn*,[143] a case decided in 1899, Lord Morris, while observing that the offence of scandalizing-the-court had almost become obsolete in English, nevertheless indicated that is application might be proper in "coloured communities," implying that the offence, though not fit for the enlightened English, could be reserved for the natives in distant colonies. Although the offence made its way back into English jurisprudence a year later in the case of *R. v Gray*, [144] it has long since fallen into disuse, with no successful application of the offence on record since the 1930s. The current attitude of the English courts toward scandalizing-the-court is best summed up in the following words of Lord Atkin, from his opinion in the 1936 case of *Ambard v. Attorney-General for Trinidad & Tobago*.[145] "[W]hether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith, in private or public, the public act done in the seat of justice."

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[142] On a *proper* interpretation of the provisions of the Constitute relating to the media, the offence of scandalizing the court, along with criminal libel, is arguably unconstitutional, at least as applied to the media. However, such a proposition seems unlikely to sway a majority of the judges on Ghana's current Supreme Court, leaving legislative repeal as the only other alternative. But there too, progressive reform seems politically unlikely at the present time; certainly not without sustained efforts by the media and other democracy activits to mobilize public opinion against these laws. The public must be made to recognize that they share identical interests with the media in these matters. For example, the criminal and seditious libel laws as well as criminal contempt extend to persons outside the media, and also apply to authors of "letters to the editor"!

[143] [1899] AC 549, PC

[144] [1900] 2 QB 36.

[145] [1936] 1 All ER 704, PC.

In any case, Ghana, unlike England, now has a *written* constitution which expressly protects the right of the public and the media to hold public officers and public institutions accountable. Therefore, regardless of what the position on scandalizing-the-court is in England today, the Ghanaian public and media are, by virtue of the provisions of Ghana's own Constitution, entitled to greater legal protection. Indeed, it is instructive that the United States, whose Constitutional jurisprudence informs many provisions of Ghana's present constitution,[146] does not recognise the offence of scandalizing the court. To the contract, the Supreme Court of that country has repeatedly held that criminal contempt cannot be used to protect the "reputation" or "dignity" of a judge or the courts against public and media comment.[147]

Furthermore, as already discussed, the courts of Canada have found scandalizing-the-court to be an unreasonable infringement on the right to free expression. In short, the modern trend in common law jurisdictions is to leave the public and the media free not only to *report* on ongoing proceedings, but also to *comment* on the decisions and conduct of judges once the proceedings are over.

In the light of this jurisprudential trend, only blind fidelity to an archaic common law invention or a refusal to adapt to the changing times can explain the continued application in Ghana of the offence of scandalizing the court (as well as of criminal libel laws). But tradition is a rather weak thread on

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[146] The 1992 Constitution of Ghana (like the 1979 Constitutuon before it) borrows from U.S. constitutional jurisprudence the following key principles and ideals: a republican system of government (as opposed to a constitutional monacrchy); separation of powers; an executive presidency; the power of judicial review for the courts; a government of limited powers; and above all, a "bill of rights" (*i.e.*, constitutional provisions protecting certain enumerated rights of the people and other private entities against encroachment by government).

[147] *See, .e.g Bridges v. California*, [1941] 314 U.S. 252; *Pennekamp v. Florida*, [1946] 326 328 U.S. 331; *Craig v. Harney*, [1947] 331 U.S. 367; *Wood v. Georgia*, [1962] 370 U.S. 375. For a comprehensive review and discussion of U.S. Supreme Court precedents in this and other area of speech, see Thomas I. Emerson, *The System of Freedom of Expression* 91970); Kenneth S. Devlo, *Mass Media and the Supreme Court: The Legacy of the Warren Years* (4th ed. 1990).

which to hang a rule of law,[148] especially where a violation of that law carries with it a risk of criminal punishment, including imprisonment. In addition, under a system of judicial selection, such as Ghana's in which judges are not directly accountable to the people through elections, allowing judges the power to punish criminally individuals and publishers for casting a judge or the judiciary in bad light smacks of *judicial tyranny.* "It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it."[149] In short, the decision of the Ghana Supreme Court in the *Mensah-Bonsu* case is a step in the *wrong* direction, and must be reversed.

This is not to suggest that the media must be left to do as it pleases. On the contrary, the Ghanaian media under the Fourth Republic have a duty to exercise their freedom to promote and defend public and democratic values. The bundle of rights granted to the media by the Constitution, and in particular by Article 162(2), is designed to give the media the freedom to contribute to the building and improvement of public institutions and the consolidation of constitutional democracy. It is not intended to serve as a license for the media to publish *ad hominem* attacks unrelated to matters of legitimate public concern, to advocate illegal conduct, or to fabricate tales about other people.

Still, opponents of a free and independent media must not hide behind the veil of so-called "responsible journalism" to undermine and weaken the

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[148] Of tradition and the law, the famour Justice Oliver Wendel Holmes had this say: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the part." Oliver W. Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 459 (1897).

[149] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* [1949] (Princeton paperback ed. 1973), at 2-3. Jerome Frank was a jude of the United States Court of Appeal. A former professor of law at Yale, he was a leading figure in the Legal Realism movement.

media's constitutional-affirmed right to hold public officers accountable for the discharge of the public trust. The use of the criminal law and, for that matter, of the scarce prosecutorial resources of the State for the purported reason of promoting "responsible journalism" not only smacks of paternalism, but also cannot be justified in terms of the relative social costs and benefits involved. Ensuring a "responsible press" hardly qualifies as a proper police function of the State as to justify the invocation of the criminal law.[150] Moreover, public officers, including judges, who believe their private reputations to have been wronged by a news medium retain the right to seek civil, redress. The right to a rejoinder, granted under Article 162(5) of the 1992 Constitution, as well as the opportunity to file a complaint with the independent National Media Commission[151] are additional avenues open to aggrieved public officers to rebut or refute false news reports. The availability of these outlets for redress should render unnecessary any use

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[150] The public, no matter how "illiterate," must be trusted to judge for themselves what to believe or to make of the stories and commentaries put out by the media. That the public is far more sophisticaed than members of the political elite would admit is clear from teh fact that people have always been able to see through propagandizing by the State even where the State is the only source of information. If the public can be trusted to choose their own government, then surely they can be trusted to discern, without the help of a paternal government, the difference between tabloid journalism and factual and analytically sound journalism.

[151] The 1992 Constitution, recognizing the need to keep watch over the media watchdoy, has provided, in articles 166-173, for the establishment of an independent National Media Commission to ensure, among other things, that journalists live up to the highest professional and ethical standards in the conduct of their work. Thus, the Media Commission, not the government, is the body chosen by the Constitution to keep watch over the media. Regrettably, the government does not appear committed to allowing the Media Commission to function independently, if at all. In clear breach of the Constitution, Parliament has not re-constituted the Media Commission, after the statutory terms of the first Commission expired. The absence of a "holdover" provision in the statute establishing the term of the Commission creates an avoidable and arguably unconstitutional discontinuity in the Commission's work. Even if its statutory term elapses, a current Commission cannot constitutonally be put out of business until a new one has been constituted or until the term of the current one is renewed. In this way, none of the bodies charged with appointing members to the Commission can prevent the Commission from being fully constituted by failing to exercise its appointing power in a timely fashion. Parliament's and the President's dilatory tactics in regard to the re-constitution of the Media Commission are a flagrant violation of the Constitution, and unless immediately self-corrected a writ of mandamus may be necessary to bring an end to this ongoing breach of constitutional duty.

of the criminal law to protect what is essentially *private* reputation.[152] The criminal law is reserved for the public rendering of account by those who have committed public wrongs. It is therefore perversity of a gross kind for the criminal law to be used in a manner that frustrates, rather than promotes, the search for truth and for accountability in public life.

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[152] It is telling that when the colonial government of the Gold Coast first introduced the Sedition Bill into the colony in 1934, it justified the law, *inter alia*, on the grounds that the colonial administration government had "no department of information;...no public relations officer; [and] no local radio" to counteract the "hostile" and "communist" propaganda that was coming from public speeches and newspaper articles. See W.E.F. Ward, My Africa (Ghana Univs. Press, 1991), at 98. Impliedly, the availability of state-owned mass communications media would hgave rendered a Sedition law unnecessary.

Conclusion

Throughout history when citizens – their lives, liberties or property – have come under attack from an arbitrary and oppressive state, they have often sought refuge in the courts. Because courts are seen as the citizen's first line of defence against an overbearing state, an independent judiciary is considered indispensable in any political community committed to democracy and constitutionalism. Thus, among the many democratic goods which the 1992 Constitution promises Ghanaians is an independent judiciary to keep watch over the bundle of rights and liberties guaranteed to Ghanaians under the Constitution. The security of those rights and liberties would be imperiled unless Ghanaians are themselves ready to defend the independence of the judiciary against threats from the State.

Of equal importance, however, is the need for the public to keep watch over the watchdog itself. Being merely human, judges are fallible and susceptible to the same influences that shape human perspectives and distort human judgement. In addition, certain institutional characteristics of the judiciary, such as its dependence on the Executive for the actual enforcement of its orders, as well as the predominant influence of positivist conceptions of law on judicial thinking tend to make judges unduly deferential to government. Thus it should not be taken for granted that the judiciary will remain independent simply because a Constitution makes them *legally* so. Rather, the public, together with other watchdog institutions such as the media and the Bar, must maintain vigilance over the conduct and activities of the courts, and make judges publicly answerable for their actions as public officers. Media, academic and professional analyses and criticisms of judicial conduct and decisions are particularly useful avenues for promoting judicial accountability, given the fact that under our constitutional system judges can neither be voted out of office nor be held legally liable for their official actions.

The 1992 Constitution places tremendous power and faith in the hands of the judiciary, and especially of the Supreme Court. As Ghana's transition to democracy forges ahead democracy activists and the public will continue to call on the courts to define the contours and direction of the constitutional journey on which the country has embarked. Whether this

promising attempt at constitutional democracy will flourish or flounder will depend, among other things, on how and to whose benefit the courts choose to exercise their immense power and responsibility. The Constitution is unequivocal that it is the people's interest – in democracy, in freedom, in accountability, and in justice – that must be the guide and the ultimate goal of the judiciary. It is for the courts to live up to that challenge, and for the Ghanaian public to make certain that they do.

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