

# LEGISLATIVE ALERT

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## THE JUDICIARY AND DEMOCRATIC GOVERNANCE IN GHANA

by

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### What is democracy?

The word has been defined in *Shorter Oxford English Dictionary Third Edition* in the following terms :

- a. "Government by the people; that form of government in which the sovereign power resides in the people, and is exercised either directly by them or by officers elected by them.
- b. The state or community in which the government is vested in the people as a whole.
- c. That class of people which has no hereditary or special rank or privilege; the common people"

Perhaps the simplest form of describing a democracy is said to be the government of the people by the people and for the people.

It has also been accepted that a democratic society is one in which human rights and social justice are given recognition and protection. A polity in which the democratic way of life holds sway, often referred to as a free society, is one in which the citizens enjoy all the basic rights and freedoms including the right to free access to independent courts. In effect it is one that accepts the rule of law.

In every democratic society, the supreme or fundamental law, that is the national constitution, makes provisions for the establishment of the three organs of the state, namely the Executive, the Legislature and the Judiciary. This tripartite form of government is a recognition of the doctrine of separation of powers, an ancient Greek legacy that was given prominence by such philosophers as John Locke of Britain and Montesquieu of France.

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Lord Acton, a historian of great eminence, had good cause to observe that "power tends to corrupt and (that) absolute power corrupts absolutely". It is in a legitimate attempt to forestall such danger that the doctrine of separation of powers exists in order to provide checks and balances in the exercise of governmental power.

### The Judiciary

A proper remedy for any abuse of power in a democratic society is to have recourse to law which regulates the conduct of people in society. This then brings into sharp focus the important role that an independent and impartial judiciary plays in the preservation of law and order, which is an essential requirement of any given society.

Article 125 of the 1992 Constitution rests the judicial power of Ghana in the Judiciary. There is no doubt that the Judiciary occupies an extremely important place in the hierarchy of the state organs, and exercises a vital role in ensuring that law, whether common or statute, public or private, is upheld and effectively applied through its judgements or pronouncements arising from cases submitted to it. Dennis Lloyd in his book — *Introduction to Jurisprudence* — regards the judges "as the priests of the law, the repositories of its ancient rules and traditions where decisions are thus distilled in a mysterious way by the Judge in scrinio pectoris sui".

In fact, it has now become established that although the Judges may be high priests and guardians of the Constitution, they do at times create new law through the interpretation of statutes and the establishment of precedents which Dennis Lloyd refers to as "the life blood of legal system whether primitive, archaic or modern". Truly speaking, the Judge never creates new laws, but only declares fresh applications of the rule of law.

As already stated, Article 125 of the Constitution does not only set up the Judicature, but proceeds further to affirm the independence of the Judiciary. As the Legislature represents the will of the sovereign people of Ghana, the Judiciary represents the conscience of the same people. One is secured by periodical elections and hustings, while the other is secured by lifelong training and experience.

In his sessional address to Parliament, His Excellency The President on the 15th of January 1998, spoke of the Judiciary in the following terms:

"Good laws, independence, judges and an efficient judicial system provide the necessary backdrop for the discipline that I have been talking about.

" With this in view, we will continue our programme of legal sector reforms to enhance capacity and provide the tools for legal sector work.

"We shall set up the programme for the modernisation of our court structure as well as our court equipment.

"We shall improve conditions for our courageous and dedicated judges, who have sometimes had to endure unjustified criticisms and insults in the stoic silence required of their profession.

"I pray that our Judiciary will strive to appreciate the socio-economic context within which their decisions are given, so that together we will promote the development and progress of this country. A good beginning was made when the Judiciary met recently at Elmina to interact with institutions of state. We hope such interactions would become a regular feature on the agenda of the Judiciary".

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In this portion of the President's address to Parliament, are mirrored the problems and aspirations of the Judiciary in the grand design of providing good governance for the country. The President also expressed His concerns, plans and a desire to encourage the Judiciary to wake up, put away past fears, and rise up to the occasion and "to appreciate the socio-economic context within which their decisions are given so that together we will promote the development and progress of the country". Earlier in an address to a security institution, His Excellency The President had identified the Judiciary as the place where the "democracy buck" stops. The Judiciary must accept this challenge in good faith. It can, and indeed must apply the law so as to make it accord with the needs of the country.

Two important matters are discussed below. They are : 1. The Independence of Judges and an Efficient Judicial System; and 2. Independence in Financial Administration in the Judiciary.

### 1. The Independence of Judges and an Efficient Judicial System

It would be wrong for the idea to gain currency in the country that the Judiciary should, as it were, stand aloof and unconcerned about occurrences in the country. In an address to the Justices of the High Court at Elmina on 8th January 1998, the author stressed "the necessity for Superior Court Judges being alive to matters occurring in this country, and those affecting our political and economic interests outside this country".

Independence, therefore, does not mean that there should be no co-operation between the Judiciary and the other arms of government. The Judges must be introduced to the business of statecraft. For example, the Constitution provides

that Commissions and Committees of Enquiry should, unless the matters are specialised or technical, be chaired by Superior Court Judges. But the Judges are being marginalised and inferentially shut out from the corridors of power.

Such, however, was not the previous practice. Some people remember Judges such as the late Justice Mills-Odoi as Chairman of the Wages and Salaries Committee, and a host of others involved in all manner of enquiries. The Speaker, apart from being a former Electoral Commissioner, has been involved in the work of other Commissions. The author was himself Chairman of the Committee of Enquiry (1975-78) to establish and determine the constitutional relationship between the towns and the chiefs within the Ga District of Ghana.

### 2. Independence in Financial Administration in the Judiciary

The Constitution provides for financial independence of the Judiciary; in matters of financial administration, the Judiciary deals directly with the President. The budget of the Judiciary is to be submitted to the President who should send it to Parliament for approval and payment out of the Consolidated Fund. The only interferences in financial administration in the Judiciary are such interventions as budget hearings which are not provided for in the Constitution. These interventions may impede the President's policies in the following ways:

- (a) The President said that the Government would "continue the legal sector reforms and the provision of tools for legal sector work." It is the Judiciary which



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knows the requisite inputs for the more efficient discharge of their duties and must be able to provide for them. It is an unwarranted intrusion into the Judiciary's assessment of their immediate needs if their estimates are subject to vetos by persons who do not appreciate the importance of the Judiciary's requirements.

With regard to the provision of tools for "legal sector work", the author expresses gratitude for the significant offers being made by N.G.O.'s and other governments in this area. The offers are for the improvement of recording and other systems for expediting legal work and improving the work of the Judges.

- (b) The programme for the modernisation of the Courts is on. It is hoped that at the end of the programme, Superior Court Judges and indeed all Judges, even of the Lower Courts, will have not only Courts which are worthy of the name, but also adequately furnished chambers befitting their status.

- (c) The mention of improvement in the conditions of service of Judges always raises a chuckle amongst them. Constitutional guidelines have been set for determining the emoluments, retiring awards and benefits of Superior Court Judges, but so far no firm decisions have been published. It is therefore difficult to determine the adequacy of the financial benefits. But it is important that firm decisions on such matters are taken with due dispatch, as they notoriously affect the image of the Judiciary — notably the alleged corruption in the Judiciary — and also affect the recruitment of lawyers of excellent calibre to the Bench.

The quality of legal thinking which emanates from Ghana's Courts can only gain approval when cases are cited in other common law countries. Therefore the Judiciary cannot condemn itself to a second-class position in this area. The issue of attracting lawyers of excellent calibre to the Bench is one that should not be treated lightly.

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