

# Appointment and removal of judges and assignment of files at Civil Courts in Ghana – current issues.

by Sedina AGBEMAVA

The Commonwealth Latimer House Principles in its laid down guidelines for the independence of the Judiciary states

*"An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human right conventions and international law, to the extent permitted by domestic law of each Commonwealth country. To secure these aims, Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure equality of opportunity for all who are eligible for judicial office, appointment on merit, and that appropriate consideration is given to the need for the progressive attainment of gender equality and the removal of other historic factors of discrimination, arrangements for appropriate security of tenure and protection of levels of remuneration must be in place...*

*Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties"*

It would seem that the Ghanaian judiciary has adopted these guidelines in addition to the Constitutional provisions and other statutes like the Courts Act, 1993, Act 459<sup>1</sup> and the Judicial Service Act, 1960 C A 10<sup>2</sup> in the appointment and removal of judges.

The Constitution of the Republic of Ghana, 1992, states in Article 126 (1) (a) & (b) that the Judiciary shall consist of;

- a) the Superior Courts of Judicature comprising;
  - (i) the Supreme Court
  - (ii) the Court of Appeal
  - (iii) the High Court and Regional Tribunals
- (b) such lower courts and tribunals as Parliament may by law establish.

This is the hierarchy of the Courts in Ghana.

Appointments to these courts are found in The Constitution, 1992 and the Judicial Service Act, 1960. They are made either by recruitment or promotion.

1 Act 459.

2 C A 10.

In the case of Justices of the Superior Courts of Judicature, the appointments are made by the President of the Republic appointed under warrant and under the seal of the President.

In the case of the Chief Justice he or she shall be appointed by the President acting in consultation with the Council of State and with the approval of Parliament. Article 144.

(2) The other Supreme Court Justices shall be appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.

(3) Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals shall be appointed by the President acting on the advice of the judicial Council.

In the unreported case of J1/26/2015. The Ghana Bar Association & 3 Ors v The Attorney General & 3 Ors (Consolidated), the Plaintiffs brought an action challenging the authority of the President to appoint Supreme Court Justices without relying on the recommendations of the Judicial Council. The Judicial Council is the body mandated by the Constitution to...

The reliefs sought by the Plaintiffs were as follows:

1. A declaration that upon a true and proper construction of Article 144 clauses (2) and (3) of the Constitution 1992 all appointments made by the President of the Republic of Ghana to the Superior Courts are valid only to the extent that such appointments are made in strict accordance with the advice of the 2<sup>nd</sup> Defendant herein, the Judicial Council.
2. A declaration that upon a true and proper interpretation of Article 144 (2) and (3) of the Constitution 1992, a constitutional trust is created in the 2<sup>nd</sup> Defendant herein, the Judicial Council, to make nominations of persons best qualified to serve as Justices of the Superior Courts of Judicature, and the 2<sup>nd</sup> Defendant is required to ensure that such nominations are actually submitted by the President to Parliament for approval after due consultations with the Council of State.
3. A declaration that accordingly, upon a true and proper construction of article 144 clauses (2) and (3) of the Constitution 1992, the Judicial Council of the Republic of Ghana has a constitutional obligation to specifically advise the president of the Republic of Ghana as to which specific person(s) is/are suitable for appointment to serve as Justice(s) of the Superior Courts of the Judicature, in accordance with which advice the President is mandatorily required to exercise his powers of appointment.
4. A declaration that an appointment or non-appointment by the President of the Republic of Ghana of a Justice of the Superior Court in a manner out of accord with the advice of the Judicial Council is unconstitutional, null, void and of no effect.

In a concurring opinion Dotse JSC<sup>3</sup>opined as follows:

3 Justice of the Supreme Court of Ghana.

*"When the two words and phrases i.e. acting on the advice are put together, a clearer meaning of the role of the Judicial Council giving an advisory opinion is apparent and this therefore in my opinion makes such an advice in the true meaning of the words not binding. Therefore, a simple, ordinary and common sense reading of these provisions indicates that the President must at all cost have this advice from the Judicial Council and if he does not have this advice, the appointments of the Justices will not be valid. But at all times, this remains an advice and the President, in my opinion is not bound to follow it... In all these, what is clear is that, "in consultation with the Council of State" connotes that, before the Justices of the Supreme Court for example are appointed, the President must have consultations with the Council of State on the nominees being considered for such appointment.*

It is therefore right and or correct to state that, whilst the President is mandated by the express provisions of the Constitution in articles 144 (2) and (3) to seek the advice of the Judicial Council before appointments to the Supreme Court and Court of Appeal are made, and similarly consult with the Council of State on the appointment process of the Supreme Court Judges, he is nonetheless not bound by the advice or opinion of these bodies."

The Supreme Court decision has thus made it clear that even though the President is mandated to obtain advice from the Judicial Council and in respect of the Chief Justice and other Supreme Court justices, act in consultation with the Council of State, he is not bound to follow the advice if he so wishes because according to Atuguba JSC<sup>4</sup> in the lead opinion, any other interpretation could lead to statutory absurdity, where for instance the Judicial Council submitted one hundred (100) names for the consideration of the President, the interpretation the Plaintiffs are calling for would mean that the President was bound to appoint all 100 nominees without due regard the complications these appointments may later have.

In the case of the removal of judges, a number of judicial pronouncements have also been given in the matter.

Article 146 of the Constitution sets out the procedure as follows:

A Justice of the Superior Court or a Chairman of the Regional Tribunal shall not be 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.

- (2) A Justice of the Superior Court of Judicature or a Chairman of the Regional Tribunal may only be removed in accordance with the procedure specified in this article.
- (3) If the President receives a petition for the removal of a Justice of the Superior Court other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal, he shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case.

4 Justice of the Supreme Court of Ghana.

- (4) Where the Chief Justice decides that there is a *prima facie* case, he shall set up a committee consisting of three Justices of the Superior Courts or Chairmen of the Regional Tribunals or both, appointed by the Judicial Council and two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers, and who shall be appointed by the Chief Justice on the advice of the Council of State.
- (5) The committee appointed under clause (4) of this article shall investigate the complaint and shall make its recommendations to the Chief Justice who shall forward it to the President.
- (6) Where the petition is for the removal of the Chief Justice, the President shall, acting in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President, and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.
- (7) The committee appointed under clause (6) of this article shall inquire into the petition and recommend to the President whether the Chief Justice ought to be removed from office.
- (8) All proceedings under this article shall be held in camera, and the Justice or Chairman against whom the petition is made is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice.
- (9) The President shall, in each case, act in accordance with the recommendations of the committee.
- (10) Where a petition has been referred to a committee under this article, the President may-
  - (a) in the case of the Chief Justice, acting in accordance with the advice of the Council of State, by warrant signed by him, suspend the Chief Justice;
  - (b) in the case of any other Justice of a Superior Court or a Chairman of a Regional Tribunal, acting in accordance with the advice of the Judicial Council, suspend that Justice or that Chairman of a Regional Tribunal.
- (11) The President may, at any time, revoke a suspension under this article.

In the unreported case of J1/29/2015 *Dery v Tiger Eye Pi & 2 Ors*, the issue was whether or not if Article 146(8) of the Constitution is violated in terms of public disclosure of the contents of a petition, it renders the original process, being a petition to the President, null, void and of no effect?

Two cases have already decided that the constitutional requirements, being that the proceedings must be held in camera must be complied with. In **Ghana Bar Association v. Attorney-General and Another [1995-96] 1GLR 598**, the Supreme Court stated the reason for the privacy of the proceeding thus;

*"Is important to note that article 146(8) of the Constitution, 1992 provides that the proceedings of the committee appointed to deal with any such petition 'shall be held in camera'. It is mandatory that such proceedings be held in private, not in public or*

*open court as has unfortunately been done in this case. The reason for this important provision is obvious. It is to preserve, protect and safeguard the authority, dignity and independence of the judiciary.”*

**Agyei-Twum v. Attorney-General and Akwetey [2005-2006] SCGLR 732**, also held that the proceedings ought to be held in camera. Date-Bah JSC stated it as follows:

*“The constitutional requirement that the impeachment proceedings be held in camera would be defeated if the petitioner were allowed to publish his or her petition to anyone other than the President. This is likely to lead to the petitioner’s allegations being aired in public while the judge’s response can only be considered in private. This would lead to grave adverse public relations consequences for the judiciary. The institution of the judiciary could be undermined without any justification. Accordingly, in my view, a petitioner under article 146 may not disclose the contents of his or her petition to the media nor indeed to any person other than the President.”*

Benin JSC in the Dery case supra reasoned as follows:

The true intent is not in dispute, it is to protect the integrity of the judiciary, the personal reputation of the judge under investigation, and it also aims at protecting potential witnesses from some form of recrimination. The reasons for confidentiality could be endless, but integrity of the administration of justice is at the centre.

The court however disagreed with the Plaintiff that the publication rendered the petition null and void. It held that it would be unconscionable and against public policy to void the proceedings.

Again Benin JSC speaking through the court held that,

*“Finally the attempt to abort the proceedings also brings it in conflict with the provisions of Articles 128(4), 136(3) and 139(4) of the Constitution which require that only persons of higher moral character and proven integrity shall be appointed to the various branches of the superior court bench, read side by side with Article 146(1) which requires, inter alia, that when a judge is alleged to have fallen short of the qualities for which he was appointed he should be investigated. It is also a matter of public policy that allegations of misconduct or misbehaviour against a public official, including a judge, should not be swept under the carpet. Indeed the very integrity of the Judiciary is at stake if such allegations are unexamined and found to be false. In the words of Berger CJ in the Landmark case ‘The operations of the courts and the judicial conduct of judges are matters of utmost public concern.’. Thus we are faced with these competing rights under the Constitution, that is, the requirement to investigate the alleged misconduct against the Plaintiff and the protection of his personal reputation as well as the integrity of the judiciary itself. It would be appropriate to apply what the Irish Supreme Court called the doctrine of harmonious interpretation. This doctrine requires that where two constitutional rights come into conflict, for example the right to privacy and the freedom of the press, the conflict should*

*be resolved in the manner which least restricts both rights. That was in the case of Attorney-General v. X and Others (1992) ILRM 401. In short the court was saying that effect should be given to both rights. The plaintiff is entitled to private and confidential process which has been breached by the public disclosure of the petition and its contents; at the same time the State has a constitutional right to investigate the allegations contained in the petition as a matter of express constitutional provisions, and also on account of public policy which requires that such allegations should be investigated. The plaintiff has other remedies available to him as mentioned earlier when we identified the five possible consequences for such violations, some of which are available under our laws. But the State and for that matter the people from whom justice emanates as per Article 125(1) of the Constitution, 1992, will lose it all if the proceedings are truncated without investigations. The State and the people of Ghana have cause to demand that, like Caesar's wife, judges should live above suspicion".*

He concluded that the invitation to the Court to nullify the proceedings as absurd and subversive of the constitutional order.

From the above constitutional provisions and the cases cited, it can be seen that Ghanaian judges are guaranteed security of tenure and where they believe their rights are being violated as under these provisions, they resort to the courts to have their rights vindicated.

In Ghana, case files and dockets are assigned from the registries of the various courts in respect of the High Court and the lower Courts. In the Court of Appeal and the Supreme Court, the Chief Justice as part of her administrative duties empanels the Justices of the Courts. The fears have been expressed that this could give the Chief Justice an advantage in determining how cases are decided especially in highly charged political cases or cases involving the executive. In view of this, a number of practice directives has been issued by various Chief Justices.

<sup>5</sup>E. K Wiredu Ag. CJ issued the following practice directive in [2000] SCGLR 586;

*"In order to minimize the mounting criticisms and the persistent public outcry against the Judiciary in our justice delivery and to restore public confidence, it is my desire that where practicable and especially in constitutional matters, all available Justices of the Supreme Court have a constitutional right to sit, or at least seven (7) justices of the court.*

In an editorial note commending the action, this is what the editor of the Supreme Court of Ghana Law Reports Dr. Bimpong-Buta<sup>6</sup> had to say;

*"The Practice Direction, in the form of a letter to all the justices of the Supreme Court, makes the empanelling of the Supreme Court for the determination of constitu-*

5 Chief Justice of Ghana from 2000.

6 Editor of the Supreme Court of Ghana Law Reports.

*tional cases more transparent; and more importantly, the Direction is in line with the democratic aspirations of all Ghanaians and the sustenance of the rule of Law in the country. It also has the obvious merit of insulating and freeing the high Office of the Chief Justice from all imaginary and unproven but disturbing allegations of political bias in the empanelling of the Justices of the Supreme Court.”*

Samuel Kofi Date-Bah JSC<sup>7</sup> also had this to say in his book Reflections on the Supreme Court of Ghana (June 2015), UK.

*“The Chief Justice’s power to empanel judges confers on him or her, arguably, the opportunity or potential to influence the outcome of particular cases. The Chief Justice’s knowledge of an individual judge’s track record on particular issues or his or her judicial inclinations on particular issues may give the Chief Justice this potential. This, rightly or wrongly, has attracted unfavourable comment from people in political circles, in relation to politically controversial decisions. It is in reaction to such comments that Chief Justice Georgina Wood decided that she would, during her tenure, empanel, as a matter of practice, a bench of nine justices to hear all constitutional cases.”*

As has earlier on been stated, in the case of the High Courts and the lower courts, the distribution is from the registries where the cases are filed. This used to be done manually, where the Registrar of the Court would assign the case to a judge. This system also led to accusations of influence buying and forum shopping where lawyers and litigants could request that their cases be placed before a particular judge. This practice of manually assigning files has now been phased out, thanks to the new e-distribution system, where cases are now distributed electronically. The case lists are fed into a computer which are then distributed to the various courts. This system, it is said makes the distribution fair and makes for an efficient administration of the justice system.

It can be seen that efforts have been made and continues to be made to ensure a transparent and impartial system of justice delivery.

Justice Sedina Agbemava

March, 2017

jsa

7 Retired Justice of the Supreme Court of Ghana.