23RD COMMONWEALTH LAW CONFERENCE, GOA, INDIA
SAFEGUARDING & STRENGTHENING THE INDEPENDENCE OF JUDICIARY
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1. **Why is Judicial Independence an important concept?**

- Article (1) of the 1992 Constitution of Ghana provides:

> *"(1) The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.*
>
> *(2) The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.*
>
> *Article 125 (5) also provides "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."*

- Additionally, article 2 provides for the enforcement of the constitution and vest the citizenry with the power to initiate actions at the Supreme Court in respect of any act or omission of a person, agency etc. which is inconsistent with any provision of the Constitution.

Observations and Comments:

- An independent judiciary is crucial to the rule of law in any democratic nation with a National Constitution. All powers of government (executive, legislature and judiciary) are subject to the Constitution.
- The Executive and Parliamentary arms of governments are answerable to the Courts when they exceed their powers. This system can only work with an independent judiciary that is well poised to adjudicate all matters that comes before the court impartially and fairly.

2. Dimensions of Judicial Independence

Judicial independence can be viewed in two dimensions.

a. Personal Independence: this relates to the commitment of individual judges to the judicial values that ensures impartiality and fairness.
b. Institutional Independence: this relates to the constitutional, statutory and other arrangements that avoids interference with judicial independence. Judicial Independence traditionally involves the following elements:

- Separation of powers
- Financial and administrative autonomy
- Processes of appointment
- Security of tenure of office
- Immunity from prosecution
- Conditions of service
- Removal and retirement
- Measures to ensure judicial accountability.

3. **The 1992, Constitution of Ghana and Judicial Independence**

a. Article 125 provides for the judicial power of Ghana as follows:

> ***"125 (1) Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.***
>
> *(2) Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems.*
>
> ***(3) 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.***
>
> *(4) The Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary.*
>
> *(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"*

Observations and Comments:

Article 125 (3) is clear enough. Final judicial power is vested in the judiciary. The courts jealously guard this jurisdiction and will strike down any legislations that purports to usurp this power without fail. In the case of **Adofo & Anor v Attorney General [2005-2006] SCGLR 42**, the court noted:

"The unimpeded access of individuals to the courts is a fundamental prerequisite for the full enjoyment of human rights. The court has the responsibility to preserve this access in the interest of good governance and constitutionalism. Unhampered access to the court is an important element of the rule of law to which the 1992 Constitution is clearly committed…"

See also the case of ***NPP v Attorney-General (31st December case) [1993-94] 2 GLR 35*** *which struck down the decision of the executive to celebrate a military takeover in a democratic era with public funds. The court held that the decision by the executive was not a political question.*

b. Article 126 provides for the composition of the Judiciary as follows:

(1) The Judiciary shall consist of –
(a) the Superior Courts of Judicature comprising –
(i) the Supreme Court;
(ii) the Court of Appeal; and
(iii) the High Court and Regional Tribunals.
(b) such lower courts or tribunals as Parliament may by law establish.
(2) The Superior Courts shall be superior courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this constitution.

(3) Except as otherwise provided in this Constitution or as may otherwise be ordered by a court in the interest of public morality, public safety or public order, the proceedings of every court shall be held in public.

(4) In the exercise of the judicial power conferred on the Judiciary by this Constitution or any other law, the Superior Courts may, in relation to any matter within their jurisdiction, issue such orders and directions as may be necessary to ensure the enforcement of any judgment, decree or order of those courts"

Observations and Comments:

Article 126 (1) (a) and (b) puts beyond doubts the composition of the courts in Ghana.

c. Article 127 provides for the independence of the judiciary as follows:

"127. ***(1) In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.***

(2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfered with Judges or judicial officers or other persons exercising judicial power, in

the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.

(3) A Justice of a Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power.

(4) The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to our in respect of, persons serving in the judiciary, shall be charged on the Consolidated Fund.

(5) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the superior court or any judicial officer or other person exercising judicial power, shall not be varied to his disadvantage.

(6) Funds voted by parliament or charged on the Consolidated Fund by this Constitution for the Judiciary, shall be released to the Judiciary, in quarterly instalments.

(7) For the purposes of clause (1) of this article, "financial administration" includes the operation of banking facilities by the Judiciary without the interference of any person or authority, other than for the purposes of audit by the Auditor-General, of the funds voted by Parliament or charged

on the Consolidated Fund by this Constitution or any other law, for the purposes of defraying the expenses of the Judiciary in respect of which the funds were voted or charged."

Observations and Comments

- Textually, article 127 (2) puts the institutional independence of the Judiciary beyond doubt.

- In the exercise of the power both judicially and administratively, the Constitution provides that the Judiciary shall not be subject to the control or direction of any person or authority except the Constitution. With these express constitutional provisions, it is fair to say that the institutional independence of the Ghanaian Judiciary is guaranteed in text. However, a closer look at these provisions presents one analytical problem. That is, the provisions have only sought to deal with a perceptible external evil or potential interference from other political institutions without consideration of the practical influence of these institutions on judicial influence. Such a conceptual framework also discounts internal threats to independence.

FINANCIAL AUTONOMY

- Per article 179 (3), (4) and (5) the judiciary prepares its own annual budget estimates. The executive is not permitted to revise the budget, it can only comment or make recommendations regarding it. Parliament is required to consider and approve the budget in its original form.

- There are practical difficulties with the financial autonomy of the Judiciary as provided for in article 127 (4) - (7) of the Constitution.
- The ambit of this financial freedom covers the operation of banking facilities by the Judiciary without the interference of any person or authority, other than for purposes of audit by the Auditor-General, of the funds and defraying the expenses of the Judiciary. These financial arrangements guarantee salaries and allowances of judges. This is imperative in order to check government against punishing, threatening, and enticing judges through financial inducements. In reality, financial guarantee is not necessarily a case for adequate funding. Besides, the relative fragile nature of the economy poses a significant threat to any conception of adequate and prompt release of funds. Adequate funding largely depends on the ability of the government to raise revenue and the viability of the economy.
- One may also wonder what the financial autonomy means, when the Chief Justice is constantly compelled to engage or chase the executive to ensure the release of funds that has already been approved by Parliament for its operations.
- Some writers have advocated that a percentage of the nation's revenue should be earmarked to cater for judicial expenditure to curb this problem.
- How about the determination of the emoluments of the judiciary by a committee set up by the president under article 71. That is an independent body charged by the Constitution to determine the emoluments of article 71 office holders which include the judiciary.

ADMINISTRATIVE AUTONOMY

The Chief Justice is head of the judiciary and administers it but certain procurement of goods and services required to be made by the judiciary such as purchase of official vehicles for judges is at the beck and call of the executive who award such contracts to political cronies and friends. The Auditor-General has also interpreted a law on disposal of vehicles to retired public servants with the approval of the Minister of Finance to include the judiciary despite the fact that the Chief Justice and the Judicial Council have come out with administrative policy guidelines on the issue. Such actions is a blight on the independence of the judiciary.

THE NUMBER OF JUDGES APPOINTED TO THE SUPREME COURT AND THE EMPANNELLING PROCESS

d. **Article 128 (1) states that the Supreme Court shall consist of the Chief Justice and not less than nine other justices of the Supreme Court.**

Observations and Comments

- The maximum number of judges that can be appointed to the Supreme Court is not provided for by the Constitution. Since the maximum number is indeterminate, it literally allows the President with the approval of Parliament to keep adding to the number. There are concerns that where a President with a Parliamentary majority perceive the Supreme Court to be "unfriendly' it may appoint more judges (perceive to be friendly) to neutralize the perceive opposition. This in a sense may weakens judicial independence.

- There are similar concerns about empanelling of judges for the court's work. The normal bench is duly constituted by five Justices and seven for its review jurisdiction under article 133. The empaneling of judges is at the discretion of the Chief Justice and may encourage a form of "forum shopping' which may affect the individual independence of the judges. By empanelling judges with 'particular' leanings, the outcome of a case may be predetermined.

- It has been suggested that article 128 should be amended whereby the constitution of the full bench is provided for in the Constitution.
- Allocation of cases are also at the discretionary power of the Chief Justice. By failing to specify a blind process of case allocation, article 128 (2) leaves a loophole which is liable for abuse.
- The benefit of E-justice (Electronic Case Distribution System) for cases allocation may be exploited for this cause.

APPOINTMENT/PROMOTION OF JUDGES

Article 144 of the Constitution provides for the appointment of judges.

"*144. (1) The Chief Justice shall be appointed by the President acting in consultation with the Council of State and with the approval of Parliament.*

(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…"

Observations and Comments

- The Council of State, the Judicial Council and Parliament play vital roles in the appointment process of the other Supreme Court judges which is expected to contribute to the prospects of enhancing the credibility and the independence of the judges. However, in practice it is not so. When the President's party commands Parliamentary majority, the approval of the appointments becomes a mere formality since a simple majority approval is required. A super majority approval would have been most desirable.

THE CASE OF AN INDEPENDENT JUDICIAL APPOINTING BODY TO STRENGHTEN JUDICIAL INDEPENDENCE

- The Latimer House principles on Judicial Appointments states as follows: -

"Jurisdictions should have an ***appropriate independent process in place for judicial appointments.*** *Where no independent system already exists, appointments should be made by a Judicial Services Commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.*

The appointment process, whether or not involving an appropriately constituted and representative Judicial Services Commission, ***should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the Judiciary.***

Judicial appointments to all levels of the Judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic facts of discrimination. Judicial appointments should normally be permanent; whilst in some jurisdictions contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure."

- In the case of Ghana Presidents in the Fourth Republic have not considered themselves bound by the advice of the Judicial Council in relation to nominations for appointment to the courts especially the Supreme Court. Presidents have on occasion refused to accept some nominees recommended by the Judicial Council. Though the Council has expressed regret at this, it has not challenged the legality of such refusal in court until the Ghana Bar Association told the bold decision to seek an interpretation of the phrase "acting on the advice of the Judicial Council" from the Supreme Court. In that case i.e., **Ghana Bar Association & Ors v Attorney-General & Judicial Council [2015-2016] 2 SCGLR 871 at 890,** the Supreme Court of Ghana regrettably failed to insulate the independent body established under the Constitution from political interference in the appointing process when it relied on the ordinary English dictionary definition of 'advice' and held that the advice of the Judicial Council on appointments of judges was not binding on the President who was under no obligation to follow the advice. The effect of this decision is that though the President has five nominees including the

Attorney-General on the Judicial Council, after they and other members of the Council have considered nominations and made their recommendations to the President, the President alone can have a second bite at the cherry and pick and choose or reject the judges so recommended if the Attorney-General and the President's nominees are outvoted on the Council or judges appointed on merit and with high moral character and integrity are perceived to be anti-government.

- Again, based on the Ghana Bar Association decision, where the consultation of the Council of State is required for an appointment to be made, the advice of the Council of State would not legally bind the President. Aside this, a significant majority of the members of the Council of State are appointed by the President and therefore are more prone to accept the President's decisions on the list of nominees submitted by the Judicial Council. Thus, the appointing process for judges is not detached from the President's influence. Ghana's case can be contrasted with that other Commonwealth countries where 'advice' given to the President by such a body is binding. In Zimbabwe for instance, the Constitution clearly defines 'advice' and states that wherever in the Constitution 'acting on the advice' is used, the advice is binding. In Kenya, the appointments of magistrates and judges are done by an independent body, the Judicial Service Commission which would be discussed shortly.

- The appointment of High Court and Court of Appeal judges is different from that of judges for the Supreme Court. The appointment of Court of Appeal and High Court judges are published to invite suitable candidate

to apply. It gives equal opportunity for all. There are however issues with the regime of promotions of judges. A judge who may have been outstanding in the discharge of his duties may not be promoted probably because he stepped on some powerful toes or is not perceived as politically aligned.

- The promotion of judges must be on merit; the process requires more transparency and the requirements made available to every judge. This process will help strengthen the independence of the judiciary.
- There is a need to ensure a complete separation of all political influences on the appointment process of judges, not just in text but practically. It must be borne in mind that the process is as crucial as the end. The appointment process of judges reflects their conduct and their decisions on the Bench. The public perception of the judicial system and the ability of the courts to deliver impartial decisions must be a consideration in the appointment process of judges.

e. <u>SECURITY OF TENURE</u>

Judges of the Superior Courts of Judicature enjoy security of tenure. They can only be removed in accordance with article 146 (a) and (2) and on grounds of stated misbehavior, or incompetence's or inability to perform the function of their office by reason of infirmity of boy or mind.

Observation and Comments

- The elaborate impeachment process cannot be circumvented. See **Tuffour v Attorney General [1980] GLR 637 and Ghana Bar**

Association v Attorney General [1995-960] 1GLR; [2003-2004] 1 SCGLR 250.

- The security of tenure is further buttressed by article 127 (5) as already stated. The condition of service cannot be varied to the disadvantage of the judges.

f. Article 127 (3) provides: "A Justice of a Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power.

JUDICIAL ACCOUNTABILITY

g. Judicial Accountability- Judicial Accountability makes the concept of independent judiciary justifiable.

Observation and Comments

- No judge is above the law. The concept of the rule of law requires judges to enforce the rule of law themselves. Accountable judges are subject to the law and the ethical standards of the profession.
- There must be a system that monitors and ensures compliance with the code of conduct for judges and magistrates.
- The impeachment procedure should be invoked to remove errant judges.
- The Chief Justice and the Judicial Council have been entrusted with the duty to formulate policies and mechanism that ensure judicial accountability.

- For instance, a complaint unit has been established to deal with unaccountable or questionable behaviours of magistrates and judges. Complains against any magistrate or judge in the judiciary are investigated for appropriate action. Responses includes, cautions, recommendations for further training, etc.
- Freedom of the media, civil society, and government to criticize the conduct and decisions of judges. This has to be done within the confines of the law to avoid undermining the role of the judiciary.

4. Personal Independence- **Judges must be accountable to the oath to perform their functions without fear or favour**. This promotes independent mindedness. In 2003, the Judicial Service of Ghana developed the code of conduct for judges and magistrates to enhance the scale of ethical conduct and professionalism among judges and magistrates.

a. **Rule 1 concerns upholding the integrity and independence of the judiciary**.

Commentary

"*Respect for judgment and rulings of the court depend upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour. Although Judges should be independent, they must comply with the law, including the provision of this code. Public confidence in the impartiality of the*

judiciary is maintained by the adherence of each judge to their responsibility…

b. Rule 3 E is on self-policing which requires judges to interrogate and report substantial violations of the code of conduct by their colleagues that raises serious questions on the honesty, integrity trustworthiness of finesses for a judicial office. The self-policing extends to reporting serious breaches of code of ethics of the Ghana Bar Association by lawyers to the appropriate authorities for actions.

c. Rule 5 A states that a judge shall conduct all of his or her extra –judicial activities in a manner that does not:

(1) Cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) Demean the judicial office; or

(3) Interfere with the proper performance of judicial duties

Commentary

"A complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Nevertheless, such activities must not be undertaken in such a way as to cast reasonable doubt on the impartiality of the judge. Expression of bias of prejudice by a judge, even outside a judge's judicial activities may cast reasonable doubt on the judge's capacity to act impartially as a judge…"

d. Rule 5 D, (1- 4) requires judges to refrain from financial activities that might interfere with the impartial performance of their judicial duties….
e. Rule 5, (5) prohibits judges from accepting gifts, favours, bequests or loans from lawyers or their firm's if they are likely to come before the judge. It also prohibits gifts, favours, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or likely to come before the judge.
f. Rule 5 H requires judges not to accept extra -judicial appointments by governments on matters other than improvement of the law, the legal system, or the administration of justice, if the acceptance of such appointments might reasonably cast doubt upon the judge's impartiality or demean the judge's office. Judges must not involve themselves in matters that may prove to be controversial. They are not permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.
g. Rule 6 states that a judge should refrain from political or quasi political activity inappropriate to his office. A judge therefore cannot act,

(i) as a leader or hold an office in a political organization.
(ii) Publically endorse or oppose another candidate for a political office.
(iii) Make speeches on behalf of a political organization.
(iv) Attend political gatherings; or
(v) Solicit funds for political organizations or candidate, or purchase tickets for political party dinners or other functions.

THE ROLE OF INDEPENDENT COMMISSION ON THE SELECTION AND APPOINTMENT OF JUDGES-THE KENYAN ROLE MODEL

To deal with the political influence in the appointment process of judges, the Kenyan 2010 constitutional provision could serve as a guide for reforms in judicial independence.

In Kenya, the decision of the Judicial Service Commission (JSC) is binding on the President. All the President is required to do is forward the names of the nominees presented to the National Assembly after a set deadline. The National Assembly is given a deadline to vet the nominee after which if approved, the President was obliged to swear in the candidate without question. The role of the President of Kenya, therefore in the appointment process of the Chief Justice, the Deputy Chief Justice and other Judges is purely facilitative as the Head of State and restricted to receiving from the JSC and submitting the name for the approval by the National Assembly. Not even the JSC itself could revisit the said names once forwarded save in the circumstances contemplated in paragraph 16 of the First Schedule to the Judicial Service Act 2011 relating to death, incapacity, or withdrawal of a nominee.

The Constitution of Kenya, 2010 (the Constitution) and the Judicial Service Act, (Judicial Service Act) describe the procedures for the appointment of the Chief Justice, the Deputy Chief Justice and the Judges of the High Court and the Supreme Court of Appeal. The Constitution highlights this process in *Article 166(1) as follows:*

> ***"166. (1) The President shall appoint—***

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission. "

Additionally, Section 30 of the Judicial Service Act provides that-

"30. (1) For the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.

(2) The function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.

(3) The provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.

Article Paragraph 14 (1) of the First Schedule to the Act reads:

The Commission shall, within seven days of the conclusion of interviews, deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.

Professor Dakas, CJ Dakas, Ph.D; SAN Professor of Law & Senior Advocate of Nigeria; Faculty of Law, University of Jos, Nigeria gave an exposition on the judicial appointment procedures for judges in Kenya in a paper titled "REFORM OF JUDICIAL APPOINTMENT PROCEDURES: DEVELOPMENTS IN SELECTED

COMMONWEALTH JURISDICTIONS AND LESSONS FOR NIGERIA". I hereby reproduce the relevant portions for our consideration.

"Section 30 and First Schedule to the Act. Key Features:

- Overarching objective is to ensure transparency in the recruitment process.

- Elaborate procedure prescribed by Parliament and publicised.

- Vacancies are advertised in the Official Gazette, on the website of the Kenyan Judicial Service Commission, through the Law Society of Kenya, and circulated in any other appropriate manner.

- Reference Check.

- Background investigation and vetting.

- Publication of names of applicants.

- Publication of non-confidential and non-sensitive information about the applicants.

- The Commission invites the public to submit any relevant information about the applicants.

- Interview of applicants in public.

- The Commission deliberates, votes and nominates qualified applicants.

Specific Features:

- The procedure for the appointment of Judges "shall be published" in the annual reports of the Judicial Service Commission and posted on the Commission's website.

- Where a vacancy occurs or exists, the CJ places a notice to that effect in the Gazette, following which the Judicial Service Commission:

- posts a notice to that effect on its website.

- sends notice of the vacancy to the Law Society of Kenya and any other lawyers' professional associations; and

- circulates the notice in any other appropriate manner.

- The notice specifies the eligibility requirements, provides information on how to apply and prescribes the deadline for applications.

- Application forms may be obtained upon request from the Commission's offices and availed on the Commission's website. The application form requires applicants to provide:

- background information and in particular information that may be relevant to determine qualifications for office, including but not limited to:

- academic,

- employment,

- legal practice'

- judicial or financial discipline,

- community service, pro bono activity and non-legal interests,

- involvement as a party in litigation,

- criminal record, etc.

- 3 professional references.

- 2 character references.

- detailed information about the applicant's practice of law in the last five years or, if engaged elsewhere, detailed information on that engagement in the last five years.

- sample of any writing by the applicant, including any legal publications authored by him/her.

- declaration of income and liabilities at the time of the application.

- a brief written summary of the applicant's bio-data including legal education and legal experience.

- An applicant's professional body or organization is at liberty to invite him/her to submit his/her application to that body or organization for evaluation and submission to the Commission. However, each individual application shall be considered on its own merits.

- The Commission shall maintain the confidentiality of sensitive and highly personal information of the applicants. The rest of the information may be made available to the public.

- The Commission reviews the applications for completeness and compliance with necessary requirements.

- The Commission undertakes a reference check of the applicants.

…

- The Commission investigates and verifies, in consultation with relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.

- Upon the expiry of the period set for applications, the Commission:

- issues a press release announcing the names of the applicant,

- publicises and posts on its website the place and approximate date of the Commission meeting for interviews,

- causes the names of the applicants to be published in the Gazette,

- invites any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants,

- interviews any member of the public who has submitted any information on any of the applicants.

- The Commission interviews each applicant in person or, at its discretion, arrange an interview by phone or other electronic means.

- All interviews shall be conducted in public.

…

- Evaluation Criteria:

- professional competence, the elements of which shall include:

- intellectual capacity,

- legal judgment,

- diligence,

- substantive and procedural knowledge of the law,

- organizational and administrative skills,

- ability to work well with a variety of people.

- written and oral communication skills.

- Integrity.

- Fairness.

- Good judgment, including common sense,

- Legal and life experiences relevant to the position,

- Commitment to community and public service.

…

• After the interview, the Commission deliberates and nominates the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.

• Each member of the Commission votes according to his/her personal assessment of the applicant's qualifications.

• The Secretary to the Commission administers the voting.

• The President appoints Judges on the recommendation of the Judicial Service Commission.

• In the case of the Chief Justice and Deputy Chief Justice, the President appoints on the recommendation of the Judicial Service Commission but subject to the approval of the National Assembly"

In the case of **Law Society of Kenya v. Attorney General & National Assembly Constitutional Petition No. 3 of 2016; [2016] eKLR (Petition No. 3 of 2016),** the court dealt with the appointment procedure of the Chief Justice of Kenya. Parliament enacted a Statute Law (Miscellaneous Amendments) Act, (Amendment Act), which contained Section 30 (3) of the Act, which sought to amend Section 30 of the Judicial Service Act. The petitioner, Law Society of Kenya, averred that this provision in the Amendment Act, which required the JSC to forward three names of nominees to the President instead of one name gave the President additional powers of appointment of a Chief Justice, which were not contained in Article 166 (1) (a) of the Constitution. The petitioner submitted that according to Article 171 of the Constitution the JSC was established with the sole purpose of removing from the President the power to nominate and appoint judges and thus safeguard the independence of the Judiciary.

The Court declared that the amendment to Section 30 (3) of the Judicial Service Act, which compelled the JSC to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively was contrary to Article 166 (1) of the Constitution and therefore unconstitutional, null and void.

The court held that-

"As appreciated by all the parties, the appointment of the Chief Justice and the Deputy Chief Justice is a three tier process which

starts with the selection of the person qualified for the respective positions by the Commission, who are then submitted to Parliament for approval in the second stage and then culminating in the appointment by the President. Each of the three stages, it is clear, is demarcated for a different arm of the government. In our view, this was a deliberate system designed to ensure that none of the three arms of the Government had the exclusive or upper role in the determination of who becomes the Chief Justice or the Deputy Chief Justice. The President in our view was meant to play no role at all in determining the name of the person to be submitted to Parliament for approval. The 1st Respondent is of the view that "the President was not bound by any law to appoint the single names recommended by the Commission" and that "where only one name is recommended to the President and the President rejects the person the process has to start again". In our view, the only way in which the names presented to the President can be reconsidered, and if so by the Commission itself, is pursuant to paragraph 16 of the First schedule to the Judicial Service Act, 2011 which provides that:

The Commission shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee." (Emphasis added.)

The Court further explained the role of the President in the appointment of the Chief Justice as follows:

"[T]here are two ways in which the executive plays a part in the selection and appointment of judges without having sole responsibility of appointing the Chief Justice. This is through its representation in the Judicial Service Commission. The Attorney General, who is the government's legal advisor, and one woman and one man representing the public, are appointed by the President, sit in the Commission. The second instance is when the President appoints the nominee approved by Parliament. This position is clearly supported by Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles where it is stated that:

"...the executive plays at least some part in the appointment of judges in every commonwealth jurisdiction, since the formal appointment of a person to judicial office is usually an executive act, commonly performed by, or in the name of, the Head of State."

...

272. To provide for a mandatory three names to be submitted to the President in our view opens an avenue for manipulation of the process and even horse-trading. To do so would open the process to contamination by the ills that informed the transformation ...."

The Court reiterated that the Constitution dictates that the sole and unfettered discretion of nomination of a person for the position of the Chief Justice lies with the JSC and not the President.

Also in the case of **Law Society of Kenya v Attorney General & 2 others Constitution Petition No. 313 of 2014; [2016] eKLR (Petition No 313 of 2014**) the JSC conducted interviews for High Court judges and forwarded 25 names to H. E. the President for formal appointment, swearing-in as judges and gazettement. However the President only proceeded to appoint 11 judges and noted that the 14 remaining names were still being processed and he could approve or disapprove some of the names. The petitioner argued that under Articles 166 and 172 of the Constitution the President has no role in **"processing", "approving" and/or "disapproving"** the appointment of Judges and that this was the JSC's role.

In this judgment, the Court highlighted the main issue to be the role of the President in the appointment of Judges of the High Court of Kenya. It held that the President violated the Constitution by purporting to "**process", "approve" or "disapprove"** the nominees for appointment as Judges of the High Court by the JSC.

In arriving at this conclusion, the High Court observed that the composition of the JSC ensures that the President indirectly participates in the process through three persons whom he has nominated, that is the Attorney General and two members of the public and after the nomination stage all he or she can do is appoint and need not further consult the Chief Justice on the nominated names. The Court further noted that the only time the JSC could reconsider its nominees after it has submitted the names is according to exceptions in

paragraph 16 of the First Schedule to the Judicial Service Act that is **"in the case of death, incapacity or withdrawal of a nominee."**

CONCLUSION: There is an urgent need for reform in the institutional independence of the judiciary in Ghana as well as the strengthening of the personal independence of judges. Civil society, the media, the Bar and International pressure groups like the Commonwealth Lawyers Association and the Commonwealth Secretariat must not be left out of the fight for an independent judiciary.

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