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JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN GHANA, A MICROCOSM OF WEST AFRICAN COMMONWEALTH JURISDICTIONS[1]

BY

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My Lords, Justices of the Superior Courts,

President of the Ghana Bar Association,

Past Presidents of the Ghana Bar Association,

Deans of Law Faculties,

Distinguished Invited Guests,

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[1] Some of the material used in this lecture has been adapted from my book entitled *Reflections on the Supreme Court of Ghana* to be published later this year by Wildy, Simmonds & Hill Publishing, London.

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Ladies and Gentlemen

I am delighted to have been invited to deliver this first Commonwealth Legal Education Association Public Lecture in Ghana. Some of you may know that I was for some two decades a faithful servant of the Commonwealth as a senior official of the Commonwealth Secretariat in London. This past history makes it a pleasant duty for me to set the ball rolling in what I hope will be a long-lasting series of public lectures by the CLEA in the West African subregion.

I) INTRODUCTION

This lecture will focus on the extent of the independence of the judiciary in Ghana, after briefly pointing out the relevance of the notion of independence of the judiciary to the rule of law. Ghana will be regarded as a microcosm of the West African Commonwealth Region for this purpose. I had originally intended to discuss briefly material from Nigeria and Sierra Leone. However, the constraints of time have excluded that option. Nevertheless, it remains true that Ghana is a microcosm of the judicial systems in place in Nigeria and Sierra Leone.

Judicial independence and the rule of law are two of the pillars identified in the Latimer House Principles as essential for the functioning of a democratic state. The formal name of the Principles is the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government. These Principles are based on Guidelines which were initially fashioned at Latimer House, Buckinghamshire, in England by a conference in June 1998 under the auspices of the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth

Lawyers' Association. The Conference brought together distinguished judges, Parliamentarians, practising lawyers and legal academics. The product of the Conference was the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence. The Guidelines were then subjected to a process of revision and fine-tuning, after they had been considered first by Commonwealth Law Ministers in Port of Spain, Trinidad and Tobago, in 1999. They were finally distilled into the Principles by a Committee of Law Ministers, including the Ghanaian Minister, agreed by Commonwealth Law Ministers, and eventually endorsed in 2003 by Commonwealth Heads of Government at the CHOGM in Abuja.

The fundamental values of the Commonwealth, identified by the Heads of Government and declared in the Final Communique of the Abuja Meeting, included the following:

> **"Fundamental Political Values**
>
> 7. Heads of Government reaffirmed their commitment to the fundamental political values of the Commonwealth as set out in the Singapore and Harare Declarations and subsequent CHOGM Communiqués, and reinforced by the Millbrook Action Programme. They reiterated their commitment to non-racism, international peace and security, democracy, good governance, human rights, rule of law, the independence of the judiciary, freedom of expression, and a political culture that promotes transparency, accountability and economicdevelopment"

These values show how important the independence of the judiciary and the rule of law are to the systems of government chosen by Commonwealth States

II) THE RULE OF LAW

The rule of law is a much discussed notion. A full expatiation of it would occupy this whole lecture and more. However, as my principal focus in this lecture is on the independence of the judiciary, I will only give a brief indication of what I understand by the rule of law. At its barest minimum, it means that all the organs of the State are subject to law and are accountable in accordance with the law. The *Magna Carta*, whose 800th Anniversary will be celebrated in June this year, embodied this basic notion. Some claim that it is the origin of the idea of the Rule of Law. However, others trace it back to the classical Greeks. By the *Magna Carta*, the English barons were able to extract from King John in June 1215 the concession that the King or the Sovereign was subject to the law. In effect, this was an acknowledgement that the institutions of the State were subject to the law. The rule of law in a modern context probably connotes more than that; and should. It probably offers also a measuring rod for the contents of the law. For me, there was no rule of law in Nazi Germany nor in Apartheid South Africa, even if the governments there enacted law and purported to follow that law. Although I am not of a natural law persuasion, the rule of law for me connotes a qualitative assessment of the content of a nation's law.

That is why I am glad that the national law in the three West African Commonwealth States (that is, Ghana, Nigeria and Sierra Leone) has a measuring rod within it, namely their Constitutions. These West African jurisdictions are emerging democracies with democratic aspirations. To abbreviate the discussion, the fair and impartial application of law in States with democratic constitutions would approximate to the rule of law. It is obvious that fair and impartial application of the law requires an independent judiciary.

Lord Bingham in his book entitled *The Rule of Law* captures the essence of the concept of the Rule of Law as follows:

> "The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in future and publicly administered in the courts."

To this definition, I would add an element identified by Lord Steyn of the United Kingdom House of Lords in *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions,*[3] where he said: "…the rule of law enforces minimum standards of fairness, both substantive and procedural."

III) JUDICIAL INDEPENDENCE

An independent judiciary is indispensable to the rule of law because, in modern governments with written constitutions, the executive and legislative branches of governments are answerable before the courts, if they exceed their powers. Under the Westminster model of democracy, Parliament is supreme and therefore not answerable to the courts on the contents of its legislation. However, in all the West African Commonwealth jurisdictions, the Constitution, and not Parliament, is supreme. Accordingly, even Parliament in these countries is answerable to the Judiciary, if it exceeds its powers. The citizen thus has the right to challenge before the courts any acts or omissions of the executive or the legislature considered to be in breach of the Constitution or the law. This system can only work if independent judges are in place to adjudicate on these legal suits.

Independence of the judiciary has two dimensions: the institutional and the personal. Personal independence relates to the commitment of individual judges to the judicial values that ensure their impartiality and fairness. I am

[3] [2001] UKHL23, [2003] 2 AC 295.

here referring to values such as eschewing corruption and not allowing ethnic and other particularistic considerations to affect judicial determinations. Institutional independence of the judiciary, on the other hand, relates to the constitutional, statutory and other arrangements put in place to assure the independence of the judiciary. Issues that are customarily dealt with under institutional independence include: separation of powers; security of tenure for judges, including appropriate provisions on the appointment process of judges, the conditions of service of judges and the process for the removal of superior court judges; financial and administrative autonomy of the judiciary; and measures to ensure judicial accountability. Accountability measures are what make judicial independence justifiable. It would be unacceptable to have independent but unaccountable judges. I will dilate first on issues relating to institutional independence before discussing the personal independence of judges.

III(i) Institutional Independence of the Judiciary

The Latimer House Principles, earlier referred to, provide useful benchmarks for assessing the standards embodied in the Ghanaian constitutional and statutory provisions on the independence of the Judiciary. The Latimer House Principle on the independence of the Judiciary states the following:

> **"IV) Independence of the Judiciary**
>
> 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 rights

conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

(a) 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 equity and the removal of other historic factors of discrimination;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

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

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary."

Let us now consider the Ghanaian constitutional provisions relating to the independence of the judiciary and assess them against the benchmarks set out in the Latimer House Principles.

The 1992 Constitution contains elaborate provisions intended to ensure the independence of the Ghana Judiciary. The Judiciary is defined in the Constitution as follows:

> "126.
>
> (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."

Although the Constitution defines the Judiciary in terms of the courts, it is reasonable to interpret the reference to the courts as one to the judges and magistrates who man the courts. In effect, all the courts in the land (meaning the judges and magistrates) are defined as constituting the Judiciary.

The first constitutional provision I would like to consider in this connection is Article 125(3) of the 1992 Constitution which provides as follows:

> "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."

This exclusive vesting of final judicial power in the Judiciary implies that Parliament cannot itself apply criminal sanctions for contempt of Parliament, as some other Parliaments in the Commonwealth can. For instance, in Australia, The Parliamentary Privileges Act 1987 allows Parliament to enforce criminal sanctions for contempt of Parliament. The Act sets out penalties for committing contempts before the Australian Parliament and its committees. Fines and imprisonment are possible by order of a resolution of Parliament. However, in contrast to the Ghanaian system, Australia operates the Westminster constitutional model, which does not have the same degree of separation of powers as the Ghana Constitution requires.

One way of viewing article 125(3)of the 1992 Constitution of Ghana is to see it as the source of the legitimacy of judicial power in the country. The people vest judicial power in the Judiciary directly and independent of the executive and legislature. In the same way as the President and Members of Parliament ground their legitimacy on their electoral mandate, the judiciary's mandate to exercise judicial power derives from this constitutional delegation of power from the people. Judges are anointed, so to speak, by the people to do justice on their behalf.

Besides separating judicial power from the other powers of government, Ghana's 1992 Constitution goes on, in Article 127, to provide expressly for the independence of the judiciary in broad terms 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 interfere 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 or 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."

Let us spend a little time now to analyse these constitutional provisions.

a) Administrative and Financial Autonomy

Clauses 4, 6 and 7 of Article 127 provide a constitutional basis for administrative and financial autonomy of the Judiciary. In Ghana, the Chief Justice heads an administration for the Judiciary that is distinct, separate from, and relatively independent of the executive and the legislature. Judges and magistrates and their supporting staff are employees of the Judiciary, as an institution, and the Judicial Service, respectively, and not of the executive. This may be contrasted with the system in the United Kingdom, for instance, where the courts are run by Her Majesty's Courts and Tribunals Service, which is a unit within the executive. It is an executive agency sponsored by the Ministry of Justice. It used to be part of the Lord Chancellor's Department until the constitutional reforms of 2005 in the United Kingdom, after which it became a

part of the Ministry of Justice. In this context, the courts do not include the independent judges themselves who manage themselves. Thus, the service which administers the courts in the UK is under the authority of the Ministry of Justice, while in Ghana it is headed by the Chief Justice and separated from the executive branch of government.

The administrative and financial independence of the Ghanaian judiciary is, however, not unqualified because of the practical realities of government. The budget process in relation to the Judiciary and Judicial Service illustrates the limits to the independence of the Judiciary. Clauses 3 to 6 of article 179 of the 1992 Constitution state as follows:

> "(3) The Chief Justice shall, in consultation with the Judicial Council, cause to be submitted to the President at least two months before the end of each financial year, and thereafter as and when the need arises -
>
> (a) the estimates of administrative expenses of the Judiciary charged on the Consolidated Fund under article 127 of this Constitution; and
>
> (b) estimates of development expenditure of the Judiciary.
>
> (4) The President shall, at the time specified in clause (1) of this article, or thereafter, as and when submitted to him under clause (3) of this

article, cause the estimates referred to in clause (3) of this article to be laid before Parliament.

(5) The estimates shall be laid before Parliament under clause (4) by the President without revision but with any recommendations that the Government may have on them.

(6) The development expenditure of the Judiciary, if approved by Parliament, shall be a charge on the Consolidated Fund."

Accordingly, the President is not to cut the budget estimates of the Judiciary by executive action. He is obliged to submit the Judiciary's budget estimates to the legislature, without revision, although he is authorised to make recommendations on it to the legislature. In practice, because of the President's influence on Parliament through the governing party, his recommendations on the Judiciary's budget are likely to be accepted. However, the constitutional provisions do ensure that Parliament gets to consider the Judiciary's budget estimates in their original form, without the usual revisions carried out by the Finance Ministry to the budget estimates of Ministries, Departments and Agencies.

According to Article 127(6) of the 1992 Constitution, funds voted by Parliament, or charged on the Consolidated Fund, for the Judiciary, shall be released to the Judiciary, in quarterly instalments. The Government does not,

however, always comply with this provision. Unfortunately, there is no effective and practical sanction for such non-compliance. The usual remedy of suing to enforce a constitutional provision which has been breached does not necessarily work in this context. This is one of the weak links in the system of financial autonomy that the Constitution provides for the Judiciary. When the executive fails to release the Judiciary's approved subventions on time, the only remedy that the Judiciary has been able to resort to, in practice, is to hold discussions with the executive with a view to expediting such release. This is an inadequate remedy which implies that the executive can in practice impair the autonomous financial functioning of the Judiciary.

A more unqualified independence would come from a funding arrangement for the judiciary that did not depend on the executive and the legislature. This would be unusual in the constitutional practice of States, but still deserves serious consideration. One technique would be to allocate to the judiciary through the Constitution a fixed percentage of national revenue. This could be a crude measure in that it could undershoot or overshoot. In other words, the quantum of revenue delivered by this constitutional measure could be more or less than the requirements of the Judiciary. The technique could thus be refined by a constitutional provision allowing Parliament to modify the projected allocation to the Judiciary through a super-majority, such as a two-thirds or three-quarters of the members of Parliament. Through such a constitutional

arrangement there would be a presumptive annual budgetary provision to the Judiciary which would automatically flow from the Consolidated Fund to the Judiciary, unless the legislature exercised its discretion to modify the quantum of the revenue going to the Judiciary. This is an idea which may be worth considering in the constitutional review exercise.

All in all, however, the constitutional provisions on administrative and financial autonomy for the Ghana Judiciary measure up reasonably well against the Latimer House Principles, although there is still scope for improvement. The provisions, in theory, ensure that resources are provided for the judicial system to operate effectively without undue constraints that hamper judicial independence. However, there are issues as to the adequacy of the resources made available to the judiciary and the timeliness of the payment of subventions to this third branch of government.

b) Independent Appointment and Security of Tenure of Superior Court Justices

Clause 5 of Article 127, combined with articles 144 and 146 of the 1992 Constitution, make provision for considerable security of tenure for Superior Court Justices in Ghana.

The mode of appointment of Justices of the Supreme Court is specified by article 144 of the 1992 Constitution. It provides for their appointment by the President, acting on the advice of the Judicial Council, in consultation with the

Council of State and with the approval of Parliament. Thus both the executive and the legislature are involved in the process. The intention of the framers of the Constitution, as confirmed by practice, appears to be that nominations should be made by the Judicial Council, although the appointment is by the President. The names of nominees, recommended by the Judicial Council, are forwarded to the President who places them before the Council of State for their views. If the views of the Council of State are positive, the President then forwards the names to the Speaker of Parliament for Parliamentary vetting.

It should be noted, however, that 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 Supreme Court. Presidents have on occasion refused to accept some nominees recommended by the Judicial Council. Though the Judicial Council has expressed regret at this, it has not challenged the legality of such refusal in court. There is thus no judicial decision clarifying the meaning of "acting on the advice of the Judicial Council" in article 144(2). Under a Constitution on the Westminster model, such as that in force in Ghana between 1957 and 1960, the Governor-General was obliged to follow the advice given him on judicial appointments. However, this convention and understanding have not survived into the Republican era. Ordinarily, Presidents tend to accept the nominees of the Judicial Council as, it

has to be remembered , the Attorney-General (the President's principal legal adviser) and four nominees of the President serve on the Judicial Council. The President thus has ample opportunity to influence the nominations by the Judicial Council. Therefore though the appointment process for Supreme Court Justices enjoys a degree of independence from the executive, it is not hermetically sealed from the influence of the executive. Furthermore, because the constitutional provision requires Parliament's prior approval, Parliament has a veto power over the appointment of any Supreme Court Justice.

Although the above shows that roles are assigned to both the President and Parliament in the appointment process of Supreme Court Justices, the crucial role of the Judicial Council ensures that the Judiciary and the Bar play important roles as well in the process. The appointment of Justices of the Supreme Court thus involves an interactive process between stakeholders identified by the Constitution. In this connection, a disclosure of the composition of the Judicial Council is pertinent. The membership is as follows:[4]

> "(a) the Chief Justice who shall be Chairman;
>
> (b) the Attorney-General;

[4] See article 153 of the 1992 Constitution.

(c) a Justice of the Supreme Court nominated by the Justices of the Supreme Court;

(d) a Justice of the Court of Appeal nominated by the Justices of the Court of Appeal;

(e) a Justice of the High court nominated by the Justices of the High Court;

(f) two representatives of the Ghana Bar Association one of whom shall be a person of not less than twelve years' standing as a lawyer.

(g) a representative of the Chairmen of Regional Tribunals nominated by the Chairmen;

(h) a representative of the lower courts or tribunals;

(i) the Judge Advocate-General of the Ghana Armed Forces;

(j) the Head of the Legal Directorate of the Police Service;

(k) the Editor of the Ghana Law Reports;

(l) a representative of the Judicial Service Staff Association nominated by the Association;

(m) a chief nominated by the National House of Chiefs; and

(n) four other persons who are not lawyers appointed by the President."

The mode of appointment of the other Superior Court Justices, that is High Court and Appeal Court Justices and Chairmen of Regional Tribunals, is similar to that for Justices of the Supreme Court, except that there is no role for Parliament and the Council of State in relation to them.

The mode of appointment of superior court Justices in Ghana is in my view compliant with the standards spelt out in the Latimer House Principles. Judicial appointments are made on the basis of clearly defined criteria, which are set out in the 1992 Constitution. These stipulate that for a person to be qualified for appointment to the High Court, he or she must be of high moral character and proven integrity and be of at least 10 years standing as a lawyer; for appointment to the Court of Appeal the period of standing as a lawyer is longer that is, 12 years, otherwise the qualification is the same as for the High Court; and finally the period of standing as a lawyer for appointment to the Supreme Court is 15 years, otherwise the qualification is the same as for the High Court. In other words, they also have to be of high moral character and proven integrity. The appointment process is publicly declared and offers equality of opportunity for all eligible for judicial office. Appointment is on merit, with

provision made for the sitting of qualifying examinations and the assessment of a sample of the written legal output of the candidates.

Article 146, clauses 1 and 2 provide as follows:

> "(1) 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."

Accordingly, Justices of the Superior Courts of Judicature in Ghana have security of tenure from the date of their appointment till their retirement, unless they are adjudged to be guilty of stated misbehaviour or incompetence or have been found to be unable to perform the functions of their office by reason of infirmity of body or mind.

The Constitution makes provision for an elaborate impeachment process, which is the only way by which a Superior Court Justice may be removed from office. The Supreme Court has held that the impeachment process cannot be circumvented by indirect means of removing a judge. In both *Tuffour v*

Attorney-General[5] and *Ghana Bar Association v Attorney-General and Anor* [6] the Court held that an action whose effect was to remove a Chief Justice from office could not be maintained, since the special procedure prescribed by the Constitution for the removal of judges had not been followed. That procedure involves three superior court Justices and two non-lawyers determining whether a judge has been guilty of misconduct or incompetence, if the Chief Justice determines that there is a *prima facie* case established against the judge[7]. The judges who are members of the impeachment committee are nominated by the Judicial Council, while the non-lawyers are nominated by the Chief Justice, on the advice of the Council of State.

In *Ghana Bar Association v Attorney-General*, the plaintiffs sought, *inter alia*, to declare the appointment of a Chief Justice null and void, on the ground that he did not satisfy the constitutional requirement of being a person of high moral character and proven integrity. The Attorney-General raised a preliminary objection to the jurisdiction of the Supreme Court and this was unanimously upheld. Justice Edward Wiredu, in the course of his judgment, explained the law as follows[8]:

> "Though the plaintiff's indorsement has been couched in a way so as to make it appear a constitutional issue, its ultimate result will be otherwise

5 [1980] GLR 637
6 [1995-96] 1 GLR 598; [2003-2004] 1 SCGLR 250
7 See article 146(4) of the 1992 Constitution.
8 [1995-96] 1GLR 598 at p. 611.

if her claim succeeds on the allegations made. In *Yiadom I v Amaniampong* [1981] GLR 3, SC this court held the view that where the issue sought to be decided is clear and it is not resolvable by interpretation, or enforcement of the Constitution, this court ought to resist any invitation to pronounce on the meaning of the constitutional provision. In the instant case, the allegations upon which the plaintiff's action is founded touch on the character and integrity of the second defendant as Chief Justice. Any person against whom such an allegation is established would not be entitled to hold the high office not only of a Chief Justice but also as a justice of any of the superior courts of which the second defendant is a member ex officio. It is my respectful view that the Supreme Court will itself be violating the Constitution, 1992 by assuming jurisdiction to embark on an inquiry into the plaintiff's allegation by treating this issue as purely constitutional. Under this same Constitution, 1992, a special procedure for embarking on such exercise for removing a judge is exclusively to be determined by a process within the contemplation of article 146."

The security of tenure of Superior Court Justices is further buttressed by the provision in article 127(5) of the 1992 Constitution which states that 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. This provision gives the protection of the levels of remuneration referred to in the Latimer House Principles and is an important element in the financial security of Superior Court Justices. Finally, in relation to the financial security of Superior Court Justices, article 71 of the 1992 Constitution includes Superior Court Justices in the category of public servants whose remuneration is independently determined in accordance with the process embodied in that article.

c) Impeachment and other Sanctions for Interference with the Independence of the Judiciary

It will be recalled that article 127(2) lays a constitutional obligation on the President, Parliament and any persons acting on the authority of these two not to interfere with judges in the exercise of their judicial functions and to accord the courts such assistance as they may reasonably require to protect their independence, dignity and effectiveness. Theoretically, this provision raises the possibility of the President or any of his Ministers or the Speaker or Members of Parliament being sanctioned for breach of this constitutional obligation. In the case of the President, sanctioning would have to be by the process of impeachment. Where the President acts in wilful violation of a provision of the Constitution, the process for the removal of the President provided for in article 69 of the 1992 Constitution can be activated.

Although the impeachment process provides for a determination of a *prima facie* case by a tribunal chaired by the Chief Justice and consisting of herself and the four most senior Supreme Court Justices, ultimately whether the President is impeached is a political decision since the determination is made by a resolution of Parliament made by secret ballot.

The President would be responsible for sanctioning any of his Ministers who acts in wilful violation of the Constitution, whilst Parliament, acting under its Standing Orders, would be responsible for applying sanctions to any of its Members who acted in wilful violation of the Constitution.

In the alternative, a citizen may bring a constitutional suit in the Supreme Court against the President, Vice-President or a Minister, or the Speaker or any Member of Parliament, claiming that they have acted in breach of article 127(2). If the action succeeds, the Supreme Court may, under article 2(2) of the Constitution make such orders and give such directions as it may consider appropriate to give effect to its declaration. Under article 2(4), failure to obey or carry out the terms of an order or direction made by the Supreme Court constitutes a "high crime" under the Constitution and shall, in the case of the President or Vice-President, constitute a ground for removal from office under the Constitution.

JUDICIAL ACCOUNTABILITY

The judiciary's independence under a democratic system has to be counterbalanced by measures to ensure its accountability. The rule of law requires that the independent judges who enforce it are themselves accountable. The judiciary is also subject to the law and to the need for ethical standards. It is not and should not be above the law. To fulfil its role in society, therefore, the judiciary needs to get its house in order on the issue of accountability. The usual measures available to ensure accountability of judges are codes of conduct, administrative mechanisms to monitor compliance with the standards set in the codes of conduct and effective impeachment procedures to remove errant judges. All these measures have been deployed in relation to the Ghanaian judiciary.

The Chief Justice, as the administrative head of the judiciary, and the Judicial Council, as the constitutional body charged with assisting the Chief Justice in the performance of her duties with a view to ensuring efficiency and effective realization of justice, [9]are the principal actors in the formulation of policies and measures to ensure the accountability of the judiciary.

The Latimer House Principles correctly indicate that[10]:

> "The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the

[9] See article 154(1) of the 1992 Constitution

[10] Principle VII (Accountability Mechanisms).

judiciary as one of the three pillars upon which a responsible government relies."

Judges in Ghana and elsewhere in the Commonwealth are not subject to the electoral accountability that the Executive and the Legislature are subject to in a democracy. This absence of electoral accountability for the judiciary does not, however, denote a lack of accountability. The accountability of the judiciary merely takes different forms. These forms include: peer review by members of the profession; criticism, through the media, by lay members of the public and also by members of the Executive and the Legislature; and legislative reversal of judicial precedent or lines of development of case law disapproved of by the Legislature. There is also self-regulation by the judiciary itself through its codes of conduct and other accountability measures.

Whilst the judiciary is not bound to follow the advice or prescriptions offered in criticisms by members of the profession and of the wider public, nor by strictures from the Executive or the Legislature, the exercise of the democratic right of free speech to scrutinise the judgments and conduct of judges, subject always to due compliance with the contempt of court laws, serves as an avenue for securing their accountability. The fundamental human right of freedom of expression is thus also an important vehicle for securing the accountability of judges. The exercise of this freedom by the Legislature and the Executive should, however, not be untrammelled and probably needs some constraints in

the broader democratic interest. The judiciary, under Ghana's written constitution, is given the role of a watchdog against abuse or excess of power by the Executive or the Legislature. As the Latimer House Principles put it: "Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice." The Executive and the Legislature may therefore on occasion wish to react vigorously to the restraining action of the judiciary. Because of the greater political power of the Executive and the Legislature, their unbridled attack on the judiciary can undermine the authority of the courts. Accordingly, there is the need in Ghana to develop conventions on how the Executive and Legislature may react to judicial decisions, without undermining the authority of the courts.

III(ii) Personal Judicial Independence

All Superior Court Justices of Ghana are obliged by the Constitution to take an oath, prior to their assumption of office, by which they swear, *inter alia*, to perform the functions of their office "without fear or favour, affection or ill-will". This oath epitomises the judge's duty to be personally independent. Judges should reach their determinations without succumbing to pressure, wherever it may come from. This personal independence is facilitated by the institutional independence that I have dwelt on thus far.

Lord Phillips, the retired President of the United Kingdom Supreme Court once said in a Lecture at London University that:

> "In many parts of the world corruption is unhappily endemic. Bribery of court officials and of judges is commonplace. In this country we have the good fortune to have been born into a society which is free of such corruption.
>
> It is simply inconceivable that anyone should try to bribe a judge. When I tell this to my colleagues in some parts of the world it is clear that they simply do not believe me."

For one to be able to speak in similar terms of Ghana, the Judiciary, in concert with employees of the Judicial Service, who are not judges or magistrates, needs to continue to monitor adherence to the judicial values that underpin personal judicial independence.

Rule 1 of the *Code of Conduct for Judges and Magistrates in Ghana* states that:

> "An independent and honourable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved."

The Chief Justice, with active support of the Judicial Council, has put in place processes for enforcing the judicial values embodied in this Code of Conduct. This augurs well for the further strengthening of the judiciary's independence in Ghana.

IV) CONCLUSION

Apart from brief remarks on the rule of law, this lecture has focussed on the independence of the judiciary in Ghana. The constitutional provisions on independence of the judiciary in Ghana provide a solid basis for the institutional independence of the judiciary. Also, the code of conduct which has been put in place by the Ghana Judiciary is an important tool for buttressing the personal independence of judges. The judiciary has adequate institutional mechanisms in place for monitoring and sanctioning non-compliance with the code. In practice, however, stakeholders need to work constantly at it to ensure that the independence of the judiciary continues and flourishes further. Financial autonomy is an area that requires further work. Public feedback and engagement is also vital in policing the personal independence of judges. Vigilance is required of all the three branches of government and of the general public in order to ensure that the Ghana judiciary is and remains independent.