THE ROLE OF THE JUDICIARY IN THE GOVERNMENTAL PROCESS: GHANA'S EXPERIENCE

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Only an Englishman could say, as Chief Justice Goddard did in his judgment in Terrell's Case,[1] that the independence of judges is comparatively modern in the long history of the law. For the newly independent African, it argues of a certain smugness to suggest that an event dating back to 1700 is comparatively modern. The independence of the judiciary is, in his case, as old as his nation. In the case of Ghana, though its independence goes back only eighteen years, the experiences of the judiciary have been varied enough to point lessons which other more settled countries took much longer to learn.

The framers of the American Constitution made the doctrine of the separation of powers the foundation of governmental structure as a matter of conscious decision. Jefferson, Madison and Hamilton had done a great deal of thinking and writing on the subject, and had a clear idea of the values they wanted to preserve by the structure adopted. It is not so certain that the leaders of the independence movements in anglophone Africa in recent years, who accepted the same institutional arrangement for their governments, questioned whether it or some alternative arrangement would best secure the type of society that they expected to build. By their time at least some form of the doctrine of separation of powers had become the inevitable order of the democratic system of government which these leaders professed a desire to promote.

Yet, the adoption of a governmental system structured on the doctrine of separation of powers was not a necessary or logical consequence of the historical development of these nations. For though the power structure of the colonial state from which these African countries had emerged was radically different, the real objection of the Africans had not been to its organisation but to the alien authority it imposed upon them. That authority could, therefore, have been changed without a change in the power structure. As it turned out, however, not only was the authority replaced but the structure of government was also altered. In some measure the transitional problems of the newly independent states have been caused or aggravated by difficulties in adjusting to the new structure they adopted.

1. The Colonial Background

The colonial government developed by Britain, in its classical form, revolved round one man -- the Governor. True he held his authority on behalf of the metropolitan power, which issued instructions to him, generally supervised his work, and received his reports. But within the particular colonial territory he was the sole visible authority, in whom was unified the executive, legislative and judicial powers of the state.

Judges were appointed as an adjunct of the executive. There was no question of their balancing the powers of the executive, the legislature and the people. They were appointed by the executive; they formed part of the colonial legal service which also included those civil service lawyers advising the government and conducting prosecutions. They were liable to transfer from colony to colony by the executive according to a system which recognised promotions not only to higher office but also to greater responsibility in an office of the same designation in another colony. As late as 1953 the Terrell case, mentioned earlier, decided they did not have and never had had tenure. This case involved the compulsory retirement of Mr. a'Beckett Terrell a judge of the Supreme Court of the Straits Settlement, then a British Colony, sought by the Secretary of State for the Colonies before the age when, according to his letters of appointment, he was due to retire. Judge Terrell challenged the right of the British Crown to terminate his office in this manner in the English Courts. Lord Goddard, C.J., ruled that judges in Malaya and in other colonial territories, did not hold office during good behaviour; they held office at the pleasure of the Crown. The right of the Crown to dismiss them at pleasure was a rule of law which could not be taken away by any contractual arrangement made by any executive officer or department of state. Terrell's claim was therefore dismissed. In spite of the confidence of no less an authority than Sir Kenneth Roberts-Wray, a former legal adviser to the British Commonwealth Relations Office and the Colonial Office, that nothing was done or said in this case to modify or prejudice the practice acted upon since 1870 whereby proposals to dismiss colonial judges were referred to the Judicial Committee of the Privy Council for its views,[2] it is submitted that a tradition of independence would be difficult if not impossible to develop in such circumstances. Besides, a system which admits of annual reports on the judges being submitted, in the case of a Chief Justice, by the Governor, and in the case of other judges through him, with liberty to add his own comments if he so desires, to the Secretary of State for the Colonies,[3] may be unavoidable in a colonial administration, but cannot be seriously put forward as conducive to judicial independence.

Clashes in personality between representatives of the various organs of government there must have been in the then Gold Coast as there were in other colonial territories,4 and this may have resulted in tensions between the respective offices. The Chief Justice, for example, was removed from the Legislative Council in 1911. Apparently, "the confidential dispatches of the period are full of complaints of his (the Chief Justice's) failure to accept the Governor's instructions as to how he should vote."5 But the colonial arrangement was so fashioned that clashes between the various organs of government as a result of adverse judicial decisions were avoided.

The Governor had, subject to the metropolitan authority, such plenary powers that the occasion for holding laws unconstitutional were rare and limited in form. In Ghana, a collection of the constitutional cases since 1872 by Messrs. Gyandoh and Griffiths6 discloses one such gem. In Peter Numo v. Akwesi Kofi7, where a local statute was found to be in conflict with an Imperial Order-in-Council, the latter was held to prevail. The Court, in doing so, said, "When His Majesty legislates upon matters reserved to him that legislature has paramountcy of title above the legislation of the Colonial Legislature and as the rules to be construed are part of the Order-in-Council, they prevail over the terms of section 3 (3) of the West African Court of Appeal Ordinance." Only within this limited context could the invalidity of legislation assented to by the Governor be conceived.

Whatever confidence the people had in the judiciary, it did not extend to a belief that the courts would oppose a Governor in a crisis. That point was poignantly brought out by the case of Ex parte Mwenya8 in 1959 where an African detained under regulations made by the Governor under emergency powers in Northern Rhodesia chose to bring his application for habeas corpus in the Queens Bench Division of the High Court in England in spite of the fact that the High Court in Northern Rhodesia had the power to grant habeas corpus. The clear implication is that rightly or wrongly, the applicant thought he would not get justice in the courts in his own country under the prevailing conditions.

From the day a Supreme Court was constituted in the Gold Coast in 1876, the position of its judges did not change substantially until 1954. Between those years the concern of the several constitutions given to the country, each purporting to be an advance on the previous one, was with the relatve proportions of official and unofficial representation in the legislature, and the extent of unofficial participation in the Governor's Executive Council.9 Constituion1 advance was measured in terms of the progressive increase in the unofficial and the diminution of the official representation. All these constitutional documents had one striking feature in common: they made no mention of the

judiciary as a separate organ of government. It was considered part of the ordinary Public Service. The appointment of judges was mentioned in the same context as that of other executive officers of the Colony and all such appointments were expressly declared to be at the sovereign's pleasure. The 1954 Constitution, the last before Ghana became independent, was the first to deal with the judiciary as a separate organ of state, promulgating new rules for appointment and retirement of judges and making them removable only upon an address of the legislature carried by no less than two-thirds of its members, on the ground of misbehaviour or infirmity of body or mind.10

2. The Position of the Judiciary Under Independence Constitutions

The independence Constitution three years later first formally recognised the doctrine of the separation of powers,11 though it still contained some vestiges of the old order. For example, the Chief Justice was made to act for the Governor-General whenever the latter was absent from the country or could not, for some reason perform his functions. In this capacity ,the Chief Justice gave the assent to some of the era's most controversial enactments,12 a fact which retarded the growth of confidence in the impartiality of a judiciary so recently made independent. Otherwise the aim was to establish the three-cornered balance of government, and considerable trouble was taken to ensure an independent judiciary in this scheme.

Two matters were thought to be of vital importance in this respect -- judicial appointments and tenure. On the question of appointments, the English system whereby judges of the Superior Court are appointed on the advice of either the Lord Chancellor or the Prime Minister, both political officers of the Executive, and the American arrangement of appointment by the President upon the advice and consent of the Senate, were examples before the framers of independence constitutions of the new nations. Neither was adopted.13 These modern constitution-makers sought a greater isolation of judicial appointments from politics and eventually produced the institution of the Judicial Commission. This institution was introduced in Ceylon, and although differently composed, performed functions for the judiciary similar to those which its sister institution, the Public Service Commission, performed for the civil service in general. With the exception of the Chief Justice, all other superior judges were to be appointed or promoted by the Head of State on the advice, some countries went as far as "according to the advice," of this Commission. In its various permutations, the Judicial Service Commission became a widespread medium for ensuring freedom from politics in judicial appointments.14 Whatever its defects, no better machinery has yet been devised for the new English-speaking nations of Africa. Ghana

abolished its Commission in 1959 but restored it in 1966. Nigeria also abolished the Commission under its republican constitution but has now reverted.

The Commission is almost invariably under the chairmanship of the Chief Justice. It varies in size, often the number of members is three but a similar institution has been known to include as many as nine.[15] The personnel varies but usually includes the Chairman of the Public Service Commission and a judge or retired judge. A few countries have the Attorney-General as member, but presumably in order to emphasise the fact of separation, most of them do not. Indeed, the Gambia was so particular on the point when drafting its Constitution of 1970 that it provided that in addition to the Chief Justice and the Chairman of the Public Service Commission the third member of its Commission must be a person who held no public office, was not a member of the Legislature and had not even stood for election to the Legislature within two years of his appointment. Ghana's Commission at the time of independence consisted of the Chief Justice, the Attorney-General, the senior Justice of Appeal, the Chairman of the Public Service Commission and a judge or a retired judge of the Supreme Court appointed by the Governor-General acting on the advice of the Prime Minister.[16]

Apart from the question whether it is entirely desirable to remove political considerations completely from such appointments, it is interesting to speculate whether a body of this nature can always perform its functions divorced from politics. Much would depend on the individual members, their weaknesses, hopes and ambitions. Nor has independence of the judiciary been an unqualified objective. It should be recalled that all judges except the Chief Justice are appointed on the advice of the Commission. In the case of the Chief Justice, the appointment has generally been made by the Head of State without advice, if he is an executive head, or on the advice of the Prime Minister, if political power resides in the latter. It has been suggested as a reason for this exception that the Commission was not an appropriate body to tender advice on a position in which some of its members would be interested.[17] Another suggestion, however, puts the main reason as the need for confidence and co-operation between the Chief Justice and the head of government in the interest of a smooth and efficient running of a country, so that the advice or opinion of the latter in the choice of the former ought to be decisive.[18]

Outside the field of appointments, other measures incorporated in independence constitutions to give judges security of tenure included provisions against arbitrary removal and the charging of judicial emoluments on the Consolidated Fund. Unlike the American federal judiciary, Ghanaian judges had to retire either at the age of sixty-two

or at sixty-five. Both ages appeared in some constitutions, with the lower applied to judges of first instance and the higher to appellate judges.[19] In other instances where both ages appear, the lower is given as the age at which the judge must retire unless his term is extended by the appointing authority. In whichever form it appears, its consequences are often undesirable because the judge due to retire at the lower age often manoeuvres for promotion or extension, thus placing himself in a position highly vulnerable to improper pressures and influences. Ghana's independence Constitution contained both types of provision with this qualification, that in the case of extensions there was no time limitation.[20] Under these provisions and similar ones of the 1960 Constitution, the term of office of Chief Justice Korsah was periodically prolonged after the retirement age until his sudden dismissal in 1963.

Until retirement, a judge can not be removed except for inability to perform the functions of his office or for misbehaviour. The expression misbehaviour seems wider than the American "treason, bribery or other high crimes and misdemeanors," for it would cover conduct unbecoming to a judge, which yet does not amount to any crime. Indeed, the only instance in which a judge has been removed under this head in Ghana, he was alleged to have engaged in conduct unbecoming to a judge by allowing his official residence to become the meeting ground of various persons who were out to corrupt a Minister of the Government in order to obtain import licences.[21]

The procedure for removal under the constitution is either parliamentary, which involves an address supported by two-thirds of the Legislature (although Malawi has been satisfied with a bare majority) or by a tribunal of enquiry investigating the allegation and reporting to the appointing authority together with recommendations, which must be acted upon by him. Ghana began with the parliamentary process, but in the 1969 Constitution it adopted the tribunal of enquiry procedure. The parliamentary process in any country with but one political party (whether de facto or de jure) - which includes most of Africa - is indeed a shabby protection.

Other points dealt with in the independence constitutions of the anglophone African countries are the charging of the salaries, gratuities and pensions of judges on the Consolidated Fund so that they are not subject to annual parliamentary appropriation. The salaries could not be reduced during their term of office. But Ghana did not forbid the abolition of a judge's office while he held it, in order to prevent a recurrence of the Terrell incident - a protection found in the constitutions of other newly independent states.

3. The Practical Experience in Ghana

The available evidence seems to support the truism that the capacity and willingness of the courts to protect the individual against abuses of power are directly related to the measure of independence conferred on the judges. He would be a bold judge who would dare to rule against the Government after the unexplained disappearance of his Chief Justice upon giving such an adverse decision. In Ghana itself the truism is illustrated by the vicissitudes of the judiciary in the past eighteen years.

It is not so often realised that the loss of this independence is sometimes caused or invited by the judges themselves. Gledhill, himself a former judge in India, described "Judges indulging in dramatic exhibitions of 'impartiality' to the discomfiture of the Executive."22 The conditions for such judicial indulgence are often present and the temptation almost irresistible. Judges of Superior Courts in Ghana are chosen entirely from the class of lawyers. From a rather restricted legal education, in the majority of cases, their experience may lie entirely within private practice, often of a limited kind, like advocacy in the criminal or civil courts, or the drafting of conveyances. Even practice in corporate law for the small number who undertake it is comparatively recent, and the field of taxation is left entirely to accountants.In this respect, the judge who had had some service in government should have an advantage over his colleague who springs straight from the ranks of private legal practitioners. The opportunity open to private practitioners in more mature countries, to gain exposure to the problems of government by a period of public service at some time during their careers - an opportunity which gives a more balanced view of the needs of government when opposed to those of the individual - is rarely available to the private lawyer in the newly emerged nations. Further, because judges are also lawyers, they often desire to disp]ay their learning in the black letter law, sometimes losing sight of the substance of a dispute. A closely related problem is the anomaly of the judge, one of the most highly educated persons in the community, laying down sophisticated rules of conduct in public affairs for the politician or administrator who in most cases is less well educated, and derives1 his values from his immediate surroundings, not from foreign or international standards. This difference in standards amongst members of the different organs of government is a circumstance which may lead to misunderstanding, suspicion and confrontation. Besides, the fact that the Executive feels it necessary constantly to remind a largely illiterate public about which of the organs of state wields the real power in the country does not diminish the dangers to the constitutional arrangement inherent in the situation.

Ghana began its independent history with scrupulous adherence to the separation of powers. Barely four months after the proclamation of independence in March 1957, certain members of the opposition in Parliament complained that some of the judges at times made derogatory remarks affecting a whole category of people when sentencing individual prisoners. The complaining Members of Parliament wanted the Minister of the Government responsible for justice to speak to the Chief Justice on the matter. Presumably the Chief Justice would in turn suggest to his brother judges that they desist from this undesirable practice. The Minister's reply on the point was as follows:

> "I should like to say that the independence of the Judiciary as an institution must be jealously guarded in any democracy. The Executive should not make any attempt whatsoever to interfere with the affairs of the Judiciary and much that perhaps any such remarks may have been unfortunate, I want to say that I do not consider that it is my duty to discuss such matter at all with the Chief Justice. If the Chief Justice wants to take any steps in this matter he will do so in his own discretion, but I will not in fact undertake in this House to discuss the matter with the Chief Justice on the advice now being given. I cannot do it, I have no power to do it, and I do not intend to do so. If I did so, it would be an interference with the administration of justice and I know that members of the judiciary would vehemently resent any such advice coming from a member of the Executive."[23]

The whole matter was concluded on the hope that the Chief Justice might read the proceedings of the House and take action on his own initiative.

From an atmosphere of calm in this area before independence, there was a sudden change, and a number of constitutional and political cases started coming before the courts after 1957. One such case was Ware v Ofori-Atta & Ors.,[24] in which a statute affecting the status of Chiefs was declared invalid because it had not been passed in accordance with the procedure laid down by the constitution for such Acts. Subsequently, the constitutional restrictions which dictated the decision were removed and a Validation Act was passed to legalize the act done under the unconstitutional Act and to put an end to Court actions.[25] In some other cases involving deportation and citizenship the findings were either against the Government or the Government itself thought its position so untenable before an open court that it took other steps to deny the courts the power to adjudicate upon them.[26] The courts performed their tasks in relative freedom, admittedly at time too rule-oriented, but

nevertheless according to what the judges saw as the dictates of justice.

This rule orientation of the courts took the form of an inflexible attachment to English precedents, sometimes, without deep consideration of local statutes or conditions, and at times productive of unnecessary tensions between the Executive and the Courts.27 The case of R. v. Colvin28 was a glaring example of undue respect for English authority leading to a disregard of local provisions over an emotional issue. Applications were made to the Divisional Court, Accra, for orders of attachment to issue against certain journalists in respect of newspaper articles dealing with a matter which, at the time they were published, was before the Divisional Court, Kumasi. The latter cases which Government was then fighting, concerned deportation and citizenship. The articles it was alleged, were in contempt of the Court in Kumasi. The Court in Accra, presided over by the then acting Chief Justice, held, following the nineteenth century English case of In the Matter of an Application for an Attachment for Contempt of Court29 that as the allegation was of a contempt of a Divisional Court, the only court with jurisdiction to entertain an application for attachment for contempt was the court in respect of which the contempt was alleged to have been committed, in this case the Court in Kumasi. The Divisional Court in Accra therefore had no jurisdiction, and the application was consequently refused. This conclusion was arrived at after a mere citation and relation of the facts and decision in the English case, where an application for committal for contempt against the printer and publisher of Punch had been brought in the English Queens Bench Division for publishing an alleged libellous comment on proceedings pending in another court. There was no discussion of the nature of the similarities or differences in the Divisional Court systems in England or Ghana. Whether the fact that the English system was based on subject matter jurisdiction while the Ghanaian system was based on geographical considerations, made any difference to the exclusiveness of jurisdiction for contempt by each Division in the two countries, was not examined. A provision in the Ghana statutes which gave power to the Chief Justice to "exercise, in any place in Ghana, jurisdiction throughout Ghana, and that with respect to any cause or matter arising in or with respect to any part of Ghana, any other enactment or statutory provision notwithstanding,"30 was construed to mean that:

> "it empowers the Chief Justice to exercise jurisdiction throughout Ghana, independent of the special powers vested in him with respect to the transfer of causes and matters from one judicial division to another. It means, in our view, that the Chief Justice can hear any cause or matter pending in any Divisional Court of the country and at that

> court ,31 if he does not wish to exercise his powers of transfer. It does not, in our view, confer any jurisdiction on the Chief Justice to hear any cause or matter in any court other than the court which has jurisdiction , or where such cause or matter has been instituted in a court which has no jurisdiction to entertain the case."32

Quite apart from the fact that the interpretation put on the section is literally incorrect, a pause to reflect on local conditions would have convinced the Court that if the meaning they proposed to adopt were correct then the section need not have been put in the statute at all. The Chief Justice was given powers by the provision beyond those which an ordinary judge of the Supreme Court had. Yet the interpretation of the provision by the Court meant that the Chief Justice's power under the section was exactly the same as any other judge because any other judge of the Supreme Court could by law and practice hear any cause or matter pending in any Divisional Court of the country , at that court , whatever might be the Judicial Division in which he normally sat.

So long as decisions against the Government were on matters of little concern to it, or where the shock could be adequately cushioned, differences between the Executive and the Judiciary could be reasonably accommodated. All States are sensitive on security matters and perhaps new nations are, understandably, more sensitive than others. It was over cases of this nature that the most serious differences between the Executive and the Judiciary occurred. By the end of 1957, Government was already considering the introduction of a preventive detention law to give itself power to detain persons without trial. The judicial process was not, in its view, a sufficient safeguard of the security of the State. It was in this atmosphere that the decision in Antor's case33 was given. This prosecution in the High Court of the alleged leaders of a small group of people in eastern Ghana who had attempted to secede from the State at independence, resulted in the conviction of some of the accused after a lengthy trial. On appeal they were set free, not on the merits of the case, but on the basis of some technical procedural rules. This was taken by the Executive as confirmation of its view of the total lack of appreciation on the part of the Judiciary of the country's security requirements. A few weeks later the assent was given to the Preventive Detention Act,which authorized the Head of State,if satisfied that any Ghanaian was acting in a manner pre-judicial to the security interests of Ghana, to detain him for up to five years without trial.34

By 1959, the thesis that judicial appointments should be isolated as much as humanly possible from politics had been abandoned, and a constitutional amendment abolished the

Judicial Service Commission. Appointments of High Court judges were in future to be made by the Governor-General on the advice of the Prime Minister after consulting the Chief Justice. Appointments of Court of Appeal judges, the highest in the land, were to be on the advice of the Prime Minister, without consultation of any kind. The provisions on tenure of judges were not then amended.35 The Republican Constitution of 1960, did away with all consultations. Judicial appointments under it were to be made by the President. Again, the provisions on tenure were left more or less undisturbed.

Despite the Government's apparent change of heart on the independence of the judiciary, the incumbent judges did not show any particular apprehension. Contemporary decisions on individual liberty may have favored the government not so much from judicial subservience as from an innate conservatism. The judges were still too captivated by English precedents to chart a course on their own. It could also be argued that the statutory provisions requiring interpretation were couched too narrowly to admit of judicial improvisation. Thus the courts decided that the exercise of the power conferred by the Preventive Detention Act was not reviewable.36 In their view, under English authorities, since the Act authorised theGovernment to detain"if satisfied" that the person concerned was acting prejudicially, the test to apply to the Government decision was subjective, and the Government's statement of its satisfaction, in the absence of fraud, could therefore not be questioned. It would have been otherwise if the words used in the statute had, for example, given the Government power to detain if it had "reasonable cause" to believe that the person was acting prejudicially. Having obtained this licence from the courts, the powers under the Act were progressively abused, and the Act became the single most repressive measure in Ghana's history.

Subsequently, in an attempt to restore some sort of judicial review in cases relating to the security of the state, the Government, still not trusting the courts on such matters, established a Special Division of the High Court composed of three selected judges instead of the usual judge and jury who try capital cases. That Court soon became known as the "Special Court." In the famous "Treason Trial" involving former Ministers of Government and the party secretary, the evidence before the Special Court was rather weak. The Court, constituted by Chief Justice Korsah, Mr. Justice Van Lare and Mr. Justice Akufo-Addo, though convicting some defendants, acquitted these.37 The Government was furious. It nullified the decision by Act of Parliament.38 It reconstituted the Special Court, making the new court a tribunal consisting of a single judge and twelve jurors specially selected from the voter's register, a system totally different from that used for the selection of the seven jurors in ordinary criminal cases. The new system was calculated to facilitate the rigging of the jury.

The Government dismissed the Chief Justice from his office, which under the constitution it was entitled to do, with the result that the Chief Justice became one of the ordinary judges of the Supreme Court, a position from which this disgraced former Chief Justice retired. The Government obtained a constitutional amendment giving power to the President to dismiss judges for any reason which seemed to him sufficient, and he then dismissed a number of judges, including the third member of the offending Court, Mr. Justice Akufo-Addo (the other, Mr. Justice Van Lare, having already discreetly retired). The new Special Court, under the new Chief Justice, Mr. Justice Sarkodee-Adoo, re-tried the case with twelve specially picked jurors. The result was a foregone conclusion. The part which the new Chief Justice was called upon to play was not enviable. But it is a measure of the Executive's fear, or perhaps its respect for judicial values, that the Chief Justice was not left with the power of deciding guilt, which was committed to the jury. And under the new law the judge could not even rule at the end of the prosecution's evidence that there was no case for the accused to answer; he was obliged to call upon the accused to make his defence and leave the matter to the jury.

One of the complaints against Chief Justice Korsah, voiced in governmental circles, was that the Chief Justice had not even had the good sense or courtesy to inform Government beforehand of the Court's intention to give the adverse decision. The claim was not that prior information would have allowed the Government to influence the judges' decision, but simply that it would enable the Government to take whatever security measures were necessary to ensure peace and tranquility. Mr. Kofi Baako, then Minister of Defence, put the point thus in Parliament:

> "... the administration of justice will continue as independently and as impartially as it should be. The Chief Executive and the Government of Ghana are not interested in the legal battles in court which may lead to whatever judgments may ensue. We are however keenly interested in justice. We are not concerned - the Chief Executive, in other words, the President, and the Government of Ghana - or bothered about what the judgment is or may be in any case, but definitely in special cases or in Cases referred to a Special Court because of their very nature, the Government would at least want to be informed at an appropriate time in order to enable them to take what steps they should in the interest of the security of the State."[39]

It would have been interesting to know whether Mr. Kofi Baako's reactions would have been the same if the decision of the Court

had been for a conviction, instead of the acquittal. For as the Government was not concerned about which way it turned, the need to inform it of the content of the decision, according to his argument, should theoretically be the same whichever way the decision was to go. Nor had the Government made any complaint before the decision itself was pronounced, even though aware that it was to be delivered. In these circumstances, the violence of the reaction to the adverse decision belies the professed attitude of indifference.

Critics of the first special court argued that good governance required cooperation between the Chief Justice and the Chief Executive, and offered as evidence the difference between the method of appointment of the Chief Justice and that of other judges in the days of the Judicial Service Commission. They compared events in Nigeria where the Privy Council decision in Adegbenro v. Akintola,40 involving the issue of the rightful Premier of Western Nigeria, was nullified by legislation introduced in Nigeria on the very day on which the judgment was read in London. The timing was such that it was plausible to argue that the Nigerian Government had had prior knowledge of the decision the Privy Council intended to give, although the possibility could not be excluded that the Nigerian Government's Parliamentary action was prompted by intelligent anticipation, which should move every government to take necessary precautionary measures whatever the outcome of a case.

After the 1964 constitutional amendment which gave the Government power to dismiss judges, and until the overthrow of the Government in 1966, there was no decision which went contrary to its wishes. Practicing lawyers became unwilling to undertake the representation of the opposition party in politically charged cases.41

Security cases are of course not the only ones likely to produce friction between the Executive and the Judiciary. Any case may do so if it can be described as political according to criteria operative in a particular country, i.e., where an adverse finding will result in loss of face or political standing. A typical example of that in Ghana was the Sallah case in 1970.42 The new constitution of 1969 had restored the judges' security of tenure. Their appointment was once again initiated by the advice of a Judicial Council, which was a revival of the Judicial Service Commission under a new name. They could be removed only for incapacity or misbehaviour after a hearing by a tribunal of enquiry composed of their brother judges. Under this dispensation they began to show a robust independence,43 deciding for or against the Government according to their appreciation of the law. In People's Popular Party v. Attorney-General,44 for example, certain provisions of the Constitution required interpretation by the High Court. The applicant, a registered political

party opposed to the party in power, was refused a permit by the police to hold protest marches on some politLcal issues, even though a permit had been given to another group to protest on one of the same issues. The police assigned no reasons for the refusal. The applicants sought a court order to compel the police to issue them a permit, claiming that their constitutional liberties of association, movement and assembly had been infringed.45 Hayfron-Benjamin, J., held that article 173 of the Constitution required that the discretionary power vested in the police to issue permits must be exercised in a fair and candid manner. When the police refuse to grant a permit they must assign reasons, and if they fail to do so the courts can enquire into the grounds and reasons for their action.

This decision was particularly interesting because in the earlier case of Captan v. Minister of Interior46 the Court of Appeal, whose decisions were binding on Judge Hayfron-Benjamin, had held that the same article of the Constitution did not allow the courts to question the decision by a Minister to revoke the residence permit of an alien.

Sam v. Comptroller of Customs and Excise47 was another case in which the Constitution was interpreted to restrict the wide claims made by an executive agency. The question was whether a vehicle unwittingly used by an owner to transport uncustomed goods should be forfeited under legislation which mandated such forfeiture. Taylor, J., held that the letter and spirit of the provisions of the Constitution which protected the rights of property must be applied so as not to deprive an innocent owner, like the man involved in this case, of the quiet and peaceful enjoyment of his property.

Although these cases, and indeed others, went against the Executive or executive agencies, not all of them were politically charged. Sam's case, for example, was not. Adverse decisions given in those cases without political content could quietly be accepted as an incidental risk of the type of government Ghana had adopted, as had always been the case. Even those adverse decisions in cases with a political content, such as the People's Progressive Party case, could be ignored by the Executive if its political fortunes or credibility did not appear to have been compromised.

It is otherwise in cases where, by the same criteria, the political profile of the case was high. And Sallah's case was one such case. The Government, according to its interpretation of the new Constitution, had assumed the power to dispense with the services of a number, of public officers on the basis that, under the relevant provision, those it had not re-employed by a certain date lost their offices. The courts in Sallah's case, brought by one of the affected persons, decided that the constitution did

not justify the Government's interpretation. The furore which greeted this decision could not be attributed to the Government's concern to be rid of those particular public servants: it could easily have done so by the ordinary methods available to it for termination of service. In a fit of pique, the Government mounted a campaign against the Judiciary and saw to it that the Supreme Court, newly established under the 1969 Constitution to deal with constitutional questions but not yet appointed, was immediately packed. What President Roosevelt threatened to do in the United States was done with considerable ease in Ghana through the medium of the apparently independent Judicial Council. The reputation of the Council as an instrument to isolate judicial appointments from the political considerations of the day was at once destroyed.

4. Concluding Observations

Several lessons emerge from this narrative. The cases illustrate the rule orientation of the Ghanaian judiciary explained, perhaps, by a lack of confidence suffered by indigenous judges suddenly required to perform tasks which, before independence, had been the province of an expatriate judiciary. The desire to prove that the Ghanaian is no less able leads to a reproduction of what his predecessor did. If such is the case, time may act as a corrective. But the human tendency to defer to expressions definitive of a solution or more felicitously or pointedly phrased than those of which the speaker thinks himself capable, has to be recognised, and should allow the continued use of foreign precedents where necessary. In this regard, some recent decisions could be pointed to in support of the assertion that the time of maturity has arrived. Some of the constitutional cases, at least, show a willingness in the courts to depart from English authorities or theories where not too long ago those authorities would have been followed without much question. The claim that Ghanaian courts are now striking out on their own, however, can be put forward with confidence only if it can be demonstrated unequivocally that the trend in the recent decisions is not mere a substitution of American authorities for the English.48 Unfortunately, the Constitution of 1969 was in operation for too short a period to permit a firm view to be taken on this point.

It is submitted that given the necessary security and freedom prom the other branches of government, the judges would find for the individual as against government where their honest even if narrow construction would lie in his favour. What could secure to judges this security and freedom? The important message of the Sallah case is that the Judiciary has no safe constituency amongst politicians, whatever their professed faith. While the courts were under attack during the regime of President Nkrumah, the severest

critics of the regime's interference with the judiciary and the most vociferous advocates of judicial independence were Dr. Busia and his followers who, when their time came under the 1969 constitution, sought to destroy that very principle they had previously proclaimed. Public opinion, which may be expected to play a role in checking excesses by the various organs of government, is insufficiently vocal at time of crisis to relieve the pressure on a beleaguered judiciary. The presses, which are often government-owned or controlled, if anything increase the tension, using whatever influence they have against the Judiciary.

The doctrine of separation of powers is supposed to give a structural, instead of a political base to judicial independence. It posits the Judiciary as the third estate of a three-cornered mechanism of government. The constitutions of the newly independent anglophone States drafted in Whitehall formally accept and provide for this theory. In reality, these States usually attain independence under the charismatic leadership of one person, who becomes the embodiment of the political party in power so that most of the States become one party States de facto, if not de jure. The Executive under the leadership of the national hero totally controls the legislature packed with his party men. Instead of the one arm acting as a check or balance to the other, it acts as the other's handmaiden. When the Judiciary confronts one, therefore, it confronts the totality of governmental power outside itself. Already the weakest of the three arms of government, the judiciary is the limping end of an unevenly balanced two-way structure. An effectively operating three-cornered system may explain why the Supreme Court in the United States has survived the bitter criticisms of one branch of government or the other, sometimes even with enhanced authority. In this regard, the unsuccessful attempt to impeach Justice Chase of the United States Supreme Court in March 1804, which consequently foreclosed the possibility of impeaching Chief Justice Marshall,[49] may be compared with the ease with which the dismissal of the judges and the outflanking of the courts were achieved in Ghana in 1964. Well might Americans talk of an invitation to the courts to adjudicate disputes between the executive and the legislature. The possibility was discussed in 1973, for example, over the issues of the President's impounding powers and executive privilege in respect of Congressional summonses. The suggestion would be wholly unreal in a developing country like Ghana.

One further consideration ought to be mentioned. The confrontation between the judiciary and the executive occurred far too soon after independence for the healthy development of a balanced governmental structure in Ghana adhering to the separation of powers. Where, for example, the Americans were allowed over a quarter of a century before the first

major confrontation between the judiciary and the executive, serious judicial challenge to executive, action in Ghana began almost immediately after independence was proclaimed, resulting in the tensions noted. With the constitution still in a fragile state, the tendency of the executive, obviously the strongest organ of government, to exhibit its superiority was greater and the victory it sought was total. The situation would probably have been happier for the courts if time had given them the opportunity to display their usefulness as a separate institution before the trial of strength occurred.

The combination of the Executive and the Legislature on the one hand with the Judiciary on the outside has, however, unintentionally conferred a direct benefit on the Judiciary and an indirect one on the country. Although there have been two successful military coups in the past eighteen years (i. e., since independence in 1957), each of which has resulted in the suspension of the prevailing constitution, in neither case has there been as much dislocation within the country as might be expected from a revolution. In each case the members of the Executive and the Legislature have been summarily dismissed, and some of them temporarily detained. The Judiciary has not suffered that same fate. The military took over the executive and legislative powers, in the exercise of which they are assisted by a public service which has remained more or less intact, leaving the judicial power undisturbed. Together with the Civil Service, the Judiciary has, therefore, provided a measure of continuity and stability in an otherwise chaotic situation. There has thus not been a substantial difference in the power structure between civilian and military regimes.

Paradoxically, judges have so far fared better under the military. Having on both occasions counted amongst the reasons justifying their coups d'etat the interference with and subversion of the judiciary, the military have been scrupulous in observing the proprieties towards the courts. Admittedly, one source of friction is removed during military regimes: there is no constitution to interpret. In Nigeria, when the courts held in Lakanmi and Another v. The Attorney-General (Western State) and Others[50] that a military decree was subject to judicial review, the regime hit back by pointing out that the nation was not living under a constitution, and that its decrees were supreme. It would be surprising if the reaction of the regime in Ghana in similar circumstances were to be different. It may therefore not be quite fair to compare military and civilian regimes in this respect.

Looking back over the years, the obvious question is whether things would have worked differently if the judges had acted otherwise than they did. A difficult question.

Of course, a wholly subservient court would have avoided all clashes with the Executive, although this would have resulted in a total sacrifice of any protection to the individual which the courts could give. And no one can deny that they have managed to give some. On the other hand, a completely antagonistic court would have led to an earlier and much more decisive subjugation of the Judiciary by the Executive with the connivance of the Legislature, with very much the same result. Why then complain? Basically because neither extreme is necessary and further because one cannot be completely free from the lurking suspicion that things turned out as they did more as a result of accident than from a conscious appreciation by the judges of the difficult problems involved in governing a people. Were there decisions evidencing sensitivity to the delicate balances to be struck between the objectives of government and the rights of individual citizens, that would evoke greater confidence in the judge's future contribution in the difficult task of nation-building.

It would seem that on the whole governments in the newly independent countries hanker after the simplicity of the colonial arrangement, with the primary aim of the courts being to uphold the power of the State, enforce its laws and provide stability. The courts' function of protection of the individual from the abuse of power is relatively new and less well appreciated. In fact there are countries where by tradition the redress of wrongs is a matter for governmental agencies outside the courts. On the other hand, there is need for the other organs of government to be reassured that the courts are not out merely to embarrass them. One possible contribution in this direction could be for the judges to seek to convince the public that their primary interest is not in legal technicalities. As was aptly put by Lord Denning, judges swear to do justice, not law, to all manner of persons. In any event until the people develop values to guide their courts, other than that of upholding state power, the constitutional enactment of the separation of powers is bound to remain largely a declaration of intent.

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FOOTNOTES

1. Terrell v. Secretary of State for the Colonies (1953) 2 Q.B. 482.

2. Roberts-Wray, Commonwealth and Colonial Law (1966), p. 496.

3. Ibid., p. 482.

4. Martin Wight, The Development of the Legislative Council, Appendix 5 at p. 166.

5. Geoffrey Bing, Reap the Whirlwind (1968) p. 205. The writer continues, "Probably the Chief Justice's office was subconsciously supposed to be akin to that of the Lord Chancellor."

6. S.O. Gyandoh Jr. and J. Griffiths, A Sourcebook of the Constitutional Law of Ghana, Vol. II: The Cases: 1872 through 1970. (Hereafter referred to as 2 G. & G.)

7. Ibid., p. 72.

8. (1960) 1 Q.B. 241, C.A.

9. See the Gold Coast Colony (Legislative Council) Order-in-Council, 1925; Instructions to the Governor and Commander-in-Chief of the Gold Coast Colony dated 23rd May, 1925; Letters Patent dated the 23rd May, 1925; the Gold Coast Colony (Legislative Council) Order-in-Council, 1927; the Gold Coast Colony (Legislative Council) Amendment Order-in-Council, 1933; the Gold Coast Colony (Legislative Council) Amendment Order-in-Council, 1934; Ashanti Order-in-Council; Northern Territories Order-in-Council; Instructions to the Governor and Commander-in-Chief of the Gold Coast Colony respecting the administration of Ashanti dated 23rd November, 1934; Instructions to the Governor and Commander-in-Chief of the Gold Coast Colony respecting the administration of the Northern Territories, dated 23rd November, 1934; Letters Patent dated 23rd November, 1934; the Gold Coast Colony (Legislative Council) Amendment Order-in-Council, 1939; The Gold Coast and Ashanti (Legislative Council) Order-in-Council, 1946; The Gold Coast Ordinances Order-in-Council, 1946; Letters Patent dated 7th March, 1946; Instructions to the Governor dated 7th March, 1946; The Gold Coast (Constitution) Order-in-Council, 1950; the Northern Territories of the Gold Coast Order-in-Council, 1950; Letters Patent dated 19th December, 1950; Instructions to the Governor and Commander-in-Chief of the Gold Coast; the Gold Coast (Constitution) (Amendment) Order-in-Council, 1952; the Gold Coast (Constitution) (Amendment) (No. 2) Order-in-Council, 1952;

the Gold Coast (Constitution) Order-in-Council, 1954; Letters Patent dated 14th May, 1954. All the above documents are collected in Gyandoh and Griffiths, A Sourcebook of the Constitutional Law of Ghana, Vol. I part 1) (hereafter referred to as 1 G. & G. (part 1)).

10. The Gold Coast (Constitution) Order-in-Council, 1954, Part VII, 1 G. & G. (part 1) 108.

11. The Ghana (Constitution) Order-in-Council, 1957(L.N. 47) 1 G. & G. (part 1) 128.

12. E.g., the Deportation Act, 1957 (No. 14); the Deportation (Othman Larden and Amadu Baba) Act, 1957 (No. 19), and the Preventive Detention Act, 1958 (No. 17), were all assented to by Korsah as acting Governor-General.

13. Of course, an arrangement likely to produce as good a result as any was put forward by Benjamin Franklin at the Philadelphia Convention when the subject was under discussion. According to the record :

> "He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves. It was here he said the interest of the electors to make the best choice, which should always be made if possible ("Proceedings of the Convention on Tuesday, June 5 1787, in the Committee of the Whole," in Documents Illustrative of the Formation of the Union of the American States. Washington, D.C.: U.S. Gov't. Printing Office, 1927. pp. 153-54.) But just as it failed to persuade the Convention, African countries also have remained unattracted by its merits.

14. On the Judicial Service Commissions generally see the Constitutions of the anglophone African countries. Ghana (Constitution, 1969, art. 119 (1) (c))and Kenya (Constitution, 1969 s. 68 (1) (b)), for example, have the Attorney-General as a member of the Commission or Council. But Gambia (Constitution, 1970, s. 99), Lesotho (Constitution, 1966, s. 125), Malawi (Constitution, 1966, s. 71), Sierra Leone (Constitution, 1966, s. 85) and Swaziland (Constitution, 1968, s. 113) do not have the Attorney-General as a member. The Chairman of the Public Service Commission is a member of the Commission in Botswana (Constitution, 1966,s. 104), Gambia, Kenya, Lesotho, Malawi, Sierra Leone, Swaziland and Zambia (Constitution, 1964, s. 104). He is not a member of the Judicial Council of Ghana.

15. See the Judicial Council of Ghana under the Constitution of 1969; Article 119, (1 G & G. (part 1) at p. 34) which had 9 members.

16. Ghana (Constitution) Order-in-Council, 1957, s. 55 (1). (1 G. & G. (part 1) 128, at p. 136).

17. Roberts-Wray, Commonwealth and Colonial Law p. 482.

18. This was, in the present writer's experience, the thinking amongst influential members of Nkrumah's Government during the 1960s.

19. It has never been convincingly demonstrated why there should be a presumption that judges of lower courts lose their faculties sooner than their colleagues in the appeal court.

20. Sections 54 (4) and (5) of the Ghana (Constitution) Order-in-Council, 1957, 1 G. & G. (part 1) 135-36, provided as follows:

> (4) The Chief Justice or a Justice of Appeal shall retire when he attains the age of sixty-five years: Provided that -
>
> (i) the Governor-General may permit the Chief Justice or a Justice of Appeal who has reached the age of sixty-five years to continue in office for a further specified period, subject to continued mental and physical fitness; and
>
> (ii) nothing done by the Chief Justice or Justice of Appeal shall be deemed to be invalid by reason only that he has attained the age at which he is required by this subsection to retire.
>
> (5) A Puisne Judge of the Supreme Court shall retire when he attains the age of sixty-two years: Provided that -
>
> (i) the Governor-General may permit a Judge of the Supreme Court who has reached the age of sixty-two years to continue in office for a further specified period, subject to continued mental and physical fitness; and
>
> (ii) nothing done by a Judge in the exercise of his office shall be deemed to be invalid by reason only that he has attained the

age at which he is required by this subsection to retire.

21. See "Ghana Today" July 13, 1966, quoting from the instrument of revocation of Judge Akainyah's appointment, dated June 6, 1966.

22. Gledhill, The Republic of India: Its Laws and Constitutions, p. 94 as quoted by Elias, The British Commonwealth: The Development of its Laws and Constitutions, Vol. 14, Nigeria, p. 138.

23. Mr. Ako Adjei, Minister of the Interior and Justice, Ghana Parliamentary Debates, 1st Series, Vol. 6, column 1557 (July 1, 1957).

24. (1959) G.L.R. 181.

25. See the Constitution (Repeal of Restrictions) Act, 1958 (Act No. 38 of 1958) s. 2; 1 G. & G. 147 and the Stool Property (Recovery and Validation) Act, 1959, (Act No. 31 of 1959).

26. See Lardan v. Attorney-General and Others (No. 1) (1957) 2 G. & G. 96; Lardan v. Attorney-General and Others (No. 2) 2 (1957) 2 G. & G. 98; The Deportation (Othman Lardan and Amadu Baba) Act, 1957 (No. 19 of 1957); Balogun and Others v. Edusei and Another (1958) 3 W.A.L.R. 547; Balogun and Others v. Minister of Interior (1959) G.L.R. 452.

27. See for example Akowuah v. Commissioner of Police (196 G.L.R. 457, S.C.; Boohene and Another v. The State(196f G.L.R. 279, S.C. (full bench); Amissah "The Contents of an Indictment and C.O.P. v. Akowuah - The Recent Judicial Attitude to Criminal Justice in Ghana" (1965) 2 U.G.L.J. 84.

28. (1957) 2 G. & 0. 101. The Court was constituted by Quashie-Idun Ag. C.J. and Windsor-Aubrey J.

29. (1886) 2 T.L.R. 351.

30. Courts Ordinance (Cap. 14 of 1951), s. 7 (2).

31. The emphasis is mine.

32. (1957) 2 G. & 0. 101 at p. 102.

33. R. v. Aitor (1958) 3 W.A.L.R. 430.

34. Preventive Detention Act, 1958 (Act No. 17 of 1958).

35. The Constitution (Amendment) Act, 1959, (Act No. 7 of 1959) ss. 5, 6 and 7; 1 G. & G. (part 1) 147 at p. 148.

36. See In re Okine & Ors. (1959) G.L.R. 1 (High Court, cor: Smith J.); In re Dumoga and 12 Others (1961) 1 G.L.R. 44 (High Court, cor: Adumua-Bossman J.); Re Akoto and 7 Others (1961) 2 G.L.R. 523, C.A.

37. The Second Treason Trial; The State v Otchere and Others (1963) 2 G.L.R. 463; 2 G. & G. 227.

38. The Criminal Procedure (Amendment) (No. 2) Act, 1964 gave the President power to nullify decisions of the Special Court and on securing this power he nullified the decision in The State v. Otchere and Others (1963) 2 G.L.R. 463; 2 G. & G. 227. See Special Criminal Division Instrument, 1963 (E.I. 161).

39. Ghana Parliamentary Debates, 1st series, Vol. 34, Column 1106 (December 23, 1963).

40. (1963) A.C. 614, P.C.

41. It was with great difficulty that counsel was secured for the defence of the accused in Ametewee v. The State (the report of the appeal is in (1964) G.L.R. 551). The accused, a Police Officer on duty at the President's residence, had fired three shots at the President, missing him but killing a body-guard. The accused was charged with murder. He was ultimately defended by Mr. D.K. Afreh, than a lecturer at the University of Ghana but now a Chief State Attorney.

42. Sallah v. The Attorney-General (1970) 2 G & G. 493; see also the ruling in the bias proceedings - Attorney-General v. Sallah (1970) 2 G. & G. 487.

43. A number of vital constitutional cases - e.g., Gbedemah v. Awoonor Williams (1969) 2 G. & G. 442, Captan v. Minister of Interior (1970) 2 G. & G. 457 - went in favour of the Government or members of the political party in power. But others, like Osman v. Tedam (1970) 2 G. & G. 466 and Sallah v. The Attorney-General (see note 42 above) went against the Government or the party in power.

44. (1971) 1 G.L.R. 138.

45. See The Constitution of Ghana, 1969, Articles 23 and 24, 1 G. & G. (part 1) at p. 12.

46. (1970) 2 G. & G. 457.

47. (1971) 1 G.L.R. 289.

48. See e.g. People's Popular Party v. Attorney-General (1971) 1 G.L.R. 138 at p. 149: "In enforcing the provisions of Chapter four of our Constitution the English decisions on the liberty of the subject are not a sure guide. England has no written Constitution, and as Dicey has shown quite clearly the doctrine of separation of powers is not firmly enshrined in the British Constitution. In the common law jurisdictions, I am of the view the American experience is a better guide in applying the provisions of articles 12 and 27 of our Constitution and it is from that experience that I propose to seek guidance, not forgetting that in the last analysis the actual words of our Constitution must be interpreted according to our own rules of statutory interpretation". And see Okorie v. The Republic (1974) 2 G.L.R. 272, where American authorities on the duty of the person making an arrest to inform the arrested of his right to consult counsel of his own choice, were relied upon without discussion of comparative conditions prevailing in the United States and Ghana or an attempt to explore the motivations underlying the American decisions.

49. Gerald Gunther, Cases and Materials on Constitutional Law (1975) p. 14; Charles Warren, The Supreme Court in United States History (1926) Vol. 1, pp. 289-291.

50. (S.C. 58/59 unreported). See Abiola Ojo, "The Search for a Grundnorm in Nigeria - The Lakanmi Case" (1971) 20 I.C.L.Q. 117.

RÉSUMÉ

Pour les pays de l'Afrique anglophone, l'adoption du principe de la séparation des pouvoirs selon le modèle américain n'était pas une conséquence nécessaire ou logique de leur histoire coloniale. Au Ghana, par exemple, les pouvoirs exécutif, législatif et judiciaire résidaient en fin de compte aux mains du Gouverneur à l'époque. La séparation des institutions juridiques fut mentionnée pour la première fois dans la constitution par interim promulguée trois ans avant l'indépendance et formellement reconnue par la suite dans la constitution de 1957.

L'exemple du Ghana démontre le bien-fondé de la proposition selon laquelle la capacité et la volonté des tribunaux à protéger les individus contre les abus du pouvoir sont directement liées au dégré de l'indépendance reconnue aux juges. Ainsi, après une période d'adhérence scrupuleuse au principe de la séparation des pouvoirs, le Ghana connût une détérioration des relations entre le pouvoir judiciaire et l'exécutif quand les tribunaux statuaient contre le gouvernement dans des causes touchant de près la sécurité nationale et la politique gouvernementale. Une série de mesures pendant les périodes Nkrumah et Busia permit le licenciement des juges au gré du gouvernement et réduit l'indépendance des tribunaux dans les causes politiques.

L'une des raisons de cette confrontation réside dans une différence de formation entre les juges d'une part et le personnel exécutif et législatif d'autre part. Mieux formés les juges rendaient des décisions que les autres, soucieux de préserver leur autorité, comprenaient difficilement. Par contre les juges invitaient parfois une réaction exécutive par des décisions trop doctrinaires. Dans la mesure où elle est fondée sur une acceptation aveugle par les juges des décisions des tribunaux coloniaux, cette tension semble s'amoindrir actuellement au Ghana.

Malgré l'entérinement constitutionnel du principe de la séparation des pouvoirs, la confrontation de fait engage les institutions judiciaires contre le pouvoir exécutif et le pouvoir législatif réunis par un leader charismatique. L'opinion publique est trop faible pour protéger les juges pendant ces crises. Cette position a cependant sauvegardé les juges contre le licenciement complet lors des deux coups d'état de 1966 et de 1972 au Ghana, le pouvoir judiciaire formant ainsi avec l'administration une force de continuité et de stabilité pendant une période confuse.

Par contraste avec l'exemple américain, au Ghana les conflits entre les tribunaux et les autres organes gouvernementaux commencèrent trop tôt après l'indépendance pour qu'une division tripartite du pouvoir puisse se développer. Etant donné la fragilité de la constitution, l'exécutif a eu tendance à montrer sa supériorité, laissant peu de place au développement d'un pouvoir judiciaire indépendant. Les gouvernements africains semblent donc préférer la simple solution coloniale, selon laquelle les tribunaux ont pour rôle de renforcer le pouvoir de l'état, d'appliquer les lois et de fournir une stabilité sociale mais non pas de protéger l'individu contre les abus de pouvoir officiels. Pour que les tribunaux remplissent cette fonction-ci, les autres organes du gouvernement doivent se rassurer que les juges ne cherchent pas à les embarasser et, de leur côté, les juges doivent convaincre le publique que leur intérêt primordiale ne réside pas dans les banalités juridiques.