

# **CHALLENGES TO SEPARATION OF POWERS IN CONSTITUTIONAL DEMOCRACIES**

## **1.0 INTRODUCTION**

This paper focuses on the manner in which, even in a Constitutional Democracy, the application of Separation of Powers might pose challenges to the independence of the Judiciary in its interrelations with the democratically elected arms of government, i.e. the Executive and Legislature. I have taken the experience in my country, Ghana, as a case in point, since Ghana's model of Constitutional Democracy is not fundamentally different from what pertains in other such democracies in the Commonwealth. I will take into account the modalities for the appointment and removal of Judges and Magistrates, as well as the allocation of financial resources. Although the independence of the Judiciary is guaranteed by the Constitution of Ghana, provisions in the same Constitution, covering these areas of governance, create certain challenges to such independence.

## **2.0 SEPARATION OF POWERS**

The principle of Separation of Powers is premised on the concept that concentration of power<sup>1</sup> in one government institution or person results in arbitrary governance. Montesquieu opined that to secure liberty, government power must be divided among different people who should constantly check one another, so that state power is never concentrated in one person. In modern times, Separation of Powers, essentially, connotes three elements; that one person should not be in more than one arm of the government, one organ should have its own functions and should not exercise the function of the other and the powers must be distributed in a manner that there are checks and balances. Complete independence and separation, however, is not possible. The agencies of governance must cooperate and complement each other.

Separation of Powers ensures rule of law by creating checks and balances. It eliminates arbitrariness through various levels of oversight by the different arms of government. It further enhances accountability as decisions of the Executive and Legislature can be nullified if they are unconstitutional. It also promotes transparency; for instance, the cabinet can be summoned by the Legislature to account for decisions or expenditure. Most importantly, to avoid abuse of power by the majority and the elite, an independent Judiciary protects the rights of the citizenry without fear or favor and with equality.

## **3.0 CONSTITUTIONAL DEMOCRACY**

“Constitutional” in this case is a reference to a system of government which has a fundamental law, whether embodied in a formal document<sup>2</sup> or evolved through statute,

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<sup>1</sup> The Spirit of Nations (1748)

<sup>2</sup> Such as the Constitution of the Republic Ghana (1992)

convention, custom, and practice that allocates power to various organs of government and places limitations on the exercise of these powers. Constitutional government, therefore, requires two things - a Constitution which allocates and limits the exercise of governmental power and an umpire, usually a Court, to enforce the Constitution.

“Democracy” connotes that government derives its power from, and reflects the will of the majority of the citizens of a country. In modern times, democracy requires that governments are the outcome of periodic free and fair elections. Therefore, in most countries, the Executive and the Legislative arms of government are elected. On the other hand, in most Commonwealth countries Judges are not elected.

Constitutional Democracy is, thus, a system of government in which the Executive and the Legislature are elected and there is a Constitution, which allocates power to various institutions and organs of state, and places limitations on the exercise of these powers. Such arrangement also requires that there is a referee or an umpire (in many cases a Court) to interpret and enforce the Constitution.

#### **4.0 INDEPENDENCE OF THE JUDICIARY**

An important component of Separation of Powers in a Constitutional Democracy is an independent Judiciary. In Ghana, the independence of the Judiciary is guaranteed by the Constitution. The Judiciary is an independent and separate arm of government and is headed by the Chief Justice who is responsible for the administration of the Judiciary; it is not part of the Civil Service. Judicial power is vested in the Judiciary and neither the President nor Parliament may, by any means, be given final judicial power<sup>3</sup>. The Constitution also provides that neither the President nor Parliament nor any other person shall interfere with Judges in the exercise of their judicial power.

This requires that the Judiciary be objective, fair and impartial in the administration of Justice. To achieve this, the processes for appointment to, and promotion in the Judiciary must be merit based and free from extraneous considerations. It is also imperative that, once appointed, Judges must have security of tenure and not be removed or dismissed except upon stated grounds and after a credible Judicial or quasi-judicial process. Another requirement of judicial independence is financial autonomy. Lastly, independence of the Judiciary requires that the Judiciary is separate from the Executive and Legislature and that it is not influenced by any person in the performance of its judicial functions. It must be noted, however, that this does not mean that the Judiciary does not interact or come into contact with any other institution.

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<sup>3</sup> Ghana Constitution: Article 125 Clause 3

## **5.0 CHALLENGES TO SEPARATION OF POWERS IN GHANA**

The Constitution itself contains provisions which pose a number of challenges to Judicial Independence, and are presented on many fronts in every governmental institution. However, we will limit this presentation to the challenges faced by the Judiciary under the doctrine. These challenges include financial autonomy of the Judiciary<sup>4</sup> and independence in respect of the appointment of Judges, security of tenure of Judges and removal of Judges.

### **5.1 *Appointment of Judges***

As is typical in many Commonwealth countries<sup>5</sup>, including Ghana, the elected branches of government play key roles in the appointment of Judges of both the higher and lower Judiciary.

#### **5.1.1 *Chief Justice***

In Ghana, the Chief Justice is appointed by the President in consultation with the Council of State<sup>6</sup> and with the approval of Parliament.<sup>7</sup> Thus, the politically elected President and Parliament play key roles in the appointment of the Chief Justice, the head of the Judiciary.

One may therefore ask: Does the participation of the Executive and/or the Legislature in the appointment of the Chief Justice pose a challenge to the independence of the Judiciary? Could there be a “safer” method of selection?

#### **5.1.2 *Justices of the Superior Courts***

Justices of the Supreme Court, Court of Appeal and High Courts are appointed by the President acting on the advice of the Judicial Council<sup>8</sup>, in consultation with the Council of State and with the approval of Parliament.<sup>9</sup> Once appointed, both the Chief Justice and Justices of the Superior Courts have security of tenure until they reach the mandatory retiring age of 70, or 65 in the case of Justices of the High Court.

The question again is, does the participation of the State President and Parliament in the appointment of Justices of the Supreme Court pose a challenge to the independence of the Judiciary?

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<sup>4</sup> Ghana Constitution: Article 127 Clause 1

<sup>5</sup> Examples include Zambia, Canada, United Kingdom and Uganda (see attached appendixes)

<sup>6</sup> Ghana Constitution: Article 89 – the Council of State comprises 31 members, of whom 11 are direct appointees of the President

<sup>7</sup> Ghana Constitution: Article 144 Clause 1

<sup>8</sup> Ghana Constitution: Article 153 – the Judicial Council comprises 19 members of whom 1 (one) is the Attorney General and 4 are directly appointed by the President

<sup>9</sup> Ghana Constitution: Article 144 clause 2

### **5.1.3 *The Judicial Council***

The Judicial Council, in Ghana, plays an important role in the appointment and discipline of Justices of the Superior Courts and judicial officers of the Lower Courts. It also proposes judicial reform and considers matters aimed at assisting the Chief Justice to ensure an effective and efficient system for the administration of Justice. This Council is comparatively weak in its powers and responsibilities, in comparison with its functional counterparts in other Commonwealth countries. Membership includes one Justice each from the Supreme Court, Court of Appeal and High Court, a representative of the Lower Courts, two representatives of the Ghana Bar Association, and other members of the legal profession, as well as four non-lawyers appointed by the President. This Council, therefore, plays no role in the appointment of the head of the Judiciary, the Chief Justice.

## **5.2 Dismissal / Removal and Suspension of Judges**

One vital chink in the protective armour of Judicial Independence is the procedure outlined in the Constitution for the removal of Judges in Ghana, which, in my view, involves too much Executive interference:<sup>10</sup>

### **5.2.1 *The Chief Justice***

The Constitution provides that if, and when, the President is petitioned for the removal of the Chief Justice, he shall, in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court<sup>11</sup> and three other persons to inquire into the petition. The President shall act on the recommendations of the committee. The elected President therefore plays a key role in the removal of a Chief Justice though he/she is subject to the recommendations of a quasi-judicial process. This obviously poses a challenge to Judicial Independence.

### **5.2.2 *Justices of the Superior Courts***

In the case of other Justices of the Superior Courts, where a petition for the removal of such Judge is received by the President, he/she must forward it to the Chief Justice, who must determine whether or not there is a *prima facie* case against the Judge. If the Chief Justice so decides, he/she then sets up an ad hoc committee consisting of three Justices of the Superior Courts, appointed by the Judicial Council and two other persons ‘who are not members of the Council of State, nor members of Parliament, nor lawyers’, who are appointed by the Chief Justice on the advice of the Council of State.<sup>12</sup> Again, it is curious why a petition for the removal of a Justice of the Superior Courts should be to the President and not the Chief Justice who is the head of the Judiciary.

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<sup>10</sup> Ghana Constitution: Article 146

<sup>11</sup> Ghana Constitution: Article 146 Clause 6

<sup>12</sup> Ghana Constitution: Article 146 Clauses 3 and 4

In both the cases of the Chief Justice and other Justices of the Superior Courts, the outcome of the proceedings are recommendations, which are forwarded to the President, and it is the President who, in the case of removal, effects such removal.

### **5.2.3 *Suspension***

Where a petition against the Chief Justice has been referred to an impeachment committee, the Chief Justice may be suspended by the President acting in accordance with the advice of the Council of State; while in the case of a Justice of the Superior Courts he/she may be suspended by the President acting in accordance with the advice of the Judicial Council.

The role of the President in the suspension of the Chief Justice and Justices of the Superior Courts is puzzling and could in certain circumstances pose a challenge to Judicial Independence.

## **5.3 Financial Independence and Autonomy**

The Ghana Constitution provides that, in the exercise of the Judicial power of Ghana, the Judiciary in its Judicial and administrative function including financial administration, is subject only to the Constitution and shall not be subject to the control or direction of any person or authority.<sup>13</sup> Therefore, by the terms of the Constitution, all salaries, allowances and administrative expenses payable to persons serving in the Judiciary are charged on the Consolidated Fund and such salaries and allowances may not be varied to the disadvantage of a Judge<sup>14</sup>. In reality, the administrative expenses, are subjected to the national budgetary process and are therefore proposed by the Executive (the Minister of Finance) to be approved by Parliament.

Funds voted by Parliament, or charged on the Consolidated Fund, for the Judiciary, are required by the Constitution to be released to the Judiciary, and in quarterly installments. In reality, the Executive hardly ever complies with this provision. Unfortunately, the Constitution prescribes no effective or practical sanction for such non-compliance. The usual remedy of suing to enforce a Constitutional provision, in the event of a breach, might not necessarily work in this context. This is yet another example of a democratically elected Executive and Legislature interfering in the financial autonomy of the Judiciary. When the Executive fails to release the Judiciary's approved subventions on time, in practice, the only remedy that the Judiciary has is to resort to discussions with the Executive with a view to expediting such release. This is an inadequate remedy, which might create negative public perception, and which implies that the Executive can, through withholding funds, tinker with the autonomous financial functioning of the Judiciary.

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<sup>13</sup> Ghana Constitution: Article 127 Clause 1.

<sup>14</sup> Ghana Constitution: Article 127 Clause 5

It is important to distinguish between two methods of corruption of the Judiciary: ‘state capture’ (through budget planning and privileges) being the more dangerous, and the private bribery. State corruption of the Judiciary has the potential to bring the Judiciary into public ridicule, and impede the ability of businesses to optimally facilitate the growth and development of a market economy.

#### **5.4 The Judiciary and the Legislature**

The Legislature is responsible for making laws<sup>15</sup>. The Judiciary, in Ghana, on the other hand is empowered to interpret the laws and, inter alia, determine whether or not a piece of legislation has been made in excess of Parliamentary powers<sup>16</sup>. The Judiciary is thus mandated to answer the question of whether an Act of Parliament is constitutionally valid or not, and if not, to strike it down in whole or in part. What may seem like the Judiciary examining whether Parliament has breached the Constitutional limits on its legislative powers in actual fact may be an opportunity for the Judiciary to engage in poking its nose into the powers of the Legislature.

#### **5.5 The Judiciary and the Executive**

In addition to the power to nullify legislation deemed to be in contravention of the Constitution, the Supreme Court of Ghana (as well as the High Court in respect of the enforcement of the human rights of a person) is also empowered to strike down any action by the Executive, which is deemed to be unconstitutional.

Clearly, in the exercise of its enforcement powers under the Constitution, there is the possibility of the Judiciary usurping the powers allocated to the Executive. In this regard, the Supreme Court of Ghana has on occasion restrained this tendency through application of the interpretational doctrine of Political Question without necessarily abdicating its broader role as guardian of the Constitution. In a landmark case, *Ghana Bar Association v. Attorney-General*,<sup>17</sup> the Supreme Court held that, the Political Question doctrine is applicable in Ghana. The challenge here is that, because of the doctrine of Separation of Powers, the Judiciary might, conversely, at times, leave matters in the hands of the appropriate branch of Government to deal with politically charged matters when, in fact, the Constitution states that the Judiciary shall have the final adjudicating power.

#### **5.6 The Executive and the Legislature**

The core function of the Executive according to the Ghana Constitution<sup>18</sup> is to execute and maintain the Constitution and all Laws made under or continued in force under the Constitution. These laws are made by Parliament. The Constitution however enjoins the

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<sup>15</sup> The Constitution, article 93 (2)

<sup>16</sup> The Constitution, article 130 - "The Supreme Court shall have exclusive original jurisdiction in - (a) all matters relating to the enforcement or interpretation of this Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution"

<sup>17</sup> [1995-96] 1GLR 598 - 662

<sup>18</sup>The Constitution, article 58 (2)

President to choose the majority of its Ministers from Parliament<sup>19</sup>. The challenge arising from this requirement is that, a Minister who is in Executive arm of government might equally be part of the Legislative arm of government. Indeed, over the life of the Constitution, it has almost become an imperative that a person desiring to become a Minister must strive first to win a parliamentary seat. How practicable is it for such a person to check his/her own party's actions once he/she becomes a Minister? Whilst such an arrangement is not unknown in certain democracies such as the parliamentary system, this may be a major challenge as it goes against the very doctrine of Separation of Powers, and in an Executive Presidential system, and a national environment, where politics overwhelm every facet of life, and political interest is rife, this challenge has a tendency to dampen democracy and constitutionalism. Moreover, the appointment of Ministers from Parliament directly places that part of the Legislature under the control of an Executive President.

A further challenge to the doctrine of Separation of Powers in Constitutional Democracies with the Ghana model, is the requirement that the Speaker of Parliament, who is the head of the Legislature, must be sworn-in, and function, as the acting President (head of the Executive) every time both the sitting President and the Vice-President are not available to perform the functions of the President's position<sup>20</sup>. The question is, the period where the head of the Legislature is acting as the President, how separate will his powers under the Legislature to Executive arms of Government be?

The Supreme Court has construed this requirement to include times when both the President and Vice President have travelled outside the country.<sup>21</sup> This position of the law carries a potential conflict, in that, the Speaker, whilst acting in the capacity of President has power to direct Ministers and other Executive members on their functions. This cannot be said to be a separation of power. Rather, this constitutional requirement from time to time, (fortunately quite rare) vests in the Speaker of the Parliament of Ghana an overwhelming power and that might one day have disastrous outcomes, creating as it does an opportunity for an ill motivated Speaker, whilst functioning as Acting President, to use the Executive powers to manipulate situations to his/her advantage or the advantage of others.

## 7.0 CONCLUSION

The Constitution of Ghana declares: "Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary."<sup>22</sup> The unique structure of the government of Ghana provides its own challenges to an ideally independent Judiciary. Though many of its powers are checked by the other branches, it still retains the final judicial power.

Also, the security of tenure for Judges is very important in ensuring an independent Judiciary. It is absolutely essential that a *prima facie* case is established before any impeachment

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<sup>19</sup> The Constitution, article 78 (1)

<sup>20</sup> The Constitution, article 60(11)

<sup>21</sup> *Asare v Attorney-General*, [2003-2004] SCGLR 832

<sup>22</sup> Ghana Constitution: Article 125 Clause 1

process is commenced. The removal of Justices should be the responsibility of the Judicial Council and it is not the President who should have the final say on the dismissal of Justices, since he/she is the head of the Executive. Petitions for removal of Judges should be sent to the Judicial Council and final say given to the Judicial Council to ensure an independent Judiciary.

Again, in most developing countries, with Ghana as an example, where spending on the Judiciary is controlled by the Executive, this undermines the principle of Judicial independence because it creates a financial dependence of the Judiciary on the Executive, which if not expertly managed, can compromise the rule of law. When the Judiciary is free and unbiased, especially with no interference from Executive restraints, it inevitably goes hand in hand with economic development, since it attracts more investors who know their capital is safe from unjust political interests, actions and policies.

The doctrine of Separation of Powers in a Constitutional Democracy has its benefits as well as its challenges, not just in Ghana, but in other Jurisdictions as shown in the appendices. The functions of the arms of government intertwine. However, the Judiciary possesses the opportunity to create policy and enforce carefully crafted laws. The Legislature and the Executive have each been given specific powers to fulfill different tasks within their control. As a result, no one branch or institution should become so powerful as to control the system completely.

As we strive to cultivate Justice and ensure efficiency, we look forward to learning from our past and stepping into an even brighter future rooted in the fundamental principles of Constitutional Democracy.

## Appendix 1

### CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS

#### 1.0 ZAMBIA

Zambia operates on the principle of Constitutional Supremacy<sup>23</sup> and as such all the three organs of government are subject to the Constitution. To this end, the three organs of government are expected to provide checks and balances on each other in the exercise of their Constitutional powers. Each branch of government has a distinct role to play and no one branch is to interfere in the other's function. Parliament makes the law; the Executive implements the law; while the Judiciary interprets the law. But this doctrine is quite subtle in Zambia.

Zambia's implementation of the doctrine of Separation of Powers is derived from their Constitution.

#### 1.1 The Executive and the Judiciary

The roles of the Judiciary, envisaged by the Constitution<sup>24</sup> include the following<sup>25</sup>:

- (i) interpreting the law;
- (ii) adjudicating disputes of both civil and criminal nature;
- (iii) determining the sentence of a convicted criminal offender;
- (iv) judicial review of administrative action; and
- (v) Protecting the rights of subjects by ensuring that Justice is done under the rule of law.

Article 122 (1) states:

“In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.”

On the possibility of the Executive dominating the Judiciary, due to the fact that the appointment of the Chief Justice and other Justices is by the head of the Executive, the President, article 140 stipulates:

“The President shall, on the recommendation of the Judicial Service commission and Subject to the ratification by the National Assembly, appoint the –

- (a) Chief Justice;

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<sup>23</sup> See the Constitution of Zambia (Amendment) [No. 2 of 2016], article 1 (1)

<sup>24</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016]

<sup>25</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016], article 119

- (b) Deputy Chief Justice;
- (c) President of the Constitutional Court;
- (d) Deputy President of the Constitutional Court; and
- (e) Other judges.”

This may pose a challenge to the doctrine of Separation of Powers.

## 1.2 The Executive and the Legislature

The Zambian system<sup>26</sup> of government **does allow** for some overlap. The Executive is almost exclusively made up of Members of Parliament and the President as head of the Executive is a principal actor in the legislative process.

The Zambian Constitution mandates the President to appoint the Vice President, Cabinet and Deputy Ministers from among the Members of Parliament.<sup>27</sup> The main functions of the Zambian Parliament are:

- (i) to legislate;
- (ii) to oversee operations of the Executive arm of government; and
- (iii) to approve government expenditure and taxation measures.

Article 62<sup>28</sup> states that:

“There is established the Parliament of Zambia which consists of the President and the National Assembly.”

Article 62 *supra* goes against the very principle of Separation of Powers. How could the President of Zambia act in a dual capacity; first as an Executive<sup>29</sup> head and second as part of the Legislature? Where then lies the principle of checks and balances. How can the President balance his dual role and at the same time check that his acts are not in excess of the powers conferred on him?

## 1.3. The Legislature and the Judiciary<sup>30</sup>

The Judiciary is the ultimate interpreter of the law;<sup>31</sup> however both Parliament and the Executive appear to have interpretive functions. In the Court’s ruling on March 23, 2016 in

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<sup>26</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016]

<sup>27</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016], articles 116, 117

<sup>28</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016]

<sup>29</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016], article 91

<sup>30</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016], article 62(2)

<sup>31</sup> See Constitution of Zambia (Amendment) [No. 2 of 2016], article 118

the case of *Geoffrey Bwalya Mwamba v Attorney General, & Others*<sup>32</sup> (the “**GBM 2016 case**”), the Court dealt with the question of whether the Speaker as head of Parliament had the power to make the declaration that Geoffrey Bwalya Mwamba Kasama’s seat had become vacant.

The Court held that the very core principle of Separation of Powers suggests that the Speaker has no power to declare a seat vacant, that function is solely the preserve of the High Court of Zambia. Such a declaration by the speaker deviates from the doctrine of Separation of Powers and as such misconstrues the Judiciary’s role in interpreting the law.

While it is true that it is the Court’s role to interpret the law, it is necessary to understand circumstances under which such a duty arises. The Judiciary comes in to resolve issues when there are legal disputes. Judicial interpretation of the law is tied to its role as an arbiter of disputes. When we refer to judicial interpretation, we are in essence referring to a form of legal dispute resolution.

Article 133 of the Constitution of Zambia does state that only the High Court can settle a dispute concerning the loss of a Parliamentary seat. A Speaker of Parliament cannot declare a seat vacant if the seat is contested in Court between two parties that are claiming the seat.<sup>33</sup>

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<sup>32</sup>2015/HP/1279

<sup>33</sup>In 2017 Speaking during the swearing in-ceremony of Judges, President Lungu said all members of the Judiciary should reflect on exploring ways of enhancing their independence, transparency, accountability and efficiency to win public trust and confidence. He said as the Executive, they shall continue to uphold and respect the doctrine of the Separation of Powers so that the Judiciary can work independently.

## Appendix 2

### CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS

#### 1.0 THE UNITED KINGDOM

The UK does not have a written Constitution. Regardless of the absence of a formal written Constitution, the principle of Separation of Powers exists, but in a weak form because they overlap and work together.<sup>34</sup>

#### 1.1 The Executive Power

The Executive consists of the Crown and the government, including the Prime Minister and Cabinet of Ministers. Moreover, the Civil Service is also a part of the Executive. The Executive mainly formulates and executes the government policies. The government is answerable to Parliament which has the ultimate power to dismiss a government and force a general election in which the new government will be elected. The government is mainly elected from the Members of Parliament who sit in either House of Common or House of Lords.<sup>35</sup>

#### 1.2 The Legislative Power

The Parliament of UK is composed of three parts, namely; the Monarch, House of Lords and House of Commons. However, the Monarch has only nominal powers and mainly has to listen to the advice of the Prime Minister who in return follows the Members of Parliament. The House of Commons is made up of elected members of Parliament, whereas the House of Lords is made up of unelected hereditary peers and life peers appointed by the Crown and Archbishops and Bishops of the Church of England. The House of Commons however, is superior to House of Lords in its law-making power. The main functions of the Parliament are to: create/amend law, scrutinise the government, and to enable the government to make financial decisions.<sup>36</sup>

#### 1.3 The Judicial Power

The main function of the Judiciary is to hear matters and adjudicate on them using the law. However, in the UK, the Judiciary has one more essential function: to develop the law through their judgments. The Judiciary consists of Judges in Courts, as well as those who hold judicial office in tribunals. The senior judicial appointments are made by the Crown. According to various sources, the Judiciary in the UK is independent of both Parliament and the Executive. It may be argued that this “independence” is really not independence per se, as

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<sup>34</sup>Papworth N, Constitutional & Administrative Law, 9<sup>th</sup> edn (Oxford University Press, 2016)

<sup>35</sup>Papworth N, Constitutional & Administrative Law, 9<sup>th</sup> edn (Oxford University Press, 2016)

<sup>36</sup>Papworth N, Constitutional & Administrative Law, 9<sup>th</sup> edn (Oxford University Press, 2016)

Senior Judges are appointed by the Crown. However, once these Judges are appointed, they become completely independent and have complete authority over all their actions. Their independence is protected in the “Act of Settlement – 1700”, according to which, Senior Judges can only be dismissed by address to the Crown from both Houses of the Parliament.<sup>37</sup>

#### **1.4 The Lord Chancellor and the doctrine of separation of powers**

One of the most peculiar features of the UK was probably the Lord Chancellor. This is mainly due to the fact that the Lord Chancellor was a part of all three branches of the government. The Lord Chancellor is often regarded as a disregard to the doctrine of separation of powers. Prior to the “Constitutional Reform Act 2005”, the Lord Chancellor acted as the head of the Judiciary, was a member of the Cabinet and presided over the House of Lords as its Speaker. However, after the “Constitutional Reform Act 2005” was passed, the Lord Chancellor was removed from his position in the Judiciary. As a matter of fact, the Constitutional Reform Act 2005, places an obligation on the Lord Chancellor under section 3 subsections (1), (4), (5), and (6) to continue to uphold the continued independence of the Judiciary.

Section 3 of the Constitutional Reform Act 2005 stipulates:

##### “3 Guarantee of continued Judicial Independence

(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the Judiciary or otherwise to the administration of Justice must uphold the continued independence of the Judiciary.

(4) The following particular duties are imposed for the purpose of upholding that independence.

(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the Judiciary.

(6) The Lord Chancellor must have regard to:

(a) The need to defend that independence;

(b) The need for the Judiciary to have the support necessary to enable them to exercise their functions;

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<sup>37</sup> Papworth N, Constitutional & Administrative Law, 9<sup>th</sup> edn (Oxford University Press, 2016)

(c) The need for the public interest in regard to matters relating to the Judiciary or otherwise to the administration of Justice to be properly represented in decisions affecting those matters.”

## **1.5 Inter-relation between the three Arms of Government.**

The UK has a unique system because it does not represent any standard structure; in fact, it is a mixture. This can be proved by looking closely at the interrelation between the three powers.

### ***1.5.1 The Legislature and the Executive***

The Legislature is dominated by the Executive because the Government is formed by the leader of whichever party wins the most seats in the House of Commons; who is the Prime Minister. Consequently, the Legislature might receive a considerable amount of pressure from the Executive. Therefore, even though it is the Parliament’s job to legislate, in reality the Government mainly controls it.<sup>38</sup>

### ***1.5.2 Executive and the Judiciary***

Since the appointment of the Senior Judges is in the hands of the Lord Chancellor, it can be said that there is a slight element of domination. However, once the Judges are appointed, it is not up to the Lord Chancellor to dismiss them.<sup>39</sup>

### ***1.5.3 Judiciary and the Legislature***

The Judiciary and Parliament mainly share the powers, rather than separate them. This is due to the fact that in Common law system Judges have a legislative role. Despite this overlap, the Judges have deferred to the authority of the Parliament since the 17th century. However, during the past two decades, there has been a shift in the balance of powers due to UK’s “increased obligations to Europe”.

Despite the fact that, Montesquieu based his explanation of the doctrine on the British system, it is obvious that the British system has a weak division of powers.<sup>40</sup>

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<sup>38</sup>Mike Thadkobylarz (2010)

<sup>39</sup> See Constitutional Reform Act, 2005, section 26 (5A) (b)

<sup>40</sup>All Answers ltd, 'Separation of Powers in the UK' (Lawteacher.net, July 2019)

<<https://www.lawteacher.net/free-law-essays/administrative-law/separation-of-powers-in-the-uk-administrative-law-essay.php?vref=1>> accessed 17 July 2019

## Appendix 3

### CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS

#### 1.0 CANADA

The recurrent theme of the respective roles of the Legislatures and Courts within Canada's Constitutional framework, so prevalent in the debate over scope of the rule of law as a Constitutional principle, brings us to a brief assessment of another and still-emerging principle, the separation of Executive, legislative, and Judicial powers.

Professor Peter Hogg has argued cogently and consistently since the first edition of his treatise in 1977 that there is no general Separation of Powers in the Constitution Act, 1867.

Nevertheless, in recent years, the Supreme Court of Canada has elevated the Separation of Powers to the level of a structural Constitutional principle. However, the Court has yet to provide a comprehensive and persuasive account of the meaning, scope, and normative effect of this principle. Indeed, the path of the Court's jurisprudence has veered significantly on this issue.<sup>41</sup>

In the *Provincial Court Judges Reference*<sup>42</sup> in 1997, Chief Justice Lamer, writing for a majority of the Court, asserted that 'a fundamental principle of the Canadian Constitution, the separation of powers... requires, at the very least, that some functions must be exclusively reserved to particular bodies'.

A year later, in upholding its advisory jurisdiction in the *Quebec Secession Reference*<sup>43</sup> the Court declared that 'the Canadian Constitution does not insist on a strict separation of powers'. Parliament and the provincial Legislatures may properly confer other legal functions on the Courts, and may confer certain judicial functions on bodies that are not Courts.

In *Babcock*<sup>44</sup>, the Chief Justice found:

"There is no general 'separation of powers' in the Constitution Act, 1867. The Act does not separate the legislative, Executive and Judicial functions and insist that each branch of government exercise only 'its own' function. As between the legislative and Executive branches, any separation of powers would make little sense in a system of responsible government, and it is clearly established that the Act does not call for any such separation. As between the Judicial and the two political branches, there is likewise no general separation of powers. Either the Parliament or the Legislature may by appropriate legislation confer non- Judicial functions on the Courts and (with

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<sup>41</sup>The Rule of Law, the Separation of Powers and Judicial Independence in Canada by Warren J. Newman

<sup>42</sup> Re Remuneration of Judges of provincial Court (P.E.I) [1997] 3 SCR [88]

<sup>43</sup> Re Secession of Quebec [1998] 2 SCR [217]

<sup>44</sup> Babcock v Canada (Attorney-General) [2002] 3 SCR [57]

one important exception [the core jurisdiction of superior Courts under s. 96]), may confer judicial functions on bodies that are not Courts.”

The biggest problem is definitional and terminological: nowhere in Canadian Constitutional jurisprudence is there a thorough analysis of the Constitutional meaning animating the concept of the Separation of Powers, or the Constitutional values it is meant to protect and enhance.

### **1.1 The Executive and the other Arms of government**

The Constitution Act, 1867 establishes Executive power by ss. 9-16. These provisions vest the Executive power in the Queen, and call for its exercise by the Governor General and Privy Council. The Constitution Act, 1867 establishes significant power in the Executive branch, including, by s. 15, the command of the Armed Forces. The Constitution Act, 1867 identifies and organizes separate Constitutional status as well for the Legislature (sections 17-52) and Judiciary (sections 96-101) and specifies their respective powers and limits.

However, what the Constitution giveth in relation to the Separation of Powers, it also taketh away: Under sections 17 and 91, the Queen is also an essential actor in the exercise of legislative power: Her Majesty is one of the three bodies composing the Parliament of Canada, and in strictness of law, it is the Queen, under section 91, who makes laws for the peace, order, and good government of Canada, albeit by and with the advice and consent of the Senate and House of Commons.

Another illustration is provided in the *Quebec Secession Reference* wherein it was observed that the United States Supreme Court cannot render advisory opinions, in keeping with the strict Separation of Powers reflected in the limitations expressed in that country’s Constitution, whereas in Canada there is ‘no Constitutional bar’ to the conferral of what is traditionally an Executive function (the rendering of legal opinions by the law officers of the Crown) upon the Judicial branch.

Canadian Parliamentary democracy increasingly trends towards power concentration in the Executive branch – a tendency that has disturbed many observers.

Parliamentary government fuses the legislative and the Executive branches. In a Parliamentary system the Executive springs from the Legislature, is part of it and is responsible to it as a confidence chamber.

The Lieutenant-Governor is part and parcel of the Legislature. He appoints members of the Executive Council and Ministers and these, according to Constitutional principles of a customary nature referred to in the preamble of the British North American (B.N.A.) Act of 1867 as well as in some statutory provisions, must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch. There is thus a considerable degree of integration between the Legislature and the Government; (*Blaikie v. A.G. Quebec (No. 2) (1981), 123 D.L.R. (3d) 15 at 122 (S.C.C.)*)

Although *Blaikie* dealt specifically with the provincial Executive power, the Court’s

description applies equally to the Federal Executive. The Court's observations in *Blaikie* are interesting because the Court focuses on the institutions of Parliamentary government established by Constitutional convention, particularly the institutions of responsible government. It is at the conventional level that integration between the Executive and legislative branches occurs.

Constitutional convention enhances integration between the Legislature and Executive in two respects. First, the formal Executive, the Governor General, is controlled by responsible Ministers of the Crown, creatures unknown to the formal Constitution. Second, the Legislature's powers and priorities are in practice controlled by other Executive instrumentalities unknown to the formal Constitution – the PMO (Office of the Prime Minister), PCO (Privy Council Office) and Cabinet. These institutions, particularly PMO and PCO, act as a clutch that meshes the gears of formal Constitutional institutions into the full force of operating political power. Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics (1999)* describes the real situation:

*"Central agencies stand at the apex of the machinery of government.... they have a licence to roam wherever they wish and to raise whatever issue they may choose; (p. 5) ... The prime Minister alone thus has access to virtually every lever of power in the federal government, and when he put his mind to it he can get his way on almost any issue; (p. 87)."*<sup>45</sup>

In other words, the central agencies, particularly PMO, PCO and, to a lesser extent, Cabinet, are the conventional Executive. It is the conventional Executive which in practice controls the Legislature, and which allows the writers to speak about the integration between the Executive and Legislature.

In practice, the bulk of the new legislation is initiated by the government (Executive). By virtue of s. 54 of the Constitution Act, 1867, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the Executive.

It is at the conventional level, not the formal level or the text of the Constitution, that the operation of Canada's Constitution exhibits a high degree of integration between the Executive and legislative branches of government. At the conventional level, where the Constitution actually functions, it is accurate to say that Canadian government is characterized by a high degree of control by the Executive over the legislative branch, particularly as contrasted with presidential systems. It is perhaps this situation that was in the mind of the Supreme Court of Canada when it commented that "the Canadian Constitution does not insist on a strict separation of powers..."<sup>46</sup>

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<sup>45</sup><http://www.constitutional-law.net>

<sup>46</sup> The Rule of Law, the Separation of Powers and Judicial Independence in Canada by Warren J. Newman

## 1.2 The Legislature and other Arms of Government

In a system of responsible government, once Legislatures have made political decisions and embodied those decisions in law, it is the Constitutional duty of the Executive to implement those choices.

Parliament is vested with Constitutional power to enact all federal laws and to establish Federal Courts. The establishment of the Courts by Parliament is the grey area here in terms of its comparison with the situation in Ghana. This is an additional means of interference on the Judiciary by the Parliament.

Parliament is however checked by the power of the Executive to call the House of Commons into session (s. 38) and by the power of the Judiciary to declare laws enacted unconstitutional. Parliament is also checked by power in the Executive to reserve Bills passed by the Houses of Parliament and to disallow laws enacted (secs. 55-7). These veto-like powers, designed for British control of Canadian law-making, have long since fallen into disuse, but they still exist in the text and structure of the Constitution.

The Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. In *R. v. Mills*, [1993] 3 S.C.R. 668 it was held that:

*"If Constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this Court has an obligation to consider respectfully Parliament's attempt to respond to such voices."*

## 1.3 The Judiciary and other Arms of Government

The Judicial branch has Constitutional power to try all cases, to interpret the laws in those cases and to declare any law or Executive act unconstitutional. The Judiciary is checked by power in the Executive to appoint its members; by power in the Legislature to enact amendments that overturn Judicial decisions, including many Constitutional decisions (Charter of Rights, s. 33); and also, by the combined power of the Executive and legislative branches to remove Judges.

In reviewing legislative enactments and Executive decisions to ensure Constitutional validity, the Courts speak to the legislative and Executive branches... Most of the legislation held not to pass Constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the Legislature responds to the Courts.

This is on all fours with the current situation of the influence of the Judiciary over other arms of government in Ghana.<sup>47</sup>

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<sup>47</sup> The Rule of Law, the Separation of powers and Judicial Independence in Canada by Warren J. Newman

## Appendix 4

### 1.0. UGANDA

#### 1.1. Executive and the other Arms of Government

The power of the Executive Branch is vested in the President of Uganda, who also acts as head of state and Commander-in-Chief of the armed forces. The President is responsible for implementing and enforcing the laws written by Parliament and, also appoints the Cabinet. The Vice President is also part of the Executive Branch, ready to assume the Presidency should the need arise.<sup>48</sup>

The Constitution of Uganda provides that the President shall execute and maintain the Constitution and all laws made under or continued in force by the Constitution. It is the duty of the President to also abide by and uphold and safeguard the Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.

The influence of the Executive over the Judiciary in Uganda is similar to the current situation in Ghana. Article 142 on the appointment of Judicial Officers provides as follows:

“(1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court **shall be appointed by the President**

acting on the advice of the Judicial Service Commission and with the approval of Parliament.

(2) Where-

(a) the office of a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is vacant; or

(b) a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is for any reason unable to perform the functions of his or her office; or

(c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, **the President may**, acting on the advice of the Judicial Service Commission, **appoint a person** qualified for appointment as a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court to act as such a Justice or Judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, **until the appointment is revoked by the President** acting on the advice of the Judicial Service Commission, whichever is the earlier.” [Emphasis supplied]

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<sup>48</sup> Article 99(1) of the 1995 Constitution of the Republic of Uganda (as amended)

Furthermore, Article 144 on the tenure of Office of Judicial officers provides that:

**“(3) The President shall remove a Judicial officer if the question of his or her removal has been referred to a tribunal appointed under clause (4) of this article and the tribunal has recommended to the President that he or she ought to be removed from office on any ground described in clause (2) of this article.**

**(4) The question whether the removal of a Judicial officer should be investigated shall be referred to the President** by either Judicial Service Commission or the Cabinet with advice the President should appoint a tribunal; and **the President then appoint a tribunal consisting of-**

(a) in the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who or have been Justices of the Supreme Court or have been Judges of a Court having similar jurisdiction or who are advocates of at least two years standing; or

(b) in the case of a Justice of the Supreme Court or a Justice of Appeal, three persons who are or have been Justices of the Supreme Court or who are or have been Judges of a Court of similar jurisdiction or who are advocates of at least fifteen years standing; or

(c) in the case of a Judge of the High Court, three persons who are or have held office as Judges of a Court having unlimited jurisdiction in civil and criminal matters. A Court having jurisdiction in appeals from such Court or who are advocates of at least ten years standing.

(5) If the question of removing a Judicial Officer is referred to a tribunal under this article, the President shall suspend the Judicial Officer from performing the functions of his or her office.”

These provisions are on all fours with articles 144, 146, 148 and 151 of the Constitution of Ghana which mandate the president to appoint and remove the Chief Justice, Justices of the Superior Courts and Judicial Officers.

## **1.2 Legislature and the other Arms of Government**

The Parliament of Uganda is the legislative arm of Government. The Constitution of the Republic of Uganda establishes this arm of government and lays down its functions under Chapter Six thereof. It is headed by the Speaker of Parliament.

The Legislature is the law-making body in Uganda; entrusted with the making of law. It is also the organ with the mandate to monitor and bring the executive to account. It can also, vary, limit or expand the jurisdiction of the Courts by law, provided all these are in conformity with the Constitution.

Similar to the Ghanaian situation, the legislature exerts influential authority in the following ways;

By virtue of the fact that Parliament has the mandate to create laws, it may take advantage of this power to interfere in the work of the judiciary. An example of this was in the case of *Jowett Lyagoba v Bakasonga [1963] E A 57* where the Court held that the installation of the Kyabazinga of Busoga was illegal. Shortly after, the then president ensured that Parliament pass the Busoga Validation Act validating the installation of the Kyabazinga. By doing this, Parliament was interfering in the judiciary by making use of its legislative powers.

Again, Article 78(d) states that, the Vice-President and Ministers, who, if not already elected members of Parliament, shall be ex-official members of Parliament without the right to vote on any issue requiring a vote in Parliament.

Here, it is difficult to see how powers between the legislature and the executive can be separated when in one breath one acts as a minister and in another breath a member of Parliament. It is likely that an issue of conflict of interests would arise in such a situation.<sup>49</sup>

### **1.3 Judiciary and the other Arms of Government**

The Judiciary is an independent legal organ comprised of Courts of Judicature as provided for by the Chapter Eight of the Constitution of the Republic of Uganda. It is headed by the Chief Justice who is at position four in the national hierarchy after the Speaker of Parliament.

The Judiciary is entrusted to administer justice through Courts of judicature including the Supreme Court, the Court of Appeal, the High Court and other Courts or Tribunals established by Parliament.

The Judicial function consists of the interpretation of the law and its application by rules or discretion to facts of particular cases.

Under Article 82 of the Constitution, the judiciary is given a considerable amount of control on Parliament where the Chief Justice, or a Judge designated by the Chief Justice, presides at an election of the Speaker of Parliament. It might be unsettling for some that, a person who is said to be at position 4 of the national hierarchy be empowered to preside over, or to appoint another judge to preside over, the election of the person who is supposed to precede such a person in hierarchy.

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<sup>49</sup> <http://asgp.co.net>