

The rule of law and democracy in Ghana since independence: Uneasy bedfellows?

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Summary

There is irrefutable evidence supporting the assertion that Ghanaians have consistently rejected any form of abuse of power and dictatorial rule. The Bond of 1844 signed on 6 March 1844, for instance, was a climax of agitation against the dictatorial rule of Governor George Maclean. Similarly, the formation of the United Gold Coast Convention, a century later in 1947, was to resist colonial rule and to pave the way for independence from the British. The question that arises is whether post-independence Ghana has lived up to the aspiration of the people to live in freedom from any form of oppression. This article, therefore, seeks to trace Ghana's pursuit of democratic governance and the rule of law since independence and to test whether there has been a recognition of and adherence to the rule of law which the people had consistently yearned for. In doing so, the article examines how the rule of law has fared during each of the four periods of democratic rule in the political history of the country, namely, the immediate post-independence era (1957-1966); the Second Republican era (1969-1971); the Third Republican era (1979-1981); and the present Fourth Republican constitutional era (1993 to date). What emerges is the fact that most of the post-independence successive governments have betrayed the people by failing to live up to the aspirations of the people to live under good governance and the rule of law. The article, therefore, is a critique of Ghana's march towards the entrenchment of the rule of law as the basis of democracy. It, therefore,

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proposes changes that ought to be made to the constitutional structure of Ghana in order to make the democratic system of governance more meaningful and also achieve the progress that adherence to the rule of law inevitably brings.

Key words: *constitutionalism; democratic governance; executive power; human rights; judicial independence; rule of law*

1 Introduction

Ghana, being the first African country south of the Sahara to gain independence, has attracted much attention in terms of its democratic credentials. However, it is worth noting that democracy is not an abstract entity. Its success is measured by a number of factors. Among these are the rule of law, strong institutions and governance structures. It is in this context that we seek to examine how Ghana has fared in its democratic aspirations and respect for the rule of law. This exercise allows us to identify the successes and failures with a view to making recommendations for redressing the shortcomings. To achieve the intended goal, the article traces Ghana's quest for democratic governance since independence. The article, therefore, examines, primarily through case law, how the rule of law has fared during each of the four periods of democratic rule in the political history of the country since independence, namely, the immediate post-independence era (1957-1966); the Second Republican era (1969-1971); the Third Republican era (1979-1981); and the present Fourth Republican constitutional era (1993 to date). Interspersed between these periods of democratic rule were military *coups d'état*, characterised by dictatorial rule. The article is a critique of Ghana's stride towards the entrenchment of the rule of law as the fundamental underlying tenet of democracy. It proposes changes that ought to be made to Ghana's present constitutional structure in order to make the democratic system of governance more meaningful, and entrench the rule of law more effectively.

2 Rule of law and democratic governance in Ghana: 1957 to 1992

2.1 Post-independence era (1957-1966)

On 6 March 1957,¹ the Gold Coast attained independence and

1 This was the 'appointed day' when the Gold Coast was to attain political independence from Great Britain. Thus, sec 5(2) of the Ghana Independence Act of 1957 provided: 'In this Act, the expression "the appointed day" means the

adopted the name Ghana.² Not long after independence, however, it became obvious that the democratic government of Ghana had no interest in upholding the rule of law. This stems from the fact that its legislative agenda betrayed some of the fundamental tenets of the rule of law. For example, in 1958 Parliament enacted the Preventive Detention Act, which sought to detain persons whose future actions were deemed likely to be prejudicial to the security of the state.³ Similarly, several orders were issued pursuant to the Deportation Act,⁴ thereby stripping Ghanaian citizens of their citizenship status for the purposes of deporting them from Ghana. It must be stated that these laws were ostensibly enacted in order to safeguard and maintain security in the newly-independent state. However, it seems as though the government overreacted in the enforcement of these laws, and the judiciary, instead of being a buffer between the executive and the ruled, chose to be an accomplice in the suppression of the fundamental rights of the citizenry. In this regard, four cases stand out, an examination of which reveals the extent of the disregard for the rule of law in Ghana in the immediate aftermath of independence, and the active acquiescence of the courts.⁵ It was at that stage that one would have expected the courts to stand up and defend the rule of law and fundamental freedoms of the people. However, as is demonstrated in the four cases, there was the active acquiescence of the courts to the extent that they became 'more executive minded than the executive', contrary to the admonition of Lord Atkin.⁶ In this sense, the judiciary surrendered its independence to the executive through self-infliction. A fifth case is also briefly considered, as the aftermath of this case shows how the executive capitalised on the self-inflicted wounds of the judiciary, which effectively emboldened the former to overturn a Supreme Court decision and subsequently led to the arbitrary dismissal of the then Chief Justice.

The first case, *Lardan v Attorney-General*,⁷ concerned a deportation order made pursuant to the Deportation Act of 1957. Under this order, the plaintiff was to be deported from Ghana as it was alleged that his continuous presence was not conducive to the public good. He brought an action seeking a declaration to the effect that the order was invalid by virtue of the fact that the Act was not applicable to him

sixth day of March, nineteen hundred and fifty-seven, unless before that date Her Majesty has by Order in Council appointed some other day to be the appointed day for the purposes of this Act.'

- 2 Ghana was the name of an ancient sub-Saharan African kingdom; and it is widely asserted that Dr JB Danquah was the person who proposed this name for the new country.
- 3 Preventive Detention Act of 1958.
- 4 Deportation Act of 1957.
- 5 These cases have been selected because they represent the major instances when the Ghanaian judiciary was called upon in the immediate post-independence era to uphold the human rights of Ghanaians.
- 6 *Liversidge v Anderson* [1942] AC 206 244.
- 7 (No 2) [1957] 3 WALR 114.

since he was a Ghanaian citizen by birth. While the matter was pending in court, Parliament enacted the Deportation (Othman Lardan and Amadu Baba) Act of 1957 which gave power to the Minister of the Interior to specifically deport the two individuals from Ghana. Furthermore, this Act sought to terminate any proceedings in any court instituted for the purpose of challenging the validity of any deportation order made against the persons affected by the Act. Section 4(2) provided as follows:⁸

On any order of deportation being made hereunder, any deportation order made under the Deportation Act, 1957, in respect of the same deportee shall be automatically revoked and if the deportee is in custody under the provisions of the Deportation Act, 1957, he may, notwithstanding any proceedings in any court, whether pending or determined, be retained in custody for the purposes of this Act without being released and such custody shall be deemed to be legal custody; and any proceedings in any court instituted for the purpose of impugning the validity of the Alhaji Alufa Othman Larden Lalemie Deportation Order, 1957, or the Alhaji Amadu Baba Deportation Order, 1957, shall be automatically determined.

The question the Court had to determine was whether the Act was *ultra vires* the Constitution of Ghana. Smith J held as follows:⁹

I have considered all the other authorities cited to me and they illustrate the same point that the words 'peace, order and good government' with no reservation attached, no restriction as to specific subjects and without qualification, give to any country 'the same plenary powers as are possessed by the Imperial Parliament in England'. It was conceded that this Act of Deportation, and that was a momentary indulgence in fantasy, if passed by the Imperial Government would be a matter for Parliament only and the English courts would be powerless to interfere. If, as I hold, the words 'peace, order and good government', unqualified in any way, are plenary powers possessed by Parliament and no less than the powers possessed by the Imperial Parliament, then it follows just as it would in England that the court here has no power to inquire into such an Act. I consider, therefore, that any law which comes within the ambit of the Ghana (Constitution) Order in Council, s 31, and which does not contravene any other provision in the Constitution can only be challenged in a court of law if it violates or purports to violate sub-section (2) or (3) of the section. On that view, the Act deporting these two persons, not being in contravention of any expressed limitation in the Ghana (Constitution) Order in Council, 1957, is a matter for Parliament ... In England it is not open to the court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the court's notions of justice and, so far as the Ghana (Constitution) Order in Council, s 31(1), is concerned, that is the position in which I find myself. For these reasons I hold that it is not for the court to inquire into this particular Act and the pending actions before the Kumasi Divisional Court are determined under the provisions of section 4(2) of the Act.

The judgment was substantially flawed by the fact that Smith J forgot that Ghana was operating under a written constitution and erroneously relied on the British parliamentary system where supremacy of Parliament operates. If he had considered the new legal

8 Deportation (Othman Lardan and Amadu Baba) Act of 1957.

9 *Lardan* (n 7 above).

system, he should not have decided in favour of the government. Smith J's decision paved the way for the excessive impunity that followed. This observation becomes more poignant as a result of the holding in the second case, and exposes the active acquiescence of the courts in fomenting impunity and disregard for the rule of law in the immediate post-independence era.

The second case, *Balogun v Edusei*,¹⁰ also revolved around the implementation of the Deportation Act of 1957. Four persons, including Wahabi Balogun, were arrested pursuant to a deportation order made under the authority of the Deportation Act. Counsel for the applicants filed an *ex parte* motion for a writ of *habeas corpus* on the ground that the applicants were all Ghanaian citizens and as such could not be the subject matter of the deportation order. The Court therefore directed that a notice of the motion be served on the Minister of the Interior, the Acting Commissioner of Police as well as the Director of Prisons. However, the notice was served on the following day, by which time the applicants had already been deported to Nigeria. The Court, therefore, found the respondents to be in contempt of court, but stayed execution of their committal to prison in the hope that they would be advised to apologise.

However, on the morning of the adjourned date, Parliament held an emergency session where it passed the Deportation (Indemnity) Act 47 of 1958. Section 2 of the Act provided as follows:¹¹

The Honourable Krobo Edusei, formerly Minister of the Interior, and Erasmus Ransford Tawiah Madjitey, Commissioner of Police, shall be indemnified from all penalties for contempt of court and exonerated from all other liabilities in respect of any action taken by them in carrying out the deportation order in the Schedule of this Act after the institution by the persons named in those orders of proceedings by way of *habeas corpus*.

Smith J found himself in a position that he had created by his earlier decision in the *Lardan* case. Obviously appalled by the blatant interference in the administration of justice by the executive and the legislature, he delivered a judgment that was poignant yet totally irrelevant in the grand scheme of things. He must have highly regretted his earlier decision, but it was far too late for his newly-discovered face-saving message:¹²

By the passing of this Act I take it that the court's finding that the respondents are in contempt is not challenged by Parliament, but that the intention is to neutralise any consequential order that I might make. It is plain that Parliament prefers that the respondents should not apologise, and it has passed this Act in order to nullify any order which I might make in the absence of the apology. The courts of justice exist to fulfil, not to destroy, the law, and it would not make sense for me to record an order which is incapable of being carried out. As to the deportations while the applications for *habeas corpus* were still *sub judice*, I cannot over-emphasise

10 [1957] 3 WALR 547.

11 Deportation (Indemnity) Act 47 of 1958.

12 *Balogun* (n 10 above).

the undesirability of interference by the executive with the functions of the court. Persistent indulgence in such a practice could not have any other than the most serious ill-effect on the well-being of the country. Decisions of a court are as binding upon the executive as the laws which Parliament passes are binding upon the ordinary citizen, and it is the court that enforces upon the people obedience to these laws, thereby aiding Parliament in the ordering of the country. In the result, the finding of contempt stands, but I make no further order.

Unfortunately, the learned judge by virtue of his own decision in the earlier *Lardan* case could not have arrived at any other conclusion. These two cases, therefore, laid the foundation for executive impunity in Ghana, for if Smith J had been bold enough to find the actions of the executive and legislature as an affront to the Constitution in the aforementioned cases, especially in the *Lardan* case, the trajectory of the political and legal development of Ghana could have taken a different course from that which eventually emerged – a protracted period characterised by the abuse of human rights and neglect of the rule of law. The third case of *In Re Dumoga & 12 Others*¹³ involved the application of the Preventive Detention Act of 1958. The facts were that, on or about 14 March 1960, Kofi Dumoga and 12 others were arrested and detained by virtue of two preventive detention orders, made under powers conferred by section 2 of the Preventive Detention Act, 1958. On 18 March 1960, the applicants were duly served with the grounds of detention. The applicants applied to the High Court for orders of *habeas corpus* directed to the Minister of the Interior and the Director of Prisons to show cause why they should not be released from detention. However, the Court held that where a person was in lawful custody, an application for *habeas corpus* does not lie and that, 'where a statute confers a discretion upon an executive officer to arrest and detain persons, the court cannot enquire into the exercise of that discretion, provided the officer acts in good faith'.¹⁴ In this case, the Court thus further entrenched the ability of the executive to abuse the rights of individuals without having to provide reasons for the curtailment of these rights, and the final nail in the coffin was provided in the next case.

The fourth case, *In Re Akoto & 7 Others*,¹⁵ has come to epitomise the extent of executive and legislative impunity, and the shameful role that the courts of Ghana played towards it. The appellants in this case were arrested and detained under the Preventive Detention Act of 1958. Subsequently, they applied for a writ of *habeas corpus* but the application was refused by the High Court. An appeal was lodged in the Supreme Court on the grounds, *inter alia*, that the Preventive Detention Act was in excess of the powers conferred on Parliament by the Constitution and contravened article 13 of the 1960 Constitution of Ghana.¹⁶ The Court held that the declaration by the President on

13 [1961] GLR 44.

14 *In Re Dumoga* (n 13 above).

15 [1961] GLR 523.

the assumption of office was similar to the Coronation Oath of the British Monarch. Hence, such a declaration, in the opinion of the Court, did not constitute a Bill of Rights, thereby creating no legal obligations enforceable in a court of law.

The Supreme Court adopted the position previously advanced by Smith J, namely, that Parliament had plenary powers to essentially do whatever it deemed fit, and that courts were not the forum to challenge the constitutionality of Acts of Parliament or actions of the executive. The Court held as follows:¹⁷

This contention, however, is based on a misconception of the intent, purpose and effect of article 13(1) the provisions which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have the statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable ... [I]n our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve ... [T]he declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy from any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

This signalled the entrenchment of impunity and unaccountability in the governance of the country. This was a significant contribution to the state of impunity on the part of the executive as it was the decision of the highest court of the land. Such a state of affairs is what led to autocratic rule, which was formalised in 1964 by virtue of the enactment of the Constitution (Amendment) Act 224 of 1964.¹⁸

The fifth case, *The State v Otchere & Others*,¹⁹ is considered not for the merits of the judicial decision, because in fact the Court did justice by acquitting some of the accused persons against whom charges of treason and conspiracy to commit treason could not be substantiated, much to the displeasure of the government. Rather, the reason we consider this case is because of what happened after the Court had reached its decision. The facts were that the accused persons were alleged to have held meetings in Lomé, Togo, between 1961 and

16 On 1 July 1960, Ghana attained Republican status and thus adopted a new Constitution. Art 13 of this Constitution provided for a solemn declaration to be made by the President on assumption of office. These included his adherence to the principles of non-discrimination, freedom of speech and expression, assembly and the right of access to courts of law.

17 *In Re Akoto* (n 15 above).

18 This Act made Ghana a one-party state and provided for other radical powers for the President, including the removal of judges from office without recourse to any laid-down procedure.

19 2 G & G 739 (2d) 739, [1963] 2 GLR 463.

1962 where they agreed to overthrow the government of Ghana by unlawful means. It was further alleged that the assassination attempt on the life of the President in August 1962 as well several bombings that had occurred in the capital city were all carried out in furtherance of the conspiracy. Only the first and second accused were convicted, while the third, fourth and fifth accused were acquitted and discharged as a result of the failure of the prosecution to discharge their burden of proof.

What occurred next was only the logical outcome of the unfettered executive power, which the judiciary had already actively acquiesced to entrenching in our body politic. Thus, by virtue of the Special Criminal Division Instrument, 1963 (EI 161), the President of Ghana, Kwame Nkrumah, unilaterally declared the decision of the Court null and void and ordered the re-arrest and re-trial of the acquitted persons. He also summarily dismissed the Chief Justice, Sir Arku Korsah, who had presided over the case. Such was the sheer impunity existing during this period and, as already noted, it was given constitutional blessing the very next year, by way of a constitutional amendment.²⁰

The blatant abdication of judicial responsibility during the immediate post-independence era that resulted in the dictatorial rule of Nkrumah was tragic as Ghana had hitherto been regarded as a beacon of democracy and hope in the sub-Saharan African region, having been the first country in the region to obtain independence. Thus, the failure of the judiciary, in particular the Supreme Court, to uphold the rule of law during this era is deeply regrettable. That notwithstanding, the political pressures at the time and the apparent instability of the state may have directly influenced how the judges reacted through their decisions. However, it is our position that if the judges were independently-minded and conscientious of their duty to upholding the rule of law as the primary consideration in all cases, a different path would have been carved out for the political and legal development of the country. Thus, the courts actively aided the executive and the legislature in undermining democracy in Ghana, and with that came the total neglect of the rule of law. Therefore, it is not surprising that the Ghanaian army and police service overthrew the Nkrumah regime in February 1966.²¹

Since the country had been declared a one-party state and no other means for removing the oppressive and autocratic regime existed in law, such an outcome (*coups d'état*) must have been foreseeable. As distasteful as this may seem, it represented the only option available

20 Constitution (Amendment) Act (n 18 above).

21 We do not intend to justify the unconstitutional or illegal overthrow of governments generally, but rather seek to point out the fact that it was the neglect of and wanton disregard for the rule of law that manifested as one of the causal factors for the first *coup d'état* in the history of Ghana. In any case, the regime that existed in Ghana after the 1964 constitutional amendment, in our opinion, was an unconstitutional one.

to the people, since the Supreme Court's holding that the enforcement of the fundamental human rights and freedoms contained in article 13 were only moral obligations on the President and that no legal recourse existed except through the ballot box, had been essentially rendered nugatory.²² Nevertheless, the regime that existed from 1964 onwards (and even to some extent from 1960) cannot by any stretch of the imagination be considered a constitutional government of Ghana. To suggest otherwise is to make a mockery out of the ideals of constitutionalism, which has the rule of law as its most fundamental tenet, the absence of which has clearly been demonstrated in the preceding paragraphs.

2.2 Second Republican era (1969-1971)

Before the advent of the Second Republic, a *coup d'état* had taken place on 24 February 1966, as already noted. As a result, Kwame Nkrumah was removed from office as President, and the Constitution of 1960 was abrogated.²³ The National Liberation Council (NLC), made up of members of the security agencies, including the Ghanaian army and police service, administered the affairs of the state between 1966 and 1969. The NLC, therefore, ushered in a new era of constitutional governance, culminating in the adoption of the 1969 Second Republican Constitution and the ascension to political power by a democratically-elected government, headed by Prime Minister Kofi Abrefa Busia.²⁴

One case during the Second Republican era signifies the judiciary's attempt to redeem its image from the immediate post-independence era. The case of *Sallah v Attorney-General*,²⁵ therefore, is of paramount importance in any discussion of democracy and the rule of law during this period of constitutional governance in Ghana. The facts of the case were that Mr EK Sallah had been appointed as manager in the Ghana National Trading Corporation (GNTC) in October 1967. The GNTC was a body corporate originally established as a state trading corporation in 1961 pursuant to Executive Instrument 203 that was issued under the authority of the Statutory Corporations Act 41 of 1961. In 1964, a new Statutory Corporations Act 232 was enacted, and a new Legislative Instrument (LI 395) was made, continuing the existence of the GNTC as a body corporate.

22 This is because after the 1964 constitutional amendments, there was no other way for the people to express their political will through elections and hold the government to account in that way, since the country had been declared a one-party state. In a sense, therefore, Nkrumah himself laid the foundation for his own overthrow, and his dictatorial tendencies are what led to the *coup d'état* of 24 February 1966.

23 National Liberation Council (Establishment) Proclamation 1966.

24 Kofi Abrefa Busia was the leader of the Progress Party (PP) that won the 1969 general elections in Ghana in a landslide victory.

25 2 G & G 739 (2d) 1319, [1970] GLR 55.

On 21 February 1970, Mr Sallah received a letter from the Presidential Commission terminating his appointment with the GNTC in apparent accordance with section 9(1) of the Transitional Provisions of the 1969 Constitution. However, he insisted that his office did not fall within any of the categories of offices contained in section 9(1) as established by the NLC. He therefore brought an action in the Supreme Court for a declaration to the effect that on a true and proper interpretation of section 9(1), the government was not entitled to terminate his appointment. The issues to be determined by the Court were twofold: (i) whether or not the word 'established' should be given its ordinary dictionary meaning or a secondary meaning of 'continuing in force', as was being advanced by the Attorney-General as justification for Mr Sallah's termination; and (ii) whether the actions of the President were immune from question in any court while he remained in office.

In response to the first issue, the Court held:²⁶

The effect of the NLC Proclamation was that it announced to the world that the then government of the First Republic had been overthrown by the NLC. It further disclosed the intentions of the NLC by making it clear that it reserved the right to alter all existing laws by Decree. The Proclamation did not repeal, revoke or abrogate the 1960 Constitution; it merely suspended its operation. The 1960 Constitution itself recognised the existence of certain laws, such as common law and customary law and certain enactments existing at the time of the coming into force of the Constitution, which did not derive authority or validity from it. To recognise the existence of a state of affairs is a far cry from giving that state of affairs its validity.

The Court therefore granted Mr Sallah's application for a declaration that his office had not been 'established' by the NLC. In terms of whether the actions of the President were immune from question in any court during his term of office, it was held as follows:²⁷

Article 36(6) merely provided a procedural not substantive, immunity to the President. It means that the official acts of the President can be challenged but he cannot be made a defendant in judicial proceedings or be made personally liable for the result of the proceedings. By virtue of article 36(7) and (8) the President's personal civil and criminal liability is suspended while he holds the office of President but the liability can be prosecuted within three years after ceasing to hold office.

It is evident that the Supreme Court in this case was in no mood to tolerate the perceived executive overreach in any form or manner. Although in the grand scheme of things it came a decade late, at least to many it signified a new-found resolve of the courts to stand up to the executive and, by extension, Parliament, by playing its watchdog role in the constitutional set-up of the country.

A controversy that arose in the immediate aftermath of the decision in the *Sallah* case was the statement made by the Prime Minister,

²⁶ *Sallah* (n 25 above).

²⁷ As above.

Dr KA Busia, on radio on 20 April 1970.²⁸ In his broadcast, he asserted that no court could enforce a decision that sought to compel the government to employ or re-employ a person. Critics have chastised the Prime Minister for making this so-called 'no court' statement, as being contrary to the rule of law. To some, the Prime Minister deliberately undermined and defied the orders of the judiciary when he made this statement.²⁹ It has, therefore, been suggested that 'his handling of the *Sallah* case leading to the "no-court" pronouncement could have been handled better' and that, were the statement made in recent times, he may have faced impeachment proceedings.³⁰

Unfortunately, such comments fail to appreciate the crux of the decision in the *Sallah* case, and the essence of constitutionalism and the rule of law, for that matter, under the Ghanaian Constitution.³¹ What Busia said in his radio broadcast should not be characterised as defiance and/or a failure to obey an order made by the Supreme Court in the *Sallah* case. This is because Mr Sallah himself did not specifically seek reinstatement, and neither did the Court make any consequential orders pursuant to the granting of the declaration that indeed his office was not one of those offices established by the NLC. The majority in the case held as follows: Archer JA held that

[t]o be established or not to be established by the Proclamation or the National Liberation Council, that is the question. I think the plaintiff succeeds in this action and he is therefore entitled to the declaration he seeks.³²

Sowah JA also held that '[i]n the result, there will be judgment for the plaintiff against the defendant. The plaintiff will have the declaration he seeks.'³³ Finally, Apaloo JA held that

28 Dr Busia's radio broadcast on the *Sallah* Decision, 2 G & G 739 (2d) 1374.

29 I Yeboah 'Arthur K writes on Prof Busia's legacy' 18 July 2013 <http://www.graphic.com.gh/features/features/arthur-k-writes-on-prof-busia-s-legacy.html> (accessed 8 October 2017).

30 As above.

31 Art 2(4) of the 1992 Constitution provides: 'Failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the case of the President or the Vice-President, constitute a ground for removal from office under this Constitution.' It must be noted that clause (2) of art 2 gives the Supreme Court the power to make orders and give directions as it considers fit for the purposes of giving effect to any declaration it makes. Therefore, if the Supreme Court makes a declaration that the government was not entitled to dismiss a particular person from office and orders his reinstatement, and the executive fails to obey or carry out the terms of the order so made, it constitutes a high crime and, in the case of the President or Vice-President, is a ground for removal. However, this was not what transpired in the case of Busia's radio broadcast after the *Sallah* case, as no reinstatement order was made. By suggesting that '[n]o court can enforce any decisions that seeks to compel the government to employ or re-employ anyone', Busia himself may have misunderstood the essence of the Court's decision in merely granting the declaration.

32 *Sallah* case (n 25 above).

33 *Sallah* case 1361.

[n]ow that everything that can be said or done has been said and done, truth and justice must have the last word. And that word is that the plaintiff succeeds in this action and is entitled to the declaration which he seeks.³⁴

From the above, it is clear that the majority in the *Sallah* case merely granted the declaration without making any consequential orders for reinstatement, for example. How, therefore, did the Prime Minister defy or disobey the order of the Supreme Court? As a result of this common misunderstanding of the decision in the *Sallah* case, Busia's broadcast has been misconstrued and taken out of context as though he was a despot who had no regard for judicial independence. On the contrary, we believe that his statements, albeit arguably politically unwise in some parts, sought to solidify his government's adherence to the rule of law and democracy by offering a candid critique of the Court's decision. For example, he stated:³⁵

During the period of the National Liberation Council, no public officer derived his position from any source other than from the National Liberation Council. It makes absolute nonsense of the *coup* to maintain that those who held offices in the Nkrumah regime before the *coup*, some of whom Commissions of Enquiry appointed by the NLC confirmed to be corrupt, should be outside the purview of the exercise, whilst those appointed by the NLC to help them carry on the reconstruction are the ones within the purview of the section. Laws do not operate in a vacuum, but within social and historical contexts, and no one can fail to see that the effect of the *coup* of February 24, 1966, and the proclamation and the subsequent decrees was to make clear that all public offices were held as a result of the Act of the National Liberation Council. What I have come to say to the nation is this: that as long as I remain the Prime Minister of this country, *I shall do my best, with the co-operation of my cabinet, to uphold the highest standards of democracy as I understand it, whether in the legislature or the executive, or the judiciary. I cannot be tempted to dismiss any judge. I shall neither honour nor deify anyone with martyrdom. But I will say that the judiciary is not going to hold or exercise any supervisory powers not given to it by the Constitution. This, again, is a well established principle which we must adhere to.*

The Prime Minister's posture can be contrasted with that of Nkrumah in the aftermath of the case of *State v Otchere*,³⁶ which led to Nkrumah declaring the decision null and void,³⁷ and his subsequent unilateral and unconstitutional dismissal of the Chief Justice of Ghana. Thus, faced with unfavourable decisions by the judiciary, Busia strongly disagreed with their decision and addressed the nation to that effect in a harmless radio broadcast where he emphasised his government's respect for the rule of law, while Nkrumah behaved unconstitutionally by nullifying the decision of the Court and also dismissing the Chief Justice.³⁸ The Nkrumah government's posture during its reign, in relation to democracy and the rule of law,

34 *Sallah* case 1373.

35 Dr Busia's radio broadcast (n 28 above) 1378 (our emphasis).

36 *State v Otchere* (n 19 above).

37 Special Criminal Division Instrument, 1963 (EI 161).

generally, as captured by the major court decisions of the time, makes it clear that the rule of law thrived during the Second Republican era of Ghana, as opposed to the immediate post-independence era. Unfortunately, the rule of law was greatly undermined when the democratic government of the Second Republic was overthrown by another military intervention in 1972.

2.3 Third Republican era (1979-1981)

The constitutional path followed by Ghana did not last long, as the Second Republican Constitution and government were overthrown through another military *coup d'état* in 1972. Thus, between 1972 and 1979, Ghana was under military dictatorship. Once more, it was a military regime that ushered in the new era of constitutional governance, although this was also short-lived. President Hilla Liman's ascension to office through the ballot box was a welcome occurrence in the constitutional and political development of the country as it ended the longest period of military rule in the country at the time.

Two cases in this era, however, illustrate the crisis of identity in terms of the role of the judiciary in maintaining the rule of law and democratic governance in Ghana. Arguably, the most important case during this period for the purposes of the advancement of democracy and the rule of law was the case of *Tuffour v Attorney-General*.³⁹ The facts of this case were that, prior to the promulgation of the 1979 Constitution, the highest court of the land was the Court of Appeal. The Chief Justice during this period was Justice Apaloo who was also a member of this court. Following the coming into force of the 1979 Constitution, there now was a Supreme Court and the President sought to re-nominate Justice Apaloo as Chief Justice, whereupon the latter submitted himself for parliamentary approval. However, the transitional provisions of the Constitution provided that certain categories of persons (including justices of the superior courts) holding office prior to the coming into force of the Constitution were deemed to have been appointed to those same offices under the Constitution.

The Court of Appeal, sitting as the Supreme Court, therefore had to determine the meaning of the phrase 'shall be deemed' and thereby decide whether or not Justice Apaloo indeed was the Chief Justice of Ghana upon the coming into force of the Constitution. The Court held as follows:⁴⁰

38 We can confidently make this assertion also because it is on record that Nkrumah's government was a dictatorial one that greatly undermined and disregarded the judiciary and acted unconstitutionally at every turn. The same cannot be said for Busia's government, and the reaction of Busia to the *Sallah* case and that of Nkrumah to the *Otchere* case provide a clear insight as to the nature and temperament of both personalities and their respective regimes.

39 [1980] GLR 637.

40 *Tuffour* (n 39 above).

The duty of the court in interpreting the provisions of article 127(8) and (9) was to take the words as they stood and to give them their true construction having regard to the language of the provisions of the Constitution, always preferring the natural meaning of the words involved, but nonetheless giving the words their appropriate construction according to the context. Thus the phrase 'shall be deemed' in article 127(8), a legislative device resorted to when a thing was said to be something else with its attendant consequences when it was in fact not, had been employed and used in several parts of the Constitution and thus an aid towards ascertaining its true meaning ... applying the definition of 'deemed' to article 127(8), a justice of the Superior Court of Judicature (that one composite institution) holding office as such immediately before the coming into force of the Constitution should continue to hold the office as if he had been appointed by its processes. The Chief Justice was a member and Head of the Superior Court of Judicature. He was a member of the class of persons or justices referred to in article 127(8). Accordingly the court would hold that upon the coming into force of the Constitution, the incumbent Chief Justice, by virtue of article 127(8) and (9) became the Chief Justice, and under article 114(1), the Head of the Judiciary – he became the Chief Justice by the due process of law holding the identical or equivalent office as he held before the Constitution came into force. That interpretation was in harmony with the use of the phrase 'shall be deemed' in other provisions of the Constitution and was in conformity with the rationale behind article 127 (8) and (9) as declared by paragraph 204 of the Proposals of the Constitutional Commission.

The significance of this case goes beyond the finding that Justice Apaloo was Chief Justice on the coming into force of the Constitution. This case is also of paramount importance in the legal and political history of Ghana in the sense that it also recognised the right of the people to bring actions in their own personal capacities in matters of public interest. The Court during this period seemed to be championing democratic ideals, including the rule of law and political accountability.

However, the case of *Kwakye v Attorney-General*⁴¹ soon reversed whatever progress had been made. The plaintiff, a former inspector-general of police, was purported to have been tried and convicted *in absentia* by an Armed Forces Revolutionary Council (AFRC) Special Court.⁴² He brought an action in the Supreme Court contending that he had never been convicted by any court of competent jurisdiction. The Supreme Court, in refusing to grant him the relief he sought, held that what took place was akin to a trial and that the transitional provisions of the 1979 Constitution forbade any court from questioning judicial actions taken or purported to have been taken by the AFRC. The Court held:⁴³

A judicial action taken within the true intendment of section 15(2) of the transitional provisions of the Constitution, 1979, meant a judicial action regularly and lawfully taken, ie a judicial action which satisfied the requirements of the law both substantive and procedural; while by a

41 [1981] GLR 944.

42 The AFRC was the military government that ushered in the Third Republican Constitution, headed by Flight-Lieutenant Jerry John Rawlings.

43 *Kwakye* (n 41 above).

'judicial action purported to have been taken' was meant an action which was not a judicial action properly so-called but which looked like, was intended to be, or which had the outward appearance of a judicial action. Precisely therefore, a purported judicial action was one whose claim to regularity, both procedurally and substantively, was inaccurate but whose intention to be a judicial action was clear. Consequently, on the facts of the instant case, although the evidence led by the defendant did not establish or prove any judicial action by the AFRC or by any person in the name of that Council, it sufficiently established a judicial action purported to have been taken by the special court, a body authorised by the AFRC, against the plaintiff. At least, it was evident that when the special court met, it intended to try the plaintiff under AFRC 3 as amended by AFRC 19, by relying on his file and to convict and sentence him if found guilty.

That notwithstanding, Taylor JSC was bold to call a spade a spade in his powerful dissenting opinion. He held as follows:⁴⁴

I must remark that the idea that any statutory institution, authority or tribunal of inferior jurisdiction, is outside the control of the judiciary, is surely incompatible with the essence and regime of democratic system; it undermines the rule of law; it is subversive of orderly government and is an erosion of the people's liberties ... [I]f the AFRC special court is uncontrollable, what was the need for the elaborate provisions setting it up? Who is to ensure that its statutory terms are complied with? ... A capricious or illegal action is not a judicial action and cannot have the appearance of a judicial action. Now, assembling unlawfully in secret, in a caucus or as a court and without hearing evidence as approved by law, to administer unlawful secret oaths and to sentence a person has no resemblance to judicial action or purported judicial action. It rather resembles a capricious act, or an illegal act.

As powerful as Taylor JSC's words were, this only represented the minority view on the Supreme Court since it had overwhelmingly rejected the plaintiff's claims. Thus, although in the *Tuffour* case the Court seemed to be willing to protect and safeguard the rule of law and consolidate democratic governance, this was in stark contrast to what it did in the *Kwakyé* case, which in our opinion set us back further and allowed and essentially fostered the longest period of military dictatorship in the country.⁴⁵

3 Rule of law and democratic governance in Ghana: 1993 to present

Before we delve into an analysis of some cases that epitomise the new era of democratic governance in Ghana, it is important to make some observations about the constitutional structure of the 1992 Constitution. This Constitution heralded a new era of democratic rule in Ghana, after the longest period of military rule in the country, which occurred under the PNDC from 31 December 1981 to

44 As above.

45 The Provisional National Defence Council (PNDC), also headed by Flight-Lieutenant Jerry John Rawlings, overthrew the government of Hilla Liman on 31 December 1981, and ruled Ghana from that time until 7 January 1993.

7 January 1993. However, the country had to endure another eight years of the PNDC in the form of the National Democratic Congress (NDC) political party that arose from the ashes of the PNDC and assumed the governance of the country following the November and December 1992 presidential and parliamentary elections in Ghana.

The Constitution of Ghana of 1992, which ushered in this new era of 'democratic' rule, however, was tainted from the outset. The controversial insertion of provisions related to indemnity for acts or omissions committed by PNDC officials, as well as officials of all the former military regimes, is a permanent blot on the conscience of the country.⁴⁶ The Constitution, therefore, is a contradictory document that seeks in one breath to stress the rule of law as a prerequisite for the sustenance of our democracy, yet in another purports to oust the jurisdiction of the courts in bringing past perpetrators' atrocities to book. However, as has been famously argued by Professor Kumado,⁴⁷ the indemnity provisions only represent a plea for mercy by the perpetrators of *coups d'état* and their cohorts and, as such, have no legal effect whatsoever. We are in full agreement. However, the unwillingness of the Supreme Court to deal with this issue concretely means that the indemnity provisions remain an affront to democratic governance, in general, and the rule of law, in particular, within the context of Ghana's constitutional structure.

It was for this reason that the National Reconciliation Commission (NRC) recommended in no uncertain terms that the indemnity provisions in the Transitional Provisions of the Constitution be resubmitted to a national referendum.⁴⁸ The Commission noted:⁴⁹

A stable constitutional order cannot be founded on injustice and impunity on the part of wrong-doers, matched by a deep sense of grievance by many citizens. The indemnity clauses must be subjected to a referendum once again, so that the democratic mechanisms might assist the nation to resolve this matter conclusively.

This still has not been done. Hence, for so long as we have a constitution grounded on impunity, the rule of law is inherently undermined. The Supreme Court's consistent failure to effectively address this issue when the opportunity presented itself in the *Kwakye* case and, to a lesser degree, in the 31 December case (briefly

46 The Constitution of the Republic of Ghana 1992 (sec 34 of the Transitional Provisions) provides for this sweeping indemnity. Furthermore, sec 37 of the same Transitional Provisions prohibits Parliament from amending sec 34. It has been suggested that the indemnity provisions contained in the draft Constitution that was presented to the people of Ghana during the 28 April 1992 referendum was inserted without debate and, as such, the choice available to the people was either approving the draft Constitution (thereby tacitly endorsing the indemnity) or rejecting the draft Constitution altogether, and continuing military rule.

47 CEK Kumado 'Forgive us our trespasses: An examination of the indemnity clause in the 1992 Constitution of Ghana' (1993) 19 *University of Ghana Law Journal* 83.

48 Report of the National Reconciliation Commission, 2004.

49 Centre for Democratic Development *Never again: Summary and synthesis of the National Reconciliation Commission's Final Report* (2014).

discussed below) signifies its weak resolve to concretely address the most important and controversial constitutional questions of our time, undermining the rule of law in the process.

In our view, several cases epitomise the progress that Ghanaian courts have made in terms of entrenching the rule of law during this period of sustained democratic and constitutional governance, some of which will be discussed below.⁵⁰ For the purposes of our analysis, we have divided the post-1993 era into three distinct periods, namely, (i) the period of judicial resurgence;⁵¹ (ii) the period of judicial entrenchment;⁵² and (iii) the period of judicial inconsistency.⁵³ The first case for consideration in the period of judicial resurgence is *New Patriotic Party v Inspector-General of Police*.⁵⁴ The Supreme Court in this case struck down provisions of the Public Order Decree (NRCD 68) that sought to put prior restraints on and limit the ability of persons to freely exercise their constitutional right to assembly, including the freedom to take part in processions and demonstrations, in contravention of article 21(1)(d) of the Constitution. The importance of this decision lies in the fact that the country was just returning to multiparty democracy after more than a decade of military and dictatorial rule by the PNDC; and the judiciary soon checked the dictatorial heritage of the new NDC government that was manifested in the fact that they had revoked a permit for peaceful demonstrations originally granted to the opposition NPP, which led to this case. That notwithstanding and true to form, the government quickly undermined the judiciary by reversing the human rights progress that had been made in this case through the enactment of the Public Order Act 491 of 1994. as Quashigah rightly notes.⁵⁵

50 It must be noted that, although the judiciary today arguably is the strongest it has been in Ghana's history and has made enormous progress in sustaining the rule of law, we are also of the considered view that the Supreme Court in particular has led the people down when it mattered the most in recent times, as will be explained below.

51 This era can be seen through the following cases: *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459; *New Patriotic Party v Attorney-General* [1993-94] 2 GLR 35; *New Patriotic Party v President Rawlings* [1993-94] 2 GLR 193; *New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] GLR 354; *Ghana Bar Association v Attorney-General & Abban* [1995-96] GLR 598; *Ekwam v Pianim* (No 2) [1996-97] SCGLR 120; and *JH Mensah v Attorney-General* [1997-98] 1 GLR 227.

52 This era can be seen through the following cases: *Amidu v President Kufuor* [2001-2002] SCGLR 86; *Asare v Attorney-General* [2003-2004] SCGLR 823; *The Republic v Wereko-Brobby & Mpiani (Ghana @ 50 case)*, Case ACC 39/2010; and *Asare v Attorney-General* [2012] SCGLR 460.

53 This era can be seen mainly through the following cases: *In Re Presidential Election Petition* (No 4); *Akufo-Addo, Bawumia & Another v Mahama, Electoral Commission & Another* [2013] SCGLR (Special Edition) 73; and *Ghana Bar Association v Attorney-General* [2016] GHASC 43.

54 [1993-94] 2 GLR 459.

55 EK Quashigah 'The constitutional right to freedom of assembly and procession in Ghana in the light of the decision in the Public Order Case and the Public Order Act' (1996-1999) 20 *University of Ghana Law Journal* 1.

*New Patriotic Party v Attorney-General*⁵⁶ pertained to whether it was unconstitutional for the government to proclaim and celebrate 31 December each year as a national holiday with state resources. The Court held the celebrations as unconstitutional as this offended the spirit of the Constitution, because the celebrations signified the glorification of *coups d'état* in Ghana. Francois JSC held as follows:⁵⁷

For if the Constitution, 1992 frowns on violent overthrows of duly constituted governments, and rejects acts that put a premium on unconstitutionality to the extent of even proscribing the promotion of one party state, it is naivety of the highest order, to expect the Constitution, and in the same breath, to sing Hallelujah's in a paean of praise to unconstitutional deviations, past or present. If the past is being buried, the spirit of the Constitution, 1992 would frown on the resurrection of any of its limbs. That is the whole point of the cloak of indemnity conferred in section 34 of the transitional provisions of the Constitution, 1992 ... The admission that a violent overthrow of government occurred on 31 December, forecloses any sanctioning of public celebration in a constitutional era.

The Court once again stood firm and upheld the rule of law, thereby safeguarding our democratic governance system from the whims and caprices of an authoritarian regime masquerading as a democratic one.⁵⁸

In *New Patriotic Party v Ghana Broadcasting Corporation*,⁵⁹ the plaintiff brought an action against the state broadcaster, who had refused to allocate it equal airtime as the government, for the purpose of rebutting the budget statement of the government. The Court held that under article 163 of the Constitution, all state-owned media had to afford fair opportunities for the presentation of divergent viewpoints and, as a consequence, Ghana Broadcasting Corporation was under an obligation to provide equal opportunity to the opposition NPP to present its views on issues of national importance. In *Ekwam v Pianim (No 2)*,⁶⁰ however, the Supreme Court, in our opinion, erred when it held that the defendant was ineligible to participate in the 1996 presidential election because the PNDC Public Tribunal had convicted him during the 1980s for the offence of preparing to overthrow the PNDC government. Thus, by virtue of this, the Court held that Mr Kwame Pianim was ineligible to contest as presidential candidate for the New Patriotic Party under article 94(2)(c)(i) of the 1992 Constitution, which barred persons who had been convicted for offences involving the security of the state from contesting as President. We believe that the rule of law could have

56 [1993-94] 2 GLR 35.

57 *New Patriotic Party* (n 56 above).

58 The PNDC transformed itself into the National Democratic Congress (NDC) in time for the 1992 general elections, which returned Ghana to democratic rule. Allegations of widespread electoral malpractices on the part of the PNDC, which oversaw the elections, famously led to the opposition New Patriotic Party coming out with the 'Stolen Verdict' publication, and thus boycotting the scheduled parliamentary elections.

59 [1993-94] GLR 354.

60 [1996-97] SCGLR 120.

been further entrenched if the Court had dismissed the case against the defendant on the basis that the PNDC government was an unlawful government and that, as admonished by the previous 1979 Constitution, all citizens had a duty to take steps to return the previous constitutional regime.

Finally, in the case of *JH Mensah v Attorney-General*,⁶¹ the Court upheld the rule of law when it required all government ministers holding such offices before the 1996 elections to be submitted to parliamentary vetting in accordance with the Constitution. This was against the backdrop of the government purporting to allow such ministers to continue holding their positions after the 1996 general elections and the subsequent swearing in and start of the second term of office of President Rawlings. The Court, however, held that such appointees, regardless of the similar positions they held prior to the elections, ought to be vetted again by Parliament in accordance with the clear dictates of the 1992 Constitution of Ghana. Thus, political impunity in the form of an abject neglect of clear constitutional provisions was halted by the resurgent court that was somehow emboldened by the return of democracy and guided by the principle of limited government.

The period of judicial entrenchment, in our estimation, existed between the years 2000 and 2012. It starts with the case of *Amidu v President Kufuor*.⁶² In this case, the Supreme Court reiterated its position first advanced in the *NPP v Rawlings* case, namely, that an action can be brought against the President in the performance of his functions, in accordance with the dictates of the rule of law. However, such an action must be brought against the Attorney-General in accordance with article 88 of the Constitution as the nominal defendant. The period ends with the case of *Asare v Attorney-General*⁶³ (citizenship case), where the Court struck down provisions of the Citizenship Act 591 of 2000, which gave the Minister of the Interior the unfettered discretion to prescribe offices that dual citizens were not eligible to hold in Ghana, in addition to the offices that they were statutorily barred from holding.

Finally, the period of judicial inconsistency is the period from 2013 to date. Two cases are important here in terms of appreciating the Supreme Court's inconsistency in upholding the rule of law in recent times. The first case is that of *In re Presidential Election Petition (No 4); Akufo-Addo, Bawumia & Another v Mahama, Electoral Commission & Another*.⁶⁴ In this case, the candidate of the then opposition New Patriotic Party (NPP) during the 2012 presidential elections brought a petition to the Supreme Court challenging the validity of the election results and the declaration of John Mahama as the validly-elected

61 [1997-98] 1 GLR 227.

62 [2001-2002] SCGLR 86.

63 [2012] SCGLR 460.

64 [2013] SCGLR (Special Edition) 73.

President of Ghana by the Electoral Commissioner. The issues set out for trial were twofold: (i) whether there were malpractices, irregularities, and so forth, in the conduct of the election; and (ii) whether these malpractices and irregularities affected the outcome of the elections. In a strange turn of events, the Supreme Court, instead of answering these two questions, decided to rather proffer their opinion on the specific categories of alleged malpractices and irregularities, thereby, in our opinion, tainting the entire judgment. The petition was dismissed, and John Mahama was affirmed as being the validly-elected President.

The Court (the majority), in our view, in this case undermined our democratic credentials and the rule of law. It seems as though the majority of the Court were in a hurry to declare President Mahama as validly elected simply because it was the safest and easiest option to pursue.⁶⁵ This, we believe, fortified the general belief in Ghana that elections are won at the polling stations and not in the courtroom.⁶⁶ The dangers associated with this state of mind is all too obvious, as political party operatives will do all they can, legally and illegally, to win on election day. The Supreme Court, therefore, in our opinion, missed another great opportunity to further entrench and uphold the rule of law in Ghana.

Another case in this era that demonstrates the inconsistency on the part of the Supreme Court is that of *Ghana Bar Association v Attorney-General & Others*.⁶⁷ In this case, the Ghanaian Supreme Court essentially granted unfettered appointment powers to the President when it held that the provision in the Constitution requiring the President to act on the advice of the Judicial Council in the appointment of justices of the Supreme Court was not binding. Thus, even though the Constitution clearly requires the President to actually act on the advice of the Judicial Council for the purposes of such appointments, the Court was of the view that this provision was not binding on the President. The effect of this decision is that it renders nugatory all other provisions of the Constitution that require the President to act on the advice of another body in his appointment functions. This has serious implications for the rule of law because, if the President can act on his own accord in his appointment functions without acting pursuant to the advice of constitutional and other bodies, what was the purpose of the constitutional provisions

65 It should be noted that during this period there was much tension in Ghana, and the fear of many, including some members of the Supreme Court, in our view, was that there would be chaos in the country if the incumbent President John Mahama was declared as not having been validly elected. Thus, maintaining the *status quo* and, with it, the safety of the people, was the overriding public policy concern that must have weighed on the minds of a majority of the Supreme Court.

66 This belief has been further buttressed in Africa by recent events in Kenya where, even though the Supreme Court there nullified the 2017 presidential results for irregularities, eventually nothing really came out of it.

67 [2016] GHASC 43.

requiring him so to do? The blatant inconsistency of the judiciary in upholding the rule of law in this period can be ascertained when contrasted with the period of judicial resurgence, for example, where the courts were quick to check the powers of the executive.

4 Proposals for constitutional restructuring

Several measures must be undertaken in order to ensure that the democratic governance system in the country is not further undermined in future. In our opinion, three major changes to the constitutional structure are imperative in safeguarding and strengthening the rule of law in Ghana. In order of importance, these are (i) removing the indemnity clauses from the Constitution and/or drafting a new Constitution altogether; (ii) ensuring actual judicial independence and integrity; and (iii) curbing the unbridled power of the executive.

It has been about 17 years since the National Reconciliation Commission recommended the submission of the indemnity clauses to a referendum. Yet, nothing has been done in this regard. It also seems unlikely that it will be politically expedient to go ahead with such a radical recommendation. Therefore, we are of the opinion that Ghana needs a new Constitution altogether – one that is coherent and free from official endorsement of impunity. In terms of ensuring actual judicial independence and integrity, the proposed new Constitution should make provision for (i) putting a cap on the number of justices on the Supreme Court to nine; and (ii) providing life tenure for the nine justices. It is our belief that by reducing the number of Supreme Court justices, the dignity and efficiency of the judiciary will be safeguarded and guaranteed for generations to come. The situation where there is no cap on the maximum number of justices on the Court has the tendency of diluting the judicial philosophical approach of the Court in the most important cases of public concern. Nine, we believe, is a reasonable number that has worked in advanced jurisdictions such as the United States, and that can also work in Ghana.

The highest court of the land must also be one inspiring confidence, is stable, consistent and predictable in terms of its composition and membership. Thus, ensuring life tenure for judges similar to the position in the United States, to a large extent, will ensure judicial independence and integrity. By being insulated from political and other pressures, the judges can go about the business of administering justice in a fair and impartial manner, as it is supposed to be. The present mandatory retirement age of 70 years for Supreme Court judges is inimical to judicial progress and an affront to judicial independence and integrity, as the law becomes less predictable with a constant influx of new judges.

Finally, we believe that the wide-ranging powers of the executive must be effectively curbed and curtailed under the proposed new

Constitution. Even though Parliament is supposed to serve as a check on the powers of the executive, the practice under the 1992 Constitution has been to allow the executive to do virtually anything it wants. This is partly due to the hybrid system where the executive draws the majority of the cabinet from the legislature. Such a state of affairs does not augur well for the democracy of the country, in the sense that an over-concentration of power in the hands of an 'uncontrollable' executive may lead to a democratic dictatorship, which has the tendency of reversing the gains made in our democratic governance experiment. Thus, the proposed new Constitution may have to consider the elimination of the hybrid system and, as a by-product, may effectively curtail the power of the executive and ensure that it acts responsibly at all times, and is accountable to the people through their representatives in Parliament.

5 Conclusion

In conclusion, Ghana has had a chequered history in its quest for democratic governance and the rule of law. As has been demonstrated, the early days of independence showed how the judiciary failed to defend and protect the citizenry when the executive systematically detained and oppressed the population. However, the subsequent years witnessed a few cases where the courts stood up to executive and legislative overreach. Nevertheless, it has to be stressed that the abuses far outweighed the few cases of success and, therefore, much more still needs to be done to ensure that the gains in the area of democratic governance are safeguarded and consolidated. One major stumbling block involves the indemnity clauses in the 1992 Constitution, which legitimise abuses. These provisions must either be removed or, in the alternative, a new Constitution for Ghana needs to be adopted. There are some significant gains that can be derived from the adoption of a new Constitution. For instance, actual judicial independence and integrity can be attained through the provision in the proposed new Constitution for a cap on the number of justices of the Supreme Court and the guarantee of life tenure. Similarly, the powers of the executive can be effectively be curbed by the proposed new Constitution. Furthermore, the hybrid system where the legislature is virtually an appendage to the executive will be addressed. It is our belief that these and other measures will help safeguard and guarantee the success of a democratic governance system and the entrenchment of the rule of law in Ghana for generations to come.