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The Judiciary in Ghana

By WILLIAM B. HARVEY

In November of 1963, a special court sitting in Ghana, comprising the Chief Justice and two other members of the Supreme Court, concluded a treason trial which had been going on for about three months. The principal defendants were three prominent former officials of the government and the Convention People's Party, two ministers and the former Party Secretary; the two lesser defendants were, or had been, associated with the opposition. All had been ably represented by counsel during the course of a long and rather tedious trial.

On December 9, 1963, the court handed down its judgment: the two lesser defendants were convicted, but the three principal defendants were acquitted. The reaction was almost immediate. Judgment came down on December 9th. On December 11th, the President dismissed the Chief Justice from that office, and a few days later Mr. Justice Van Lare, another of the justices who had heard the case, resigned from the judicial service. The Chief Justice, after being dismissed from that particular office, remained a member of the court, but shortly thereafter he, too, resigned.

Following the enactment of legislation authorizing it, the acquittals of the three principal defendants and the convictions of the two lesser defendants were annulled. Subsequently they were tried by another court under a new procedure and sentenced to death. These sentences, however, have not been carried out up to this time, I believe.

The concern of the remarks I would like to make tonight is not specifically with the trial itself, the evidence adduced, or the

Editor's Note: This paper results from the edited remarks of Professor William B. Harvey of the University of Michigan and Professor Conor Cruise O'Brien of New York University at a joint dinner meeting of the Foreign Law Committee of The Association of the Bar and the African Law Committee of the American Bar Association, held on December 6, 1965. Professor Harvey is a former Dean of the Law School of the University of Ghana, and Professor O'Brien a former Vice Chancellor of that University.

guilt or innocence of these particular accused. Rather, it is with the status and function of the judiciary in Ghana, in the revolutionary climate that prevails there. Some light may be thrown on this by the general background and the immediate aftermath of the treason trial.

Briefly, by way of capitulation of what I suspect is familiar to all of you, the cardinal feature of the legal order in the Gold Coast, or as it is now, Ghana, and in most parts of former British Africa was and is a dual system of courts: a system of native courts, as they were once called, administering a body of customary law to the great mass of the population, and on the other side a system of superior courts administering a body of received law, and now, of course, an increasing body of national legislation.

During the early stages of British rule, the native courts had a somewhat ambiguous status. Until reforms that took place under colonial ordinances in the 1930's and 1940's, the prevailing theory was that the Colonial Government merely recognized and acquiesced in the continuance of certain courts within the indigenous societies, and the members of those courts served by reason of their status in the traditional regimes. Under the reform legislation, however, the theory changed; native courts were created by official act and brought within the framework of colonial government. Unquestionably the colonial government tried to effect certain improvements in the operation of these courts, but a certain number of features, and if you will, a certain number of inadequacies, remained. Moreover, additional ones were introduced.

The first was that members of the courts were appointed by the Governor or Governor-in-Council without any stated criteria of qualification; they had, understandably, absolutely no protection of tenure, and were fully subject to administrative discipline, suspension or even dismissal from their posts.

The second feature that I think is worthy of notice is that proceedings in the native courts were subject to review and modification by administrative officers of the colonial government, and finally, I think it remained true throughout their existence that

the native courts were replete with corruption, dilatory procedures, political bias, and general incompetence.

I am not reporting to you my own view. I am reporting the views of commissions that studied the operation of the courts, the last of these being a commission headed by Sir Arku Korsah, who later became Chief Justice. His commission reported in 1951 a set of conclusions that showed the ineffectiveness of the colonial reforms. In 1958, legislation was passed substituting a regime of local courts for the native courts. These are under the supervision of the higher judiciary, but I think the evidence demonstrates that the operation of the local courts has remained quite unsatisfactory, and that to a very considerable extent they lack the respect or the confidence of the people.

Now, alongside the native courts existed the superior courts. At the moment I am not concerned with their formal hierarchy. I would like, however, to point out certain developments which are relevant to the status and function of judges as they were revealed, I think, at the time of the treason trial. During the colonial period itself, the Supreme Court judges were appointed by Royal letters patent, and served at the pleasure of the monarch. All other judicial officers of the Gold Coast were appointed by the Governor and, as best I have been able to determine by careful examination of the law of the Gold Coast, there was no legally articulated protection of their tenure or of their independence during this period.

As independence approached, however, the concern of the colonial power for judicial independence became considerably more pronounced, and in the constitution of 1954, the so-called Nkrumah Constitution, a provision was included that judges of the Supreme Court could be removed from offices only on resolution of the Assembly, passed by a two-thirds majority of all members on stated grounds of misbehavior or infirmity of mind or body. In addition, there was a separate provision which protected them from diminution of salary during their term of office.

It bears emphasis, however, that below the level of the Supreme Court, none of these protections were available. It also bears emphasis that in the lower order of the judiciary, the courts re-

mained very closely identified with the administration, because of the fact that District Commissioners exercised judicial powers as magistrates.

The grant of independence to Ghana in 1957 affected the judicial order very little. The dual court system remained, and protection of the tenure and independence of judges was not extended beyond the Supreme Court level, where it had previously existed.

There were some important changes in the general legal order of Ghana in 1960, when the country became a Republic. The right of ultimate appeal from the Supreme Court of Ghana to the Privy Council was terminated. For the first time all judicial power was inside Ghana.

Under the Republican constitution, all appointive power over Superior Court Judges was vested in the President. The constitution did not state any qualifications for judicial office and did not require confirmation of the President's appointments by any other body. The Judges of the Superior Courts, that is, the Supreme Court and the High Court, continued to enjoy constitutional protections of tenure and salary of the same kind as I mentioned earlier. However, the Chief Justice was specifically made removable from that office by the President. The official explanation in the White Paper that had presented the constitution to the people for this unfortunate provision was that as the administrative head of the judicial system, the Chief Justice ought to give loyal cooperation to the President.

While the constitutional guarantees did not extend below the level of the Supreme Court and High Court, the Judicial Service Act, which was enacted at the same time, did include some rather important guarantees of a fair hearing of judicial officers at a lower level in cases where they might be brought up for discipline. But even those protections did not extend to local judges who remained fully subject in terms of appointment, discipline, dismissal, etc., to the actions of the relevant minister. This, then, was the general position of the judiciary at the time of the judgment in the treason trial which I mentioned earlier.

One other development, a special innovation in the court sys-

tem, does bear mentioning. In 1961, in a period of political tension following a politically motivated strike, Parliament passed legislation authorizing the creation of special criminal courts to be manned by three Judges. These were authorized to proceed summarily in the trial of a specified range of criminal offenses. They were to operate without a jury or assessors under a restricted application of the Code of Criminal Procedure, and the accused had no right of appeal from their judgment. The President's prerogative of mercy was, of course, available in cases of conviction.

It was such a court as this, a special court sitting as a Special Criminal Division of the High Court of Ghana, composed of the Chief Justice and Justices William Van Lare, and Edward Akufo-Addo, who tried the defendants for treason and acquitted the principal accused.

As I have suggested, the reaction of the President and others to the judgment was immediate and vigorous, to say the least. The President removed the Chief Justice from office; the Attorney General summoned a press conference and described the judgment as a "travesty of justice." The Evening News, a party organ, commented as follows:

"The courts, ideally an instrument of Socialist education and discipline not of class insolence and subversion, ye have made a den of thieves, robbers, assassins and corruption.

"And the voices of the people say away with them. No more shall we entrust such vital machinery in the hands of the class enemy."

I might simply state, parenthetically, that there were those with imagination or acumen sufficient to see a relation between the acquittals and the kind of legal education that was going on in the University of Ghana. And they may be right in a certain sense, as I will point out in a few moments when I came to the basis of the acquittals.

The reaction of the Government and of officialdom was not restricted to vituperation, however. The President moved, without delay, for summary power of dismissal over Superior Court

judges. Since those provisions protecting the judges' independence and tenure in office were entrenched in the Republican constitution, both a favorable plebiscite and parliamentary approval were required, if the President was to achieve his objective.

The plebiscite was held, and by an overwhelming vote the proposed amendment was approved. It was simply inserted in the constitution, following the protections of tenure and independence which I mentioned earlier, and provided "that the President may at any time for reasons which to him appear sufficient remove from office a Judge of the Supreme Court or a Judge of the High Court."

On the 2nd of March, 1964, in the exercise of this power, the President actually did dismiss from the Supreme Court Mr. Justice Akufo-Addo who was the last surviving member of the Special Court panel that had tried the treason defendants, and two other justices of the Supreme Court, who had not even been involved in the trial. Somewhat later he dismissed, without any explanation and without any statement of cause (which was not in any event required by law) Mr. Justice Henry Prempeh of the High Court in Kumasi.

It would be easy at this point to work toward the conclusion of these remarks with some facile clichés about unpreparedness for political independence, the evils of black authoritarianism, and what have you. I would hope to avoid any conclusions of that kind, although as substitutes I can offer no guaranteed insights into either the past or the future of judges, or the value of judicial independence, in Ghana or anywhere else. I can only hope, in a few concluding remarks, that I may be able to put this problem in a somewhat clearer perspective.

There are several points I would like to make in this connection. The first of these is that the experience of the judges in Ghana does not in my judgment reveal a peculiarly Ghanaian or even a peculiarly African problem.

Experience in this country, highlighted in the 1930's with a court-packing plan rather crudely designed to solve the problem created by the Supreme Court's voiding of social welfare legis-

lation enacted by a democratically elected Congress, and again today when the Supreme Court is under severe attack from the racists and the exponents of more vigorous enforcement of the criminal law, provides an occasion, I think, for raising the question, what do *we in this country* mean by an independent judiciary? And, what sort of price are we willing to pay for it?

What *do* we mean by an independent judiciary? From what is it that we want our judges to be independent? What is it we want them to be independent to do? A part of the answer would surely be clear to all of us. We want our judges to be independent of political pressure or calculation of personal gain or loss, so that they may apply clearly formulated general rules to specific cases without regard to factors other than those determined by the rules themselves to be relevant. But in a group of this kind, it needs no argument to establish that this function does not exhaust the judicial office.

What about the cases that are outside the clear core of the rule, where the judges must resolve penumbral uncertainties by creative choice? In such cases, of what is the judge to be independent? Is he to be independent of his own political philosophy, his own moral commitments, of the value structure of the society that he cannot establish empirically, but which he may in some way sense? Is he to be independent of the dominant political leadership of the state, when he makes these creative choices within the area around the clear core?

Now these are important questions, and they are hard questions which the usual cliché of judicial independence doesn't really answer for us. As we search for answers, however, the long history of our own institutions, which we sum up rather grossly in the doctrine of separation of powers, aids us. But to what extent does Ghana share a similar institutional history?

In this connection, time permits only a few rather summary suggestions.

The first of these is that in the traditional societies of Ghana, there was nothing that I can detect that might be regarded as an embryonic doctrine of separation of powers. The chief and his

councillors exercised executive powers. They also sat as a court, and insofar as there was law creation by human fiat, as against the slow accretion of custom, it was again the chief and his councillors who exercised the legislative powers.

This is the traditional background. Against it, it seems to me quite clear that British tutelage in the Gold Coast during most of the colonial period hardly fostered a doctrine of separation of powers or nurtured the value of an independent judiciary.

When native courts came to be established, their members (and note that they were "members" and not judges) were fully subject to discipline, suspension or dismissal by executive officers. As I said earlier, the lowest level of the colonial court structure, with which most of the people of the country probably were more familiar than they were with the Supreme Court, comprised the District Commissioners, who ordinarily were not legally educated and who combined executive and judicial functions in the exercise of which they did not enjoy the protections of independence with which our tradition cloaks our judges. Only in 1954, as I have said, were these protections extended to the judges by express enactment, and this only for judges at the level of the Supreme Court.

Finally I would mention one further factor, though with considerable hesitation and only because it seems to me necessarily relevant if one is determining the desirability of guaranteeing independence to the judges of Ghana. My own studies in Ghana produced evidence that rather strongly suggests that the ordinary Ghanaian views lawyers as a devil's mixture of greed, mendacity, general untrustworthiness, and arrogance. In the data that I gathered, the judge is a special sub-type of the general class, lawyers, and fares somewhat better. As a matter of fact, he fares considerably better. Yet, approximately one third of the people whose views I examined indicated a common belief that the judges were under the control of the executive, were biased in any case having political overtones, and could be influenced privately, as they said, by "money or drink." This doesn't mean getting them drunk. This means presents and that kind of thing.

Fortunately, however, popular regard for the judges improved as you went toward the top of the judicial hierarchy. Nevertheless, with this general image of the profession in Ghana, it perhaps is not surprising that guaranteeing the independence of professionals so perceived would not be a dominant social value.

Today in Ghana, as in all of Africa, the society is in the throes of a revolution. Its dominant political élite is using law and all other instrumentalities of the state to further rapid social change. That élite, whatever its ideological bent, is going to be concerned about the status and function of the judiciary and is going to try to shape it so as to make it functional to the revolution. If, as tends to be the case in Ghana, the political leadership regards the judges as unduly dominated by a foreign culture, as dangerously conservative and thus unsympathetic to the aspirations of the revolution, it is not surprising that systematic attacks are made on a judicial prerogative to decide cases without reference to the viewpoint of the political leadership. I make this point simply as a matter of fact and not to present a justification.

Even we would condemn, I am sure, a judge who, behind firm guarantees of independence, used his own ideological persuasions as the operative basis for his judicial actions, and refused to find the facts in accordance with the evidence, or refused to apply a clear rule of law. In the Ghana treason trial I strongly suspect, without knowing, that President Nkrumah believed that the Supreme Court had committed such indefensible judicial acts. I believe, however, that he was wrong. In my judgment the Special Court did not acquit because of an anti-state or anti-Nkrumah bias, or even because there was reasonable doubt on the evidence adduced as to the guilt of the accused. Rather, it acquitted, probably reluctantly, because the government simply did not make a case that would have enabled a court operating within the range of judicial decencies to convict these particular defendants. The education we were providing in the Law Faculty of the University of Ghana would doubtless have indicated apprehension of such judicial conduct.

In conclusion, then, I would say that the judgment in the trea-

son trial offered no possible justification for the President's humiliation of the judges of Ghana or for the constitutional steps that were taken to subordinate the higher judiciary to the President's whim.

But putting aside the case where the judge may have violated the clearest duties of his judicial office, what should we say about the risk that the highest courts, behind their protections of tenure and independence, may exercise their creative choices within the penumbral area so as to shape the governing norms in conflict with the developing sense of the community and contrary to the views of the dominant political leadership—which may be democratically elected? Should a society—I think this is a question one ought to force himself to address—should a society tolerate and even institutionalize protections for a judicial oligarchy that is usually in no sense democratically responsible?

This is a tough question. It is an important question, and I would simply suggest to you that my answer is yes, and a resounding yes.

Certainly if our concern is with the judge who violates the clearest duties of his office, virtually every system provides some mechanism for removing that kind of judge from office on the basis of objectively stated grounds of misbehavior or, possibly in some cases, infirmity. Where the problem is one of judges performing their function of law creation contrary to community need or democratically formulated desire, the expedient of legislative correction or even constitutional modification is also available.

Admittedly these processes are slow and cumbersome and it is not surprising that the impatient leadership of revolutionary Africa should chafe under the necessity for invoking them. Yet it seems clear, to me at least, that human history up to this point has rather fully demonstrated that if you concentrate too much political power in a single organ of government, as by granting judicial powers to the executive or the legislative body, or making the judiciary subject to the whims of the executive, then you have placed in mortal danger men's hope for political liberty and

other deep-seated claims of the human personality—whether that be the human personality in Africa or in the United States. It is from this perspective, it seems to me, that we may, with sensitivity and patience, add our voices to the call for judicial integrity and judicial independence in Ghana or in the United States, or anywhere else in the world.

By CONOR CRUISE O'BRIEN

I am in a unique position, and, I might add an unenviable one. I am the only layman, I believe, in this gathering.

I am, therefore, in the position of a man on trial before a jury of lawyers, and I can think of no more terrible fate. Can you?

Furthermore, I have to comment to a gathering of lawyers on a statement just made by a very distinguished professor of the law about the law. I can think of few stickier positions than that.

However, the thing is considerably mitigated by the fact that I have known and respected Professor Harvey for a number of years. I therefore have great pleasure in offering some lay comments on what he said.

What he said about the treason trial and the removing of the judges and subsequent events is, of course, perfectly true and well founded. I would like to make one point in this connection, more as an endorsement and development of the point he made than in criticism of it, and that is that when something like this occurs in West Africa or anywhere else, the reactions—not the public reactions in the press, which is controlled, but the popular, informed popular reactions—are the same as they would be anywhere else.

A friend of mine who was a chief and a very well known man in Ghana was traveling at that time. He was a supporter of the President. Following the dismissal of the judges he called upon another chief and his elders and they said to him, "We cannot see why this thing was done. It seems to us that these people—the judges—gave a just judgment. Why should they be removed for giving a just judgment?"

So that basic question is applicable there as well as here.

Professor Harvey has pointed out, and with illustrations which were new to me, the extent to which the removability of judges prevailed under the colonial system, and I think this is a very important point. It can be broadened into the general question of what exactly did a country like Ghana inherit from the era of British domination?

I suppose they inherited many things, but concerning the state and also concerning the judiciary, they inherited not a British or European system as known in Britain or in Europe. Rather they inherited a colonial system which had been run by the kind of people who were not generally greatly impregnated with liberal principles.

The colonial administrators were rather impatient of fads like judges being irremovable, or whatever it might be. They were expressions of what you might call the Tudor tradition, and the national movements took over what was, to a considerable extent, the Tudor state.

And the forms and ideas of that state—for example, the idea that the monarchy has his head on the coins—have been taken over in full. But where the head was formerly that of the British monarchy, now it is Nkrumah, as head of the republican state. He regards that as quite normal.

In a sense it is quite normal. Similarly you find Anglican services celebrated in Accra following Elizabethan formula; they wish the President success over his enemies, spiritual (which I don't mind, maybe) and temporal. The latter includes Dean Harvey, I suppose. For the Englishman, of course, this was an ancient respected, liturgical formula. But for Nkrumah it was in deadly earnest. Success or victory over my enemies, spiritual and temporal.

In this situation, where the new state took over the powers of a centralized paternalist, archaic system, really relating back to the Tudor system, it was in the short term, I would suggest, vain to say, "well, now, just before independence, just the year before independence, we are going to introduce a lot of nice things like

the independence and irremovability of the judiciary, and so on. Everything that we have had in Britain all these years, you are going to have it, too, and God Bless You."

To many of the political people taking over this instrument of state that seemed sheer hypocrisy. They felt, "Listen! We are going to have all the powers that you have had. Thank you very much. We are going to inherit the whole system, these beautiful levers of power, real power, including removing judges, and maybe extend them a bit." And they did.

Then we meet the point which we met together in Ghana for a couple of years, where you experience how this works, when you experience the power of the arbitrary state, essentially of the colonial Tudor state, taken over by plebiscite and universal. Now the suffrage is a little theoretical, since there will not be plebiscites for some little time—well, you feel the hot breath of that on your neck. You do not make the allowances for it that you make from abroad.

This happens and I think it is bound to happen. What we must, I think, hope for, and believe in, is that—in part because of that reaction which I mentioned of the chief and elders the basic suspicion and resentment of the arbitrary, and also in part because of the teaching of people like Professor Harvey and his colleagues, who can demonstrate that a legal system not dominated by whim can be a better mechanism for achieving social goals, a spontaneous, powerful critique of arbitrary action will emerge and ultimately effect its rejection. This is a very different thing from the handing over of papers saying, "you now have all the rights of the white settlement and you carry on and show yourselves to be worthy of us."

If I may go from West Africa to Ireland for a moment, there was a famous scene in the House of Commons in the last century in England, where the Irish, not for the first time, were pressing for Home Rule, which I am sure at that time they would have administered in a very arbitrary fashion. The opponents of Home Rule pointed out that the Irish, as well as being backward and all those things, as indeed we are, were also motivated by peculiar

hatreds, rancors and unpleasant emotions of one kind or another. Isaac Butt, the leader of the Irish party in the House of Commons at that time, admitted that this was indeed the case, but he quoted MacBeth to make the point that only independence and the actual practice and experience of independence could change this: "Who can minister to a mind diseased, plucked from the memory of rooted sorrow?" Then, after a dramatic Victorian pause, he said, "The doctors reply therein, 'The patient must minister to herself!'"

And I think that is it. It is not a question of handing over nice papers about rights of judges and others, that must be respected. It is a question of what is found in experience to work.

I do not know how many years will elapse before a new system begins to emerge which represents a rejection of both the arbitrary post-independence system and of what came before that. From my own experience in Ghana, I would suggest that it may be a more rapid process there than in many other countries, because I think that process is already moving, and I think Professor Harvey has helped it to move.