PUBLIC LECTURE CAPTIONED: "BOLSTERING OTHER ARMS OF STATE AS COUNTERPART TO EXECUTIVE POWER "BY JUSTICE DENNIS DOMINIC ADJEI, FGA AT THE GHANA ACADEMY OF ARTS AND SCIENCES ON THURSDAY 25TH NOVEMBER, 2021

The doctrine of separation of powers is a fluid principle in that its meaning is not of universal acceptance. The proponents of the theory of separation of powers hold different opinions and there is no one accepted definition for it. Separation of powers is understood within the context in which a country's National constitution has been couched. It is the people of a country who decide the type of separation of powers they would like to exercise.

INTRODUCTION TO THE THEORY OF SEPARATION OF POWERS

Aristotle who lived between 384 BC to 322 BC is said to be the first proponent of separation of powers and he accepted that government is made up of lawgivers, magistracies and the judiciary. According to Aristotle, the most important and powerful of the three arms was the legislature which has the power to change the existing laws to better the lives, hopes and aspirations of the people. The executive power which he described as magistracy was subordinate to the legislative arm as the former exercised powers given to it by the latter, and the executive exercised powers delegated to it to exercise by the lawgivers as managers of the State. In effect, the magistracy and the judiciary were accountable to the lawgivers who delegated their managerial and judicial functions to the magistracy and the judiciary to exercise on its behalf[1].

Charles- Louis de Secondat alias Baron de La Brede et de Montesquieu who lived between 1689 and 1755 proposed a strict separation of powers among the three arms of government. Montesquieu was of the considered opinion that the executive arm of government shall exclusively perform its managerial role assigned to it without any interference from the other arms. Furthermore, the legislature shall exclusively perform its law-making function. The judiciary is also to exclusively perform its judicial functions without interference from any of the other arms. Montesquieu did not state that the three powers of government were to be placed in the hands of different bodies, but rather that no two powers shall be placed in the hands of one arm of government.

THEOCRACY AND SEPARATION OF POWERS

The executive, legislative and judicial arms of Government were vested in God when Israel was a theocratic state. Isaiah 33 verse 22 provides thus:

" For the Lord our judge, the Lord our lawgiver, the Lord our king-he himself will save us[2]."

The three arms of Government were fused together and exercised by one person and the issue of ensuring that the legislative and judicial arms compliment the executive arm did not arise.

SEPARATION OF POWERS IN CHIEFTAINCY INSTITUTIONS IN GOLD COAST

[1] Miller, F. Aristotle Political Theory, (2002), Stanford Encyclopedia of Philosophy, pp 259-260; Stewart, Iain. Men of Class: Aristotle, Montesquieu and Dicey on Separation of Powers; & Adjei, D.D., Constitutional Law of Ghana, Evolution, Theory and Practice, Buck Press Ltd, 2020, pp 169-171.

[2] Isaiah 33 verse 22, The New English Bible with the Apocrypha.

The system where the three arms of Government were vested in and exercised by one person continued to exist among the States in the Gold Coast until the introduction of the protectorate system of government and colonization by the Europeans.
The chiefs who were monarchs in present day Ghana included the Ashanti, Denkyira, Akim, Assin, Akwapim, Anlo, Ga, Dagomba, Gonja, Mamprusi, the separate Fante States, Shai, Osudoku and Ada. They were independent States and the Chiefs were the rulers, lawgivers and judges. Professor AKP Kludze in his book: *Chieftaincy in Ghana* described the executive, legislative and judicial powers jointly exercised by the chiefs thus:

> "*In his territorial domain, a chief is at the same time the supreme legislator, the repository of the executive powers of the polity, the fount of justice, the supreme judge, the fount of honor, and commander -in - chief of the armed forces*[3]".

In the case of *Asare v Attorney-General*, the Supreme Court stated unambiguously that there was no room for separation of powers in the Ghanaian traditions of chieftaincy by the fact that chiefs exercised all the powers which are presently exercised in democratic regimes independently by the executive, legislature and the judiciary[4].

The Chiefs in the Southern Ghana in 1844 lost their judicial power in serious criminal matters to the British after the execution of the Bond of 1844 and finally lost their executive, legislative and judicial powers in 1874 when they were colonized by the British. The chiefs of Anlo State equally lost their executive, legislative and judicial powers to the British in 1874 after colonization. On 1st January, 1902, the British finally declared the entire Ashanti Territories and the Northern Territories as Protectorates and the chiefs completely lost their executive, legislative and judicial powers to the British[5].

SEPARATION OF POWERS UNDER THE PREVIOUS REGIMES

Under the 1957 Constitution, the Governor-General exercised both executive and legislative powers on behalf of the Queen. The Prime Minister also exercised both executive and legislative powers. The Governor-General assented to Acts of Parliament made by the Constituent Assembly and in his absence that executive power was exercised by the Chief Justice. It is trite that in the early years of independence, the Chief Justice assented to some Acts of Parliament in the absence of the Governor-General and among the Acts he assented to, was the notorious Preventive Detention Act, 1958 (No 17 of 1958)[6].

[3] AKP Kludze, Chieftaincy in Ghana, Austin & Winfred, 2000, page 224.
[4] Asare v Attorney- General [2003-2004] 2 SCGLR 823.
[5] Ward, W.E. (1935) Short History of the Gold Coast.
[6] Asare v Attorney-General, supra.

A justice of the Supreme could be impeached by the Governor-General after he had addressed the Assembly on the question of impeachment and had secured not less than two thirds of the votes cast by the members for that purpose[7].

The 1960 Constitution gave the President Dr Kwame Nkrumah special powers to make a legislative instrument to alter any enactment in force with the exception of constitutional provisions, provided he considered it to be in the national interest so to do[8]. There was no yard stick used to measure a decision by the President which was deemed to be in the national interest and could be used to alter an enactment validly made by Parliament. The special powers given to the first President under the 1960 Constitution could be challenged in the Supreme Court where it was exercised in violation of the Constitution or where it was exercised ultra vires the powers conferred on Parliament[9]. The President had the power to, at any time by a proclamation, summon or prologue the National Assembly[10].

The President further had powers to dissolve the National Assembly after it had served for five years[11]. The President could refuse to sign a bill made by Parliament or part of the bill and there was no procedure to compel him to sign[12]. The President could also remove a Chief Justice from office, and he used that power vested in him to remove Sir Arku Korsah from office as the Chief Justice barely three days after he had rendered the decision in *State v Otchere and Others [1963] GLR 463*, the case on subversion in which some of the accused persons were acquitted and discharged to the dissatisfaction of the President[13]. The President had powers to remove a superior court judge from office for any cause which appeared to him to be sufficient. Ghana was further made a one-party state[14].

The powers of the judiciary and the legislature were drastically reduced and could not compete with the executive due to the enormous power vested in the President to remove judges and also detain persons including parliamentarians whose acts were perceived to be inimical to the security of the State under the Preventive Detention Act, 1958.
In all the military regimes; National Liberation Council, National Redemption Council, Supreme Military Council, Armed Forces Revolutionary Council, and the Provisional National Defence Council, both executive and legislative powers were vested in the respective Councils while the judiciary was kept separate[15].

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[7] Section 54 of the Ghana (Constitution) Order in Council, 1957.
[8] Article 55 of the Constitution of Ghana, 1960.
[9] Article 55 (2-6) of the 1960 Constitution of Ghana.
[10] Article 22(2) of the 1960 Constitution.
[11] Article 23 (1) & (2) of the Constitution,1960.
[12] Article 24 of the Constitution of Ghana, 1960.
[13] Article 44 (3) of the Constitution, 1960.
[14] 1964 Referendum which gave birth to Constitution (Amendment) Act 1964.
[15] Sections 2 and 3 of the National Liberation Council (Proclamation) (Amendment) Decree, 1966 (N.L.C.D. 1); Sections 3 and 24 of the National Redemption Council (Establishment) Proclamation, 1972; The Supreme Military Council (Establishment) Proclamation (Amendment) Decree, 1978 ((S.M.C.D. 168); Section 3 of the Armed Forces Revolutionary Council (Establishment) Proclamation, 1979; and Section 4 of the Provisional National Defence Council (Establishment) Proclamation, 1981 (P.N.D.C.L. 42) and Adjei, D.D. Constitutional Law of Ghana, Evolution, Theory and Practice, supra.

The 1969 Constitution made all Ministers appointed from among the members of the National Assembly, and a person who was not a member of Parliament could not become a Minister of State. Ministers of State were appointed by the President acting on the advice of the Prime Minister. The Prime Minister was the head of government business and a member of cabinet. The executive authority was vested in the President and the Prime Minister and the Ministers of State who were members of Parliament were at the same time members of the executive. The 1969 Constitution was tailored to reduce the executive dominance of the other arms of government which existed under the 1960 Constitution. The Judiciary was independent, and the Supreme Court determined all constitutional infractions by the executive, legislature and any other person or authority. The removal of judges was to be made in accordance with law. The 1969 Constitution further created independent bodies to exercise powers which ordinarily should have been exercised by the Executive. The bodies were created to reduce Executive powers over those institutions which required independent minds to manage them.

The 1979 Constitution introduced a new governance system to ensure that the executive role is performed by persons who are not members of Parliament. The Cabinet consisted of the President, Vice-President and Ministers of State. The President was vested with unfettered power to appoint a host of public officers in consultation with or on the advice of the Council of State. A Parliamentarian who wanted to become a Minister of State was first to vacate his or her seat in Parliament. The executive function was exercised by the members of the executive branch while legislative function was exercised by the members of Parliament. There was a clear distinction between the executive and the legislature, and this was introduced to promote separation of powers and accountability. The Judiciary was independent and was to perform its traditional role of resolution of disputes and legalities. The Supreme Court was to ensure that constitutional breaches by the executive, legislature and any other person was determined in accordance with law. Judges were to be removed in accordance with law.

1992 CONSTITUTION AND SEPARATION OF POWERS

The 1992 Constitution created the three arms of government as existed under the previous constitutions, but excessive powers were given to the President as pertained under the 1979 Constitution, which is perceived to have marginalized the legislature and the judiciary. A host of appointments are made by the President under the Constitution.

The President appoints public office holders acting in accordance with the advice of the governing council in question in consultation with the Public Services Commission.[16].He can also dismiss them without the advice of the governing council in question. It would be ideal if that consultation would take place before the President can dismiss public office holders he has appointed in consultation with the Public Services Commission. If there would be any amendment to the constitution, it should consider placing fetters on the President's power to dismiss without consulting the body or bodies whose advice was sought before the appointment. Ministers of State are appointed by the President with the prior approval of Parliament. Majority of

[16] Article 195(1) of the Constitution, 1992.

Ministers shall be appointed from among the members of Parliament[17]. The President appoints Deputy Ministers in consultation with a Minister of State, with the prior approval of Parliament[18].

The President also appoints the Chairmen and members of the independent constitutional and other bodies, namely; the Commissioner for Human Rights and Administrative Justice and his Deputies, the Auditor-General, the District Assemblies Common Fund Administrator; the Chairman and other members of the Public Services Commission, the Lands Commission, the governing bodies of public corporations, a National Council for High Education, holders of such other offices as may be provided by the Constitution or any other law in consultation with the Council of State. He further appoints the Chairman, Deputy Chairmen and other members of the Electoral Commission acting on the advice of the Council of State[19]. The importance of the independent Constitutional bodies was to control the unrestrained powers of the Executive and to deepen the nations democracy. The objective for creating the independent constitutional bodies will be defeated where the President has unfettered powers to dismiss them without assigning any reason. The independent constitutional bodies whose chairperson and members may be dismissed by the President without any reason are susceptible to become rubberstamps and unable to perform the functions for which they were created.

The President is also responsible for the appointment of the Chief Justice acting in consultation with the Council of State and with the approval of Parliament. The Supreme Court Judges are also appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. The other Justices of the Superior Court and Chairmen of Regional Tribunals are appointed by President acting on the advice of the Judicial Council[20].

On the question as to whether or not the President in making an appointment to the Superior Court was bound by the advice of the Judicial Council, the Supreme Court held that the President cannot make such appointments without seeking the advice of the Judicial Council, but the advice offered by the Judicial Council shall not have a binding effect on the President. The President is not bound to appoint a person recommended by the Judicial Council for appointment as a Justice of the Superior Court[21].

The Supreme Court further held that the appointment made on the advice of the Judicial Council, and in consultation with the Council of State and approval by Parliament places fetters on the power of the President to appoint Supreme Court Judges. By parity of reason, the role played by the Judicial Council in the appointment

[17] Article 78 of the Constitution of Ghana, 1992.
[18] Article 79 of the Constitution of Ghana, 1992.
[19] Article 70 (1) and (2) of the Constitution.
[20] Article 144 (1), (2) and (3) of the Constitution of Ghana, 1992.

[21] Ghana Bar Association, Amegathcer, Amenuvor & Beecham Vs Attorney-General & Judicial Council; Sky Vs Attorney-General; Danso - Acheampong Vs Attorney- General (Consolidated) [2015-2016] 2 SCGLR 872.

of the other justices of the Superior Courts is meant to be a restraint on the appointing powers of the President[22].

The question that agitates the mind of people is how would the President know persons who are competent to be appointed as Justices of the Superior Court, particularly where the President was not a practicing lawyer? The answer that normally comes out is that political consideration is likely to inform the President's appointment and may influence the judge's decision except where the judge is fair and firm and able to uphold the Judicial Oath. I wish to emphatically state that judges should owe allegiance to the country and not those who appoint them to judicial office. Ghana's position is different from Kenya and Sierra Leone where the Judicial Service Commission rather recommends competent persons to the President for appointments and not Vice versa. Article 166 of the Constitution of Kenya, 2010 provides thus:

"(1) The President shall appoint-
(a) the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
(b) all other judges, in accordance with the recommendation of the Judicial Service Commission."

The position in Kenya and Sierra Leone clothes the Judicial Service Commission which is made up of Judges, lawyers and the representatives of other institutions including the President to look for persons who are competent to fill judicial office devoid of political allegiance to recommend them to the President for appointment and the President shall be required to assign a reason where he refuses to appoint a person recommended by the Judicial Service Commission.

THE POWER OF THE PRESIDENT OVER THE INDEPENDENT CONSTITUTIONAL BODIES

The President appoints the chairmen and members of the Independent Constitutional bodies, governing bodies of public corporations, a National Council for Higher Education and holders of such other offices provided by the Constitution or by any other law[23]. The President has an implied power to remove those persons from office without assigning any reason[24]. The question is how can such persons be independent taking into account the likelihood of losing their positions? I shall address this question from two angles. The first proposal is that there shall be a clear procedure to provide for the grounds upon which they may be removed from office as available for Justices of the Superior Court and the analogous institutions such as the Chairman and members of the Commission on Human Rights and Administrative Justice, Electoral Commission and the National Commission for Civic Education. The Chairmen and members of the above Commissions shall be removed from office on grounds of stated

[22] Kor Vs Attorney- General & Another [2015-2016] 1 SCGLR 114.

[23] Article 70 of the Constitution of Ghana, 1992.
[24] Article 297 of the Constitution of Ghana, 1992.

misbehaviour, incompetence or inability to perform their functions as a result of infirmity of body or mind[25].

Kenya has set the pace by placing fetters on the powers of the President to remove officers appointed by the President under the Constitution or any other law without a just cause, to ensure that the holders of the Independent Constitutional bodies perform their functions independently and are answerable to the Constitution of Kenya. To bolster Parliament to ensure that the members of the Independent Constitutional bodies work in accordance with the Constitution, a holder of an independent office shall not be removed from office without the involvement of the National Assembly. Article 251 of the Kenyan Constitution provides thus:

"1. A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for-
(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
(b) gross misconduct, whether in the performance of the member's office holder's functions or otherwise;
(c) physical or mental incapacity to perform the functions of office;
(d) incompetence; or
(e) bankruptcy.

2. A person desiring the removal of a member of a commission or a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

3. The National Assembly shall consider the petition and, if it is satisfied that it discloses ground under clause (1), shall send the petition to the President...."

The other independent bodies including the Chairman and members of the Lands Commission shall be protected to enable them to discharge their constitutional mandate without fear of losing their office.

THE ROLE OF THE COUNCIL OF STATE AND SECOND CHAMBER

The Council of State was established by the Constitution to counsel the President in either consultative or advisory capacity. The role of the Council of State puts a restraint on appointments made by the President in that the President is either required to consult them or seek their advice. The Council of State is made up of eminent personalities including a retired Chief Justice, a retired Chief of Defence Staff of the Armed Forces of Ghana, a retired Inspector-General of Police, the President of the

[25] Article 146 of the Constitution of Ghana, 1992.

National House of Chiefs and a representative elected from each region to represent the sixteen regions of Ghana, and eleven members appointed by the President.

Until the creation of the six new regions to increase the membership of the Council of State, the President appointed three persons who had previously served as Chief Justice, Chief of Defence Staff and Inspector-General of Police in consultation with Parliament, and further appointed eleven other members. The members appointed by the President were more than half of the membership of the Council of State and some experts raised questions about their neutrality and unalloyed support to the President who appointed them over other equally competent persons in matters of a sensitive nature. The perceived fear has been dissolved with the creation of six more regions which has increased the membership of the elected ones and the ex officio member over and above the appointed members.

It seems that the creation of the second chamber of Parliament is dominant in federal countries including the United States and Nigeria and not in unitary countries. The Council of State shall be maintained by the fact that it is made up of respectable persons who are capable of offering objective advice to the President irrespective of their modes of appointment. A member of the Council of State's appointment may be terminated by the President on stated grounds with prior approval of Parliament and therefore offers them security of tenure to effectively discharge their constitutional mandate without fear or intimidation[26].

Some reforms are required to make the Constitution more relevant to meet the needs of the people, including the situation where the winner takes all. This attitude may change but it can only be changed through attitudinal change of those at the helm of affairs to appreciate that the political opponent is not an enemy and Ghana is for all Ghanaians. Politicians on the other side must also be candid to accept an office when the incumbent may appoint them to serve on merits. Papa Kwesi Ndoum and Mallam Issah who were not members of the New Patriotic Party were appointed by President Kuffour as Ministers of States. Professor John Evans Atta Mills also appointed the late Mr. Akenten Appiah Menkah of the New Patriotic Party as a member of the Constitutional Review Commission.
The question to address is what do the followers of the persons who accept positions from another government say? The words which are used to describe them include betrayers, they have crossed carpet, they are not sincere to their party. Until the negative comments by the members of their respective parties are stopped, the winner takes all syndrome shall continue to prevail.

The Constitution forbids one party State, and leaders shall accept members in opposition and their followers and appoint them to public offices they qualify to serve[27]. Article 41 of the 1992 Constitution requires every citizen of Ghana to promote the good name of Ghana, to defend the constitution and all other laws, to promote national unity and harmonious relationship, and to respect the rights freedoms and legitimate interests of other people.

[26] Article 89 (6) of the Constitution of Ghana, 1992.
[27] article 3(1) of the Constitution of Ghana, 1992.

There are several calls for the amendment of the Constitution by experts in constitutional law, governance and the entire citizenry and the common denominator for the amendment is to reduce the powers of the executive and in particular the President. The important thing about the constitution such as ours is that it is *sui generis* which holds the hopes and aspirations of a particular country. Some countries adopt executive supremacy, others adopt legislative supremacy but Ghana in her wisdom adopted the hybrid system where some of the parliamentarians exercise some executive powers. Ghana has gone through several constitutional reviews where all the Ministers of State were members of Parliament under the 1960 Constitution. Under the 1969 Constitution, Ghana adopted the Westminster System with President, Prime-Minister and all Minsters of State who were members of Parliament.

In 1979, Ghana adopted the constitution which made the executive distinct from members of Parliament and had its own serious challenges. This system is practised in Nigeria and has its own short comings when it comes to the implementation of government policies and parliamentary decisions.

Ghana under the 1992 Constitution adopted the hybrid form of constitutional government and it should be made to work, subject to the amendments which shall be brought to bear to ensure that persons appointed under the Constitution to discharge constitutional mandates are given unfettered rights to exercise, subject to the Constitution.

The Constitution such as ours is a living organism capable of growth and the courts in discharging their constitutional duties shall interpret it purposively to meet the needs of the time. The Supreme Court as the watch dog of the Constitution should be able to stand against all the constitutional infractions brought against the executive, legislature and all other persons to maintain the supremacy of the Constitution.