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ON THE CONSTITUTIONALITY OF NKRUMAH'S SPECIAL COURT

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Introduction

On 21 November, 1961 the Ghana National Assembly amended the Criminal Procedure Code, 1960 in order to provide for a new procedure to be followed in certain criminal cases. The new law, The Criminal Procedure (Amendment) Act, 1961, set up a Special Criminal Division of the High Court, which came to be popularly known as the Special Court.

During the debate on the amending bill, virulent exchanges took place between its supporters and its opponents; first, over the need for the court and, secondly, about whether Parliament had the power to pass the bill at all. In this essay I review the reasons for setting up the court and assess the constitutional issue. It needs to be pointed out that the argument made here concerns the original act which set up the Special Court: Whatever constitutional issues might have cropped up on the occasions during which the court was invoked, or upon subsequent emendations of the original act, are not considered here.[1] I take it that the constitutional debate in Parliament precedent to the enactment of the act is of more than passing significance in the extent to which it related to a clarification of the relationship between the High Court and the Supreme Court.

The Court

Whenever the need for it arose, the Special Court would be constituted by the Chief Justice "in accordance with a request made to him by the President"[2] and would be made up of a presiding judge plus two other judges. It was to try offences taken from the country's Criminal Code and specified in the Act, as well as offences which would, from time to time, be "specified by the President by legislative instrument."[3] In general the offences were classified as: "offences against the state, such as treason and sedition; and offences against the peace, such as rioting, unlawful assembly and other serious breaches of the peace."[4]

Offenders were to be brought directly before the Special Court by the Attorney General, who also had power to transfer cases from other courts to it. There would be no trial by jury or assessors. Generally, the procedure to be followed by the court was to be "in accordance with that applicable to the summary trial of an offence by the High Court."[5] The court's decision would be by a majority of the three judges, and any dissenting opinion was not to be disclosed. The decision would be final and subject only to the President's prerogative of mercy.

Reasons for creating the Court

Some members of Parliament interpreted Clause 6(2) of the Bill, which sought to empower the President to specify offences by legislative instrument, as empowering him to create new criminal offences. On the other hand, the Minister of Justice, E.A. Ofori-Atta, explained that "offence" in that clause meant an offence under the existing Criminal Code. As Harvey points out, the Minister's explanation in Parliament could not be taken to "resolve the ambiguity on the face of the statute."[6] That aside, on the Minister's own explanation the new law would not create any new offences, meaning that all the offences triable by the court fell within the jurisdictional competence of the existing courts system. For this reason the opponents argued

that there was no need whatsoever for the proposed court. Instead, they recommended that to expedite trials the number of judges might be increased to ease their workload.

The supporters of the bill were impervious to any arguments or suggestions by their opponents. They sought to justify the setting up of the Special Court not only on the grounds of expediting trials but also of eliminating technicalities in the law. Ofori-Atta described the bill as essentially a procedural one, "a Bill brought forward to shorten trials."[7] Kwaku Boateng, Minister of Interior and Local Government, contended that it was time for the country to "cease to rely on ancient and archaic procedures." Accordingly, he said the bill sought "to design a procedure for the effective, speedy and expeditious trial of criminals."[8] On the subject of technicalities Tawia Adamafio, Minister of Information and Broadcasting, said:

> *We know that people in this country sometimes believe that because there are technicalities in the law they can do what they like and go free ... In the courts we do not get justice, we get law. It is justice that we want and that is what is going to be created.*[9]

The opponents of the bill did not believe that this was the real intent of its supporters. In opposing the Bill, K.A. Gbedema, who had then fallen out with the ruling Convention People's Party (CPP), recalled that back in 1958 the Prevention Detention Act (PDA) had been passed in good faith as a measure to safeguard freedom; but that it had been used as an instrument of terrorism by which many people had been sent to jail. He feared that the proposed Special Court might turn out to be a similar instrument by which "We may be pulled out of bed to face the firing squad after a summary trial and conviction."[10]

It would appear that the Special Court was being set up to try what may be described as 'offences against the President.' Twenty days before the enactment of the Criminal Procedure (Amendment) Act, 1961 the Assembly had duly amended the Criminal Code, 1960 by inserting Article 183A as follows:

> *Any person who with intent to bring the President into hatred or contempt publishes any defamatory or insulting matter whether by writing, print, word of mouth or in any other manner whatsoever concerning the President commits an offence and shall be liable on summary conviction to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.*[11]

During the debate on the amendment several members emphasized the need to protect the person and dignity of the President, Dr. Kwame Nkrumah, in view of his singular importance to the country. Kofi Baako, Minister of Defence and Leader of the House, explained that:

> *The Government is not the President but he is the rock on which the Government is built. The President is the Head of the Party, that is, the rock on which the government is built. He forms the Government and his spirit runs through the Government.*[12]

In the view of W.K. Aduhene, Deputy Ministry of Defence, "Kwame Nkrumah is associated with this State as Jesus Christ is with Christianity."[13] In similar vein, Kwaku Boateng also said as follows:

> *Osagyefo Dr. Kwame Nkrumah ... by his own lofty deeds and achievements has provided a real justification for this Amendment. There is positive evidence that everywhere in this country and elsewhere Osagyefo the President is acclaimed the hero, the founder and the fons et origo of the State of Ghana. Everywhere he is loved by his people and praised by them because of his magnificent devotion to the affairs of his country and also to the cause of African redemption and*

unity. Does it not stand to reason, therefore, that any act by any unscrupulous person to bring his honour and dignity into contempt and ridicule should be made an offence?[14]

There was yet another reason for setting up the Special Court. In the words of Harvey, its creation "was part of the aftermath of the political strikes originating in Sekondi-Takoradi and the readjustment of the leadership within the CPP, incident to the expulsion of Mr. Gbedema and Mr. Botsio."[15] More generally, by 1961 the government was heading toward a crisis of legitimacy. The country was facing serious economic problems, and the accompanying hardships gave rise to widespread discontent and a pronounced tendency toward strike action. A serious rift had opened within the leadership of the ruling party, which had resulted in the displacement of some of the former party leaders. And the opposition, muzzled and driven underground, was perceived to be hatching plots within and without the country to overthrow the government. In these circumstances, the Special Court was no doubt conceived as a handy weapon to deal speedily with any form of dissidence.

Indeed, evidence to that effect was easily forthcoming during the debate on the bill. Kofi Baako explained that the Special Court was intended to deal only with cases that were so special that "they (had) to be dealt with expeditiously by special procedure."[16] Similarly, Ofori-Atta emphasized that the court was not an ordinary one "but a court which (had) become necessary in the circumstances we find ourselves in today."[17] More explicitly, Kwaku Boateng said that recent events in the country had clearly demonstrated the need for the government to take prompt and vigorous action "against criminals, saboteurs and elements engaged in subversive activities tending to overthrow the lawfully constituted Government of the country."[18] And Tawia Adamafio summed it all up when he said that the Special Court was for "procuring the stability of the state."[19]

The Constitutional Issue

During the debate on the Criminal Procedure (Amendment) Bill, 1961 Abayifaa Karbo, member for Lawra Nandom, raised an objection to it on constitutional grounds. He argued that Article 42 of the 1960 Republican Constitution made the Supreme Court the only court of the land whose decision was not subject to appeal, and so it would be *ultra vires* for the Assembly to establish a court whose decision would not be subject to appeal to the Supreme Court. He also argued that while the Constitution made the decisions of the Supreme Court binding on the High Court and the lower courts, the Special Court would not be bound to follow judicial precedent. He concluded that, in effect, the bill amounted to amending the Constitution.[20]

Perhaps the conception of constitutionality implicit in Karbo's objection and upon which this paper is based needs to be made more explicit. It may be summarized as follows: The 1960 Constitution would prevail over a later Act if:

a) *the Act did not duly amend the Constitution but contained a provision which, expressly or by implication, conflicted with a provision of the Constitution.*
b) *the Constitution did not expressly contemplate that such a provision as is contained in the Act might be made.*[21]

In the course of the debate two supporters of the bill addressed the constitutional issue. Kofi Baako contended that Article 42 of the 1960 Constitution meant no more than that "when an appeal is allowed at the Supreme Court and it is disposed of there can be no further appeal."[22] Concerning the same article, Ofori-Atta argued as follows:

It is only when the law provides the Supreme Court with such a jurisdiction that it becomes the final court of Appeal in that instance. Therefore, if this law

definitely says that the Supreme Court shall not have jurisaction over the special court, then of course it is within the constitution.[23]

It should be clear that in the view of Ofori-Atta the Constitution contemplated changes in the country's courts system of the kind being made by the bill. He would appear to have based his interpretation on the fact that even though Article 42(1) said that "The Supreme Court shall be the final court of appeal," it also said that the appellate and other jurisdiction of that court would be "as may be provided for by law." A similar interpretation could also have been engendered by 42(3) which said that, subject to the original jurisdiction given to the Supreme Court to determine whether the legislature had exceeded its powers in making an enactment, "the High Court shall have such original and appellate jurisdiction as may be provided for by law." On the basis of the interpretation placed on such provisions, the view that it was within the power of the Assembly, as the supreme lawmaking body, to provide for the jurisdiction of the Special Court in the manner it sought to do may not be entirely surprising.

However, the issue of the constitutionality of the Special Court could not be rested solely on the provisions of Article 42 of the 1960 Constitution. In fact, of seminal importance to the issue were the provisions of Article 41 on superior and inferior courts, which read in full as follows:

41. (1) *There shall be a Supreme Court and a High Court, which shall be the superior courts of Ghana.*

(2) *Subject to the provisions of the Constitution, the judicial power of the State is conferred on the Supreme Court and the High Court, and on such inferior courts as may be provided for by law.*

(3) *The power to repeal or alter this Article is reserved to the people.*

It is important to note that, being entrenched, the provisions had been placed beyond the power of the legislature to alter them at will, by itself. Their alteration required the approval of the President, the people and the National Assembly. It is equally important to note that section (1) of the Article established only *one* Supreme Court and only *one* High Court as the superior courts of the land; and section (2) made it abundantly clear that only inferior courts might be created by the legislature. To my mind, the implication of these provisions was that, irrespective of the power of the legislature to spell out the appellate jurisdiction of the Supreme Court, and, indeed, the responsibilities of the superior courts established by the Constitution, without duly amending the Constitution the Assembly had no power to set up what amounted to a different High Court; that is to say, a High Court which differed in its relationship with the Supreme Court from the one established by the Constitution.

The architects of the Act appear to have been mindful of these provisions; hence the presentation of the Special Court not as another High Court, but as only a division of the existing and only legitimate High Court; and, correlatively, the presentation of the Act as an act to amend an earlier one. Thus what made the Special Court different from the ordinary High Court was achieved by making certain provisions of the Courts Act, 1960(C.A.9) and the Criminal Procedure Code, 1960 not applicable to the Special Court. But did this legal manoeuvre succeed in getting around the issue of the constitutionality of the Special Court?

In my view, in the form of the Special Court, what the Criminal Procedure (Amendment) Act, 1961 produced was the curious spectacle of a High Court bereft of its constitution-based relationship with the Supreme Court. As Amissah has pointed out, on Ghana becoming a Republic in 1960 a new Supreme Court come into being "separate and distinct from the High Court, hearing appeals from that court."[24]

This relationship derived in part from the entrenched provision of article 41 and in part from

Article 42(4) which said that the High Court was "bound to follow the previous decisions of the Supreme Court" on questions of law. This meant that when the Supreme Court had made a determination on a proposition of law, "that proposition (was) binding without modification in the High Court ..."[25] Where the need arose, this would obviously make the Supreme Court the final and logical authority to determine whether its decisions had been faithfully followed.

In this connection Amissah has written that:

> *A loophole not commonly noticed was left for bringing the legal aspect of the (Special) Court's work before the Supreme Court. Under the Courts Act 1960, and the Criminal Procedure Code 1960, the High Court could reserve any question of law for the consideration of the Supreme Court. This was in addition and without prejudice to the right of appeal. Although the Act setting up the Special Division excluded the right of appeal it said nothing about the power to reserve questions of law for the decision of the Supreme Court, which presumably remained untouched.*[26]

That may well have been so. But it is at least implied by Amissah's observation that it was not intended by the creators of the Special Court to reserve questions of law for the decision of the Supreme Court. In any case, to say that the High Court *could* reserve questions of law for the decision of the Supreme Court is not quite the same as saying that the High Court was *bound* to follow the decisions of the Supreme Court on questions of law. The difference here is between discretionary and binding authority.

The question could be raised here as to whether, with regard to judicial review, the ouster of the Supreme Court in the case of the decisions of the Special Court could not be dealt with by prerogative writs or orders.[27] In the *Republic vrs. Military Tribunal: Ex parte Ofosu-Amaah*,[28] Justice Abban held that even though the decree setting up the tribunal made its decision final, the tribunal was an *inferior* court and therefore fell under the general supervisory jurisdiction of the superior courts. Since the Special Court was itself a superior court, it is doubtful whether such a decision would have applied to it. In any case, to argue that deviations from established questions of law could be dealt with by prerogative writs or orders would be to argue that the Special Court fell under the supervisory jurisdiction of the Supreme Court, in contradiction of the intention of the creators of that court.

In the context of the argument of this paper, Ammissah's statement that "There is no right of appeal except as conferred by statute ..."[29] can be misleading. True enough, it was the responsibility of the legislature to specify by statute where in the myriad of cases an appeal would lie, and the manner and procedure for it - as was done by the Criminal Procedure Code, 1960 and the Courts Act, 1960. But, without prejudice to the legislature's responsibility to so confer and detail out the right of appeal or to the power of a trial judge or a higher court to disallow an appeal, the bare right of appeal was, in my view, a necessary implication of the fact that the 1960 Constitution set up a hierarchy of courts and made the Supreme Court the final court of appeal. To that extent the right was constitution-based. Of course, like many a constitutional right - such as freedom of assembly, free speech, and press freedom - and as a general principle of law, the right of appeal was to be conferred and detailed out by statute.

With regard to appeals, in the context of the 1960 Constitution, the right of appeal and the principle of *stare decisis* were intricately bound together. Both derived their basic authority from that Constitution, and not from the Courts Act, 1960 or the Criminal Procedure Code, 1960. Neither could, therefore, be *abolished* by altering those enactments. Nor did the 1960 Constitution expressly *contemplate* that a High Court such as the Special Court might be set up. Under that Constitution there simply could not be *two kinds* of High Court - one *with* and

one *without* the right of appeal from its decisions to the Supreme Court. So it was an error to view the extant relationship between the High Court and the Supreme Court as merely procedural.

Conclusion

In the Foreword to Peter Omari's book on Nkrumah, Justice Ollennu wrote that the most subtle and dangerous instrument used by Nkrumah was to make "each important step he took appear to be in strict conformity with the letter of the law of the land."[30] In my view the setting up of the Special Court was one such step. It was a feat of legal craftsmanship which constitutionally did not come off too well.

References

N.B. Unless otherwise stated, all references to pages are to the *Parliamentary Debates*, Vol.25, 1961.

1) The Special Court was invoked in March and August, 1963. Regulations governing proceedings in the court were issued in 1963; and in February, 1964 the President assented to an amenement of the original Act giving him power to nullify a decision of the court.
2) The Criminal Procedure (Amendment) Act, 1961, 1(3).
3) *Ibid.*, 6(2).
4) *Daily Graphic*, Accra, 17 October, 1961.
5) The Criminal Procedure (Amendment) Act, 1961, 3(2).
6) William Burnett Harvey, *Law and Social Change in Ghana*, Princeton; Princeton University Press, 1966, p.231.
7) p. 74.
8) pp. 37 and 79.
9) p. 66.
10) pp. 42 and 43.
11) The Criminal Code (Amendment) Act, 1961. Assented 1 November, 1961.
12) p. 91.
13) p. 66.
14) p. 23.
15) William Burnett Harvey, *op. cit.*, p. 232.
16) p. 61.
17) p. 74.
18) p. 79.
19) p. 65.
20) pp. 52, 108 - 111.
21) What a constitution expressly contemplates may be done can easily be judged by its language. For example, in part Article 6 of the 1960 Constitution said as follows: "Until otherwise provided by law, Ghana shall be divided into the following Regions, which shall reespectively comprise such territories as may be provided for by law ..." Clearly, this meant that the legislature did not require constitutional amendment but an ordinary act to create additional regions, or abolish existing ones or alter their boundaries.
22) p. 112.
23) p. 74.
24) A.N.E. Amissah, *Criminal Procedure in Ghana*, Accra: Sedco Publishing Ltd., 1982. p.9.
25) F.A.R. Bennion, *The Constitutional Law of Ghana*, London: Butterworth, 1962, p. 173.
26) A.N.E. Amissah, *The Contribution of the Courts to Government: A West African View*, Oxford: Clarendon Press, 1981, p. 181.
27) Such as certiorari, mandamus, prohibition, quo warranto, and habeas corpus.
28) *Ghana Law Review*, Vol.2, 1973. p.227.
29) A.N.E Amissah, *The Contribution of the Courts to Government: A West African View*. p. 275.
30) T. Peter Omari, *Kwame Nkrumah: The Anatomy of an African Dictatorship*. Accra: Moxon Paperbacks. 1970. xi.