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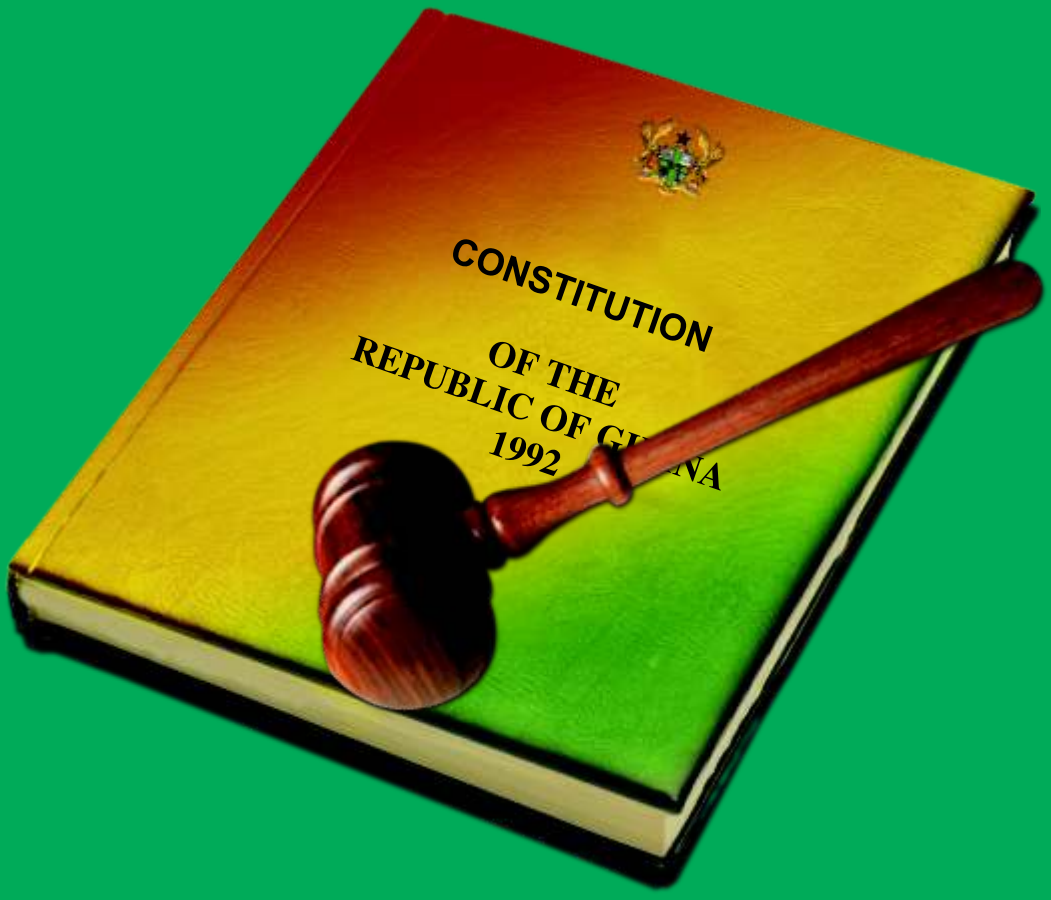
THE PANEL SYSTEM AT THE SUPREME COURT: MERITS AND DEMERITS



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THE PANEL SYSTEM AT THE SUPREME COURT: MERITS AND DEMERITS

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Preface

Ghana's 1992 Constitution stipulates in Article 128(2) that any five Justices of the Supreme Court may sit on a case. To review its own decision, the Constitution sets the minimum number at seven. This has attracted criticism. The first being that a decision of a panel of the Supreme Court does not carry the weight and precedential value of a decision of the whole Court. Secondly, it is argued that decisions of particular cases may hinge on the composition and prejudices of the panel. Thirdly, and although there have not been recent complaints in this regard, it is argued that it is possible for the Chief Justice to pre-determine the outcome of a case by empaneling Justices of known views on the law and critical issues. Finally the possibility of conflicting decisions by different panels of the Supreme Court can confuse lower courts and lawyers as to the state of the law.

Prof. Kludze makes a strong case that the panel system facilitates the expeditious disposal of cases. Several cases can be adjudicated by different panels within the same time frame and thereby reduce the clutter of the Supreme Court's calendar. He examines the United States Supreme Court where in the absence of the panel system, the Supreme Court reduces its workload by declining to hear most appeals by the process known as *certiorari denied*. The panel system also reduces the time for debates and discussions at pre-judgment conferences, since the numbers are smaller. This allows for easier assignment of cases and for the writing of opinions by the Justices.

The panel system somehow provides an antidote against the packing of the Court. Neither the parties nor the President may know in advance which Justices would compose a panel. Were the President to appoint his favourites to the Court, there is no guarantee that they would constitute a specific panel.

He suggests that the panel system may be generally retained, but with a constitutional amendment which requires that all members of the Supreme Court sit on matters of constitutional interpretation where absolute certainty of the law is desirable.

We look forward to receiving your feedback and hope you find this publication useful.

Thank you.

Jean Mensa
Executive Director

Introduction

The panel system at the Supreme Court means that all the Justices of the Supreme Court do not sit on all cases argued before and decided by the Supreme Court. On each occasion the Chief Justice selects Justices of the Court who should decide the case. Perhaps this practice pre-dates the 1992 Constitution because it is also the practice adopted in the Court of Appeal. In many foreign jurisdictions this system is also applied in the intermediate appellate courts as in the Supreme Court.

The system in Ghana typically empowers the Chief Justice to select, or as is usually expressed, "empanel" a Court out of the membership of the Supreme Court. Usually the Supreme Court panel consists of five Justices of the Court who are empanelled to sit on a case. This practice is reinforced by Article 128(2) of the Constitution which provides that the Supreme Court is duly constituted for the dispatch of the work of the Court by a minimum of five Justices. In fact the words of that Article are:

> "The Supreme Court shall be duly constituted for its work by not less than five Supreme Court Justices…"

There is, therefore, constitutional authority for the Court to sit in panels of five Justices. The exception to this is in Article 133(2) of the Constitution where it is provided that:

> "The Supreme Court, when reviewing its decisions….shall be constituted by not less than seven Justices of the Supreme Court."

The effect of these constitutional provisions is that the Constitution itself envisages that the Supreme Court shall sit in panels.

The Article does not require that the Supreme Court panel shall always consist of only five Justices. It is an enabling provision which

sets a minimum number of five Justices. Nothing in this Article prevents the Chief Justice from empanelling a court consisting of more than five Justices. In a few cases the panel has consisted of seven Justices. Indeed, in the celebrated case on the constitutionality of the Fast Track High Court, Chief Justice Wiredu empanelled almost the whole Court, consisting of himself and eight other Justices. At that time, there were only ten Justices of the Supreme Court. The obvious purpose of the Chief Justice was to lend the authority of the full membership of the entire Supreme Court to any decision in this important matter. In a sense this arrangement backfired, or it did misfire, when the Attorney-General sought a review of the decision. Normally a review panel is an enlarged panel. When the whole court, except one Justice who was out of the country, had sat upon the case, it was difficult to obtain an enhanced panel to review the decision. The return of the absent Justice, and the completion of the already initiated process for the appointment of an additional Justice, saved the situation by having a review panel of eleven. All the members of the Supreme Court, therefore, sat on the review panel.

The panel system means that no particular Justice of the Supreme Court can anticipate that he or she will sit on a particular case. Selection to the panel is left to the sound judgment of the Chief Justice. A Justice who has been selected for a panel can recuse himself for good reason, but one cannot ask to be included on the panel for a particular case.

The Chief Justice presides over the Court in any case in which he or she is sitting. If the panel does not include the Chief Justice, the presiding Justice is the most senior Justice on the panel. Such seniority is determined by the date of appointment to the Supreme Court. Each Justice of the Court, however, has an equal vote. There is no casting vote by the presiding Justice, not even by the Chief Justice. Because the panel usually consists of an uneven number of Justices, such as five or seven, there is hardly ever a tie to be broken by a casting vote.

As has been just explained, the panel system also extends to cases of review. The numerical strength of a review panel, being seven as provided in the Constitution, is also only a minimum. Therefore, when thought fit, the Chief Justice can constitute a review panel of more than seven Justices of the court. If, as is usual, the original panel consisted of five Justices, the review panel would normally be of seven Justices. If the panel which heard the appeal in the first instance consisted of seven Justices, the review panel would be nine Justices, unless the Chief Justice decides on a larger panel for the purpose, by reason of the gravity of the issues to be resolved with finality.

The contrast with other systems may be apparent. In many foreign countries, all the Justices of the Supreme Court sit on each case heard by the Court. Each Justice, in such cases, participates in every case before the Court without the need to be empanelled by the Chief Justice.

There are a number of advantages in the panel system as I have outlined above. However, as can be surmised, there also are some strong reasons which can be advanced against it.

Expeditious Disposition of Cases

One of the distinct advantages of the Panel System at the Supreme Court is that it facilitates the expeditious disposition of cases before the Court. Because the entire membership of the Supreme Court would not sit on all cases, several cases can be adjudicated by different panels within the same time frame. While one panel is sitting on a case in the week, a differently constituted panel may be hearing another case.

This arrangement has the merit of reducing the clutter of the calendar of the Supreme Court. It means that the waiting time for particular cases to be called on a day may not be as long as it would have been, if all Justices were to take time to hear all cases together. In fact on a particular day two or more different panels can sit on different cases heard in the Supreme Court.

There are occasions when one panel sits only to deliver judgment, and would be followed later the same day by a different panel to hear arguments in the same Court room on another case.

The small size of only five Justices allows for quick deliberations on the judgment in a case. There is a pre-judgment conference of Justices assigned to a particular case. At this conference, the Justices are free to discuss their views of the law as applicable to the case. A Justice, after listening to his colleagues, may be persuaded to change his mind. Furthermore, normally the draft judgments may be circulated among members of the panel who may react to the proposed judgment or a specific proposition enunciated in the draft judgment. This is especially necessary when one Justice writes an opinion for the whole panel. All these aspects of decision-making are much faster and allow for greater confidentiality when dealing with a panel of five or so Justices rather than all the Justices of the Supreme Court.

The panel system also allows for the easier assignment of cases for the writing of opinions. Where the panel is unanimous, only one member may be assigned to write the unanimous opinion. Of course, nothing prevents individual Justices from writing concurring opinions even in the case of unanimity. Where the decision is not unanimous, one Justice may write for the majority and another for the minority. Even in such a case concurring and dissenting opinions may be separately filed in the case. It appears that under this arrangement the volume of work is more easily distributed among the different panels.

It should be pointed out that the panels are not permanently constituted. The Justices are empanelled on an *ad hoc* basis, so that it is not known who will be on a particular panel. In practice however, a senior Justice is always on each panel over which he or she presides. The same practice lends colour to the assumption that often some Judges are associated with particular members of the Court. There is, however, no rule that one can expect to be on a particular panel. The composition of the panel is a matter to be decided by the Chief Justice.

Facility to Replace Justices

Where the Supreme Court sits in panels, its' work may not necessarily be disrupted by the disqualification or recusal of a particular Justice. A Justice may recuse himself because he knows the parties or has a direct or indirect interest in the outcome of the case. A Justice may also be disqualified or may excuse himself because, prior to elevation to the Supreme Court, he may have rendered decisions on some aspects of the case in the lower courts. Similarly, as a practitioner, the Justice may have been Counsel for one side in the case which has now travelled to the Supreme Court. In all such cases, the panel system gives the Chief Justice the discretionary power to replace the Judge. If the Court would not sit in panels, the recusal, excusal or disqualification of one or more Justices would mean that the Court would not sit with its full complement.

In my experience, this has not posed any serious problem for the Supreme Court. Occasions such as that are infrequent, but when they occur they are resolved because of the system of panels sitting in the Supreme Court. The Chief Justice would replace the Judge who excuses himself or whose impartiality has been questioned on satisfactory grounds.

There may be a situation where a litigant wishes to paralyse the administration of justice by raising objections to most of the Justices of the Supreme Court. When objections are raised against a Judge, it is usually up to that Judge to decide whether he can effectively dispense justice in the case. The familiar cliché is that justice must not only be done but must be openly and manifestly seen to be done. A Judge under the cloud of a serious objection will, therefore, normally excuse himself from the case. If, however, it is apparent that the objections are only being raised in order to manipulate or subvert the functioning of the Court, the Justices would resist the attempt and proceed to do justice.

The Panel System and "Packing" the Court

Perhaps one of the least explored advantages of the panel system is that it may, to a large extent, neutralise the effects of an attempt to pack the Supreme Court with favoured Justices. Packing of the Court is the expression for a situation where a President or the appointive authority contrives to appoint his cronies to the Court in order to ensure that the Court would be swayed to render expected results. Typically, a President would appoint extra Justices to the Court in order to secure a majority decision in a particular case or cases. These may be sensitive political cases. This is a method particularly resorted to when the whole court sits on every case. The President would be assured that his pliable Justices would always be on the Court to decide in the manner desired by him. Even if the Justices with whom the Court is "packed" are in the minority, their voices may be determinative since they would require the support of only a few others to be transformed into a majority.

I have already opined in these lectures that Justices have often disappointed Presidents who appointed them. Once on the Bench, most Justices would be faithful to their Judicial Oath and would strive to promote and advance established tenets and principles of the law. The fact that a Justice shared the political or philosophical views of the appointing President cannot guarantee the perversion of justice and the law to please the sitting President. There are many such examples. Although Judge Sirica, a Republican, was appointed by President Richard Nixon, it did not matter when the Judge was seised with the matter of the Watergate tapes. The Judge ordered the production of the incriminating tapes, to the disappointment and chagrin of President Nixon. The packing of the courts, therefore, may have only a limited effect, perhaps as a temporary palliative.

The greatest obstacle to the effectiveness of the attempt to "pack the

Court" may be the panel system. If the Supreme Court continues, as at present, to sit in panels, there can be no guarantee that the new additions to the Court would be on the panel that hears and determines a particular case. The composition of the panel is a matter reserved for the sound judgment of the Chief Justice. Therefore, even though the new appointees would remain on the Court, they might not be on the panels for the cases in which the President would wish them to sway the Court. Even if there is a review panel, there would still be no assurance that the President's favoured Justices would be on that panel. If the sitting President would go further to decide the composition of a panel in a particular case, it would be an instance of the abdication of responsibility by the particular Chief Justice. That menace would be a greater one than the mere phenomenon of "packing" the Court. It would be a manifestation of the more serious malaise of the corruption of the entire system of administration of justice.

The panel system, therefore, whatever may be its drawbacks, is one of the provable mechanisms for resisting the harmful effects of any attempt to manipulate a Supreme Court by the addition of unqualified persons of questionable integrity to advance a political or other agenda.

Acceptability of Panel Decisions

One of the demerits of the panel system is that some people, including members of the legal profession, are occasionally reluctant to accept the decision of a panel of the Supreme Court as truly establishing the decision of the whole Court on critical issues. While accepting the precedential effect of a panel decision, such doubting critics conjecture that the decision could have been different if the whole Supreme Court had sat on the matter, or if the panel had been differently constituted.

From the legal point of view, however, such strictures have no basis. A decision of a panel of the Supreme Court is a Supreme Court

decision. Other panels and individual Justices are reluctant to depart from such decisions unless they were given *per incuriam* and the Court is minded to reverse the error in the earlier decision. Now the Supreme Court can depart from its previous decision that it finds to be wrong, but not on the basis of the fact that it had been delivered by a panel and not the Supreme Court sitting *en banc*.

I may, however, relate briefly a conversation with a retired Justice of the Supreme Court. At that time I had not been elevated to the Supreme Court. We were in a discussion with the Justice relative to an instance when an apparently rowdy group wanted to foment trouble by attempting to install a rival chief. The retired Supreme Court Justice, at that time a sitting Justice, in what appeared to be an unguarded moment remarked that, "The Supreme Court has ruled that citizens do not now need a Police permit for a demonstration." He could not say, "We have decided…." It was obvious that he was distancing himself from the decision of the Supreme Court panel on which he was not a member. We reminded him that he was a member of the Supreme Court!

We are not often confronted with situations like this. But we do hear from time to time criticisms of panel decisions with the observation that it was a weak panel. On other occasions we do emphasise, even in the Court room, that the decision was delivered by a "strong panel, including the Chief Justice himself." These observations show that there are some lingering doubts in even legal minds on the total acceptability of panel decisions of the Supreme Court.

Conflicting Decisions of Panels

One of the noted risks associated with the panel system is that there may be conflicting decisions by different panels of the same Court.

Where the attention of the subsequent panel is drawn to the earlier decision, it may decide to adopt it or to chart a new course. That is perfectly acceptable, as the Supreme Court can consciously depart

from its own previous decision. Unfortunately, however, the attention of the panel may not have been drawn to the earlier decision of the Court. This occurs quite often in this country because reports of decisions of the courts are lagging behind for many years. It may, therefore, not be attributable to the fault of Counsel in the matter, although I am not discounting negligence and deliberate misconduct by lawyers appearing before the Court. A mischievous Counsel may deliberately violate the ethics of the profession by suppressing an unfavourable decision of the Court when he knows that it has not gained wide circulation in the legal fraternity.

In a number of cases, the conflicting decision is unearthed by a Justice of the Court after the end of arguments. In one case in which I was a member of the panel, the conflict was not detected until after our pre-judgment conference, when the draft judgment had been circulated. In that case we became aware that two previous panels had delivered conflicting decisions, neither of which was conformable to the decision we had taken. We found ourselves in a quandary. In the circumstances, we informed the Chief Justice and suggested that an enlarged panel, which was not a review panel, should revisit the issue, with an opportunity being given to Counsel on all sides to address the Court on the matter.

In the Supreme Court itself, the conflicting decisions can be considered by a subsequent panel which may decide which line of cases it may follow. It may even decide to propound a new rule or principle of law. For the lower courts, however, conflicting decisions of different panels of the Supreme Court pose the difficult question of ascertainment of the law.

A solution to this problem is not easy. However, early publication of decisions will remove at least a part of the hurdle. If the published reports are available, it can be expected that both the Supreme Court Justices and the lawyers will be cognizant of existing authorities on any point of law. It will then be up to the panel to decide whether to

render its decision in conformity with the previous decisions.

Another approach would be to institute a practice of circulating the draft decisions among all the members of the Supreme Court. In that case, even Justices who are not on the particular panel can draw attention to any inconsistent decisions. The present practice is not to allow a Justice to discuss a case with other Justices who are not members of the particular panel. This may have to change. There is, however, a serious danger inherent in any new practice of making draft judgments available to all members of the Supreme Court. The integrity of the system may be compromised. Draft judgments circulating in the Court may easily be leaked through the carelessness or deliberate acts of staff in the judicial service. With the large number of persons who may handle the drafts, it would be difficult to identify the source of any leakage.

Risk of Improper Influence of Panels

If there is a risk of influence by the Government or corrupt litigants on the judicial process, the risk is greater with a panel of five than with the entire membership of the Supreme Court, whatever the number may be. This is an ordinary logical deduction. Improper inducement and undue influence can more easily be extended to only a small number of five than to a larger group.

For this reason it has often been asserted that it would be better for all the Justices of the Supreme Court to sit together. There is strength in numbers. Any person or authority seeking to manipulate or intimidate the Court would have a more difficult task in extending his influence to all the Justices.

Manipulation by the Chief Justice

The biggest problem with the panel system is the risk that, by selecting for the panel a number of Justices whose views are already

known, the Chief Justice may, by machination, pre-determine the result of a case. Every panel of the Court must be constituted by the Chief Justice. A Chief Justice is a human being and it is not inconceivable that, even without pressure from any quarters, he or she may have the preference for a particular view of the law.

Let us take a hypothetical case of the death penalty. If the constitutionality of the death penalty becomes an issue, the selection of the panel may very well determine the outcome. The Chief Justice, by selecting Justices with known positions on the question, may pre-determine the outcome by the simple expedient of empanelling the Court. If all the Justices of the Supreme Court should sit on the issue, the result cannot be influenced in this manner by whoever happens to be the Chief Justice at the time. The reason is that the Chief Justice would not have the prerogative of empanelling the Court if all the Justices are to sit together.

There is the well-known case of *Akuffo-Addo v. Quarshie-Idun*, reported in [1968] G.L.R. 667. In that case the Ghana Bar Association had sued Chief Justice Edward Akuffo-Addo for a declaration that he had no authority to direct that lawyers who had not discharged their tax obligations should be denied audience in the courts. At the High Court, Anterkyi, J., agreed with the Bar Association and issued an injunction against the learned Chief Justice. The Chief Justice appealed against that decision, as he was entitled to do. The big problem, however, was the process by which a panel of the Court of Appeal would be constituted to hear the appeal. The Ghana Bar Association took the preliminary objection that, as the Chief Justice was the appellant, he could not select the Judges to sit on his appeal. It was like being a judge in his own cause. The Bar Association suggested that the responsibility of empanelling the Appeal Court should devolve on another member of the Supreme Court, preferably the most senior of the Justices. The learned Chief Justice replied to this objection by arguing that, for as long as the office of Chief Justice was not vacant, a court empanelled by any other person would be an

illegal court. The Court of Appeal overruled the preliminary objection of the Ghana Bar Association and held that the Chief Justice, although the appellant, was the only competent authority to select the members of the panel to hear his own appeal. The Court of Appeal invoked the doctrine of necessity, under which a Judge can sit in his own cause if it would otherwise be impossible to appoint a proper adjudicating authority. You can predict the result of a case in which the appellant selected his own Justices to hear his appeal. The judgment in the matter by the Court of Appeal, then the highest court of the land, may well be sound. However, it left a feeling among many members of the Bar that justice was not seen to be done. I do not believe that a case of this nature is likely to arise any time soon, or that, if it did, the Chief Justice would insist on selecting the Justices to rule on his appeal.

Again, this is a problem for which there is no easy solution. It seems that the realisation of this problem calls for the exercise of greater care and extreme good judgment in the appointment of a Chief Justice and the Justices of the Supreme Court. No system is fool-proof or can be fool-proof. Care must be exercised in appointing Chief Justices who will resist pressure in selecting Supreme Court panels without fear or favour, affection or ill-will, as the saying goes. It will all depend on the temperament and personality of the Chief Justice. For instance, in *Akuffo-Addo v. Quarshie-Idun*, the Lord Chief Justice could have excused himself from selecting the panel for his appeal. If there could be legal challenges to that procedure, the Chief Justice could have undertaken a short journey out of Ghana, even if only to Togo or la Cote d'Ivoire, to enable an Acting Chief Justice to deal with the matter. He chose not to adopt either or any other course of action, thereby not insulating himself from the charge of being a judge in his own case.

This brings me to the recurrent theme of the procedure for the appointment of the Chief Justice and other Justices of the Supreme Court. In the case of the Justices of the Supreme Court, the Judicial

Council bears the primary responsibility of advising that a person be elevated to the Supreme Court. In previous discussion I emphasise the weight of responsibility assumed by the Judicial Council to ensure that the right caliber of Justices are appointed to the Supreme Court, and, by judicious use of its power, to prevent the "packing" of the Court by any President with his incompetent cronies.

In the case of the Chief Justice, the appointment is not made on the advice of the Judicial Council. Under Article 144(1) of the Constitution, it is a Presidential prerogative. However, the President must consult the Council of State and the appointment must be "with the approval of Parliament." Parliament, I will again emphasize, must take its role very seriously in vetting a nominee for the highest judicial office in the land. Especially as the nomination would not have been made with the prior concurrence of the Judicial Council or any other body, Parliament must scrutinize the nominee very carefully before voting its approval.

All Justices to Sit

The alternative to the panel system is perhaps the legal requirement that all the Supreme Court Justices should sit on every case argued before the Court. If this is adopted, there would be no panels, and some of the problems associated with the panel system may be obviated. However, experience has shown that there are also serious difficulties in requiring that all the Justices sit on every case.

It is true that without the panel system for hearing appeals from the lower courts, every decision will be a decision of the whole Supreme Court. That will perhaps confer added weight and greater acceptability to the decisions of the Court. One would then not be tempted to think that the result reflected only the *ad hoc* composition of the panel. All decisions will be decisions of the majority of the total membership of the Court in each case. To many people that is what it means to take a case to the Supreme Court. When a matter comes before the Court, the general public's expectation is that it is to be

tried or heard by the entire Court and not a part of it. It may be the lay man's view; but perception is important in the administration of justice.

In a system where the Court is in every case constituted by all the Justices, there cannot be conflicting panel decisions. There would be no conflict because there would be no panels. Instead, there could only be contradictory or otherwise irreconcilable decisions of the Supreme Court which the Court itself may either explain, review or reject as circumstances would demand.

Where the entire membership of the Supreme Court decides every case, the discretion of the Chief Justice to empanel the court will be removed. Therefore, the Chief Justice, regardless of his prejudices and biases, cannot pre-determine the outcome of the appeal by the exercise of his power to empanel Justices anticipated to be committed to particular views of the law. In a case like *Akuffo-Addo v. Quarshie-Idun*, to which I have earlier referred, where the Chief Justice was himself the appellant, the Chief Justice would not have become a Judge in his case by empanelling Justices to hear his own appeal. Whether the Chief Justice so desired or not, all the Justices of the Court would together have to determine the appeal. The decision would have been perceived as fairer in the eyes of the public and of the litigants themselves.

Another advantage in the sitting together of all Justices of the Court is that external influence on the Court would be of minimal significance. It would be much more difficult for the President or the Executive to exert improper influence or pressure on the entire membership of the Court, which may be composed by nine or more Justices. *A fortiori,* it is easier to reach five Justices, or a majority of them who are sitting on a case. This applies also to a situation where a litigant would wish to improperly influence the Court or corrupt its processes. While he may have the happenchance of access to one or two Justices, it would be more unlikely that he would be able to establish a contact or relationship with the Supreme Court as a whole.

These may be among the reasons why it can be urged that the panel system should yield to the practice under which the whole Court would adjudicate every case. Indeed, it is the practice in many advanced countries that all members of the Supreme Court sit together in deciding every case.

There are, however, considerable draw-backs in the arrangement which would require all the Justices of the Supreme Court to sit on all cases.

The Size of the Court

If it is decided that the entire membership of the Supreme Court should sit on all cases, perhaps one consequence would be to reduce the size of the Court. This would not mean setting a ceiling on the membership. What would mandate this would be to reduce the Court to a manageable size. It would be much more manageable to have a smaller Supreme Court where all the Justices should sit together on all cases.

There is nothing inherently wrong with this. However, in that case, care must be taken to craft the constitutional amendment in such a way that a President will find it difficult to enlarge the court by inundating it with pliant Justices to change the direction of the Court.

Packing the Court

The reduction in the size of the Supreme Court will bring in its train the danger that a determined President can easily pack the Court for a specific agenda. If, for instance, the Court is made up of Nine Supreme Court Justices, packing the Court would be effective by the addition of even two or three extra Justices. This small number would

only have to be augmented by a couple of other Justices to attain a majority.

On the other hand, if the Supreme Court continues to sit in panels, the effect on the Court of "packing", would be difficult. The reason is that a President who has appointed cronies to the Court cannot ensure that his cronies would be empanelled for cases in which he has an interest or a stake. Empanelling would be the responsibility of the Chief Justice. Therefore, unless the President can also manipulate the Chief Justice, the cronies on the Court may not be empanelled to participate in the decisions of cases according to the whims of the appointing President.

It can be said, therefore, the panel system provides some measure of built-in resistance to the full effect of any attempt to pack or enlarge the Supreme Court for political or other reasons.

Delays When all Justices sit Together

In jurisdictions where all the Justices of the Supreme Court sit on all cases, one of the problems is the speed with which cases can be disposed of. In the first place, the Justices tend to be over-burdened, because each of them must read every case docket. That is not easy. Where the system operates by panels, Justices do not have to read each and every one of the case dockets. They read only those cases for which they are empanelled. This arrangement assists in the expeditious disposition of cases before the Court. Reading every docket or file is tedious and tiresome. The tedium tends to make some of the Justices slow in forming their opinions, especially as Supreme Court Justices are usually not young women or men. This reflects in the delay of the work of the Court, because the Court cannot announce its verdict until and unless all the Justices have submitted their written opinions, even if they be only concurring opinions. It is known that Chief Justice Earl Warren of the United States Supreme Court had complained that one or two Justices were slowing down the work of the Court because of their delay in submitting draft opinions.

Part of this can be legitimately attributed to the sheer volume of work when each Justice must read every case docket. Unless the Justice has read the record of the proceedings in the lower court, he will not be in a position to formulate his opinion on the merits.

Added to the responsibility of reading the record of proceedings in the lower court in all cases, the Justice of the Supreme Court must also write considered opinions on every case. The assignment of Justices to write the Court's opinion is much more difficult when dealing with a large number of independent Justices. Furthermore, a Justice who has to write a judgment in every case can be truly over-worked. You must bear in mind that the Justice or Judge who often concurs in the opinions of others is perceived as lazy or incompetent, or both. Therefore, where all the Justices must adjudicate every appeal, it can be expected that most of the Justices will endeavour to write separate opinions in each case. This is an additional potential cause of delay in the work of the Court when the Justices do not sit in panels.

There will always be lazy Justices in any Court. However, where Justices are selected in panels, the volume of work assigned to each Judge is appreciably reduced. Each Justice will not be required to read the record of proceedings in every appeal unless he or she had been empanelled for that case. Similarly, each Justice will not be required to write an opinion for the court or separately in every case, except those relating to his panel. Therefore, delay may be reduced to a degree.

Selection of Cases

Because of the volume of work when all the Justices of the Supreme Court are required to sit on every case, some countries have devised mechanisms to reduce the number of cases before the Court. If the panel system should be abolished in the Supreme Court of Ghana, it may be necessary to establish such a process for eliminating appeals

which appear to be unmeritorious. The United States Supreme Court has a rule that the Court hears not all appeals but only those cases that it chooses.

Faced with the problem of exploding case dockets, the United States Supreme Court moved to adopt a system by which, without reason, it can decline to hear an appeal. At the behest of the U.S. Supreme Court itself, under the leadership of Chief Justice William Howard Taft, the Judge's Act of 13th February, 1925, was enacted to statutorily establish the principle of the discretion of the Supreme Court in selecting cases that it will hear on appeal.

The 1925 legislation gave statutory support for the Supreme Court of the United States which then formalised and developed a system under which it can and does decline to hear certain appeals. If at least four of the nine Justices are not disposed to hear arguments on the case, it will not be heard. It is then said that *certiorari* is denied. The expression "*certiorari denied*" is not a dismissal of the appeal on the merits. It does not constitute affirmation of the decision of the intermediate appellate court, although that appeal court's decision prevails as between the parties to it. It also does not constitute a Supreme Court precedent. This reduces the clutter on the calendar of the United States Supreme Court which hears only appeals that it decides to hear, based primarily on the significance of the legal issues arising from the case. It has been estimated that out of about 5,000 cases filed annually for review by the Supreme Court of the United States, less than 5% are actually selected by the Court for hearing. Ghana, the United Kingdom and many other countries do not have that system. Every appeal properly lodged in the Supreme Court of Ghana must be decided on the merits, even if by way of its dismissal as frivolous or unmeritorious.

If the panel system is abolished, the Supreme Court of Ghana may have to adopt a variant of the American practice, to have the discretion to refuse to hear an appeal to the Court. Typically the Supreme Court will select cases which raise important questions of

law, or cases where existing rules of law have become anachronistic or require a re-appraisal. Even this will still tax the resources and the time of the Justices. The reason is that each Justice of the Supreme Court will still have to read every docket, at least in a cursory or perfunctory manner, to determine whether in his opinion it raises an important or novel issue of law which will justify a hearing by the Court.

The exercise of such discretionary power by the Supreme Court may draw the criticism of both lawyers and litigants. The Court would not have to state reasons for declining to hear an appeal, because that refusal would not be a decision on the merits. It will be difficult, therefore, to establish criteria by which the legal profession can construct a body of authority on the refusal to hear appeals.

Problem of Plurality of Opinions from all Justices

Where all the Justices sit and decide a case, there is inevitably a difficulty in extracting the principle of law or *ratio decidendi* deducible from the case. This is a known difficulty in many American cases. Even when the Justices are unanimous in dismissing or granting an appeal, each of the Justices may have arrived at that decision for different reasons. There may, therefore, be as many *rationes decidendi* as there are Justices on the Court, which in the United States is nine.

From the jurisprudential point of view, this is one of the demerits inherent in the system where all the nine or more Justices adjudicate every appeal. The lower courts may be confused. Practitioners and academics alike may encounter enormous problems in distilling the principles of law from the plurality of opinions. It is worse when it is a split decision which is swayed by one or two Justices.

Conclusion

I think that the present panel system has worked well. In any system of this nature, there are bound to be draw-backs. As I have

endeavoured to show, the system of all the Justices sitting on all cases has its own inherent disadvantages.

As this is a matter that must be considered in a review of our Constitution, I hope that these observations will encourage a discussion of the merits and demerits of either system.

Perhaps there are acceptable *via media* solutions. One suggestion may be to restrict the power of the Chief Justice in empanelling Justices for specific cases. If this power of the Chief Justice is curtailed, there must be contrived a mechanism by which panels can be constituted without unfettered discretion. This would remove the personal discretion of the Chief Justice. I have not heard any criticisms of the present Chief Justice in this regard, or of the recent previous Chief Justices. That does not preclude prophylactic measures to forestall possible problems in the future.

It may also be that we can experiment with a variant of the panel system with the requirement in specific cases that all the Justices of the Supreme Court shall adjudicate such matters. For instance, the panel system may be retained for most cases of civil litigation and criminal appeals. While maintaining that, it may be stipulated that in matters of constitutional interpretation, all the members of the Supreme Court must sit to render final and authoritative judgments.

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