THE CONSTITUTIONAL BASIS FOR THE APPOINTMENT OF MINISTERS: A CRITICAL EXAMINATION OF J.H. MENSAH v. ATTORNEY GENERAL IN LIGHT OF ARTICLE 78(1) OF CONSTITUTION OF GHANA, 1992

A. INTRODUCTION & BACKGROUND

One of the most popular sayings in democratic governance is that government is a continuum. The transition between governments requires its own set of rituals and responsibilities, demanding careful adherence to constitutional processes to ensure the seamless continuity of governance. This only refers to the governance processes and the practical framework for running the affairs of a state remaining and continuing without changes that destroy their basis essence and foundation.

However, it does not include personnel (political appointees). In Ghana, the commencement of a new government follows a structured sequence: the election and swearing-in of Speaker of Parliament by Parliament and by the Chief Justice respectively[1], and finally, the inaugural session of Parliament where the President is sworn in by the Chief Justice[2].

Once this process is complete, the President assumes office and, within the first few weeks, is required to nominate individuals he wishes to appoint as ministers. Parliament, in turn, must approve these nominees before they are sworn into office by the President to commence their duties[3].

Between the date of nomination and the date of parliamentary approval ("vacuum" period"), what is the role of a minister designate? Do the ministries remain vacant and without ministers until the approval of parliament to enable

[1] Article 95(4), Constitution 1992
[2] Article 57(3), Constitution 1992
[3] Article 78(1), Constitution 1992

the nominees perform the functions of Ministers of State legally? These have been legitimate questions raised by concerned Ghanaians and students of constitutional law in Ghana.

The importance of governance continuity become glaringly evident during the transitional period of a new administration. For instance, at the inaugural meeting of the transition teams of the outgoing and incoming Presidents of Ghana in 2024, it was revealed that the country's energy sector was in a severe crisis, burdened by overwhelming debt. This revelation signalled the looming threat of *"Dumsor"* (widespread power outages), casting a shadow over the nation's stability and progress.

Similarly, even before the 2024 general elections, it became widely known that the country's education sector was on the brink of collapse. From arrears owed to the West African Examination Council (WAEC) for both Junior and Senior High School examinations to the severe shortage of food in Senior High Schools, forcing headteachers to appeal to the public for assistance to feed students, since the situation was dire. These challenges, particularly the food crisis, worsened in the early weeks of the new President's term. Yet, with the government still taking shape and no sector ministers in place, there was a glaring leadership vacuum, leaving critical problems unaddressed and awaiting urgent attention, even if only through temporary measures.

It is perhaps no coincidence that the President's first set of ministerial nominations prioritized the portfolios of Energy, Education, Agriculture, and Finance. This move appears to reflect the urgent need for leadership in these areas, where the crises demanded immediate attention. But could these nominees perform their duties prior to parliamentary vetting, approval, and swearing-in?

For those familiar with Ghana's constitutional framework, Article 78 of the 1992 Constitution which requires the prior approval of parliament has been interpreted by the Supreme Court of Ghana in the landmark case of **J.H. Mensah v. Attorney-General**[4]. This case has been widely interpreted summarily to mean that persons nominated by the President as ministers must be vetted and approved by Parliament before assuming their roles. This article assesses this interpretation and the framers' intent to ascertain whether this interpretation accurately reflects the Court's ruling. Also, at the heart of this article is a digest of J.H. Mensah v. Attorney-General to ascertain what happens during the vacuum period.

B. A BRIEF OF THE CASE OF J. H. MENSAH v ATTORNEY GENERAL

After the swearing-in of President J.J. Rawlings for his second term in January 1997, the President decided to retain several ministers and deputy ministers from his previous administration. However, these retained ministers were not presented to the new Parliament for approval, based on the argument that they had already been approved by the previous Parliament.

One of these retained ministers was Mr. Kwame Peprah for Finance Minister. The minority caucus in Parliament vehemently opposed this idea, arguing that under the 1992 Constitution, no one can be appointed or act as a minister or deputy minister of state during the second term of the Fourth Republic without being vetted by the new Parliament, since the tenure of office of previous ministers and deputy ministers of state ended with the dissolution of that Parliament, and in this case on 6th January 1997.

[4] [1997-98] 1 GLR 227 – 281

Amid this controversy, it was announced that Mr Kwame Peprah was going to present to the new Parliament on 7th February 1997, in his capacity as the Minister for Finance in the second term of President Rawlings, the nation's budget. But at the dawn of the scheduled presentation, the Minority Leader, Mr J. H. Mensah, filed the suit for a declaration, that:

i. *"On a true and proper interpretation of the Constitution, 1992, particularly articles 57(3), 58(1) and (3), 66(1), 76(1) and (2), 78(1), 79(1), 80, 81, 97(1), 100(1), and 113(1) arid (3) thereof, no person can after 6 January 1997 act as a minister or deputy minister of state without the prior approval of the Second Parliament of the Fourth Republic of his appointment.*

ii. *A necessary incident of prior approval is the consideration and vetting of each nominee for ministerial appointment by the Second Parliament of the Fourth Republic.*

iii. *Accordingly, any person who has not been so approved and appointed cannot lawfully act or hold himself out as a minister or deputy minister of state."*

The Plaintiff argued that, under the Constitution, no one could serve as a minister or deputy minister without prior approval by the current Parliament. He sought declarations that the actions of the President and Parliament in retaining these ministers without fresh approval were unconstitutional. The main Constitutional provisions which were considered were:

Article 78(1): ***"Ministers of State shall be appointed by the President with the prior approval of Parliament*** *from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament."*

Article 79(1): ***The President may, in consultation with a Minister of State, and with the prior approval of Parliament****, appoint one or more*

Deputy Ministers to assist the Minister in the performance of his functions.

Termination of Tenure

The Court determined that the term of ministers and deputy ministers is coterminous with the President and Parliament that appointed and approved them. Thus, their roles cease with the expiration of that term of the parliament that approved them and the President.

Necessity of Fresh Parliamentary Approval

The Court held that all ministers, whether newly appointed or retained, must receive prior approval by the current Parliament before assuming office. This includes scrutiny, vetting, and consideration of their qualifications and suitability.

Interpretation of "Prior Approval"

The court embarked on an interpretation of the phrase "prior approval" as employed in Articles 78(1) and 79(1) of the 1992 Constitution. The Supreme Court was of the opinion that "prior approval" is not a mere formality but an indispensable process that includes vetting, scrutiny, and evaluation of the competence, integrity, and suitability of each nominee. Parliament must exercise independent judgment in assessing whether a nominee meets the requisite standards. The Court further held that the vetting process is crucial for maintaining accountability and safeguarding the integrity of public office. What this meant was that the resolution passed by Parliament's Appointments Committee, which sought to exempt retained ministers from vetting, was unconstitutional. The Court was of the view that parliamentary resolutions cannot override express constitutional mandates as the Constitution is the

supreme law of Ghana, and all actions of Parliament must conform to its provisions.

Impact of the Ruling

The judgment of the court has marked a significant milestone in our constitutional jurisprudence as a lead authority and has become a landmark decision in any discourse on the constitutional limits of the exercise of governmental powers.

Justice Ampiah JSC, argued that while ministers' terms end with the President's and Parliament's, a reasonable time should be allowed for the new administration to appoint and gain approval for new ministers. However, this must be regulated and should not undermine constitutional requirements. He supported the plaintiff's claims that ministers, whether retained or new, require parliamentary approval to act legally.

Acquah JSC (as he then was) in the final paragraph of his ruling stated that:

"...accordingly, I will refuse the plaintiff's second and third reliefs. In respect of the first relief, ***I take judicial notice that a newly inaugurated Parliament cannot immediately be ready with its various committees to approve presidential nominees. The Constitution, 1969 of Ghana, in article 64(3) thereof took care of the interim period from the inauguration of the President and the Parliament to the time Parliament gets settled down to approve nominees for ministerial appointments. There is no such provision in the Constitution, 1992.*** But until Parliament acting under article 298, makes a law to regulate the interim period, I will simply hold that on a true and proper interpretation of the Constitution, 1992 particularly articles 57(3), 58(1) and (3) 66(1), 76(1) and (2), 78(1), 79(1), 80, 81, 97(1), 100(1), and 113(1) and (3) ***no person can in each Parliament of the Fourth Republic after a reasonable time from***

that Parliament's inauguration, act as a minister or deputy minister of state without the prior approval of that Parliament."

The common thread in both holdings is that both Justices identified the inevitable gap during government transitions and addressed it in their own way. This gap arises from the procedural formalities of awaiting the parliamentary approval of nominees, followed by their swearing-in by the President before they can officially assume their roles as Ministers of State.

C. SCOPE AND MEANING OF ARTICLE 78(1) OF THE 1992 CONSTITUTION

Article 78(1) of the 1992 Constitution of Ghana provides that:

> **"*Ministers of State shall be appointed by the President with the prior approval of Parliament*** *from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament."*

The Court in the case of **J. H. Mensah v Attorney General (supra)** concluded that "prior approval" as couched in the provision is not a mere formality but an indispensable process that includes vetting or scrutiny, and evaluation of the competence, integrity, and suitability of each nominee. Parliament must exercise independent judgment in assessing whether a nominee meets the requisite standards.

This approval process is crucial for maintaining accountability and safeguarding the integrity of public office.

Aikins JSC was of the opinion that it is unambiguously clear that the appointment of ministers and deputy ministers of State by the President under

articles 78(1) and 79(1) of the Constitution, 1992 shall be with the prior approval of Parliament, and Parliament here should mean the current Parliament and not the previous Parliament. To him, ***"if the framers of the Constitution, 1992 had intended to refer to the erstwhile Parliament they would have stated so. It stands to reason that when a new Parliament and a new President are sworn in, all such ministers intended to assist the President in his administration must be appointed in accordance with the provisions of articles 78(1) and 79(1) of the Constitution, 1992 before they assume office as such officers."***

The above ratio read in conjunction with article 78(1), clearly suggests that there is a required prior approval from Parliament before the appointment of ministers can be effective. This provision applies without derogation to all types of Ministers of State, whether new or retained ministers.

Indeed, the Framers of the Constitution, in their report submitted to the PNDC, were silent on the scope of Article 78(1), and whether any exception was required in its application. Thus, in the absence of any ambiguity, the provision must be adhered to.

As a cardinal rule of interpretation, the court in construing the meaning of any statute, must first give effect to its plain and ordinary meaning. This principle has received judicial fortification in a number of cases including the decision of the Supreme Court in **Ghana Bar Association v Attorney-General[5],** where it was stated thus:

> *"It must also be borne in mind that in construing any statute, for that matter any of the provisions of the Constitution, the first duty of the court is to stick to the ordinary meaning of the actual words used. After ascertaining the general purport and the meaning of the provision in*

[5] (1994-95) 2 GBR 290 at 294

question from the words used, effect must be given to it, unless by so doing it would be at variance with the intention of the law makers or could result in or lead to some obvious absurdity"

Thus, there appears to be no ambiguity apparent under article 78(1). In construing the ordinary meaning of the words used in the said provision, no absurdity is evident. The irresistible conclusion that can be gleaned is that all ministers must undergo parliamentary approval before assuming their office as Ministers of State. The refusal to comply with this provision is at variance with the constitution and under Article 2(1), the court can declare such an action as null and void.

D. MINISTER-DESIGNATES AND THE QUESTION OF ACTING BEFORE APPROVAL

There is no denying, however, that the strict interpretation of this provision creates a gap in leadership between the time the new parliament forms its committees to the time the Ministers are gradually scrutinized, approved, and sworn into office. It is this gap of leadership that the President at the time, His Excellency, Jerry John Rawlings, sought to prevent when he made the appointments without prior parliamentary approval. And it is the same gap that Ampiah JSC and Acquah JSC referred to. Acquah JSC on the other hand, went further to deny the Plaintiff, J.H. Mensah, the second and third reliefs sought, which were as follows:

i. *A necessary incident of prior approval is the consideration and vetting of each nominee for ministerial appointment by the Second Parliament of the Fourth Republic.*

ii. *Accordingly, any person who has not been so approved and appointed cannot lawfully act or hold himself out as a minister or deputy minister of state.*

Acquah JSC furthered this down by admittedly stating that

> "***I take judicial notice that a newly inaugurated Parliament cannot immediately be ready with its various committees to approve presidential nominees. The Constitution, 1969 of Ghana, in Article 64(3) thereof took care of the interim period from the inauguration of the President and the Parliament to the time the Parliament gets settled down to approve nominees for ministerial appointments. There is no such provision in the Constitution, 1992.*** But until Parliament acting under Article 298, makes a law to regulate the interim period, I will simply hold that on a true and proper interpretation of the Constitution, 1992 particularly articles 57(3), 58(1) and (3) 66(1), 76(1) and (2), 78(1), 79(1), 80, 81, 97(1), 100(1), and 113(1) and (3) ***no person can in each Parliament of the Fourth Republic after a reasonable time from that Parliament's inauguration, act as a minister or deputy minister of state without the prior approval of that Parliament"***

It is evident that the final holding of Acquah JSC answers the core question this article seeks to answer. That is to say that while Parliament hurriedly puts together its Appointments Committee to be able to vet Ministers as nominated by the President, the persons nominated can in the interim act as Ministers so as not to have a break in leadership and it is this period he referred to as *"reasonable time"*. Thus, after this period no person can act as a Minister without the prior approval of Parliament.

Furthermore, it is undeniable that this gap is what Ampiah JSC referred to in his holding when he stated that

"While ministers' terms end with the President's and Parliament's, a reasonable time should be allowed for the new administration to appoint and gain approval for new ministers. However, this must be regulated and should not undermine constitutional requirements.

Lord Denning MR, Lord Denning, in **Seaford Court Estates v. Asher**[6] said thus:

"... When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give force and life to the intention of the legislature.... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

In the case of **New Patriotic Party v Attorney General**[7] the Supreme Court speaking through Francois JSC, in interpreting the constitution relied on **Tuffuor v Attorney General**[8]**,** and stated that

"a written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises." My own contribution to the evaluation of a Constitution is that, a

[6] (1949) 2 All ER 155
[7] [1993-94] 2 GLR 35 – 192
[8] [1980] GLR 637 at 647

Constitution is the out-pouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and the spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation. In support of this, we may profitably turn to the Constitution, 1992 itself which directs that we accord due recognition to the spirit that pervades its provisions."

The quoted passage underscores the dual character of the Constitution—its "letter" and its "spirit"—which is central to our analysis. It emphasizes that the Constitution is not merely a static set of written rules but a living document reflecting the will, history, and aspirations of the people. This perspective is vital when addressing gaps left by the drafters, as highlighted by the reference to Lord Denning in **Seaford Court Estates v. Asher[9],** where he expressed that a judge must not just fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and then he must supplement the written word to give force and life to the intention of the law.

It is evident that this was the intention of Justice Acquah when, in his ratio, he highlighted the gap and stated that after a reasonable time, a person cannot continue to act as a minister, as Parliament should have concluded the approval process by then. This implies that, within this reasonable timeframe, a nominated individual may step in to address pressing issues requiring immediate attention, such as the challenges of *Dumsor* and the food shortages in Senior High Schools. This approach is believed to uphold the spirit of the Constitution, allowing it to evolve and address contemporary challenges effectively.

[9] supra

The next question that would linger on minds would be what is considered a reasonable time. Well, I do not think the ordinary man on the Madina bus will be happy if his Minister of Transport is still "acting" after three (3) months of having been nominated as a minister by the President. Until the Court makes a definite pronouncement, the reasonable man will be the yardstick.

E. CONCLUSION

The case of **J.H. Mensah v. Attorney-General** remains a cornerstone in Ghanaian constitutional law, emphasizing the supremacy of parliamentary oversight in ministerial appointments. It highlights the delicate balance between governance continuity and constitutional compliance during transitions. As Ghana's democracy evolves, addressing gaps in the Constitution and ensuring adherence to its principles will be essential to strengthening the nation's institutions and ensuring effective governance.

Although the law may not explicitly address the issue discussed in this paper, case law has largely bridged the gap, permitting individuals to act as ministers within a reasonable period before undergoing parliamentary vetting and approval. Bold as it may seem, believe that exceptional performance as an acting Minister could significantly strengthen a nominee's case during the vetting and approval process.

While government transitions may not always flow as effortlessly as day turning into night, implementing robust structures could help make the process considerably more seamless.