

THE CONSTITUTIONAL OATHS AND STATE SECRETS ACT PROHIBIT THE COVERING UP OF UNCONSTITUTIONAL AND CRIMINAL ACTS OR CONDUCT BY PUBLIC OFFICERS IN GHANA: BY MARTIN A. B. K. AMIDU

Can a person who has sworn the Constitutional oaths of office and who is also bound by the State Secrets Act, 1962 (Act 101) disclose communication that he or she has come to know about in the course of his or her duties which infringe the Constitution, amount to violations of the Criminal Offences Act or have been designed to commit crime or undermine the Constitution of Ghana? This is a vexed question often repeated in recent months. I recently had occasion to speak on the subject of legal ethics when the Ghana Bar Association (GBA) invited me to be a resource person at its Annual General Conference in Takoradi in September 2012 on the subject: “In-House Counsel’s Dilemma; Conflict between Professional Ethics and Corporate Strategy”.

The invitation itself posed a personal ethical dilemma, as unsubstantiated charges of misconduct had been leveled at me by a fellow member of the GBA, the Chief of Staff, prior to my leaving office as Attorney-General. A letter written to him by the GBA in January 2012 to provide further and better particulars of the misconduct remained unanswered. My solution was, therefore, to write a letter dated 11th September 2012 to the then President of the Ghana Bar Association (enclosing my letter of 20th January 2012 to Mr. John H. M. Newman, Chief of Staff, in response to his false and dishonourable Press Release of 19th January 2012) to demand that the Chief of Staff substantiate his propaganda charges of misconduct against me before his term of office ends on 6th January 2013. The Daily Guide newspaper of Wednesday 16th October 2012 and the Chronicle newspaper of the same date have already carried excerpts from my response to the Chief of Staff’s Press Release and my recent letter to the GBA. The Chief of Staff, Lawyer John H. M. Newman, still has his honour to redeem by substantiating his allegations and responding to the GBA’s earlier letter in January 2012 on the matter.

However, I regard the topic of the implication of constitutional oaths as a highly relevant subject for discourse in current times. I, therefore, publish hereunder unedited portions of the paper I delivered at the In-House Programme session of the Bar Conference on 18th September 2012 as to whether it is consistent with the Constitution and the constitutional oaths for a public officer to cover up unconstitutional and criminal acts or conduct of other public officials or any person. This component deals with the 1992 Constitution and its constitutional oaths only. The following excerpts exclude the footnotes for purposes of space:

Constitutional and legislative framework of governing professional conduct of in-house counsel

Unlike other countries within the Commonwealth where lawyers’ ethical conduct is self-regulated by their professional associations, in Corporate Ghana, the 1992 Constitution, the Legal Profession Act, and the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 made pursuant to Act 32 are the main statutory rules and norms governing the professional conduct of both in-house and out-house counsel. An examination of

these will show the onerous and burdensome duties placed on practicing lawyers generally and in-house counsel particularly within the organization in which he has chosen to be engaged in whole-time occupation performing legal duties.

The 1992 Constitution of the Republic of Ghana

The preamble to the 1992 Constitution sets the tone for every citizen of Ghana when it stipulates that:

“We the people of Ghana... IN EXERCISE of our natural and inalienable right to establish... AND IN SOLEMN declaration and affirmation of our commitment to; Freedom, Justice, Probity, and Accountability; ...DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

It follows as a general conception that the conduct of every Ghanaian must be guided by a quest for justice, probity, and accountability in addition to the over all commitment to freedom.

Article 1 (2) which has been the subject of several applications by the Supreme Court provides that the Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void. It is to emphasize the supremacy of the 1992 Constitution that article 2 (1) enjoins a person who alleges that an enactment or anything contained in or done, under the authority of that or any other enactment or any other act or omission of any person is inconsistent with, or in contravention of a provision of the Constitution, may bring an action in the Supreme Court for a declaration to that effect. Article 3 gives all citizens the right and power to defend the Constitution at all times and particularizes the more serious violations that citizens shall resist such as the overthrow of the Constitution or any part thereof by violent or other unlawful means etc.

The Constitution in article 44 of the Directive Principles of State Policy makes it the duty of every citizen “to uphold and defend this Constitution and the law”; and “to protect and preserve public property and expose and combat misuse and waste of public funds and property.” These demands of the 1992 Constitution place a higher duty on the legal profession and lawyers in practice as handmaidens of the law.

More specific obligations have been placed on public office holders including politicians. It is provided in article 58 (1) and (2), that: the executive authority of Ghana is vested in the President and shall be exercised in accordance with the provisions of this Constitution; and the executive authority shall extend to the execution and maintenance of this Constitution and the laws made under or continued in force by the Constitution. By the Presidential oath scheduled to the 1992 Constitution, the *President swears that having been elected to the high office of President of the Republic of Ghana he will be faithful and true to the Republic of Ghana; that he will at all times preserve, protect and defend the Constitution of the Republic of Ghana; and that he dedicates himself to the service and well-being of the people of the Republic of Ghana and to do right to all*

manner of persons. He further swears or affirms that should he, at any time break this oath of office he will submit himself to the laws of the Republic of Ghana and suffer the penalty for it. (Emphasis supplied)

The oaths of secrecy for Ministers enjoins them to not directly or indirectly communicate or reveal to any person, any matter which shall be brought under their consideration or shall come to their knowledge in the discharge of their official duties *except as may be required for the discharge of his official duties or as may specially be permitted by law.* When one reads the schedule to the 1992 Constitution setting forth the various oaths one cannot fail to be struck by the fact that almost every one of them ends with the words: *“I will uphold, preserve, protect and defend the Constitution of the Republic of Ghana.”* Such repeated emphasis underscores the supremacy of the 1992 Constitution in the face of the breach of the Constitution or any other law by the President, Cabinet Minister, Ministers of State and Deputy Ministers of States; Justices of the Superior Courts; Members of Council of State, Members of Parliament and indeed all other officers taking constitutional oaths. (Emphasis supplied).

The view I take of the importance of these constitutional oaths to the spirit of the 1992 Constitution embodied in the preamble words of “Freedom, Justice, Probity, and Accountability” and article 88 imposing responsibilities upon the Attorney-General and all in-house counsel working with him is that they have a supreme responsibility to prevent those bonded by the oaths from abusing their offices or using their offices in a manner not consistent with the 1992 Constitution and laws of Ghana. Maintaining the dignity and honour of the legal profession and the in-house counsel’s personal dignity as a lawyer have formed part of the code of conduct and etiquette of the Legal Profession in Ghana over the years but sadly because we prefer to protect our remunerations and benefits our employers give us, we aid them to engage in conduct inconsistent with or in contravention of the 1992 Constitution. Self-interest as a reason for not enforcing one’s professional duties cannot by any stretch of imagination be a dilemma. It is misconduct pure and simple.

It follows from the foregoing that apart from the general obligations imposed on citizens generally, in-house counsel in the public service assume additional responsibilities of fidelity to the 1992 Constitution and the law in discharging their legal duties to the corporate employer-client. It is in consequence of this that in-house counsel working in the public services of Ghana are protected under article 191 of the 1992 Constitution from being victimized or discriminated against for having discharged his duties faithfully, in accordance with this Constitution; or dismissed or removed from office or reduced in rank or otherwise punished without just cause. It is on this reasoning that I take the view that in-house counsel in the Attorney-General’s Office and other public corporations ought not to be able to plead any dilemmas of loyalty and confidentiality to the President, Ministers of State, Corporate Chief Executive Officers, etc because their loyalty and confidentiality is to the Republic of Ghana and not to particular occupants of public offices. In this connection, the State Secrets Act, 1962, talks of acts prejudicial to the Republic and not any individual. In any case the State Secrets Act is subordinate to the

1992 Constitution and cannot take away obligations imposed on citizens by the 1992 Constitution.

The foregoing examination, review and discussions of the constitutional provisions on the duties of citizens generally and of various categories of public office holders to preserve, protect and defend the 1992 Constitution of Ghana is a call to every Ghanaian to put Ghana First in whatever profession or occupation he is engaged or employed in. They place upon in-house counsel generally and public in-house counsel particularly the “gatekeeper” and “corporate moral conscience” role of the onerous responsibility to protect and expose all forms of wrong doing and corporate malpractices prohibited under the laws of Ghana.