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APPOINTMENT OF OFFICERS IN THE NACENT TECHNICAL UNIVERSITIES IN GHANA: A BREACH OF LEGAL AND STATUTORY PROVISIONS

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Abstract

The period of 2016-2020 saw the migration of 10 Polytechnics within the Republic of Ghana into Technical Universities. The Universities were birthed through the Technical Universities Act, 2016 (Act 922) and Technical Universities (Amendment) Act, 2018 (Act 974). The Transitional Provisions of Act 922 under section 42(6) provide that persons in the employment of a polytechnic in existence immediately before the coming into force of this Act, shall be deemed to have been duly employed by the respective Technical University… The paper takes a cursory look at the state of advertisements and appointments of some officers within the Technical University system which appears contrary to the transitional provisions. It is observed that appointments of some officers are being carried out which appears a breach of the law and total disregard for the dictates of the governing statutes or rather ignorance of the law.

The paper recommends that GTECH, Governing Council, Administrators, and managers of Technical Universities, must respect the supremacy of the law regulating their affairs and submit to its dictates in its operations. This would be the only way to avoid a mountain of legal tussles before the courts and the frustration of academic and institutional progress within the Technical University System.

Keywords: *Ghana, Technical Universities (TUs), Transitional Provisions, shall be deemed, Standardised Statutes and Scheme of Service for Technical Universities*

Introduction

The migration of Polytechnics into technical universities started from 2013 by the Government of Ghana. It took full force in the 2016-2017 academic year with only six Polytechnics, namely the Accra Technical University, Takoradi Technical University, Ho Technical University,

Koforidua Technical University, Kumasi Technical University, Sunyani Technical University, Takoradi Technical University occasioned by the enactment of the Technical Universities Act, 2016 (Act 922). Cape Coast Technical University and Tamale Technical University were converted under the Technical Universities (Amendment) Act, 2018 (Act 974). And the Bolgatanga Polytechnic and Wa Polytechnic, became technical universities in 2020 by virtue of Technical Universities (Amendment) Act, 2020 (Act 1016).

This transition into Technical Universities (TUs)came with its challenges. One critical challenge has to do with their collaboration with Ghana Tertiary Education Commission (GTECH) formerly known as the National Council for Tertiary Education (NCTE) in the smooth implementation of directives issued for successful transition and operationalization by the latter.

Some of the directives from GTECH have met stiff opposition from Union leaderships of the various union groups on the campuses of the TUs. It appears that these differences are rooted in the legal comprehension or conflict of statutes. It may well be a matter of confusion as to a well thought-through established administrative process for the TUs, a misunderstanding or misapplication of the regulatory/statutory provisions by GTECH. This has given birth to the eruption of regular acrimony and disputes between the Governing Councils of Tus, managers and administrators and staff on procedures, placements, renumerations among others.

The main focus of this paper is based on the directive from the GTECH which instructed the TUs to advertise the positions of the Directors of Works and Physical Development as well as the Directors of Internal Audit without recourse to the relevant governance documents.

TRANSITION PROCESS FROM POLYTECHNICS TO TECHNICAL UNIVERSITIES

New enactments usually have mechanisms contained therein to ensure continuity or the beginning of the new orders or regimes they create. One of such mechanisms is the provision of transitional provisions (G.A Allotey, 2019)[1].

The conversion of Polytechnics to Technical Universities in Ghana has been affected by several legal battles, most of which have not been in the overall interest of the nascent Technical Universities. In order to avoid the creation of a vacuum in the system, the Technical Universities Act 2016 (Act 922) provided for transitional provisions under Section 42(6). The framers of Act 922 in our opinion, deemed it imperative to make room for the smooth transition from the Polytechnics to Technical Universities. Foreseeably, most of the legal tussle, centre around the transitional provisions.

This has necessitated the writing of this paper, to interrogate the subject matter within the frame of the law and attempt to provide some opinion in the form of advice to the governing

[1] Godwin Akweiteh Allotey, 'Transitional provision, 'shall be deemed' must apply to technical universities staff' (Accra, 25 April 2019) <https://citinewsroom.com/2019/04/transitional-provision-shall-be-deemed-must-apply-to-technical-universities-staff-article/>

Councils of the Technical Universities and Ghana Tertiary Education Commission (GTECH) in the light of the issuance of directives and implementation of same.

Transition means the process or a period of changing from one state or condition to another; the meaning as elucidated gives credence to the process of conversion of the Polytechnics in Ghana into Technical Universities.

Transitional provisions are, therefore, meant to ensure continuity in new enactments without unnecessarily creating lacunae or vacuum. One of such important provisions is the '*Shall be deemed*' clause. This is provided under Section 42(6), which states that "A person in the employment of a polytechnic in existence immediately before the coming into force of this Act, shall be deemed to have been duly employed by the respective Technical University established under this Act on terms and conditions attached to the post held by that person before the coming into force of this Act"

Legislative framework and Case Law

This is strengthened by case law, as in the famous and celebrated cases of Tuffour v. Attorney-General [1980] GLR 637-66 [Apaloo Case][2] and that of the Ghana Bar Association v Attorney-General (1995-96) [Abban Case][3] of the Supreme Court of Ghana.

The Supreme Court, in the Tuffour v. Attorney-General, was tasked to interpret the meaning of the clause '*shall be deemed*' in the Transitional Provisions of the 1979 Constitution of the Republic of Ghana, in relation to the appointment of Justice Kwasi Apaloo as the Chief Justice. In Tuffour v. Attorney-General, prior to the enactment of the 1979 Constitution, the highest Court in Ghana was the Court of Appeal, made possible as a result of the military regime which toppled the constitutional government. With the coming into force of the 1979 Constitution and its subsequent creation of the Supreme Court, the 'shall be deemed' clause was employed to transition the Judges of the Court of Appeal to the Supreme Court. The said provisions are captured in Article 127(8 &9) as clause 8 provided that:

> "Subject to the provisions of clause 9 of this article, a Justice of the Superior Court of Judicature holding office as such immediately before coming into force of this Constitution shall be deemed to have been appointed as from the coming into force of this Constitution to hold office as such under this Constitution.
> Clause 9, A Justice to whom the provisions of clause 8 of this article apply shall, on the coming into force of this Constitution, take and subscribe the oath of allegiance and the judicial oath set out in the Second Schedule to this Constitution."

In the decision of the Supreme Court, their Lordships indicated that "The duty of the court in interpreting the provisions of Article 127 (8) and (9) was to take the words as they stood and to give them their true construction having regard to the language of the provisions of the Constitution, always preferring the natural meaning of the words involved, but nonetheless giving the words their appropriate construction according to the context. Thus, the phrase

[2] Bimpong-Buta, S.Y., 2005. The role of the supreme court in the development of constitutional law in Ghana., at pg. 66 – 67.
[3] Ibid (n 2) at 67

"shall be deemed" in article 127 (8) (a legislative device resorted when a thing was said to be something else with its attendant consequences when it was in fact not) had been employed and used in several parts of the Constitution and thus an aid towards ascertaining its true meaning. Dicta of Lord Radcliffe in St. Aubyn V. Attorney-General [1952] A.C. 15 at p. 53, H.C. and of Viscount Simon L.C. in Barnard V. Gorman [1941] A.C. 378 at p. 384, H.L. applied."

Their Lordships expressed that "applying the meaning of the word 'deemed' to section 1 (1) of the transitional provisions to the Constitution, it meant that though the First President was not appointed under the Constitution, he should for all purposes exercise all the functions of the President as if he had been so appointed under the Constitution. But for that provision, he would have had to stand for fresh elections. It was the same meaning attachable to the provision in section 2 (1) of the transitional provisions relating to a member of Parliament elected before the coming into force of the Constitution. It was by virtue of that provision that a member of Parliament was considered as having been elected under the Constitution when, in fact, he had not been so elected.
Similarly, applying the definition of 'deemed' to article 127 (8), a justice of the Superior Court of Judicature (that one composite institution) holding office as such immediately before the coming into force of the Constitution should continue to hold the office as if he had been appointed by its processes. The Chief Justice was a member and Head of the Superior Court of Judicature. He was a member of the class of persons or justices referred to in article 127 (8)".

With the coming into force of the 1979 Constitution, in the case of Tuffour v. Attorney-General supra, the incumbent Chief Justice, Mr. Justice Fred Kwasi Apaloo, was purported to be nominated as Chief Justice by the President of the Republic of Ghana in consultation with the Judicial Council. Parliament purported to 'vet' the said Mr. Apaloo in Parliament and subsequently rejected his nomination. The plaintiff, Dr. Kwame Amoako Tuffour, invoked the original jurisdiction of the Supreme Court under Article 118(1) (a) of the 1979 Constitution. The plaintiff sought a declaration that, upon the coming into force of the 1979 Constitution, Mr. Apaloo was deemed to have been appointed Chief Justice of the Republic and as such became president and member of the Supreme Court. He also prayed to the Court that the purported vetting and rejection by Parliament were in contravention of the Constitution, 1979 and were, therefore, all null, void, and of no effect. The plaintiff, therefore, sought a declaration that Mr. Apaloo remained Chief Justice of the Republic and President of the Supreme Court.

On the substantive matter, the lead counsel for the plaintiff submitted that with the coming into force of the 1979 Constitution, a new order was created. And for there to be continuity between the old and new orders the framers put in place schemes by which certain officeholders were deemed to have been appointed into the equivalent offices upon the coming into force of the Constitution.

To him, one such scheme was articles 127(8) and (9) of the Constitution, 1979. Further, he forcefully argued and urged upon the Court that upon a true and proper construction of Article 127, those Justices of the Superior Court of Judicature who held offices on 23rd

September 1979, retained their offices upon their taking the oaths referred to in the Second Schedule. The lead Counsel for the plaintiff, in his argument, stated that Mr. Justice Apaloo who was the Chief Justice of the Republic became the Chief Justice under the 1979 Constitution. And thus, having been pronounced Chief Justice by the Constitution itself, it was incompetent for him to be nominated, endorsed, and subjected to parliamentary approval.

The Supreme Court, upon the lucid argument of the Lead Counsel for the plaintiff, held that the incumbent Chief Justice became the Chief Justice after the coming into force of the Constitution, 1979. The Court, in arriving at this conclusion, carefully weighed the interpretation of the clause 'shall be deemed' contained in clause (8) of Article 127 of the Constitution, 1979. The Court was of the view that their first duty was to give the words their true construction always preferring the natural meaning of the words involved, but also giving the words their appropriate construction according to the context as enunciated in Barnard v. Gorman [1941] A.C. 378.

The Court emphasized that 'shall be deemed' was a legislative device used to say a thing is something else that is, in fact, is not. St. Aubyn v. Attorney-General [1952] A.C. 15 was cited by the Supreme Court as giving the clause 'shall be deemed' its true meaning. This clause was also used to give the first President and the first Parliament of the third Republic their legitimacy under the 1979 Constitution as though both the President and Parliament were elected under the Constitution. This legal principle was also true of public officeholders and it consequently applied. The Court established clearly that,

> It is this clause that the 1979 Constitution used in article 127(8) to hold that the Chief Justice was appointed as Chief Justice under the 1979 Constitution as if he went through the process laid down in it. This was the intention or purpose of the framers of the Constitution. Therefore, Mr. Justice Fred Kwasi Apaloo was the Chief Justice of the Republic of Ghana under the 1979 Constitution; he automatically became a member of the Superior Court (and therefore any court) and the head of the judiciary.[4]

Section 8 of the Constitution of the Republic of Ghana 1992, also made provisions for transition.

Similarly in the Ghana Bar Association (GBA) v Attorney-General (1995-96) [Abban Case], about 15 years later, the Supreme Court was confronted with a similar legal question, which arrived at the same conclusion. The Supreme Court indicated that the claim that the plaintiff, the GBA, who sought a declaration that Justice Abban whose appointment as C.J had been approved by parliament was not a person of high moral character and proven integrity, if successful, would result not only in removing him as the C.J but also in removing him completely from the bench. The Court, therefore, held, like the Tuffour case that, the special procedure specified in article 146 of the 1992 constitution for removing a judge of a superior court from office, must be invoked and not based on the procedure of appointment since Justice Abban became the Chief Justice of Ghana by the due process of law since he had

[4] Emphasis

held the identical or equivalent office before the coming into force of the1992 Constitution for which he "shall be deemed to have been appointed".

The Supreme Court speaking through Edward Wiredu JSC submitted unequivocally that:

> We[5] should not by any means open the floodgates so wide as to circumvent what is not properly cognisable in the courts under the Constitution. The Supreme Court does not have original concurrent jurisdiction with the body empowered to exercise jurisdiction on matters properly falling within the parameters of article 146. *We as judges must not arrogate to ourselves powers we do not have... We should recognise the initiations imposed on us by the Constitution.*

It is our considered opinion founded on this sound trite legal position and reasoning; similarly, that it should not appear that the Ghana Tertiary Education Commission (GTECH) nor Governing Councils of TUs are exercising power not within their jurisdiction as provided by the Technical Universities Act 2016 (Act 922), but strictly operating within their mandate under confines and dictates of the law.

Legislative framework in the conversion of Polytechnics to Technical University

In the conversion of the Six (6) Polytechnics to Technical Universities under the Technical Universities Act 2016 (Act 922), the drafters of Act 922 brought to bear the above legal issues settled in the Apaloo Case and Abban Case respectively, in order to aid the smooth transitional process which is reasonably fair and just without leaving a vacuum, thereby establishing a cogent legal principle which is trite.

This is stated in Section 42(6) of the Technical Universities Act, 2016 (Act 922) in respect of workers of the then Polytechnics who were being transitioned into the Technical Universities as thus:

> "A person in the employment of a Polytechnic in existence immediately before the coming into force of this Act, "SHALL be deemed" to have been duly employed by the respective Technical University established under this Act on the terms and conditions attached to the post held by that person before the coming into force of this Act."

The drafters of the Technical Universities Act, 2016 (Act 922) employed the clause 'shall be deemed' in reference to the status of the employees of the six (6) polytechnics which were converted to Technical Universities.

In 2016, Act 922 established Six (6) Technical Universities that were hitherto, Polytechnics and in 2018, the amendment to the Act (Act 974) added two additional Polytechnics to the list of Technical Universities. It should, however, be put on record that all the other polytechnics have been converted to Technical Universities. Act 922 had the force of Parliament to convert the Six (6) Polytechnics into Technical Universities. The transition from Polytechnics to Technical Universities was wholistic, both in terms of physical and human resources.

[5] the Court

The enactment specifically made mention of the status of the employees of the polytechnics as employees of the Technical Universities with the coming into force of the Technical Universities Act 2016 (Act 922). Thus, the transition of workers from the Six (6) polytechnics to Technical Universities was secured with all the conditions that were hitherto attached to the positions that were once held during the polytechnic era.

In order to fulfill all righteousness, the National Council for Tertiary Education (NCTE – now GTECH), based on its own approved standards, as a regulator of tertiary education in Ghana, conducted both staff and infrastructural audits and approved the worthiness and readiness of six (6) out of the ten (10) polytechnics for conversion to Technical Universities.

Advertisement of the Position of the Directors and Administrative Implications

They seem to appear some inconsistencies between the governance documents such as the Technical Universities Act 2016 (Act 922) and Technical Universities (Amendment) Act 2018 (Act 974), Scheme of Service for Staff of Technical Universities (© NCTE, 2019), and some decisions of the governing Councils. The attention of the Governing Council of Technical Universities is, therefore, drawn to this breach bordering within the advertisement of vacancies in respect of the following positions:

a. Director of Internal Audit
b. Director of Works and Physical Development

In determining the legal question of whether or not the above offices require advertisement or whether officers who held similar or identical positions before conversion from Polytechnics into TUs ought to hold same, calls to attention Section 42(6) of Technical Universities Act 2016. This states that:

> *"A person in the employment of a Polytechnic in existence immediately before the coming into force of this Act,* SHALL be deemed *to have been duly employed by the respective Technical University established under this Act on the terms and conditions attached to the post held by that person before the coming into force of this Act.*

It is our considered opinion that, for example, the status of the Directors of Internal Audit and Directors of Works and Physical Development as employees of the Takoradi Technical University just as any TUs was guaranteed upon conversion from Polytechnic to Technical University.

The category of Officers whose continuity as employees were not guaranteed in the form of accrual in respect of the provisions in the amendment to Act 922 were termed 'Key Officers'.

It appears GTECH may have lost sight of the true position of the law or side-stepping the law; however, the state of affairs is that the affected 'Key Officers' may have been caught up with acquiescence. It is of little importance here rather than engaging in legal and academic

gymnastics. However, we do not have to wait to be denied getting the right things done as a result of '*acquiesce and laches*'.

However, assuming without admitting that the Technical Universities (Amendment) Act, 2018 (Act 974) is consistent with the established position of law, the 'Key Officers' mentioned in Act 974 did not include the Director of Internal Audit and the Director of Works and Physical Development.

'Key Officer' has been defined to include the Vice-Chancellor, the Pro-Vice-Chancellor, the Registrar, and the Director of Finance.

It is our understanding that it cannot, therefore, be suggested by GTECH or any Council of TU or any entity or person(s) to view or broaden the definition or redefine 'Key Officers' to include employees who were not specifically mentioned in the principal and amended enactments (Acts). The law remains the law and not what one thinks it ought to be, you do not have to read your personal meaning into it, if you have any challenge, you approach the Supreme Court for interpretation as they are clothed with the jurisdiction when it comes to the interpretation legal statutes and legal instruments.

The Latin Maxim, "*generalia specialibus non derogant*", meaning, for the purposes of interpretation of two Statutes (Acts/Legislations) in apparent conflict, the provisions of a general Statute (Act/Legislation) must yield to those of a special one. This maxim is very helpful in the instance issues under discussion.

Specifically, the Technical University Act 2016 (Act 922) was specific to the Six Polytechnics which were converted to Technical Universities in 2016. A later amendment to the Act cannot take retrospective effect to undo what the principal enactment did.

POSITION OF THE SCHEME OF SERVICE

Appointment of Directors of Internal Audit

The Scheme of Service states clearly that ''Vacancy shall be advertised.'' Appointment to the position of Internal Auditor shall be through a competitive interview and as provided for in the Technical Universities Act, (Act 922) and in the Guiding Statutes. In addition, applicants shall be required to produce a write-up on work done at the current grade, based on work output for two (2) External Assessors' evaluations.

Appointment of Director of Works and Physical Development

A vacancy shall be advertised and qualified applicants may be considered for appointment. In both, the appointments of the Directors of Internal Audit, as well as Directors of Works and Physical Development, the Scheme of Service for Staff of Technical Universities (© NCTE, 2019), states the prerequisite for appointment as *availability of vacancy*. A vacancy can only be created through resignation, dismissal, death, ill-health, or vacation of post for ten (10) conservative working days without reasonable excuse or by operation of law.

None of the events mentioned above (resignation, dismissal, death, ill-health, vacation of post for ten (10) conservative working days without reasonable excuse or by operation of law) have

occurred[6] at the Technical Universities to warrant vacancy advertisement in respect of the two (2) positions listed above, in the case of Takoradi Technical University.

The terms and conditions attached to the post held by the persons occupying same as Directors of Directorate of Internal Audit and the Directorate of Works and Physical Development, as employees of the Polytechnic before the coming into force of the Technical Universities Act, 2016 (Act 922) and Technical Universities (Amendment) Act, 2018 (Act 974) were guaranteed by the Technical Universities Act, 2016 (Act 922) and Technical Universities (Amendment) Act, 2018 (Act 974) upon conversion to Technical Universities.

Recommendations

Firstly, observation is placed on the consideration of Section 10 of Technical Universities (Amendment) Act, 2018 (Act 974) which states that:

> "(6) A person in the employment of a polytechnic in existence immediately before the coming into force of this Act, (Act 974), shall, SUBJECT to the requirements of the Standardised Statutes and Scheme of Service for the Technical University, be deemed to have been duly employed by the respective Technical University established under this Act"[7]

The contradiction here is that there is no operational document Known as Standardised Statutes in existence in all the Technical Universities.

Secondly, it must be noted that there is no document known as "the Standardised Statutes and Scheme of Service for Technical Universities". Once Act 974 mentioned the Standardised Statutes and Scheme of Service for Technical Universities, it meant one document. If Act 974 had referred to "*the*" Standardised Statutes and "*the*" Scheme of Service for Technical Universities, it then would have meant two different documents.[8]

Hence the need to take immediate steps in establishing these Standardised Statutes and Scheme of Service for Technical Universities anticipated by the Act to facilitate the smooth running of the TUs.

Furthermore, Section 10 of Act 974, by implication, means that all other employees of the Technical Universities are interim (with the exception of the Vice-Chancellor, Pro-Vice-Chancellor, Registrar, and the Director of Finance whose appointments have been made subject to the provisions of Section 10 of Act 974).

We respectfully use this medium to advise the governing Councils and the Management of the TUs as well as the GTECH to engage their legal Officers to study and advise on policy documents so as to avoid the inclusion of positions that may have legal defects that can engender litigations in the administration and management of the TUs.

[6] at the period under consideration
[7] Emphasis ours
[8] Emphasis ours

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The Scheme of Service for Staff of Technical Universities © NCTE 2019

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