AYINE &
PARTNERS
LEGAL CONSULTANTS

June 14, 2021

The Administrative Secretary
General Legal Council
P. O. Box 179
Accra

Dear Sir or Madam:

RE: CONDUCT OF MR. DOMINIC AYINE, ESQ.

I refer to your letter dated May 31, 2021 with reference number DC.74/2021/2 on the above subject matter and wish to acknowledge receipt of same. Attached to your said letter is another letter dated May 25, 2021 with reference number SCR.76/Vol 88 from the Judicial Secretary to the Chairman of the Disciplinary Committee of the General Legal Council ("the Council"), requesting that I be investigated by the Committee for statements I am alleged to have made. The Judicial Secretary stated categorically that the petition to investigate me is at the instance of His Lordship the Chief Justice. In other words, the Chief Justice is the complainant in this matter. Also attached to your letter for the attention of the Chairman of the Committee is an article published online by Myjoyonline.com on May 6, 2021, titled "Dominic Ayine questions independence of the judiciary."

I have carefully read the contents of the complaint to the Committee and the attached online article and wish to state without equivocation that the statements I made were at a round-table discussion organized by the Center for Democratic Development (CDD) on the subject of *Presidential Election Petitions and their Impact on Africa's Democracy*. These statements were expressions of my personal opinion on the unreported judgment of the Supreme Court in *John Dramani Mahama v. Electoral Commission & Anor, Writ No. J1/05/2021 (4th March 2021).*

With all due respect to His Lordship the Chief Justice, I wish to state that I stand by the opinion I expressed at the said roundtable discussion. I am firmly convinced that the opinion I expressed neither imperiled the independence of the judiciary nor did it cause any actual or potential harm to the reputation of the individual justices who sat on the case. On the contrary, I was engaged in constructive criticism based on my reading of the unanimous judgment of the Supreme Court in exercise of my constitutionally protected right to freedom of speech. I did so in good faith, without malice or falsehood or recklessness and in furtherance of my responsibility to our country as a lawyer and an academic.

Received by Patience S. Lycan
15th June, 2021

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Background

On April 27, 2021, I was invited via email by the CDD to participate in a roundtable discussion on "Presidential Election Petitions and their Impact on Africa's Democracy" as a member of a panel that the CDD had put together. Attached to the email inviting me was a concept paper which outlined, among others, the objectives of the roundtable discussion. The two objectives of the roundtable discussion were (a) to ascertain how election petitions contribute to strengthening constitutional and democratic institutions in Ghana and other African countries and (b) to generate discussion on structural reforms to strengthen Ghana's electoral systems and democratic practice. I accepted to participate in the roundtable discussion which took place on May 6, 2021. The panelists from Ghana included Yaw Oppong Esq. and Akoto Ampaw Esq. who were both members of the legal team of H. E. Nana Addo Danquah Akufo-Addo, as well as Dr. Maame Abena Mensa-Bonsu and Prof. H. K. Prempeh, both of the CDD. There were panelists from other African countries.

The moderator for the roundtable discussion was Mr. Evans Mensah from the Multimedia Group. The discussion was largely online for most of the panelists, and I had initial technical hitches with my equipment and so got onto the program slightly late. Apparently, the moderator had asked Yaw Oppong Esq., a question as to whether the conduct of the election petition proceedings before the Ghanaian Supreme Court enhanced his confidence in the independence of the judiciary in Ghana. Yaw Oppong Esq., answered the question in the affirmative and no one begrudged him his answer. The same question was thrown to me and I answered in the negative. In other words, I stated that my own (subjective) confidence in the independence of the judiciary did not increase as a consequence of the conduct of the 2020 presidential election petition proceedings. I stated that my hopes of judicial independence in Ghana were dampened by the proceedings and went on to give a number of reasons why that is so.

It is important, in light of the allegation that I said things that were meant to disparage the judiciary, to put on record that I neither asserted that I had evidence of overt or subtle political interference in the work of the justices who sat on the case, nor did I claim that I had evidence of external influences operating on the minds of the judges. Indeed, I categorically denied having such evidence but argued that I was drawing inferences from the general conduct of the case in order to come to the conclusion that my confidence in the independence of the judiciary had been dampened. In sum, my position on whether my personal confidence in the independence of the judiciary was enhanced by the conduct of proceedings during the hearing of the presidential election petition before the Supreme Court was that (a) the justices were not faithful to precedent; (b) the preponderance of unanimous rulings on preliminary applications brought by the petitioner smacked of lack of individual decision-making autonomy by the justices and (c) the court did not sufficiently assert itself in holding the Electoral Commission accountable for its conduct of the 2020 general elections. These observations were limited to the proceedings and the judgment of the Supreme Court and were not meant to be general observations regarding the work of the judiciary. Far from being the case, the foregoing observations were not intended to disparage the judiciary. On the contrary, I thought I was engaged in constructive *ex post facto* criticism of the handling of the petition by the Supreme Court for purposes of contributing to strengthening the judicial arm of our Republic.

Nature and Scope of the Complaint

I am in no doubt that the complaint filed by His Lordship the Chief Justice is one seeking to sanction me for professional misconduct. In terms of section 18 of the Legal Profession Act, 1960 (Act 32) and Rule 1 of the Legal Profession (Disciplinary Committee) Rules, 2020 (LI 2424), a complaint is filed where the person filing the complaint is "dissatisfied with the professional conduct of a lawyer". Thus, the instant complaint is intended to trigger an inquiry into my alleged conduct of making statements that disparaged the judiciary. Though the term "professional conduct" is not defined by the Rules, I am in no doubt that it is conduct in connection with the practice of law. In other words, for a complaint to lie against me, I must have conducted myself in a professional capacity so as to bring myself within the ambit of the rules of discipline.

In the complaint, the Judicial Secretary, acting on behalf of His Lordship the Chief Justice, refers to the fact that the Supreme Court had discharged me "on a charge of contempt for similar comments made against members of the Supreme Court during the Election Petition hearing." The complaint further states that I "apologized profusely" when I appeared before the Supreme Court on the charge of contempt and admitted "having made statements which were unbecoming of a Lawyer of [my] standing and a former Deputy Attorney General."

With all due respect to His Lordship the Chief Justice, I find the reference to the contempt proceedings brought against me by the Supreme Court headed by the complainant and from which I was discharged by their Lordships as an attempt to poison the minds of the members of the Committee against me. Implicit in the reference is the insinuation that I am engaged in a pattern of misconduct, if misconduct it is, for which I must be investigated and penalized. Indeed, the assertion that I made similar comments against members of the Supreme Court during the hearing of the election petition is meant to affirm the recidivist nature of the (mis)conduct that His Lordship the Chief Justice has complained about to the Council.

The central plank of the complaint is that my observations, which I have summarized above, were disparaging of the judiciary and totally unacceptable to His Lordship the Chief Justice and for which reason the Council, through its Disciplinary Committee, is called upon to investigate my (mis)conduct. As stated above, my statements were intended as my contributions to a constructive discussion about presidential election petitions in Africa and their impact on democracy on the continent. I am keenly aware of the importance of an independent judiciary to the sustenance of democracy in Ghana and cannot denigrate the invaluable contribution that the Supreme Court in particular has made to the development of Ghana's democracy. But the Court is not an infallible institution; its judges, being temporary incumbents of that high judicial office, are also not infallible because they are human and I firmly believe that criticism is necessary if both the Court and its judges are to live up to the high standards set by the Constitution and expected of them by citizens. This firm conviction explains why I summoned the courage, despite my earlier troubles with the Court during the pendency of the petition, to criticize the proceedings and the resultant judgment.

I will now proceed to explain why, with due deference to His Lordship the Chief Justice, I am inviting the Disciplinary Committee of the Council not to proceed to hold an inquiry into the complaint.

Reasons Why the Committee Should not Proceed to Hold an Inquiry

1. *My Contribution at the Roundtable Discussion was not Intended to Disparage the Judiciary and did not in fact Disparage the Judiciary*

According to Black's Law Dictionary, the word "disparage" means "1. To speak slightingly of; to criticize (someone or something) in a way showing that one considers the subject of discussion neither good nor important. 2. To degrade in estimation by disrespectful or sneering treatment." In expressing my opinion on the question whether the conduct of proceedings during the Presidential Election Petition hearing enhanced my confidence in the independence of the judiciary, there was no intention whatsoever on my part to disparage the judiciary and no such disparagement resulted from the comments I made.

I have been a practicing lawyer in Ghana for the past 25 years and my practice has substantially involved representation of clients before the courts and tribunals of this country. I have always conducted myself with utmost decorum towards the judges before whom I have had the singular privilege of representing my clients. In the course of my 25 years of law practice, I have never been rebuked for unprofessional or disrespectful conduct by any judge or magistrate and never been reported for such conduct to the General Legal Council.

I have also had the privilege of serving as Deputy Attorney General of this country for 4 years (i.e., from 2013 to 2016) and I carried out the duties of my office with utmost decorum towards the judiciary. Indeed, as Deputy Attorney General, I had the privilege of representing the Attorney General on the Judicial Council and the General Legal Council. I was a passionate advocate for judicial independence and fair treatment of the judiciary by the executive branch of government. The justices and senior lawyers who served with me on these two august bodies would testify to my record in this regard.

Since January 2013, I have been a Member of Parliament for the Bolgatanga East Constituency. I have served in various capacities on the Committee on Constitutional, Legal and Parliamentary Affairs, one of two Parliamentary Committees that deal with matters affecting the legal and justice sectors of our country. I am currently the Chairman for the Committee on Subsidiary Legislation. In these various capacities, I have had to deal intimately with matters affecting the judiciary. On and off the floor of Parliament, I have been an ardent advocate of judicial integrity and independence. When the Right Honourable Speaker of Parliament, Rt. Hon. Alban Sumana Kingsford Bagbin, recently announced to Parliament that he had received a letter from the Secretary to the President communicating the intention of the President to effect budget cuts affecting the judiciary, I rose to my feet and argued strongly against touching the budget of the judiciary. I did so in the belief that the constitutional protection of the financial autonomy of the judiciary must be safeguarded against executive infringement.

I was a senior member of the then Faculty of Law, University of Ghana (now the University of Ghana School of Law) from April 2000 to January 2017 when I took a voluntary retirement due to the exhaustion of my statutory leave of absence from the University. As a law teacher and in the best traditions of that Faculty, I was often quick to supply judgments freshly delivered by the

courts and international tribunals to my students. In some cases, when I felt strongly about a decision of our courts, I criticized such decisions publicly. For example, when the Ghana@50 decision of the High Court came down, not only did I share it with my students of Administrative Law, but I also wrote a candid critique of the judgment which was published in the *Daily Graphic* of September 10, 2010. In the article titled "The Ghana@50 Ruling: Why Justice Marful-Sau is Wrong", I described the reasoning and conclusions of the High Court as "troubling" and argued that: "His Lordship not only misapplied the law but drew conclusions and rendered a decision that effectively deprives commissions of inquiry of their use as tools for holding public officeholders accountable for their actions that might have caused injury to the public welfare." I did so respectfully because I considered myself then and now as a public intellectual with a duty to inform my fellow citizens about the workings of the courts and the legal system as a whole.

The foregoing clearly demonstrates that, in both my private practice as a lawyer and my life in public service, I have always respected the integrity and independence of the judiciary. I have never acted contrary to my belief that no political mileage is gained by a deliberate or reckless act of running down the institutions and officeholders critical to the sustenance of our democracy. Consistent with this belief, I could not have been engaged in the reckless enterprise of disparaging the judiciary on a platform such as the CDD roundtable knowing that people from all over the continent were watching me.

In any case, the actual statements I made cannot be construed as disparaging comments. The constitutional guarantee of the independence of the judiciary is at best described as a nominal guarantee or protection. The question whether and the extent to which the judiciary is independent as a matter of fact is one that can be answered by observing how judges perform their core mandate of adjudicating disputes. Besides overt external political interference by the political branches of government, the best mechanism for assessing the independence of our judges is their judgments. In his book *Reflections on the Supreme Court of Ghana*, Date-Bah JSC states as follows:

> "The value of the independence of the judiciary needs to be internalized by serving judges as well as by the general public. A widespread popular perception and belief that the judiciary is independent are a vital element in earning moral and political authority for the judiciary in general and the Supreme Court in particular. **The judgments delivered by the Supreme Court will in the long run be the principal foundation for an assessment of the Court's independence**. One can reasonably expect that this independence in fact would then be reflected in the perception of the public." (Emphasis mine).

Serving judges may internalize the value of their own independence by drawing on their personal experiences as judges. However, the general public, not sharing that experience, cannot internalize the value of judicial independence in our constitutional democracy without public education through forums such as the CDD roundtable discussion. That public education must be offered by lawyers like myself in recognition of "the important role the profession plays in a free and democratic society….". [See Rule 1(b) of the Legal Profession (Professional Conduct and Etiquette) Rules, 2020, LI 2324].

During the roundtable discussion, and in answer to the question whether my personal confidence in the independence of the judiciary was enhanced by the Supreme Court's handling of the petition

in *Mahama v. Electoral Commission & Anor*, I relied on the judgment delivered by the Court as the "principal foundation" of my assessment of the Court's independence. Judges are independent subject only to the law and that includes the case law determined by the Supreme Court itself. As Barak has observed: "Judicial independence does not mean release from the chains of binding precedent or other judicial instructions that bind the judge. These are part of the law to whose authority the judge is subject."[1] Of course, in making my observations about the lack of fidelity to precedent and settled practices in the judgment of the Supreme Court, I was keenly aware that the Court is constitutionally not bound to follow its earlier decisions and may depart from its earlier decisions "when it appears to it right to do so".[2] I take the view that the discretionary power to depart from its own decisions when the Court deems that it is right to do so must be exercised reasonably and not arbitrarily. In other words, I do not subscribe to the view that our judges are at liberty not to accord sound reasons for their departure from previous judicial decisions that the Constitution enjoins the Supreme Court to treat as *normally binding*.

In my contribution to the discussion, I tried within the limited time given me to develop this point about lack of fidelity to judicial precedent during the hearing of the 2020 Presidential Election Petition in tandem with the principle of consistency in judicial decision-making. The courts as a whole, and individual judges in particular, owe a duty to the people of this country to be as consistent as possible in rendering judgments when confronted with similar facts or situations. Similar facts and situations must not be accorded dissimilar treatment unless there are proper reasons for differential treatment. Therefore, a judge who dissents strongly in a previous case may depart from that dissent in a future case when confronted with similar facts but owes a duty imposed by her judicial oath to say why she is departing from her dissenting opinion. Merely departing from an earlier dissent without reason or in silence may raise suspicions of extrajudicial considerations operating on the mind of the judge at the moment she was making that decision. To give but one example, in the 2012 election petition case, the current Chief Justice and complainant in this matter dissented strongly from the judgment of the majority on several fronts. In his dissenting judgment, Anin-Yeboah JSC (as he then was), took a strong view of the refusal of the Electoral Commission to assist the Court to arrive at the truth and expressed his disappointment in the following terms:

> "I must confess that I was very uncomfortable with the way and manner this highest court of the land was left unassisted by the second respondent Electoral Commission in whose custody the original pink sheets are kept. It appeared from the reports of the official referee that as many as 1,545 of the pink sheets supplied by the petitioners as filed exhibits were not legible. In a serious matter in which the mandate of the entire voters of this country is being questioned through the judicial process one expected the second respondent as the sole body responsible for the conduct of elections to have exhibited utmost degree of candour to assist the court in arriving at the truth. Surprisingly, the second respondent Electoral Commission opted for filing no pink sheets leaving this court unassisted and thereby placing reliance only on the pink sheets supplied to the agents of the petitioners at the various polling stations in issue. *Why the second respondent elected to deny assistance to a court of law in search of the truth in a monumental case of this nature is beyond my comprehension. I think this must be deprecated in view of the constitutional autonomy granted to it to perform such vital functions under the Constitution for the advancement of*

[1] Aharon Barak, *The Judge in a Democracy* (2006), Princeton University Press, p. 76-77
[2] See Article 129(3) of the Constitutionw

our democratic governance. The second respondent strongly resisted an application to produce documents for inspection filed by the petitioners. The Results Collation Form which are in the exclusive custody of the second respondent Electoral Commission were never exhibited; indeed, not a single constituency collation form was before this court. This court was thus left to consider only the pink sheets supplied by the petitioners which were copies of the original." (Emphasis added).

I have taken the time to extensively cite this excellent opinion expressed by His Lordship the Chief Justice in his dissenting opinion in the 2012 presidential election petition because I felt the same way that he felt about the need for the Electoral Commission to assist the court in arriving at the truth. I feel that the greatest downside of the proceedings in the 2020 presidential election petition was the decision to virtually shield the Electoral Commission from assisting the court in arriving at the truth in a monumental case of this nature involving the determination of the validity of a presidential election. In 2012, the Chairperson of the Electoral Commission testified before the Court and subjected himself to cross-examination. In the recent proceedings, the Chairperson did not testify and was protected from exposure to cross-examination, even though allegations of her personal conduct and representations made to agents of the Petitioner, not contradicted by evidence, as well as admitted errors by the Commission, required explanation from her. My point about fidelity to precedent and consistency in judicial decision-making is that, whilst His Lordship is at liberty to depart from his previous position on the question whether the Electoral Commission owes a constitutional duty to assist courts in arriving at the truth in presidential (and other) election petitions, His Lordship equally owes a duty flowing from his judicial oath to give reasons for his departure from that previous position. This is especially the case because, in the 2020 presidential election petition case, the court went to extraordinary lengths in refusing applications filed to unearth evidence in search of the truth. I am not convinced that this time around, the truth was so obvious to the court and to the nation that the constitutional obligation of the Electoral Commission to assist the court in search of the truth had evaporated. On the contrary, the facts made this a stronger case for demanding accountability from the Electoral Commission and its Chairperson.

In my contribution, I expressed the opinion that the Court placed hurdles in the way of the petitioner in eliciting evidence relating to the conduct of the Electoral Commission and that the Court ought to have adopted a more open-minded approach to the issue of evidence. I stand by those statements and do not consider them as disparaging. When a court refuses an application for inspection of documents, for example, the refusal constitutes a hurdle that the applicant must overcome in order to gain access to such evidence. The same is true when the court refuses an application to have a witness called as an adverse witness. There is nothing disparaging of the court in describing the refusal in such terms.

Finally, I also expressed the opinion that the preponderance of unanimous rulings dismissing the petitioner's preliminary applications gave the impression of lack of autonomy in decision-making by individual justices. A cardinal principle of judicial independence is that individual judges are free to rule on matters according to their conscience and in accordance with the authority of the existing law. On a bench of more than one judge, the freedom of any one of the judges to rule according to her conscience may be influenced by the process of deliberation during judgment conferences and there is absolutely nothing wrong with that. The result of such deliberations may be either a unanimous decision or a majority decision with some judges dissenting. Citizens not

seated at the judgment table through the deliberations are also free to draw inferences from the decision outcomes and to express opinions on them. A majority decision may give the impression that dissenting judges exhibited individual autonomy because they parted ways with their colleagues. On the other hand, unanimity may signal the absence of such autonomy. Either way, a citizen who expresses the view that the preponderance of unanimous decisions gave an impression of lack of autonomy in decision-making by individual judges cannot be said to have disparaged the court.

2. *Criticism of Judicial Decision After the Fact Does Not Constitute Professional Misconduct*

The invitation to me by the CDD indicated that they were inviting me because I was a member of the legal team of the Petitioner during the hearing of the 2020 Presidential Election Petition. Indeed, I was introduced as such by the moderator of the roundtable discussion. In participating in the roundtable discussion, it cannot be argued that I was engaged in the practice of law in the strict sense. In other words, I was not in the business of providing legal services on the platform offered me by the CDD.

That said, the opinion I expressed was a criticism of the judgment of the Supreme Court in *Mahama v. EC & Anor* (supra). Such criticism, with all due respect to His Lordship the Chief Justice, is not only permissible in a democratic society governed by law but is the kind that lawyers have a professional duty to undertake by reason of their training. In criticizing the judgment, I stayed within the bounds of professionalism; I was neither scurrilous nor scandalous. I did not impute any ill motives to their Lordships in making my observations about their conduct of proceedings and about their final judgment. My comments were exclusively based on my analysis of the judgment and its implications for judicial independence. In consequence, my statements do not warrant professional discipline for the reasons that follow.

My statements were expressions of opinion about a judgment delivered by the court. I strongly feel that as a legal academic and former Deputy Attorney General of this country, I owe a duty to the people of this country to comment on legal matters for a number of reasons. First, there is no denying that the judiciary forms part of the public services of Ghana and that the judiciary is accountable to the people just as any other public institution. As Justice Frankfurter noted in his dissenting opinion in *Bridges v California*, 314 U. S. 252, 289-90 (1941), "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." The citizens best placed to keep judges mindful of their limitations are lawyers like me who, by reason of our training, can observe and evaluate the deficiencies in the judgments delivered by the courts. As one writer has observed:

> "If judges are arbitrary, if their behavior is improper, if their decisions are not well-grounded in constitutional and legal principles, if their reasoning is faulty, the bar is in the best position to observe and evaluate the deficiencies, to inform the public and to suggest corrections. When lawyers engage in criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced and the public duty of the bar is performed."[3]

[3] See Roger J. Milner, "Criticizing the Courts: A Lawyer's Duty (III)" (2000). *Lawyers and the Legal Profession*. 5

Second, without crossing the line to impugn the integrity of a judge or obstructing the administration of justice, "..lawyers are free to criticize the state of law."[4] In expressing my opinion during the roundtable discussion about the constitutional precept of judicial independence, I did not attack the qualification or integrity of any of the judges. I made no false statements of fact with respect to the judges and did not make any statement recklessly not caring whether it was false. I merely expressed a legal opinion about the state of the law on presidential election petitions and its implications for the independence of the judiciary. I made no attributions either directly or indirectly of external interference in the proceedings designed to influence the outcome. Indeed, I categorically denied having such evidence but based my answer on the preliminary rulings and the judgment of the court. Assuming, without admitting, that the opinion I expressed was incorrect, an erroneous opinion cannot be the basis of a charge of professional misconduct.

3. *My Observations About the Conduct of the 2020 Election Petition Proceedings Constitute Protected Speech within the Ambit of Article 21 of the Constitution*

The opinion I expressed during the roundtable discussion is protected speech in terms of article 21(1)(a) of the Constitution which guarantees the right of every person to freedom of speech and expression. I take the view that my right to freedom of speech and expression is exactly the same as the right to freedom of speech and of expression of every other citizen of Ghana. Criticism of public officials and their performance in public office is at the core of the right to free speech in a democratic society and free speech directed at the judiciary is no exception. In *Ghana Independent Broadcasters Association v. Attorney General and National Media Commission* (Suit No. J1/4/2016), Benin JSC observed as follows regarding the importance of the right to free speech in our democracy:

> "It was not lost on the framers of the Constitution how important free expression was to the development of society. It ensures democratic self-government, informed voting and checks abuses of power. As a voter education tool, free speech is the foundation of democratic self-government. Needless to say it propels and promotes the development of culture, science, art, technology and commerce. It also ensures individual self-development, association and enjoyment of all other rights. **The Constitution is thus a moribund document without the freedom of expression which enables people to talk about infractions thereof and to go to court to seek redress. Thus for democracy to thrive and survive, nothing should be done to stifle this freedom except where the person is said to have gone beyond legitimate boundaries prescribed by the Constitution itself or any other law which is not inconsistent with the Constitution**..." (Emphasis added).

The platform on which I expressed my opinion on the question of the independence of the judiciary was designed to advance discourse on the contribution of presidential election petitions and their impact on democracy in Africa. As noted earlier, the two objectives of the roundtable discussion were (a) to ascertain how election petitions contribute to strengthening constitutional and democratic institutions in Ghana and other African countries and (b) to generate discussion on structural reforms to strengthen Ghana's electoral systems and democratic practice. Such speech is constitutionally protected speech.

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[4] In re Sawyer, 360 U. S. 622, per Brenan J.

I am keenly conscious of the fact that my right to freedom of speech and of expression is not absolute and is subject to the exceptions stipulated under the Constitution and laws not inconsistent with the Constitution. I am further aware that my professional and ethical obligations may serve as legitimate limitations to the exercise of my right to free speech and expression. However, for the reasons that follow, I am convinced that the exceptions to the right to freedom of speech, including the possible limitations that may be imposed by the rules of professional ethics, do not apply in this case.

As I have pointed out earlier, the judiciary is part of the public services of Ghana and may be criticized in the same way that any other public institution or agency of state is criticized. In the words of Justice Frankfurter: "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."[5] In the oft-quoted words of Lord Atkin in *Ambard v. A-G. Trinidad and Tobago* [1936] 1 All E. R. 704 (P.C.): "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

On the face of it, the complaint does not demonstrate that, in contributing to the discussion on presidential election petitions and their impact on democracy, I transcended the bounds of respectful, even if outspoken, criticism of the decision in *Mahama v. Electoral Commission and Anor*. I did not use intemperate or abusive language in putting forth my opinions and I did not degrade or impugn the integrity of the individual justices who sat on the petition by the attribution of any form of misconduct or improper motives to them. In short, on the face of the complaint and the attached report of the roundtable discussion, I stayed within the bounds of temperate and fair criticism of the judgment and the proceedings.

Given the quasi-criminal nature of the disciplinary proceedings, they are certain to have a chilling effect on my freedom of speech if charges are filed after the preliminary inquiry has been conducted by the Committee. However, no legitimate public interest objective would be served by penalizing constitutionally protected speech that is within the bounds of fair criticism of the judiciary as a public service institution. In the circumstances, I invite the Committee not to proceed to hold an inquiry.

Conclusion

I have been at pains to make clear that the opinion I expressed in answer to the question whether my confidence in the independence of the judiciary was enhanced by the proceedings of the Supreme Court in *Mahama v. Electoral Commission and Anor* was in good faith and was meant to provide an alternative insight to the varied views that were expressed by other panelists. My opinion was strongly contested by the other panelists in a veritable marketplace of ideas.

As I have stated in this response, as a lawyer, I have a special responsibility to engage in criticism of the work of the judiciary. By reason of my training and experience, I am better placed than most of my fellow citizens to point out deficiencies in judgments and in the performance by the judiciary of its core constitutional mandate. In and of itself, such criticism of the judiciary does not constitute

[5] In re Sawyer, 360 U. S. 622 (1959) (Frankfurter, J., dissenting)

professional misconduct. As a lawyer, I have the same right to comment on matters of public concern as any other citizen. In other words, I have not waived my basic constitutional right to freedom of speech and of expression by being called to the Bar. I am entitled to exercise the right to freedom of speech subject to the limitations imposed by the Constitution, the Legal Profession Act and the Legal Profession (Professional Conduct and Etiquette) Rules, to the extent that the latter two are consistent with the Constitution. In expressing my views on the independence of the judiciary against the background of the 2020 presidential election petition, I stayed within the bounds of fair and temperate criticism in tandem with my special responsibility as a lawyer in a free and democratic society.

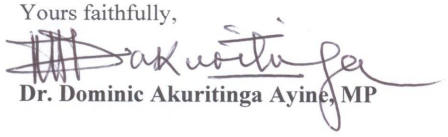
With the greatest respect to His Lordship the Chief Justice, the filing of this complaint may set a retrogressive precedent whereby disciplinary proceedings would be used as a tool to enforce silence from the bar in the name of shielding judges from disparaging criticism by lawyers. As Justice Hugo Black observed succinctly in *Bridges v. California* (supra), pp. 270-271:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. *And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.*" (Emphasis added).

Finally, our progressive march as a constitutional democracy would suffer a grave and decidedly irreversible setback if the Committee were to proceed to hold an inquiry into this matter. Our Constitution and laws protect the integrity and independence of the judiciary and not the sensibilities of judges.

Accept, Madam, the assurances of my highest considerations.

Yours faithfully,



Dr. Dominic Akuritinga Ayine, MP