

THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF CONSTITUTIONAL LAW IN GHANA

by

SETH YEBOA BIMPONG-BUTA

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ABSTRACT

The Theme running through this Dissertation is intended to prove that the Supreme Court has a role to play in the promotion, enforcement and sustenance of a proper democratic system of government, good governance and fundamental human rights and freedoms in Ghana.

The Study would therefore address the role of the Supreme Court in the development of Constitutional Law in Ghana, with particular emphasis on the court's contribution to the underlying concepts of the Fourth Republican Constitution of 1992; the guiding principles of constitutional interpretation and the vexed issue of whether the court should adopt a mechanical and literal approach to the interpretation of the Constitution or adopt a liberal, beneficent and purposive approach. The Supreme Court has asserted in the locus classicus decision: *Tuffuor v Attorney-General* [1980] GLR 637 that the 1979 Constitution as the supreme law, must be construed as a living political document capable of growth. Is there any evidence now to support that claim?

The study shall also investigate the question of the power of the Supreme Court to review legislative and executive action. We shall also examine the role of the Supreme Court in the interpretation and enforcement of the Constitution and Fundamental Human Rights and Freedoms in relation to the rights and obligations of the individual and the State with the view to achieving good governance. The 1992 Constitution itself is founded on the premise that there are limitations to the enjoyment of fundamental human rights and freedoms. What is the extent of such limitations as determined by the Supreme Court?

What has been the Supreme Court's contribution to the sustenance of political stability and democratic governance and, especially, in matters relating to coup d'états and to enforcement of the Constitution itself as distinct from the enforcement of fundamental human rights and freedoms? Has the Supreme Court power to enforce the Constitution and the existing law where there is proven case of injustice and illegality? Has the Supreme Court power to enforce Directive Principles of State Policy as formulated in chapter 6 of the 1992 Ghana Constitution?

TITLE OF THE THESIS

THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF CONSTITUTIONAL LAW IN GHANA

Key terms:

Meaning of Constitutional Law; importance and meaning of democracy and good governance; Underlying concepts of the Fourth Republican Constitution of 1992; Supreme Court and guiding principles of constitutional interpretation; Supreme Court and judicial review of legislative and executive action; Supreme Court and interpretation or enforcement of fundamental human rights and freedoms; limitations on enjoyment of fundamental human rights and freedoms; jurisdiction of the Supreme Court in interpretation or enforcement of the Constitution; principles pertaining to the enforcement of the Constitution.

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TABLE OF ABBREVIATIONS

AC	Appeal Cases (England)
All ER	All England Law Reports
AFRC	Armed Forces Revolutionary Council
BCLR	Bhupathatswana Constitutional Law Reports
Can Bar Rev	Canadian Bar Review
CC	Current Cases (Ghana)
CHRAJ	Decisions of the Commission on Human Rights and Administrative Justice (1994-2000)
CLB	Commonwealth Law Bulletin
CLR	Commonwealth Law Reports (Australia)
CRR	Canadian Rights Reporter
DLR	Dominion Law Reports (Canada)
GBR	Ghana Bar Reports
GG	Gyandoh and Griffiths Ghana Constitutional Cases
GLR	Ghana Law Reports
GLRD	Ghana Law Reports Digest
GR	The Gambia Law Reports
ICLQ	International & Comparative Law Quarterly
LRC	Law Reports of the Commonwealth
LRC (Const)	Law Reports of the Commonwealth (Constitution)
MLJ	Malayan Law Journal
NLC	National Liberation Council
NLPC	Nigerian Law of the Press under the Constitution
NRC	National Reconciliation Commission
NWLR	North Western Nigerian Law Reports
PNDC	Provisional National Defence Council
RGL	Review of Ghana Law
SA	South African Law Reports
SC of India	Reports of the Supreme Court of India
SC of Nigeria	Supreme Court of Nigerian Law Reports
SCGLR	Supreme Court of Ghana Law Reports
SMC	Supreme Military Council
Sri LR	Sri Lanka Law Reports
UGLJ	University of Ghana Law Journal
UKHL	United Kingdom Human Rights Law
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US	United States Law Reports

WILJ
WIR

West Indian Law Journal
West Indian Law Reports

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CHAPTER 1

GENERAL INTRODUCTION AND THE CENTRAL THEME OF THE DISSERTATION

STATEMENT OF THE CENTRAL THEME

I shall in this chapter examine the central theme of this dissertation on The Role of the Supreme Court in the Development of Constitutional Law in Ghana. In that regard, it appears from the decisions and pronouncements by judges in the Supreme Court, which had been established under the Ghana Republican Constitutions of 1960, 1969 and 1979, that their stated objectives had always been the defence of the Constitution, the rule of law and the tenets of democracy as they understand it. Recent decisions of the present Supreme Court since the coming into force of the Fourth Republican Constitution of 1992, project similar objectives. In concrete terms, the court seems to recognize that it has a role to play in the promotion, enforcement and sustenance of a truly democratic system of government, good governance and fundamental human rights and freedoms in Ghana. This is the theme running through the chapters of the dissertation. The role in short is for the court to ensure, in the words of Kpegah JSC in the case of *Amidu v President Kufuor*,¹ “the maintenance of the culture of constitutionalism.” In that same case Kpegah JSC also poignantly said:²

“Every student of the Constitutional Law of Ghana might have felt, after reading the celebrated case of *In re Akoto*, [1961] 2 GLR 523, SC that if the decision had gone the other way, *the political and constitutional development of Ghana would have been different. ‘Different’ in the sense that respect for individual*

¹ [2001-2002] SCGLR 86.

² Ibid at page 138 (emphasis is mine).

rights and the rule of law might well have been entrenched in our land, and we who now occupy this court would have had a well-beaten path before us to tread on in the discharge of our onerous responsibilities imposed upon us by the 1992 Constitution.”

And Adjabeng JSC, in his opinion in the same case of *Amidu v President Kufuor*, also said:³

“It must be noted that our 1992 Constitution has firmly established the rule of law in the country. The Constitution makes it clear that everybody in this country, including His Excellency, the President, is under the Constitution and the law. This is clearly what we mean by the rule of law...And I have no doubt that adherence to this policy will indeed bring about real democracy... and therefore real freedom, justice and prosperity.”

That role had earlier been also succinctly and simply put by Amua-Sekyi JSC in the case of *New Patriotic Party v Attorney-General (31st December Case)*⁴ when, in delivering his opinion in support of the majority decision in that case, he said:⁵ “We have the duty and the right and the power to ensure that the provisions of the Constitution, 1992 are observed.”

It is suggested that the role of the Supreme Court in contributing to the development of Constitutional Law of Ghana is very crucial and challenging. That is because a national constitution such as the previous Republican Constitutions of 1960, 1969 and 1979, and the

³ Ibid at page 175.

⁴ [1993-94] 2 GLR 35, SC.

⁵ Ibid at 123.

present Fourth Republican Constitution of 1992, cannot possibly contain all the provisions governing every aspect of governmental activities. The provisions cannot also capture the life and activities of the individual in relation to the coercive powers of the State. In this respect, it might be observed that the United States Federal Constitution, adopted on 17 September 1787, consists of only seven short articles and 27 Amendments as of 7 May 1992, when the 27th Amendment was ratified.⁶ It has been the distinctive role of the United States Supreme Court to interpret the Constitution which had led to the development of American Constitutional Law. The Ghana Supreme Court has a similar role to play! Wade and Bradley⁷ in their book made the point clearer when they wrote:

“But no written document alone can ensure the smooth working of a system of government. A written document has no greater force than that which persons in authority are willing to attribute to it... Nor can a written constitution contain all the detailed rules upon which government depends.”

Commenting on the central thesis of Professor William B Harvey’s book:⁸ Dr Nana S K B Asante⁹ in an article wrote:¹⁰

⁶ See *United States Government Manual 1993-94* (Washington DC: Government Printing Office 1993)5-20.

⁷ Wade and Bradley: *Constitutional and Administrative Law* (11th ed), A W Bradley and K Ewing ed), Longman Group UK Ltd, 1993 at page 5. See also Foley, *The Silence of Constitutions*, cited by A W Bradley and K Ewing *op cit* as footnote 6 at page 5 for “The Argument that all Constitutions leave important things unsaid.”

⁸ *Law and Social Change in Ghana* Princeton University Press, 1966, Princeton, New Jersey, USA.

⁹ Then a law lecturer in University of Leeds, UK now Legal Consultant, Accra, Ghana and President of the Ghana Academy of Arts and Sciences.

¹⁰ “Law and Society in Ghana” in *Africa and Law* (Hutchison ed), University of Wisconsin Press 1968, Madison and London, at p 121 (emphasis is mine).

¹¹ [1961] 2 GLR 523, SC.

“This work deals primarily with those aspects of Ghanaian public law that ‘structure, channel, allocate and control public power and define the role of the citizen in relation to the power structure.’ The accent is on the development under the Nkrumah regime (1951-1964); and *Professor Harvey’s central thesis is that the basically democratic legacy of the British was ultimately distorted by the emergence of autocratic tendencies in this period.*”

It seems that one cannot justifiably condemn the Nkrumah regime as wholly responsible for the collapse and gross denial of the rule of law and democratic form of government and good governance. It appears the blame may be laid partly at the door of the highly unresponsive Supreme Court under the Constitution, 1960 which in the event, proved itself impotent and thereby regrettably failed in its decision in *Re Akoto*,¹¹ to give teeth to article 13(1) of the First Republican Constitution, 1960 namely, that it provides for fundamental human rights capable of enforcement by the courts.¹² Article 13(1) of the Constitution, 1960 obliged the President to solemnly declare his adherence to certain fundamental human rights including the right that: “Freedom and justice should be honoured and maintained”; and that “no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.”

Chapter 7 examines in detail the decision of the Supreme Court in *Re Akoto* (supra). However, it should be stressed for now that it was the failure or the apparent refusal of the Supreme Court to interpret article 13(1) of the Constitution, 1960 as providing for an enforceable fundamental human right and also for the failure to hold that the Preventive

¹² For a general discussion on the Supreme Court and the enforcement of Fundamental Human Rights and Freedoms: see Chapter 7.

Detention Act, 1958 (No 17 of 1958) was unconstitutional, that contributed to or rather encouraged the denial of fundamental human rights and the erosion of a democratic system of government under the Republican Constitution of 1960. Not surprisingly, the Supreme Court decision in *Re Akoto* has been the subject of scathing criticism by academicians, textwriters and more interestingly by some Justices of the Supreme Court of Ghana established under the present Constitution, 1992. For instance, in his opinion in support of the unanimous decision of the Supreme Court in *New Patriotic Party v Inspector-General of Police*,¹³ Charles Hayfron-Benjamin JSC severely criticized the decision in *Re Akoto*. In his view, the decision “undermined” the very fabric of the Constitution, 1960 and thus pushed aside certain principles and fundamental human and civil rights which has become the “bulwark” of the Constitution, 1992. In the same year 1993, Hon Mr Justice Charles Crabbe, a retired Justice of the Ghana Supreme Court in his book:¹⁴ said of the decision in *Re Akoto*:¹⁵

“That entrenched article [article 13] was believed by some to be unique. It proved to be worthless than the paper on which it was printed. The test came in ... *Akoto v The Minister of Interior*... It was argued that the principles enunciated in article 13 of the Constitution, placed a limitation on the legislative powers of Parliament... The Supreme Court rejected this argument.”¹⁶

¹³ [1993-94] 2 GLR 459.

¹⁴ *Legislative Drafting* 1993 Cavendish Publishing Ltd, London.

¹⁵ *Ibid* at 65.

¹⁶ See also the comment of Dr Kwame Frimpong in (1981-82) 13 & 14 RGL 239 at 240 where he wrote: “Under the Nkrumah era, 1957-66, the independent and impartial judiciary established by the Independence Constitution that the citizen looked up to for the protection of his liberty and fundamental rights, failed him miserably in the *Re Akoto case*.”

Be that as it may, it shall be demonstrated in the analysis of the relevant issues in succeeding chapters of this dissertation, the central theme, namely, that notwithstanding the previous decision in *Re Akoto* (supra), the Supreme Court of Ghana, has had, and still has a laudable role to play in contributing to the rapid and sustained development of Ghana Constitutional Law, the sustenance and enforcement of the democratic system of government, fundamental human rights and good governance. The question is what constitutes constitutional law?

MEANING OF CONSTITUTIONAL LAW

The question was answered by Professor D C Yardley in his book:¹⁷ where he defines¹⁸ constitutional law rather simply as “that law which is concerned with the Constitution of the country.” Yardley goes on to elaborate on the general definition. He writes:¹⁹

“The constitution of any country must comprise the fundamental structure and organization of that country, and that therefore constitutional law is its fundamental, its basic, essential law, whether it be civil, criminal, public or private together with those rules of conduct laid down to govern the exercise of state power by the official organs of the State.”

Earlier on Yardley referred to the definition of “Constitutional Law” by Hood Phillips, namely:²⁰

¹⁷ *British Constitutional Law* (7th ed) Butterworth's, London.

¹⁸ Op cit at page 3.

¹⁹ Op cit at page 4.

²⁰ Hood Phillips, *Constitutional and Administrative Law* (7th ed) at p 5.

“The system of laws, customs and conventions which define the composition and powers of organs of the State and regulate the relations of the various State organs to one another and to the private citizen.”

After examining the issue of what constitutes constitutional law, Yardley concludes that it consists of : the law governing the composition of the national legislature and legislative powers; the composition and functions of the central government; the composition and powers of any subordinate or devolved legislature or executive within the UK; the hierarchy and status of courts of law; the limits of personal liberty and the rights of the individuals; citizenship and status of aliens; status of certain national institutions such as the Armed Forces and the Church; and the relations between the central and local governments.

It is interesting to note that other textwriters such as Wade and Bradley:²¹ define constitutional Law in the same vein as Yardley. The authors define constitutional law as:²²

“That part of the law which relates to the system of government of the country. It is more useful to define constitutional law as meaning those laws which regulate the structure of the principal organs of government and their relationship with each other and to the citizen, and determine their main functions.”

Earlier on Wade and Bradley had succinctly stated the scope of constitutional law-very relevant to our central theme- as follows:²³

²¹ *Constitutional and Administrative Law* 11th ed, A W Bradley and K Ewing (ed).

²² Op cit at page 9.

²³ Op cit at page 1.

“Within a stable democracy, constitutional law reflects the value that people attach to orderly human relations, to individual freedom under the law, and to institutions such as Parliament, political parties, free elections and a free press.”

In discussing the role of the Supreme Court in the development of constitutional law in a country such as Ghana,²⁴ we need to distinguish constitutional law from administrative law. However, as pointed out by Wade and Bradley:²⁵

“There is no precise demarcation between constitutional and administrative law ... [which] may be defined as the law which determines the organization, powers and duties of administrative authorities. *Like constitutional law, administrative law deals with the exercise and control of governmental power. A rough distinction may be drawn by suggesting that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law is concerned with the work of official agencies in providing services and in regulating the activities of citizens.*”

Wade and Bradley also discuss the functions of administrative law and conclude that:²⁶

“Administrative law serves to ensure that public authorities take their decisions in accordance with the law; it is also a means of promoting the accountability of public authorities and of securing some public participation in their decisions.”

²⁴ With special reference to the issues raised in chapters 5 and 6.

²⁵ Op cit at page 10 (emphasis is mine).

²⁶ Op cit page 604.

In the light of the above, the definition and the scope of Ghana Constitutional Law may be stated in general terms as including constitutionalism within the context of this thesis and also as embodying the law provided by the Fourth Republican Constitution, 1992 relating to: citizenship (chapter 3); the laws of Ghana (chapter 4); fundamental human rights and freedoms (chapter 5); the right to vote (chapter 7); the exercise of executive, legislative and judicial powers (chapters 8, 10 and 11 respectively); freedom and independence of the media (chapter 12); the Public Services, The Police Service, The Prisons Service and Armed Forces of Ghana (chapters 14,15,16 and 17 respectively); State institutions such as Commission on Human Rights and Administrative Justice, National Commission for Civil Education, decentralization and local government and chieftaincy (chapters 18,19,20 and 22 respectively); lands and natural resources (chapter 21); and amendments of the Constitution (chapter 25).

Flowing from the statement of the central theme of the dissertation and having examined the definition and scope of Ghana Constitutional Law, the question may be put as to what is meant by democracy and good governance, being important attributes which are to be promoted, enforced and sustained by the Supreme Court in the exercise of its constitutional role.

IMPORTANCE AND MEANING OF DEMOCRACY AND GOOD GOVERNANCE

The term “democracy” and its twin sister “good governance” have attained both national and global significance and meaning. In his 2000 Report to the Commonwealth Heads of Government entitled: “Continuity and Renewal in the New Millennium” excerpts of which were published in *Commonwealth Currents*,²⁷ the Commonwealth Secretary-General, Don McKinnon, expressed the belief that:²⁸

“The promotion of democracy and good governance is the key to improving people’s lives and that the growing gap between rich and the poor is the most powerful destabilising force and the greatest threat to democracy.”

It is respectfully agreed; but it should be further observed that an even greater threat to democracy is the injustice meted out to citizens by the application of the laws and the legal system in developing countries like Ghana. As shall be later demonstrated and argued,²⁹ it is the duty of the Supreme Court as the highest constitutional court in developing countries like Ghana, The Gambia and Nigeria to strike out such laws as are unconstitutional and unenforceable.

The importance of democracy and good governance cannot be overemphasized! Thus the world’s leading industrial nations have tied economic aid to good governance. Hence, the

²⁷ Issue No 3, 2001, Commonwealth Secretariat, London.

²⁸ Ibid at pp 4-5.

²⁹ See chapters 7 and 8 respectively on Supreme Court and Enforcement of the Constitution and Fundamental Human Rights and Freedoms as distinct from enforcement of the Constitution itself.

issue of democracy and good governance was on the agenda at the Summit Meeting of the Leaders of the World's Richest Nations (G8) held in Calgary, Canada in June 2002. At the meeting which ended on 30 June 2002, the Leaders of the G8 signed an agreement: *The G8 African Action Plan*, with four African Heads of State, in response to an Initiative by African Nations called The New Partnership for Africa's Development (NEPAD).³⁰ As published in *The Gambia News & Report*,³¹ *The G8 African Action Plan* promised benefits for African nations "whose performance reflects the NEPAD commitments." One of the four main points of the Action Plan is: "An offer to work towards spending half or more of the G8's annual new development aid – about US \$6bn on African nations that govern justly." And much earlier on, Professor Claude Ake, a Nigerian political economist, had observed:³²

"In the realm of bilateral relations, the West has already agreed to use its leverage over development assistance, aid, and investment to encourage support for human rights and democracy. The US Congress has indicated that its limited aid will be awarded to 'newly, forming democracies and not wasted on autocratic regimes.'"

³⁰ Namely, President Olusegun Obasanjo of Nigeria; President Abdelaziz Boutaflika of Algeria; President Thabo Mbeki of South Africa and President Abdoulaye Wade of Senegal. Earlier in February 2002, the British Prime Minister Tony Blair undertook a four-day historic visit to West Africa: Nigeria, Ghana, Sierra Leone and Senegal. On that occasion, he expressed strong sympathy and showed enthusiasm for Nepad: see *West Africa*, Africa Weekly, 18-24 February 2002, Issue at page 9. Closely associated with the Nepad concept is what has been described by the African Union (AU) as the African Peer Review Mechanism (APRM). Opening the Ghana stakeholders forum on the APRM, Accra on May 27, 2004, the Vice-President, Alhaji Aliu Mahama described the APRM as a national strategic intervention which, if properly harnessed, would strengthen Ghana's democracy: see on this, *Daily Graphic*, May 28, 2004, front page.

³¹ Gambia Weekly Newspaper, Vol 11, No 21, 9-15 July 2002 at p 14.

³² See Claude Ake, "Re-thinking African Democracy" in Larry Diamond and Marc F Plattner eds, *The Global Resurgence of Democracy* (1993) The Johns Hopkins University Press at p 77.

The same author³³ quoted the former British Foreign Secretary, Douglas Hurd, as saying that “Britain’s assistance will favour countries tending toward pluralism, public accountability, respect for the rule of law, human rights, and market principles.”

Different meanings of democracy

It should be stressed that what is democracy and its attributes is of great interest to Ghanaians. Thus the majority of the people of Ghana have, through their massive participation in the 1992 and 1996 Parliamentary and Presidential Elections and the earlier Referendum on the Draft 1992 Constitution and the latest December 2000 Parliamentary and Presidential Elections, embraced the democratic system of government as preferable to autocratic, authoritarian, dictatorial or tyrannical rule.³⁴ No wonder the international community has praised Ghana for adopting a democratic system of government. Thus at a breakfast meeting held in honour of the former President, Fl Lt J J Rawlings and his delegation at the State Department in Washington during the President’s three-day official visit to the United States in February 1999, the former US Vice-President, Al Gore, commended Ghana not only for her role in peace-keeping efforts in Africa and other parts of the world, but also for the re-birth of democracy and freedom in Ghana.³⁵

³³ Ibid.

³⁴ See eg a national newspaper, *Daily Graphic*, 5 February 1994, where the former President of Ghana, Fl Lt JJ Rawlings, was quoted as calling on friends of Ghana in the international community to help sustain her democratic culture to enhance the living standards of her people. This democratic culture was defined as “the culture of discussing issues fully and reaching consensus with or without institutional opposition.”

³⁵ See *Daily Graphic*, 27 February 1999 Issue front page.

The question, however, remains as to what is meant by democracy? There is no universally agreed definition of what constitutes democracy. It is for this reason that I would like to adopt the observation made in 1980 by Professor Kwame Wiredu in his Anniversary Address organised by the Ghana Academy of Arts and Sciences, when he said: ³⁶

“In spite of the fact that almost everybody professes a love for democracy, trying to say just what democracy is, is notoriously difficult. The problem is not only or principally due to the circumstance that the lovers of democracy include people of the most diverse and incompatible ideologies.”

The late Professor E A Boateng makes the same point in his book:³⁷ where he wrote:³⁸

“So strong has this dominance [the idea of democracy] become that even the most undemocratic countries either claim to be democratic or to be aspiring toward the establishment of democratic forms of government for their people. It is difficult to think of any country today which is prepared to admit that it has no belief in democracy even as a long term goal. More often than not, countries that still operate undemocratic forms of government seek respectability and acceptance by the international community by suggesting that democracy is of many kinds and that the particular forms they follow happen to be different from the Western model which may be suitable for the countries of Western Europe but not necessarily for all other countries.”

³⁶ “Democracy and Human Rights” in *Human Rights and the Democratic Process* 1993 at p 14.

³⁷ *Government and The People’s Outlook for Democracy in Ghana*, The Institute of Economic Affairs, Ghana (1996).

³⁸ Ibid at p 4.

It is in the light of the above considerations, that Schmitter and Karl, both Professors of Political Science at Stanford University, also expressed the view that:³⁹

“For some time, the word democracy has been circulating as a debased currency in the political marketplace. Politicians with a wide range of convictions and practices strove to appropriate the label and attach to it their actions.”

It is quite clear then, that democracy as a political form of government has different meanings, depending on the country’s political and economic conditions. We may therefore agree with the observation made by Professors Schmitter and Karl that:⁴⁰

“There are many types of democracy, and their diverse practices produce a similarly varied set of effects. The specific form democracy takes is contingent upon a country’s socio-economic conditions as well as its entrenched state structures and policy practices.”

In the light of the above observation, Western democracy may be seen as different from Third World democracy in terms of its extent and intensity. Be that as it may, and in spite of the absence of a common definition of what democracy is, it may be defined as a “unified system for organising relations between rulers and the ruled”;⁴¹ and that it has the following universally accepted attributes or prerequisites:

³⁹ Philippe C Schmitter and Terry L Karl: “What democracy is and is not” in *The Global Resurgence of Democracy* eds: Larry Diamond and Marc F Plattner (1993) The Johns Hopkins University Press and the National Endowment for Democracy at p 39.

⁴⁰ Ibid at page 40.

⁴¹ Ibid.

- (i) the existence of a parliament consisting of representatives of the people - chosen at regular elections - freely and fairly conducted;
- (ii) the right of individual citizens of the country of sound mind and reasonable age to vote at the regular elections - with each individual entitled to vote under the principle of “one man one vote”;
- (iii) each individual entitled to vote has the right to offer himself for any political office;
- (iv) the existence of majority rule, ie where a party secures the votes of more than half or the majority of the eligible electorates and where decisions can be reached, by a majority vote, in the absence of unanimity or consensus;
- (v) the freely elected government must be held accountable to the people by the citizens acting through their elected representatives;
- (vi) where the government loses the confidence of the electorate, that government must be changed through a constitutionally established procedure and not through any violent means, such as a coup;⁴²
- (vii) the establishment and promotion of the rule of law and protection of

⁴² Thus article 3(3) of the Ghana Fourth Republican Constitution, 1992 prohibits any violent means of overthrowing or abrogating the Constitution. Such an unlawful violent means constitutes the offence of high treason punishable by the death penalty. Under article 3 (4): “All citizens of Ghana shall have the right to resist any person or persons seeking to abolish the constitutional order as established by [the] Constitution.” As to when it is proper to invoke this right: see Supreme Court decision in *Ekwam v Pianim (No 2)* [1996-97] SCGLR 120 examined in detail in chapter 5.

- (viii) fundamental human rights;⁴³ and
- (ix) the existence of an independent judiciary.

In sum, we might define democracy in terms of what The Democracy for All Programme, launched in South Africa by the Centre for Socio-Legal Studies (CSLS), a National Educational Project, refers to as the “Sign posts for Democracy”: control of abuse of power, political tolerance, regular and free and fair elections, accepting the results of elections, multi-party system, accountability, transparency, economic freedom leading to the rule of law and the due process of law, fundamental human rights and equality.⁴⁴

Meaning of good governance

Having examined what constitutes democracy, the next question to be examined is: what is really meant by the term “good governance.” The question of promoting good governance in Ghana has, like that of democracy, also assumed both international and national significance. Good governance is now seen as very important and crucial to Ghana’s socio-economic and political development. Thus, the former Vice President of Ghana, Professor John Atta

⁴³ See *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson* [1996-97] SCGLR 804, where defence counsel contended that the offence of sedition in section “185 of the Criminal Code, 1960 (Act 29) was unconstitutional and also antithetical to the broad libertarian spirit which animates the Constitution of the Fourth Republic, ... consciously tailored to serve the needs of a democratic society governed according to the *rule of law* and permitting the full *flourishing of the fundamental human rights* of its citizens.” (Emphasis is mine.) The offence of sedition under section 185 of the Criminal Code has now been repealed by the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602).

⁴⁴ For detailed analysis of what is meant by democracy: see Schmitter and Karl op cit at pp 39-48.

Mills,⁴⁵ recommended the principle of good governance as one of the prerequisites which must be satisfied if African economies were to be competitive. Again, the importance of good governance was raised in Parliament during the Second Term of the Presidency of FI Lt J J Rawlings which ended on 6 January 2001. The issue came up during the debate on a motion for the adoption of the Report of the Appointments Committee on the vetting of the then Hon Member of Parliament, Mrs Rebecca Adotey, for appointment as Deputy Minister of Communications. In his contribution to the debate, Hon Nana Akufo-Addo, the New Patriotic Party (NPP) Member of Parliament for Abuakwa (formerly Attorney-General and Minister of Justice in the present NPP Government and now Minister of Foreign Affairs), argued against the motion. He conceded that Mrs Adotey was extremely articulate and competent. However, he argued that taking decisions in Parliament that might prejudice the decision yet to be given in a pending court case, which challenged her election during the December 1996 Parliamentary Elections as the Member of Parliament for the Ayawaso West-Wuogun Constituency, was not an act of good governance. In effect, a prior decision by Parliament would militate against attainment of good governance. Yet Parliament was expected to ensure good governance in the country!

It should be observed that, like the term “democracy”, there is no general consensus as to what constitutes “good governance.” The issue of good governance was addressed by the United Nations Resident Representative and Co-ordinator of the UN System in The Gambia, Dr John O Kakonge, at a forum organized by the Alliance for Democracy, a Washington based NGO and held in The Gambia on 7 August 2002. He pointed out that:⁴⁶ “There is no blue print for good governance, a broad-reaching concept which can only be attained under a democratic political system”; that good governance “requires the transparency and

⁴⁵ Under the Rawlings Government, in a keynote address delivered in Dakar, Senegal, on 3 March 1999, at a forum on the future competitiveness of African economies.

⁴⁶ See *The Gambia News & Report*, Vol II, No 26, 13-19 August 2002 at p 8.

accountability of public institutions and also relies on quality public sector institutions and a strong civil society”; that it promotes the rule of law; and that it ensures that:

“political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and most vulnerable are heard in decision making over the allocation of development resources.”⁴⁷

Similar views had earlier been expressed in Ghana. Thus in an article entitled: “Media, good governance and development,” Kofi Akordor said:⁴⁸

“What is good governance and how can it be engendered and sustained? There may be different opinions as to what constitutes good governance but no matter how one looks at it, certain elements are basic and fundamental. These include accountability, transparency, participation, the rule of law and human rights.”

And in a publication,⁴⁹ “democratic governance” was defined as:⁵⁰

⁴⁷ Ibid. In a similar vein, the question of good governance (as stated in the Ghana’s daily news paper: *The Daily Graphic*, May 27, 2004 Issue front page and at page 3) was highlighted by the participants at the National Economic Dialogue (NED) held in Accra on May 26, 2004. The NED was instituted in 2001 in Ghana to present the progress report of the implementation of the Ghana Poverty Reduction Strategy (GPRS) to the public and to enable all sections of the society to make inputs. On good governance, the NED recommended “the need for the deepening of decentralisation of government policies to serve as an empowering framework for the people, integrate women and the marginalised into national programmes and the institution of a similar dialogue at the local government level.”

⁴⁸ See *Daily Graphic*, Accra, 28 May 1997 at page 7.

⁴⁹ *Democratic Governance in Ghana under the 1992 Constitution*, Occasional Paper No 4 (1996), Institute of Economic Affairs, Accra.

⁵⁰ Ibid at p 3.

“... the exercise of the powers of government under conditions where there is the existence and observance of freedom of speech and expression; freedom of association and movement; rule of law; free flow of information, citizen’s uninhibited involvement in politics; fair and objective administration of the law; as well as favourable conditions for private enterprise.”

METHODOLOGY, WORK DIVISION AND SCOPE OF THE DISSERTATION

The methodology employed is examination of:

- (i) all the Republican Constitutions of 1960, 1969 and 1979 and Military Proclamations of 1966, 1972, 1979 and 1981 between the 1957 Independence Constitution and the 1992 Fourth Republican Constitution;
- (ii) comparative study and analysis of the Ghana Constitution of 1992, especially the provisions relating to Fundamental Human Rights, vis-à-vis other Constitutions such as the United States, Canada, India, South Africa and Nigeria with a view to making suggestions and recommendations for the future development of Constitutional Law in Ghana; and
- (iii) examination of Ghanaian Constitutional law cases as determined by the Ghana Superior Courts and other courts exercising common law jurisdiction like Ghana.
- (iv) reference to and consideration of relevant literature on constitutional law issues.

The dissertation consists of nine chapters. Chapter 1 states and examines the central theme of the dissertation. The chapter also examines the meaning of constitutional law and the importance and meaning of democracy and good governance.

As a necessary background to the dissertation, and having regard to its theme, Chapter 2 briefly addresses Ghana's constitutional evolution and the legal system within which the Supreme Court operates, while Chapter 3 examines the underlying concepts of the 1992 Constitution, namely: the supremacy of the Constitution, the doctrines of separation of powers, of the non-justiciable political question and of mootness. Chapter 4 examines the all important question or issue of the role of the Supreme Court in the interpretation of a national constitution with special reference to the Ghana's Fourth Republican Constitution, 1992. The Supreme Court and the power of judicial review of legislative and executive action is investigated in Chapters 5 and 6 respectively. Chapters 7 and 8 examine what may be considered as the most distinctive contribution of the Supreme Court to the development of Constitutional Law in Ghana, namely, the question of the enforcement of fundamental human rights and freedoms and of the Constitution respectively. The final Chapter 9 is devoted to general conclusions, lessons and recommendations for the future development of Constitutional Law in Ghana, given the fact that a national constitution is a dynamic document which is susceptible to change, growth and development.

CONCLUSION

Given the discussion in this chapter, it could be concluded that the attributes of democracy and good governance are the same. They complement each other. It is suggested that all these attributes of democracy and good governance are worthy of enforcement by Ghana's judiciary

spearheaded by the Supreme Court, namely: the principle of accountability;⁵¹ participation by the people in matters affecting their daily lives, especially, the decentralised government administration by strengthening the local government system; the establishment and enforcement of the rule of law;⁵² the protection and enforcement of the fundamental human rights and freedoms as enshrined in the Constitution;⁵³ the essential need for ensuring the independence of the judiciary; need for reconciliation in all aspects of national life and due and adequate compensation to all persons: the living and the dead (through their surviving relatives) who had unjustifiably suffered injustice and loss of life and property at the hands of previous autocratic and undemocratic governments of the country;⁵⁴ the promotion of

⁵¹ See eg *Owusu v Agyei* [1991] 2 GLR 493 where the court refused to uphold the traditional immunity law accorded to chiefs from accountability of stool property under customary law.

⁵² Thus the Supreme Court may respectfully welcome and adopt as very appropriate the comments of Hon Mr Justice Brennan, Justice of the High Court of Australia in an address: “Courts, Democracy and the Law”, *Commonwealth Law Bulletin* April 1991 Issue at pp 700-701: “The Courts do not seek to interfere with lawful policy: that is the proper domain of the political branches. But the courts are concerned to subject political branches of government to the rule of law, for that is the constitutional imperative which binds all branches of government. It can hardly be anti-democratic to restrain Parliament to its constitutional power, nor to constrain the Executive to conform to the Constitution and the laws enacted by Parliament.”

⁵³ This is an issue which is at the heart of this thesis and is examined in detail in Chapter 7. In that regard, the decision by the Norwegian Nobel Committee to award the 2002 Nobel Peace Prize to Mr Jimmy Carter, the former US President, for his sustained efforts to advance democracy and human rights is to be most welcomed. In congratulating Mr Carter for winning the coveted prize, the Secretary-General of the Council of Europe was quoted by the Gambian daily newspaper *The Point*, October 21, 2002, vol 11, No 160 at page 10 as having said that: “The recognition of Mr Carter’s sustained efforts to advance democracy and human rights should strengthen the resolve of all countries to support these values, which are at the heart of our civilisation. The Nobel Award is also an encouragement to international organisations such as the Council of Europe, which are active in defence of fundamental freedoms and rights.”

⁵⁴ The NPP Government headed by President J A Kufuor established in 2002 under the National Reconciliation Commission Act, 2002 (Act 611), a National Reconciliation Commission (NRC), headed by Hon Mr Justice Amua-Sekyi, a retired Justice of the Ghana

national consensus as part of the democratic process; need for a responsible media and constructive criticism of government and further reform or review of statutory laws on freedom of speech and the media. The object of the suggested review should aim at preventing further abuse of freedom of speech and expression by persons who have taken undue advantage of decriminalisation of libel and seditious laws brought about by the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602);⁵⁵ the need for subjecting legislative and executive actions, decisions or conduct to the test of constitutionality and accountability;⁵⁶ and lastly but by no means the least, the abhorrence and zero tolerance of abuse of public office and corruption and corrupt practices in all its forms and facets in the country.⁵⁷

Supreme Court, to investigate complaints from victims of past injustices and generally heal the wounds of society. The NRC submitted its final Report on 12 October 2004.

⁵⁵ For justification for further amendment to the laws on libel and sedition : see *West Africa*, 9-15 September 2002 at p 4 where the Editor in a commentary on “The Media and reconciliation in Ghana” wrote: “There are several misfit journalists in the country whose actions must be severely brought under control, and who must be made to account for their misdemeanours sometimes. Some sadly call it freedom of speech and expression. But many of the so-called journalists would not survive a day in a more civilised and democratic country where freedom of speech is well defined and practised...The media have made everybody uncomfortable in the country. Members of the government are as aggrieved as the opposition.” See also the national daily newspaper *Daily Graphic* January 23, 2004 at page 13 for a news report headed “Don’t misuse freedom of speech.” As stated in this publication, President J A Kufuor urged Ghanaians not to lose their cultural attributes of respect for the elderly and finesse in language under the pretext of freedom of speech. He also pointed out that the current media pluralism in the country has played a good role in promoting accountability and transparency in public life but cautioned that ‘while enjoying the freedom that this brings, I ask that the nation does not lose its soul.’ He made these remarks while delivering the 2004 State of the Nation Message to Parliament. The issue is further examined in chapter 7.

⁵⁶ An issue examined in detail in chapters 5 and 6 respectively.

⁵⁷ It is suggested that Ghana needs to enact a comprehensive legislation to fight and eliminate or reduce to its barest minimum, all facets of corruption and abuse of public office, similar to the Nigerian Corrupt Practices and Other Related Offences Act, 2000 (Act 2000 No 5). This Act was, with the exception of certain sections, ie sections 26(3) and 35, was upheld as

And, as it is demonstrated in succeeding chapters of this dissertation, the Ghana Supreme Court, in the exercise of its interpretative and enforcement jurisdiction, has asserted and promoted the observance of some of the above specified prerequisites for good governance and democracy -leading to a very significant contribution to the development of Ghana Constitutional Law. It is hoped that this in turn would lead to sustained economic prosperity and social development in the country.⁵⁸

The role of the Supreme Court in this regard, more specifically, its role in enforcing a democratic system of government and values in Ghana, becomes even more challenging and crucial given “the harrowing experiences of our not so distant past” if one may borrow the words of Sophia Akuffo JSC who, in her dissenting opinion in *Tsatsu Tsikata (No 1) v Attorney-General (No 1)*,⁵⁹ had said:⁶⁰

constitutional and enforceable throughout Nigeria, by the Nigerian Supreme Court decision in *Attorney-General of Ondo State v Attorney-General* [2002] 6 NWLR. The court by its decision sought to enforce the apparent legislative policy, namely, the need to fight and uproot corrupt practices and abuse of public office which have become endemic in Nigerian society, with its attendant adverse effect on the country’s economy and fiscal policy.

⁵⁸ See *West Africa* (supra) at p 23 where the US Secretary of State Collin Powell was quoted as having said during the Annual UN General Assembly Debate, which opened on 12 September 2002, that Africa would achieve prosperity with good governance and respect for human rights. He was also quoted as having said that: “ The United States is committed to helping the people of Africa build a peaceful, prosperous and democratic future. Development must begin at home with sound economic and political governance at all levels necessary to attract development capital and to use it well.” See also *Daily Graphic*, Tuesday May 25, 2004 at page 3 for a news report titled: “Observe good governance.” As stated in this publication, Hon Mr Akwasi Osei-Adjei, the Deputy Minister of Foreign Affairs of Ghana, called on African Leaders to observe the tenets of good governance in the management of their economies. The Deputy Minister made the call when he opened a three-day political-military seminar held in Accra on May 24, 2004.

⁵⁹ [2001-2002] SCGLR 189. The majority decision was subsequently reversed by the Supreme Court on an application for review by the Attorney-General : see *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620. See also chapter 5 for a detailed examination of the two decisions.

⁶⁰ Ibid (emphasis is mine).

“Given the harrowing experience of our not so distant past, one might readily appreciate any fears... about any forum the plaintiff might perceive to be a special court functioning entirely outside the aegis of the mainstream system of courts. *Most citizens of Ghana still recall the special courts and the public tribunals (as well as the Special Military Tribunals that had the power to try civilians for certain crimes) where the right to counsel was not guaranteed, where there was no right of judicial review, where justice was hurried with such indecency as to amount to justice buried and where the protection afforded by habeas corpus orders was ousted.*”

CHAPTER 2

HISTORICAL BACKGROUND: CONSTITUTIONAL EVOLUTION AND THE LEGAL SYSTEM IN GHANA

As a necessary background to the thesis on: The Role of the Supreme Court in the Development of Constitutional Law in Ghana, and having regard to its central theme as examined in Chapter 1, Chapter 2 examines two issues: Part A gives a brief historical account of Ghana constitutional evolution; whilst Part B examines briefly the legal system under which the present Supreme Court, as the final constitutional, appellate and review court, operates.

PART A: CONSTITUTIONAL EVOLUTION IN GHANA

Ghana was the first country in Black Africa, South of the Sahara, to achieve political independence from Britain on 6 March 1957. The Preamble to the Ghana Independence Act, 1957 (5 & 6 Eliz 2, c6), stated that it was: "An Act to make provision for, and in connection with, and the attainment of fully responsible status within the British Commonwealth of Nations."¹ In 1960, the 1957 Ghana Independence Act was repealed² and Ghana was declared a sovereign unitary Republic under article 4(1) of the Constitution of the Republic of Ghana, 1960. This Constitution, in effect, created the First Republic of Ghana. The Constitution established a system of constitutional arrangement more akin to the American

¹ For a detailed account of the earlier constitutional evolution of Ghana before 1957: see Bennion, FAR, *The Constitutional Law of Ghana*, London Butterworths, 1962 at pages 1-73. See also L Rubin & P Murray, *Constitution & Government of Ghana* (2nd ed), 1964 Sweet & Maxwell, London, chapter 1 on "From Colony to Republic."

² The 1957 Act was repealed by the Constitution (Consequential Provisions) Act, 1960 (CA 8).

system of government. The President was the Head of State responsible to the people, and vested with the executive power of the State under article 8 of the Constitution.³ He was also the Head of the government. A cabinet consisting of the President and not less than eight ministers appointed by the President wholly from among the Members of Parliament was established.⁴ A Parliament consisting of the President and the National Assembly was also established.⁵ Parliament, established under article 21 of the Constitution, 1960 was vested with unlimited legislative powers. It should be mentioned that article 55 of the Constitution vested in the First President special legislative powers which were, in fact, never exercised by the President. Thus article 55(2) and (3) provided:

"(2) The first President may, whenever he considers it to be in the national interest to do so, give directions by legislative Instrument.

(3) An Instrument under this Article may alter (whether expressly or by implication) any enactment other than the Constitution."

Under article 41 of the Constitution, 1960 the judicial power of the State was vested in the Superior Courts (consisting of the Supreme Court and the High Court) and the inferior courts established by law.

The First Republican Government of Ghana under the Constitution, 1960 was overthrown on 24 February 1966 in a coup d'etat.⁶ The 1966 coup d'etat led to the creation of the First

³ Dr Kwame Nkrumah was appointed the First President. He was chosen as such before the enactment of the Constitution in a Plebiscite conducted in accordance with the principle set out in article 1 of the Constitution, 1960.

⁴ Under the Constitution, 1960, arts 15 and 16.

⁵ Constitution, 1960, art 20(1).

⁶ The Council was constituted by Lt Gen J A Ankrah (chairman); J W K Harlley, esq, (deputy chairman); and five other members, namely, Colonel E K Kotoka; B A Yakubu, esq,

Military Government in the constitutional and political history of Ghana.⁷ A council known as National Liberation Council was established and it "assumed the Government of the State of Ghana", that is, it exercised executive powers under the Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana and for Other Matters. Under section 2 of the Proclamation, the Constitution, 1960 was suspended with effect from 24 February 1966; Dr Kwame Nkrumah and all the ministers in his government were dismissed from office and the National Assembly, elected under the Constitution, 1960 was dissolved. Section 2(3) of the Proclamation stated that notwithstanding the suspension of the 1960 Constitution, all the courts in existence before 24 February 1966, ie the judiciary, under the Constitution, 1960 were continued in force and exercised the same powers they had immediately before 24 February 1966. The legislative power of the State was also vested in the National Liberation Council and was exercised without any limitation whatsoever. The NLC Military regime, like all the three succeeding military regimes, was autocratic.

The executive and the legislative powers of the State were exercised by the National Liberation Council until 22 August 1969. The National Liberation Council was dissolved under section 1 of the Constitution (Consequential and Transitional Provisions) Decree, 1969 (NLCD 406). A new Constitution, enacted by a Constituent Assembly, ie the Constitution, 1969 came into force and thus ushered in the Second Republic of Ghana.

Deputy Commissioner of Police; Colonel A K Ocran; J E O Nunoo, esq Assitant Commissioner of Police; and Major AA Afrifa.

⁷ As we shall see later, there have been four successful coups on the following dates, namely, 24 February 1966 (NLC); 13 January 1972 (NRC/SMC); 4 June 1979 (AFRC); and 31 December 1981 (PNDC).

What sort of government was established under the Constitution, 1969? The answer was given by Archer CJ in his dissenting opinion in the case of *New Patriotic Party v Attorney-General (31st December Case)*⁸ where his lordship said:⁹

"Chapter 9 of the Constitution, 1969 vested the judicial power of Ghana in the judiciary. Article 102 (3) of the Constitution, 1969 guaranteed the independence of the judiciary. For the first time in the legal history of this country, the American concept of the doctrine of separation of powers could be discerned throughout that document, namely, the powers of the legislature, the executive and the judiciary."

Thus under article 69(2) of the Constitution, 1969 the legislative power of Ghana was vested in the National Assembly which, unlike the Constitution, 1960 did not include the President. Under article 37, the executive authority of Ghana was vested in the President and he exercised that power directly through subordinate officers. And under article 102, judicial power of Ghana was vested solely in the judiciary headed by the Chief Justice.

The Constitution, 1969 under which the Busia Government was established, did not last long. The government was in power for about two and a half years. It was overthrown by yet another coup d'état led by General I K Acheampong- leading to the establishment of the National Redemption Council under a Proclamation: the National Redemption Council (Establishment) Proclamation, 1972. Both the executive and legislative powers of the State (like under the previous NLC Proclamation) were vested in the council. Under section 2 of the Proclamation, the Constitution, 1969 was suspended, the Office of the President established under the Constitution was abolished and the Government of Dr K A Busia was dismissed

⁸ [1993-94] 2 GLR 35, SC.

⁹ Ibid at pp 43-44.

from office. Again under section 4 of the Proclamation it was provided that notwithstanding the suspension of the Constitution, all the courts in existence immediately before 13 January 1972 (when the Proclamation came into force), would continue in existence with the same powers, duties and composition as they had immediately before that date.

The military government established in 1972 by the National Redemption Council was overthrown in a palace coup by the Supreme Military Council (SMC) headed by General Fred Akuffo on 5 July 1978. The SMC Government was itself overthrown in yet another coup on 4 June 1979 by the Armed Forces Revolutionary Council (AFRC) led by Fl Lt JJ Rawlings. The Government of the AFRC was in power for only three months. Thus on 24 September 1979, it handed power to the third democratically elected government, ie the Limann Government established under the Constitution, 1979.

The Third Republican Constitution under the Constitution, 1979 re-introduced the Presidential System of Government. There was an elected President assisted by the Vice-President. Thus under article 45(1), the executive authority was vested in the President. The President was assisted by a Cabinet which determined the general policy of the government.¹⁰ And the Cabinet consisted of the President, the Vice-President and not less than ten and not more than nineteen Ministers of State.¹¹ The Ministers of State were appointed by the President with the prior approval of Parliament from among persons qualified to be elected as Members of Parliament. A person so appointed as a Minister had to resign as a Member of Parliament.¹² And whilst legislative power of the State was vested in

¹⁰ Constitution, 1979, art 63.

¹¹ Ibid.

¹² Ibid at 65(1) and (2).

Parliament consisting of 140 members,¹³ the judicial power was vested in a judiciary headed by the Chief Justice.¹⁴

However, the government established under the Constitution, 1979 did not also last long. It was overthrown by yet another coup d'état on 31 December 1981 - leading to the establishment by Proclamation of the Government of the Provisional National Defence Council (PNDC) headed by Fl Lt J J Rawlings, the same person who had headed the 1979 AFRC military regime. The PNDC ruled the country from 31 December 1981 until 6 January 1993 when another democratically elected government, the government of the winning party, ie the National Democratic Congress led by the same Flt Lt J J Rawlings, was installed under the Fourth Republican Constitution of 1992.¹⁵

The Government of the National Democratic Congress (NDC) ruled for four years as from 7 January 1993. General elections were held at the end of the four-year term, and the Government of the NDC, with Flt Lt JJ Rawlings as the President, was re-elected for a second term of four years. The second term ended on 6 January 2001.

Before the expiration of the second term of President Rawlings, Parliamentary and Presidential Elections were organized by the Electoral Commission and held in December 2000. The elections were keenly contested by a number of political parties and witnessed by International Observers. There were two main contesting political parties: the National Democratic Congress (NDC) the ruling party, whose Presidential Candidate and Flagbearer was Professor John Evans Atta Mills, the then Vice-President; and the New Patriotic Party

¹³ Ibid art 75(1) and (2).

¹⁴ Ibid art 114(1) and (2).

¹⁵ For a detailed account of the process leading to the promulgation of the 1992 Constitution: see Dr K Afari-Djan: "The Making of the Fourth Republican Constitution" Friedrich Ebert Foundation, Accra, Ghana, 1995.

(NPP) the main Opposition Party, whose Presidential Candidate and Flagbearer was Mr John Agyekum Kufour. The contest turned out to be a straightforward contest between the *continuity policy* of the NDC and the *positive change policy* of the NPP.¹⁶ There was no outright winner after the first round of the Presidential Elections. A re-run had to be organized by the Electoral Commission. It was contested by the two leading Presidential Candidates: Vice-President Professor J E A Mills of the NDC and Mr J A Kufour of the NPP.

In the event, the December 2000 Parliamentary and Presidential Elections were won by the NPP under the leadership of Mr J A Kufour. He was installed as the President of Ghana on 7 January 2001 under the Fourth Republican Constitution of 1992. It should be stressed at this stage that the democratically elected government under the National Democratic Congress, a political party founded by Fl Lt J J Rawlings, the former Military Ruler of Ghana from 31 December 1981 to 6 January 1993, was succeeded by another democratically elected government led by Mr J A Kufour, the present President of Ghana. It should also be stressed that the Fourth Republican Constitution, 1992 like the Third Republican Constitution of 1969 established the Presidential System of Government - with the powers of State distributed amongst the three arms of government - the executive, the legislature and the judiciary.

Thus under the Constitution, the executive authority of the State is vested in the President assisted by the Vice-President.¹⁷ Both the President and the Vice-President and not less than ten and not more than nineteen Ministers of State constitute the Cabinet which assists the

¹⁶ The rallying battle cry of the NPP was, in the local *Akan* language, *asieho* meaning one should vote for the symbol at the bottom of the ballot paper; whilst that of the NDC, also in the local *Akan* language, was *esoroho* meaning one should vote for the symbol at the top of the ballot paper. The ballot paper indicated in a descending order, the symbols of all the contesting political parties.

¹⁷ Constitution, arts 58(1) and 60(1).

President in determining the general policy of the government.¹⁸ Again, like the Constitution, 1969 the President appoints the Ministers of State from among members of Parliament or persons qualified to be elected as Members of Parliament, except that the majority of the Ministers should, under article 78(1) be appointed from among the members of Parliament with the prior approval of Parliament.¹⁹ It should be noted, by way of contrast, that whereas under the Constitution, 1969, art 65(1) and (2), Ministers of State were not required to be members of Parliament, the Constitution, 1992, art 78(1) requires that the majority of the ministers should rather be appointed from amongst members of Parliament.

With regard to the exercise of legislative power, the Constitution, 1992 like the Constitution, 1979 provides in article 93(2) that the legislative power of the State shall be vested in Parliament elected under that Constitution. With regard to the exercise of judicial power, article 125(3) provides that judicial power shall be vested in the judiciary and that no other body apart from the judiciary shall have or be given final judicial power.

It is quite clear then, that the Constitution, 1992 like the Constitutions of 1969 and 1979, has put in place a very viable democratic system of government. We shall seek to demonstrate in this Thesis that, the Supreme Court of Ghana, in the exercise of its powers under articles 2(1) and 130(1) of the Constitution, 1992 has nurtured, promoted and asserted this democratic system of government as shown by some of its ground-breaking and epoch-making decisions. These include *New Patriotic Party v Attorney-General (31st December Case)*,²⁰ *National*

¹⁸ Ibid art 76(1) and (2).

¹⁹ In the case of *J H Mensah v Attorney-General* [1996-97] SCGLR 320, the Supreme Court held that the effect of articles 78 (1) and 79 (1) of the Constitution, 1992 was that persons nominated by the President for appointment as ministers or deputy ministers, whether retained or not, required the prior approval of Parliament; that the articles did not draw a distinction between fresh and re-appointed ministers; neither did they exempt any category of nominees from the requirement of prior approval.

²⁰ [1993-94] 2 GLR 35, SC.

Media Commission v Attorney-General,²¹ *Agbevor v Attorney-General*²² and other notable decisions. We shall have occasion to examine in detail some of the decisions in subsequent chapters of this thesis. The examination will show, quite conclusively, that the Supreme Court, by these decisions, has contributed to the development of the Ghana constitutional law.

With this brief discussion on Ghana constitutional evolution, we shall proceed to a discussion of an important issue relevant to the thesis: The Ghana Legal System.

PART B: GHANA LEGAL SYSTEM

What is the legal system in Ghana under which the judiciary, spearheaded by the Supreme Court, operates? We shall briefly examine what constitutes the legal system under two sub-heads: (a) sources of law in Ghana; and (b) the judicial system in Ghana (the past and present) and other related issues pertaining to the judiciary.

Sources of law in Ghana

In the introduction to his book,²³ Thomas O'Malley wrote:²⁴

“To some law is a science, to others it is an art; but in many ways it is also a craft. Just as the craftsman must know the materials and the tools required to

²¹ [2000] SCGLR 1.

²² [2000] SCGLR 403.

²³ *Sources of Law (An introduction to legal research and writing)* The Round Hall Press Ltd, Dublin, Ireland, 1993.

²⁴ Op cit at page 1.

shape them into a finished product, so the lawyer must be familiar with [his] working materials (primary and secondary sources) and the research tools...”²⁵

The primary sources of law in Ghana are the Constitution, legislation and the common law. Whilst the secondary sources are: writings about law in books, especially scholarly works, legal periodicals, government publications, law reform documents, parliamentary debate, newspapers containing edited law reports such as *The Times*, *The Guardian*, *The Independent* and *Financial Times* in England, and general publications.²⁶

It is in this context that article 11(1) of the Fourth Republican Constitution, 1992 like its predecessors, the Constitutions of 1960, 1969 and 1979,²⁷ defines the Laws of Ghana (the primary sources) as comprising:

- “(a) this Constitution;
- (b) enactments made by or under the authority of the Parliament established by this Constitution;
- (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;
- (d) the existing law; and
- (e) the common law.”

²⁵ What is meant by “primary and secondary sources” referred to in the above passage? The word “source” is defined by *The Pocket Oxford Dictionary* (8th ed) as : “1 place from which a river flows or stream issues. 2 place of origination. 3 person or document etc providing information.” However, the word “source” as used in the context of law, means the place from where domestic or international law originates and gives it binding force.

²⁶ See Thomas O’Malley, op cit chapters 1 and 4 for details of what constitutes primary and secondary sources of law.

²⁷ See Constitution, 1960, art 40; Constitution, 1969, art 126 and Constitution, 1979, art 4(1).

The Constitution, 1992, art 11, like the previous three Republican Constitutions, goes on to give details of what is meant by “the common law” and “the existing law.” The common law of Ghana has been defined in article 11(2) as comprising:

“The rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.”²⁸

What is meant by customary law included in the above definition of the common law of Ghana has been defined by article 11(3) of the Constitution as “the rules of law which by custom are applicable to particular communities in Ghana.” The majority decision of the Supreme Court in *In re Adum Stool; Agyei v Fori*,²⁹ has thrown further light on the existence and application of “customary law” in Ghana. The defendants in the case, claimed to be eligible to occupy the vacant Adum Stool of Kumasi, Ashanti. They relied on a custom called *ayete custom*. The trial court, the Judicial Committee of the Kumasi Traditional Council (KTC), gave judgment in favour of the defendants, relying on the *ayete custom*.³⁰ On appeal by the plaintiffs, the Judicial Committee of the Ashanti Regional House of Chiefs affirmed the decision of the trial court. On further appeal by the plaintiffs, the Judicial committee of the National House of Chiefs reversed the decision of the regional house of chiefs. The

²⁸ For a detailed examination of what is meant by “the rules of law generally known as the common law and the rules generally known as the doctrines of equity”: See Bimpong-Buta, S Y “Sources of Law in Ghana” (1983-86) 15 RGL 129 at 136-138; see also Henry J Abraham, *The Judicial Process*, Oxford University Press, 1968 (2nd ed) at page 10. On application in Ghana of the English rules of common law and the doctrines of equity: see Ghana Court of Appeal decisions in *In re Abotsi; Kwao v Nortey* [1984-86] 1 GLR 144; and *Amaning alias Angu v Angu II* [1984-86] 1 GLR 309.

²⁹ [1998-99] SCGLR 191.

³⁰ Succession to the Adum Stool of Kumasi, Ashanti was patrimonial and under the *ayete* custom, a particular house or family was customarily entitled to supply wives to the occupant of the stool.

defendants in turn appealed to the Supreme Court from the decision of the National House of Chiefs. The Supreme Court dismissed the appeal and upheld the decision of the National House of Chiefs to the effect that, on the evidence before the trial court, the alleged *ayete* custom, relating to the eligibility of the Adum Stool of Kumasi, had no precedence and appeared unreasonable; and that the alleged *ayete* custom was a “novel proposition requiring scrutiny.” In dissenting from the majority decision of the Supreme Court, Hayfron-Benjamin JSC said:³¹

“Nananom³² [meaning the National House of Chiefs] were, indeed, bound by the provisions of article 11 of the 1992 Constitution, which defines ‘customary law’ as the rules of law which by custom are applicable to *particular communities* in Ghana. [Judge’s emphasis.] The views of the Kumasi Traditional House of Chiefs were therefore of very great importance, and it was an unwarranted interference in their practice of the custom for Nananom to apply logic to that hallowed custom of *ayete* and claim that it was a ‘novel proposition.’”³³

As to what is meant by the term “existing law”, article 11(4) gives a fuller definition, namely:

³¹ Ibid at pp 211-212.

³² *Nana* is the customary title of a chief under Akan customary law and the plural of *Nana* is *Nananom*.

³³ For detailed examination of what constitutes customary law and issues relating to internal conflict of laws between the customary law and the common law: see Bimpong-Buta, SY “Sources of Law in Ghana”(1983-86) 15 RGL 139-144.

“the written and unwritten laws of Ghana as they existed immediately before the coming into force of [the] Constitution, and any Act, Decree, Law or statutory instrument issued or made before that date, which is to come into force on or after that date.”

It should be emphasised that article 11(5) states that the existing law “shall not be affected by the coming into force” of the Constitution and that under article 11(6), the existing law “shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the Constitution.”³⁴

Thus in *Ellis v Attorney-General*,³⁵ the Supreme Court upheld an enactment, ie the Hemang Lands (Acquisition and Compensation) Law, 1992 (PNDCL 294), as an existing law. The plaintiff, claiming that PNDCL 294 had unlawfully expropriated his lands, sued for a declaration that PNDCL 294 was a nullity for being inconsistent with or contravening the Constitution, 1992. The Supreme Court rejected the claim because PNDCL 294, as an enactment, had been passed and the plaintiff’s lands had been acquired and vested in the Republic before the coming into force of the Constitution on 7 January 1993. In his opinion in support of the decision, Atuguba JSC said:³⁶

“PNDCL 294 relates to matters concluded by it both in terms of the vesting of the plaintiff’s lands in the PNDC on behalf of the Republic and as to the quantum of compensation for the same. As these matters do not fall to be done on or after the

³⁴ The same provision in article 11(5) and (6) of the 1992 Constitution was given in the Constitution, 1969, art 126(5) and the Constitution, 1979, art 4(5) and (6).

³⁵ [2000] SCGLR 24.

³⁶ Ibid at page 41.

coming into force of the 1992 Constitution; that Law, even if it is regarded as an operative existing law within the meaning of article 11(5), is incapable of infringing the 1992 Constitution.”

Further in *Kangah v Kyere*³⁷ the Supreme Court held that the Chieftaincy Act, 1971 (Act 370), should be construed as an existing law in so far as it was not inconsistent with any provision of the Constitution, 1979 and that the operation of the Act was not affected by the Constitution.

The decision in *Ellis v Attorney-General*³⁸ (supra) and that in *Kangah v Kyere* (supra) may be contrasted with the decision in *Mensima v Attorney-General*.³⁹ In this case, the plaintiffs, members of a registered co-operative union, broke off from the union and formed a limited liability company. The object of the company was to distil a locally manufactured gin called *akpeteshie*. They were prevented from distilling *akpeteshie* by the officers of the co-operative union; they were also harassed and their products were impounded by the officers on the grounds, inter alia, that they did not belong to any registered distiller’s co-operative union and did not have a licence as required by regulation 3 (1) of the Manufacture and Sale of Spirits Regulations, 1962 (L I 239), which provided that: “ Every applicant for the issue of a distiller’s licence shall be a member of a registered Distiller’s Co-operative.”

³⁷ [1982-83] 1 GLR 649 , SC.

³⁸ See also *Ex parte Agyekum* [1982-83] 1 GLR 688 where the Supreme Court held that the Stool Lands Boundaries Settlement Decree, 1973 (NRCD 172), was part of the existing law which was not in conflict with the Constitution.

³⁹ [1996-97] SCGLR 676 - a decision further examined in chapter 3 in discussing the question of supremacy of the constitution and in chapter 7 in discussing the question of general fundamental freedoms.

The plaintiffs therefore sued in the Supreme Court under article 2 (1) of the Constitution, 1992 for a declaration, inter alia, that regulation 3 (1) of LI 239, which made it mandatory for an applicant “for the issue of a distiller’s licence” to belong to a registered distiller’s co-operative, was inconsistent with the letter and spirit of the Constitution, particularly the exercise of their fundamental right of freedom of association guaranteed under article 21 (1) (e) of the Constitution.

The Supreme Court, by a majority decision, upheld the claim. It was held that as an existing law, regulation 3(1) of LI 239 was inconsistent with article 21(1) (e) of the Constitution, 1992 and therefore void. In support of the majority decision, Ampiah JSC said:⁴⁰

“L I 239 does not show on the face of it why an individual or an association should become a member of a co-operative society before a licence is issued to him or it for the manufacture of *akpeteshie* ...Although there is some provision in the parent Act to regulate the sale of *akpeteshie*, there is no provision in the parent Act to regulate specifically the requirement of a membership of a co-operative society as a condition for the issue of a distiller’s licence.”

It must be stressed that the laws of Ghana as defined in article 11 of the Constitution, 1992 and the previous Republican Constitutions of 1960, 1969 and 1979, did not come about, as it were, out of the blue. As observed elsewhere,⁴¹ the Laws of Ghana as defined in all the four Republican Constitutions and what constituted the law in colonial times

⁴⁰ Ibid at page 703.

⁴¹ SY Bimpong-Buta, op cit at page 131.

came about and is still the outcome or compromise of the conflict between the received English Law and the indigenous customary law.⁴²

The received English Law was first introduced in the Gold Coast Colony by the Supreme Court Ordinance, 1876, s 14 which provided that:

“The Common Law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the Court.”

Section 17 of the Ordinance also provided that the Imperial Laws were to be applied subject to local circumstances and conditions including any existing or future or local legislation.⁴³ Section 18 of the 1876 Ordinance also provided that the court was to apply and administer the common law concurrently with equity and where there was a conflict between the rules of common law and equity in respect of the same subject matter, the doctrines of equity were to prevail. More importantly, section 19 of the 1876 Ordinance provided that the Supreme Court was to apply in suitable cases, local laws and customs where they were not “repugnant to justice equity and good conscience.”⁴⁴

⁴² For an example of the conflict between the indigenous customary law and the received English law and the resultant issue of what law was to be applied: see *Des Bordes v Des Bordes* 2 G & G 3 examined in detail in S Y Bimpong-Buta, op cit at 131.

⁴³ This was later re-enacted as section 85 of the Courts Ordinance, Cap 4 (1951 Rev).

⁴⁴ That provision was also re-enacted as section 87 of the Courts Ordinance, Cap 4 (1951 Rev). It also provided for continued application of customary law where such law or custom was not “repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any Ordinance for the time being in force.”

The 1876 Supreme Court Ordinance had the effect of introducing into the then Gold Coast Colony, a dual system of laws – the received English Law, that is English statutes of general application and the common law on the one hand, and the customary law and local legislation on the other hand.⁴⁵ It is this dual system of laws which compendiously constituted the laws of Ghana. And that dual system of laws was continued and fortified by all the post independence Constitutions of Ghana, namely, the Constitutions of 1960, 1969, 1979 and 1992 and the Military Proclamations which came into force immediately after the overthrow of the civilian constitutional governments.⁴⁶

The judicial system in Ghana (the past and the present)

As has been observed elsewhere,⁴⁷ that the effect of the 1971 Courts Act,⁴⁸ was to create a unified court system consisting of: (i) the Superior Courts of Judicature made up of the Supreme Court, the Court of Appeal and the High Court of Justice; and (ii) inferior courts

⁴⁵ It is conceded that the dual system of laws could also be described as consisting of the received English law and local legislation on the one hand, and the indigenous customary law on the other hand.

⁴⁶ See the Constitution, 1960, art 40; the Constitution, 1969, art 126; Constitution 1979, art 4 and Constitution 1992, art 11. See also Afreh DK, “Ghana” in Allott, AN (ed), *Journal and Legal Systems in Africa* (London Butterworths, 1970), p 26. See also the Proclamation for the Constitution of National Liberation Council (NLC), 1966, s 2(3) and 3(2); the National Redemption Council (Establishment) Proclamation, (NRC) 1972, ss 3(2) and 4(a); the Armed Forces Revolutionary Council (Establishment) Proclamation 1979, ss 3(2) and 3 and 4(a); and the Provisional National Defence Council (PNDC) (Establishment) Proclamation, 1981, ss 4(1) and 9(1).

⁴⁷ See: Bimpong-Buta, S Y ‘The Court System under the 1992 Constitution: Jurisdiction and Powers of the Courts’ in *Lectures in Continuing Legal Education*, Bimpong-Buta, S Y (ed), Ghana Bar Association, Accra (1997) at pp 3-7.

⁴⁸ Act 372 now repealed by the Courts Act, 1993 (Act 459).

made up of the circuit court, district court grades I and II and juvenile courts and such other traditional courts as might be established by law.⁴⁹

However, in 1972, the integrated unified court system, with the Supreme Court at the apex, was varied by the Courts (Amendment) Decree, 1972.⁵⁰ The full bench of the Court of Appeal was created to replace the Supreme Court at the apex of the integrated court system. However, in 1979 the unified court system, as it operated in 1969, was restored. Under article 114(5) of the Constitution, 1979 the judiciary was defined as consisting of the superior and inferior courts with the Supreme Court, once again, being the final appellate and review court in Ghana.

However, as from 31 December 1981, following the enactment of the PNDC (Establishment) Proclamation, 1981, sections 9(1)(a) and 10(1) thereof had the effect of creating a dual court system made up of: (a) the regular courts, being all the courts in existence immediately before 31 December 1981, namely, the superior and inferior courts established under article 114(5) of the then suspended Constitution, 1979; and (b) a system of public tribunals consisting of the National, Regional, District and Community Public Tribunals. Those public tribunals, under section 10 of the Proclamation, 1981 operated independently of the regular courts for the trial and punishment of offences specified by law. The administration of the public tribunals was vested in the Public Tribunal Board - consisting of not less than five members

⁴⁹ For a detailed account of the Court System established in the then Gold Coast under the Supreme Court Ordinance, 1876 to the present Court System established under the Courts Act, 1993 (Act 459): see Yeboah, K Y “The Courts Act, 1993 (Act 459): New Elements”, chapter 4 in *Lectures in Continuing Legal Education*, supra. For the evaluation of the court system from Independence to 1992: see also Brobbey, S A, *Practice and Procedure in the Trial Courts and Tribunals*, Vol 1 pp 8-20, Black Mask Ltd, 2000 Cantonments, Accra.

⁵⁰ NRCD 101.

and not more than fifteen members of the public appointed by the PNDC.⁵¹ Under the Public Tribunal Law, 1984 (PNDCL 78), appeals from the decisions of the Community, District and Regional Public Tribunals, terminated at the National Public Tribunal subject to the final right to apply for review by the national tribunal of its own decision. In effect, the regular courts had no jurisdiction to entertain an appeal from the decisions of the public tribunals. Furthermore, under section 24 of the PNDCL 78, decisions of the public tribunals could not be questioned by any of the prerogatives orders such as *certiorari* and *mandamus* issued by the High Court. Commenting on the status of the public tribunals under the then judicial system, the late K Y Yeboah wrote:⁵²

“Thus it was that when the public tribunals were established they constituted a system of their own, uncontrolled in any way by the Chief Justice and completely insulated from any supervisory jurisdiction of the regular courts. They were controlled by the National Public Tribunals Board and ultimately by the PNDC itself.”⁵³

However, the Judicial Council, headed by the Chief Justice, continued under article 131(3) of the Constitution, 1979 to exercise responsibility for the effective and efficient administration of the regular courts.

It should be further observed that the judicial system, consisting of the two independent parallel courts - the regular courts and the public tribunals - was abrogated following the re-

⁵¹ See sections 1 and 2 of the now repealed Public Tribunals Law, 1984 (PNDCL 78).

⁵² Then Senior Lecturer, Faculty of Law, Legon in “The Courts Act, 1993 (Act 459): New Elements” chapter 4 in *Ghana Bar Association Lectures in Continuing Legal Education* (supra) at page 127.

⁵³ It was precisely for these reasons that the Ghana Bar Association, as a policy, passed a resolution boycotting the proceedings of the public tribunals throughout their existence and called upon its members not to appear before any of the public tribunals. However, some members refused to comply with the resolution in open defiance.

introduction of the integrated, unified court system by the Constitution, 1992. The public tribunal system as conceived and operated under the Public Tribunals Law, 1984 (PNDC 78), was completely abolished but the concept of lay persons being involved in the administration of the criminal justice as members of a tribunal was retained albeit in an attenuated form. The cumulative effect of the provisions of the Constitution, 1992, art 126 and the Courts Act, 1993 (Act 459), before its amendment by the Courts (Amendment) Act, 2002 (Act 620), was to create a unified judiciary - consisting of:

- (a) the Superior Courts comprising the Supreme Court, the Court of Appeal, the High Courts and Regional Tribunals;⁵⁴ and
- (b) lower courts and tribunals comprising circuit court and circuit tribunal; community tribunal; the Judicial Committees of the National House of Chiefs, Regional Houses of Chiefs and traditional councils and such other lower courts or tribunals as might be established by law.

It must be explained and stressed that a regional tribunal, defined as part of the superior courts, and the circuit and community tribunals also defined as forming part of the lower courts, under the judicial system established under Act 459, were a far cry from the public tribunals as they operated under the old judicial system. The regional, circuit and community tribunals created under the Courts Act, 1993 (Act 459), were different from the national, regional, district and community public tribunals which operated under PNDCL 78 in terms of *status, procedure and jurisdiction*.

The procedure of the former public tribunals under PNDCL 78 was informal. As already pointed out, they were controlled by the National Public Tribunals Board and ultimately by the PNDC as the supreme body; they also operated outside the regular courts. In fact, there

⁵⁴ Under the Constitution, 1992, art 126 and the Courts Act, 1993 (Act 459), ss 1, 10 and 23.

were occasions, during the operation of the Public Tribunals Law, 1984 (PNDCL 78), when changes occurred in the composition of the panel of a public tribunal in the course of the hearing of a criminal case involving the same accused persons. The question whether such changes in the membership of a panel, constituting a public tribunal, did or did not occasion a miscarriage of justice was raised *suo motu* by the Supreme Court in *Okyere v The Republic*.⁵⁵

This case came before the Supreme Court on appeal from the judgment of the Court of Appeal. The matter had come before the Court of Appeal as an appeal from the decision of the Ashanti Regional Public Tribunal, which had convicted the appellants of the offences of forgery. The appellants appealed to the National Public Tribunal established under PNDCL 78. But the appeal could not be heard by the National Public Tribunal before the coming into force of the Constitution, 1992. The appeal was therefore transferred to the Court of Appeal for determination.

The convictions of the appellants by the Ashanti Regional Public Tribunal were affirmed by the Court of Appeal. The Supreme Court, on appeal from the decision of the Court of Appeal, found that a panel member of the Ashanti Regional Public Tribunal, which had tried the case, had sat as a member of the panel at the start of the hearing of the case. The member absented himself on two occasions. He did not hear the evidence of some of the witnesses but participated in the conviction of the appellants. The Supreme Court pronounced the whole proceedings resulting in the conviction of the appellants a nullity. The court held that the conduct of the panel member was caught by section 13(17) of PNDCL 78 as having occasioned a substantial miscarriage of justice.⁵⁶ The Supreme Court held that the effect of section 13(17) was that the procedure adopted by the tribunal was so gravely irregular that it

⁵⁵ [2001-2002] SCGLR 833.

⁵⁶ Section 13(17) of PNDCL 78 provided that: “Non-compliance with the rules governing the mode of trial shall not render a trial invalid unless a substantial miscarriage of justice has been occasioned.”

had occasioned a miscarriage of justice. The effect was to render the whole proceedings and the judgment invalid. The Supreme Court further explained that if the panel member had not taken part in convicting the appellants, the proceedings might have been protected by section 24(2) of PNDCL 78 because his absence from the trial *simpliciter*, would have been a defect under the said section 24(2).⁵⁷

However, in contrast to tribunals set up under PNDCL 78, the tribunals under Act 459, were part of the regular courts. Under section 44(2) of the Act, the Chief Justice can sit as a member of the regional tribunal as part of the regular superior courts. A regional tribunal is vested with jurisdiction under article 143 (1) of the Constitution, 1992: “to try such offences against the State and the public interest as Parliament may, by law, prescribe.” Under section 24(1) of Act 459, a regional tribunal has been vested with jurisdiction to try some specified offences including offences “involving serious economic fraud, loss of state funds or property.”⁵⁸ And a circuit tribunal established by Act 459, was a totally new court; it exercised the criminal jurisdiction previously exercised by the circuit court under the old judicial system. Furthermore, a community tribunal established under Act 459, was not the same as the community public tribunal under the old system. A community tribunal established under Act 459 exercised the civil and criminal jurisdiction of the former district courts grade 1 and 2 under the old system. The decisions of all tribunals, as indeed all courts under the judicial system established under Act 459, unlike the public tribunals under the old judicial system, were subject to appeals ultimately to the Supreme Court as the final appellate court in Ghana.

⁵⁷ Section 24(2) of PNDCL 78 provided that “No decision, order, findings or a ruling of a Public Tribunal set up under this Law shall be regarded as invalid by reason of any defect in the composition of the Tribunal or in the appointment of any member thereof.”

⁵⁸ For the true effect of section 24 (1) of Act 459: see *Republic v Yebbi & Avalifo* [2000] SCGLR 149, SC.

It must be further stated that the circuit and community tribunals established under the Courts Act, 1993 (Act 459), as part of the lower courts and tribunals, have now been abolished under section 6(5) and (7) of the Courts (Amendment) Act, 2002 (Act 620) respectively. Indeed, under the new section 39 of Act 459 as amended by Act 620, the lower courts now consist of: circuit courts,⁵⁹ district courts,⁶⁰ juvenile courts, the judicial committee of the national house of chiefs, regional houses of chiefs and every traditional court vested with jurisdiction to adjudicate over a cause or matter affecting chieftaincy; and such other lower courts as Parliament may by law establish.

It could be said that the public tribunal system as it operated under the repealed PNDCL 78, consisting of: the community, district, regional and national public tribunals were, in fact, not retained. They were abolished. The use of the term “tribunal” in the Courts Act, 1993 to describe the regional, circuit and community tribunals – the composition of which included some lay persons - had given the false impression that the old public tribunals had been somewhat retained.

As pointed out, the circuit and community tribunals created under Act 459 have been abolished by the Courts (Amendment) Act, 2002 (Act 620). The present unified judicial

⁵⁹ Under section 115 of Act 49 as amended by Act 620, the circuit court is the successor to the circuit court in existence immediately before the coming into force of Act 620. And any criminal case pending before a circuit tribunal immediately before the coming into force of Act 620, was transferred to the new circuit court created by Act 620.

⁶⁰ Under Act 459 as amended by Act 620, district courts have now replaced community tribunals. Under section 115(8) of Act 459 as amended by Act 620, any civil or criminal matter pending before a community tribunal immediately before the coming into force of Act 620, was transferred to the relevant district court for hearing and determination.

system as set up under Act 459 as amended by Act 620, now operates under one central authority: the Judicial Council headed by the Chief Justice. The functions of the Judicial Council include: (i) proposing for consideration of government judicial reforms to improve the level of administration of justice and efficiency of the judiciary; and (ii) dealing with matters relating to the discharge of the functions of the judiciary and assisting the Chief Justice in the performance of his duties so as to ensure efficiency and effective realization of justice.⁶¹

Independence of the judiciary

It should be emphasized that the judiciary as composed at present is supposed to be independent and subject only to the Constitution, 1992 and is solely vested with judicial power, which is to be exercised by it to the exclusion of all other persons or institutions.

To that end, the Constitution, 1992 in article 125(3) provides that: “neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.”⁶² In exercising the final judicial power of the State, the judiciary shall, under article 122(1), be subject only to the Constitution and not to the control or direction of any person or authority. More specifically, under article 127(2) both the executive and the legislature are obliged not to interfere with the judiciary in the exercise of the judicial power

⁶¹ See Constitution, 1992, art 154.

⁶² For the meaning of “judicial power” as meaning not only the power to decide claims but also the power to enforce decisions of the courts: see *Republic v Court of Appeal; Ex parte Agyekum* [1982-83] 1 GLR 688, SC and *Akainyah v The Republic* [1968] GLR 548, CA. See also Read, J S “Judicial Power and the Constitution of Ghana” (1971) 3 RGL 107 at 118-128; see also Amidu, A B K, “The Scope and Effect of Judicial Power in the Enforcement and Defence of the Constitution, 1992”(1991-92) 18 RGL 120 at 128-130 and 135. After detailed examination of what constitutes “judicial power”, Amidu concludes at page 151: “[T]he whole issue of judicial power, its scope and its exercise is in fact a device to choose between competing public social policy objectives that would foster good governance so as to ensure stability,”

of the State; and all organs and agencies of the State are obliged to accord to the courts all assistance reasonably required “to protect the independence, dignity and effectiveness of the courts.” Judicial independence is further ensured by the provision in article 127(5) to the effect that:

“The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the Superior Court or any judicial officer or other person exercising judicial power, - shall not be varied to his disadvantage.”

Security of tenure of judges of the Superior Courts and their removal from the Bench should only be in accordance with the procedure for removal as laid down in article 146 of the Constitution.⁶³ All these provisions are aimed at ensuring the independence of the judiciary.

In discussing the issue of the independence of the Judiciary, one tends to think of interference emanating or committed by the executive arm of government by direct or indirect act or conduct. Such interference may be defined to include, intimidation by die-hard supporters of the ruling government;⁶⁴ or sheer indifference by the government to the logistic

⁶³ See *Tuffuor v Attorney-General* [1980] GLR 637; and also *Ghana Bar Association v Attorney-General (Abban Case)* [2003-2004] SCGLR 250, SC where a procedure other than that specified in article 146 was rejected. In contrast: see *Nartey v Attorney-General & Justice Adade* [1996-97] SCGLR 63. For detailed examination of these three cases: see Chapter 8.

⁶⁴ See in that regard: Ocquaye, Mike “Towards Democratic Consolidation in Ghana: A study of the Judiciary and its Relationship with the Executive” chapter 2 in *Six Years of Constitutional Rule in Ghana: 1993-1999 (Assessment and Prospects)* Freidrich Ebert Foundation, Accra, Ghana (1999) at page 19 where he wrote: “The experiences of Ghana Judiciary under the Provisional National Defence Council (PNDC) Government were terrible in several ways. The revolutionary Committees for Defence of the Revolution set up their own People’s Courts to rival the Traditional Courts at the grass roots level ... At one point the cadres of the Revolution raided the Supreme Court Building and took all those present

requirements and the urgent needs of the judiciary necessary for the “efficient and effective realization of justice” within the meaning of article 154(1)(b) of the Constitution, 1992.

An example of an assault on and interference with the independence of the judiciary occurred in The Gambia. It was reported⁶⁵ that Mr Justice Hassan Jallow, the most senior Justice of the Supreme Court, which is the highest appellate and constitutional court in The Gambia, had been summarily dismissed or removed from office *without stated reason* by a letter signed by the Solicitor-General apparently as instructed by the Government of The Gambia. The newspaper also carried a statement issued by The Gambian Bar Association (GBA) to the effect that the GBA has:

“Unreservedly condemned the action as unconstitutional and consequently void. The association ‘expressed its deep concern at this further blatant disregard for the rule of law and interference with the independence of the judiciary.’”

It was also reported in the same newspaper that the GBA had, in protest, decided to boycott all court sittings from 29-31 July 2002.

The removal was clearly unconstitutional. It was contrary to section 141(1) of the 1997 Gambian Constitution which provides for an elaborate procedure for removing a judge of the Supreme Court from office. Section 141(4) provides that: “ A judge of a Superior Court shall only be removed from office for inability to perform the functions of his or her office,

hostage. Offices were ransacked ... The worst came when three High Court Judges were captured and murdered by people who were ostensibly acting on behalf of the revolution. Judges on the whole held their offices at the pleasure of the revolutionaries of the day.”

⁶⁵ *The Daily Observer*, Friday 26 July 2002, front page.

whether arising from infirmity of body or mind or for misconduct.” Under section 141(4), (5) and (7), the Speaker of Parliament, the National Assembly and a tribunal of three, chaired by a person who holds or has held high judicial office, had to be involved in the process of removing a judge of the superior court from office. The procedure laid down for the removal of judges under article 141 (1) of the Constitution was thus ignored and not complied with by the executive in the removal of Mr Justice Hassan Jallow.⁶⁶

In November 2001, another judicial officer, Mr Ousman A S Jammeh, the Master of the Gambia High Court, who exercises, *inter alia*, the functions of a High Court Judge in chambers under the Courts Act, Cap 6:01, was also summarily removed from office without any reasons or explanation by the Government of The Gambia. However, the summary dismissal of the Master of the High Court drew no condemnation from the Gambia Bar Association (GBA). There was total silence from the association. The association, regrettably, simply turned a blind eye to the unconstitutional dismissal of the Master of the High Court. It seems to me that if the GBA had issued a statement of condemnation, just as it did in the case of the unconstitutional removal of Justice Jallow, the government might have been somewhat restrained or at least cautious in resorting to the summary dismissal of Mr Justice Hassan Jallow. It appears that in that sense, it could be said that the Gambia Bar Association cannot be totally blameless for the interference with the independence of the judiciary in The Gambia. Its regrettable inaction might have contributed to the further unconstitutional action of the executive.

We therefore have the regrettable situation in The Gambia where the democratically elected government acts contrary to the demands of the rule of law, an indispensable pillar of the

⁶⁶ Justice Hassan Jallow, in fact, tendered his resignation immediately after his summary dismissal from office. He was soon thereafter appointed by the UN Secretary General as a Judge of the UN International Criminal Tribunal for Sierra Leone.

democratic system of government.⁶⁷ One can only express the hope that The Gambian Government,⁶⁸ which must be commended for its demonstrable achievement in the area of rapid economic development in health, education and road construction, may no longer, in consonance with the demands of rule of law and good governance, resort to summary dismissal of judges of the superior courts. If it has to do so, then it must, as a democratically elected government, comply with the procedure for removal of judges of the superior courts as provided in article 141 (1) of The Gambian Constitution, 1997. Such a move, would, no doubt, enhance the reputation of the government.

It should be stressed, however, that open and direct interference with judicial independence, as exemplified by The Gambian experience, is not the only mode of interfering with the independence of the judiciary. The judiciary could compromise its own independence by its own act or omission. In other words, the interference could be self-inflicted. The Ghana Supreme Court in its recent decision in *Agbevor v Attorney-General*⁶⁹ made it very clear that such self-inflicted interference with judicial independence would not be allowed to go on unchecked.

The Supreme Court asserted in the *Agbevor* case (supra) that the President of Ghana, ie the executive, had no disciplinary authority for the removal of judicial officers such as the Deputy Judicial Secretary, the plaintiff in that case; that the power of removal of a judicial officer was, in terms of article 151(1) of the Constitution, solely vested in the Chief Justice for stated

⁶⁷ The Gambian experience relating to summary and unconstitutional dismissal and removal of superior court judges is to be compared to the Ghana experience, namely, similar unconstitutional and summary dismissal of judges during Nkrumah regime see eg *State v Otchere* [1963] 2 GLR 463 – examined in detail post in this chapter; and also summary removal from office of superior court judges by the PNDC military regime: see footnote 72 below.

⁶⁸ Headed by His Excellency President Dr A J J Jammeh (Col Rtd).

⁶⁹ [2000] SCGLR 403.

grounds, namely, for misbehaviour, incompetence or inability to perform his functions and “upon a resolution supported by the votes of not less than two-thirds of all the members of the Judicial Council.” The Supreme Court in this case also castigated and condemned the Judicial Council itself for making wrong recommendations to the President for the removal of the Deputy Judicial Secretary, the plaintiff in that case.⁷⁰

The condemnation by the Supreme Court in the *Agbevor* case (supra), was a regrettable indictment of the Judicial Council headed by the Chief Justice. The Supreme Court, in an uncompromising mood, made it clear that the Judicial Council was ultimately responsible for the unconstitutional acts of the President in purporting to remove the plaintiff as a judicial officer. In his opinion in support of the unanimous decision of the Supreme Court in the *Agbevor* case, Kpegah JSC said:⁷¹

“... the [Judicial] Council, in effect, recommended to the President to do an act which is in clear violation of article 127(1) of the 1992 Constitution, which guarantees, in very robust language, the independence of the Judiciary in its administrative matters...

The second point I find disturbing about the recommendation by the Judicial Council is that *it has not only undermined its own authority under article 151(1) of the Constitution, but also that of the Chief Justice, the disciplinary authority for judicial officers.*”

⁷⁰ See also the dictum of Atuguba JSC in his dissenting opinion in *Tsatsu Tsikata (No 1) v Attorney-General (No 1)* [2001-2002] SCGLR 189, namely: “The judiciary itself cannot waive its independence under articles 125 (1) and 127 (1) of the Constitution, 1992 by acquiescing in the administration of justice in the name of the President or other authority or person, rather than the Republic.”

⁷¹ Ibid at p 411 (the emphasis is mine).

There is no doubt that the *Agbevor* case (supra), could be considered as an epoch-making decision and also as a distinctive contribution to the development of Ghana Constitutional Law. The decision could be so considered, bearing in mind the fact that during the Nkrumah and the PNDC regimes, judges of the superior courts could and were summarily dismissed.⁷²

An example of a summary dismissal by the Nkrumah regime arose after the decision of the Special Criminal Division of the High Court (*coram*: Sir Arku Korsah CJ, van Lare and Akufo-Addo JJSC) in the case of *State v Otchere*.⁷³ The court in this case, after hearing and reviewing the evidence, acquitted and discharged the third, fourth and fifth accused persons⁷⁴ of the offences of conspiracy to commit treason and treason. The decision was subsequently declared null and void by the Special Criminal Division Instrument, 1963 (E I 161), issued by the government. And two days after, President Nkrumah, in exercise of his powers under article 44 (3) of the Constitution, 1960 summarily dismissed Sir Arku Korsah, the Chief Justice from office.

There is no doubt that all the actions taken by the Nkrumah regime in respect of this criminal trial and its aftermath, constituted gross interference with the judicial process, albeit taken in

⁷² During the PNDC military regime, a number of judges of the superior courts were summarily dismissed from office. They included the former Chief Justice of Ghana, Hon Mr Justice Edward Wiredu, then Justice of the Court of Appeal, who was re-instated and promoted to the Supreme Court much later, upon protest and petition made to the PNDC; and Hon Mr Justice P K Twumasi, then a Justice of the High Court, who was also re-instated and also promoted to the Court of Appeal, in his case after many years later, also upon a petition presented to the PNDC.

⁷³ [1963] 2 GLR 463.

⁷⁴ Namely, Tawiah Adamafio and Ako Adjei, both Ministers in the Nkrumah Government and one Cofie Crabbe, a very top functionary of the ruling party, the Convention People's Party (CPP).

accordance with the prevailing law. The truth, however, is that all the actions taken were politically motivated and draconian.

There can be no talk of the independence of the judiciary unless the judges themselves, especially in the Supreme Court of Ghana, and in any final appellate and constitutional court in any democratic country for that matter, are bold, even-handed and independent-minded, regardless of all political, economic and personal considerations. Consequently, we should welcome as timely and appropriate, the observation made by Kpegah JSC in his opinion in the case of *Tsatsu Tsikata (No 1) v Attorney-General (No 1)*.⁷⁵ He asserted in this case that judicial independence implies that judges must be bold and fearless. As he poignantly put it:

“The saying that justice must be done even if the Heavens fall will be meaningless unless it is linked up with an equally important saying that the Bench is not for timorous souls.”

It is also suggested that it is not enough for the judges to be bold and fearless. The judges must also display competence, integrity, personal comportment (both publicly and privately). They must also exude sound knowledge of the law and command respect and confidence from their peers and litigants who expect from them nothing but unalloyed justice and truth. Judges must further resist all pressures, monetary or otherwise. In this way, the judges, especially in the Supreme Court, can effectively contribute to the observance of not only the rule of law

⁷⁵ [2001-2002] SCGLR 189. It must be noted that the majority decision in this case was, on an application for a review by the defendant Attorney-General, set aside in *Attorney-General (No 2) v Tsatsu Tsikata (No 2)*, [2001-2002] SCGLR 620.

and true freedom and justice but also all the abiding values inherent in a free and democratic society.⁷⁶

Related to the question of judicial independence are the constitutional requirements for the composition and jurisdiction of the Supreme Court; and the appointment and removal from office of the Justices of the Supreme Court under the Constitution of Ghana, 1992.

Composition of the Supreme Court

Article 115(1) and (2) of the Constitution, 1979 provided that the Supreme Court should be composed of the Chief Justice as President and not less than six other Justices of the Supreme Court. And it was to be constituted for the exercise of its specified jurisdiction by not less than five justices thereof. However, article 115 (1) and (2) of the Constitution, 1979 was impliedly amended by section 19 of the Provisional National Defence Council Law (PNDCL 42). That section provided that the Supreme Court should consist of the Chief Justice as President and not less than four justices thereof but for the determination of a particular case, the Chief Justice might, in his discretion, request other Justices of the Court of Appeal to sit in the Supreme Court for a specified period. Thus in the case of *Republic v High Court, Accra; Ex parte Adjei*,⁷⁷ the Supreme Court held by a majority decision of four to one, that the effect of section 19 of PNDCL 42 was that the Supreme Court could be validly constituted to exercise its jurisdiction by any five Justices of the Supreme Court, or the Court of Appeal or both. It is very interesting to observe that in the subsequent 1987 Supreme Court case of *Bisi*

⁷⁶ See also Ocquaye, Mike, op cit at page 21 where he wrote: “The calibre of judges, their boldness, courage of their convictions, innovativeness and commitments to the protection of fundamental human rights, largely determine the manifestation of judicial autonomy and rectitude in administering justice.” See also pages 20-26 of the same publication for detailed discussion on the basic requirements of judicial independence in the modern democratic state.

⁷⁷ [1984-86] 2 GLR 511, SC.

v Tabiri alias Asare,⁷⁸ three Justices of the Court of Appeal were invited to sit in the Supreme Court with two very experienced Justices of the Supreme Court. By a three to two majority decision, the three Justices of the Court of Appeal overruled, causing much embarrassment, the decision of the two Supreme Court Justices.

The present situation under article 128 of the Constitution, 1992 is that the Supreme Court shall consist of the Chief Justice and not less than nine Justices of the Supreme Court. It shall, under article 128(2), which is the same as article 115(2) of the Constitution, 1979 be duly constituted for the exercise of its jurisdiction by not less than five Justices of the Supreme Court. However, when exercising its review jurisdiction as conferred upon it by article 133(1) of the Constitution, 1992 (an issue examined in detail later in this chapter), the Supreme Court shall, under article 133(2), be composed by not less than seven justices of the court.

The Constitution, however, does not make provision for the empanelling of the Supreme Court for the exercise of its jurisdiction be it constitutional, supervisory, appellate or review. The Supreme Court has, however, in furtherance of its role in the development of the Constitutional Law of Ghana, thrown the much-needed light on the status of the Chief Justice vis-à-vis his constitutional role in the empanelling of the Supreme Court, especially where the Chief Justice himself is a party to the action.

Thus in the recent case of *Tsatsu Tsikata v Chief Justice & Attorney-General*,⁷⁹ the plaintiff sued both the Chief Justice and the Attorney-General under articles 2(1) and 130(1) of the Constitution, 1992 for a declaration, inter alia, that the *Practice Direction* (*Practice in the Empanelling of Justices of the Supreme Court*)⁸⁰, issued on 10 January 2001 by the Ag Chief

⁷⁸ [1987-88] 1 GLR 360, SC.

⁷⁹ [2001-2002] SCGLR 437.

⁸⁰ [2000] SCGLR 586.

Justice, was in conflict with articles 125(4) and 128(2) of the Constitution and therefore null and void.⁸¹ At the hearing, the plaintiff raised a preliminary objection on the ground that it was against the rule of natural justice and the principle of *nemo judex in causa sua*, for the Chief Justice, being a party to the action, to empanel the court which was to hear the action. In other words, the plaintiff made an allegation of bias against the Chief Justice in the empanelling of the court.

The Supreme Court unanimously dismissed the preliminary objection. It was held that: (i) the allegation of bias, in the circumstances of the case, could not disable the Chief Justice from performing his functions under article 144(6) of the Constitution;⁸² (ii) the Chief Justice had the prerogative of empanelling the Supreme Court and was thus vested, under article 128(2), with the discretionary power to administratively empanel all or the available Justices of the Supreme Court to sit on a case; (iii) the Chief Justice had the discretion under article 133(2) of the Constitution to empanel justices of uneven number but not less than seven to sit on a review application brought before the Supreme Court; (iv) the *Practice Direction* was not binding on the court or any person; and neither did it in any way infringe articles 125(4) and 128(2) of the Constitution; and (v) in exercising his discretion generally, the Chief Justice was required under article 296 (a) and (b) of the Constitution to be fair and candid, not

⁸¹ *The Practice Direction* [2000] SCGLR 586 was issued by the Ag Chief Justice in the exercise of his functions under articles 125 (4) and 144 (6) of the Constitution, 1992. It states that: “ In order to minimize the mounting criticisms and the persistent public outcry against the Judiciary in our justice delivery and to restore public confidence, it is my desire that where practicable and especially in constitutional matters, all available Justices of the Supreme Court have a constitutional right to sit, or at least seven (7) justices of the court...”

⁸² Article 144 (6) briefly provides that where the office of Chief Justice is vacant or where for any reason he is unable to perform the functions of his office, those functions shall be performed by the most senior of the Justices of the Supreme Court, pending the appointment of a new Chief Justice or until the holder of the office has resumed the functions of his office. The functions include the empanelling of the Supreme Court.

capricious or biased by either resentment, prejudice or personal dislike and the discretion should be exercised in accordance with the due process of law.

In so holding, the Supreme Court in the *Tsatsu Tsikata v Chief Justice & Attorney-General* (supra), cited its previous decision in *Kuenyehia v Archer*.⁸³ In that case, four office bearers of the Ghana Bar Association sued the Chief Justice, the Judicial Secretary and the Attorney-General, for a declaration, inter alia, that by the combined effect of article 156(1)-(3) and section 4 of Schedule I and Schedule II of the Constitution, 1992 the President, and not the Chief Justice, was the proper person to administer the oath of allegiance and the judicial oath to judges of the Superior Courts who had continued in office after the coming into force of the 1992 Constitution.

At the hearing of the action, the plaintiffs raised a preliminary issue, contending that it was in the interest of all the Justices of the Supreme Court, excluding the Chief Justice, to be empanelled to determine the action. The preliminary objection was dismissed on the ground, inter alia, that there was no requirement under the Constitution that all Justices of the Supreme Court should be empanelled to determine any particular issue; that under the law and practice of the Supreme Court, the Chief Justice had the prerogative to empanel the court and that unless there were very good reasons for seeking a change on grounds such as legal bias - and as there was no such ground in the that case - the court would be loath to interfere with the Chief Justice's exercise of his prerogative. Giving his opinion in support of the majority decision, Edward Wiredu JSC (as he then was)⁸⁴ who, incidentally, was the Chief Justice

⁸³ [1993-94] 2 GLR 525, SC.

⁸⁴ It should be explained that there was another Justice of the Superior Court also called Justice Wiredu. To distinguish between the two justices, the first name Edward was added by the Editor of the Ghana Law Reports to the name of the present Justice Wiredu. Hence he is described in all publications of the *Ghana Law Reports* (GLR) and the *Supreme Court of Ghana Law Reports* (SCGLR) as Edward Wiredu JSC now as Edward Wiredu CJ.

against whom the objection had been raised in *Tsatsu Tsikata v Chief Justice & Attorney-General* (supra), said rather ironically and prophetically that:⁸⁵

“In my ...view the submission made on behalf of the plaintiffs did not persuade me as legally commendable. The power or the right to empanel judges to sit on cases has by convention, usage and practice become the exclusive preserve of the Chief Justice. He has constitutional responsibility for the smooth administration and supervision of the judiciary. He is the constitutional head of the judiciary. The right to empanel justices by the Chief Justice is in accordance with precedents and authority. He has no power to delegate or waive that responsibility or that duty in favour of any person whilst in office and is able to act...

It is not being alleged that the Chief Justice had illegally acted or that he was incompetent to empanel the court or that he did so in bad faith or that the court was wrongly constituted which would have given us a cause to examine the issue.”

It is very interesting to point out that the issue of the right of the Chief Justice to empanel the Supreme Court was raised by the plaintiff's counsel in chambers and quickly conceded by the Supreme Court in the recent case of *Bimpong-Buta v General Legal Council & Three Others*.⁸⁶ In this case the plaintiff, Mr S Y Bimpong-Buta, sued in the Supreme Court on 22 May 2003 for the following declarations and orders:

“1. A declaration, under articles 2 and 130(1) of the Constitution, 1992 that on a true and proper interpretation of section 8(1) and (7) of the transitional provisions of the 1992 Constitution, Seth Yeboa Bimpong-Buta, the plaintiff herein, formerly the Editor of the Ghana Law Reports, who was transferred

⁸⁵ [1993-94] 2 GLR 525 at 589.

⁸⁶ Supreme Court, Suit No 4/2003, 11 November 2003, unreported.

from the Council for Law Reporting to the General Legal Council on his appointment as the Director of Legal Education/Director of Ghana School of Law, had the accrued right, by the combined effect of the Interpretation Act, 1960 Act 1960 (CA 4), s 8(1)(c), the Legal Profession Act, 1960 (Act 32), s 1(4); Council for Law Reporting Decree, 1990 (PNDCL 234), ss 6(2) and 9A; the Legal Service Law, 1993 (PNDCL 320), ss 5 and 7 and section 8(1) and (7) of the Transitional Provisions of the 1992 Constitution, to retire at the age of 65 years before the coming into force of the 1992 Constitution on 7 January 1993.

2. That the plaintiff, Seth Yeboa Bimpong-Buta, Director of Legal Education/Director of the Ghana School of Law, the plaintiff herein, is entitled to retire at the age of 65 years and that the provision in article 199(1) of the Constitution is inapplicable to him.
3. That so long as the appointment of the plaintiff, Seth Yeboa Bimpong-Buta as the Director of Legal Education/Director of Ghana School of Law under section 1(4) of the Legal Profession Act, 1960 (Act 32) subsists, neither the Chief Justice, the Chairman of the General Legal Council, nor the Council itself can appoint or purport to appoint any other person as the Director of Legal Education/Director of the Ghana School of Law.
4. That the letter dated 2 January 2003, signed by His Lordship, the Chief Justice, in his capacity as the Chairman of the General Legal Council, purporting to appoint Mr Kwaku Ansa-Asare, the second defendant, as the Substantive Director of Legal Education/Director of Ghana School of Law, with effect from 1st October 2002, under the same section 1(4) of the Legal Profession Act, 1960 (Act 32), is a nullity and of no effect because the said appointment impugns the accrued right of the plaintiff to retire at the age of 65 years under section 8(1) and (7) of the Transitional Provisions of the Constitution, 1992.
5. Perpetual injunction restraining the General Legal Council, the first defendant or its chairman, the Chief Justice, henceforth, from holding out Mr Kwaku Ansa-Asare, the second defendant, as the Director of Legal Education/Director of Ghana School of Law and also for restraining Mr Kwaku Ansa-Asare, the second defendant, from holding himself out as the Director of Legal Education/Director of Ghana School of Law.
6. A declaration under article 2 of the Constitution, 1992 that Mr Michael Nkansah Okyere, the third defendant's continued stay in office as Registrar

of the Ghana School of Law/Secretary of the Board of Legal Education, after 4 February 2003, when he attained the compulsory retiring age of 65 years, is inconsistent with and in contravention of article 199(1) and (4) of the Constitution, 1992 as amended by the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) and therefore unconstitutional and unlawful.

7. Perpetual injunction restraining the first defendant and its Chairman, the Chief Justice, from holding out the third defendant, Mr Michael Nkansah Okyere, as the Registrar of the Ghana School of Law/Secretary of the Board of Legal Education and also restraining the said Mr Michael Nkansah Okyere from holding himself out as the Registrar of the Ghana School of Law/Secretary to the Board of Legal Education and further from performing any functions pertaining to that office.”

The case was subsequently listed for hearing on 11 November 2003 before the Supreme Court. A five-member court, presided over by the Chief Justice, was empanelled by the same Chief Justice, Justice George Kingsley Acquah in the exercise of his constitutional right to empanel the court.⁸⁷

Before the commencement of the hearing, counsel for the plaintiff⁸⁸ applied to the court for permission for counsel for all the four defendants to meet the court in chambers to enable him raise a very important preliminary issue. The court readily granted the request. Whilst in chambers, counsel for the plaintiff raised a preliminary objection against the Chief Justice sitting and presiding over the hearing of the case. The grounds raised for the objection were, inter alia, that the Chief Justice, who had decided to empanel himself to sit and preside over the hearing of the case, was in fact, under the Legal Profession Act, 1960 (Act 32), the ex-officio Chairman of the General Legal Council, the first defendant in the case. Counsel therefore argued that if the Chief Justice were to continue to sit and preside over the case, he

⁸⁷ *Coram*: Acquah CJ, Baddoo, Dr Twum, Prof Kludze and Dr Bate-Bah JJSC.

⁸⁸ Mr Sam Okudzeto, Senior Advocate of Ghana (SAG) and the former President of the Ghana Bar Association.

would, in effect, sit as a judge in his own cause. The Chief Justice readily conceded the plaintiff's preliminary objection and declined to sit on the case. The Supreme Court therefore decided to adjourn the case *sine die* for the Chief Justice to reconstitute the panel.⁸⁹

The decision of the learned Chief Justice to sit on the case cannot escape adverse comment and criticism. The decision is at once, bizarre and incomprehensible. Given the incontrovertible fact that the Chief Justice was and is still the statutory chairman of the first defendant, ie the General Legal Council, he ought, with respect, to have advised himself not to sit on the case. The decision is even more astonishing and clearly difficult to understand by any reasonable standards, given the fact that the plaintiff's reliefs included the claim that: "so long as the appointment of the plaintiff as Director of the Ghana School of Law subsists... neither the Chief Justice, the Chairman of the General Legal Council, nor the Council itself can appoint or purport to appoint any other person as the Director of Legal Education/Director of the Ghana School of Law." What is even more surprising and, indeed, very regrettable was

⁸⁹ It should be noted that a new panel was subsequently empanelled by the Chief Justice to hear the case *coram*: Sophia Akuffo, Baddoo, Dr Twum, Prof Kludze and Dr Date-Bah JJSC. The court subsequently heard the case on the merits on 12 February 2004 and adjourned the case for nearly six weeks for judgment. The court by its unanimous ruling given on 24 March 2004 held (*suo motu* ie without prior hearing given to the parties on the issue of want of jurisdiction or otherwise) that it has no jurisdiction to determine the plaintiff's claims, and that the proper court to determine the claims as endorsed on the writ was the High Court, if the plaintiff was minded to do so. The Supreme Court, by its failure to give prior hearing for the parties, committed a fundamental procedural error of law: see *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620 where the court per Acquah JSC at 646 said: "The issue of jurisdiction can be raised at any time, even after judgment. Thus whether the parties raised the issue of jurisdiction or not, the court is duty bound to consider it. *And where the issue is not raised, the court is to raise it suo motu and call upon the parties to address that issue.*" (My emphasis). The plaintiff subsequently filed substantially the same claim before the Fast Track High Court, Accra. The Writ No A(HR) 16/2004 is still pending before the High Court for determination. Formal search conducted in the records of the court at the instance of the solicitors for the plaintiff shows that as at 1 December 2004, the first defendant General Legal Council has still not filed its statement of defence to the plaintiff's claim even though the council had been served with the plaintiff's writ since June 2004.

the fact that the other learned Justices of the Supreme Court, who sat on the case with the Chief Justice at the hearing on 11 November 2003, failed to detect the inappropriateness of the Chief Justice to sit with them in the light of the plaintiff's reliefs as endorsed on the writ, given the fact that he was the Chairman of the General Legal Council. Like the Chief Justice, the other four judges, knew or ought to have known that, in the special circumstances of the case, it would be most improper for the Chief Justice to sit with them and preside over the hearing of the case.

The inescapable conclusion is that the decision of the Chief Justice to sit on the case of *Bimpong-Buta v General Legal Council* (supra), was most unfortunate and regrettable. The only charitable comment one can make is that perhaps, what was obvious to any unbiased person, unwittingly escaped the judges, namely, that even though the Chief Justice has the constitutional right to empanel himself and sit on the case, in the special circumstances of the case, it was most improper for him to sit on the case. The failure of the judges to see the obvious, is, to say the least, most regrettable and certainly uncomplimentary of the Supreme Court, which as the final constitutional court, must radiate confidence and not mistrust and suspicion.⁹⁰

Having examined the question relating to the composition of the Supreme Court and the related issue of the discretion vested in the Chief Justice to empanel the court to exercise its

⁹⁰ It must be noted that if, in the case of *Bimpong-Buta v General Legal Council* (supra) the Chief Justice had refused to decline jurisdiction, he could not have taken part in the decision to determine the plaintiff's preliminary objection raised in chambers. The Chief Justice, would have been compelled by law to empanel another court to sit on the case to determine a formal motion by the plaintiff, raising a preliminary objection to the Chief Justice sitting on the case: see *Akufo-Addo v Quashie-Idun* [1968] GLR 667, SC and *Tsatsu Tsikata v Chief Justice & Attorney-General* [2001-2002] SCGLR 437.

jurisdiction, we shall proceed to examine next the issue, namely, the qualifications for appointment of the Chief Justice and Justices of the Supreme Court.

Qualifications for appointment as Chief Justice or Justice of the Supreme Court

Article 128 (4) of the Constitution, 1992 requires that the person to be so appointed, must be a person of “ high moral character and proven integrity” and “of not less than fifteen years’ standing as a lawyer”. In the case of the Chief Justice, article 144 (1) provides that the appointment shall be made by the President “ acting in consultation with the Council of State and with the approval of Parliament.” However, in the case of the appointment of a Justice of the Supreme Court, the appointment must, under article 144 (2), be made by the President “ on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.”

It is very interesting to observe that in *Tuffuor v Attorney-General*⁹¹ and *Ghana Bar Association v Attorney-General (Abban Case)*,⁹² the Supreme Court had to rule on the constitutionality of the appointment as Chief Justice of Mr Justice F K Apaloo and Mr Justice I K Abban respectively. The Supreme Court in the *Tuffuor Case* held that Mr Justice Apaloo became the Chief Justice of Ghana by the due process of law in that he had held the identical or equivalent office before the coming into force of the Constitution, 1979 and that he “shall be deemed to have been appointed” as the Chief Justice of Ghana as provided in article 127 (8) of the Constitution, 1979. Consequently, the Supreme Court held that once the Chief Justice was constitutionally in office, he could only be removed from office by the invocation of the procedure for removing a superior court judge as specifically provided by article 128, and not by recourse to article 127(1) (a) which dealt with the mode of appointment of the Chief Justice.

The Supreme Court reached the same conclusion fifteen years later in the *Abban Case* (supra.). In that case the court, in upholding the preliminary objection by the defendants to the exercise of its jurisdiction, unanimously held that the claim by the plaintiff, the Ghana Bar Association, for a declaration that Justice Abban (whose appointment as Chief Justice 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 Chief Justice, but also in removing him completely from the Bench. The court therefore held, like the *Tuffuor Case*, that the special procedure specified in article 146 of the Constitution, 1992 for removing a

⁹¹ [1980] GLR 637.

⁹² [1995-96] 1 GLR 598; [2003-2004] SCGLR 250.

judge of a superior court from office, must be invoked. In support of the unanimous decision in the *Abban Case*, Edward Wiredu JSC (as he then was) said:⁹³

“ We 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 limitations imposed on us by the Constitution.”

The above dictum of Edward Wiredu JSC that “the judges must not arrogate” to themselves “powers [they] do not have” leads us to the question of the extent of the jurisdiction of the Supreme Court.

Jurisdiction of the Supreme Court

Under the Constitution, 1992 the Supreme Court has jurisdiction in the following matters: (i) *original exclusive jurisdiction* in all matters relating to the interpretation and enforcement of the Constitution under articles 2 and 130 (1) (a) and (b)⁹⁴; (ii) *supervisory jurisdiction* over all courts and any adjudicating authority under article 132; and (iii) *appellate and review jurisdiction* under articles 131 and 133 respectively. We proceed to examine in detail, the appellate and review jurisdiction of the Supreme Court.

⁹³ Ibid.

⁹⁴ An issue examined in detail in chapter 8.

Appellate jurisdiction

The Supreme Court has appellate jurisdiction under article 131(1) from any judgment of the Court of Appeal: (a) *as of right* in any civil or criminal matter in respect of which an appeal has been brought to the Court of Appeal from any judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction;⁹⁵ or (b) *with the leave of the Court of Appeal* in any case or matter where the case was commenced in a court lower than the High Court or Regional Tribunal. In that event, the Court of Appeal must be satisfied that the case involves a substantial question of law or is in the public interest. Apart from the right of appeal conferred under article 131(1), ie whether as of right or with leave of the Court of Appeal, article 131 (2) provides that the Supreme Court may grant a person *special leave to appeal* from the judgment of the Court of Appeal.

Apart from appeals from a judgment or any order of the Court of Appeal, the Supreme Court also has, under article 131 (3), *exclusive jurisdiction to hear appeals from the conviction or otherwise of a person for high treason or treason by the High Court*. The Supreme Court also has, under article 131 (4), exclusive jurisdiction to hear an appeal from the judgment of the

⁹⁵ The Supreme Court has, in the case of *In re Parliamentary Election for Wulensi Constituency; Zakaria v Nyimakan* [2003-2004] SCGLR 1 decided, by majority decision, that the general appellate jurisdiction of the Supreme Court under article 131(1)(a) of the Constitution, may be superseded by the special mode of a determining an election petition under article 99(2) of the Constitution. In other words, there was no right of further appeal from the Court of Appeal to the Supreme Court in respect of an appeal from an election petition determined by the High Court under article 99(1) of the Constitution, 1992. In the said *Wulensi Constituency* case (supra), the Supreme Court said (per Dr Twum JSC) at page 8: “Where the Constitution provides for appellate jurisdiction in the Supreme Court as of right in a ‘civil cause or matter’ in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court, it is in essence the type of action, suit or other proceeding and not the *court* whence the suit commenced that gives the Supreme Court jurisdiction.”

Judicial Committee of the National House of Chiefs with the leave either of the Judicial Committee of the National House of Chiefs or the Supreme Court itself.

It must also be noted that apart from the right of appeal to the Supreme Court conferred under the provisions of the Constitution, the general law may also confer an appeal as of right to the Supreme Court from a decision of any adjudicating body. Thus, for example, under the National Tribunal Law, 1988 (PNDCL 203), an appeal against the decision of the Revenue Commissioners on questions of law and of fact, shall lie as of right to the Supreme Court.

Review jurisdiction of the Supreme Court

The Supreme Court has jurisdiction exercisable by not less than seven justices of the court to review its own decisions under article 133 (1) of the Constitution, 1992 “on such grounds and subject to such conditions as may be prescribed by rules of court.” Rule 54 of the Supreme Court Rules, 1996 (C I 16), provides for two grounds upon which the Supreme Court may review its previous decision, at its discretion, on an application by a dissatisfied person, namely:

- (a) proof of exceptional circumstances resulting in a grave miscarriage of justice; and
- (b) discovery of new matter or evidence that has come to light after the decision which with all due diligence had not been within the applicant’s knowledge or could not be produced by him earlier, ie at the time when the decision was made.

The Supreme Court in the recent case of *In re Krobo Stool (No 2); Nyamekye (No 2) v Opoku (No 2)*⁹⁶ has decided that the lists of matters which might constitute exceptional circumstances were not exhaustive or closed; that mere repetition of grounds of appeal which

⁹⁶ [2000] SCGLR 567.

had been dismissed, was no justification for granting of review; and that an applicant must show the existence of some fundamental and basic error affecting his substantial rights. The Supreme Court further held that an applicant for review of the court's previous decision, must, in a supporting affidavit and statement of case, argue fully all relevant grounds relied upon. Further examples of matters held by the Supreme Court in other cases as constituting exceptional circumstances are: (i) where the court has inadvertently or unwittingly committed a fundamental or basic and patent error of law such as want of jurisdiction or error of fact such as giving weight to irrelevant or unproved facts or omitting to take relevant matters into consideration;⁹⁷ (ii) void judgments or orders founded on the principles laid down by the decision of the Supreme Court in *Mosi v Bagyina*;⁹⁸ and (iii) *per incuriam* decisions or discovery of matters of exceptional relevance which, if timeously discovered, would have had the effect of altering the judgment complained of.⁹⁹

Conversely, the Supreme Court has held that its review jurisdiction is not the time for: (i) re-opening an appeal which had been dismissed under the guise of review;¹⁰⁰; (ii) reiterating arguments proffered during the hearing of the appeal or raising matters which could have been raised but were not raised due to inadvertence, forgetfulness or otherwise;¹⁰¹;

⁹⁷ See *Republic v High Court, Kumasi; Ex parte Abubakari (No 3)* [2000] SCGLR 45.

⁹⁸ [1963] 1 GLR 337, SC.

⁹⁹ See *Mechanical Lloyd Assembly Plant Ltd v Nartey* [1987-88] 2 GLR 598 per Taylor JSC at 638, SC. See also *Republic v Tetteh* [2003-2004] SCGLR 140 wherein the court set aside the previous decision of the court in *Tetteh v The Republic* [2001-2002] SCGLR 854 on the grounds that that earlier decision had been given *per incuriam*. For detailed comment on these two decisions: see chapter 7, Part B dealing with General Fundamental Human Rights and Freedoms under the topic: "right of accused person to be given reasons by trial court for conviction for a criminal offence."

¹⁰⁰ See *Nasali v Addy* [1987-88] 2 GLR 286, SC.

¹⁰¹ See *In re Adum Stool (No 2); Agyei (No 2) v Fori* [2000] SCGLR 449.

(iii) interpreting the court's previous decision with a view to breaking new grounds in the law; and (iv) indulging in apologia of its previous decision.

It could be concluded, from the examination of the decisions by the Supreme Court, that the situations or instances which would constitute "exceptional circumstances resulting in grave miscarriage of justice" within the meaning of rule 54 of C I 16 are not closed. In that regard, attention may be drawn to recent pronouncements by their Lordships in the Supreme Court, which may be viewed as giving some general guidelines on when to grant or refuse an application for a review of the previous decision of the court.

First in his dissenting opinion from the majority decision in the *Nyamekye (No 2)* case, Ampiah JSC said:¹⁰²

"It is not the purpose of a review application to evaluate the evidence all over again; but, where in a situation, as in the instant case, the conclusions arrived at on the evidence, fly in the face of the established custom, it becomes the duty of the court to review the evidence so as to avoid miscarriage of justice."

Second, as Acquah JSC put it *Attorney-General (No 2) v Tsatsu Tsikata (No 2)*,¹⁰³ in support of the majority decision:¹⁰⁴

¹⁰² [2000] SCGLR 567 at 579.

¹⁰³ [2001-2002] SCGLR 620.

¹⁰⁴ Ibid at page 635.

“...it is important to appreciate that the review jurisdiction being a discretionary one, the decision to grant or not to grant ultimately depends ...on the facts and circumstances of each case and as dictated by the ends of justice.”¹⁰⁵

Jurisdiction relating to production of official documents

The Supreme Court also has exclusive jurisdiction relating to the production of official documents in court under article 135(1)-(3) of the Constitution. The issue of production of official documents may arise in a court other than the Supreme Court. When that issue so arises, that court may suspend its proceedings and refer the matter to the Supreme Court for determination. When a matter is so referred to the Supreme Court, the court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State or will be injurious to the public interest.

CONCLUSION

This chapter has examined Ghana’s constitutional evolution and its legal system as a necessary background to the dissertation. In Part A, attention was focused on Ghana’s constitutional development, starting from the promulgation of the Ghana Independence Act, 1957 to the establishment of the Fourth Republic under the Constitution of 1992. In Part B, the discussion dealt with the issues pertaining to: sources of law, the judicial system in Ghana (the past and present), the crucial question of the independence of the judiciary; and the composition, qualifications for appointment, and the jurisdiction of the Supreme Court.

¹⁰⁵ For a detailed examination of the previous cases on review jurisdiction: see Bimpong-Buta, S Y “Supreme Court and the Power of Review” (1989-90) 17 RGL 192.

CHAPTER 3

THE UNDERLYING CONCEPTS OF THE FOURTH REPUBLICAN CONSTITUTION OF 1992

INTRODUCTION

There are certain fundamental concepts or principles which underlie most written constitutions. Notable among these concepts are: the doctrines of the supremacy of the constitution, of separation of powers, of non-justiciable political question and of mootness. Thus, in the case of *Amidu v President Kufuor*,¹ Kpegah JSC in his dissenting opinion said:

“Our Constitution like the American Constitution, is a written one underpinned by the doctrine of separation of powers. And it is important to say that being a written Constitution, it has, like the American Constitution, certain fundamental or basic attributes.”²

In her opinion in support of the unanimous decision of the Supreme Court in the case of *Apaloo v Electoral Commission*,³ Bamford-Addo JSC said:⁴

¹ [2001-2002] SCGLR 86.

² Ibid at p 153. See in that regard: Lee Espstein & Thomas G Walker, *Constitutional Law for A Changing America: Institutional Powers and Constraints* (2nd ed), 1995 Congressional Quarterly Inc, Washington DC at page 8 where it is stated: “Table 1-1 sets forth the basic proposals considered at the convention and how they got translated into the Constitution. What it does not show are the fundamental principles underlying, though not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers/checks and balances doctrine, federalism, and individual rights and liberties.”

³ [2001-2002] SCGLR 1.

⁴ Ibid at pp 9-10 (my emphasis).

“The people of this country in 1992 promulgated for themselves a constitution, which vested sovereign power in the people and provided a democratic system of government based *on certain fundamental principles*, namely, political pluralism, a majority parliamentary representative rule, under which form of government, all citizens of full age and of sound mind had the right to vote during an election to choose their representatives.”

The question to be posed is: to what extent has the Supreme Court of Ghana developed or accepted these fundamental concepts or principles as applicable under the Constitutional Law of Ghana? This chapter seeks to examine *seriatim* the application or otherwise to the Ghana Constitutional Law of these four fundamental principles.

SUPREMACY OF THE CONSTITUTION

Articles 1(2) and 2(1) of the Fourth Republican Constitution, 1992 assert the supremacy of the Constitution as the fundamental law of Ghana. By these provisions, the Constitution seeks to emphasize that it provides the framework for governance. In effect, it is the Constitution that governs since it prescribes the manner and also the limits within which the powers of government may be exercised. These articles state as follows:

"1(2) This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

"2(1) A person who alleges that -

- (a) an enactment or anything contained in or done under the authority of that or any other enactment; or
- (b) any act or omission of any person
- is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

The true effect of article 1(2) of the Constitution, 1992 was determined by the Supreme Court in *Mensima v Attorney-General*.⁵ In this case, the plaintiffs, members of a registered co-operative union, broke off from the union and formed a limited liability company. The object of the company was to distil a locally manufactured gin called *akpeteshie*. They were prevented from distilling *akpeteshie* by the officers of the co-operative union; they were also harassed and their products were impounded by the officers on the grounds, inter alia, that they did not belong to any registered distiller's co-operative union; and also for having no licence as required by regulation 3 (1) of the Manufacture and Sale of Spirits Regulations, 1962 (L I 239), which provided that: "Every applicant for the issue of a distiller's licence shall be a member of a registered Distiller's Co-operative."

⁵ [1996-97] SCGLR 676 (a case earlier examined in chapter 2 on the question of what constitutes the existing law). It is clear, given the wording of article 1(2) of the Constitution, 1992 that the Constitution of Ghana, like most written Constitutions, prevails over Treaties and other International Instruments and Protocols such as the African Charter on Human and Peoples' Rights approved by the Organisation of African Unity (OAU) in 1981. Thus in an article: "Ecowas free labour movement protocol" published in the Ghanaian newspaper, *The Daily Graphic*, 25 June 2003 at page 7, Professor S K B Asante discussed the importance and challenges posed by the Free Movement of the Labour Protocol of the Economic Community of West African States (ECOWAS) signed by the Heads of State and Governments of West Africa on May 29, 1979 at the Dakar Summit. In lamenting on the weakness of the Protocol, and calling for the need for integrating Ecowas Legal Systems, Professor Asante said: "Thus the doctrine of 'primacy' of community law has not been acceptable to the national courts of the ECOWAS Member States."

The plaintiffs therefore sued in the Supreme Court under article 2 (1) of the Constitution, 1992 for a declaration, inter alia, that regulation 3 (1) of LI 239, which made it mandatory for an applicant “ for the issue of a distiller’s licence” to belong to a registered distiller’s co-operative, was inconsistent with the letter and spirit of the Constitution, particularly the exercise of their fundamental right of freedom of association guaranteed under article 21(1) (e) of the Constitution. The said article 21(1)(e) provides that:

“All persons shall have the right to –

(e) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest.”

The defendants, however, contended, inter alia, that LI 239 and its parent Act, ie the Liquor Licensing Act, 1970 (Act 331), were existing laws within the meaning of article 11(5) of the Constitution; and that, that Act and the regulations made under it, had not been specifically repealed and must, therefore, be complied with.

That argument was rejected by the Supreme Court. By a majority decision of three to two, the court upheld the plaintiffs’ claim in relation to regulation 3 (1) of L I 239. The court declared regulation 3(1) of LI 239 as null and void for being inconsistent with the letter and spirit of the Constitution, particularly article 21(1)(e) thereof because of its mandatory requirement for an applicant for a distiller’s licence to belong to a registered distiller’s co-operative. On the specific issue of the continued application of the impugned legislation, the majority of the Supreme Court held, per Acquah JSC, that:⁶

⁶ Ibid at pp 712-713 (the emphasis is mine).

“Article 1(2) of the 1992 Constitution is the bulwark which not only fortifies the *supremacy of the Constitution* but also makes it impossible for any law or provision inconsistent with the Constitution to be given effect to. And once the Constitution does not contain a schedule of laws repealed by virtue of its provisions, whenever the constitutionality of any law vis-à-vis a provision of the Constitution is challenged, the duty of this court is to determine the authenticity of the challenge. And in this regard, the fact that the alleged law has not been specifically repealed is totally immaterial and affords no validity to that law. For article 1(2) contains a built-in repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution. It therefore follows that the submission based on the fact that the [refutation] 3(1)...of L I 239 [has] not been specifically repealed, and therefore valid, misconceives the effect and potency of article 1(2), and thereby underrates the *supremacy of the 1992 Constitution*.”

The supremacy of the Constitution, 1992 as asserted by the Supreme Court, is a carry over from the Constitutions of 1969 and of 1979.⁷ Under the concept, governmental powers, be they executive, legislative or judicial are to be exercised subject to the provisions and dictates of the Constitution. The concept of the supremacy of the Constitution may be contrasted with the principle of parliamentary sovereignty (or supremacy) under the First Republican Constitution of 1960. Thus article 20(2) and (6) of that Constitution provided:

"20(2) So much of the legislative power of the State as is not reserved by the Constitution to the people is conferred on Parliament...

⁷ See Constitution, 1969, art 1(2) and Constitution, 1979, art 1(2).

(6) Apart from the limitations referred to in the preceding provisions of this Article, the power of Parliament to make laws shall be under no limitation whatsoever."

It was in the light of the above provisions and other provisions in article 20 of the Constitution, 1960⁸ that Bennion wrote:⁹

"The real question is not whether powers shall be divided but whether any organ of the State shall be granted supremacy, and if so, which. In this matter Ghana has followed the British rather than the American model and granted supreme power to a Parliament consisting of the President and the National Assembly. This power is not absolute, since the power to repeal or alter certain entrenched provisions of the Constitution is expressly reserved to the people, but *within the basic framework of the Constitution, Parliament is sovereign by virtue of its possession of unlimited legislative powers.*"

It should be emphasized, however, that the above observation on the doctrine of parliamentary sovereignty referred to by Bennion, no longer holds sway today even in Britain which, unlike Ghana, has no written constitution as the fundamental law of the land.¹⁰

⁸ The said article 20 of the Constitution had as its marginal notes, the words "The Sovereign Parliament."

⁹ See Bennion, FAR, *The Constitutional Law of Ghana*, Butterworths London 1962 at pp 117-118 on the issue of distribution of governmental powers amongst the executive, the legislature and the judiciary (my emphasis).

¹⁰ The statement by Maitland in his book *Constitutional History of England* at page 332 to the effect that "We have no irrevocable laws; all laws may be repealed by ordinary legislation..." needs now to be re-written.

As was rightly observed by Kpegah JSC, in his dissenting opinion in *Amidu v President Kufuor*.¹¹

“... some of the assumptions which flow from the theory of supremacy of Parliament in British Constitutional Law, are slowly coming under stress by certain realities of the modern state and the relations between other States.”

And the inimitable Lord Denning M R was well ahead of his times when, in *Blackburn v Attorney-General*,¹² he said:

“We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But *legal theory does not always march alongside political reality*.”¹³

The position today is that the concept of parliamentary sovereignty even in Britain, has now been eroded in the words of Lord Denning, “alongside political reality.” This is reflected by the interpretation placed by the courts on the UK Human Rights Act, 1998 and the European Convention on Human Rights (European Community Law within the European Union (EU)). Section 3(1) of the U K Human Rights Act states:

¹¹ [2001-2002] SCGLR 86.

¹² [1971] 1 WLR 1037, CA cited by Kpegah JSC in *Amidu v President Kufuor* (supra).

¹³ The emphasis is mine.

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention.”

Commenting on section 3(1) of the Human Rights Act, Dudley Moore said:¹⁴

“Quite simply, this [section 3(1)] means that judges must try and interpret legislation to uphold the Convention rights. If they cannot, they have the power to declare this (by a ‘declaration of incompatibility’ under section 4) and it is then the duty of Parliament to remedy the situation by way of further legislation (fast track remedial action, s. 10).”

The question is: what has been the interpretation placed by the English Courts on sections 3(1) and 4 of the Human Rights Act? The problem posed is: when can a court make a declaration of incompatibility and when to find the relevant Act “fit” or be compatible with the European Convention on Human Rights? In *R v A*,¹⁵ Lord Steyn expressed the view that declaration of incompatibility should be made only as a last resort and only when there was a clear limitation on European Convention Rights stated in the legislation under consideration. In the same case, however, Lord Hope gave a narrower interpretation to section 3 of the Act.

¹⁴ An English barrister and Fellow of the Institute of Legal Executives in an article, “Sovereignty and all that” in *The Legal Executive*, The Journal of the Institute of Legal Executives, February 2002 Issue at page 24 Ilex, Publishing and Advertising Services Ltd, London, cited as (2002) February Ilex.

¹⁵ [2001] UKHL 25; [2001] 3 All ER 1.

He criticised Lord Steyn's approach as allowing the judges to act as legislators.¹⁶ In his view, "... compatibility is to be achieved only as far as possible."

The issue of whether the provisions of European Community (E C) Treaty (Community Law) should prevail over English legislation, arose in the case of *Factortame Ltd v Secretary of State for Transport (No 2)*.¹⁷ In this case, the Secretary of State promulgated the Merchant Shipping (Registration of Fishing Vessels) Regulations, 1988 for a new register of British fishing vessels, in the exercise of his powers under the Merchant Shipping Act, 1988. The applicant fishing company complained that they could not apply for registration under the regulations because the majority of their directors and shareholders were not British but Spanish nationals. They sued by way of an application for judicial review to challenge the validity of the legislation on the grounds that the English legislation had the effect of depriving them of their European Community Law rights. The Divisional Court (High Court) granted the applicants an injunction restraining the Secretary of State from enforcing the regulations under the Act. The court also ordered that the operation of Part II of the 1988 Act and the regulations made thereunder should not be applied against the applicants pending the determination of the substantive claim impugning the validity of the Act. The English Court of Appeal allowed the appeal of the Secretary of State against those orders. The applicants appealed to the House of Lords which allowed the appeal and restored the orders made by the Divisional Court. It held that the applicants had a strong case to present to the European Court of Justice of the European Communities and that the evidence presented by the

¹⁶ That view is certainly contrary to the decision in *Coltman v Bibby Tankers Ltd* [1988] AC 276 where it was held that the courts had the power to fill gaps in legislation to make sense of enactments –reversing decision of the House of Lords in *Magor & St Melons v Newport Corporation* [1951] 2 All ER 839,HL.

¹⁷ [1991] 1 All ER 70, HL.

Secretary of State was not sufficient to outweigh the obvious and immediate damage which would continue to be caused to the applicants if no injunction was granted in their favour. The House of Lords, in effect, held that European Community Law could not be overridden by United Kingdom legislation.

The inescapable conclusion is that the doctrine of parliamentary sovereignty, as earlier indicated, no longer holds sway even in the UK.¹⁸ Not surprisingly, the authors of *Wade and Bradley: Constitutional and Administrative Law*,¹⁹ after detailed examination of the concept of parliamentary sovereignty or supremacy in chapter 5, concluded:²⁰

“The view taken in this chapter has been that Parliament’s legislative authority includes power to make new constitutional arrangements under which future Parliaments would not enjoy legislative supremacy. Those who would adhere to the doctrine of legislative supremacy at all costs must be prepared to demonstrate that the political system provides adequate safeguards against legislation which

¹⁸ See in further support: Anthony Lester QC, “The Judicial Protection of Human Rights in the Commonwealth” in *Journal of Commonwealth Law and Legal Education* Vol 1, No 1, December 2001 at pp 3-4, Cavendish Publishing Ltd, London, where he wrote: “The principle of Parliamentary sovereignty is formally preserved by the Human Rights Act, 1998 but in practice British judges must robustly read down legislation which infringes human rights or, where this is not possible, declare the legislation to be incompatible with the European Convention. Although they cannot strike down legislation which cannot be read compatibly with the Convention rights, they have a similar role to that other Commonwealth judges in protecting the civil rights and liberties of individuals and minorities against the misuse of public powers by Parliament, the Executive or other public authorities.”

¹⁹ (11th ed) 1993 ELBS with Longman Group Ltd, London.

²⁰ *Ibid* at page 96.

would be contrary to fundamental constitutional principle or the individual's basic rights.”²¹

In Ghana, like most developing countries with a written Constitution as the fundamental law, the doctrine of parliamentary sovereignty has no application at all. The supremacy of the Constitution prevails as asserted by the Supreme Court in cases such as *Mensima v Attorney-General* (supra).

There is therefore no doubt that the principle of constitutional supremacy under the Constitution, 1992 as opposed to the principle of parliamentary sovereignty under the Constitution, 1960 is one of the distinctive developments of Ghana Constitutional Law. Thus, in his opinion in support of the majority decision of the Supreme Court in *New Patriotic Party v Attorney-General (31st December Case)*²² Aikins JSC said:²³

"In my view, even though Parliament has the right to legislate, this right is not without limit, and the right to enact a law that June 4 and December 31 should be declared public holidays cannot be left to linger in the realm of public policy. *Such legislation must be within the parameters of the power conferred on the legislature, and under article 1(2) of the Constitution,*

²¹ See also the Privy Council case of *Collymore v Attorney-General* [1970] AC 538, PC; [1967] 12 W I R 5. As noted by A. Fiadjoe, in *Commonwealth Caribbean Public Law* 2nd ed, 1999 at p 6: “*Collymore* itself made no such express assertion of constitutional supremacy over parliamentary supremacy. Yet the logical effect of *Collymore* is to accept the fact that Parliament's sovereignty is limited by the constitution. That is why that case has been generally credited with having disposed of the lingering adherence to parliamentary sovereignty and for having recognized that the acts of Parliament are subordinate to the prescription of the constitution.”

²² [1993-94] 2 GLR 35.

²³ Ibid at 137-138 (my emphasis).

1992 any law found to be inconsistent with any provision of the Constitution (the supreme law) shall, to the extent of such inconsistency, be void.”

In the same case, the *31st December Case*, Amua-Sekyi JSC also in support of the majority decision said:²⁴

"Parliament now has no uncontrolled right to pass laws on public holidays, any more than it has to declare a 'one party' state, or make a party leader President for life or crown him Emperor. As the fundamental or basic law the Constitution, 1992 controls all legislation and determines their validity. *It is for the courts, as the guardians of legality, to ensure that all agencies of the State keep within their lawful bounds.*"

We may also underline and adopt the words of Edward Wiredu JSC (as he then was), in *Ghana Bar Association v Attorney-General (Abban Case)*,²⁵ where he said:²⁶

“The Constitution, 1992 has established a new legal order for this country. Ghana is now in *an era of constitutional supremacy* as opposed to parliamentary sovereignty as it exists in Britain ...In Britain, no policy of the government or legislation ...can be questioned in any of the British Courts...

In this country, however, under the new order of constitutional supremacy, the Constitution has vested the power of supervising and the enforcement of the Constitution in the Supreme Court, the judges of which have sworn to uphold and defend its provisions without fear or favour. *Parliamentary sovereignty as*

²⁴ Ibid at p 130 (my emphasis).

²⁵ [1995-96] 1 GLR 598; [2003-2004] SCGLR 250, SC.

²⁶ Ibid (the emphasis is mine.)

practised in Britain is alien to our new legal order. The Constitution has vested the power of judicial review of all legislation in the Supreme Court. It has done away with either an executive or parliamentary sovereignty and subordinated all the arms or organs of State to the Constitution."

In the case of *Ghana Bar Association v Attorney-General (Abban Case)*²⁷ the President of the Republic, on 15 February 1995, acting in pursuance of articles 91(1) and 144(1) of the 1992 Constitution, nominated, in consultation with the Council of State, Mr Justice I K Abban, a Supreme Court Judge, for approval by Parliament as the new Chief Justice of Ghana in succession to Mr Justice Archer, who was soon to retire as the Chief Justice of Ghana. Parliament granted the approval under a certificate of urgency and Justice Abban was duly appointed by the President on 22 February 1995. Subsequently, the Ghana Bar Association, the plaintiffs, brought the instant action against the Attorney-General as the first defendant, and Justice Abban as the second defendant, in the Supreme Court - invoking its original jurisdiction under articles 2(1)(a) and (b) and 130(1) of the Constitution for four reliefs, namely:

- "(1) a declaration that on a true and proper interpretation of articles 2(1)(a) and (b) 91(1) and (2), 128(4) and 144(1) of the Constitution, the President of the Republic should not have nominated and appointed the second defendant Mr Justice Isaac Kobina Abban, to the Office of Chief Justice since *he is not a person of high moral character and proven integrity*;
- (2) a declaration that the appointment on or about 22 February 1995 by the President of the second defendant, Mr Justice Isaac Kobina Abban, as Chief Justice as well as the advice by the Council of State and the approval by Parliament of his nomination to

²⁷ This case was referred to in chapter 2 in discussing the question of the appointment and removal from office of the Chief Justice.

such office were each made in contravention of articles 91(1) and (2), 128(4) and 144(1) of the Constitution, and are therefore null and void;

(3) an injunction restraining the second defendant from acting or purporting to act in the office of Chief Justice of Ghana;

(4) a declaration that the warrant of appointment of the second defendant by the President is null and void, and an order that the second defendant deliver up same to this honourable court for cancellation and that the same be duly cancelled."

The claim was unanimously dismissed on a preliminary objection to the jurisdiction of the court raised by the defendants. The court held, applying its earlier reasoning in *Tuffour v Attorney-General*²⁸ and *Yiadom I v Amaniampong*,²⁹ that the reliefs claimed by the plaintiffs, would have the effect of indirectly removing the second defendant as the Chief Justice without complying with the mandatory special procedure for removing the Chief Justice under article 146 of the Constitution. In other words, the Supreme Court, by that decision, was asserting that no procedure other than that laid down by the Constitution in terms of article 146 for removing Justices of the Supreme Court would be resorted to and enforced. In support of the unanimous decision, Bamford-Addo JSC said:³⁰

"What the plaintiffs, in actual fact, are seeking from this court is the removal of the Chief Justice from office since an injunction and a cancellation of his warrant of appointment would result in his removal.

The fact that reliefs (3) and (4) are not so couched, makes no difference to

²⁸ [1980] GLR 631.

²⁹ [1981] GLR 3, SC.

³⁰ Ibid (my emphasis).

the true nature of the claim. *It is the duty of the court to decide on the true nature of a claim, however camouflaged or disguised in another form, in order to decide whether or not it is clothed with the requisite jurisdiction to entertain a case under article 130 and other provisions of the Constitution.* If this court cannot grant the declarations in (3) and (4) which, in effect, aim at removing the Chief Justice from office, then the court has no jurisdiction under the Constitution to entertain the case.”

Charles Hayfron-Benjamin JSC, in his opinion in support of the unanimous decision of the court, also said:³¹

"In the present case, the object being to remove the second defendant from office, it is clear that the matter is by the Constitution committed by article 146(1) and (6) thereof to another forum for resolution. *In that article a definite procedure is laid down for the ventilation of any such grievance in which this court qua court is not and cannot in any way be involved.*"

In the same vein, Kpegah JSC, who delivered a very long opinion in support of the unanimous decision in the same *Abban Case*, also said:³²

"The undeclared intention of the plaintiffs is to impeach the second defendant not only as the Chief Justice but also as a judge of the Supreme Court by using the judicial process. For if we should declare that the second defendant is “not a man of high moral character and proven integrity” to occupy the position of

³¹ Ibid (my emphasis).

³² Ibid (emphasis is mine).

Chief Justice, we would also equally have declared that he is not fit to be a Justice of the Supreme Court. This invidious scenario is not supported by the Constitution.”

Lastly, but by no means the least, Adjabeng JSC, also supporting the majority view, made the true legal position even more explicit, when he also said:³³

“The plaintiffs want us not only to declare [the] warrant of appointment null and void; we are also to order the second defendant to deliver up his warrant to us with the request that we cancel it. *This, no doubt, means that this court is being asked ... to remove the Chief Justice from office. The question is: can we do that? Does the Constitution give us power to remove his Lordship the Chief Justice? The answer obviously is No! We do not have any such power.*”

The Supreme Court’s apparent and commendable commitment to upholding the supremacy of the Constitution, informed its decision in the case of *Yeboah v JH Mensah*.³⁴ The defendant in this case, Mr J H Mensah, was elected as a Member of Parliament for Sunyani East Constituency at the conclusion of the nationwide parliamentary elections held on 7 December 1996. Subsequently, two persons from the electoral area filed an election petition against him at the High Court, challenging the validity of his election. The election petition was, however, dismissed by the High Court on the ground that the petition had been filed outside the statutory period of 21 days as prescribed by the Representation of the People Law, 1992 (PNDCL 284). On 25 February 1997, however, the plaintiff, a registered voter in the electoral area, filed a new claim in the Supreme Court. He invoked the court’s jurisdiction under articles 2 and 130 of the Constitution, 1992 for a declaration, inter alia, that under article 94

³³ Ibid (my emphasis).

³⁴ [1998-99] SCGLR 492.

(1) (b) of the Constitution, the defendant was not qualified to be a Member of Parliament. The defendant denied the claim and also raised a preliminary objection, challenging the propriety of the action, on the ground that, the plaintiff's action was, in substance and in reality, an election petition; that such a petition was determinable only by the High Court under article 99 (1) (b) of the Constitution and sections 16 (1) and (2) and 20 (1) (d) of PNDCL 284. The defendant, therefore, argued that the court should strike out the action as incompetent.

The Supreme Court, by majority decision of four to one, Kpegah JSC dissenting, upheld the defendant's preliminary objection to the assumption of jurisdiction and dismissed the claim. It was held that, in substance, the claim of the plaintiff was an election petition to challenge the validity of the defendant's election to Parliament and therefore, the High Court and not the Supreme Court, was the proper forum for the action under article 99(1)(a) of the Constitution; that the said article had provided for a specific procedure to be pursued in the High Court for any challenge to the validity of an election petition; that that procedure could not be ignored by the plaintiff; and that the plaintiff could not resort to the enforcement jurisdiction of the Supreme Court under articles 2 (1) and 130 (1) of the Constitution.

In arriving at its decision, the majority of the Supreme Court, followed the court's reasoning in the case of *Edusei v Attorney-General*.³⁵ In the *Edusei* case, the Supreme Court, by a majority decision, affirmed, in an application for a review of its earlier decision in the case, that because article 33 (1) of the Constitution, 1992 had provided a specific remedy for redressing violations of human rights provisions, the court's enforcement jurisdiction could not be resorted to in the enforcement of human rights provisions.

³⁵ [1996-97] SCGLR 1; *on review* [1998-99] SCGLR 753.

Not surprisingly, Charles Hayfron-Benjamin JSC, who had supported a similar conclusion reached by the Supreme Court in 1995 in *Ghana Bar Association v Attorney-General (Abban Case)*, had no difficulty at all in supporting the majority decision in *Yeboah v J H Mensah* and thus affirmed that:³⁶

"[W]hen a remedy is given by the Constitution and a forum is given by either the Constitution itself or statute for ventilating that grievance, then, it is to that forum that the plaintiff may present his petition."

Concurring with the majority opinion, Atuguba JSC also said:³⁷

"The plaintiff's action invoking the original jurisdiction of this court is misdirected as the same is primarily an election petition which is cognisable by the High Court only as an original action."

It must be pointed out that, in arriving at its decision, the majority in *Yeboah v J H Mensah* came to grips with the court's contrary decision in *Gbedemah v Awoonor-Williams*,³⁸ a case which was heavily relied on by the plaintiff in *Yeboah v J H Mensah*. In the *Awoonor-Williams* case, the plaintiff, Mr Awonoor-Williams, was the defeated candidate for the Keta

³⁶ [1998-99] SCGLR 492 at 498.

³⁷ Ibid at 558.

³⁸ (1970) 2 (G & G) 442, SC.

Constituency in the 1969 General Parliamentary Elections. Mr Gbedemah, the defendant, was the elected candidate for the same constituency. The plaintiff sued in the Supreme Court for a declaration that, by virtue of article 71 (2) (b) (ii) and (d) of the Constitution, 1969 the defendant, Mr Gbedemah, was not qualified to be a Member of Parliament; and also for an injunction restraining him from taking his seat as a Member of Parliament. The defendant filed a defence to the action. He also counterclaimed and sought an order striking out the plaintiff's claim on the ground that under article 76 (1) (a) of the Constitution (the same as article 99 (1) of the Constitution, 1992) and the Representation of the People Decree, 1968 (NLCD 255), para 32 (1) (d), the High Court had the jurisdiction to determine the matters raised in the action.

The Supreme Court refused to strike out the action- holding that a person could resort to both the enforcement jurisdiction under articles 2 (1) and 106(1) of the Constitution, 1969 and an election petition at the High Court under article 76 (1) (a) of the Constitution and NLCD 255. The court thus held that the right to sue for the two claims: the enforcement jurisdiction and the election petition were not in the alternative because they were not mutually exclusive. In resolving the apparent conflict between the instant case of *Yeboah v J H Mensah* and the earlier case of *Gbedemah v Awoonor-Williams*, Acquah JSC, in support of the majority in *Yeboah v J H Mensah*, reasoned thus:³⁹

“[I]n so far as the court in *Gbedemah v Awoonor-Williams* ...relied on the enforcement jurisdiction when article 76 (1) (a) of the 1969 Constitution and the Representation of the People Decree, 1968 (NLCD 255), the same as PNDCL 284, provided a specific remedy for resolving the dispute, the court, with respect, erred. Its assumption of jurisdiction violated well settled principles and further negated the clear intention of the framers of the 1969 Constitution – an intention manifested in article 76 (1) thereof.

³⁹ [1998-99] SCGLR 492 at 543-544.

But in fairness to the court in *Gbedemah v Awoonor-Williams*...there were certain factors which might have indirectly influenced it in assuming such jurisdiction. For, the defendant did not only file a defence, but also put in a counterclaim seeking certain declarations from the Supreme Court. Again, even in his motion to strike out the plaintiff's action, the defendant sought an order joining the Attorney-General ...as a plaintiff in the action for the determination of the matters raised by him in his counterclaim.

The above factors perhaps justify the defendant in the instant case in contending that the decision in *Gbedemah v Awoonor-Williams*...must be confined to its peculiar facts and must not therefore be said to have laid down a general principle that one can resort to the Supreme Court's enforcement jurisdiction to challenge the validity of a person's election to Parliament. To this, I entirely agree with the defendant."

Having addressed the apparent conflict in the two decisions of *Yeboah v J H Mensah* and the earlier Supreme Court decision in *Gbedemah v Awoonor-Williams*, attention may be drawn to the dissenting opinion of Kpegah JSC in *Yeboah v J H Mensah*. It is very surprising to observe that Kpegah JSC, who had delivered a very long and persuasive opinion in support of a similar conclusion in the *Abban Case* (supra), found himself regrettably unable to agree with the majority opinion in *Yeboah v JH Mensah*, namely, that the plaintiff's claim was, in substance, an election petition not cognisable by the Supreme Court but rather by the High Court in terms of the mandatory provision in article 99(1)(a).

It should be stressed that the issue with which the Supreme Court had to contend with in the *Abban Case*, namely, whether or not to ignore the mandatory procedure for removing the Chief Justice from office, was not any different from the issue raised in *Yeboah v JH Mensah*, namely, whether or not to uphold the provision of article 99(1)(a) to the effect that an election petition shall be determined only by the High Court. In the circumstances, one can hardly, with the greatest respect, understand and find as acceptable the reasoning adopted

by Kpegah JSC in dissenting from the majority decision in *Yeboah v JH Mensah*. His lordship said, inter alia:⁴⁰

"My understanding of the plaintiff's claim is that the defendant...did not satisfy the residential requirement imposed by article 94(1)(b) of the 1992 Constitution before he got himself elected as Member of Parliament... The plaintiff is therefore invoking our *enforcement jurisdiction*, as distinct from our *interpretative jurisdiction*, to make a declaration to this effect. *The fact that the action of the plaintiff may have the possible consequence of the removal of the defendant from Parliament does not turn his claim into an election petition. That is the wrong test to apply in determining what the real claim of the plaintiff is...* If the enforcement of article 94(1)(b) of the Constitution against the defendant leads to his removal from Parliament, ... I will be doing what my oath enjoins me to do to - *defend and uphold the supremacy of the Constitution*. The end result of the plaintiff's claim should not scare and stampede us into declining what I see as a legitimate invitation to us to exercise our enforcement jurisdiction... *The implication of the majority decision is that this court is prevented from defending the Constitution from a conduct which is clearly subversive of the fundamental law...*"

The above reasoning by Kpegah JSC in *Yeboah v JH Mensah* case is susceptible to quite a number of criticisms: First, the distinction drawn by his lordship between the *enforcement jurisdiction* and *interpretation jurisdiction* of the court ignores the question as to what, in fact, was the true nature of the claim - a test which helps in determining whether a claim falls within any particular jurisdiction of the court as specified by the Constitution. Secondly, if, as held by his lordship, the fact that the plaintiff's action in *Yeboah v JH Mensah* might have

⁴⁰ Ibid at page 509 (the emphasis is mine).

the possible consequence of removing the defendant from Parliament would not turn the action into an election petition, and that that was a wrong test to apply in determining what was the real claim of the plaintiff, why, it may be asked, did his lordship apply in the *Abban Case* what may be described as “the reality of the action test”? That was the test unanimously applied by the Supreme Court in that case which was decided in 1995.

It is conceded that the above quoted reasoning of Kpegah JSC in *Yeboah v JH Mensah* raises a fundamental issue, which was not addressed by the majority of the court: which is that where there is an allegation of *illegality*, namely, an infringement of article 94(1)(b) relating to non-satisfaction of residential requirements for election as Member of Parliament, should the allegation of illegality continue, when it can be dealt with under article 2(1), that is by enforcement action? This issue was not argued and therefore rightly not decided by both *Abban* case and *Yeboah v JH Mensah*.

It must be pointed out, in all fairness to Kpegah JSC, that he tried valiantly, in his dissenting opinion, to reconcile his inconsistent decision in that case with that in *Ghana Bar Association v Attorney-General (Abban Case)*. When faced with the submission of Nana Akufo-Addo, counsel for the defendant in *Yeboah v JH Mensah*,⁴¹ that the Supreme Court was bound to follow its previous unanimous decision in the *Abban Case* where the court had declined jurisdiction in similar circumstances, his lordship sought to distinguish that unanimous decision from the case before the court. He said:⁴²

⁴¹ Formerly Hon Attorney-General and Minister of Justice and now the Minister of Foreign Affairs in the New Patriotic Party (NPP) Government headed by His Excellency the President, Mr J A Kufuor.

⁴² [1998-99] SCGLR 492 at 510.

“It is clear that we [ie in the *Abban Case*] declined jurisdiction on the grounds that the appointment of the Chief Justice has been textually committed by the Constitution to other organs of government, namely, the executive and the legislature and there are no discoverable and manageable standards for resolving the issue raised by the plaintiff’s writ. In the instant case, the Constitution vests this court with jurisdiction to enforce *all provisions* of the Constitution except those relating to the fundamental rights of the individual.”

It must be conceded that the Supreme Court had also held in the *Abban Case*⁴³ that jurisdiction to determine the plaintiffs’ case must be declined because on the application of the non-justiciable political question doctrine, the appointment of the Chief Justice has been committed to the executive and the legislature to decide under article 144 (1) of the Constitution.⁴⁴

However, the fact still remains that the Supreme Court in the *Abban Case*-as clearly shown above- also unanimously (per Edward Wiredu, Bamford-Addo, Charles Hayfron-Benjamin, Kpegah and Adjabeng JJSC) based the decision to decline jurisdiction under article 146 of the Constitution; and therefore decided that under article 146 of the Constitution, 1992 a special procedure for removing a judge of a superior court, such as the Chief Justice, was to be exclusively determined by a body empowered to exercise jurisdiction in such matters; and that procedure must be invoked. In so holding, the Supreme Court followed its previous decisions in *Tuffuor v Attorney-General*⁴⁵ and in *Yiadom I v Amaniampong*.⁴⁶

⁴³ Per Kpegah JSC with Bamford-Addo Charles Hayfron-Benjamin JJSC *concurring*

⁴⁴ A decision which we shall later, in this chapter, examine in detail on the question of the application or otherwise of the political question doctrine to the Ghana Constitution.

⁴⁵ [1981] GLR 3, SC.

⁴⁶ [1980] GLR 637, SC.

In effect, the statement of the law as unanimously decided in the *Abban Case*, was that the procedure for removing the Chief Justice under article 146 of the Constitution must be invoked and complied with. If that is the true effect of the Supreme Court decision in the *Abban Case*, then the conclusion may be drawn, that the dissenting view of Kpegah JSC in *Yeboah v JH Mensah* cannot, with respect, be supported in law and was in conflict with the unanimous decision in the *Abban Case*; it is even more so when it is remembered that his lordship himself was a party to that unanimous decision. This appears to be so notwithstanding the fact that his lordship has (with the concurrence of Bamford-Addo and Charles Hayfron-Benjamin JJSC), in addition to the unanimous decision founded on article 146, based his decision on article 144 (1) of the Constitution.

In that regard, it must be emphasized that, on the facts of the case, the issues raised for determination in *Yeboah v J H Mensah* did not involve at all the application or otherwise of the political question doctrine. That issue was neither raised nor argued, let alone decided. Therefore the decision in the *Abban Case* relating to the political question doctrine was, with the greatest respect, irrelevant in deciding the issues which the court had to resolve in *Yeboah v J H Mensah*. Besides, the provisions in articles 144 (1) and 146 are completely different: the former dealt with the appointment of the Chief Justice, the latter with the removal of justices of the superior courts from office including the Chief Justice.

It seems to me that the unanimous decision of the court in the *Abban Case* and the majority decision of four to one in *Yeboah v JH Mensah*, may be viewed as rightly given. Those decisions had the effect of ensuring the supremacy of the Constitution in so far as they respectively insist that the provisions of article 146 relating to the removal of the Chief Justice from office, and article 99(1)(a) which, like article 146, provides for a specific remedy at the

High Court for determining challenges to the validity of a person's election to Parliament, must be resorted to.⁴⁷

However, there is one redeeming commendable feature of the dissenting view by Kpegah JSC in *Yeboah v JH Mensah*, which must be underlined, namely, that his lordship would welcome an invitation to the court to exercise its enforcement jurisdiction so as "to defend and uphold the supremacy of the Constitution." In effect, one may concede that the minority judgment of Kpegah JSC in *Yeboah v JH Mensah* would also have had the effect of ensuring the supremacy of the Constitution.

In any case, it must be pointed out that the concept of the supremacy of the Constitution under the Constitution, 1992 has been emphasized not only in article 2(2) as previously pointed out, but also in article 295(8) which provides that:

“No provision in this Constitution or any other law to the effect that a person or authority shall not be subject to the direction or control of any other person or authority in the performance of any functions under this Constitution or any other law, shall preclude a court from exercising

⁴⁷ It must be observed that the principle laid down in *Yeboah v J H Mensah* was applied by the majority of the Supreme Court in the recent case of *In re Parliamentary Election for Wulensi Constituency; Zakaria v Nyimakan* [2003-2004] SCGLR 1. For detailed examination and comment on the *Wulensi* case: see chapter 8 on the question of “Jurisdiction to hear appeal from determination of an election petition.” In contrast to the decision of the Supreme Court in the *Abban* case: see the court's decision in *Nartey v Attorney-General & Justice Adade* [1996-97] SCGLR 63 where the plaintiff's claim was upheld by a majority decision even though in substance and reality, the action was also aimed at removing a Justice of the Supreme Court from office. For detailed examination of the *Abban* case: see chapter 8 on the issue of “Jurisdiction where action dressed as enforcement action.”

jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution.”⁴⁸

Commenting on article 295(8), Acquah JSC, in his opinion in support of the majority decision in *Amidu v President Kufuor* rightly said:⁴⁹

“Under the 1992 Constitution, even if the body in question is independent from any other authority, the courts can still assume jurisdiction in disputes alleging that that institution, is acting in violation of the Constitution...”

It should be stressed that the concept of the supremacy of the Constitution as discussed above, is not peculiar to Ghana. The concept has been enshrined in the written Constitutions of all the emerging democracies in developing countries.⁵⁰ Thus section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 states:

“1 (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

⁴⁸ The provision in article 295(8) is directed at institutions like the Electoral Commission, which under article 46 “shall not be subject to the direction or control of any person or authority.” The provision in article 295(8) does not apply to the exercise of the jurisdiction to remove justices of superior courts from office under article 146.

⁴⁹ [2001-2002] SCGLR 86 at 100.

⁵⁰ For example, the Constitutions of all the Commonwealth Caribbean countries assert their supremacy: Constitution of Barbados, 1966, s 1; Constitution of the Commonwealth of Bahamas, 1973, s 2; Constitution of the Commonwealth of Dominica, 1978, s 117; Constitution of Guyana, 1966, s 8; Constitution of St Christopher and Nevis, 1983, s 2; Constitution of St Lucia, 1978, s 120; Constitution of St Vincent and Grenadines, 1979, s 102; and Constitution of the Republic of Trinidad and Tobago, 1976, s 2.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of that inconsistency be void.”

The issue of supremacy of the 1979 Nigerian Constitution vis-à-vis the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap 10 of the Laws of the Federation of Nigeria, 1990 was considered by the Nigerian Supreme Court in *Sani Abacha v Fawehhinmi*⁵¹ on appeal from the decision of the Federal Court of Appeal. One of the main issues argued before the Supreme Court was whether the African Charter on Human and Peoples’ Rights as adopted by Nigeria was inferior or superior to Nigerian municipal laws. The Supreme Court held – reversing the Court of Appeal – that the African Charter was not superior to and did not override the Constitution of the Federal Republic of Nigeria. The Supreme Court conceded, as held by the Court of Appeal, that the African Charter was in a class of its own but nevertheless held that that was no reason for ascribing to the Charter superiority over the Nigerian Constitution. The fact that the Charter had become part of the Nigerian Law as enacted in Cap 10 could not give the Charter a higher status because it was open to the National Assembly to revoke it by the simple exercise of repealing it from Nigerian Law. In so holding, the Supreme Court of Nigeria, per Mohammed JSC said:⁵²

“The decision of the Court of Appeal would elevate the African Charter above the Constitution. This will then be a violation of the provisions of the supremacy of our Constitution.”

Similarly, section 4 of the Constitution of The Gambia, 1997 provides for the supremacy of the Constitution. It states:

⁵¹ [2000] 6 NWLR 228.

⁵² Ibid at pp 301-302 (the emphasis is mine).

“This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with provisions of this Constitution shall, to the extent of the inconsistency, be void.”

In the case of *Jeng (No 4) v Gambia Commercial & Development Bank Ltd (No 4)*⁵³ the Supreme Court of The Gambia, in asserting the supremacy of the Constitution, 1997 held that section 23 of the Assets and Recovery Corporation Act, 1992 (No 23 of 1992), was inconsistent with the provisions of section 128 (1)(a) of the Constitution to the extent that the former purported to eliminate a right of appeal to the Supreme Court provided by the latter. The court therefore declared section 23 of the Act as null and void to the extent of the inconsistency. It therefore held that the appellant’s right under section 128(1)(a) of the Constitution, 1997 to appeal from the decision of the Court of Appeal to the Supreme Court, could not be taken away by section 23 of the 1992 Act.

In applying *the Jeng (No 4)* case (supra) and the Privy Council decision in *Attorney-General of The Gambia v Jobe*,⁵⁴ the Supreme Court of The Gambia held in *Jammeh v Attorney-General*,⁵⁵ that the purported amendment of section 1(1) of the Constitution, 1997 contained in the Schedule to the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (No 6 of 2001), purporting to substitute for that section, a new section, namely, that “The Gambia is a sovereign secular Republic”, was a nullity and of no effect because of non-compliance with the provisions of section 226(4) of the Constitution. That section provided for the holding of a referendum on the Bill before its enactment by the National Assembly and the President. It was also held that the purported amendment of paragraph 13 of Schedule II

⁵³ [1997-2001] GR 679.

⁵⁴ (1985) LRC (Const) 556.

⁵⁵ [1997-2001] GR 839.

was a nullity for contravening paragraph 17 of the same Schedule II, which provided that the said paragraph 13 could not be amended.⁵⁶

DOCTRINE OF SEPARATION OF POWERS

The Fourth Republican Constitution of 1992, like all the previous Constitutions of 1960, 1969 and 1979, reflects one basic characteristic of the democratic system of government in most modern States, namely, the doctrine or concept of separation of powers. By this we mean the distribution of powers of government amongst the three arms of government: the legislature, the executive and the judiciary. Commenting on the doctrine of separation of powers, Wade and Bradley state:⁵⁷

⁵⁶ In upholding the supremacy of the 1997 Constitution, the Supreme Court of The Gambia, per Jallow JSC, said (ibid at page 852 - emphasis is mine): “[G]iven the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for all those involved in the exercise of the legislative authority of State to exercise due care and caution to ensure that such legislation is consistent with the requirements and procedures of the Constitution. Failure to comply with these legal requirements will attract the kind of consequences which have befallen the purported amendment to section 1(1) and paragraph 13 of Schedule II to the Constitution.” Regrettably, Jallow JSC, the most senior Justice of the Supreme Court of The Gambia) was on 23 July 2002 summarily removed from office by mere executive letter without stated reasons as required by article 141(1) of the 1997 Constitution – an issue discussed in detail in chapter 2.

⁵⁷ *Constitutional and Administrative Law* (11th ed) edited by A W Bradley and K Ewing 1993 ELBS with Longman Group Ltd, London, at page 7. See also Ocquaye, Mike, “Towards Democratic Consolidation in Ghana: A study of the Judiciary and its Relationship with the Executive” chapter 2 in *Six Years of Constitutional Rule in Ghana 1993-1999 (Assessment and Prospects)* Frederick Ebert Foundation, Accra, Ghana, 1999 at page 21 where he wrote: “In advocating for separation of powers so as to promote individual liberty, Montesquieu observed that political liberty can be found only if there is no abuse of power; but constant experience has shown that any person vested with power is liable to abuse it and extend his authority as far as it will go. In order to prevent this abuse, the legislative, executive and judicial powers should be in separate hands. From this conceptualisation evolved the notion of separation of powers and checks and balances, first effectualised in the US Constitution.”

“... many constitutions seek to avoid a concentration of power in the hands of any one organ of government by adopting the principle of separation of powers, vesting legislative power exclusively in the legislature, executive power in the executive and judicial power in the courts.”

Thus in his dissenting opinion from the Supreme Court majority decision of five to four in *New Patriotic Party v Attorney-General (31st December Case)*⁵⁸ Archer CJ said:⁵⁹

"For the first time in the legal history of this country, the American concept of the doctrine of separation of powers could be discerned throughout ...[the Constitution, 1969] namely, the powers of the legislature, the executive and the judiciary."

Also commenting on this well-known and widely accepted democratic system of government, Bennion wrote:⁶⁰

“A basic analysis would show civilised people governing themselves first by establishing some means of laying down general rules for the ordering of individual conduct and state affairs..., secondly by establishing some means both of finding out whether individuals have broken such of the rules of conduct as are mandatory (and punishing them if they have) and of settling disputes between

⁵⁸ [1993-94] 2 GLR 35.

⁵⁹ Ibid at 44 (the emphasis is mine).

⁶⁰ Bennion, F A R *The Constitutional Law of Ghana*, Butterworths, 1962 at p 115. At page 117 of the same book, Bennion, immediately after stating that: “it is clear that all powers cannot be given to one organ of the state” quotes the following from *The Federalist* by James Madison, one of the Founding Fathers of the United States: “...the accumulation of all powers, legislative, executive and the judiciary in the same hands, whether of one, a few or

individuals as to the meaning or effect of other rules of conduct, and thirdly by establishing some means of carrying into effect the rules laid down for ordering affairs of State. *The means thus established regulate respectively the exercise of the legislative power, the judicial power and the executive power of the State.*"⁶¹

Thus under article 58 of the Constitution, 1992: "The executive authority of Ghana" which includes "execution and maintenance of the Constitution and all laws made under or continued in force" by the Constitution is vested in the President. The said executive power is to be exercised by the President in accordance with the provisions of the Constitution by him directly or through subordinate officers. With regard to the exercise of legislative power, article 93(2) provides: "Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution." And regarding the exercise of judicial power, article 125(3) also provides that:

"The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power."

The scope and extent of the doctrine of the separation of powers as endorsed by the Constitution, 1992 were stated by Edward Wiredu JSC (as he then was), in his opinion in support of the unanimous decision of the Supreme Court in *Ghana Bar Association v Attorney-General (Abban Case)* where he said :⁶²

many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

⁶¹ (The emphasis is mine). See also to the same effect, Afari-Djan, K *The Ghana Constitution, Introduction* 1998 Friedrich Ebert Foundation, Accra, at pp 1-2.

⁶² [1995-96] 1 GLR 598 at 605-606. A case examined above in detail in this chapter in our discussion on the concept of the supremacy of the Constitution.

"The scope and extent of the doctrine of separation of powers ... under the Constitution, 1992 is to ensure that each arm of state in the performance of its duties within the framework of the Constitution, 1992 is to act independently and should not be obstructed in the exercise of its legitimate duties or be duly interfered with. In other words, all arms of the State are answerable or responsible to the Constitution, 1992. It is also to ensure the smooth administration of the judicial, legislative or executive governance of the State whilst checks and balances are provided to ensure strict observance by each arm of state of the provisions of the Constitution, 1992."⁶³

The view expressed in the above quotation by Edward Wiredu JSC, namely, that under the concept of separation of powers, one arm of government should not interfere with the performance of the functions given by the Constitution to another arm of government should be stressed. It is for this reason that one should underline what Archer CJ said in his opinion in support of the minority decision in the *New Patriotic Party v Attorney-General (31st December Case)*. His lordship, after quoting article 108 of the Constitution, 1992 dealing with the settlement of financial matters, said:⁶⁴

⁶³ See to the same effect, K Afari-Djan, op cit at p 2 where he wrote: "In modern democratic theory and practice, the three branches of government are said to be independent of each other. This does not mean that there is a rigid or watertight separation of their powers. Instead, what is envisaged in a democracy is that one branch of the government will not control another, but that all the three branches will share the powers of government in such a way that the power of one branch can be used to counter-balance (check) that of another whenever it oversteps its limits. This is known as *checks and balances*."

⁶⁴ [1993-94] 2 GLR 35 at 52, SC (my emphasis)-a case to be examined in detail *post* in this chapter in discussing the application or otherwise to the Ghana Constitutional Law of the doctrine of non-justiciable political question.

"I have quoted this article in extenso to demonstrate the procedure the Constitution, 1992 has laid down for the provision of moneys for the government to administer the country. It is only the President, who is the head of the executive, who can go to Parliament to seek financial provision charged upon the Consolidated Fund. Nowhere in this article is the role of the judiciary mentioned. Yet, this court is being invited to prevent the government from spending moneys which Parliament has constitutionally provided for government use. I think if the order is granted, it would amount to judicial officiousness - poking our noses into the affairs of Parliament and intermeddling with the prerogative of the executive by directing the government not to spend moneys approved by Parliament. *Such a move clearly amounts to a violation of the doctrine of separation of powers which is the core of our Constitution, 1992.*"

It is very important to stress, however, that whilst the three arms of government are independent of each other, they do not operate independently without reference to each other. This all important statement of the Ghana Constitutional Law is supported by the recent unanimous decision of the Supreme Court in *Tsatsu Tsikata v Chief Justice & Attorney-General*.⁶⁵ It is necessary to relate the events leading to the filing of the claim in this case before the Supreme Court. The plaintiff, Mr Tsatsu Tsikata, the former Chief Executive of the Ghana National Petroleum Corporation, was at first arraigned before a circuit tribunal (a court lower than the High Court) on a charge of causing financial loss to the State contrary to section 179A(3)(a) of the Criminal Code, 1960 (Act 29) as amended by the Criminal Code (Amendment) Act, 1993 (Act 458). The Attorney-General entered a *nolle prosequi* and the criminal prosecution was discontinued. However, on the same day, the police served a summons on Mr Tsikata to appear before the Fast Track High Court, a division of the High Court, to answer the same criminal charge. He did not do so. He rather filed an action in the Supreme Court invoking its original jurisdiction (founded on articles 2(1) and 130(1) of the

⁶⁵ [2001-2002] SCGLR 437.

Constitution, 1992) for, inter alia, a declaration that: "there is no Fast Track Court with jurisdiction to try criminal cases established under the 1992 Constitution... and therefore a summons to appear before such a 'court' is null and void." The Supreme Court, by a majority decision of five to four given on 28 February 2002, upheld the claim that there is no Fast Track High Court vested with jurisdiction to try criminal cases.⁶⁶ However, the majority decision of the Supreme Court was challenged by the defendant, the Attorney-General, a day after the decision. He filed an application in the Supreme Court, on 1 March 2002 for a review of the majority decision.

Before the Chief Justice could exercise his function of empanelling a bench to determine the pending application for a review of the majority decision in favour of the plaintiff, he, the plaintiff, in an apparent pre-emptive strike, filed the instant action, namely, *Tsatsu Tsikata v Chief Justice & Attorney-General* (supra). He sued the Chief Justice and the Attorney-General in the Supreme Court for, inter alia, a declaration that, on a true and proper interpretation of articles 125 (4) and 128 (1) and (2) of the Constitution, 1992 "all available Justices of the Supreme Court do not have a constitutional right to sit where practicable and especially in constitutional matters" as directed by the Chief Justice in a *Practice Direction (Practice in Empanelling Justices of the Supreme Court)* issued on 10 January 2001.⁶⁷

Before the hearing of the claim, the plaintiff filed notice of a preliminary objection, contending, inter alia, that the Chief Justice could not be represented by the Attorney-General. He relied on the principle of separation of powers under which it should not be seen or appear to be seen that the executive arm of the government, represented by the Attorney-General, was interfering with the judiciary. He contended that the Chief Justice had been sued in his personal capacity and therefore the Attorney-General had no responsibility to

⁶⁶ See *Tsatsu Tsikata (No 1) v Attorney-General (No 1)* [2001-2002] SCGLR 189.

⁶⁷ [2000] SCGLR 586.

defend him. The plaintiff therefore argued that the statement of defendants' case filed by the Attorney-General's Office on behalf of the Attorney-General and the Chief Justice was improper; and that the statement of defendant's case ought to have been personally sworn to by the Chief Justice.

The Supreme Court unanimously dismissed the preliminary objection founded on the principle of separation of powers on the ground that, as a public officer, the acts performed by the Chief Justice in pursuance of his functions were official and not personal. The court held that any action brought against the Chief Justice in the exercise of his official functions ought to be defended by the Attorney-General on behalf of the State as required by article 88(5) of the Constitution. It was therefore held that the Attorney-General had every right to swear to the affidavit on behalf of the Chief Justice. He also had the right to verify the facts in the statement of the defendant's case.

In the light of the Supreme Court decision in *Tsatsu Tsikata v Chief Justice & Attorney-General* (supra), it could be argued that under the concept of separation of powers, the three arms operate independently but certainly not in isolation. Thus even though the judiciary under article 125(1) and 127(1), shall be independent, "in both its judicial and administrative functions, including finance administration," it cannot operate as an independent entity without financial support of the executive which has the duty to release funds (regularly and not without the usual delays) through the Ministry of Finance for the day to day administration of the judiciary. The three arms of government must support and complement each other. This point was stated clearly and succinctly by Kpegah JSC in his dissenting opinion in *Amidu v President Kufuor*:⁶⁸ "Although power is dispersed among the various organs of government, it should not be at the expense of harmony."

⁶⁸ [2001-2002] SCGLR 86.

It must be said that the same point as to the need for co-operation amongst the three arms of government had been stressed much earlier by Justice Jackson in the United States case of *Youngstown Sheet & Tube Co v Sawyer (Steel Seizure Case)*⁶⁹ where he said:

“While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence; autonomy but reciprocity.”⁷⁰

It should be observed that the *Steel Seizure Case* (supra) was cited with approval by Kpegah JSC in his dissenting opinion in *Amidu v President Kufour*⁷¹ where he raised *suo motu* the application or otherwise under Ghana Constitutional Law of the doctrine of non-justiciable political question, the next issue for discussion in this chapter.

⁶⁹ 343 US 579.

⁷⁰ See also Lewis, A (Sir) “The separation of powers: its relevance for parliamentary government in the Caribbean” [1978] WILJ 4 where he wrote: “ For practical purposes, it is essential, if developing countries are to be moved forward quickly, that there should be the utmost trust and co-operation between the legislature and the executive and the administration to facilitate implementation of government’s economic and social policies.” See also the dictum of Saunders J in the West Indies unreported case of *Benjamin v Minister of Information*, Suit No 56 of 1997, 7 January 1998, High Court of Anguilla: “For our democracy to operate effectively, it has been said that it is necessary that a certain comity should exist between the three branches. Each should respect the role and function of the other. The court is subject to and must enforce laws passed by Parliament that are intra vires the Constitution. The executive should respect and obey the decisions and accept the intimations of the court.” Both quotations were cited by Fiadjoe, A op cit at pp 160 and 162 respectively.

⁷¹ [2001-2002] SCGLR 86.

THE DOCTRINE OF THE NON-JUSTICIABLE POLITICAL QUESTION

Introduction

The concept of separation of powers as discussed above brings to the fore the related question of the doctrine of non-justiciable political question. Thus in his dissenting opinion in *Amidu v President Kufuor*, Kpegah JSC said:⁷²

“The other so-called American doctrine often applied with some inconsistency is the political question doctrine the development of which is based on the doctrine of separation of powers which underpins the American Constitution like ours.”

What is meant by the doctrine of non-justiciable political question? Does it apply to the Fourth Republican Constitution of 1992? To what extent does the principle oust the jurisdiction of the Supreme Court? More specifically what is the contribution of the Ghana Supreme Court to the development and application of that doctrine under Ghana Constitutional Law? There are three decisions of the Supreme Court in which the defence of non-justiciable political question was specifically raised and determined. The first was the *New Patriotic Party v Attorney-General (31st December Case)*;⁷³ the second was *Ghana Bar Association v Attorney-General (Abban Case)*⁷⁴ and the third was *JH Mensah v Attorney-General*.⁷⁵ The doctrine of non-justiciable political question, founded, primarily on the

⁷² [2001-2002] SCGLR 86 at 147.

⁷³ [1993-94] 2 GLR 35 – a landmark decision, discussed in detail in this chapter on the questions of the doctrines of the supremacy of the constitution and separation of powers.

⁷⁴ [1995-96] 1 GLR 598, SC; [2003-2004] SCGLR 250.

⁷⁵ [1996-97] SCGLR 320. It should be noted that the case of *J H Mensah v Attorney-General* – to be discussed in detail, on the question of non-justiciable political question – is different from the subsequent case of *Yeboah v J H Mensah* [1998-99] SCGLR 492 previously examined in detail in relation to the concept of separation of powers.

doctrine of separation of powers, simply means that when under the Constitution, the determination of a particular matter is exclusively committed to one branch or branches of government such as the executive and the legislature, another branch of government, namely, the judiciary, cannot or is precluded from interfering with the determination of that particular question. In other words, where there is a textual commitment to a co-ordinate department of government, the courts are excluded from questioning the determination of that textual commitment by the other arms of government, namely, the executive and the legislature.

Examination of the cases on application or otherwise of the doctrine of non-justiciable political question.

In the first case, *New Patriotic Party v Attorney-General (31st December Case)*, the doctrine of non-justiciable political question was raised and rejected as inapplicable to the Ghana Constitution, 1992 by a thin majority decision of five to four. In this case, the NPP, the plaintiffs, the leading political party, then in opposition, sued for a declaration, under article 2(1) of the Constitution, 1992 that the intended public celebration of the overthrow of the legally constituted Government of Ghana on 31st December 1981 and the financing of such celebration from public funds, was inconsistent with and in contravention of the letter and spirit of the Constitution. The Hon Attorney-General, the defendant, contended that the question whether 31st December should be declared as a public holiday was a political question, not properly determinable by the Supreme Court, but by the executive or the electorate through the legislature.

That contention was rejected by the majority of the judges. The majority per Adade and Aikins JJSC were of the opinion that the Supreme Court had jurisdiction to determine political questions because in exercising its constitutional duty of enforcing or interpreting the Constitution, 1992 under articles 2(1) and 130, the Supreme Court might decide cases

involving political questions.⁷⁶ The judges therefore held that the controversy whether or not the celebration of the 31st December coup d'état was inconsistent with or in contravention of the Constitution, would itself raise an issue of interpretation of the Constitution for which the Supreme Court had jurisdiction under article 2 to adjudicate and make such orders as it might consider appropriate. In the words of Adade JSC:⁷⁷

“ ... the Constitution itself is essentially a political document. Almost every matter of interpretation or enforcement which may arise from it is bound to be political, or at least to have a political dimension.”

After examining and distinguishing the United States case of *Baker v Carr*⁷⁸ cited by defence counsel in support of the argument that the plaintiffs' case had raised a political question which could not be determined by the Supreme Court, Adade JSC concluded that the doctrine of political question, based on the federal nature of the United States Constitution, was inapplicable in Ghana; that in any case, in the light of the United States Supreme Court decision in *Baker v Carr*, it would seem that even in the United States, the doctrine of political question was inapplicable to the United States Supreme Court as the "ultimate interpreter of the Constitution." The judge therefore held that, similarly, the Ghana Supreme Court as "the ultimate interpreter" of the Constitution under articles 2(1) and 130 might lawfully decide cases of a political nature. In the words of Adade JSC:⁷⁹

⁷⁶ Adade JSC gave as an example cases involving political questions, issues relating to human rights and chieftaincy disputes.

⁷⁷ [1993-94] 2 GLR 35 at 65.

⁷⁸ 369 US 186.

⁷⁹ Ibid at 65.

“What we have is a written Constitution, 1992 to be interpreted and enforced, with the result that in Ghana, courts and tribunals much lower in the hierarchy than the Supreme Court may lawfully decide cases which may involve ‘political questions.’”

In further support of the majority opinion that the Supreme Court was entitled to decide questions of a political nature, Amua-Sekyi, Aikins and Hayfron-Benjamin JJSC held that, unlike the British Parliament, which was supreme without a written Constitution, in Ghana, it was the Constitution, not Parliament, which was supreme; that in Ghana, Parliament had no uncontrollable power to enact laws but was subject to article 1(2) of the Constitution under which all laws inconsistent with the Constitution could be declared void. It was therefore held (per Aikins and Hayfron-Benjamin JJSC) that the right of Parliament to enact a law (declaring June 4th and 31st December as public holidays) could not be left to linger in the realm of public policy but must be within the parameters of the power conferred on Parliament. Amua-Sekyi JSC arrived at the same conclusion when he said:⁸⁰

“It was also said that the issue is a political one that the plaintiff ought to have made its complaint to Parliament. Perhaps, if it had been represented in Parliament it might have sought an amendment or repeal of the offending legislation. However, there was nothing to stop it from making a legal issue of it and coming to this court for redress. Parliament now has no uncontrolled right to pass laws on public holidays, any more than it has to declare a 'one party' state, or make a party Leader President for life or crown him emperor. As the fundamental or basic law, the Constitution, 1992 controls all legislation and determines their validity. It is for the courts, as

⁸⁰ Ibid at 130 (emphasis is mine).

the guardians of legality, to ensure that all agencies of the State keep within their lawful bounds.”⁸¹

However, in the *31st December Case*, the judges in the minority, were of the opinion that the fixing of a date as a public holiday was a political question, a policy decision, best left to the executive and the legislature to determine; and that judging from the history of declaration of public holidays in Ghana,⁸² that right had never been interfered with by the courts. All the four judges in the minority,⁸³ were of the opinion that it was only Parliament, representing the people or the electorate, which could validly delete 31st December from the list of public holidays in Ghana.

It seems that the judges in the minority were right in holding that the fixing of public holidays was a policy decision, a political question which could be changed or determined by the executive or government through legislation. But that, with the greatest respect, was not the real issue before the Supreme Court. It must be emphasised that the real issue was whether or not the declaration of 31st December as a public holiday (albeit a political question) to the extent that it was enacted by the Public Holidays Law, 1989 (PNDCL 220), could be declared as unconstitutional by the Supreme Court as being inconsistent with or in contravention of the Constitution, 1992. Bamford-Addo JSC, dissenting, was very much alive to the real question as stated above when she observed thus:⁸⁴

⁸¹ It is interesting to note that the plaintiff in the case, the NPP, as now the ruling political party, ie the NPP Government under President JA Kufuor in 2001 enacted the Public Holidays Law (Amendment) Act to repeal June 4 as a public holiday in Ghana.

⁸² Namely, Public Holidays Act, 1960 (Act 23); Public Holidays Decree, 1972 (NRCD 18); Public Holidays Decree, 1974 (NRCD 262); Public Holidays Law, 1989 (PNDCL 220); and Public Holidays (Schedule Amendment) Law, 1992 (PNDCL 274).

⁸³ Per Archer CJ, Abban, Bamford-Addo and Ampiah JJSC.

⁸⁴ [1993-94] 2 GLR 35 at 153 (my emphasis).

“It seems to me that 31 December public holiday, *unless unconstitutional*, which I have said it is not, can only be deleted from the list of public holidays by any government which desires this as a policy decision, to take necessary legislative action to delete this date from the list provided in PNDCL 220.”

If, as impliedly held by Bamford-Addo JSC, the declaration of 31st December as a public holiday, could be quashed or construed as unconstitutional by the Supreme Court (in the exercise of its powers under articles 2 and 130 of the Constitution), then, the fact that the claim raises a political question, should not (as viewed by the minority) preclude the Supreme Court from entertaining or hearing the claim. If the Ghana Parliament, founded on a constitutional democracy, is not supreme in terms of article 93(2), then it is respectfully submitted that, an existing enactment such as PNDCL 220, to the extent that it raises a political question as to the declaration of 31st December as a public holiday, could be questioned by the Supreme Court in the exercise of its constitutional power of interpretation under article 130. If it is so conceded, then it appears the majority in the *31st December Case* were right in rejecting the defence founded on the issue of being a political question, that is, as an issue not properly determinable by the Supreme Court.

However, notwithstanding the majority decision in the *31st December Case* that the doctrine was inapplicable to the Ghana Constitution, the defence of political question was again raised and held as applicable to the 1992 Constitution in the subsequent case of *Ghana Bar Association v Attorney-General (Abban Case)*.⁸⁵

⁸⁵ [1995-96] 1 GLR 598; [2003-2004] SCGLR 250, SC (per Kpegah JSC, Bamford-Addo and Charles Hayfron-Benjamin JJSC concurring). The full facts of the case were given in our earlier discussion of the issue of the supremacy of the constitution in this chapter.

In this case, the plaintiffs sought a declaration, inter alia, that the second defendant, Mr Justice I K Abban "is not a person of high moral character and proven integrity" in terms of article 128(4) of the Constitution, 1992; and also a further declaration that the appointment on 22 February 1995 by the President of the second defendant as the Chief Justice, as well as the advice of the Council of State and the approval by Parliament of his nomination, were done in contravention of articles 9(1) and (2), 128(4) and 144(1) of the Constitution, 1992 and were therefore null and void.

The defendants raised a preliminary objection to the assumption of jurisdiction by the Supreme Court which they founded, inter alia, on the defence of non-justiciable political question. The defence contended that the issue of the appointment of the second defendant as the Chief Justice by the President, acting in consultation with the Council of State and with the approval of Parliament, was a non-justiciable question specifically committed by the Constitution, articles 9(1)(1) and 144(1) to the President, the Council of State and Parliament. In reply, counsel for the plaintiffs argued that having regard to the provisions of articles 125(3) and 295(8) of the Constitution, the doctrine of non-justiciable political question was inapplicable to the 1992 Constitution.

The Supreme Court (per Kpegah JSC, Bamford-Addo and Charles Hayfron-Benjamin JJSC concurring), held that the principle of non-justiciable political question was applicable to the Constitution, 1992; that the principle was inherent in the concept of separation of powers where certain functions were committed to a specific branch of government; that in such a situation a political question could not evolve into a judicial question determinable by the Supreme Court. The court further held that the Constitution had, under articles 91(1) and 144(1) specifically committed the appointment of the Chief Justice to the executive and the

legislature. In so holding, Kpegah JSC relied on the following well-known dictum of Justice Brennan in the case of *Baker v Carr*⁸⁶:

"prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department."

Relying also on the concurring opinion of Justice Powell in *Goldwater v Carter*,⁸⁷ Kpegah JSC identified what he referred to as the "common characteristics" involved in the principle of non-justiciable political question, namely:

"(a) does the issue involve resolution of questions committed by the text of the Constitution to co-ordinate branch of government; (b) would a resolution of the question demand that a court move beyond areas of judicial expertise; and (c) do prudential considerations counsel against judicial intervention?"

And before settling on the "common characteristics" of the principle of non-justiciable political question, Kpegah JSC in the *Abban Case* went on to observe that: "there are some local authorities" in support of the application in Ghana of the doctrine of non-justiciable political question.

The pertinent question to be posed is: were there, in fact, "local authorities" in support of the principle? It should be pointed out that in the *Abban Case* itself, Edward Wiredu JSC

⁸⁶ 369 US 186 (1962).

⁸⁷ 444 US 996 (1979).

clearly dissented from the majority view that the doctrine of political question is applicable to the Ghana Constitution. His lordship said⁸⁸:

"[W]here an allegation is properly made under article 2(1)(b) of the Constitution in circumstances that can be justified under the Constitution, such an allegation becomes justiciable in the Supreme Court and is answerable by that arm or organ of State against which such an allegation is made. I therefore reject as untenable the proposition that the appointment of the Chief Justice under article 144(1) is a non-justiciable political question that cannot be questioned in any way and under no circumstances in the Supreme Court... *I must admit that the nomination of a person for appointment as the Chief Justice is essentially an executive preserve; it can, however, under certain circumstances be questioned under article 2(1)(b) since the appointment is exercisable under the provisions of the Constitution... Nothing done under the Constitution which is ultra vires its provisions can be justified under a plea of political immunity and therefore privileged so as to oust the jurisdiction of the Supreme Court as the organ charged with the responsibility to see to due compliance with the provisions of the Constitution.*"

It should also be noted that Bamford-Addo JSC commenced her opinion in the *Abban Case* as follows: "I have been privileged to read in advance the comprehensive ruling of my brother Kpegah JSC and I agree with him." Beyond this, Bamford-Addo JSC did not express any further views on the application or otherwise to the Ghana Constitutional Law of the non-justiciable political question doctrine. However, Charles Hayfron-Benjamin JSC, in concurring with the opinion of Kpegah JSC, said:⁸⁹

⁸⁸ [2003-2004] SCGLR 250 at pp 261-262. (The emphasis is mine).

⁸⁹ Ibid at page 275.

“I do not think it is necessary for me in this opinion to discuss the principle of the non-justiciable political question. It is certainly one ground upon which the jurisdiction of this court may be ousted... Although in the *Tuffuor* case... their lordships did not use the term, ‘non-justiciable political question’, I think they reached conclusions which accord with Justice Brennan’s dictum in the American case of *Baker v Carr* 369 US 186 (1962)...”

It should also be emphasized that the judges in the *Abban Case* (decided on 5 December 1995) disagreed on the application of the doctrine of non-justiciable political question to the Ghana Constitution. However, the court (per Edward Wiredu, Bamford-Addo, Charles Hayfron-Benjamin, Kpegah and Adjabeng JJSC) in that same case were unanimous in upholding the preliminary objection on one specific ground: that the real effect and nature of the plaintiffs’ claim was to remove Justice Abban completely from the Bench; and that since article 146 of the Constitution had a special procedure for removing a judge, exclusively determinable by a specified body, the Supreme Court had no jurisdiction to entertain the plaintiffs’ claim.

It seems to me that, in answering the question earlier raised, namely, whether there were, as observed by Kpegah JSC in the *Abban Case*, “local authorities” to support the court’s other decision that the non-justiciable political question was applicable to the Constitution, 1992 the starting point is to examine the authorities relied upon in support of the decision.

In arriving at his decision in the *Abban Case*, Kpegah JSC cited the decision of the Court of Appeal sitting as the Supreme Court in *Tuffuor v Attorney-General*.⁹⁰ It is also interesting to recall that Charles Hayfron-Benjamin JSC, in his concurring opinion earlier quoted, also

⁹⁰ [1980] GLR 637, SC.

cited the *Tuffuor Case* as authority in support of the application in Ghana of the doctrine of non-justiciable political question. He, however, conceded that the court in the *Tuffuor Case* did not “ use the term –non-justiciable political question” although they reached conclusions which accorded with Justice Brennan’s dictum in the American case of *Baker v Carr*.⁹¹ Apart from relying on the *Tuffuor Case*, Kpegah JSC also quoted dicta from the opinion of Archer CJ and Hayfron-Benjamin JSC in the *31st December Case*.

Kpegah JSC relied on dicta of Sowah JSC in the *Tuffuor Case* as authority for holding that the political question doctrine was applicable to the Constitution, 1992. It is therefore necessary to examine in detail what the *Tuffuor Case* really decided.

In the *Tuffuor Case*, the plaintiff sued for a declaration that on the coming into force of the Constitution, 1979 Mr Justice Apaloo (the incumbent Chief Justice of Ghana before the coming into force of the Constitution, 1979) was deemed, under article 127 (8) to have been appointed Chief Justice and as such became the President and a Member of the Supreme Court; and that the application of the procedure for appointment in article 127(1) (a) to Justice Apaloo and the purported vetting and rejection by Parliament were in contravention of the said article 127 (8) of the Constitution; and (iii) Justice Apaloo remained the Chief Justice and thereby the President of the Supreme Court.⁹²

⁹¹ 369 US 186 (1962).

⁹² Article 127 (1) (a) provided that: “ The Chief Justice and the other Justices of the Supreme Court shall be appointed by the President ... in the case of the Chief Justice, acting in consultation with the Judicial Council; ...and with the approval of Parliament.” And article 127 (8) also provided that: “Subject to the provisions of clause (9) of this article, [relating to the taking of oath of allegiance and the judicial oath] a Justice of the Superior Court of Judicature holding office as such immediately before the 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 the Constitution.”

The Attorney-General, in his statement of the defendants' case, contended, inter alia, that the procedure in article 127 (1) was mandatory. The said article 127(1) of the Constitution, 1979 provided that the Chief Justices "shall be appointed by the President... acting in consultation with the Judicial Council... and with the approval of Parliament." And it is very significant to stress that even though the Attorney-General also contended that the rejection of Justice Apaloo as Chief Justice by Parliament was done by Parliament in the exercise of the powers conferred upon it by article 127(1) (a) and that the rejection was proper, the preliminary objection raised by the Attorney-General to the institution of the action, was not founded on the application of the non-justiciable political question. The preliminary objection was founded, inter alia, on want of jurisdiction in the court itself sitting as a Supreme Court. It was contended that the plaintiff's claim could only be determined by the Supreme Court properly constituted under the Constitution, 1979.

It should also be noted, in contrast, that whereas the court in the *Abban Case* (per Kpegah JSC) upheld the preliminary objection to the exercise of jurisdiction on grounds, inter alia, of the application of the doctrine of non-justiciable political question, the Court of Appeal sitting as the Supreme Court in the *Tuffuor Case*, rather dismissed the preliminary objection because it had exclusive jurisdiction to determine the plaintiffs' claim under article 118 (1)(a) of the 1979 Constitution. The said article 118(1)(a), which was the same as article 130(1)(a) of the present 1992 Constitution, empowered the Supreme Court to determine "all matters relating to the enforcement or interpretation of any provision of [the] Constitution."

The Supreme Court in the *Tuffuor Case*, after hearing the substantive matter, upheld, as already indicated, the plaintiffs' claim. The Supreme Court held, inter alia, that once Justice Apaloo was constitutionally in office, his removal could be constitutionally effected by recourse to the provisions in article 128 (which dealt with the special procedure for removing Superior Court Judges from office (the same more or less like the procedure laid down in the

present article 146 of the 1992 Constitution) and not to article 127(1), which dealt with the appointment of a judge “with the approval of Parliament.”

In arriving at the above decision, namely, that the special procedure laid down in article 128 must be resorted to before Justice Apaloo could be removed from office (interestingly the same conclusion was unanimously arrived at in the *Abban Case* in relation to Justice Abban, on application of article 146 of the Constitution, 1992), Sowah JSC in the *Tuffuor Case* said:⁹³

“Is there then a controversy? Is there then a duty, a right, a liability that can be established by this court? The answer is yes! There is a right, a duty cast upon every citizen of Ghana to go to the Supreme Court for determination whether a person or persons is, or are, seeking to abolish the constitutional order established by the Constitution. There is a controversy regarding the status of the incumbent Chief Justice, the determination of which depends upon an interpretation of the Constitution. *Once there is a controversy, a justiciable issue, we believe that under the wing of interpretation as contained in paragraph (a) of clause (1) of article 118, the court has jurisdiction to entertain the issue raised by the plaintiff's writ. And the plaintiff is thus properly before the court.*”

Sowah JSC continued:⁹⁴

“This then brings us to the question of how far the courts can question what, under our Constitution, has been done in, and by, Parliament? There is a long

⁹³ [1980] GLR 637 at 650 (my emphasis).

⁹⁴ Ibid at pp 650-651 (my emphasis).

line of authorities which establishes two important principles governing the relationship that subsists or should exist between Parliament and the courts:

- (a) *that the courts can call in question a decision of Parliament; but the courts cannot seek to extend their writs into what happens in Parliament; and*
- (b) *that the law and custom of Parliament is a distinct body of law and, as constitutional experts do put it, ‘unknown to the courts.’*

And therefore the courts take judicial notice of what has happened in Parliament. The courts do not, and cannot, inquire into how Parliament went about its business. These constitute the state of affairs, as between the legislature and the judiciary which have been crystallized in articles 96, 97, 98, 99, 103 and 104 of the Constitution [the same respectively as 115, 116, 117, 118, 122 and 123 of the Constitution, 1992.] *Of particular importance to us are the provisions of article 96 of the Constitution* [dealing with freedom of speech, the same as article 115 of the Constitution, 1992.] *They confer on Parliament freedom of speech, of debate and of proceedings in Parliament.* The article also states categorically: ‘that freedom of speech shall not be impeached or questioned in any Court or place out of Parliament.’ *The courts cannot therefore inquire into the legality or illegality of what happened in Parliament.* In so far as Parliament has acted by virtue of the powers conferred upon it by the provisions of article 9(1) [providing that Parliament may regulate its own procedure the same as article 110(1) of the 1992 Constitution)], its actions *within* Parliament are a closed book.” (Judge’s emphasis).

In the light of the decision of the Supreme Court in the *Tuffuor Case* as to the constitutional status of the Justice Apaloo and as clarified by the above dicta by Sowah JSC, one may

legitimately conclude that the Supreme Court in that case arrived at the following decisions: First, once there is a controversy, a justiciable issue would arise and the court has jurisdiction to deal with it, as it did, in the case before it. Second, the courts can question the decisions of Parliament but not how the decisions were arrived at. Third, the courts cannot question what goes on inside or within Parliament, especially on matters pertaining to its procedure as stated in article 110(1) of the Constitution, 1992. In these matters, the “actions *within* Parliament are a closed book.” Fourth, the decision of the court neither turned on nor was it founded on article 127(1) (a), dealing with requirement of parliamentary approval of the Chief Justice, which is the same as article 144(1) of the Constitution, 1992. The decision rather turned on article 128, dealing with the tenure of office of superior court judges, which is the same as article 146 of the present Constitution, 1992. Fifth, it could be said that the decision in the *Tuffuor Case*, did not at all throw any light on the application or otherwise of the non-justiciable political question doctrine, an issue which was not even raised, let alone argued.

However, given the defence filed by the Attorney-General in that case, founded on the fact that Parliament had rejected the appointment of Justice Apaloo as Chief Justice, it could be argued that the defence of non-justiciable political question was, on the facts, open to the Attorney-General. However, the fact remains that it was not raised. Even if the Attorney-General had done so, that defence would, in all probability, have been rejected by the Supreme Court, given its decision that: “Once there is a controversy, a justiciable issue... the court has jurisdiction to entertain the issue.”⁹⁵

In the light of the above analysis of the *Tuffuor Case* –pointing out what in fact it decided and what, it did not decide –was the court in the *Abban Case*, on the specific issue of the application or otherwise of the non-justiciable political question, entitled to base its decision on the *Tuffuor Case*?

⁹⁵ [1980] GLR 637 at 650.

In support of the decision in the *Abban Case* that the principle of non-justiciable political question was applicable to the Constitution, 1992 Kpegah JSC relied upon a portion of the dicta of Sowah JSC in the *Tuffuor Case* fully quoted above. The relevant portion of the judgment of Sowah JSC relied upon by Kpegah JSC was as follows:⁹⁶

“The courts cannot therefore inquire into the legality or illegality of what happened *in* Parliament. In so far as Parliament has acted by virtue of the powers conferred upon it by the provisions of article 9 1(1), its actions *within* Parliament are a closed book. The above were the considerations that led to our conclusions...(c) that the Speaker ought not to be a party to the present proceedings and we accordingly discharged him as the first defendant.”

Immediately after quoting the above dicta of Sowah JSC in the *Tuffuor Case*, Kpegah JSC in the *Abban Case* said:⁹⁷

“The *rationale* for the court’s holding in the *Tuffuor Case* at page 651 that proceedings in Parliament are a closed book and cannot be subjected to judicial review *is the concept of separation of powers and its necessary implication of non-justiciability of proceedings within Parliament*. This case is a classic example of a court being confronted with a complex issue of constitutional interpretation, a function of the Supreme Court, to give itself jurisdiction, in the strict sense, and yet applying at the same time the principle of non-justiciable political question to decline jurisdiction to go into an issue.”

⁹⁶ [1980] GLR 637 at 650-651.

⁹⁷ My emphasis.

It seems to me that the above pronouncement by Kpegah JSC on the effect of the quoted dicta by Sowah JSC in the *Tuffuor Case* lends itself to a number of criticisms: First, it is respectfully submitted that, it is *non sequitur* that because Kpegah JSC *appears* to conclude that, by stating that proceedings within Parliament “are a closed book”, Sowah JSC in the *Tuffuor Case*, must be taken to have held that the Supreme Court decided to decline jurisdiction in the case before it on the application of the doctrine of non-justiciable political question. Second, there is no doubt at all, that Sowah JSC was, with great respect, quoted out of context given the fact that, his dicta to the effect that “actions *within* Parliament are a closed book” were preceded immediately by his remark that “the courts can call in question a decision of Parliament” as earlier quoted above. Third, Kpegah JSC, again, with great respect, omitted to draw attention to the clear *distinction* drawn by Sowah JSC in the *Tuffuor Case between* “decisions” of Parliament which can be questioned by the Supreme Court and “actions within Parliament” which cannot be questioned because as quoted by Kpegah JSC, “Parliament has acted by virtue of the powers conferred upon it by the provisions of article 9(1).” It must be noted that, article 9(1) of the Constitution, 1979 the same as article 110(1) of the Constitution, 1992 provides that “Parliament may regulate its own procedure.”

It is therefore very clear that the effect of the dicta of Sowah JSC, relied upon by Kpegah JSC, was that the procedural actions of Parliament, what may properly be described as, its *modus operandi*, cannot be questioned by the Supreme Court. That decision is certainly a far cry from the conclusion reached by Kpegah JSC in the *Abban Case*, that by the said pronouncement, Sowah JSC, in the *Tuffuor Case*, must be held to have founded the Supreme Court’s decision on the doctrine of non-justiciable political question.

It is very interesting to note that the decision reached by the Supreme Court in the *Tuffuor Case* per Sowah JSC (relied upon by Kpegah JSC in the *Abban Case*) to the effect that proceedings or “actions within Parliament are a closed book”, which cannot be questioned by

the Supreme Court, was followed by the Supreme Court in its subsequent decision in *JH Mensah v Attorney-General*.⁹⁸

The relevant facts in the case of *J H Mensah v Attorney-General* (supra) were as follows. The second four-year term of the Fourth Republic of Ghana under the Constitution, 1992 commenced from 7 January 1997. On that day, Flt Lt J J Rawlings, who had won the December 1996 Presidential Election, was sworn in as the President for a second term of four years. Thereafter, the government announced that, the President had decided to retain in office some of his previous ministers and deputy ministers; and that since the appointment of the retained ministers had been approved by the previous Parliament, that is, the first Parliament of the Fourth Republic, there was no need for them to be approved again by the newly elected Parliament. The announcement was vehemently opposed by the Opposition Group.

Consequently, the Opposition Leader in Parliament, Mr J H Mensah, sued in the Supreme Court for a declaration, inter alia, that: (i) on a true and proper interpretation of article 78 (1) and some other specified articles of the Constitution, 1992 no person can, as from 7 January 1997, act as a minister without the prior approval of the newly elected Second Parliament;⁹⁹ and (ii) a necessary incident of prior approval is the consideration and vetting of the person or persons nominated for appointment by the newly elected Second Parliament.

⁹⁸ [1996-97] SCGLR 320 per Aikins, Charles Hayfron-Benjamin, Ampiah, Acquah and Sophia Akuffo JJSC. *J H Mensah v Attorney-General* is the last of the three cases referred to in the introduction above, which specifically determined the issue of the application or otherwise to the Ghana Constitutional Law, of the doctrine of the non-justiciable political question.

⁹⁹ Article 78 (1) of the Constitution, 1992 states 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 Attorney-General filed a statement of defence by which he raised a preliminary objection to the plaintiff's action on the grounds, inter alia, that: (i) the issues for determination were moot and there was no longer any live question for determination because the government had retracted from its position by submitting (after the filing of the writ) the names of the retained ministers to the new Parliament for its approval;¹⁰⁰ (ii) there was no law requiring for the vetting of ministerial nominees as claimed by the plaintiff; and (iii) the process by which Parliament exercised its powers such as approval of ministerial nominations, could not be questioned by the courts under the political question doctrine.

The Supreme Court unanimously granted the plaintiff's claim in part by upholding the first relief, namely, that all persons nominated for ministerial appointment, whether retained or new, required the prior approval of Parliament. On the specific issue of the nature of the approval process by Parliament, the court held that, the effect of article 110(1) of the Constitution, 1992 (which is the same as article 91(1) of the Constitution, 1979 referred to by Sowah JSC in his dicta in the *Tuffuor Case*), was that Parliament could, by standing orders, regulate its own procedure; and that the court could not intervene at the suit of a person who desired a different procedure to that adopted by Parliament so long as the procedure by Parliament did not infringe a provision of the Constitution. The court thus held that, it could not, in the exercise of its powers under articles 2 and 130(1) of the Constitution, 1992 direct Parliament on how to conduct its business. In his opinion in support of that decision, Ampiah JSC said:¹⁰¹

¹⁰⁰ An issue which would be examined later in detail in this chapter in discussing the application or otherwise of the doctrine of mootness to the Ghana Constitutional Law.

¹⁰¹ [1996-97] SCGLR 320 at 356-357 (emphasis is mine).

“Provided ‘approval’ is given to the nominees of the President, in accordance with the orders regulating Parliament’s procedure, such exercise of a right could not be unconstitutional. The Constitution itself has not regulated the procedure for approval. *It is a different matter if no approval at all is given for such appointments.*”

In the same vein, Aikins JSC in support of the decision also said:¹⁰²

“...the Standing Orders of Parliament, dealing with its own internal procedures, must be in conformity with the spirit and letter of the Constitution or, as Nana Akufo-Addo, counsel for the plaintiff rightly put it, ‘run the risk of being struck down as unconstitutional, and accordingly null and void.’ It means therefore that if Parliament’s procedures are so regulated in such a way that it can be shown to be contrary to any provision of the Constitution, the fact that “ the law and custom of Parliament” is a distinct law “ unknown to the Courts” would be of no moment. It would be the law of the Constitution known only to the Supreme Court that the court would be pronouncing upon.”

In so holding, the Supreme Court in *J H Mensah v Attorney-General* followed the dicta of Sowah JSC in the *Tuffuor Case*, the same passage relied upon by Kpegah JSC in the *Abban Case*, namely:¹⁰³

¹⁰² Ibid at 347.

¹⁰³ [1996-97] SCGLR 320 at 371 per Acquah JSC.

“In so far as Parliament has acted by virtue of the powers conferred upon it by the provisions of article 9 1(1), its actions *within* Parliament are a closed book.”

In the light of the above detailed examination of the Supreme Court decision in *J H Mensah v Attorney-General* and the dicta of Sowah JSC in the *Tuffuor Case*, we may draw the inexorable conclusion that the *Tuffuor* decision and the dicta of Sowah JSC quoted and relied upon by Kpegah JSC are, with great respect, in fact, no authority for the decision in the *Abban Case* to the effect that the doctrine of non-justiciable political question is applicable to the Ghana Constitutional Law.

Kpegah JSC in the *Abban Case*, also cited (as earlier indicated) as authority, the following observation of Archer CJ in his dissenting opinion in the *31st December Case* that:¹⁰⁴

“The Constitution, 1992 gives the judiciary power to interpret and enforce the Constitution, 1992 and I do not think that this independence enables the Supreme Court to do what it likes by undertaking incursions into territory reserved for Parliament and the executive. This court should not behave like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it.”

The above dictum of Archer CJ is certainly relevant and is entitled to due respect by the courts. However, it is a dictum having no binding effect as an authority to support the conclusion reached by the court (per Kpegah JSC) in the *Abban Case* that the doctrine of non-justiciable political question is applicable to the Ghana Constitutional Law. Interestingly enough, the same dictum was, rightly in my respectful submission, cited by Acquah JSC in

104 [1993-94] 2 GLR 35 at 49.

his opinion in support of the Supreme Court unanimous decision in *J H Mensah v Attorney-General* to the effect that,¹⁰⁵ Parliament may, by its standing orders, regulate its own procedure provided the same does not infringe a provision of the Constitution.

It seems to me that the true legal position is that as of 5 December 1995, when the court in the *Abban Case* had to decide on the preliminary objection by the defendant, founded on the non-justiciable political question, the court was bound to follow the previous decision of the Supreme Court in the same *31st December Case*. The decision was that the political question doctrine was inapplicable to the Ghana Constitutional Law, unless it decided specifically or impliedly to depart from that decision “if it appears to it right to do so” in terms of article 129(3) of the Constitution.

In any case, in response to the argument founded on the political question doctrine, in support of the preliminary objection raised by the defendant to the plaintiff’s claim in *J H Mensah v Attorney-General*,¹⁰⁶ the court held that it had jurisdiction to determine political questions under the combined effect of articles 2(1) and (3)-(5) and 130(1) of the Constitution. The court held that in the exercise of its powers under the said articles, it had jurisdiction to entertain all questions relating to the enforcement and interpretation of the Constitution and all questions relating to the constitutionality of any enactment or any act or omission of any person. In the concurring words of Acquah JSC:¹⁰⁷

“...[W]here one alleges that the conduct of Parliament... in passing
a law is inconsistent with a provision like article 106 of the 1992

¹⁰⁵ [1996-97] SCGLR 320 at 370-371.

¹⁰⁶ [1996-97] SCGLR 320.

¹⁰⁷ Ibid at pp 367-368 (my emphasis).

Constitution [mode of exercising legislative power], *the political question doctrine cannot forbid the Supreme Court from determining the authenticity of the allegation ... The 1992 Constitution of Ghana therefore vests the Supreme Court of Ghana with a more substantial power of judicial review than what the US Supreme Court acquired in Marbury v Madison.*¹⁰⁸

Accordingly if by the political question doctrine, it is meant that where the Constitution allocates power or function to an authority, and that authority exercises that power or function *within* [judge's emphasis] the parameters of that provision and the Constitution as a whole, a court has no jurisdiction to interfere with the exercise of that function, then I entirely agree that the doctrine applies in our constitutional jurisprudence. For this is what is implied in the concept of separation of powers. But if by that doctrine, it is meant that even where the authority exercises that power in violation of the constitutional provision, a court has no jurisdiction to interfere because it is the Constitution which has allocated that power to that authority, then I emphatically disagree. If the court finds that the function is being exercised in contravention of the Constitution, then as empowered under articles 2(1) and 130(1) of the 1992 Constitution, the Supreme Court has to declare the said exercise, null and void.”¹⁰⁹

¹⁰⁸ 1 Cranch 137; 2 LED 60 (1803).

¹⁰⁹ See also the obiter dictum of the same Acquah JSC in the subsequent case of *Amidu v President Kufuor* [2001-2002] SCGLR 86 at 100 where he said (my emphasis):

“[N]o individual nor creature of the Constitution is exempted from the enforcement provision of article 2 thereof. No one is above the law. And no action of any individual or institution under the Constitution is immuned from judicial scrutiny if the constitutionality of such an action is challenged. *Thus the doctrine of the political question found mainly in the United States constitutional jurisprudence by which the courts refuse to assume jurisdiction in certain disputes because the subject-matter of those disputes are alleged to be ‘textually committed’ to that institution, is inapplicable in our constitutional law because of the power*

In his concurring opinion in support of the decision in *J H Mensah v Attorney-General*, namely, that the Supreme Court had the power to determine political questions, Aikins JSC, adopted a fresh approach by seeking to lay down the condition for the application to the Ghana Constitutional Law of the non-justiciable political question. He said:¹¹⁰

“To determine whether there has been a textual commitment to Parliament, a coordinate department of the government, the court must interpret the Constitution. In other words, the court must first determine what power the Constitution confers on Parliament before it can determine to what extent if any, the exercise of that power is subject to review. That is if, ...articles 78(1) and 79(1) entitle Parliament to give prior approval to a nominee of the President before he is appointed by him as a minister or deputy minister of State further consideration by the court will be necessary to determine the extent and scope of that power and whether the action exceeds or is in conformity with whatever authority has been committed. This in itself is a delicate exercise in constitutional interpretation, and it is the responsibility of the court as the ultimate interpreter. In order to determine the scope of any textual ‘commitment’ under articles 78(1) and 79(1), we must necessarily determine the meaning of the phrase ‘with the prior approval of.’” The court cannot justifiably avoid its constitutional responsibility, and it will be palpably wrong to suggest that the court will be usurping the constitutional function of Parliament if the court exercises its original and exclusive jurisdiction to

granted to any person in article 2 of our Constitution to challenge the constitutionality of any action or omission of an individual or institution.”

¹¹⁰ [1996-97] SCGLR 320 at 341-342 (my emphasis).

interpret and enforce the Constitution, as the Attorney-General seems to contend. *The fact that such matter involves a political question does not necessarily mean that it cannot be adjudicated upon as is illustrated by Powell v McCormack*”¹¹¹

It should be pointed out that in his dissenting opinion in the recent Supreme Court decision in *Amidu v President Kufuor*¹¹², Kpegah JSC in an *obiter*, again raised the question of the application or otherwise of the doctrine of non-justiciable political question. The issue was neither raised nor argued in the *Amidu case*. However, the judge *suo motu* raised it and discussed it quite extensively in an apparent bid (or so it appeared to me) to defend the majority decision in the *Abban Case* (earlier examined.) The judge expressed the view that since the *Abban Case* had disapproved of the majority decision of the Supreme Court in the *31st December Case*); and since that decision was not referred to by the court in *J H Mensah v Attorney-General*, in deciding on the application or otherwise of the doctrine of non-justiciable political question, the decision in *31st December Case* was given *per incuriam*.

It should be observed that a close reading of the decision in the *Abban Case* does not, with great respect, show that it even purported to disaffirm as wrongly given, the majority decision in the *31st December Case*. It must be emphasized that even though the decision was much criticised by Kpegah JSC in the *Abban Case*, the *31st December Case* was not, in fact, specifically or impliedly disapproved by the court in the *Abban Case*

What was the nature of the criticism? Kpegah JSC in the *Abban Case*, directed his criticism of the decision in the *31st December Case*, primarily at the reasons given by Adade JSC in

¹¹¹ 395 US 486; 23 L Ed 2d 491(1969)

¹¹² [2001-2002] SCGLR 86 – examined in detail post in this chapter on the issue of the application of the doctrine of mootness.

support of the majority decision in the *31st December Case* relating to the doctrine of non-justiciable political question. First, Kpegah JSC criticised Adade JSC for expressing the view that “even in the US the doctrine of political question does not apply to the US Supreme Court, the ‘ultimate interpreter’ of the Constitution.” Kpegah JSC, after considering that view, came to the conclusion that Adade JSC was wrong in expressing the view that the political question doctrine was not applicable to the US Supreme Court. Kpegah JSC also quoted Adade JSC’s observation in the *31st December Case*, that:¹¹³

“... to refuse to do a constitutional case on the ground that it is a political issue is to abdicate our responsibilities under the Constitution, and to breach, in particular, articles 2 and 3.”

Commenting on the above dictum of Adade JSC, Kpegah JSC strongly criticised Adade JSC as follows:

“With great respect to my learned brother, I think this is a very simplistic way to consider a serious and deep legal concept like the doctrine of political question.”

It should be emphasized, once again, that apart from the criticisms levelled at the views of Adade JSC in the *31st December Case*, the court (per Kpegah JSC) in the *Abban Case* did not, as earlier indicated, decide that the *31st December Case* was wrongly decided on the issue of the application of the non-justiciable political question doctrine. The mere criticism of the reasoning of Adade JSC in the *31st December Case*, does not, it is submitted, constitute disapproval of the binding effect of the decision and that it should no longer be applied as a decision binding on all the courts of Ghana as provided in article 129(3) of the Constitution.

¹¹³ [1993-94] 2 GLR 35 at 65, SC.

Until the Supreme Court specifically decides in another case to overrule its previous majority decision in the *31st December Case* to the effect that the Supreme Court had power to determine political questions relating to any provision of the Constitution, that decision remains binding on the courts within the meaning of article 129(3) of the 1992 Constitution. Consequently, it seems to me that the Supreme Court in the *Abban Case* was bound to follow the majority decision in the *31st December Case*. Nothing that was said in the *Abban Case* on the issue of the application of the non-justiciable political question could be read as having overruled the decision of the *31st December Case* to the effect that the political question doctrine was applicable to the Ghana Constitution of 1992.

Criticism of a judgment or decision of a court, however robust, does not per se constitute a reversal of that judgment or decision. It should be noted that the majority of the Supreme Court in *Yeboah v JH Mensah*¹¹⁴ severely criticized the Supreme Court's earlier decision in *Gbedemah v Awoonor-Williams*¹¹⁵ but the majority did not thereby hold nor can they be taken to have held that the decision in *Gbedemah v Awoonor-Williams* should be set aside or reversed as no longer binding. The majority decision in *Yeboah v J H Mensah* given by Acquah JSC, merely said of the *Gbedemah v Awoonor-Williams*:¹¹⁶

“Its assumption of jurisdiction violated well-settled principles and further negated the clear intention of the framers of the 1969 Constitution... But in fairness to the court in *Gbedemah v Awoonor-Williams* ... I must point out that there were certain factors which might have indirectly influenced it in assuming such jurisdiction.”

¹¹⁴ [1998-99] SCGLR 492 (examined in detail in discussing the question of the supremacy of the constitution).

¹¹⁵ (1970) 2 G & G 438, SC.

¹¹⁶ [1998-99] SCGLR 492 at 543.

It is suggested that the following words of Aikins JSC in *J H Mensah v Attorney-General* sum up the true legal position on the application to Ghana Constitutional Law of the political question doctrine:¹¹⁷

“Admittedly, the principle of a non-justiciable political question is an American formulation that is steadily creeping into the Ghanaian ... jurisprudence. In the American case of *Baker v Carr* 369 US 186, 198 7L ED2d 663 (1962) the court discussed the political question doctrine and noted that political questions are not justiciable primarily because of the question of separation of powers. It pointed out in 198 7LED 2d at 674 that in deciding generally whether a claim is justiciable, a court must determine whether ‘the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.’ But in *Powell v McCormack* 395 US 486 (1969) the court said in order to determine whether there is a textual commitment to a coordinate department of government, *the Constitution must be interpreted to determine first what power the Constitution confers upon the House through article 1 clause 5 before the court can determine to what extent, if any, the exercise of that power is subject to judicial review.*”

DOCTRINE OF MOOTNESS

The doctrine of mootness comes into play when in the course of hearing a suit or claim, an event or changed circumstances occur which render the continued hearing or determination of the claim pointless or unnecessary. As was pointed out by Kpegah JSC in his dissenting

¹¹⁷ [1996-97] SCGLR 320 at 341 (my emphasis).

opinion in *Amidu v President Kufuor*,¹¹⁸ a pending claim or action could become moot due to a change in the law or status of the parties; or the claim could become moot by some action of one of the parties to the litigation which tends to terminate or remove the controversy; or where the parties lack a legally cognizable interest in the outcome of the case.¹¹⁹

Thus in the United States case of *De Funis v Odegaard*,¹²⁰ the plaintiff sued, alleging that he had been refused admission to the Washington University School of Law on grounds of racial discrimination. The case travelled all the way to the US Supreme Court. The court found that the plaintiff, had, in fact, been admitted to the university as ordered by the trial judge and that at the time of the hearing before the Supreme Court, the plaintiff was a registered second year final student at the law school in his final quarter. The Supreme Court, after making that finding, refused to determine the claim before it on the ground that it was moot. The court in so holding said:¹²¹

“Because (De Funis) will complete his law school studies at the end of the term for which he has now registered regardless of any decision this court might reach on the merits of the litigation, we conclude that the court cannot, consistently with the limitations of Art III of the Constitution, consider the substantive issues tendered by the parties.”

¹¹⁸ [2001-2002] SCGLR 86.

¹¹⁹ See the United States case of *Powell v McCormack* 395 US 486; L Ed 2d 491, 89 Set 1944 at 502 per Chief Justice Warren –cited by Aikins JSC in *J H Mensah v Attorney-General* [1996-97] SCGLR 320 at 333.

¹²⁰ 416 US 312 (1979) – cited by Acquah JSC in *Amidu v President Kufuor*.

¹²¹ Ibid at pp 319-320.

The Supreme Court of Ghana has had the opportunity to apply or refuse the application of the doctrine of mootness in two recent decisions: *JH Mensah v Attorney-General*¹²² and in *Amidu v President Kufuor*.¹²³

In *JH Mensah v Attorney-General* (supra), the relevant facts leading to the institution of the action were as follows. Soon after the swearing in of Fl Lt JJ Rawlings for a second four-year term as the President of Ghana, following the December 1996 Presidential and Parliamentary Elections, it was announced that the President had decided to retain in his cabinet some of his previous ministers and deputy ministers, and that since the appointment of the retained ministers had been approved by the previous Parliament, it would be unnecessary for the same ministers to be approved again by the newly elected Parliament.

Following that announcement, the plaintiff, Mr J H Mensah, the Minority Leader in Parliament, sued in the Supreme Court for a declaration, inter alia, that on a proper interpretation of article 78(1) of the Constitution, 1992 no person could serve as a minister during the Second Term of the Rawlings Government, commencing from 7 January 1997, without the prior approval of the newly elected Parliament.

The defendant, the Attorney-General, filed a preliminary objection to the hearing of the claim on the grounds, inter alia, that the plaintiff's claim was moot and there was no longer any live question for determination because, the government, after the filing of the suit, had submitted the names of the retained ministers to the new Parliament for approval.

¹²² [1996-97] SCGLR 320 (a case earlier examined in discussing the non-justiciable political question).

¹²³ [2001-2002] SCGLR 86.

The Supreme Court unanimously dismissed the preliminary objection founded on the doctrine of mootness. In his opinion in support of the rejection of the application of the doctrine, Aikins JSC said:¹²⁴

“In my view, the issue in the instant case is still live, and the fact that the President is still submitting names of the retained ministers to Parliament is of no moment. *I reject the Attorney-General’s proposition that mootness of a ‘primary’ claim requires a conclusion that all ‘secondary’ claims are moot. It confuses mootness with whether Mensah has established the right to a declaration that Parliament’s action is unconstitutional, a question which is inappropriate to treat at this stage of litigation. It is still unresolved and hotly contested, and there is no suggestion that his averments as to declaratory relief are insufficient.* In the result, I ...find it unreasonable to accede to the request of the Attorney-General to strike out the plaintiff’s action. I would reject it.”

In a clear bid to develop Ghana Constitutional Law, the Supreme Court in *J H Mensah v Attorney-General* laid down the guiding principles as to when to refuse to decide a claim on grounds of mootness. The court held that if the question though moot, was certainly not likely to re-occur, the court would not waste its time to determine the question and the doctrine would apply. However, before refusing to decide a question on the ground that it was moot, it must be established that subsequent events had made it absolutely clear that the alleged wrong behaviour could not reasonably be expected to re-occur. Where it was not so established (as in the case before it), the court would go into the question to forestall multiplicity of suits. In so holding, the court relied on and applied two decisions of the

¹²⁴ [1996-97] SCGLR 320 at 334 (emphasis is mine).

United States Supreme Court, namely, *United States v Concentrated Phosphate Exp Assn*¹²⁵ and *United States v W T Grant & Co.*¹²⁶ In both cases it was held that for a court to decline jurisdiction on the ground that the claim was moot, it must be established that “subsequent events made it absolutely clear that the allegedly wrong behaviour could not reasonably be expected to recur.” In giving further justification for the refusal to uphold the preliminary objection on the ground that the action was moot, the court in *J H Mensah v Attorney-General* said, per Acquah JSC:¹²⁷

“Now whatever be the merits of these preliminary objections, it cannot be denied that the tension that this dispute has caused both in and outside Parliament and in the nation as a whole, makes it prudent that this court determines the questions in issue for the guidance of future Governments and Parliaments.”

As earlier observed, the question of the application or otherwise of the doctrine of mootness under Ghana Constitutional Law, was again argued before the Supreme Court in the very recent case of *Amidu v President Kufuor*.¹²⁸ The relevant facts were as follows. In December 2000, Parliamentary and Presidential Elections were held throughout Ghana. The New Patriotic Party (NPP) won the elections. The leader of that party, Mr J A Kufuor, was sworn in as the President of Ghana on 7 January 2001. Soon after, it was publicly announced by the government that three persons had been appointed by the President, Mr J A Kufuor, to assist

¹²⁵ 393 US 201.

¹²⁶ 345 US 629.

¹²⁷ [1996-97] SCGLR 320 at 360.

¹²⁸ [2001-2002] SCGLR 86.

the President in the performance of his official duties.¹²⁹ Soon after this announcement, Mr Martin Amidu, the former Deputy Attorney-General in the outvoted Rawlings Government, sued in the Supreme Court, under article 2 (1) of the Constitution, 1992 for a declaration that, on a true and proper interpretation of, inter alia, article 91(1) of the Constitution, 1992 and section 4(1) of the Presidential Office Act, 1993 (Act 463), President J A Kufuor, the first defendant, could not appoint the three persons specified as the third, fourth and fifth defendants as Staff at the Office of the President without consultation with the Council of State.¹³⁰

The Attorney-General, representing the defendants, raised a preliminary objection against the action by filing an application for an order to set aside the plaintiff's writ, on the grounds, inter alia, that the plaintiff's action was moot and no more live for adjudication because since the filing of the writ, the third and fourth defendants had been appointed as ministers with parliamentary approval; and that the appointments, complained of by the plaintiff, had, in fact, not been made under Act 463 as alleged by the plaintiff. In response, Mr Martin Amidu, the plaintiff, contended that the mere subsequent approval by Parliament, of the appointments of the third and fourth defendants as Ministers of State on 6 February 2001, did not render his action moot. He also contended that the principle of mootness was not contemplated in respect of declaratory reliefs or orders brought under article 2 (1) of the Constitution, 1992.

¹²⁹ The three persons allegedly appointed were: Mr Jake Obetsebi-Lampitey, Miss Elizabeth Ohene and Lt General Joshua Hamidu as Chief of Staff, Presidential Advisor on Public Affairs and National Security Advisor respectively in the Office of the President

¹³⁰ Article 91(1) of the Constitution, 1992 states that: "The Council of State shall consider and advise the President or any other authority in respect of any appointment which is required by this Constitution or any other law to be made in accordance with the advice of, or in consultation with, the Council of State." And section 4 (1) of Act 463 provides that: "The President shall, acting in consultation with the Council of State appoint such persons as he considers necessary to hold office as presidential staff in the office."

The Supreme Court, by a majority decision of six to three, dismissed the action on the grounds, *inter alia*, that the action was moot because, on the facts, events which occurred after the filing of the claim, had shown that the third, fourth and fifth defendants had not been appointed, as alleged by the plaintiff, under the provisions of the Presidential Office Act, 1993 (Act 463); but that in fact, the third and fourth defendants had been appointed as Ministers of State with parliamentary approval. Giving the majority opinion, Acquah JSC, said:¹³¹

“The subsequent approval by Parliament had unequivocally shown that the offices complained of were not those contemplated under Act 463, and that the said parliamentary approval had glaringly exposed the fallacy underlying the plaintiff’s action and rendered same pointless for adjudication. The plaintiff’s action is nothing but an exercise in futility.”

It is very interesting to observe that Atuguba JSC, who joined the majority in dismissing the action, disagreed with the majority on the issue of the application or otherwise in that case of the mootness doctrine. His lordship said:¹³²

“A declaration on the issue could still be useful to the President and other relevant officials, like the Council of State... It seems to me ... that the upholding of the supremacy of the Constitution is itself of great constitutional utility. The action is therefore not moot.”

The conclusion by Atuguba JSC, that the action was not moot is baffling and difficult to understand. Since the judge had concurred in upholding the preliminary objection raised by

¹³¹ Ibid.

¹³² Ibid at pp 108-109.

the defendant, how could, with respect, the action be still continued and heard by the court because the action is not moot?

It should also be pointed out that Ampiah and Kpegah JJSC, in dissenting from the majority decision in the *Amidu Case*, also held that the plaintiff's action was not moot, notwithstanding the fact that the events subsequent to the filing of the claim had shown quite clearly that the alleged appointments complained of by the plaintiff had not been made under the Presidential Office Act, 1993 (Act 463). In response to the decision of the majority that the plaintiff's action must be dismissed as moot, Kpegah JSC said in dissent:¹³³

“To read the doctrine of mootness in article 2 of the Constitution, will be a dangerous step to take... The mootness doctrine can easily expose the Constitution to frequent breaches resulting in subsequent loss of sanctity.”

It is respectfully suggested that the minority decision to the effect that the plaintiff's claim was not moot, may be viewed as indefensible in law given the facts of the case as shown by subsequent events. Since the substratum of the plaintiff's claim was founded on alleged breach of Act 463; and since on the facts, there was no longer any basis for so alleging as proved by the subsequent events, there was nothing left for adjudication by the Supreme Court. There was no longer a controversy to be determined by the Supreme Court.

On application of the earlier decision of the Supreme Court in *Bilson v Apaloo*¹³⁴, there was no longer (as contemplated by article 2(1)(b) of the Constitution, 1992) the existence of an “act” or “omission” of the President which was alleged to be inconsistent with or in contravention of a provision of the Constitution.

¹³³ Ibid at p 163.

¹³⁴ [1981] GLR 24, SC.

Furthermore, the minority decision in the *Amidu v President Kufuor* that the plaintiff's claim was, on the facts, not moot and that the court should proceed to determine the claim on its merits, can also not be supported on application of the Supreme Court majority decision in *New Patriotic Party v National Democratic Congress*.¹³⁵ In that case, the majority of the court upheld the preliminary objection by the defendant on the grounds¹³⁶ that there was no proof of the existence of an "act or omission" in terms of article 21(1)(b) of the Constitution, 1992 attributable to the defendant, the National Democratic Congress, which could be said to be inconsistent with article 94(3)(b) of the Constitution. It appears very clear that the issues considered in *New Patriotic Party v National Democratic Congress* (supra) are on all fours with the issues raised in *Amidu v President Kufuor*. Not surprisingly the Supreme Court arrived at the same conclusion: the preliminary objections in both cases were upheld on the same ground, namely, that the factual basis or foundation upon which the action had been mounted, had been removed or proved not to be the case by events which occurred after the institution of both writs.

One may therefore agree with the majority decision in *Amidu v President Kufuor* that, events arising after the institution of the plaintiff's action, made the continued hearing of the case unnecessary or pointless and that the action could no longer be heard on the grounds that the claim had been rendered moot.

¹³⁵ [2000] SCGLR 461.

¹³⁶ Per Bamford-Addo and Kpegah JJSC.

Rationalisation of the apparent conflict in decisions in relating to the application of the doctrine of mootness

The pertinent question to be posed is whether the earlier decision of the Supreme Court in *J H Mensah v Attorney-General*,¹³⁷ on the question of the application or otherwise of the doctrine of mootness to the Ghana constitutional law, is reconcilable with its later decision in *Amidu v President Kufuor*.¹³⁸ As we saw from the examination of the two cases, the application of the mootness doctrine was denied in *J H Mensah* and the court refused to uphold the preliminary objection and decided to determine the action on the merits. But the doctrine was upheld in *Amidu* and the court granted the preliminary objection and dismissed the action *in limine*, that is, without hearing the action on the merits. In my view, the two seemingly irreconcilable decisions, can be reconciled.

First, in *J H Mensah*, the declaratory relief sought by the plaintiff, namely, the claim that no person could act a minister, after 6 January 1997, without the prior approval of Parliament, remained to be resolved by the court even where the government had retracted from its position by submitting to Parliament for approval, the list of both retained and new ministers. It was the earlier refusal by the government to do so, which forced the plaintiff, Hon Mr J H Mensah, to go to court to seek compliance with article 78 (1) of the Constitution, 1992. Even though the subsequent submission of the list rendered moot the action based on the refusal to submit the list of persons nominated for appointment as ministers, the substantive claim remained to be determined. However, in the case of *Amidu*, the cessation of the act complained of as proved by events, which happened after the writ had been filed, namely, the appointment of the third and fourth defendants as Ministers of State with approval of

¹³⁷ [1996-7] SCGLR 320.

¹³⁸ [2001-2002] SCGLR 86.

Parliament, rendered the plaintiff's action moot and left nothing more to be determined by the Supreme Court. Besides, future events showed that the act complained of, namely, the appointments allegedly made under the Presidential Office Act, 1993 (Act 463) without consultation with the Council of State, were, in fact, not made under the Act. Those events and new facts rendered further determination of the claim in *Amidu* pointless. The claim as endorsed on the writ, namely, for a declaration that, on a proper interpretation of article 91 (1) of the Constitution and sections 2-4 of Act 463, the President could not appoint the defendants as Staff of the Presidential Office without consultation with the Council of State, was rendered truly moot. Besides, it must be stressed that the plaintiff in the *Amidu* case, placed no evidence before the Supreme Court that the President had, in fact, appointed the defendant as staff of the Presidential Office, let alone the question of appointing them without prior consultation with the Council of State. The other important factor is that unlike the defendants in the *JH Mensah* case, the defendants in the *Amidu* case, did not file even a statement of defence. The Supreme Court was right in dismissing the action in the *Amidu* case *in limine*.

Second, as rightly noted by Acquah JSC in *J H Mensah*,¹³⁹ the determination of the questions in issue in that case could be “for the guidance of future Governments and Parliaments”; but in the case of *Amidu*, there was nothing left to be determined for future guidance. It is conceded (as earlier pointed out) that Atuguba JSC in *Amidu* expressed a contrary view- despite concurring with the majority decision, upholding the preliminary objection and dismissing the action *in limine*. In that case Atuguba JSC said:¹⁴⁰

“A declaration on the issue, could still be useful to the President and other relevant officials, like the Council of State...It seems to me that the

¹³⁹ [1996-97] SCGLR 320 at 360.

¹⁴⁰ [2001-2002] SCGLR 86 at 115 (earlier quoted but worth repeating).

upholding of the supremacy of the Constitution is itself of great constitutional utility. The action is therefore not moot.”

One could readily accept the above observation of the judge if there was, in fact, a disputed substantive claim still pending for determination by the Supreme Court after the action had been rendered moot by subsequent events. There was regrettably none left for determination.

In the light of the above considerations, the Supreme Court was right, it is submitted, in upholding the application of the doctrine of mootness in *Amidu* case but denying it in *J H Mensah* also.

CONCLUSION

In the light of the discussion in this chapter, could it be concluded that all the four doctrines, namely, the supremacy of the constitution, of separation of powers, of non-justiciable political question and mootness are applicable to the Ghana Constitutional Law?

The Supreme Court has clearly asserted in cases such as *Mensima v Attorney-General, New Patriotic Party v Attorney-General (31st December Case), Abban Case and Yeboah v J H Mensah* that every enactment must meet the test of constitutionality in terms of article 1(2) of the Constitution, 1992. In other words, the doctrine of the supremacy of the constitution is applicable to Ghana Constitutional Law.

It is true that the Supreme Court in *Ghana Bar Association v Attorney-General (Abban Case)* accepted the application of the doctrine of separation of powers. However, the court did not fail to assert in its unanimous decision in *Tsastu Tsikata v Chief Justice and Attorney-General* that whilst the three arms of government are independent of each other, they do not operate independently without reference to each other. They rather complement each other.

As seen from the examination of the three cases, namely, *New Patriotic Party v Attorney-General (31st December Case)*, *Ghana Bar Association v Attorney-General (Abban Case)* and *J H Mensah v Attorney-General*, the judges in the Supreme Court are not *ad idem* on the question of the application of the doctrine of non-justiciable political question. Whilst the majority in the *31st December Case* decided that the doctrine of non-justiciable political question is inapplicable in Ghana, the minority thought otherwise. After detailed examination of the decision in the *31st December Case* and the other relevant cases, the conclusion was reached that the doctrine of non-justiciable political question is not applicable to Ghana Constitutional Law.

As to the application of the doctrine of mootness, whilst the Supreme Court in the case of *J H Mensah v Attorney-General* rejected the doctrine as inapplicable on the facts of that case, the court by a majority decision applied the doctrine in the subsequent case of *Amidu v President Kufour*. It should be stressed, however, that the court in *J H Mensah v Attorney-General* did not simply reject the application of the doctrine. The court must be commended for taking the opportunity offered in that case to lay down the guiding principles as to when to refuse to determine a claim on grounds of mootness.

CHAPTER 4

THE SUPREME COURT AND THE INTERPRETATION OF THE CONSTITUTION

INTRODUCTION

As examined in chapter 2, the Fourth Republican Constitution, 1992 empowers the Supreme Court to exercise jurisdiction in five main areas: original, appellate, supervisory, review and exclusive jurisdiction with regard to the production of official documents in court as specified in articles 130, 131, 132, 133(1) and 135 of the Constitution respectively.

Article 130 deals with the court's interpretative jurisdiction as distinct from its enforcement jurisdiction. Under article 130(1), the Supreme Court is vested with original and exclusive jurisdiction in all matters relating to the enforcement or interpretation of the Constitution; and also as to whether Parliament or any other authority or person empowered to enact any legislation has exceeded its powers.¹ Under article 130(2), whenever an issue relating to any of the matters referred to in article 130(1) arises in any proceedings of a lower court, the proceedings should be stayed; and the question of law raised in the proceedings should be referred to the Supreme Court whose interpretative decision shall be binding on the lower court.² The exercise of the original and exclusive jurisdiction under article 130, is reinforced by the provision in article 2.

¹ An issue examined in detail in chapter 5.

² See *Republic v Maikankan* [1971] 2 GLR 473, SC where the Supreme Court held that “ a lower court is not bound to refer to the Supreme Court every submission alleging as an issue the determination of a question of interpretation of the Constitution...” The view has been expressed that a strong High Court Judge like Robert Hayfron-Benjamin J (as he then was) might, as he did in *Shalabi v Attorney-General* [1971] 2 GLR 473, take advantage of the *Maikankan* directive and usurp the exclusive jurisdiction of the Supreme Court to interpret and enforce the Constitution: see Dankwa E V O and Flinterman, C in “Judicial Review in Ghana.” (1977) 14 UGLJ 1 at 25. For the conditions justifying reference to the Supreme

Under article 2(1), a person may seek a declaration in the Supreme Court to the effect that:

- (a) an enactment or anything contained in or done under the authority of that or any other enactment; or
- (b) any act or omission of any person is *inconsistent with* or is in contravention of a provision of [the] Constitution.³

It should be stressed that the Constitution itself does not give any principles or guidance which may be applied by the Supreme Court in exercising its interpretative role under articles 2(1) and 130(1).⁴ It appears that the apparent assumption of the framers of the 1992 Constitution is that the Supreme Court would itself fashion out the requisite approach and principles and rules of constitutional interpretation.

However, it should be observed that Bennion, in his pioneering book on the First Republican Constitution of Ghana, 1960⁵ identified what he described as the “formal principles governing” the Constitution. Four of these principles, were stated as follows:⁶

Court by lower courts: see *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592, CA determined under article 118(1)(a) of the 1979 Constitution-the same as article 130(2) of the 1992 Constitution. For the view that the Supreme Court has no power to go beyond the question referred to it: see *Republic v Independent Media Corporation of Ghana* [1996-97] SCGLR 258.

³ The emphasis is mine.

⁴ As noted by Kumado, C E K , in “Forgive us our Trespasses: An examination of the Indemnity Clause in the 1992 Constitution of Ghana” (1993-95) UGLJ 83 at 94 “..the hard fact is that, where it matters most, constitutions do not contain instructions on how provisions are to be interpreted.”

⁵ See Bennion, F A R *The Constitutional Law of Ghana* 1962 Butterworths, London.

⁶ Ibid at pp 111-112.

- “1. It is a mechanism, and all of its operative provisions are intended to have the precise effect indicated by the words used- no more no less.
2. It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning; that they mean what they say and not what people would like them to mean; and if they prove unsuitable they will be altered formally by Parliament and not twisted into new meanings by ‘interpretation’...
5. It assumes that legitimate inferences will be drawn by the reader, but that he will not transgress the rules of logic – as by drawing an inference from one provision which is inconsistent with the express words of another provision.
6. It needs to be read as a whole, and with care.”

The formal principles formulated by Bennion as governing the Constitution, 1960 especially those quoted above, which may be described as rules of constitutional interpretation, were subjected to extensive and critical analysis and comments by S O Gyandoh Jnr.⁷

He concluded that⁸ the first two principles were “hopelessly inadequate as intellectual tools for undertaking the crucial task of giving meaning to the expressed words of the Constitution”; that the principles stopped short of offering any guide as to the modalities

⁷ See Gyandoh, S O Jnr, “Principles of Judicial Interpretation of the Republican Constitution of Ghana” (1966) UGLJ 37.

⁸ Ibid at page 47.

by which to give a determinate, authoritative form to the words of the Constitution; that at best, the two principles were an “unimaginative reformulation of the ‘plain meaning’ rule; and at worst, “a counsel of despair.” Gyandoh went on to construe the two principles laid down by Bennion as meaning that the words used in the Constitution had a plain meaning in their context; and if that plain meaning, which was easily discoverable (presumably by reference to the Interpretation Act, 1960 (CA 4), and other rules of constructions mentioned therein), proved “unsuitable”, then an Act of Parliament or a referendum was to be resorted to by way of providing a new plain meaning.

After dismissing the stated principles as inadequate and inappropriate, Gyandoh proceeded to examine⁹ the decision of the Ghana Supreme Court in the celebrated case of *In re Akoto*¹⁰ against the background of what appropriate conceptual tools might be employed in constitutional adjudication. The Supreme Court in this case had held, inter alia, that the declaration of fundamental rights and freedoms required by article 13 of the Constitution, 1960 to be made by the First President on his assumption of office, was like the Coronation Oath of the Queen of England and did not constitute a Bill of Rights which could be regarded as creating an enforceable legal obligations. After criticising the Supreme Court for opting for the “mechanistic” interpretation of the

⁹ Ibid at pp 54-60.

¹⁰ [1961] 2 GLR 523, SC.

Constitution as argued by the Attorney –General, Gyandoh concluded that¹¹ the Supreme Court in *Re Akoto* missed the “golden opportunity ...to lay down the principled criteria upon which the interpretation of the Constitution must proceed..”

The alleged failure by the Supreme Court to lay down in *Re Akoto* some guiding principles of constitutional interpretation or the want of such principles in the present Fourth Republican Constitution, 1992 itself, are in marked contrast to the 1996 South African Constitution. Section 39 thereof provides some guidelines in interpreting the Bill of Rights contained in Chapter 3 of the 1993 Interim Constitution and Chapter 2 of the 1996 Constitution. Section 39 (1) states that in interpreting the Bill of Rights, the court must promote the values that underlie an open democratic society based on human dignity, equality and freedom; that it must consider international law and may also consider foreign law; whilst section 39 (2) says that in interpreting any legislation, and when developing the common law or customary law, the court must promote the spirit, the purport and objects of the Bill of Rights.¹²

Be that as it may, the question of the proper approach to the vexed issue of judicial interpretation generally, had been discussed by me in a previous publication. And the conclusion was reached that all the various approaches to statutory interpretation: the literalist, creative, purposive, social policy, free intuition and all other identifiable

¹¹ Gyandoh op cit at 59.

¹² For commentary on section 39(2) on the need to promote the spirit and purport of the Bill of Right: see D Davis et al *The Fundamental Rights in the Constitution: Comments & Cases* Juta & Co Ltd at 340-341, 1997.

approaches have their own advantages and disadvantages.¹³ In that publication, I raised the specific issue whether or not the various approaches, which involve the application or otherwise of the rules and presumptions of statutory interpretation, are applicable to the interpretation of a national constitution as the fundamental law of the land. Reference was also made to Professor Friedman's contribution to the vexed question of judicial interpretation.¹⁴ Friedman concluded¹⁵ that there was no particular answer or solution to the problems of judicial interpretation. He therefore suggested the need for differentiation in interpreting statutes, ie statutes must be grouped for purposes of interpretation and each group must have its own particular approach. The suggested groups are constitutional legislation, social purpose statutes, specific reform statutes, statutes implementing International Conventions, penal statutes, revenue legislation and predominantly technical statutes. Thus in respect of a constitutional document, for example, he suggests that the judges must stress its political character.¹⁶ As he put it¹⁷: "a predominantly political document must be interpreted flexibly and general terms used in it must be understood in the light of changing social and political developments."

It is very interesting to observe that the same point was made by Adade JSC when, in dissenting from the six to one majority decision of the Ghana Supreme Court in *Kuenyehia v Archer*,¹⁸ he said: "But we are expounding a Constitution, not a penal code: a lot of flexibility is called for." Furthermore, in her opinion in support of the minority decision in *New Patriotic Party v*

¹³ See Bimpong-Buta, S Y, *The Law of Interpretation in Ghana (Exposition and Critique)* Advanced Legal Publications(ALP), Accra 1995, chap 8 at 304.

¹⁴ See Friedman, "Statute Law and its interpretation in the Modern State" (1948) 26 *Can Bar Rev* 1277 et seq.

¹⁵ As summarised in Bimpong-Buta op cit at 302.

¹⁶ An issue examined in detail below.

¹⁷ Ibid.

¹⁸ [1993-94] 2 GLR 525.

Attorney-General (31st December Case),¹⁹ Bamford-Addo JSC said: "I shall proceed to interpret the 1992 Constitution as I see it in accordance with the rules of constitutional construction or interpretation."

The question is: what are these "rules of constitutional construction or interpretation" referred to by Bamford-Addo JSC? The burden of this chapter is to demonstrate that the Supreme Court, in the exercise of its interpretative jurisdiction under the Republican Constitutions of Ghana, 1969, 1979 and 1992 has made a very distinctive contribution to the development of Ghana Constitutional Law by laying down some principles of constitutional interpretation.

RULES APPLICABLE IN CONSTRUING A NATIONAL CONSTITUTION

Before discussing in detail the rules applicable in construing a national constitution such as the Fourth Republican Constitution, 1992 we may distil from a close examination of the decisions and judgments by the Ghana Supreme Court, some general principles of constitutional interpretation which have emerged.

General principles of constitutional interpretation

First, a national constitution must be given a benevolent, broad, liberal and purposive construction so as to promote the apparent policy of its framers. In effect, a strict, narrow, technical and legalistic approach must be avoided.²⁰ Second, a constitution must be construed

¹⁹ [1993-94] 2 GLR 35, SC per Adade, Francois, Amua-Sekyi, Aikins and Hayfron-Benjamin JJSC - Archer CJ and Abban, Bamford-Addo and Ampiah JJSC *dissenting*.

²⁰ See the locus classicus decision by the Supreme Court of Ghana in *Tuffuor v Attorney-General* [1980] GLR 63 per Sowah JSC; Atuguba JSC in *Nsiah v Amankwaah*; *Nsiah v Mansah (Consolidated)* [1998-99] SCGLR 132 at 140; Sophia Akuffo JSC in *Okofoh Estates Ltd v Modern Signs Ltd* [1996-97] SCGLR 224 at 230; Anin JA (as he then was) in *Jobe (No 1) v Attorney-General (No 1)* [1960-93] GR 178, CA; on appeal *Attorney-General of the Gambia v Jobe* [1984] 3 WLR 174, PC; and Ogwuegbu JSC in *Attorney-General of Ondo*

as a political document capable of growth.²¹ Third, a national constitution is a document *sui generis* and must therefore be interpreted according to principles suitable to its character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.²² Fourth, the court must avoid importing into the constitution what does not appear therein.²³ In other words, the constitution must be interpreted in the light of its own wording and not on the basis of words found in other constitutions. The court must therefore generally recognise that judicial pronouncements in other common law jurisdictions founded on the wording of their constitutions are not likely to be of assistance. This is especially so where passages are lifted out of context.²⁴

State v Attorney-General of Nigeria [2002] 6 NWLR – citing the Australian case of *Attorney-General of New South Wales v Brewery Employees Union of South Wales* (1908) 6 CLR 496 at 612.

²¹ See *Tuffuor v Attorney-General* [1980] GLR 637, SC per Sowah JSC at 647-648.

²² *Republic v High Court, Accra; Ex parte Adjei* [1984-86] 2 GLR 511 per Sowah JSC at 518-519, SC; *Kuenyehia v Archer* [1993-94] 2 GLR 525 at 561-562 per Francois JSC-citing *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 26, PC per Lord Wilberforce; *Hinds v R* [1976] 2 WLR 366 at 372, PC per Lord Diplock; and *Rabiu v Kano State*, Supreme Court of Nigeria [1980] 8-11 SC 130.

²³ See *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620 where Acquah JSC in his opinion in support of the majority decision, setting aside on review, the earlier majority decision of the ordinary bench in the same case, said: “The majority’s insistence on putting words into article 139 (3) of the 1992 Constitution when such words are not in the article, with a view to imposing restrictions on the exercise of the Chief Justice’s discretion, is not a permissible exercise of the judicial function.” See also *Judges on Judging* 1997 (David M O’Brien ed) at page 226 where United States Supreme Court Justice Felix Frankfurter was quoted as saying that in interpreting legislation a judge “must not read in by way of creation. He must not read out except to avoid patent nonsense of internal contradictions.”

²⁴ See Francois JSC in *Kuenyehia v Archer* [1993-94] GLR 525 at 562 –citing *Adegbenro v Akintola* [1963] 3 WLR 63 at 73; Apaloo CJ in *Kwakyie v Attorney-General* [1981] GLR 944 at 958, SC; Adade JSC in *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35 at 63, SC; *Republic v Tommy Thompson Books Ltd (No 2)* [1996-97] SCGLR 484 per Acquah JSC at 502; and *Sam (No 2) v Attorney-General* [2000] SCGLR 305 per Bamford-Addo JSC at 315.

Thus in the South Africa case of *Qozeleni v Minister of Law and Order*,²⁵ the court warned on the danger of relying on comparative foreign law because of the differing contexts with which foreign constitutions were drafted and operated; and also on the danger of unnecessarily importing doctrines associated with these constitutions into an inappropriate South African setting. Fifth, the court may have to take into account the spirit of the constitution as a tool for constitutional interpretation.²⁶ Sixth, the provisions of the Interpretation Act, 1960 (CA4), may be relevant in construing the provisions of our national constitution.²⁷ Seventh, the court may resort to the Directive Principles of State Policy embodied in chapter 6 of the Constitution, 1992 as a tool for constitutional interpretation.²⁸ Eighth, the court must ascertain the intention of the framers of the constitution as collected or gleaned from the provisions of the constitution and once ascertained, it is the duty of the court to give effect to that intention.²⁹ Ninth, in construing a constitution, the court must look at all the provisions thereof as a whole. In the words of Acquah JSC, in delivering the leading opinion of the Supreme Court in *National Media Commission v Attorney-General*:³⁰ “in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts

²⁵ [1994] 2 LRC 359.

²⁶ See *Tuffuor v Attorney-General* [1980] GLR 637 per Sowah JSC at 647-650, SC; Francois JSC in *NPP v Attorney-General* [1993-94] GLR 35 at 79 and 86, SC; Acquah JSC in *National Media Commission v Attorney-* [2000] SCGLR 1 at 11; and per Bamford-Addo JSC in *Apaloo v Electoral Commission of Ghana* [2001-2002] SCGLR 1.

²⁷ See *New Patriotic Party v Attorney-General (Ciba Case)* [1996-97] SCGLR 729.

²⁸ See *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR459, SC.

²⁹ See Ampiah JSC in *Mensima v Attorney-General* [1996-97] SCGLR 676 at 703-704; and Abban JSC (as he then was) in *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 1 GLR 35 at 103, SC.

³⁰ [2000] SCGLR 1 at 1 at 17.

must fit together logically to form a rational, internally consistent framework...”³¹ Tenth, the Supreme Court has held, per Bamford-Addo JSC, in *New Patriotic Party v Attorney-General (Ciba Case)*³² that in testing any law for unconstitutionality, the court should not concern itself with the propriety or expediency of that impugned law but what the law itself provides. It was therefore held that “the highest motives and the best of intentions are not enough to displace constitutional obstacles” –citing the dictum of Lord Diplock in *Hinds v R*³³ and the Malayan case of *Dewan Undangan Negerikelenian v Nordin Bin Sallah*.³⁴ Lastly, but by no means the least, Bamford-Addo JSC in her dissenting opinion in *New Patriotic Party v Attorney-General (31st December Case)* (supra) was also of the view that public policy considerations cannot be used as a tool for constitutional interpretation just as public policy cannot be relied upon in interpreting statutes. The reason is that public policy is a vague and unsatisfactory term which may lead to uncertainty and error. When applied to the decision of legal rights, it is capable of being understood in different senses. Public policy has thus been described as a “very unruly horse.”

Having summarised some of the main principles as determined by the Supreme Court which, in the exercise of its interpretative role, may guide the court in construing a national constitution, we shall now proceed to examine in detail some of these principles.

³¹ See also Davis et al *Fundamental Rights in the Constitution*, Juta & Co Ltd Kenwyn, South Africa, 1997 at p 11: “The Constitution cannot be read clause by clause nor can any clause be interpreted without an understanding of the framework of the instrument.”

³² [1996-97]SCGLR 729.

³³ [1976] 1 All ER 353 at 356.

³⁴ [1992] 1 MLJ 676,SC.

Need for a benevolent, broad, liberal and purposive construction of a national constitution

The *locus classicus* on the need for a benevolent, broad, liberal and purposive interpretation of a national constitution is the decision of the Court of Appeal sitting as the Supreme Court in *Tuffuor v Attorney-General*.³⁵ The court in this case had to construe, inter alia, article 127(8) and (9) of the Constitution, 1979 which provided:

“(8) Subject to the provisions of clause (9) of this article, a Justice of the Superior Court of Judicature holding office as such immediately before the 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.

(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...”

It was held that the incumbent Chief Justice, Mr Justice Apaloo, was a member of the class of persons or justices referred to in article 127(8); and that on the coming into force of the Constitution, 1979 he (Mr Justice Apaloo), by virtue of article 127(8) and (9), became the Chief Justice of Ghana. The court held that the interpretation placed on article 127(8) was in harmony with the use of the phrase "shall be deemed" in other provisions, ie sections 1(1) and 2(1) of the transitional provisions to the Constitution, 1979; and was also in conformity with the rationale behind article 127(8) and (9) as declared by paragraph 204 of the Proposals of the Constitutional Commission in respect of the Constitution, 1979.

³⁵ [1980] GLR 637,SC.

In alluding to the factors which informed it in arriving at this interpretation, the Court of Appeal per Sowah JSC said:³⁶

“A written Constitution such as ours... 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 law. Equally, the Constitution has its spirit... Its language ... must be considered as if it were a living organism capable of growth and development... *A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do.* We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.”³⁷

In a similar vein in support of the majority decision in *New Patriotic Party v Attorney-General (31st December Case)*,³⁸ Charles Hayfron-Benjamin JSC also said:

“My duty was to discover the 'intent and meaning' of ... our Constitution and apply "a broad and liberal spirit" in its interpretation. There is no benefit in these modern times in applying a strict interpretation to modern democratic

³⁶ Ibid at 647-648 (emphasis is mine).

³⁷ The dictum in *Tuffuor v Attorney-General* was quoted with approval by Bamford-Addo JSC in support of unanimous decision of the Supreme Court in *Apaloo v Electoral Commission of Ghana* [2001-2002] SCGLR 1 at 19.

³⁸ [1993-94] 2 GLR 35 at 168 (examined in detail below on the relevance of the spirit of the constitution in constitutional interpretation.)

Constitutions. So to do would mean that we forget that Constitutions are made by men for the governance of men.”³⁹

The need for giving a liberal construction to a national constitution could be further illustrated by the recent Supreme Court decision in *Republic v Yebbi & Avalifo*.⁴⁰ This case came before the Supreme Court, on a reference from the Greater Accra Regional Tribunal, on a case stated under article 130 (2) of the 1992 Constitution. The tribunal sought an interpretation of article of 143 (1) of the 1992 Constitution which provides:

“ A Regional Tribunal shall have jurisdiction to try such offences against the State and the public interest as Parliament may, by law, prescribe.”

The Supreme Court made the pertinent observation that the question referred to it, did not relate to an ordinary Act of Parliament. Having made that observation, the court held that, unless there were compelling reasons for interpreting the word “and” in article 143 (1) as being only conjunctive, it would be more desirable to interpret it liberally to encompass both its conjunctive and disjunctive meanings. The court therefore concluded that regional tribunals had jurisdiction under article 143 (1) to try such offences against both the State and the public interest or against the State or against the public interest; and that the “ and” as used in the article should be read as “and/or.”

³⁹ See also *Kuenyehia v Archer* [1993-94] 2 GLR 525 at 562 where Francois JSC also said: “It [the Constitution] allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt to achieve enlightened objectives.”

⁴⁰ [2000] SCGLR 149.

It should be said that it is not only the Supreme Court of Ghana which has emphasised the need for a benevolent construction of a national constitution. The courts in Namibia, Tanzania, Nigeria, Zimbabwe, The Gambia and South Africa have all expressed preference for a benevolent interpretation of a national constitution.⁴¹ Thus the Supreme Court of Zimbabwe in *A Juvenile v The State* per Dumbutshena CJ said:⁴²

“Since Independence this court has persistently given a broad and benevolent interpretation to the provisions of the Constitution on human rights and fundamental freedoms.”

And Anin JA, as he then was, in delivering the unanimous judgment of the Gambian Court of Appeal in *Central Bank of the Gambia v Continent Bank Ltd* also said:⁴³

“The important additional omnibus right ‘such other cases as may be prescribed by Parliament’ in section 96 (1) (c) of the 1970 Gambian Constitution, ought, in my considered view, not to be reduced to a meaningless or insubstantial right. On the contrary, the phrase deserves, in Lord Diplock’s memorable words in *Attorney-*

⁴¹ See the decisions of the High Court of Namibia in *Kauesa v Minister of Home Affairs* [1994] 2 LRC 263 where the court held that the preamble to the Namibian Constitution should be interpreted broadly, liberally and purposively; of the High Court of Tanzania in *Republic v Mbushu* [1994] 2 LRC 335; of the High Court of Zimbabwe in *A Juvenile v The State* [1989] LRC 774; of the Gambian Court of Appeal in *Central Bank of The Gambia v Continent Bank Ltd* [1960-93] GR 335 per Anin JA; and of the Supreme Court of Bhoputhatswana in *Baloro v University of Bophuthatswana* [1996] 1 LRC 12; 1995 (4) SA 197 (BSC).

⁴² [1989] LRC 774.

⁴³ [1960-93] GR 335 at 345.

General of The Gambia v Jobe (1985) LRC 556, PC a liberal, purposive and generous construction in order to advance the important remedy of appeal which they are obviously intended to provide.”

The reference made by Anin JA to the Privy Council decision in *Attorney-General v Jobe*⁴⁴ (a decision on appeal from the Gambia Court of Appeal’s decision in *Jobe v Attorney-General*)⁴⁵ needs to be expatiated upon. The facts of that case were that Mr Jobe was brought before a special criminal court charged with the offences of dishonesty affecting public funds under the provisions of the Special Criminal Court Act, 1979. Whilst the criminal proceedings were pending, he brought a civil action for a declaration that certain provisions of the Special Criminal Court Act, including sections 8 and 10 were ultra vires section 18(1) of the Gambian Constitution, one of the entrenched provisions guaranteeing fundamental rights and freedoms. Sections 8 and 10 of the Act dealt with the freezing and confiscation of the bank accounts of a person reasonably suspected of having committed an offence under the Act. The said section 18(1) of the Constitution provided:

“No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily without adequate compensation judicially determined.”

⁴⁴ [1985] LRC (Const) 556; [1984] 3 WLR 174; [1960-1993] GR 208,PC.

⁴⁵ [1960-1993] GR 178.

It was held, inter alia, by the Privy Council that a Constitution, particularly that part protecting and entrenching fundamental rights and freedoms, was to be given "generous and purposive construction"; that the word "property" in section 18(1) of the Constitution was to be read in a wide sense to include choses in action such as a debt owed by a banker to a customer; that the expression "right over or interest in" would cover a claim for repayment of a debt or any part of it on demand; and that if section 10 of the Act had the effect of conferring an executive discretion on the Inspector-General of Police to prevent a customer from drawing on his bank account, then the section would be ultra vires section 18(1) of the Constitution.

The purposive, broad and liberal approach adopted by the Privy Council in *Attorney-General v Jobe* (supra), was also followed by the then Supreme Court of Bophuthatswana in *Baloro v University of Bophuthatswana*.⁴⁶ The applicants in this case were expatriate foreign nationals holding academic posts in the University of Bophuthatswana. They claimed that they had been unfairly discriminated against on the grounds of their nationality and origin, contrary to section 8(2) of the Constitution of the Republic of South Africa. They therefore sued in the Supreme Court (Bophuthatswana Provincial Division) for, inter alia, an order requiring the university to consider their applications for promotion. The applicants founded their relief on section 7(2) of chapter 3 of the South African Constitution providing for Fundamental Human Rights. The said section 7(2) provided that chapter 3 "shall apply to all law in force and administrative acts performed during the period of its operation." The university opposed the application, relying, inter alia, on section 7(1) of chapter 3 which provided that: "This Chapter shall bind all legislative and executive organs of State at all levels of government." The university contended that section 7(1) operated to bind legislative and executive organs of State in a "vertical" operation between the State and individuals only; and was therefore inapplicable to "horizontal" relations between individuals inter se.

⁴⁶ [1996] 1 LRC 12; 1995 (4) SA 197 (BSC).

In granting the application, the Supreme Court held that “organs of State” in section 7(1) of the South Africa Constitution, should receive an extended meaning to include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as the respondent university. It was therefore held that the respondent university was an organ of State which was thus subject to the “vertical” application of the fundamental human rights provisions as between the State and the individual in terms of section 7(1) of the Constitution. The court also referred to section 35(1) of the Constitution providing that: “In interpreting the provisions of [chapter 3] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality...” The court further held that the effect of reading section 35(1) together with section 7 was that the fundamental human rights provisions also operated “horizontally” between third parties, ie in addition to its “vertical” operation. In arriving at these conclusions, Friedman JP, said:⁴⁷

“A purposive approach to interpretation, in so far as the language permits, is called for, more particularly in view of the use of the words ‘a court of law shall promote’ in section 35.”

And in further support for the purposive approach in constitutional interpretation, Friedman JP found as “instructive” the following comments by Beaudoin and Ratushy (eds) in *The Canadian Charter of Rights and Freedoms*:⁴⁸

“The purposive approach requires a distillation of the underlying values that a specific right or freedom is meant to protect, and an analysis drawn from our legal system, or from broader historical tradition, which reflect these values in order to

⁴⁷ Ibid at 56.

⁴⁸ (2nd ed, 1989) p 27.

ensure that the purpose of the right or freedom is advanced by the interpretation adopted.”⁴⁹

The Supreme Court of Ghana has demonstrated, as part of the process in developing Ghana Constitutional Law, its preference for the same purposive and liberal approach as adopted in the *Baloro* case (supra), in construing constitutional provisions on the right to vote.

Benevolent construction on provisions on the right to vote

The issue relating to the approach to constitutional provisions on the right to vote was considered by the Ghana Supreme Court in two recent decisions: *Tehn-Addy v Electoral Commission*⁵⁰ and *Apaloo v Electoral Commission of Ghana*.⁵¹

In the *Tehn-Addy* case, the plaintiff sued for, inter alia, a declaration that the failure or refusal of the Electoral Commission to register him as a voter was inconsistent with and in contravention of article 42 of the Constitution, 1992 which provides that:

“42. Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.”

The Supreme Court held that the effect of article 42 was to vest in every Ghanaian sane citizen of eighteen years and above, the constitutional right to vote; that the exercise of that

⁴⁹ See also the judgments in *State v Mhulungu* (1995)2 LRC 503 at 533 and 552 where the court founded its decision on the “purposive construction “or “context-based purposive approach” respectively.

⁵⁰ [1996-97] SCGLR 589.

⁵¹ [2001-2002] SCGLR 1.

right was indispensable in the enhancement of the democratic process; and that it could not be denied in the absence of a constitutional provision to that effect. In so holding, the court rejected the view that the right to vote was a mere political right, privilege or civil right to be given or withheld in the exercise of the law-making powers of the sovereign. In contributing to the enhancement of the democratic process and thereby advancing the theme of this dissertation, the Supreme Court said per Acquah JSC :⁵²

“A heavy responsibility is therefore entrusted to the Electoral Commission under article 42 of the Constitution in ensuring the constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of elections and therefore the choice of a government but also is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of government.”

In the subsequent case of *Apaloo v Electoral Commission of Ghana* (supra) decided in 2001, the issue turned on whether the Electoral Commission could merely direct the use of Photo Identity Card for voting in the 2000 Presidential and Parliamentary Elections by a notification in a *Gazette* to that effect, without the need for publication of a constitutional instrument as required by articles 51 and 297(e) of the Constitution, 1992. The Supreme Court unanimously ruled that the direction was unconstitutional and a nullity as made in contravention of the two specified articles of the Constitution.

In her opinion in support of the decision, Bamford-Addo JSC considered the issue of the citizen's right to vote in an election without any hindrance. Her ladyship expressed the view that, given the democratic system of government as provided by the Constitution, 1992 all

⁵² [1996-97] SCGLR 589 at 594.

citizens of full age and of sound mind, had the right under article 42 of the Constitution to vote in an election to choose their representative. Emphasizing, as compared to the *Tehn-Addy* case, a more convincing preference for the benevolent approach in construing constitutional provisions on the right to vote, Bamford-Addo JSC said:⁵³

“The principle regarding the interpretation of election laws is that they should be construed liberally in favour of the right to vote rather than a denial of that right.”

In adopting this benevolent approach, Bamford-Addo JSC relied on two notable United States decisions. First, *Carpenter v Barber*⁵⁴ where the court was quoted as having said that:

“Generally, the courts in construing statutes, relating to elections, hold that the same should receive a liberal construction in favour of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters...”

Second, her ladyship also cited the United States Supreme Court decision in *Whitley v Hollis Rinehart Jr*⁵⁵ where Terrel CJ said: “Election laws should be construed liberally in favour of the right to vote.” After referring to its previous decision in *Tehn-Addy v Electoral Commission* on the right of every Ghanaian citizen under article 42 of the Constitution to be registered as a voter, Bamford-Addo JSC in the *Apaloo* case concluded:⁵⁶

⁵³ Ibid at p 20 (emphasis is mine).

⁵⁴ 190 So 49, 51 (Fla 1940).

⁵⁵ JR 198 So 49, 51 (Fla 1940).

⁵⁶ Ibid at page 22 (emphasis is mine).

“In similar manner, the courts should and would protect the right to vote at all costs as it has previously protected the right to register, *otherwise, democracy in this country would be undermined...* As guardians of the Constitution, and the right and freedoms provided therein... including the right to vote, which is the first basic right and the pivot upon which all other rights rest, it is the bounden duty of this court, to strike down an act which has the effect of taking away the full and free enjoyment of the franchise...”

National constitution as a document *sui generis* to be construed not necessarily according to ordinary rules and presumptions of statutory interpretation

The notion that a national constitution should be viewed as a document *sui generis*, ie meaning “one of its kind” or “like only itself” was examined by Professor Lourens M du Plessis in his Paper: “The Interpretation of Bills of Rights in South Africa: taking stock.”⁵⁷ The author carried a survey of some of the cases such as *S v Marwane*⁵⁸ decided by the South African Appellate Division as the final court before the promulgation of the 1996 South African Constitution. In a general comment on these decisions, the learned author said:⁵⁹

“A major shortcoming (if not *the* fatal blow) in the approach of South and southern African Courts to the interpretation of bills of rights has been the failure to recognize the intrinsic dissimilarity of, on the one hand, a bill of rights and, on the other, regular, ‘non-sovereign’ legislation.”

⁵⁷ In *Interpreting a Bill of Rights* (Kruger & Currin eds), Juta & Co Ltd, South Africa, 1994 at 1-25.

⁵⁸ 1982 (3) SA 717 (A).

⁵⁹ Du Plessis, LM op cit (see footnote 57 above) at 3.

The *Marwane* case (supra) came before the South African Appellate Division on appeal from the decision of the Bophuthatswana Division of the Supreme Court. The appellant had been found guilty of a crime under section 2 of the South African Terrorism Act, 1967. That Act was still applicable in Bophuthatswana despite attaining political independence in 1977. The appellant sued in the Bophuthatswana Supreme Court for a declaration that the Act was in conflict and therefore inconsistent with section 7(2) of the Bill of Rights specified in the Constitution of Bophuthatswana. Section 7(2) provided that “This Constitution shall be the supreme law of Bhoputhatswana.” The action was dismissed on the ground that, on its plain meaning, section 7(2) was applicable solely to legislation passed subsequent to the coming into force of the 1977 Constitution. On appeal from that decision, the South African Appellate Division held by a majority decision (per Miller JA) that the Terrorism Act was inconsistent with the 1977 Constitution on the ground that under section 93(1) thereof, all laws in existence prior to the commencement of the Constitution, should continue to apply “subject to the provisions of the Constitution.” The Terrorism Act was therefore struck down as unconstitutional for being in conflict with the Constitution.

Despite this conclusion, the majority decision of the Court of Appeal in the *Marwane* case was criticised by Professor Du Plessis for not paying any regard to:⁶⁰

“The fact that a constitution professing to be the *supreme law* of a country and including a *justiciable bill of rights*, is a legislative instrument – *sui generis* which requires, for its proper construction, as equally *sui generis hermeneutical* approach.”

The learned author conceded that the majority of the court in *Marwane* referred to the Privy Council decision in *Minister of Home Affairs v Fisher*⁶¹ where the court, per Lord Wilberforce, emphasised⁶² the need for giving a Bill of Rights a *sui generis* approach. However, the majority was criticised for delivering itself of a pronouncement, what the learned author described as a “rather unreflecting and ... downright disappointing conclusion.” which did not reflect the need for giving a *sui generis* construction to the Bhoputhatswana Constitution. On the contrary, the majority of the Court of Appeal applied the literalist approach applicable to ordinary legislation. The Court of Appeal had said, per Miller JA, that:⁶³

“Whether our courts were to regard an Act creative of a Constitution as it would any other statute, or as an Act *sui generis*, when construing a particular provision therein, they would give full effect to the ordinary accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give effect to a glaring absurdity; or unless there were

⁶⁰ Ibid at 5-6.

⁶¹ [1980] AC 319; [1979] 3 All ER 21.

⁶² [1980] AC 319 at 328-329.

⁶³ 1982 3 SA 717(n).

indications in the Act (considered as a whole in its own peculiar setting and with due regard to its aims and objects) that the legislation did not intend the words to be understood in their ordinary sense.”

In contrast to the above pronouncement by Miller JA in the *Marwane Case*, Du Plessis referred to the commendable approach adopted by the Canadian Supreme Courts which had given a *sui generis* approach to the Canadian Charter of Rights and Freedoms contained in Schedule B to the 1982 Constitution Act.⁶⁴

The Ghana Supreme Court has also given recognition to the *sui generis* character of a national constitution. The court in the oft-cited case of *Tuffuor v Attorney-General*, per Sowah JSC, said:⁶⁵ “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.” Equally, Francois JSC, an exponent of constitutionalism, in his opinion in support of the majority decision of the Supreme Court in *Kuenyehia v Archer* also said:⁶⁶

“Any attempt to construe the various provisions of the Constitution 1992, ...must perforce start with an awareness that a constitutional instrument is a document *sui generis* to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.”

⁶⁴ See eg *In re Southam Inc & R (No 1)* [1983] 146 DLR (3d) 408 per Ontario Court of Appeal; *R v M Drug Mart* [1985] 18 DLR (4th) 321, SCC 360; and *Hunter v Southam Inc* [1984] 11 DLR (4th) 641 where the Supreme Court of Canada held that the word “unreasonable” in the Canadian Charter of Rights and Freedoms could not be determined by recourse to a dictionary or with reference to the rules of statutory construction.

⁶⁵ [1980] GLR 637 at 647.

⁶⁶ [1993-94] 2 GLR 525 at 561.

In so holding, Francois JSC cited the Privy Council decision in *Minister of Home Affairs v Fisher*.⁶⁷ This case came before the Privy Council on appeal by the Bermudan Minister of Home Affairs from the decision of the Bermudan Court of Appeal. The facts of this case were that in 1972, a Jamaican woman, with four illegitimate children, all under the age of eighteen, married Mr Fisher who possessed Bermudan status. In 1975, the mother together with the four children came to reside in Bermuda with Mr Fisher, who accepted all the four children as children of his family.

In 1976, the Bermudan Immigration authorities refused permission for two of the children to remain at school. Subsequently Mrs Fisher and the four children were informed to leave Bermuda by 30 October 1976. Consequently Mr and Mrs Fisher sued in the Bermudan Supreme Court for, inter alia, a declaration that the four children were “deemed to possess and enjoy Bermuda status” and that they “belong to Bermuda” under section 11(5)(d) of the Bermuda Constitution, 1968 which provided:

“... a person shall be deemed to belong to Bermuda if that person – is under the age of eighteen years and is the child, stepchild or child adopted in a manner recognised by law...”

The trial judge in the Supreme Court held, inter alia, that the four illegitimate children “did not belong to Bermuda” because the words “child” and “stepchild” in section 11(5)(d) of the Bermudan Constitution did not include persons who were illegitimate. On appeal, the majority of the Court of Appeal of Bermuda reversed the trial judge and held that the children belonged to Bermuda. The Minister of Home Affairs appealed to the Privy Council from the decision of the Court of Appeal.

⁶⁷ [1979] All ER 21.

The issue before the Privy Council was whether the word “child” in section 11(5)(d) of the Bermuda Constitution included an illegitimate child. Counsel for the Minister argued, *inter alia*, that in all Acts of Parliament, the word “child” *prima facie* meant “legitimate child”, and therefore the same meaning must be placed on the word “child” in section 11(5)(d) of the Constitution brought into force by an Act of the United Kingdom Parliament. In effect it should be construed according to Acts of Parliament.

The argument was rejected by the Privy Council. It was held that the Bermudan Constitution (albeit brought into force by Act of UK Parliament), should not be seen as an ordinary legislation. It should rather be seen as a document having special characteristics. Its chapter 1 headed: “Protection of Fundamental Rights and Freedoms of the Individual” (similar to other constitutional instruments drafted in the post-colonial period) had been greatly influenced by a number of international instruments, namely: 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; 1948 United Nations Universal Declaration of Human Rights; the United Nations Declaration of the Rights of the Child adopted by Resolution in 1959; and article 24 of the 1966 International Covenants on Civil and Political Rights which guarantees protection to every child as to birth. The Privy Council held that the influence of the above international instruments and the form of chapter 1 itself (which included section 11(5)(d)) called for⁶⁸ “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms.” The court therefore held that:⁶⁹

“...It would ... treat a constitutional instrument such as [Bermudan Constitution] ... *sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant

⁶⁸ Ibid per Lord Wilberforce at 25.

⁶⁹ Ibid at page 25.

to legislation of private law... Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take a point of departure for the process of interpretation a recognition of the character and origin of the instrument...”

In the light of the above considerations, the Privy Council approached the question “with an open mind” unfettered by presumptions as to legitimacy arising in ordinary legislation dealing with citizenship or succession or property. The court therefore concluded that “child” in the context of section 11(5)(d) must be construed as bearing an “unrestricted meaning” to include illegitimate child.

The Privy Council in *Minister of Home Affairs v Fisher* (supra) implicitly, recognised that it might be necessary, given the wording in a particular constitutional provision, to apply to that provision, ordinary rules of statutory interpretation and presumptions.⁷⁰ See also *Baloro v University of Bophuthatswana*⁷¹ where Friedman JP, after applying the purposive approach and referring to the pragmatic approach of European judges, ie the “schematic and teleological approach.” to constitutional interpretation, said⁷² : “While suggesting these ‘new’ and different principles of interpretation, other principles of statutory interpretation may be usefully enlisted. These may be useful in construing language and textual interpretation.”

⁷⁰ See also Davis et al op cit at 338 where they wrote: “While special principles have been formulated to assist in the interpretation of bills of rights, this does not, of course, mean that other principles of statutory interpretation have no application. Many of the ordinary rules of statutory interpretation constitute a commonsense guide to construing language.”

⁷¹ [1996] 1 LRC 12.

⁷² Ibid at 57.

The question whether the ordinary rules of statutory interpretation should be resorted to in construing a provision of a national constitution arose in the Ghana Supreme Court case of *Awoonor-Williams v Gbedemah*.⁷³ The parties in this case were both candidates at the Keta Constituency in the General Parliamentary Elections held in Ghana on 29 August 1969. The defendant, Mr Gbedemah, had the majority of the votes and was declared duly elected. He was sworn in as a Member of National Assembly established under the Second Republic Constitution of 1969.

On 9 October 1969, the plaintiff sued in the Supreme Court for a declaration, inter alia, that by virtue of article 71(2)(b)(ii) and (d) of the Constitution, 1969 the defendant was not qualified to be a member of the National Assembly. The said article 71(2)(b) (ii) and (d) stated as follows:

“71.(2) No person shall be qualified to be a member of the Assembly who ...

(b) has been adjudged or otherwise declared

(i)...

(ii) by the report of a Commission of inquiry to be incompetent to hold public office or while being a public officer he acquired assets unlawfully, or defrauded the State, or misused or abused his office or wilfully acted in a manner prejudicial to the interests of the State; or

(d) has had his property confiscated as the result of the findings of a Commission of Inquiry.”

⁷³ (1970) CC 18; (1969) 2 G & G 442.

The plaintiff contended that the defendant had been “adjudged or otherwise” declared by the Report of the Jiagge Commission of Inquiry set up under a Decree⁷⁴ to have acquired assets unlawfully while holding public office within the meaning of article 71(2)(b)(ii) and was therefore ineligible to be a member of Parliament for a period of five years from the date of the publication of the report.

In reply, the defendant contended that the words “adjudged” and “declared” as used in the article, were terms of art with a recognised legal meaning, ie a technical meaning, and that an adjudgment or declaration could only be made by a court, not a commission of inquiry.

Commenting on the issue of interpretation which the Supreme Court had to resolve in *Awoonor-Williams v Gbedemah*, Professor J S Read wrote:⁷⁵

“The plaintiff’s counsel argued for a popular broad interpretation of the phrase ‘adjudged or otherwise declared; the defendant’s counsel urged adoption of a restricted, technical meaning which would limit the phrase to decisions by courts of law.’”

The Supreme Court was divided on the interpretation to be placed on the words “adjudged” and “declared.” The majority of the court⁷⁶ were of the view that in determining what the framers of the Constitution meant in enacting the provision in article 71(2)(b)(ii), it was necessary to

⁷⁴ Namely, paragraph 2 of the Investigation and Forfeiture of Assets Decree, 1966 (NLCD 72).

⁷⁵ See Read, J S, "Judicial Power and the Constitution of Ghana" (1971) 3 RGL 107 at 111.

⁷⁶ Per Apaloo, Siriboe, Sowah and Archer JJA, Azu Crabbe JA *dissenting*.

determine the ordinary meaning of the two key verbs “adjudge” and “declare.” The majority resorted to the most comprehensive dictionary meaning of the words “adjudge” and “declare.”⁷⁷ In doing so, the majority of the court per Apaloo JA concluded:⁷⁸

“We do not accept the argument that because the words “adjudged or otherwise declared” can, with accuracy, be used to describe the finding of a court, they cannot be used to describe the finding or conclusion of a body which is not a court *stricto sensu*. Indeed the ordinary dictionary meaning of the words shows that the court has no monopoly over the use of words. Looking at the matter as a purely philological question, it is just as accurate to say that X has been adjudged guilty of fraud or declared to be of unsound mind (purely court pronouncements) as it is to say that X has been adjudged the best pupil or declared the winner of the first prize (purely non-court pronouncements). We think therefore that the words “adjudge or declare” have no technical connotation, and in the context of article 71(2)(b) mean that the commission of inquiry “found or pronounced” that a person acquired assets unlawfully, etc. To accede to the interpretation put up on behalf of the defendant, it would be necessary to substitute for the words “report of commission of inquiry” the words “by a court as a result of the finding of a

⁷⁷ The court relied on *Webster’s Third International Dictionary* at p 27 where the words “adjudge” is defined as including: “to decide or rule upon as a judge or with judicial or quasi-judicial powers; to regard, hold or pronounce to be. ” The court also relied on the definition of “declare” in the same dictionary at p 586: “to make clear; to announce, proclaim or publish,” “to make full statement of or about (eg property).”

⁷⁸ (1969) 2 G & G 442 at 443-445.

Commission of Inquiry.” In our judgment, this would be an amendment, not interpretation of the article.”

However, the sole dissenting judge, Azu Crabbe JA, held that the phrase “adjudged” or “declared” as used, must be interpreted to mean adjudged or declared by the exercise of judicial power reserved to a court under the Constitution, 1969. The minority held that since a commission of inquiry did not exercise judicial power, the disqualification imposed by article 71(2)(b)(ii) of the Constitution, 1969 could not be given effect to upon the basis of the report of a commission of inquiry.

The minority judge, Azu Crabbe JA, arrived at his dissenting opinion by applying a number of rules of statutory interpretation. First, that the Constitution should be interpreted “not according to the intention of the framers, but according to the conditions which are necessary to carry into effect its objects and purposes.”⁷⁹ The judge identified one such condition as the rule of law as stressed in the Preamble to the Constitution, 1969 and as buttressed by article 102(1) of the Constitution. The said article provided for the vesting of final judicial power in the judiciary, and not in a commission of inquiry such as the Jiagge Commission of Inquiry.

Second, that “where there are two alternative constructions, [the court] should prefer the construction which will carry into effect the purposes of the instrument in which they are used rather than one which will defeat those purposes.”⁸⁰ Third, “the general rule is that the jurisdiction of Supreme Court is not taken away except by express

⁷⁹ The judge cited in support, Sir Ivor Jennings, *Constitutional Laws of the Commonwealth* Vol 1 pp 188-189.

⁸⁰ The application of this rule pointed to the defendant’s construction as being more consistent with the working of the constitutional system.

words or necessary implication.”⁸¹ Fourth, “*prima facie*, the same words used in different parts of the same statute should be construed in the same sense.”⁸²

Fifth, “within the same article, and even more within the same clause, a phrase must have a consistent meaning.”⁸³ Sixth, “in order to avoid some absurdity or some repugnance or inconsistency with the rest of the statute, the grammatical and ordinary sense of the words may be modified, or varied, or departed from.”⁸⁴

It is submitted that the resort to the ordinary rules of statutory interpretation by Azu Crabbe JA in his dissenting judgment in *Awoonor-Williams v Gbedemah* (supra), is justified, having regard to the subsequent majority decision of the Ghana Supreme Court in *Republic v High Court, Accra; Ex parte Adjei*.⁸⁵ The issue in this case turned on the interpretation to be placed on the word “thereof “ in article 115 (2) of the Constitution, 1979 as subsequently amended by section 19 of PNDCL 42 of

⁸¹ On application of this rule, the terms of article 71(2)(b) and (d) were not clear enough to take away such jurisdiction.

⁸² The minority found that the phrase "adjudged or declared" in article 71(2)(b) was first used in the Constitution in article 18(2)(a) where it referred to "person adjudged or otherwise declared bankrupt or insolvent. "

⁸³ The dissenting judge cited in support the dictum of Lord Romer in the House of Lords decision in *Barnard v Gorman* [1941] AC 378 at 379, HL.

⁸⁴ Citing Maxwell, *The Interpretation of Statutes* (11th ed) at 221, 1976 NM Tripathi Pvt Ltd, India. Commenting on the rules of interpretation applied by the dissenting judge in *Awoonor-Williams v Gbedemah*, Professor J S Read in "Judicial Power and the Constitution of Ghana" (1971) 3 RGL 107 at 118 said: "These points of interpretation from the dissenting judgment emphasise the unhappy drafting of the article in question which, even apart from uncertainty as to its precise meaning, is, as a result of the compendious nature of the provision, hardly grammatical. "

⁸⁵ [1984-86] 2 GLR 511, SC. See also *Amidu v President Kufuor* [2001-2002] SCGLR 86 where Atuguba JSC said: "a written constitution ought not to be construed according to the

1982. The effect of the implied amendment of article 115 (2) was to enable the Chief Justice to invite Justices of the Court of Appeal to sit in the Supreme Court for the hearing of a particular case. In the circumstances, the issue was whether the word “thereof” meant of the Supreme Court or both the Supreme Court and the Court of Appeal.

The Supreme Court by a majority decision of four to one held that the jurisdiction conferred on it by articles 114(5) and 115(1) and (2) of the Constitution, 1979 as amended by section 19 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982⁸⁶ could be exercised by any five justices of the Supreme Court and the Court of Appeal or both; and that the Supreme Court continued in existence and could work and exercise its jurisdiction even though its membership had fallen below the minimum quorum of five. In so holding, the majority of the Supreme Court (per Adade JSC) applied the rule of presumption applicable to the interpretation of ordinary legislation, namely, the *ut res magis valeat quam pereat* so as to make the amendment effectual and to avoid the absurdity of the Supreme Court ceasing to exist because its membership had fallen below the minimum of four justices as provided by the amendment. In his opinion in support of the majority decision, Sowah CJ said:⁸⁷

“The narrow rules of construction applicable in the cases of contracts, wills, statutes and ordinary legislation may or may not be adequate when it comes to the interpretation of a Constitution or law intended to govern the body politic. In the instant case, the court is interpreting provisions relating to the organ of State,

ordinary rules of construction of statutes. But that does not mean that they can be excluded altogether from the construction of such constitution.”

⁸⁶ PNDCL 42.

⁸⁷ Ibid at 518-519 (emphasis is mine).

namely the judiciary. Our interpretation should therefore match the hopes and aspirations of our society and our predominant consideration is to make the administration of justice work...”

It is interesting to observe that in dissenting from the majority decision, Taylor JSC also applied another rule of statutory construction, the plain meaning rule, in holding that it was only when the Supreme Court was constituted of the Chief Justice and at least four other justices, that it could exercise its jurisdiction.

In the subsequent case of *Boye-Doe v Teye*,⁸⁸ the Supreme Court also applied the literal rule in construing article 145 (4) of the 1992 Constitution. The case came before the Supreme Court on appeal from the judgment of the Court of Appeal, which had affirmed the judgment of the High Court. The Supreme Court found that on the evidence before it, the trial High Court Judge, who had been compulsorily retired under article 145(4), had not delivered her judgment in the case commenced before her within the stipulated time of six months as required by the mandatory provision in article 145 (4); that the judgment was in fact delivered two years after her retirement by another sitting judge. In effect, it was delivered outside the constitutionally permitted period of six months. Consequently, the Supreme Court set aside the judgments of both the Court of Appeal and the High Court and remitted the case to be tried *de novo*.

In arriving at this decision, with disastrous consequences for the losing party, who was mulcted in costs, the Ghana Supreme Court re-echoed a similar literal approach adopted by the Nigerian Supreme Court in its 1984 decision in *Ifezue v Mbadugha*.⁸⁹ The decision turned on section 258 (1) of the 1979 Constitution of Nigeria which provided that: “ Every Court ...shall deliver its decision in writing not later than three months after the conclusion of evidence and

⁸⁸ [2000] SCGLR 255.

⁸⁹ [1985] LRC (Const) 1131.

final addresses.” The majority of the court construed the provision in its literal meaning as being mandatory and not directory, ie the court must deliver its judgment in three months after conclusion of the evidence and final addresses regardless of the consequences. In so holding, the court applied the mischief rule of statutory interpretation,⁹⁰ after noting that the object of the constitutional provision in section 258(1) was to arrest the rampant delay in delivery of judgments by the courts.

It should be said, however, that the same Supreme Court of Nigeria had, in an earlier decision expressed the view that the narrow rules of statutory interpretation are inappropriate in construing a national constitution. In *Rabiu v Kano State*,⁹¹ the issue for determination was whether the Federal Court of Appeal had jurisdiction to entertain an appeal against an order of acquittal by the High Court in respect of the offence of culpable homicide. That issue involved an interpretation of the word "decision" in section 277 of the 1979 Nigerian Constitution. In dismissing the appeal and holding that the Court of Appeal had jurisdiction under section 219 of the Constitution, the Supreme Court delivered itself of an opinion which left no one in any doubt that the approach to the interpretation of a political document such as a national constitution, must certainly be different from the approach in interpreting ordinary legislation. The court, per Udoma JSC, said:⁹²

“The function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, our being a plural, dynamic society, and therefore, *mere technical* rules of

⁹⁰ See Lord Reid in the *Ladies Directory Case* [1961] 2 All ER 446 at 453 where he said: “What was the mischief that Parliament must have had in mind? and “What is the natural meaning of the words?”

⁹¹ [1980] 8-11 SC 130.

⁹² The emphasis is mine.

interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the question is whether the Constitution has used an expression in the wider or in the narrower sense ... this court should whenever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution.”

National constitution to be construed as political document capable of growth

In *Tuffuor v Attorney-General*, the Supreme Court asserted that a national constitution must be construed as a living organism capable of growth. Sowah JSC said:⁹³

“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 ... exercises. It is a source of strength. It is a source of power ... Its language ... must be considered as if it were a living organism capable of growth and development. Indeed it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development.”

In the same vein, Charles Hayfron-Benjamin JSC, in his opinion in support of the majority decision of the Supreme Court in *New Patriotic Party v Attorney-General* (31st December Case) said:⁹⁴

⁹³ [1980] GLR 637 at 647, SC (emphasis is mine).

⁹⁴ [1993-94] 2 GLR 35 at 168 (emphasis is mine).

“The 1992 Constitution is therefore the sum total of our hopes, disappointments, experiences and expectations as a nation. *If we forget the historical development of our Constitution then we fail to recognise that it is a living organism capable of growth.*”

The same point was discussed by Lee Epstein and Thomas G Walker in their *Constitutional Law for A Changing America*.⁹⁵ The authors referred to some of the criticisms levelled at the American Federal Constitution, namely, that the Constitution, adopted by a convention of the States on 17 September 1787, was crafted by an entirely white dominated delegates; that in the words of Justice Thurgood Marshall, the Constitution was “defective from the start” because its first words “we the people” excluded “the majority of American citizens because it left out blacks and women.”⁹⁶ The authors also referred to the view of Charles Beard, a critic of the United States Constitution, who in his controversial work⁹⁷ said (as quoted by the authors) that the American Constitution was an “economic document” devised to protect the “property interests” of its framers. The authors then posed the rhetorical question: “how has the US Constitution survived for so long, particularly as the US population has become increasingly heterogeneous?” The authors proceeded to answer the question, namely:⁹⁸

⁹⁵ See Lee Epstein and Thomas G Walker, *Constitutional Law for A Changing America: Institutional Powers and Constraints* (2nd ed), 1995 Congressional Quarterly Inc, Washington DC at p 7.

⁹⁶ Ibid page 7.

⁹⁷ *An Economic Interpretation of the Constitution of the United States*, New York: Macmillan, 1935 cited by Epstein and Walker op cit at page 7.

⁹⁸ Ibid at page 7.

“The answer lies in part with the Supreme Court, which generally has analysed the document in the light of its contemporary context. That is, some justices have viewed the Constitution as a living document and have sought to adapt it to the times. In addition, the Founders provided for an amending process to keep the document alive.”

See also the decision of the Ontario Court of Appeal in the case of *In re Southam Inc & The Queen (No 1)*⁹⁹ where the court in a relation to the Canadian Charter of Rights and Freedoms, contained in the 1982 Constitution Act, said:¹⁰⁰

“...as part of a constitutional document, [it] should be given a large and liberal construction. The spirit of this new ‘living tree planted in friendly Canadian soil should not be stultified by narrow, technical, literal interpretations without regard to its background and purpose, capability for growth must be recognised.”

⁹⁹ [1983] 146 DLR (3d) 408.

¹⁰⁰ Ibid at 418.

Role of Directive Principles of State Policy as a tool for constitutional interpretation

What is the role of the Directive Principles of State Policy as formulated in chapter 6 of the 1992 Constitution?¹⁰¹ Can the Supreme Court apply them as a tool for the interpretation of the Constitution?

Under article 34(1) of the 1992 Constitution, the Directive Principles of State Policy, as stated in articles 35-41 (and these include the political, economic, social, educational and cultural objectives of the State), "shall guide" not only all citizens, Parliament, the President, the Council of State, the Cabinet and political parties but also the Judiciary "in applying or interpreting the Constitution or any other law." A similar provision in article 6 (1) of the Constitution, 1979 did not contain the word "interpret." In contrast to the 1992 Constitution, it provided that it "shall be the duty " of the Judiciary and other State institutions to observe and apply" –indicating a more compelling duty on the institutions including the judiciary. The word "guide" in article 34(1) may be construed in its ordinary meaning as merely directing or conducting another on the way. In effect, the Directive Principles of State Policy are aids to construction or interpretation of the Constitution or any other legislation.

It is suggested that in exercising its original jurisdiction under article 130(1) of the Constitution as to the enforcement or interpretation of the Constitution, ie in deciding whether an enactment was made in excess of the powers conferred on Parliament or any other person, the Supreme Court may, where appropriate, apply as an aid to construction or interpretation, the Directive Principles of State Policy as stated in chapter 6 of the Constitution. Thus in a clear demonstration of its role in the development of Ghana Constitutional Law, the Supreme Court

¹⁰¹ It is to be noted that chapter 4 of the 1979 Constitution contained similar provisions. However, there were no such provisions in the 1960 and the 1969 Constitutions.

has in two decisions applied the provisions of the Directive Principles of State Policy as an aid to the construction or interpretation of the Constitution, 1992.

First, in the case of *New Patriotic Party v Inspector-General of Police*¹⁰², the Supreme Court held,¹⁰³ per Hayfron-Benjamin JSC, that it was entitled to take into consideration, the political objectives in article 35, being one of the Directive Principles of State Policy in applying or construing article 21 (1) (d) the Constitution. That article dealt with the enjoyment by all persons of the freedom of assembly including freedom to take part in processions and demonstrations. Second, in the subsequent case of *New Patriotic Party v Attorney-General (Ciba Case)*,¹⁰⁴ the Supreme Court by a majority of four to one held that the Directive Principles of State Policy had the effect of providing goals for legislative programmes and a guide for judicial interpretation.

It is suggested that another opportunity offered itself to the Supreme Court in the case of *New Patriotic Party v Electoral Commission*.¹⁰⁵ The plaintiffs, a political party, sought a declaration that the intended holding of elections to the office of District Chief Executive between 18 and 30 August 1993 by the District Assemblies established by the Local Government Law, 1988 (PNDCL 207), as (amended by PNDCL 272 and PNDCL 306), were in contravention of the Constitution, especially articles 242, 243 and 246. It was therefore argued that the intended elections were unconstitutional and illegal. The defendants contended, inter alia, that the plaintiffs (who took no action when the District Assemblies elected their representatives to the Council of State under article 89(2)(c) of the Constitution), were estopped

¹⁰² [1993-94] 2 GLR 459.

¹⁰³ Ibid at 494.

¹⁰⁴ [1996-97] SCGLR 729.

¹⁰⁵ [1993-94] 1 GLR 124- a case further examined below on the question of the relevance of the spirit of the Constitution as a tool for interpretation.

by inaction and acquiescence from contending that the district assemblies as constituted under PNDCL 207 (and as amended by PNDCL 272 and PNDCL 306), were not properly constituted for the discharge of the functions of the District Assemblies under the Constitution. The court unanimously rejected that contention. The Supreme Court held that the equitable defences of acquiescence and inaction or conduct could not operate as a shield to prevent a citizen from ventilating and seeking the enforcement of his constitutional rights as enshrined in article 2(1) of the Constitution; such equitable defences would whittle down the efficacy of the provision in article 2(1).

It is suggested that the reasoning of the Supreme Court could be further supported by the application and reliance on a provision in the Directive Principles of State Policy, namely, article 41(b) which enjoins all citizens "to uphold and defend the Constitution and the law." Where a citizen or a statutory body or political party has the mandatory duty to uphold and defend the Constitution in terms of article 41(b), it would be no defence to argue that because of an earlier failure or inaction to defend an infringement of a provision in the Constitution, that person or political body is estopped from bringing an action to enforce another provision of the Constitution in terms of article 2 (1).¹⁰⁶

The role of the spirit of the Constitution as a tool for interpretation

The Ghana Supreme Court has recognised the spirit of the Constitution, as distinct from its letter, as a tool for constitutional interpretation. Thus the doctrine of the spirit of the Constitution had been recognised by the Court of Appeal sitting as the Supreme Court in 1970 in relation to the Constitution, 1969 in the case of *Sallah v Attorney-General*.¹⁰⁷

¹⁰⁶ On the related issue of whether or not the Directive Principles of State Policy are justiciable or legally enforceable: see chapter 7.

¹⁰⁷ (1970) CC 5; (1970) 2 G & G 493.

The issue in this case turned on the true meaning of the word “established” in section 9(1) of the transitional provisions to the Second Republican Constitution, 1969 namely whether to be construed in its ordinary or technical meaning. The word was construed by the majority of the court as bearing its ordinary meaning of creating. In support of that decision, the majority, per Apaloo JA, (as he then was), said:¹⁰⁸

“We should fail in our duty to effectuate the will of the Constituent Assembly if we interpreted the Constitution, 1969, Sched I, s 9(1), *not in accordance with its letter and spirit* but in accordance with some juristic doctrinaire theory.”

In the same case, Sowah JA (as he then was) also said:¹⁰⁹

“I consider that the best guide to interpretation is the *letter and spirit* of the intention of the Constitution; if the intention of the Assembly... can be collected from the words used and *if that intention, when so collected, is in consonance with the spirit of the Constitution*, then there is no need for further aids.”¹¹⁰

The invocation of the *spirit* as distinct from the *letter* of the constitution as a tool for constitutional interpretation, was further recognised in relation to the Constitution, 1979 by the Supreme Court in the oft-cited decision in *Tuffuor v Attorney-General*.¹¹¹ The court, per Sowah JSC, said:¹¹²

¹⁰⁸ (1970) 2 G & G 493 at 508-509 (emphasis is mine).

¹⁰⁹ Ibid at 506 (emphasis is mine).

¹¹⁰ See also the invocation of the concept of the spirit of the constitution in *Kuenyehia v Archer* [1993-94] 2 GLR 525 per Francois JSC at 562; and of Aikins JSC in *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459 at 476.

¹¹¹ [1980] GLR 637.

¹¹² Ibid at 647 (emphasis is mine).

“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. It is a source of strength. It is a source of power... A broad and liberal spirit is required for its interpretation.”

Commenting on the above dictum of Sowah JSC, Francois JSC, in his opinion in support of the majority decision of the Supreme Court in the landmark case of *New Patriotic Party v Attorney-General* (31st December Case) also said:¹¹³

“My own contribution to the evaluation of a Constitution is that, a 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. ... [I]n every case, a true cognition of the Constitution can only proceed from the breadth of understanding of its spirit... The necessary conclusion is that the written word and its underlying spirit are inseparable bedfellows in the true interpretation of the Constitution.”

Again the Supreme Court resorted to the spirit of the Constitution as an aid to its interpretation in the case of *National Media Commission v Attorney-General* where the court said (per Acquah JSC):¹¹⁴

¹¹³ [1993-94] GLR 35 at 79-80 (emphasis is mine).

¹¹⁴ [2000] SCGLR 1 at 11 –emphasis is mine. See also *Amidu v President Kufour* [2001-2002] SCGLR 86 where Sophia Akuffo JSC in her opinion in support of the majority decision that the President could not be personally sued, said: “In Ghana, the Constitution is the

“... it is important to remind ourselves that we are dealing with our national Constitution, not an ordinary Act of Parliament. It is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It .. imposes obligations as much as it confers privileges and powers. *All these duties, obligations, powers, privileges and rights must be exercised and enforced not only in accordance with the letter, but also with the spirit, of the Constitution.*”

It should be emphasised that the Ghana Supreme Court’s recognition of the concept of the spirit of the Constitution as an aid to its interpretation, had equally been recognised by the framers of both Chapter 3 on Fundamental Rights of the 1993 Interim Constitution and Chapter 2 of the 1996 Constitution of the Republic of South Africa. Thus section 35(3) of the Interim Constitution provided that:

“In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.”

Section 35(3) in chapter 3 of the Interim Constitution was re-worded as section 39(2) in chapter 2 of the 1996 Constitution. The words “In the interpretation of any law “in section 35(3) were replaced by the words “When interpreting any legislation.” As re-worded, section 39(2) reads:¹¹⁵

supreme law and every act performed by the President in the exercise of his executive authority, must be referable to the word or spirit of the Constitution...”

¹¹⁵ The emphasis is mine. It is to be noted that Fundamental Rights in the South African Constitution have been formulated as Chapter 2 of the 1996 Constitution and as Chapter 3 of the 1993 Interim Constitution.

“(2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote *the spirit*, purport, and objects of the Bill of Rights.”

The question is what is the true effect of section 35(3) of the 1993 Interim Constitution, which requires the court to have due regard to the “spirit, purport and objects” of the Bill of Rights? The issue was considered in *Baloro v University of Bophuthatswana*¹¹⁶ – a decision, earlier examined in detail in our discussion on the need for purposive approach to constitutional interpretation. As pointed out by Davis et al in their book¹¹⁷ Friedman JP in *Baloro* disagreed with the position taken by Van Dijkhorst J to the effect that section 35(3) was merely an aid to interpretation and development of law and custom and not an aid to the interpretation of chapter 3 itself. Friedman JP was of the view that section 35(3) must be considered as a whole; that the distinction drawn by Dijkhorst J was artificial, more particularly if regard was paid to the words in section 35(3), namely “in the interpretation of any law” and that “a court shall have due regard to the spirit, purport and object of the chapter”. In any case, in commenting on section 35(3), Davis *et al* in the same book said:¹¹⁸

“The directive contended in s 35(3) makes it clear that legislation, the common law and customary law, fall within the ambit of the Constitution. Should such law fall foul of the ‘spirit, purport and objects’ of the Chapter of Fundamental Rights, it may be struck down as invalid.”¹¹⁹

¹¹⁶ 1995 8 BCLR 1018(B).

¹¹⁷ Op cit at page 339.

¹¹⁸ Ibid at page 336.

¹¹⁹ The author cites as an example a case falling foul of section 35(3): the decision of the Appellate Division in *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580A.

It is interesting to note that applying the concept of the spirit of the Constitution as a tool for interpretation, the Supreme Court of Ghana has in some recent cases, also struck down an enactment and also the intended or proposed holding of elections and the directives published in a *Gazette* by the Electoral Commission of Ghana, as unconstitutional. The court declared the same as a nullity on the ground that they were against the *spirit* of the Constitution.

The first of these cases is the oft-cited landmark decision in *New Patriotic Party v Attorney-General (31st December Case)*.¹²⁰ The plaintiff sued for a declaration that the intended celebration of 31st December 1993 as announced by the Rawlings Government—itsself democratically elected under the 1992 Constitution—and as provided in section 1 of the Holidays Law, 1989 (PNDCL 220), and the financing of such celebration from public funds, was inconsistent with or in contravention of the letter and spirit of the 1992 Constitution, particularly articles 3(3)-(7), 35(1) and 41(b) thereof. It is provided by article 3(4)(a) that:

“(4) All citizens shall have the right and duty at all times –
(a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3)...”

And article 41(b) also provides that: “it shall be the duty of every citizen
(b) to uphold and defend this Constitution and the law.”

¹²⁰ [1993-94] 2 GLR 35, SC a case examined in detail in chapter 3 on the application of the non-justiciable political question.

It should be emphasised that 31st December 1981 was the date when the Limann Government, also democratically elected under the 1979 Constitution, was overthrown in a coup d'état by the PNDC Military Government headed by Fl Lt JJ Rawlings. And 31st December 1993 was by the announcement to be celebrated as the twelfth anniversary of that coup.

The Supreme Court, by a five to four majority, upheld the claim in terms as stated above on the ground, inter alia, that the intended celebration was against the spirit of the Constitution, 1992. The majority of the court, per Francois and Amua-Sekyi JJSC, were of the view that the effect of the 1992 Constitution was to frown upon the violent overthrow of a duly constituted government and to place an embargo on future coups. Francois JSC showed a highly uncompromising stance in favour of promoting the spirit of the Constitution as a tool for constitutional interpretation. His lordship said:¹²¹

“For if the Constitution, 1992 frowns on violent overthrows of duly constituted governments, and rejects acts that put a premium on unconstitutionality to the extent of even proscribing the promotion of one party state, it is naivety of the highest order, to expect that very Constitution, and in the same breadth, to sing Hallelujah's in a paean of praise to unconstitutional deviations, past or present. *If the past is being buried, the spirit of the Constitution, 1992 would frown on the resurrection of any of its limbs. That is the whole point of the cloak of indemnity conferred in section 34 of the transitional provisions of the Constitution, 1992...*”

¹²¹ Ibid at 81(emphasis is mine).

His lordship continued:¹²²

“The admission that a violent overthrow of government occurred on 31 December, forecloses any sanctioning of public celebration in a constitutional era.”

In his opinion in support of the majority decision, Adade JSC held that the effect of articles 3(4)(a) and 41(b) relied upon by the plaintiffs, was to confer a right and impose a duty to defend the Constitution. He therefore held that the intended celebration of 31st December as a public holiday would weaken the peoples’ resolve to enforce that right or perform that duty. The majority of the court therefore concluded (per Aikins JSC) that since the intended celebration of 31st December as a public holiday had been sanctioned by section 1(1) of the Public Holidays Law, 1989 (PNDCL 220), and since the declaration of 31st December as a public holiday was inconsistent with the spirit and letter of articles 3, 35(1) and 41(b) of the Constitution of 1992, PNDCL 220 was, to the extent of that inconsistency, a nullity and should be struck down under article 1(2) of the Constitution.

However their lordships in the minority in the *31st December Case*, rejected the plaintiff’s contention that the intended celebration of 31st December as a public holiday was against the spirit of the Constitution. Archer CJ dismissed the concept of the spirit of the Constitution:¹²³

“... as a cliché used in certain foreign countries when interpreting their own constitutions which were drafted to suit their own circumstances and political thought. Whether the word ‘spirit’ is a metaphysical or transcendental concept,

¹²² Ibid at 83-84.

¹²³ Ibid at 49.

I wish to refrain from relying on it as it may lead me to Kantian obfuscation. I would rather rely on the letter and intendment of the Constitution, 1992.”

In her contribution in support of the minority view, Bamford-Addo JSC was also of the view that there was nothing in PNDCL 220 which could be said to be inconsistent with the letter and spirit of articles 3(3)-(7), 35(1) and 41(b) of the 1992 Constitution.¹²⁴

It could be argued that the failure of the minority in the *31st December Case* to recognise the spirit of the Constitution, 1992 as distinct from its letter, in resolving the constitutional and political issues raised before the court, was (with respect) a retrograde step. It was out of step with progressive judicial trends on the relevance of the spirit underlying a national constitution.¹²⁵ It also failed to recognise that the intended celebration of the 31st December, which hitherto (during the ten-year rule of the PNDC military regime) had marked the violent overthrow of the democratically elected Government of Dr Hilla Limann, was inconsistent with the democratic ideals espoused by the Constitution, 1992.¹²⁶ On the

¹²⁴ For a contrary view on the effect of absence of an express constitutional provision proscribing an act or a thing: see also the dissenting opinion of Sophia Akuffo JSC in *Tsatsu Tsikata(No1)v Attorney-General(No 1)* [2001-2002] 189 where her ladyship also said: “the absence of an express provision in the Constitution proscribing the doing or the existence of any particular act or thing cannot be interpreted or construed as a proscription of the doing or the existence of that act or thing, so long as such act or thing is not against the spirit of the Constitution.”

¹²⁵ See, eg *Sturges v Crowningshield* 4 Wheat (US) 122 at 202 (1819) where Marshall CJ said: “the spirit of an instrument, especially of a constitution, is to be respected no less than its letter, yet the spirit is to be collected chiefly from its words.”; see also *Fairbank v United States* 181 US 283 (1901); *Fallbrook Irrigation District v Bradley* 164 US 112, 41 Led 469 (1896) and the decision of the Supreme Court in *Papua New Guinea in NTN Pty Ltd & NBN Ltd v The State* (1988) LRC (Const) 333 at 353 referred to below.

¹²⁶ As noted by Hon Mr Justice JNK Taylor, a retired Justice of the Supreme Court in an article “The Constitutional Significance of a Supreme Court Decision” in *The Ghanaian Chronicle*, Vol 3, No 21, January 10-12, 1994 at page 8: “It is inconsistency... that stamps any law as a nullity... It is failure to draw the distinction between ‘conflict’ and

other hand, the recognition of and reliance by the majority on the spirit behind the Constitution, 1992 in resolving the political problem raised before it- to be viewed as an act of constitutionalism- is to be most welcomed.¹²⁷ It seems the majority, as it were, took a leaf from section 35(3) of the Chapter 3 of the Interim 1993 Constitution of South Africa (earlier quoted) which had placed a lot of premium on the spirit of the Constitution behind the Fundamental Rights provided in the 1993 Interim Constitution.¹²⁸ In my opinion, the recognition by the majority of the concept of the spirit of the Constitution was in line with the avowed proclamation in 1980 by the court itself in the *Tuffour* case that it would approach the national constitution as a “living organism capable of growth.”

It is respectfully suggested that the spirit of the Constitution or any legislation for that matter, cannot be divorced from the design, purpose or rationale behind or underlying it.¹²⁹ This practical and realistic approach had long been recognised by Lord Denning MR in *Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*.¹³⁰ In explaining what the European judges refer to as the “schematic and teleological” method of interpretation, Lord Denning MR said:¹³¹

inconsistency that can possibly... give ...support to the view of the minority of the Supreme Court.”

¹²⁷ By constitutionalism here we mean “balancing core values against the exercise of political power”: See Davis et al op cit at page 1.

¹²⁸ As also noted by Davis et al op cit at 336: “This provision [section 35(3)] of Chapter 3 of the Interim Constitution] suggests that the yardstick for the future development of the common law and customary law is the Chapter of Fundamental Rights.”

¹²⁹ The earlier discussion on the need for a benevolent, broad, liberal and purposive construction of a national constitution, may be considered as a variant of the concept of the spirit underlying a national constitution.

¹³⁰ [1977] 1 All ER 518.

¹³¹ Ibid at 522-523 (emphasis is mine). In its context, the word “legislation” in the passage may appropriately be replaced by the words “national constitution.”

“All it means is that the judges do not go by the liberal meaning of the words or by the grammatical structure of the sentence. *They go by the design or purpose which lies behind it. When they come upon a situation which is to their mind within the spirit – but not the letter – of the legislation they solve the problem by looking at the design and purpose of the legislation – at the effect it was sought to achieve. They proceed then to interpret the legislation so as to produce the desired effect...*”

It is suggested that it is this pragmatic approach in identifying the spirit behind the constitution with its “design or purpose,” to quote the words of Lord Denning MR in the *Buchanan* case (supra), which informed the decision of both the Court of Appeal, exercising its special and exclusive interpretative jurisdiction under the 1969 Constitution in the case of *In re Election of First President; Appiah v Attorney-General*¹³²; and the of Supreme Court established under the Constitution, 1992 in the case of *New Patriotic Party v Electoral Commission*.¹³³

In *Appiah v Attorney-General* (supra), the petitioner challenged the validity of the election of Mr Edward Akufo-Addo as the First President of the Second Republic of Ghana under the provisions of the Transitional Provisions to the Constitution, 1969. The petitioner sought a declaration that certain constitutional instruments published by the Interim Electoral Commission and under which the election was conducted, were in contravention of the provisions in the First Schedule to the Transitional Provisions of the Constitution. The court dismissed the petition on the ground (per Edmund Bannerman Ag CJ) that:¹³⁴

¹³² (1969) 2 G & G 530.

¹³³ [1993-94] 1 GLR 124 (earlier examined in relation to the issue of effect of Directive principles of State Policy).

¹³⁴ Ibid author’s emphasis.

“There has been no evidence adduced concerning the actual conduct of the election of the First President to show that anything was done or any law or regulation was applied or followed ... during the election which was contrary to the *letter, spirit and intent of the Constitution.*”

The same conclusion was reached by the Supreme Court in its decision given on 16 September 1993 in *New Patriotic Party v Electoral Commission* (supra). In this case the plaintiff, a political party, sued for a declaration that the intended or proposed election of district chief executives by district assemblies (which were yet to be established under article 242 of the Constitution), for each district as envisaged by article 243(1) of the 1992 Constitution, was illegal and in contravention of the Constitution. The said article 243(1) provided for the appointment of a district chief executive by the President with “the prior approval of not less than two-thirds majority of members of the Assembly present and voting at the meeting.” The court found that the composition and functions of district assemblies established under the Local Government Law, 1988 (PNDCL 207), as subsequently amended by PNDCL 306, were completely different from the composition and functions of the district assemblies which were yet to be established under article 242.¹³⁵ Consequently the court held that the district assemblies as then constituted could not take a decision on a matter such as the appointment of a district chief executive under article 243; that the district assemblies, as then composed, were incompetent to hold elections for the purpose of approving candidates for appointment as district chief executives. In so holding, the Supreme Court per Abban JSC (as he then was) said:¹³⁶

¹³⁵ The district assemblies had been empowered by PNDCL 306 to continue in existence until the election of new assembly members as envisaged under article 242 of the Constitution.

¹³⁶ Ibid at 131(emphasis is mine).

“Any election intended to be held in the present district assemblies for that purpose *would be contrary to the letter and spirit of the Constitution, 1992*. In short, it would be unconstitutional.”

The same conclusion was again reached by the Supreme Court in the subsequent case of *Apaloo v Electoral Commission of Ghana*.¹³⁷ The court found that the Public Elections Regulations, 1996 (CI 15), had been properly made by the Electoral Commission pursuant to its powers under article 51 of the 1992 Constitution; that regulations 30 and 31 of the said regulations had given the power to check and verify the identity of prospective voters to officers of the Electoral Commission, namely presiding officers or polling assistants. Consequently, the Supreme Court unanimously held that the directives given by the Electoral Commission as published in *Gazette* Notice of 27 November 2000, and which had given the power of identification of prospective voters to candidates’ agents, and not to its officers, as required by the regulations, namely CI 15, was ultra vires the said regulations. The directives were therefore declared a nullity. In her opinion in support of the decision of the court, Bamford-Addo JSC emphasised the “*mischief sought to be prevented by the Constitution*” Her ladyship said:¹³⁸

“[W]hereas the 1992 Constitution has been so *designed to make the defendant commission completely independent in the performance of its duties and functions*, the directives of the commission amounted to a delegation of its duties; it would, if permitted to be effective, be contrary to the *mischief sought to be prevented* by the Constitution, namely to empower the commission to act in a non-partisan and fair manner in the discharge of its functions. The directives are

¹³⁷ [2001-2002] SCGLR 1.

¹³⁸ Ibid at 18 (emphasis is mine).

contrary to both the *letter and the spirit* of the Constitution and contravened articles 42, 51, 46, 21(3) and 55(2) thereof and are therefore null and void.”

It is apparent that the use of the word “design” by Bamford-Addo JSC in the above passage echoes the same word used by Lord Denning MR in the *Buchanan* case (supra). The above pronouncement by Bamford-Addo JSC is also a commendable shift away from her dissenting opinion from the majority decision in the *31st December Case* as to the existence of the spirit behind the same 1992 Constitution as being distinct from its letter. It would be recalled that the Supreme Court had, per Bamford-Addo JSC in the *Apaloo* case (supra), held that it was against the spirit of the Constitution for the Electoral Commission to have delegated its statutory duties to the candidates’ agents; and that the decision of the commission, if allowed to stand, would militate against the non-partisan status of the commission. If that is the case, then it must also be conceded that it would have been equally against the spirit of the same Constitution for the same court to have endorsed the public celebration with State funds of the anniversary of the violent overthrow of a democratically elected government.

Conclusion

There is no doubt, as demonstrated by the discussion in this chapter, that the Supreme Court has made a very distinctive contribution to the important and crucial question of the interpretation of a national constitution such as the Ghana Fourth Republican Constitution of 1992.

It is suggested that the greatest achievement that the Ghana Supreme Court would be proud of and thus justify its indispensable role as a constitutional court is to live up to expectation by construing the constitution as a living document capable of growth, and at the same time, giving due recognition to the present needs and aspirations of the people. Such an approach would create the peaceful and congenial atmosphere for national development in all its facets.

And given the discussion in this chapter, it could be concluded that the Supreme Court of Ghana, like that of Nigeria, shares the now well- settled rule of constitutional interpretation, namely, that of giving *sui generis* approach or consideration to constitutional provisions. However, the courts do also recognize that the ordinary rules of statutory interpretation and presumptions are inappropriate for construing a national constitution, especially the provisions laying down the fundamental rights and freedoms of the individual. Thus, it could be said that a distinctive contribution of the Ghana Supreme Court to the development of Ghana Constitutional Law, is its recognition that there might be occasions, such as seen in the *Ex parte Adjei* case (supra), where given the context of the constitutional provision, the court might apply the ordinary rules of statutory interpretation and presumptions so as to effectuate the apparent intention of the framers of the Constitution.

It also seems clear that the principles of constitutional interpretation, such as the need for a benevolent, broad, liberal and purposive construction of the 1992 Constitution as a political document, *sui generis* and capable of growth (as stated by the Supreme Court in cases such as *Tuffuor v Attorney-General*¹³⁹), would very much assist the Supreme Court in the exercise of its interpretative and enforcement jurisdiction under articles 2 and 130(1) of the 1992 Constitution. As stated elsewhere,¹⁴⁰ the 1992 Constitution as the fundamental law, must not be narrowly construed so as to avoid absurdity; the Constitution must be given: “... a wide, generous and purposive construction in the context of the people’s aspirations and hopes and with special reference to the political, social and economic development of the country.”¹⁴¹

¹³⁹ [1980] GLR 63, SC.

¹⁴⁰ See Bimpong-Buta, SY, “The Supreme Court and the Interpretation of the 1992 Constitution” (1991-92) 18 RGL 95 at 104.

¹⁴¹ Commenting on the above quoted view, J Ebow Quashie, the Immediate Past President of the Ghana Bar Association, in a public lecture, not yet published: “The Role of the Supreme Court under the 1992 Ghana Fourth Republican Constitution” delivered at the British Council Hall, Accra, 16 June 2003 as part of the Ghana Academy of Arts and Sciences /FES Public Forum, said: “It is my considered view that had the Supreme Court

However, notwithstanding the commendable approach adopted by the Ghana Supreme Court on the question of constitutional interpretation, there is one singular omission or perhaps shortcoming which needs to be pointed out. The Supreme Court has not as yet, indicated its willingness to resort or apply international human rights standards such as the United Nations Universal Declaration of Human Rights, or the European Convention on Human Rights, or the African Charter on Human and Peoples' Rights, in construing the fundamental human rights provisions as enshrined in chapter 5 of the 1992 Constitution. Perhaps the judges in the Supreme Court are not inclined to be guided by international conventions on human rights in construing the fundamental human rights provisions as enshrined in the Constitution because there is no specific provision in the Constitution which requires them to do so. There is no provision in the 1992 Constitution similar to the one provided in the 1996 Constitution of the Republic of South Africa, to the effect that when interpreting the Bill of Rights contained in the Constitution, the courts must consider international law and foreign law.¹⁴² In the absence of any such provision, the Ghana Supreme Court may, in interpreting the Human Rights provisions contained in chapter 5 of the Constitution, take into account or adopt with profit, one of the Bangalore Principles issued at the Commonwealth Judicial Colloquium held in Bangalore, India in 1998, namely:¹⁴³

been guided by the admonitions of S Y Bimpong-Buta, the review application in the *Fast Track High Court* case [2001-2002] SCGLR 189 and 650 would have been unnecessary.”

¹⁴² See the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), section 39(1) which states: “When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

¹⁴³ As quoted by Anthony Lester QC op cit at pp 8-9.

“It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.”

THE SUPREME COURT AND THE POWER OF JUDICIAL REVIEW OF LEGISLATIVE ACTION

GENERAL INTRODUCTION

The power of judicial review of legislative action has been vested in the Ghana Supreme Court by article 130(1)(b) of the 1992 Constitution. Under the said article, the Supreme Court has been vested with exclusive original jurisdiction to declare any enactment or legislation as null and void on the grounds that the legislation in question has been made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution.¹ In effect, the exercise of the power of judicial review is founded on the supremacy of the Constitution.² The supremacy of the Constitution, 1992 over any other law

¹ The power of judicial review conferred under article 130(1) (b) of the 1992 Constitution is a verbatim reproduction of articles 106(1)(b) and 118(1)(b) of the 1969 and 1979 Constitutions respectively. Similar power was conferred on the Supreme Court under article 42(2) of the First Republican Constitution, 1960. Whereas the power of judicial review has been expressly conferred on the Ghana Supreme Court by the Constitution, such power was assumed by the United States Supreme Court itself in *Marbury v Madison* 1 Cranch 137 2 L Ed 60 (1803). For a critique of that assumption of power: see Bickel, *The Least Dangerous Branch* (1963) at 2-13. As noted by Amidu, A B K in “The Scope and Effect of Judicial Power in the Enforcement and Defence of the Constitution, 1992” (1991-92) RGL 120 at 127 “[T]he invitation to the court by counsel for the appellants [*In re Akoto* [1961] 2 GLR 523, SC] to interpret the [1960] Constitution so as to confer on itself the *Madbury v Madison* type of expansive powers of judicial review was resisted by the court.” For the exercise of power of judicial review of legislation in the Commonwealth Caribbean: see the decision of the Court of Appeal of Trinidad & Tobago in *Collymore v AG* (1967) 12 WIR 5 –affirmed by the Privy Council in [1970] AC 38.

² For a detailed examination of the concept of the supremacy of the constitution: see chapter 3. For the view that the concept of judicial review is founded on certain legal principles including the rule of law: see Kumado, C E K, “Judicial Review of Legislation in Ghana since Independence” (1980) 12 RGL 67.

in Ghana as enshrined in article 1(2) of the Constitution, has been reinforced by article 2(1). These articles state as follows:

- "1.(2) This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.
2. (1) A person who alleges that -
- (a) an enactment or anything contained in or done under the authority of that or any other enactment; or
 - (b) any act or omission of any person
- is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

The need for all existing legislation to be, as it were, in tune with the Constitution, 1992 is further strengthened by section 36(2) of the Transitional Provisions of the Constitution which also provides that:

"36(2) Notwithstanding the abrogation of the Proclamation referred to in subsection (1) of this section, any enactment or rule of law in force immediately before the coming into force of this Constitution shall, in so far as it is not inconsistent with a provision of this Constitution, continue in force as if enacted, issued, or made under the authority of this Constitution."

Similarly, article 93(2) of the Constitution also provides that the legislative power of Ghana shall be exercised in accordance with the Constitution. The effect of the above quoted provisions is that no legislation in Ghana can be regarded as valid unless it satisfies the test of consistency with the Constitution, 1992. On the question as to the ambit of the Supreme Court's power of judicial review of legislative action, Edward Wiredu JSC in his opinion in

support of the unanimous decision of the Supreme Court in *Ghana Bar Association v Attorney-General (Abban Case)* said:³

“The Constitution has vested the power of judicial review of all legislation in the Supreme Court. It has dealt away with either an executive or parliamentary sovereignty and subordinated all the arms or organs of State to the Constitution...The arms of State and the institution involved in the appointment of the Chief Justice are all creatures of the Constitution and each, in playing its part, must exercise such powers as are authorized by it in a democratic manner as enshrined in the Constitution.”

This chapter seeks to examine the ambit of the Supreme Court’s “power of judicial review of all legislation” referred to by Edward Wiredu JSC (as he then was) in the *Abban* case, under the following sub-titles: (i) the ambit of judicial review of legislative action; (ii) ouster clauses and judicial review of legislative action; (iii) the legality of coup d’etats and judicial review of legislative action; and (iv) the constitutionality of the Fast Track High Court.

II AMBIT OF JUDICIAL REVIEW OF LEGISLATIVE ACTION

Introduction

The Ghana Supreme Court had no power to declare any legislative action invalid before the coming into force of the Constitution, 1992 for the simple reason that there was no supreme law, a written constitution, against which an impugned legislation could be tested or measured. However, the Supreme Court had the power of judicial review of legislation under article 118(1)(b) of the Constitution, 1979. But that power (together with the right and

³ [2003-2004] SCGLR 250 at 259.

enjoyment of fundamental human rights and freedoms guaranteed by articles 19-34 of the Constitution, 1979), was curtailed following the suspension of the Constitution itself by the 1981 PNDC (Establishment) Proclamation. It was provided by sections 4(1) and 9(1) of that Proclamation that the courts in existence immediately before 31 December 1981 were to continue to exist and exercise the same powers as they had before the suspension of the Constitution, 1979. However, those powers were to be exercised subject to the provisions of the Proclamation and Laws issued under it.

Similarly, the right to judicial review of legislative action was totally denied under the legal system established after the suspension of the 1969 Constitution by the 1972 NRC (Establishment) Proclamation. Not surprisingly, therefore, the full bench of the Court of Appeal in *Spokesman Publications Ltd v Attorney-General*⁴ held that following the suspension of the Constitution, 1969 by section 2(1) of the 1972 NRC (Establishment) Proclamation, the operation of the entrenched provisions of the Constitution, relating to fundamental human rights upon which the plaintiffs had founded their claim, ceased to exist. That conclusion was equally applicable to the exercise of judicial power vested in the Supreme Court under the Constitution, 1979.

We shall therefore examine the ambit of the Supreme Court's power of judicial review of legislative action principally under the Fourth Republican Constitution of 1992.⁵

⁴ [1974] 1 GLR 88, CA (full bench).

⁵ For a detailed examination of the Supreme Court power of judicial review of legislative action under the 1957 Independence Constitution, the First and Second Republican Constitutions of 1960 and 1969 respectively and during the period of 1966 NLC and the 1972 NRC Military Regimes: see Dankwa, E V O and Flinterman, C, "Judicial Review in Ghana" (1977) 14 UGLJ 1 et seq. The learned authors concluded at p 39 that : " As we have already noted the NRC (Establishment) Proclamation, 1972 saved the powers of the High Court. The aspect of the ruling just considered [*Ex parte Ofosu-Amaah* [1977] 1 GLR 227] indicates that the Superior Courts, during military regimes, can review legislative action of earlier legislative bodies if such action is found to be inconsistent with the powers given to

Examination of ambit of judicial review of legislative action

It is well-settled that any legislation made in excess of the powers conferred on the legislature by the Constitution, 1992 which is inconsistent with any provision of the Constitution, would be declared a nullity by the Supreme Court in the exercise of its power of judicial review under article 130(1)(b) of the Constitution.⁶ What is the extent of the court's power of judicial review of legislation under article 130(1)(b)?

The issue was considered by the Supreme Court in the recent case of *Republic v Yebbi & Avalifo*.⁷ The case came before the Supreme Court on a reference from the Greater Accra Regional Tribunal by way of case stated under article 130(2) of the Constitution, 1992. The issue turned on whether section 24(1) of the Courts Act, 1993 (Act 459), was inconsistent with article 143(1) of the Constitution, 1992. Article 143(1) of the Constitution, 1992 states as follows:

“143. (1) A Regional Tribunal shall have jurisdiction to try such offences against the State and the public interest as Parliament may, by law, prescribe.”

those legislative bodies. *It does not matter that those legislative bodies ceased to exist and those Constitutions under which they operated have been suspended.*” Clearly their statement herein italicized cannot be supported in law in the light of the Court of Appeal (full bench) decision in the *Spokesman Publications* case cited above. For similar detailed examination of judicial review of legislation for the same period covered by Danquah and Flinterman: see Kumado, C E K, “Judicial Review of Legislation in Ghana since Independence” (1980) 12 RGL 67-103.

⁶ For analogous provisions in previous Republican Constitutions: see 1960 Constitution, art 42(2); 1969 Constitution, art 106(1)(b) and 1979 Constitution, art 118(1)(b).

⁷ [2000] SCGLR 149.

On the other hand, section 24(1) of the Courts Act, 1993 (Act 459), provides as follows:

“24. (1) Subject to the provisions of the Constitution, this Act and any other law, a Regional Tribunal shall have concurrent original jurisdiction with the High Court in all criminal matters and shall in particular try -

(a) the special offences specified under Chapter 4 of Part II of the Criminal Code;

(b) offences arising under -

(i) Customs, Excise and Preventive Services Management Law, 1993 (PNDCL 330),

(ii) Income Tax Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL 236); and

(c) any other offence involving serious economic fraud, loss of state funds or property.”

The facts which led to the reference by the regional tribunal to the Supreme Court were that the accused in the case had been arraigned before the regional tribunal on two charges of conspiracy to steal and stealing the sum of one hundred million cedis, the property of a political party, contrary to sections 23(1 and 124(1) of the Criminal Code, (Act 29).⁸ The accused challenged the jurisdiction of the tribunal to try him for the charges brought against him. He argued that under article 143(1) of the Constitution, a regional tribunal had jurisdiction “to try such offences against the State and public interest as Parliament may, by law, prescribe.” But, he contended, the offences brought against him could not be said to be

⁸ According to the prosecution, the property belonged to the ruling political party, National Democratic Congress (NDC) – a party registered under the Political Parties Registration Law, 1992 (PNDCL 281).

against “The State or the public interest” because the alleged stolen money was said to belong to a political party which could not be described as a State institution; nor was the theft of a political party’s money, an offence against the public interest. The accused therefore contended that the regional tribunal had no jurisdiction to try him for the charges brought against him. On the other hand, the prosecution contended that once Parliament had exercised its discretion by enacting the Courts Act, 1993 (Act 459), s 24(1) by providing that a regional tribunal had jurisdiction in all criminal matters, the tribunal had jurisdiction to try the case.

In response to these opposing arguments, the Supreme Court compared the provision in article 143(1) of the Constitution with that of article 140(1), dealing with the jurisdiction of the High Court. On one hand, the court found that article 140(1) provides that: “The High Court shall, subject to the provisions of [the] Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters...” On the other hand, however, the court found that the original jurisdiction of a regional tribunal under article 143(1) was confined to : “such offences against the State and the public interest as Parliament may, by law prescribe.” Having made that comparison, the Supreme Court held that:⁹ “the High Court and Regional Tribunal are not meant and were not intended to have the same original jurisdiction”; and that the Constitution did not grant the Regional Tribunal jurisdiction in “all criminal matters.” The Supreme Court therefore concluded, per Acquah JSC, that:¹⁰

“To attempt, therefore, in section 24(1) of Act 459 to vest jurisdiction in all criminal matters in the Regional Tribunals *negates not only the clear and unambiguous language of article 143(1) of the 1992 Constitution but also the intention of the framers of the Constitution.*”

⁹ [2000] SCGLR 149 at 156.

¹⁰ Ibid at 157-158 (author’s emphasis).

In the light of the above conclusion, the Supreme Court held that on a true and proper interpretation of article 143(1) of the Constitution, Parliament had no power to provide that a regional tribunal should have “concurrent original jurisdiction with the High Court in all criminal matters.” Consequently, the court held that section 24(1) of Act 459, which made provision to that effect, was clearly inconsistent with the letter and spirit of the Constitution, 1992. The section was therefore declared a nullity under article 1(2) of the Constitution.

It must be emphasised that in holding that a regional tribunal had no concurrent original jurisdiction in all matters with the High Court, the Supreme Court in this case emphasised the relevance of the intention (as distinct from the letter of the law) of the framers of the 1992 Constitution. In other words, the court relied on the policy which impelled the provisions in articles 140(1) and 143(1), dealing respectively with the jurisdiction of the High Court and a regional tribunal. In that respect, the court, per Acquah JSC, said:¹¹

“There are ... divisions within the broad definition of crime. And the framers of the Constitution cannot be said to be unaware of these divisions. The very fact that article 143(1) talks of : ‘such offences against the State and the public interest,’ while article 140(1) talks of ‘all matters and in particular, in civil and criminal matters,’ clearly shows that the drafters were fully aware of the divisions within crime, and therefore intended to confine regional tribunals to ‘such offences against the State and public interest.’

Furthermore, from the proceedings of the Consultative Assembly which drew up the Draft of the 1992 Constitution, it is evidently clear that after much debate on the status and jurisdiction of the public tribunals, it was finally agreed that the public tribunals should be part of the unified judicial system *but with*

¹¹ Ibid at p 157 (author’s emphasis).

jurisdiction in certain criminal matters only; not in all criminal cases, as section 24(1) of Act 459 now provides.”

The position taken by the Supreme Court in the *Yebbi & Avalifo* case (supra), on the importance of the intention of the framers of the Constitution in determining the validity of the impugned section 24(1) of Act 459, is in sharp contrast to the position on the same issue taken by the Court of Appeal of Sierra Leone in *Akar v The Attorney-General of Sierra Leone*.¹² This case turned on section 1 of the 1961 Constitution of Sierra Leone, ie the Sierra Leone Independence Act, 1961 and the subsequent two amendments to the section passed by the Sierra Leone House of Representatives. The said section 1 of the 1961 Constitution provided that:

“Every person who, having been born in the former Colony or Protectorate of Sierra Leone was on the 26th day of April 1961 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the 27th day of April 1961. Provided that a person shall not become a citizen of Sierra Leone by virtue of this sub-section if neither of his parents nor any of his grandparents was born in the former colony or Protectorate of Sierra Leone.”

In 1962, The Sierra Leone Parliament passed an amendment Act. The purpose was to substitute the words “person of Negro descent” for the words “Every person” in section 1 of the Constitution. The said second amendment sought, in the words of Elias¹³ “to remove the limitation of citizenship to persons of Negro African descent from the category of

¹² CC 68/67A No 30, October 26, 1967 unreported cited and examined by T O Elias “The Judicial Process in Commonwealth Africa” in Aggrey, *Fraser & Guggisburg Memorial Lectures 1975* at pp 84-86, 1977 University of Ghana.

¹³ See T O Elias op cit at 84-85.

discriminatory legislation, since the protection against discriminatory legislation is one of the entrenched provisions of the Constitution.”

The plaintiff, not being “a person of Negro descent”, alleging that the amendments had the effect of depriving him of his right to citizenship of Sierra Leone, sued in the Supreme Court (High Court), for a declaration that the amendments were *ultra vires* section 1 of the 1961 Constitution. The trial judge, the Chief Justice of Sierra Leone, in his ruling, conceded that the impugned amendments had followed the laid down procedure for amending the Constitution. He, however, pronounced the two amendments invalid because the purported amendments constituted “a direct negation of the *basic intention behind the Constitution, namely the creation of a non-racial citizenship for Sierra Leone* and that both amendments were “invalid as not being reasonably justifiable in a democratic society.”¹⁴ The decision of the trial learned Chief Justice, the trial judge in *Akar v The Attorney-General of Sierra Leone*, in holding the amendments invalid on the ground that the amendments were against the intention of the framers of the Sierra Leone Constitution, is very significant. It is in line with the approach of the Ghana Supreme Court in *Yebbi & Avalifo* in relying on the intention of the framers of the Constitution, 1992 to support the decision.

However, the decision of the trial judge was reversed on appeal by the Court of Appeal of Sierra Leone. The court held that the proper function of the courts in the exercise of the power of judicial review of legislation should be limited to an “examination of the procedural and substantive validity of legislation”; and that it was not their business to “preoccupy themselves with moral considerations or the rightness or wrongness of the legislative policy of Parliament.”¹⁵ The approach of the Court of Appeal of Sierra Leone in the *Akar* case is certainly diametrically opposed to the approach of the Ghana Supreme Court in *Yebbi &*

¹⁴ My emphasis.

¹⁵ See T O Elias op cit at p 86.

Avalifo, in arriving at its decision that, on a proper interpretation of article 143(1) of the Constitution, regional tribunals had no concurrent jurisdiction in matters with the High Court, and that in so far as section 24(1) of Act 459 so provided, it was a nullity.

It must be emphasised, however, that the Supreme Court in *Yebbi & Avalifo* did not go on to hold that the charges of conspiracy and stealing the property of political party brought against the accused in that case, could not be determined by the regional tribunal under the impugned section 24(1) of Act 459. The court noted that article 143(1) as fully quoted above, empowers a regional tribunal to “try such offences against the State and the public interest as Parliament may, by law, prescribe”; that the word “and” coming in between “State” and “public interest” must be liberally construed to read as “and/or.”¹⁶ In effect, the court construed article 143(1) as meaning that a regional tribunal had jurisdiction to try any offence against either the State or against the public interest. Having so held, the court further held that the stealing of moneys belonging to a political party registered under the Political Parties Law, 1992 (PNDCL 281) (the subject-matter of the charges against the accused), constituted a crime against the public interest in the light of the provisions in articles 55(1) and 55(4) of the Constitution.¹⁷

In the light of the above conclusions, the Supreme Court in *Yebbi & Avalifo* finally held that the first part of section 24(1) of the Courts Act, 1993 (Act 459), which provided that “a Regional Tribunal shall have concurrent original jurisdiction with the High Court in all criminal matters” was inconsistent with article 143(1) of the 1992 Constitution and, to the

¹⁶ For a detailed examination of the need to give a liberal interpretation to a national constitution as distinct from an ordinary legislation: see chapter 4.

¹⁷ Article 55(1) of the 1992 Constitution provides that: “Every political party shall have a national character, and membership shall not be based on ethnic, religious, regional or other sectional divisions.” Whilst article 55(4) requires every political party to: “declare to the *public* their revenues and assets and the sources of those revenues and assets; and (b) to publish to the *public* annually their audited accounts” (my emphasis).

extent of such inconsistency, void under article 1(2) of the Constitution.¹⁸ However, the remaining part of section 24(1) of Act 459, namely, clauses (a), (b) and (c) as fully quoted above, was declared consistent with article 143(1) and therefore valid. Consequently the court held that the regional tribunal had jurisdiction under article 143(1) of the Constitution to try the accused for the offences of conspiracy to steal and stealing of moneys belonging to a political party.

It should be stressed that the decision of the Ghana Supreme Court in *Republic v Yebbi & Avalifo* (supra) to declare part of section 24(1) of Act 459 valid and the other part invalid, constituted, in effect, the application of the doctrine of severability of impugned legislation. It was, however, not so stated in so many words by the Ghana Supreme Court in the judgment of the court delivered by Acquah JSC

However, the principle of severability of impugned legislation was explained and applied by the Gambia Supreme Court in *Jammeh v Attorney-General*.¹⁹ In this case, the plaintiff, the

¹⁸ For further instances of legislation declared void by the Supreme Court on grounds of inconsistency with the Constitution, 1992: see *Sam (No 2) v Attorney-General* [2000] SCGLR 305- declaring PNDCL 326, s 15 void for contravening articles 140(1) and 293(2) and (3); and *New Patriotic Party v Attorney-General (Ciba Case)* [1996-97] SCGLR 729 – declaring void section 4(1) of PNDCL 312 for offending against articles 21(1)(e) and 37(2)(a) of the 1992 Constitution. For the holding that where an Act is a spent force, there is no need to strike it down as void: see *Ellis v Attorney-General* [2000] SCGLR 24 and *Fattal v Minister for Internal Affairs* [1981] GLR 104, SC. See also *Kwakye v Attorney-General* [1981] GLR 9 where the Supreme Court declared as void and unconstitutional section 1 of the State Proceedings (Amendment) Decree, 1969 (NLCD 352), for impeding right of access to the Supreme Court under article 2 of the 1979 Constitution. See also *Ware v Ofori-Atta* [1959] GLR 181 where the High Court declared as invalid the Statute Law (Amendment) (No 2) Act for non-compliance with the procedure for amending legislation as laid down in section 35 of the Ghana (Constitution) Order-in-Council 1957. The Order made under the Act by the Minister of Local Government, ie the Ejisu Stool Property Order, 1958 was equally declared invalid.

¹⁹ [1997-2001] GR 839 *coram*: Lartey CJ, Jallow, Wali, Ogwuegbu and Amua-Sekyi JJSC.

Leader of the Minority in the Gambian National Assembly, sued in the Supreme Court for a declaration that the Constitution of the Republic of the Gambia, 1997 (Amendment) Act, 2001 (No 6 of 2001), was made in excess of the powers conferred on Parliament. The basis for seeking that declaration was that: first, section 1 of the Schedule to the Act purported to amend section 1(1) of the Gambia Constitution, an entrenched provision, without complying with the procedure for amendment laid down in section 226(4) of the Constitution, namely, no referendum had been held to give approval to the amendment.²⁰ Second, that the purported amendment had sought to amend paragraph 13(1) of Schedule II to the Constitution even though paragraph 17 of that schedule prohibited such amendment. The plaintiff therefore argued that the effect of the purported amendments had rendered the whole Amendment Act – containing other extensive constitutional amendments – void and unenforceable.

The Supreme Court of The Gambia upheld the application in part. It was held, *inter alia*, that: (i) the purported amendment to section 1 of the Constitution was a nullity for non-compliance with the procedure for amendment stated in section 226(4) of the Constitution; and (ii) the purported amendment of paragraph 13 of Schedule II was also a nullity for contravening paragraph 17 of the same Schedule II. In so holding, the court applied the Privy Council decision in *Attorney-General of The Gambia v Jobe*²¹ and its own previous decision in *Jeng (No 4) v Gambia & Development Bank Ltd (No 4)*.²²

²⁰ The purported amendment stated: “The Gambia is a sovereign secular Republic.”

²¹ [1985] LRC (Const) 556, PC; [1997-2001] GR 947, SC.

²² [1997-2001] GR 679. The Supreme Court held in the *Jeng (No 4)* case that section 23 of the Assets Management and Recovery Corporation (AMRC) Act, 1992 providing that no appeal shall lie from decision of the Court of Appeal in proceedings involving the assets of AMRC was a nullity for being inconsistent with section 128(1)(a) of the 1997 Gambia Constitution. See also *Sabally v Inspector-General of Police* [1997-2001] GR 878 where the Gambia Supreme Court held that the Indemnity (Amendment) Act, 2001, No 5 of 2001), s 1 was void for contravening section 100(2)(c) of the 1997 Constitution prohibiting against retroactive deprivation of vested rights.

In his opinion in support of the unanimous decision of the court, Jallow JSC said:²³

“...given the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for all those involved in the exercise of the legislative authority of the State to exercise due care and caution to ensure that such legislation is consistent with the provisions of the Constitution and that it is enacted in accordance with the requirements and procedures of the Constitution. Failure to comply with these legal requirements will attract the kind of consequences which have befallen the purported amendments to section 1(1) and paragraph 13 of Schedule II to the Constitution.”

The Supreme Court, however, rejected the contention of the plaintiff that the whole of the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 should be declared void because of the purported unconstitutional amendments to section 1(1) and paragraph 13 of its Schedule II. The court (per Jallow JSC) considered the test for severability of impugned legislation not only as exhaustively examined by the Supreme Court of India in *Chamarbaugwaklla v Union*²⁴ but also as concisely stated by the Judicial Committee of the Privy Council in *Attorney-General for Alberta v Attorney-General for Canada*²⁵, namely, that:

“The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be

²³ Ibid at 852.

²⁴ [1947] SCR 930.

²⁵ [1947] AC 503.

assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.”

In applying the above noted principle, the Supreme Court of The Gambia in the case of *Jammeh v Attorney-General* further held that the purported amendments to section 1(1) of the Constitution and paragraph 13 of its Schedule II, were severable and would therefore be severed from the remaining other provisions of the Amending Act. It was so held because the void amendments were not inextricably bound up and had no linkage whatsoever with the other remaining provisions of the Act which were independent of the void amendments. The court therefore held that the remaining provisions of the impugned Act could not be regarded as part of a single legislative scheme. Having struck out the invalid provisions, the remaining provisions still retained their coherence and could be enforced without any alterations or modifications.

It is suggested that it was the above enunciated principle of severability of impugned legislation, applied by The Gambia Supreme Court in *Jammeh v Attorney-General* (supra), that informed the decision of the Ghana Supreme Court in *Republic v Yebbi & Avalifo* (supra).

However, the answer to the question of the true ambit of the Ghana Supreme Court’s power of judicial review of legislation may be found not in the decision in *Republic v Yebbi & Avalifo* (supra), but in its 2002 decision in *Amidu v Electoral Commission & Assembly Press*.²⁶ In this case, the plaintiff²⁷ sued in the Supreme Court, invoking its original jurisdiction under article 2 of the Constitution, 1992. He challenged the constitutionality of the 2001 Ghana *Gazette* No 1 which contained notice to the public of the results of the

²⁶ [2001-2002] SCGLR 595.

²⁷ Formerly Deputy Attorney-General and Minister of Justice in the Rawlings Government.

December 2000 Parliamentary Elections. The ground for challenging the validity of the *Gazette* was that it bore a retrospective date of publication, namely, 5 January 2001 instead of 16 January, the actual date of the publication. He therefore sued for a declaration, inter alia, that the conduct of the defendants, the Electoral Commission and the Assembly Press, in causing the publication of the 2001 *Gazette* No 1 with a retrospective date, was in contravention of and inconsistent with specified provisions of the Constitution, 1992 including article 99(1) and also article 107 which proscribes retrospective legislation. Under article 99(1), the High Court has jurisdiction to determine an election petition relating to the issue whether a person has been validly elected as a Member of Parliament. And it is also provided by section 18(1) of the Representation of the People Law, 1992 (PNDCL 284), that an “election petition shall be presented within 21 days after the date of publication in the *Gazette* of the result of the election to which it relates.”

In the light of the above provisions, the plaintiff by his claim, in effect, sought to enforce the constitutional right of a person to challenge the result of a parliamentary election under article 99(1) of the Constitution within 21 days of the date of publication of the results in the *Gazette*. The plaintiff claimed that, that right had been adversely affected by the back-dating of the 2000 *Gazette* No 1 containing the results of the December 2000 Parliamentary Elections.²⁸

Thus the real issue which the Supreme Court had to decide in this case was rightly identified by the court. First, Sophia Akuffo JSC, in her judgment said:²⁹

²⁸ The back-dating to 5 January instead of 16 January 2001, meant that a petitioner, in effect, had only five days instead of 21 days to present a petition to the High Court under article 99(1) of the Constitution, 1992.

²⁹ Ibid at page 604 (my emphasis).

“It is clear from the plaintiff’s ... submission that what he really seeks to safeguard or enforce is the full availability of the 21 days stipulated in section 18(1) of PNDCL 284, which he claims has been shortened by the alleged back-dating of the *Gazette*. He seeks to do this by challenging the veracity of the publication date stated in the *Gazette*.”

Secondly, Atuguba JSC, the only member of the panel who delivered an opinion apart from the leading opinion by Sophia Akuffo JSC,³⁰ said:³¹

“In the instant case the plaintiff contends that a right of action accrues within 21 days of publication of the result of a parliamentary election in the *Gazette*. *The plaintiff contends that ... by publishing that result in the Gazette with retrospective date, the right of access to the court under article 99(1) has been impeded or truncated.*”

Giving the majority opinion of the Supreme Court, Sophia Akuffo JSC pointed out that if any person was desirous of challenging the veracity or existence of any fact notified in a public *Gazette*, he could legally do so but not by invoking the Supreme Court’s original jurisdiction under article 2 of the Constitution; that the assumption that there had been any breach on the part of the defendants in assigning 5 January 2001 as the date of publication of the *Gazette*, rather than 16 January 2001 as alleged by the plaintiff, constituted at worst, “a statutory or operational” breach of the Public Elections Regulations, 1996 (CI 15), rather than a constitutional breach.³² The learned judge went on to hold that the publication of the results

³⁰ The others are Edward Wiredu CJ, Bamford-Addo, Ampiah, Adjabeng and Lamptey JJSC.

³¹ Ibid at p 611 (my emphasis).

³² Section 41(2)(a) of CI 15 requires the Electoral Commission to publish in the *Gazette* notice of the results of parliamentary election in the *Gazette* – “stating the name of the person elected and the total number of votes cast for each candidate.”

of parliamentary elections in a *Gazette* was not and could not be a legislative act of Parliament; nor was it a constitutional act grounded in a provision of the Constitution, 1992. In the light of those conclusions, the Supreme Court unanimously struck out the plaintiff's writ. Sophia Akuffo JSC concluded that:³³

“[T]he plaintiff's cause of action, if any, arises from provisions outside the Constitution and his reliefs lay elsewhere other than by way of an invocation of our original jurisdiction under article 2.”

The Supreme Court's decision, holding that the publication of the results of a parliamentary election in a *Gazette* did not constitute a legislative act of Parliament is unexceptionable and no proper criticism could be levelled at it. However, the decision that a person cannot challenge the veracity of a publication of an election result even on the assumption that the *Gazette* has been back-dated is, with respect, susceptible to criticism. The decision glossed over a very crucial constitutional issue: Where a *Gazette* containing notice to the public of the results of a parliamentary election is back-dated to say 5 January 2003, when it is actually published on 16 January 2003, such back-dating would lead to the following result: such a person cannot exercise his constitutional right to lodge an election petition at the High Court under article 99(1) of the Constitution within the full 21 days as from 5 January as prescribed by PNDCL 284, s 18(1). He would only be left with five days to prepare and lodge his petition under article 99(1). If that is conceded, would that not negate or be inconsistent with his constitutional right under article 99(1) as a direct result of the back-dating of the *Gazette*? Would the effect of back-dating of the *Gazette* not constitute “an act” of “any person” which “is inconsistent with, or is contravention of a provision of this Constitution” within the meaning of article 2 of the Constitution? The answer to these relevant questions, in my respectful view, is surely in the positive. If so, then it could be said that the majority decision

³³ Ibid at p 605.

of the Supreme Court, striking out the plaintiff's writ for want of jurisdiction under article 2 cannot, with great respect, be sustained as proper construction of the constitutional provision. The decision is certainly questionable.

Atuguba JSC in this case, came to the right conclusion on the true effect of the plaintiff's claim founded on the back-dating of the *Gazette*. In delivering his opinion in, the judge said:³⁴

“I believe ... that the truncation of the period within which a plaintiff can invoke the jurisdiction of the High Court under article 99(1) of the Constitution, 1992 if proved, would at least be inconsistent with that article since it unduly impedes its invocation. That act would provoke the wrath of the spirit, if not the letter, of that article.”

In expressing this view, the judge cited the Supreme Court earlier decision in *Mekkaoui v Minister of Internal Affairs*³⁵ and the Court of Appeal decision in *In re Yendi Skin Affairs; Andani v Abudulai*.³⁶

In *Mekkaoui v Minister of Internal Affairs*, the plaintiff sued in the Supreme Court established under the Constitution, 1979 invoking its original jurisdiction under article 2(1) of the Constitution.³⁷ He sought a declaration that the Ghana Nationality (Amendment) Decree, 1979 (AFRCD 42), which purported to deprive him of his status as a citizen of Ghana by naturalisation without obtaining a judicial order of the High Court, was null and void as being: (a) ultra vires the powers of the Armed Forces Revolutionary Council under the 1979

³⁴ Ibid at p 612 (author's emphasis).

³⁵ [1981] GLR 664, SC.

³⁶ [1981] GLR 283, CA.

³⁷ The same as article 2(1) of the present 1992 Constitution.

AFRC Proclamation; and (b) inconsistent with or in contravention of chapters 5, 6, 9 and 12 of the Constitution, 1979.

The Supreme Court found, on the evidence before it, that the impugned enactment, AFRC 42, was actually printed in October 1979 and published in the same October in *Ghana Gazette* No 45 even though the *Gazette* was retrospectively dated 22 September 1979. The Supreme Court also considered section 3(7) of the 1979 AFRC Proclamation, which had provided that where the date of commencement had been stated in a Decree, then it should take effect from that date; but where no date had been stated, then it should take effect from the date of publication. In the light of those considerations, the Supreme Court, by a majority decision, allowed the declaration sought by the plaintiff. The court held, *inter alia*, (as stated in the headnote to the case) that:³⁸

“... the date of notification of AFRC 42 in the gazette was stated as 22 September 1979 whereas in fact AFRC 42 was published as AFRC 42 in October 1979. Consequently, what was published as AFRC 42 in October 1979 was null and void and of no legal consequence.”

The legal consequence following from the declaration of AFRC 42 as a nullity, was pointed out by Taylor JSC in his opinion in support of the majority decision in that case. His lordship said:³⁹

“This case has some features not unlike *Fattal v Minister for Internal Affairs* [1981] GLR 104, SC. It is in essence a case of an alleged Decree of the erstwhile Armed Forces Revolutionary Council by which the plaintiff with ... other persons was said to

³⁸ Ibid at p 666.

³⁹ Ibid at 711 – my emphasis.

have been denaturalised. The alleged Decree is the Ghana Nationality (Amendment) Decree, 1979 (AFRCD 42). In this suit the plaintiff invokes the original jurisdiction of this court under article 2(1) of the Constitution, 1979, for substantially a declaration that the Decree is null and void. In the light of my dissenting views in the *Fattal* case, *such a denaturalisation effected by a Decree will on or after 24 September 1979, be inconsistent with the provisions of article 17(3) of the Constitution, and by virtue of the directive principle in article 1(2) of the Constitution, the Decree will be void and of no effect.*"

It is suggested that there are compelling similarities between the claim in *Amidu v Electoral Commission & Assembly Press* and the claim in *Mekkaoui v Minister of Internal Affairs*: In both claims, the plaintiffs invoked the original jurisdiction of the Supreme Court under article 2 of the 1979 and 1992 Constitutions respectively. The plaintiffs in both cases also challenged the veracity of the date of publication of the *Gazette* in so far as it affected their constitutional rights. Thus in the *Amidu* case, the court per Sophia Akuffo JSC noted that: "what he (the plaintiff) really seeks to safeguard or enforce is the full availability of the 21 days stipulated in section 18 (1) of PNDCL 284." As already noted above, Atuguba JSC in the same case identified the same issue as being that: "The plaintiff contends that ... by publishing the result in the *Gazette* with retrospective date, the right of access to the court under article 99(1) has been impeded or truncated." Similarly, in the *Mekkaoui* case, the plaintiff challenged the veracity of the date of publication as stated in the *Gazette* so as to enforce the acquired rights as a citizen of Ghana by naturalisation – a right protected under the Constitution, 1979 and which AFRCD 42 sought to take away.

In the light of the above comparative analysis of the two cases, namely, *Amidu v Electoral Commission & Assembly Press* and *Mekkaoui v Minister of Internal Affairs*, it could be concluded that the Supreme Court in the *Amidu* case was bound to follow its previous binding decision in the *Mekkaoui* case. The court's decision in the *Amidu* case that the plaintiff could

not, under article 2 of the Constitution, challenge the veracity of any fact in the *Gazette* containing the results of the December 2000 Parliamentary Elections cannot, therefore, with respect, be supported as rightly given. It was a *per incuriam* decision for failing to consider the earlier binding decision in the *Mekkaoui* case.⁴⁰ The decision by the court in the *Amidu* case to strike out the plaintiff's writ, even on the assumption that the *Gazette* bore a retrospective date of publication, constitutes, in my respectful view, an error of law. It constitutes a retrograde step under the Constitutional Law of Ghana in the light of the Supreme Court's earlier binding decision in the *Mekkaoui* case.⁴¹ The decision, in my respectful view, also constitutes a self-imposed limitation on the Supreme Court's power of judicial review under article 130(1) of the Constitution, 1992 as reinforced by article 2(1). It is strongly suggested that it should not be followed by the court in future cases.

OUSTER CLAUSES AND JUDICIAL REVIEW OF LEGISLATIVE ACTION

Introduction

The Supreme Court's power to declare any legislation as a nullity under article 130(1)(b) of the Constitution, is to be exercised subject to the ouster clause in section 34(3) of the Transitional Provisions of the Constitution, 1992.⁴² The primary objective of the whole of section 34, particularly section 34(1) of the Transitional Provisions of the Constitution, is to

⁴⁰ For a recent example of the Supreme Court setting aside its previous decision as given *per incuriam*: see *Republic v Tetteh* [2003-2004] SCGLR 140.

⁴¹ It should be noted that Atuguba JSC in his opinion in the *Amidu* case agreed with the decision to dismiss the plaintiff's action because there was no proven evidence that the impugned *Gazette* was in actual fact published on 16 January 2001 and not 5 January 2001 as stated in the *Gazette* No 1 of 2001.

⁴² The equivalent provision of section 34(3) of the transitional provisions of the Constitution, 1992 was section 15(2) of the transitional provisions of the Constitution, 1979 and section 13(3) of the transitional provisions to the Constitution, 1969.

take away the power or jurisdiction of all the courts to entertain any proceedings or to grant any order in respect of any matter relating to the unconstitutional and violent overthrow of the democratically elected Governments of Ghana by the 1966, 1972, 1979 and 1981 coup d'états. We propose to examine the Supreme Court's power of judicial review of legislative action in the light of the indemnity clauses in sections 34(3) and also the provision in section 36(2) of the transitional provisions of the Constitution, 1992.

The indemnity clause in section 34 (3) and the provision in section 36 (2) of the transitional provisions relating to legislative action

Section 34(3) of the 1992 transitional provisions provides as follows:

"34. (3) For the avoidance of doubt, it is declared that no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defence Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defence Council or the Armed Forces Revolutionary Council or by any person appointed by the Provisional National Defence Council or the Armed Forces Revolutionary Council in the name of either the Provisional National Defence Council or the Armed Forces Revolutionary Council shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act."

On the face of it, the obvious effect of section 34(3) is to prohibit the courts, and the Supreme Court for that matter, from questioning in any proceedings whatsoever the executive, legislative or judicial action taken or purported to have been taken either by the PNDC or

AFRC or by any person appointed by those regimes even if (as stated in section 34(4)), the action “was not taken in accordance with any procedure prescribed by law.”⁴³

It is suggested that the immunity granted by section 34 was and is necessary and justified on the grounds of pragmatism, good sense and the maintenance of stability and national reconciliation without which there can be no sustained socio-economic development of Ghana.

It should be stressed, however, that the indemnity clause in section 34, particularly section 34(1) cannot, on the face of it, be construed by the Supreme Court as giving indemnity to crimes or illegal or unlawful or civil acts, not authorised by the PNDC, but committed by members of the PNDC in their individual private capacity. Indeed, under section 34(1), no member of the PNDC “shall be held liable either jointly or severally for any act or omission during the administration of the Provisional National Defence Council.” It is necessary to set out section 34(1) and (2) which states:

“34.(1) No member of the Provisional National Defence Council, Provisional National Defence Council Secretary, or other appointees of the Provisional National Defence Council shall be held liable either jointly or severally, for any act or omission during the administration of the Provisional National Defence Council.

(2) It is not lawful for any court or tribunal to entertain any action or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of Ghana whether before or after the coming into force of this Constitution or against any person or

⁴³ See *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35, SC where Amua-Sekyi JSC was of the view that section 34(3) should not be seen as standing

persons acting in concert or individually to assist or bring about the change of Government which took place on the twenty-fourth day of February 1966, on the thirteenth day of January 1972, on the fourth day of June 1979 and on the thirty-first day of December 1981 in respect of any act or omission relating to, or consequent upon –

(a) the overthrow of the government in power before the formation of the National Liberation Council, the National Redemption Council, the Supreme Military Council, the Armed Forces Revolutionary Council and the Provisional National Defence Council;... or”

Commenting on the true effect of section 34(1), Mr Martin Amidu, the former Deputy Attorney-General and Minister of Justice under the Rawlings Government (now in opposition) wrote:⁴⁴

“It has been argued that it [ie section 34(1)] is a blanket indemnity for all PNDC members, secretaries and other appointees for any acts done while the PNDC was in authority... It is however our submission that section 34(1) can be construed to exclude crime and civil liabilities not necessarily and exclusively incidental to the office or functions of a PNDC member, secretary or appointee... If we have the likes of the Hon Mr Justice Taylor and the Hon Mr Justice Anin on the Supreme Court, the concept of total indemnity cannot easily be read into that provision. It can be construed as

alone but referable to section 34(1) and (2).

⁴⁴ See Amidu, M “The Scope and Effect of Judicial Power in the Enforcement and Defence of the Constitution, 1992” (1991-92) 18 RGL 120 at 154.

being limited to acts necessarily and exclusively incidental to the office ...
of a functionary.⁴⁵

The crucial question to be addressed, however, is: first, what is the true legal effect of section 34(3)? Does the ouster clause in section 34(3) prohibit the Supreme Court from questioning the validity or legality of enactment passed by the PNDC and the AFRC, which form part of the existing law as defined by article 11(4) of the Constitution and which are clearly inconsistent with any provisions of the Constitution, 1992? This question is especially relevant in the light of two other provisions: First, section 36 (2) of the same transitional provisions which states that:

“36 (2) Notwithstanding the abrogation of the Proclamation referred to in subsection (1) of this section, any enactment or rule of law in force immediately before the coming into force of this Constitution shall, in so far as it is not inconsistent with a provision of this Constitution, continue in force as if enacted, issued, or made under the authority of this Constitution.”

Second, attention should be drawn to the provision in article 11(6) of the Constitution, which provides that the existing law should be construed with "modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the Constitution."

⁴⁵ See a Ghanaian daily newspaper, *The Evening News*, Monday June 2, 2003 No 839 edition, front page where Professor Kofi Kumado was quoted as having stated that the “indemnity clauses in constitutions can no longer protect perpetrators of crime.” See also *The Evening News*, Friday June 6, 2003 edition, front page where Mr Abraham Osei-Aidoo, the Deputy Leader of the Majority Party in Parliament under President Kufuor Administration, was also quoted as stating that the indemnity clause in section 34(2) does not cover the commission of crimes; and that any person who has evidence to implicate the former President J J Rawlings in the case involving the murder of the judges and the retired Army Officer, could institute a criminal action in the matter.

The issue herein raised was determined by the Supreme Court in *Ellis v Attorney-General*.⁴⁶ The issue turned on the validity of the Hemang Lands (Acquisition and Compensation Law), 1992 (PNDCL 294), ss 1 and 2 of which provided that:

"(1) Notwithstanding any law or anything to the contrary, the lands specified in the Schedule to this Law are hereby vested in the Provisional National Defence Council, on behalf of the Republic, free from all encumbrances.

2.(1) There shall be payable to the Ellis and Wood families a final and total compensation in the sum of two hundred million cedis in respect of the said land.

(2) The compensation specified in subsection (1) of this section shall be paid subject to the deduction therefrom of all taxes, rents and other charges payable and outstanding in respect of the said lands."

The plaintiffs in this case sued the Attorney-General in the Supreme Court for a declaration under article 2 of the 1992 Constitution that, PNDCL 294 is inconsistent with and in contravention of the Constitution, 1992 particularly articles 20 and 107; and also for an order to strike down the Law as a nullity under the Constitution. The Attorney-General raised a preliminary objection to the action on the ground that PNDCL 294, being the legislative act of the PNDC, could not be questioned by the courts by virtue of the provisions in section 34(3) of the transitional provisions to the Constitution, 1992.

The preliminary objection was unanimously upheld by the Supreme Court. Adjabeng JSC, who delivered the ruling of the court, held that the court had no jurisdiction under section 34(3) of the transitional provisions to declare PNDCL 294 a nullity under the Constitution

⁴⁶ [2000] SCGLR 24.

because PNDCL 294 had been enacted and its provisions implemented, ie the plaintiffs' lands had been acquired and vested in the PNDC on behalf of the Republic before the coming into force on 7 January 1993 of the Constitution; and that the Constitution was to be applied prospectively and not retrospectively. The learned justice said:⁴⁷

"What did PNDCL 294 do? This Law, at the time it took effect in 1992, vested the plaintiffs' lands in the Republic ... And this was done before the 1992 Constitution came into force on 7 January 1993. There is nothing in the Law suggesting anything else to be done before the vesting of the lands would be complete. At the time the Law came into force in 1992, therefore, the acquisition and vesting of the plaintiffs' lands were complete. The only thing the plaintiffs were to do was to collect the compensation stated in the Law. I find it difficult to see how this court can legally use the provisions of the 1992 Constitution to declare that PNDCL 294 is null and void."

In concurring with the leading ruling, Atuguba JSC made the position even more explicit when he said⁴⁸:

"PNDCL 294 relates to matters concluded by it in terms of the vesting of the plaintiffs' lands in the PNDC on behalf of the Republic and as to the quantum of compensation for the same. *As these matters do not fall to be done on or after the coming into force of the 1992 Constitution, that Law, even if it be regarded as an operative existing law within the meaning of article 11(5), is incapable of infringing the 1992 Constitution...* [T]hough I accept the submission ... that article 11(5), relating to the operation of the existing law, is subject ...to the provisions of the

⁴⁷ Ibid at 35-36.

⁴⁸ Ibid at 41-42 (my emphasis)

Constitution, inclusive of section 36(2) of the transitional provisions, yet the said 36(2) itself is subject to the principle of prospectivity of statutes... *Therefore, the consistency requirements of the said section 36(2) of the transitional provisions must relate to consistency with provisions of the Constitution directing something to be done or not to be done in a certain manner or otherwise governing a state of affairs in any respect, as from 7 January 1993 and not before that date...*

The pertinent question, therefore, is whether PNDCL 294, which expropriated the plaintiffs' property, requires anything to be done which can affect the period commencing from 7 January 1993 (when the Constitution came into force), in a certain manner whereas a provision of the Constitution requires that very thing to be done as from 7 January 1993, in a different manner. The answer is clearly No!"

The effect of the unanimous decision of the court is that where the existing law such as the laws passed by the PNDC and the AFRC required anything to be done and what is to be done has already been done before the coming into force of the Constitution, 1992 that legislation cannot be questioned by the Supreme Court by virtue of the provision in section 34(3). However, where an enactment by the PNDC or the AFRC requires anything to be done after the coming into force of the Constitution, then if what is to be done is inconsistent with any provision of the Constitution, then that Law can be questioned by the Supreme Court under section 36(2) of the transitional provisions. This appears to be the true legal position because under section 36(2) of the 1992 transitional provisions:

"any enactment or rule of law immediately before the coming into force of [the]Constitution shall, (and this includes enactments by the PNDC and the AFRC) in so far as is not inconsistent with a provision of [the] Constitution, continue in force as if enacted, issued, or made under the authority of [the] Constitution."

It should be pointed out that in support of the ruling in the *Ellis* case, Bamford-Addo JSC expressed her views as to the legal effect of sections 34(3) and 36(2) of the transitional provisions, on the issue of questioning the validity of enactments passed by the PNDC and the AFRC, as follows:⁴⁹

"The effect of section 36(2) is that the existing law passed by any government except the PNDC or Armed Forces Revolutionary Council Government could be challenged under section 36(2) of the transitional provisions of the Constitution if it is found to be inconsistent with a provision of the 1992 Constitution. However, the exception to this is clearly stated in the provisions of section 34(3) of the transitional provisions and affects PNDCL 294, which is a legislative act of the PNDC Government... By virtue of section 34(3)... PNDCL 294 cannot be questioned by this court; nor can any remedy or relief be granted in respect of any such challenge to the unconstitutionality of the said law, notwithstanding section 36(2) of the transitional provisions."

The above pronouncement by Bamford-Addo JSC on the legal effect of section 34(3) in relation to the existing laws passed by the AFRC and the PNDC, with special reference to PNDCL 294 cannot, with great respect, be allowed to stand without further comment. If by the above pronouncement, the judge meant that the court could not, by virtue of section 34(3), challenge the validity of PNDCL 294 in that what PNDCL 294 sought to do, has already been done, then one could accept the above dictum as the correct statement of the law. However, it appears by the above pronouncement, the judge sought to construe section 34(3) as meaning that the existing law - being laws passed by the AFRC and the PNDC could not, by virtue of section 34(3), "be challenged under section 36(2) of the transitional provisions even if they are found to be inconsistent with a provision of the 1992 Constitution."

⁴⁹ Ibid at page 28 (author's emphasis).

It is respectfully suggested that the interpretation placed by the judge on sections 34(3) and 36(2) of the transitional provisions cannot be supported in law. It appears that in construing section 34(3) of the transitional provisions, Bamford-Addo JSC, did not, unlike the leading opinion delivered by Adjabeng JSC and reinforced by the opinion of Atuguba JSC, distinguish between legislative "action taken or purported to have been taken" by the PNDC and the AFRC, ie as legislation dealing with matters implemented and concluded before the coming into force of the 1992 Constitution and legislation being part of the existing law which would affect matters not yet implemented and are to be enforced after the coming into force of the Constitution. The former, ie matters concluded and executed under legislation by the PNDC and the AFRC cannot be questioned by the Supreme Court by virtue of section 34(3). However, the latter, ie legislation dealing with matters to be taken after the coming into force of the Constitution can be challenged if the legislation in question is part of the existing law. Such legislation, whether or not passed by the PNDC and the AFRC, can be questioned if in terms of section 36(2) they are "inconsistent with a provision" of the 1992 Constitution.

The view expressed above as to the true legal effect of section 34(3) of the transitional provisions can be supported by the opinion given by Charles Hayfron-Benjamin JSC in support of the leading opinion in the *Ellis* case. The judge said:⁵⁰

"... in this case, the plaintiffs have not pointed to any specific article in the Constitution which PNDCL 294 may be said to be inconsistent with and for which reason, it should be void. PNDCL 294 is therefore an existing law within the intendment of article 11 of the Constitution."

In any case, there are two previous decisions of the Supreme Court which negate the interpretation placed by Bamford-Addo JSC on the legal effect of section 34(3) of the

⁵⁰ [2000] SCGLR 24 at 29 (my emphasis).

transitional provisions, namely, that the legislation passed by the PNDC and the AFRC - being part of the existing law - cannot be questioned by the Supreme Court by virtue of the provision in section 34(3) of the 1992 transitional provisions even if they are inconsistent with the provisions of the Constitution, 1992. The two cases are: *Gbedemah v Awoonor-Williams*⁵¹ - cited by Atuguba JSC in the *Ellis* case in his concurring opinion; and the case of *Fattal v Minister for Internal Affairs*⁵² - also cited by Adjabeng JSC in his leading opinion in the same *Ellis* case.

In *Gbedemah v Awoonor-Williams*, the plaintiff was the losing candidate for the Keta Constituency in the 1969 General Parliamentary Elections held in Ghana.; whilst the defendant was the winning candidate for the same constituency. The plaintiff sued in the Supreme Court for a declaration that, by virtue of the provision in article 71(2) (b) (ii) of the Constitution, 1969 the defendant was not qualified to be a member of the National Assembly and an injunction to restrain him from taking his seat as an elected Member of Parliament. The plaintiff's claim was founded on the fact that the defendant had been "adjudged or otherwise declared" by a commission of inquiry to have acquired assets unlawfully while being a public officer. That commission of inquiry (the Jiagge Commission) had been set up under the NLC (Investigation and Forfeiture of Assets) Decree, 1966 (NLCD 72). A subsequent Decree, NLC (Investigation and Forfeiture of Assets) (Amendment) Decree, 1967 (NLCD 129), took away the right of appeal from adverse findings against any person by a committee of inquiry set up under NLCD 72. Yet another Decree was passed by the NLC Military Government, namely the NLCD (Investigation and Forfeiture of Assets) (Further Implementation of Commission's Findings) Decree (NLCD 354). The purpose of that Decree was to realise and get in assets found by the committee of inquiry to have been acquired

⁵¹ (1969) 2 G & G 442, SC.

⁵² [1981] GLR 104, SC.

unlawfully. Under the Decree, such findings that the assets were unlawfully acquired were deemed to be judgments of the High Court without the right of appeal.

In his defence, the defendant, in a counterclaim, challenged the constitutionality of the two enactments passed by the NLC, namely, NLCD 129 and 354 on the ground that they were against the spirit and letter of article 102 of the Constitution, 1969. The said article 102 had vested the exercise of judicial power solely in the courts. In holding that the two Decrees were constitutional, the Supreme Court, by majority decision, per Apaloo JA, held that:⁵³

"No Decree which was passed by the National Liberation Council could have been struck down by the courts as unconstitutional. In our opinion, ...not only were the two Decrees perfectly valid at the dates of their passing,, but so were any acts and steps taken under them ...

As we read the Constitution, it has no retrospective effect on Decrees passed by the National Liberation Council on *matters lawfully transacted under them*. On the contrary, we read section 13(3) of the 1969 transitional provisions [similar to section 34(3) of the 1992 transitional provisions] as wholly validating them including ... the findings of the commissions established under the Decree 72 ..."

Similar conclusion was subsequently reached by the full bench of the Court of Appeal in *Benneh v The Republic*.⁵⁴ In this case, the plaintiff attacked the validity of the National Liberation Council (Investigation and Forfeiture of Assets) (Further Implementation of Commissions' Findings) (No 3) Decree, 1969 (NLCD 400), on the ground that the Decree had been enacted after the 1969 Constitution had come into force, and that its provisions under which the State was seeking to acquire property without compensation, were in conflict with

⁵³ Ibid at (my emphasis)

⁵⁴ [1974] 2 GLR 47 – a case also cited by Atuguba JSC in the *Ellis* case.

articles 12 and 18 of the 1969 Constitution. In upholding the validity of NLCD 400, the majority of the court, per Apaloo JA, held that NLCD 400, having been enacted after the coming into force of the 1969 Constitution, must conform to the provisions of the Constitution. However, the majority found that the provisions of the Decree dealt with matters that had been effected before the coming into force of the Constitution, namely, the forfeiture to the State of the properties of the plaintiff as declared by the commission of inquiry, whose findings had been authenticated by the commission before the promulgation of the Constitution, 1969. Thus it was not NLCD 400 that had expropriated the plaintiff's property without compensation. The majority therefore construed NLDC 400 as not invalid.

Similar conclusions were also reached by the Supreme Court in *Fattal v Minister for Interior*.⁵⁵ The plaintiffs contended that the Ghana Nationality (Amendment) Decree, 1978 (SMCD 172) was unconstitutional because it was inconsistent with chapters 5, 9 and 12 of the Constitution, 1979. In rejecting the contention, the Supreme Court by majority decision held, inter alia, that although SMCD 172 was on the statute books as part of the existing law, it was no longer operative because whatever was intended to be done by the Decree, ie the cancellation of the certificate of naturalisation earlier given to the plaintiffs, had been done and completed; that even if SMCD 172 was still operative, its repeal would not restore the certificates of naturalisation given to the plaintiffs in view of the provision in section 8 of the Interpretation Act, 1960 (CA 4).

The decision in the *Fattal* case is to be contrasted with the recent decision of the Supreme Court in *Sam (No 2) v Attorney-General*.⁵⁶ In this case, the plaintiff challenged the validity of section 15 of the Divestiture of State Interests (Implementation) Law, 1993 (PNDCL 326), which provided that:

⁵⁵ [1981] GLR 104, SC – cited by Adjabeng JSC in the *Ellis* case..

⁵⁶ [2000] SCGLR 305.

“15. No action shall be brought and no Court shall entertain any proceedings against the State, the Committee or any member or officer of the Committee in respect of any act or omission arising out of the disposal of any interest made or under consideration under this Law.”

The Supreme Court held that the indemnity granted by section 15 of PNDCL 326 was contrary to and inconsistent with articles 140(1) and 293(2) and (3) of the Constitution, 1992 and therefore void under article 1(2) of the Constitution. Article 140(1) vested the High Court with jurisdiction in all matters, subject to the provisions of the Constitution; whilst article 293 (2) and (3) gave the right to all persons to seek redress and relief from the courts for any torts committed against them by the State itself as if it were a private person of full age and capacity. The Supreme Court further held that section 15 of PNDCL 326 could not be upheld as valid under section 34 of the transitional provisions of the Constitution because the indemnity granted by section 34 covered only acts or omissions of the PNDC Government committed before 7 January 1993 when the 1992 Constitution came into force. In support of the unanimous decision of the Supreme Court in *Sam (No 2) v Attorney-General*, Bamford-Addo JSC said:⁵⁷

“ To allow section 15 of PNDCL 326 to remain in our statute books...is to permit a direct misguided attack on the cherished hopes and aspirations of the sovereign people of Ghana, to wit, to live under the rule of law specified forcefully in the preamble to the 1992 Constitution. The Constitution stipulates that all persons shall live under the rule of law in justice, equality and freedom, to ensure unity and stability of this nation.”⁵⁸

⁵⁷ Ibid at 323 (my emphasis).

⁵⁸ This view is the most welcomed. It is, however, contrary to the previous opinion of the judge in the *Ellis* case to the effect that an enactment by the PNDC which is clearly inconsistent with a provision of the Constitution cannot be challenged because of section 34 (3) of the transitional provisions.

Atuguba JSC in the same case also said:⁵⁹

“...section 34(3) of the transitional provisions provides only a partial and not a total indemnity. It indemnifies only the validity of executive, legislative or judicial acts of the PNDC and its agents so far as the period of the administration of the PNDC is concerned. It is in this way that effect can be given to both sections 34(3) and 36(2) of the transitional provisions...If section 34(3) were to be given total coverage of operation, then it would nullify section 36(2)...”

The decision of the Supreme Court in *Sam (No 2) v Attorney-General* could be further supported by the argument that the true effect of section 15 of PNDCL 326 was that it was a continuing law. Therefore, to the effect that it purported to be in force after 7 January 1993, when the 1992 Constitution came into force, it offended the 1992 Constitution and was thus void. It is also necessary to draw attention to the earlier unanimous decision of the Supreme Court in *Attorney-General v Commission on Human Rights and Administrative Justice (No 2)*,⁶⁰ where the court held that the defendant commission could not commence an investigation on the basis of what it conceived as past conduct which had contravened provisions of chapter 18 of the Constitution, 1992; and that matters concluded by governments before 7 January 1993 could not be investigated by the commission.

It is very important to stress the legal and political significance of the Supreme Court decisions in *Sam (No 2) case* and *Attorney-General v Commission on Human Rights and Administrative Justice*, on the question of indemnity for past injustices and wrongs committed during the period of military rule. These decisions would help sustain the stability of the present democratic system of government after many years of military rule. By these

⁵⁹ Ibid at 333-334.

⁶⁰ [1998-99] SCGLR 894, SC.

two decisions, the Supreme Court properly drew a sharp line between the past and the present. The net effect is that the Government of the PNDC and its appointees cannot be held accountable for their stewardship by virtue of the provision in section 34(3) of the transitional provisions; but the Government of the NDC, democratically elected and headed by former President JJ Rawlings must be held accountable for their stewardship during the eight-year democratic rule under the Constitution, 1992. However, witch-hunting and unnecessary acts of harassment against the members of the NDC Government (now in opposition), should not be countenanced and encouraged by the NPP Government which was also democratically elected under the Constitution, 1992. To do otherwise might lead to the creation of a one party state which is prohibited under the 1992 Constitution.

Apaloo JA for the majority in the *Benneh* case, summed up the legal position as to when the Supreme Court could invalidate legislation on grounds of inconsistency with constitutional provisions despite an ouster clause such as section 13(2) of the 1969 Constitution or section 34(3) of the 1992 Constitution: His lordship said:⁶¹

"The inviolability of the Decrees to which expression was given, can only relate to the era of the National Liberation Council. It is equally clear, that the acts referred to were acts done during such an era on the authority of those Decrees. There was, during the National Liberation Council regime, no 'fundamental law' against which the validity or otherwise of any legislation could be tested. The Constitution which became operative on 22 August 1969, was prospective and did not seek to invalidate acts which were done before it came into being. After the coming into force of the Constitution, those Decrees have legislative efficacy only in so far as they harmonise with the provisions of the Constitution. If they fall foul of it, they go. NLCD 400,

⁶¹ [1974] 2 GLR 47 at 85 (author's emphasis).

whose validity is in question, was passed after the promulgation of the Constitution and the act of attachment about which the plaintiff complains, took place during the subsistence of the fundamental human rights provisions of the 'fundamental law.' That law, that is, NLCD 400, as well as the attachment attempted under it, was not inviolable. It was, we think, open to challenge and the plaintiff was within his rights to so challenge it. In our opinion, the provisions of section 13(3) do not preclude us from determining the validity or otherwise of the impugned legislation."

The distinction made by the Supreme Court in the *Benneh* case (supra) – a distinction also made in the earlier cases such as *Gbedemah v Awoonor-Williams* and in recent cases such as *Ellis and Sam (No2)* marks a very significant development of Constitutional Law in Ghana: The ouster clause in section 34(3) of the transitional provisions is relevant and effective only in respect of legislative, executive and judicial action taken or purported to have been taken and completed by the Military Regimes before the coming into force of the Fourth Republican Constitution, 1992. However, the existing law (including laws passed by previous military regimes) can be declared void by the Supreme Court in the exercise of its power of judicial review of legislation notwithstanding the provision in section 34(3) of the transitional provisions if they are inconsistent with, or to borrow the words of Apaloo JA (as he then was) in the *Benneh* case, if they do not "harmonise with the provisions of the Constitution. If they fall foul of it, they go."⁶²

⁶² For further examination of the indemnity clause in the Constitution, 1992: see Kumado, C E K "Forgive us our Trespasses: An Examination of the Indemnity Clause in the 1992 Constitution of Ghana" (1993-95) 17 UGLJ 83. At page 85 Professor Kumado observed: "The indemnity clauses provide the victims no hope." That observation was subsequently sanctioned by the Supreme Court in respect of matters concluded before the coming into force of the 1992 Constitution as per its decisions in the cases of *Ellis and Sam No 2* –examined in detail above. At page 100, the learned author recommends "a non-legal solution to the objectives of the indemnity clauses and the problems they give rise to." The suggested recommendation appears to be the only realistic remedy for victims of military rule. These victims may now seek redress at the Justice Amua-Sekyi National Reconciliation

LEGALITY OF COUP D'ETATS AND JUDICIAL REVIEW OF LEGISLATIVE ACTION

Introduction

It is conceded that the Supreme Court in the three cases examined above, namely: *Gbedemah v Awoonor-Williams*, *Fattal v Minister for Internal Affairs* and *Ellis v Attorney-General* and also the full bench of the Court of Appeal in *Benneh v The Republic*, upheld the validity of the Laws or Decrees passed the NLC, SMC and the PNDC Military Regimes. However, those decisions should not be viewed or considered as the Supreme Court's endorsement or approval of the legality of coup d'états or a military regime itself in an independent sovereign state like Ghana. In fact, the issue of the legality or otherwise of a military regime itself was neither raised nor argued in all the four cases examined above on the question of ouster clauses and judicial review of legislation.

Examination of the issue of the legality of a coup d'état

However, the issue was raised and discussed by no less authority than the late T O Elias⁶³ in his book: *The Judicial Process in Commonwealth Africa*.⁶⁴ The learned author examined, inter alia, a number of cases determined by both the Nigeria and the Ghana Supreme Courts.

Commission appointed by the Ghana Government under the National Reconciliation Commission Act, 2002 (Act 611), which sat in Accra and other cities and places in Ghana to hear petitions from the public. The commission submitted its final Report on 12 October 2004. See *Daily Graphic* 13 October 2004, front page.

⁶³ Formerly Professor and Dean of the Faculty of Law, University of Lagos; Chief Justice of Nigeria and President of the International Court of Justice, The Hague.

⁶⁴ *Aggrey-Fraser and Guggisburg Memorial Lectures*, University of Ghana 1975; Lecture Four titled: "Judicial Interpretation of the Constitution" at pp 93-102.

He referred to the decision of the Nigerian Supreme Court in *Adamolekun v The Council of the University of Ibadan*.⁶⁵ The court in this case upheld as valid section 6 of the Constitution (Amendment and Modification) Decree No 1 of 1966. It thus held that the provision in section 6 to the effect that no question as to the validity of any Decree or Edict was to be entertained by any court did not preclude the courts from inquiring into any question of inconsistency in a Decree or Edict; and that section 6 merely barred the courts from questioning the validity of the making of a Decree or Edict on the ground that there was no valid legislative authority to make one.

The learned author also cited the case of *Lakanmi v The Attorney-General (Western State)*.⁶⁶ The case came before the Nigerian Supreme Court on appeal from the decision of the Western State Court of Appeal. The plaintiffs challenged the validity of a Decree of the Federal Military Government under which the Western State Government had established a tribunal of inquiry to investigate the assets of certain public officers suspected of having been corruptly acquired. Adverse findings were made against the plaintiffs by the inquiry tribunal and their assets were forfeited to the State. The Western State Court of Appeal applied the earlier Supreme Court decision in *Adamolekun* (supra) and therefore upheld the validity of the Decree. The plaintiffs further appealed to the Supreme Court. The decision of the Western State Court of Appeal was reversed. The Supreme Court held, inter alia, that the Federal Military Government, as a temporary military regime, had no competence to make laws, not justified by the necessity of the State, although the power transferred to it was to make laws for the “peace, order and good government of Nigeria on any matter whatsoever.”

⁶⁵ (1967) 1 All NLR 213.

⁶⁶ (1971) 1 University of Ife Law Reports 201.

The Nigerian Supreme Court decision in the *Lakanmi* case, in effect, challenged the legality of the Federal Military Regime itself apart from declaring as invalid the Decrees passed by the Federal Military Regime. The reaction of the Federal Military Government was to pass another legislation: The Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970. That Decree re-affirmed the coup d'état which took place on 15 January 1966 and which led to the establishment of the Federal Military Government.

As earlier pointed out, T O Elias also referred to two decisions of the Ghana Supreme Court on the issue of legality of coup d'états: *Gbedemah v Awoonor-Williams*⁶⁷ – a decision already examined in detail above and *Sallah v Attorney-General*⁶⁸ – a decision to be examined in detail below. After examining the Supreme Court's decision in *Gbedemah v Awoonor-Williams*, T O Elias quoted the following observation by the majority of the court, per Apaloo JA, (as he then was):⁶⁹

“... it would be accurate to say that judicial power was exercised by the courts during the era of the National Liberation Council on sufferance. To say this is not to accuse the National Liberation Council even obliquely of totalitarianism or cast anything like a posthumous reflection on a regime which was in many respects a liberal one. But we think this is the true constitutional position. *No Decree which was passed by the National Liberation Council could have been struck down by the courts as unconstitutional.* In our opinion, ... not only were the two Decrees perfectly valid at the dates of their passage, but so were any acts

⁶⁷ (1969) 2 G & G 442.

⁶⁸ (1970) 2 G&G 493.

⁶⁹ Ibid at 101.

and steps taken under them including ... the findings of the Commissions established under the Decree 72 and Act 250.”

Commenting on the above pronouncement of the majority in *Gbedemah v Awoonor-Williams*, Elias said:⁷⁰

“Thus the Supreme Court of Ghana reached a conclusion which was in consonance with those reached by its Nigerian counterpart in earlier cases before the strange decision in the *Lakanmi* Case in 1970... *The Ghana Supreme Court had in this way vindicated the legality of the military regime* without the existence of any specific Decree to that effect, as there was in Nigeria – namely, the Constitution (Suspension and Modification) Decree No 1 of 1966. *It is also significant that throughout the judgment in Gbedemah v Awoonor-Williams the Ghana Supreme Court had no occasion to make any conscious reference to the four principles of customary international law governing the legality of illegal regimes...*”

The above observation by Elias calls for two comments: First, his conclusion to the effect that the Supreme Court decision in the *Awoonor-Williams* case had “in this way vindicated the legality of the military regime” does not, with great respect, reflect the true decision of the court. It is wrong to suggest that the Supreme Court in the *Awoonor-Williams* case passed any judgment on the legality of the NLC Military Regime itself. The effect of the decision was simply to uphold the validity of the Decrees passed by the NLC, namely NLCD 129 and 354 on the ground that they were not against the spirit and letter of article 102 of the 1969

⁷⁰ Op cit page 101 (the emphasis is mine).

Constitution.⁷¹ Second, the statement by the learned author to the effect that the Supreme Court “did not make any conscious reference to the four principles of customary international law governing the legality of illegal regimes” assumes that the issue of the legality or otherwise of the military regime itself was raised and argued before the court.⁷² There was no such argument before the court and it was therefore clearly unnecessary for the court to say anything on the illegality or otherwise of regimes established by coup d’etats.

It was rather in *Sallah v Attorney-General*⁷³, that (as was rightly observed by Elias)⁷⁴ the Supreme Court “had to determine definitively the precise legal effect of a coup d’etat on the country’s legal system.” The plaintiff in this case was on 16 October 1967 appointed as a manager of a statutory corporation⁷⁵ set up under the Statutory Corporations Act, 1961.⁷⁶ His

⁷¹ Article 102 of 1969 Constitution vested the exercise of judicial power in the Judiciary and that “no organ or agency of the executive shall be given any final judicial power.”

⁷² The four basic requirements or principles of customary international law as legitimizing a coup d’etat as an effective and legal way of changing a government as noted by Elias op cit at page 97 are: (a) there must have been an abrupt political change, eg a coup d’etat or a revolution, not necessarily by the use of armed force; a change by a military junta or by a civilian group subverting the existing legal order, with or without the aid of the military; (b) the change must not have been within the contemplation of the existing constitution; if it were, then the change would be merely evolutionary, ie constitutional; it would not have been revolutionary; (c) the change must destroy the entire legal order except what is preserved; and (d) the new constitution and government must be effective, ie no concurrent rival regime or authority.

⁷³ (1970) CC 55 (coram: Apaloo, Siriboe, Sowah, Anin and Archer JJA).

⁷⁴ Op cit at pp 101-102.

⁷⁵ Ghana National Trading Corporation (GNTC).

⁷⁶ Act 41 which was later repealed and re-enacted by the Statutory Corporations Act, 1964 (Act 232).

appointment was subsequently terminated by a letter issued by the Presidential Commission in purported exercise of its power of dismissal under the Constitution, 1969 Sched 1, s 9(1) which provided:⁷⁷

“9. (1) Subject to provisions of this section, and save as otherwise provided in this Constitution, every person who immediately before the coming into force of this Constitution held or was acting *in any office established*

(a) by or in pursuance of the Proclamation for the constitution of a National Liberation Council for the administration of Ghana and for other matters connected therewith dated the twenty-sixth day of February, 1966, or

(b) in pursuance of a Decree of the National Liberation Council, or

(c) by or under the Authority of that Council,

shall, as far as is consistent with the provisions of this Constitution, be deemed to have been appointed as from the coming into force of this Constitution to hold or to act in the equivalent office under this Constitution for a period of six months from the date of such commencement, unless before or on the expiration of that date, any such person shall have been appointed by the appropriate appointing authority to hold or to act in that office or some other office.”

The plaintiff therefore brought an action before the Supreme Court for a declaration that on a proper and true construction of section 9(1), the government represented by the Presidential Commission, was not entitled to terminate his appointment.

⁷⁷ My emphasis.

At the hearing, counsel for the plaintiff argued that on a proper construction of section 9(1) of the transitional provisions, the plaintiff's appointment as a manager did not fall within the phrase "in any office established" appearing in section 9(1). In a counter argument, the Attorney-General,⁷⁸ representing the Government of Ghana, relied on paragraph 3(2) of the NLC Proclamation, 1966 (referred to in section 9(1) of the transitional provisions.) The said section 3(2) provided:

“(2) Subject to any decree made under the immediately preceding sub-paragraph, any enactment or rule of law in force in Ghana immediately before the 24th day of February, 1966 shall continue in force and any such enactment or rule of law may by decree of the National Liberation Council be revoked, repealed, amended (whether by addition, omission, substitution or otherwise) or suspended.”

Basing his argument solely on Kelsen's *General Theory of Law and State*, counsel for the State contended that paragraph 3(2) of the Proclamation had the effect of re-establishing all the public services of Ghana and all those public offices held by persons (including the plaintiff). It was thus argued that the 1966 NLC Proclamation had the effect of sweeping away the old legal order and establishing a new order from which all laws and institutions derived their validity. Counsel therefore concluded that the word "established" in section 9(1) must be construed in its technical meaning as "deriving legal validity from." As was aptly put by a learned commentator:⁷⁹

“It was to circumvent [the] result of reading the disputed provision in its plain meaning that the Attorney-General invoked Kelsen's theory of the legal effect of

⁷⁸ Hon Mr N Y B Adade, now retired Justice of the Supreme Court.

⁷⁹ See Date-Bah, S K "Jurisprudence's Day in Court in Ghana" (1971) ICLQ 315 at 317 (the learned commentator is now Justice of the Supreme Court of Ghana.)

revolutions and *coups d'etat* on legal systems to support his plea that the word 'establish' in section 9(1) should be given a 'technical meaning'."

The Supreme Court, by a majority decision,⁸⁰ rejected the technical meaning interpretation sought to be placed on the phrase "in any office established." The majority held that the word "established" in the context of section 9(1) must be construed as meaning that any person who held or acted in any office created or set up by the NLC Proclamation, a Decree of the NLC or under an authority of the NLC was caught by section 9(1). Since the plaintiff's appointment did not fall under any of the above heads, the termination of his appointment was unlawful. The majority did not mince its words in rejecting the technical meaning interpretation founded on Kelsen's jurisprudential theory of law. Archer JA (as he then was) said:⁸¹

“The Constitution of Ghana is a conglomeration of English words. The lives of citizens depend on these words. Rights and obligations, qualifications and disqualifications, privileges and disabilities depend on these words. Unless these words are *specially defined in the Constitution, then the ordinary meaning of these words as properly and generally understood by literate persons should prevail*. No system of jurisprudence, however popular, be it analytical positivism, the Pure Theory, or the Historical, can assist the courts in this country in their interpretation of the Constitution.”

⁸⁰ Per Apaloo, Sowah and Archer JA (Anin and Siriboe JJA dissenting).

⁸¹ See certified judgment of the court, Suit No SC 8/70, 20 April 1970 at 29 (my emphasis).

As Apaloo JA (as he then was) also succinctly put it:⁸²

“We should fail in our duty to effectuate the will of the Constituent assembly if we interpreted the Constitution, 1969, Sched I, s 9(1), not in accordance with its letter and spirit but in accordance with some *doctrinaire juristic theory*.”

In so holding, the majority did not find as relevant to the interpretation of section 9(1) of the transitional provisions of the Constitution, the argument founded on the Kelsenite theory of a legal system deriving its validity from one basic source, the *Grundnorm*.⁸³

As earlier noted, Siriboe and Anin JJA dissented from the majority opinion. Siriboe JA refused or failed to give his reasons for dissenting after the conclusion of the hearing of arguments and the holding of the judgment conference at which the judges reached their decision.⁸⁴ However,

⁸² Ibid at 89 (my emphasis) – (earlier quoted) bears repetition in this context.

⁸³ Date-Bah, op cit at 320, took the majority to task for their failure to address the issue raised by reference to Kelsen's theory of law: what is the legal effect of a coup d'etat on a country's legal system? As the learned commentator put it ibid: "their judgments nowhere contain express reasons why the Kelsenite analysis of the effect of a *coup d'état* is wrong." It appears this criticism is, with respect, uncalled for. Where a court finds a legal argument irrelevant to the resolution of a legal issue - whether to give an ordinary or technical meaning to the wording of a statute - it would be nothing short of *obiter* for a court to make a pronouncement on such a legal argument. There are numerous instances where the courts have declined to do so. In the instant case, the learned commentator at page 323 himself conceded that the Kelsenite analysis of the legal systems as founded on the Grundnorm was unacceptable to the situation in Ghana following the 1966 *coup d'état* on grounds of "social desirability" which requires "the conclusion that certain rules in a legal system ought to survive the destruction of the *Grundnorm* of that legal system." It appears that the majority were right in not providing in their judgments "manna for jurisprudence."

⁸⁴ Commenting on the failure of Siriboe JA to deliver his dissenting opinion, the President of the court, Apaloo JA, said ibid at 105: "He dissented from the decision of the majority and agreed to articulate his dissent in a judgment to be delivered on April 13. He says he has withdrawn. We take this to mean that the reasons for his dissent are not ready..." Siriboe JA regrettably never gave his reasons for dissenting.

Anin JA (as he then was), delivered a dissenting opinion which, with great respect, completely side-stepped the issue before the court which was whether the word "establish" should bear its ordinary or technical meaning. It must be emphasised that whereas the majority met headlong the jurisprudential arguments founded on Kelsen's *Pure Theory of Law and State* and dismissed them as simply irrelevant and inapplicable having regard to the facts of the case and the plain meaning of the word "establish" in the context of section 9(1), the minority opinion of Anin JA failed to address the arguments in favour of giving the word "establish" its ordinary meaning. After examining certain provisions of the 1966 NLC Proclamation, notably the preamble and paragraph 3(2) of the NLC Proclamation, his lordship said:⁸⁵

“In my opinion, the true legal effect of the revolutionary provisions of paragraph 3(2) of the Proclamation is that, with the suspension of the 1960 Constitution all public offices and laws of Ghana as defined in articles 40-46, 51 and 52 of the said Constitution ceased to exist. The old legal order founded on the 1960 Constitution yielded place to a new order under an omnipotent, eight-member, military-cum-police sovereign - a veritable octopus whose tentacles covered the whole gamut of executive, legislative and judicial powers of the state ...

Having suspended the 1960 Constitution and thereby abolished the old legal order and public services and offices founded therein, the National Liberation Council proceeded to *establish or create a new legal order, public services and offices. This it did partly by a process of "reception" and partly by ad hoc Decrees.*”

⁸⁵ Certified judgment of the court at 36-37 (my emphasis).

By this pronouncement, particularly the above italicised words, Anin JA unwittingly ended up construing the word "establish" in section 9(1) as meaning to create or set up. That the National Liberation Council, after its establishment, proceeded to create or set up a number of institutions by Decrees as noted by both the majority and the dissenting opinion of Anin JA cannot be gainsaid.⁸⁶ But to say that the NLC created a new legal order by a process of "reception" is to strain the meaning of the word "create." The dictionary meaning of the word "create"⁸⁷ is:

“to bring into being or *form out of nothing*; to bring into being by force of imagination to make, produce or form: to design: to invest with a new form, office, or character; to institute; *to be the first to act.*”

Given the above dictionary meaning of the word "create", the National Liberation Council could not be said to have created any law by merely receiving it. One can receive something if the thing received already exists or has been created by someone else. If it is so conceded, then the Statutory Corporations Act, 1961,⁸⁸ which was later replaced by the Statutory Corporations Act, 1964,⁸⁹ could not possibly have been created by the National Liberation Council which was not even in existence at the time those Decrees were enacted. The truth of the matter is that Anin JA valiantly tried to defend the technical interpretation sought to be placed on section 9(1) in a situation which appeared to be clearly indefensible.⁹⁰

⁸⁶ Notably NLCD 84 which created a new court system and NLCD 17 - dealing with the re-organisation of the Civil Service and revival of the Civil Service Commission - and a host of other Decrees.

⁸⁷ *Chamber's Twentieth Century Dictionary*, 1970 at 247 (my emphasis).

⁸⁸ Act 41.

⁸⁹ Act 232.

⁹⁰ This point was forcefully brought home by Apaloo JA *ibid* at 94: "Yet the Attorney-General would have us to say that an entity whose existence was acknowledged and left undisturbed

It must be emphasised that the Supreme Court in *Sallah v Attorney-General*, did not find it necessary to give any definitive decision on the legal effect of a coup d'état on Ghana's legal system.⁹¹ After examining the issues argued before the court in *Sallah v Attorney-General* in the light of the "Kelsen's theory on revolutions" with a view to considering its relevance to the case, two learned commentators in a joint article rightly said:⁹²

"The legal validity of the NLC regime has been on the whole accepted in Ghana and even though Archer JA claimed to 'refuse to open...[his] lips on the legal validity of the Proclamation itself', he has undoubtedly since the coup, for example, by applying NLC decrees assumed the validity of the NLC regime and the Proclamation. The courts in Ghana were spared the difficult problem of deciding whether and when the revolution succeeded in overthrowing the previous government."

was in fact 'established' by the entity that acknowledges it. To permit a thing to continue is to acknowledge its prior existence and it is abuse of language to say that the person who permitted its continuance in fact created it."

⁹¹ Cf the Privy Council's decision in the *Matzimbamuto Case* [1968] 3 All ER 561 on the legality or otherwise of the Universal Declaration of Independence in Southern Rhodesia. The Board of Privy Council held, inter alia, that usurpers might become, in certain circumstances, lawful government and that a court must answer the question how or at what stage the new regime in Southern Rhodesia became lawful. See also the Uganda High Court decision in *Uganda v Commissioner of Prisons; Ex parte Matovu* (1966) EA 514 and the Pakistani case of *The State v Dooso* (1958) 2 PS CR 180 – in both cases the new constitution of each country was held to be valid on the doctrine of efficacy of the change and the fact that the pre-existing constitution had been annulled.

⁹² See Tsatsu Tsikata and Fui S Tsikata, "*Sallah v Attorney-General Kelsen and Others* in the Court of Appeal" (1970) 7 UGLJ 142 at 148-149. The learned commentators pointed out rightly, at pp 150-151 that the attitude of the majority of the court in the *Sallah* case in treating the matter – "as one of interpretation without putting on Kelsenite spectacles was the correct one ... and that an examination of section 9 of the Transitional Provisions amply confirms the view that Kelsen's theory is irrelevant to its interpretation."

It is submitted that even if the issue of legality of coups had been raised and argued in *Ellis v Attorney-General*, the Supreme Court in that case could not have upheld the legitimacy or the legal validity of the PNDC Military Regime itself in the face of article 3(3)-(7) of the 1992 Constitution. It might be recalled that in *Ellis v Attorney-General* (supra), the plaintiffs had challenged the validity of PNDCL 294 as being inconsistent with and in contravention of the Constitution, 1992. No issue of the legality of the PNDC regime itself was raised. And therefore no such decision was given. Any such decision would have been inconsistent with the letter and spirit of the provisions in article 3(3)-(7). The effect of these provisions, ie article 3 (3)-(7) is that the Constitution frowns upon and proscribes the suspension or overthrow of the Constitution by “any violent or other unlawful means”;⁹³ that any person who aids or abets the violent overthrow or suspension of the Constitution commits an offence of high treason punishable by death upon conviction.

The provisions in article 3 (4) –(7) of the 1992 Constitution must be emphasized. Under these provisions, all citizens of Ghana have the right and duty to defend the Constitution and resist any person or group of persons who seek to overthrow the Constitution by violent or unlawful means; that a person commits no offence for resisting the violent overthrow or suspension of the Constitution; that where a person suffers any punishment as a result of such resistance, “the punishment, shall, on the restoration of the Constitution, be taken to be void” from the time of its imposition; and the Supreme Court may, on application, give adequate compensation for “any suffering or loss incurred as a result of the punishment.”

The defence envisaged under article 3 (4) of the Constitution, 1979 namely, the right to defend and resist any violent overthrow of the Constitution, was invoked by the defendant in

⁹³ See *New Patriotic Party v Attorney-General* (31st December Case) [1993-94] 2 GLR 35 per Francois JSC at 81 where he said: “the Constitution, 1992 frowns on violent overthrows of duly constituted governments, and reject acts that put a premium on constitutionalism to the extent of even proscribing the promotion of a one party state.”

Ekwam v Pianim (No 2).⁹⁴ The plaintiff sued for a declaration that the defendant, Mr Kwame Pianim, was disqualified from contesting as a New Patriotic Party (NPP) Presidential Candidate for the December 1996 Presidential Elections. The ground for the claim was that the defendant had been convicted in 1982 by a public tribunal of the offence of preparing to overthrow the Military Government of the Provisional National Defence Council (PNDC) headed by Fl Lt J J Rawlings.⁹⁵ That military government had unlawfully overthrown the Constitution, 1979 as a result of the 31st December 1981 coup d'état.

The defendant invoked as a defence, article 1(3) of the Constitution, 1979 (the same as article 3 (4) (a) of the 1992 Constitution), which provided that:

“1(3) All citizens of Ghana shall have the right to resist any person or persons seeking to abolish the constitutional order as established by this Constitution should no other remedy available.”

He contended that even if he had committed the offence of preparing to overthrow the PNDC Government, he had done so in exercise of his lawful and constitutional right conferred on all citizens of Ghana under article 1 (3) of the Constitution, 1979.

The Supreme Court by a majority decision of three to two, rejected the defence founded on article 1 (3) of the Constitution, 1979 on two grounds: First, there was no factual basis for invoking the defence founded on article 1 (3) of the Constitution because there was no evidence before the court that, that was what the defendant professed to do when he prepared to overthrow the PNDC Government in 1982. Second, article 1 (3) relied upon, was not in force at the time the offence was committed; the Constitution itself had been suspended by

⁹⁴ [1996-97] SCGLR 120.

⁹⁵ The conviction was under section 41(g) of the Public Tribunals Law, 1982 (PNDCL 24).

the PNDC (Establishment) Proclamation, 1981. In his opinion in support of the majority decision, Atuguba JSC said:⁹⁶

“Plainly, the very provision relied on, ...realistically stops short of what is to happen when the persons seeking to abolish it, in fact succeed in doing so. It knows that, that will be its end. Yet the defendant is erecting a defence on its dead body.”

THE CONSTITUTIONALITY OF THE FAST TRACK HIGH COURT

Introduction

The question of the constitutionality or otherwise of the Fast Track High Court, a Division of the High Court in Ghana, evoked intense public interest not only in Ghana but also outside Ghana. Thus commenting on what the Fast Track High Court case was all about, the then London based commentator wrote:⁹⁷

“...the recent case of *Tsatsu Tsikata v The Attorney-General* has caused some uneasiness in some quarters. In that case, Tsikata was brought before the so-called ‘Fast Track Court’ recently established and equipped to deal with cases faster than the traditional courts. Tsikata argued that the court was unconstitutional and illegal, owing to the manner in which it was established. The matter went to the Supreme Court, which found for Tsikata and in a

⁹⁶ Ibid at 171.

⁹⁷ See Emile K Yakpo, “Flaws in democratic states” in *West Africa*, 23-29 September 2002 at page 12. Regrettably Mr Yapko was found to have passed away on arrival in Accra from London on 19 November 2003. May he rest in perfect peace.

judgment given on February 28, 2002, [reasons thereof given on March 20, 2002] ruled that the ‘Fast Track High Court’ was unconstitutional.”

And in the introductory remarks to his opinion in support of the majority decision of the Supreme Court in *Tsatsu Tsikata (No 1) v Attorney-General (No 1)*⁹⁸ Adzoe JSC said:

"... no one previously ever questioned the constitutionality of the so-called Fast Track High Court since it started holding its proceedings, but that is no argument to suggest that the question cannot now be raised."

The question was indeed raised by the plaintiff in this case. However, before delving into a detailed examination of the case, we need to briefly deal with the issue of the creation and purpose of the Fast Track High Court.

Creation and purpose of the Fast Track High Court

This court had been operating for some time in Accra as a Division of the High Court before the plaintiff in *Tsatsu Tsikata (No 1)* case (supra) sued on 11 February 2002 in the Supreme Court, challenging its constitutionality. In the foreword to *The Guidelines on the Fast Track High Court*, it was stated that:

“The Chief Justice ‘caused to be established the Fast Track Division of the High Court – a division which applies modern case management practices and seeks to

⁹⁸ [2001-2002] SCGLR 189.

introduce new judicial mechanisms that facilitate faster processing and trial of cases.”⁹⁹

What distinguishes the Fast Track High Court from the other High Courts is that the court is equipped with sophisticated technological devices. It uses computer-based record transcription system in contradistinction to the traditional system of recording court proceedings by the very tedious long-hand writing by the trial judge. The purpose of the computer-based record transcription system “is therefore geared to efficient case management and speedy disposal of cases.”

It must also be said, that contrary to popular belief, the decision of the Supreme Court in *Tsatsu Tsikata (No 1)* case did not turn on the merits or demerits of the computer-based system being used in the Fast Track High Court. On the contrary, all the judges of the ordinary bench of the Supreme Court who determined the case, applauded the computer based recording system being used in the Fast Track High Court. Further, the decision of their lordships in that case, was also not founded on the nomenclature of the court as a Fast Track High Court; nor on the use of mechanical or electronic means of recording proceedings in the Fast Track High Court. Not surprisingly, when the case of *Tsatsu Tsikata (No 1)* subsequently came again before the Supreme Court on an application for a review, Acquah JSC, in delivering the joint opinion of himself and Edward Wiredu CJ, said:¹⁰⁰

⁹⁹ The above quotation was culled from a document called *The Guidelines* which was attached as an exhibit to the defendant’s statement of case in the *Tsatsu Tsikata (No 1) Case*. *The Guidelines* were administrative instructions issued by the Chief Justice relating to the operations of the Fast Track High Court. *The Guidelines* were not published. They were not meant for judges. The purpose of the *Guidelines* was to set up standards that would ensure the cost-effective use of the equipment of the Fast Track High Court. *The Guidelines* were also meant to instruct and set standards for court clerks, ushers, machine operators and advise participants in court activities.

¹⁰⁰ See *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620 at 644 and 648.

“Now what makes the operation of the Fast Track High Court different? It uses computers. What makes the guidelines different? It uses computers... Thus the operational difference between the fast track and other divisions of the High Court is the use or non-use of automation... Thus the Fast Track High Court process seeks to introduce a qualitative standard into the terminally slow, sub-standard legal system that violates the due process of law.”

Having dealt briefly with the question of the factual creation, existence and purpose of the Fast Track High Court as a Division of the High Court, we shall next proceed to examine the crucial or central legal issue raised for determination in *Tsatsu Tsikata (No 1)* case (supra).

The facts and the central issue for determination

It is necessary, before examining the central issue, to briefly state the facts of the case. The plaintiff, Mr Tsatsu Tsikata, the former Chief Executive of the Ghana National Petroleum Corporation, was at first arraigned before a circuit tribunal (a court lower than the High Court) on a charge of causing financial loss to the State contrary to section 179A(3)(a) of the Criminal Code, 1960 (Act 29) as amended by the Criminal Code (Amendment) Act, 1993 (Act 458). The Attorney-General entered a *nolle prosequi* and the criminal prosecution was discontinued. However, on the same day, the police served a summons on Mr Tsikata to appear before the Fast Track High Court to answer the same criminal charge. He did not do so. He rather filed an action in the Supreme Court, invoking its original jurisdiction (founded on articles 2(1) and 130(1) of the 1992 Constitution) for, inter alia, a declaration that "there is no Fast Track Court with jurisdiction to try criminal cases established under the 1992 Constitution... and therefore a summons to appear before such a ‘court’ is null and void."

In reply, the Attorney-General contended that the Fast Track Court was a Division of the High Court created by the Chief Justice under article 139 (3) of the Constitution and vested with

jurisdiction to try criminal cases. The said article 139 (3) states that: "There shall be in the High Court such divisions consisting of such number of Justices respectively as the Chief Justice may determine." He relied on a document attached to his statement of case, namely, *Guidelines on the Fast Track Court* issued by the Chief Justice. The guidelines stated, inter alia, that:

"The ultimate object of the Fast Track Court is to ensure that a civil case filed there is disposed of completely and judgment given within a maximum of six months from the date of the filing."

It also listed (subject to future increases) civil cases "to be handled in this Division as those directly involving: investors and investments, banks, specified commercial and industrial disputes, election petitions, human rights, prerogative writs and National Revenue (of substantial) value and brought by or against ... Government Departments or Agents."

The crucial question which the Supreme Court had to decide in the *Tsatsu Tsikata (No 1)*, case¹⁰¹ was clearly stated by Kpegah JSC in his opinion in support of the majority decision. His lordship said: "The question is how does he [the Chief Justice] carry out his decision since the provision [in article 139(3)] is silent on it." The same question can be put this way: Does article 139(3) vest the Chief Justice with a discretion to create or establish by mere administrative action a division of the High Court as contended by the Attorney-General, the defendant, or must he do so by legislation in the form of a constitutional instrument, rule or regulation or order as contended by the plaintiff? It should be noted, in this respect, that under article 11(7) of the Constitution, 1992 such orders, rules or regulations, to be valid, must be laid before Parliament for 21 sitting days unless Parliament, by two-thirds' majority vote, annuls the order, rule or regulation before the expiration of the

¹⁰¹ [2001-2002] SCGLR 189.

period of 21 sitting days. The order, rule or regulation must also be published in the *Gazette* on the day it was laid before Parliament.

Determination of the central issue

The Supreme Court by a majority decision of five to four (given on 28 February 2002 – reserving its reasons which were given on 20 March 2002) upheld all the plaintiff's claims including the claim that there is no Fast Track High Court vested with jurisdiction to try criminal cases. The reasons for the decision were, inter alia, that the Fast High Track Court was not a Division of the High Court created by the Chief Justice under article 139(3) of the Constitution because it was not created by an Act of Parliament or by an order, rule or regulation as required by article 11(7) of the Constitution, 1992. The majority rejected the guidelines issued by the Chief Justice as having any legal effect. In his opinion in support of the majority decision, Kpegah JSC said:¹⁰²

"A statute or some legal instrument or an enactment is required in the creation, not only of a court, but the creation of a division as well. The guidelines, ... (relied upon by the defendant) cannot achieve this because it has no legal effect... That the individual can administratively create a court has not been part of legal thought... The basic position derived from our legislative history is that an Act of Parliament or other statutory instrument is always needed to create a court... A substantive law is always necessary to create a court; not courts only, but also divisions of such courts because this will entail curtailing the general jurisdiction of that court when a 'division' of it is created. You can only administer a court when it has been established or created. But you cannot, in law administratively create a court."

¹⁰² Ibid at p 238.

It should be stated that all the five Justices of the Supreme Court, who upheld the plaintiff's claim¹⁰³ (with the exception of Ampiah JSC), were of the opinion that the creation of a division of the High Court under article 139(3) of the Constitution, must be by an Act of Parliament or by constitutional or statutory instrument. However, as indicated, a member of the majority, Ampiah JSC did not share that opinion. His lordship said:¹⁰⁴

"The Chief Justice for the purposes of the administration of justice may establish divisional courts without reference to Parliament but these divisional courts can only be Judicial Divisions and must be established in accordance with the constitutional provision, namely, article 139(3). (Compare the provision under article 136(4) of the Constitution and also section 10(4) of the Courts Act, 1993 (Act 459)). It is a notorious fact that there exists three Divisions of the Court of Appeal - one doing criminal appeals and two doing civil appeals..."

It is very interesting to note that section 136(4) of the Constitution, which Ampiah JSC said may be compared with article 139(3), the subject of interpretation in the *Tsatsu Tsikata (No 1)* case, states: "The Chief Justice may create such divisions of the Court of Appeal as he considers necessary to sit in such places as he may determine."

It is respectfully submitted that Justice Ampiah, who supported the majority in upholding the plaintiff's claim, was right and in effect, agreeing with the minority judges in the case, namely, that the Chief Justice had the power under article 139(3), to administratively create a division of the High Court. It is very surprising and regrettable that the opinion of Ampiah

¹⁰³ Namely, Bamford-Addo, Ampiah, Kpegah, Adjabeng and Adzoe JJSC.

¹⁰⁴ Ibid at p 218 (author's emphasis).

JSC on the true effect of article 139(3) appears to have been lost on his colleagues in the majority!¹⁰⁵

Can the interpretation placed on article 139(3) by the remaining four justices in the majority be defended? Were their lordships right in holding that under article 139(3), the Chief Justice could create a division of the High Court only by legislation? Their lordships in the majority (per Kpegah JSC) founded their decision principally on legislative history of making laws.

It is well-settled that a court can rely on legislative or parliamentary history in construing the meaning of a provision in an Act or Constitution.¹⁰⁶ Thus the Supreme Court in *Ali-Jiagge v Inspector-General of Police*¹⁰⁷ held (per Francois JSC) that: "A cardinal aid to the ascertainment of legislative intent is through the study of the particular enactment." See also the case of *New Patriotic Party v Attorney-General (31st December Case)*¹⁰⁸ where the majority of the Supreme Court per Adade JSC relied on legislative history of the provisions in chapter 6 (particularly articles 35(1) and 41) of the Constitution, 1992 - traceable to chapter 4 of the 1979 Constitution - in construing the said articles 35(1) and 41 as justiciable.

It is therefore clear that their lordships in the majority were right in seeking reliance on legislative history as a tool for construing article 139(3) of the Constitution, 1992. Kpegah JSC quoted (as evidence of legislative history relevant to the question of creation of courts

¹⁰⁵ It appears the attention of the four other Justices in the majority was not drawn to the interpretation placed on article 139(3) by Ampiah JSC before their lordships delivered their individual written opinions in support of the majority decision.

¹⁰⁶ See Bimpong-Buta S Y, *The Law of Interpretation in Ghana (Exposition and Critique)*, 1995 Advanced Legal Publications, Accra, Ghana at pp 79-86.

¹⁰⁷ Supreme Court, Suit No 16/81, 26 March 1990, unreported but digested in *The Law of Interpretation in Ghana* (supra) at pp 84-85.

¹⁰⁸ [1994-95] 2 GLR 35, SC.

and divisions thereof) some provisions in the Courts Ordinance, 1876 (No 4 of 1876) and the Courts Ordinance, 1935 (Cap 4). Of particular relevance was section 22(1) and (3) of the Courts Ordinance, 1935 (Cap 4) which stated:

"22. For the purpose of the administration of justice, the Chief Justice, with the approval of the Governor may by order under his hand provide for the formation of Judicial Divisions throughout the Colony and from time to time may in like manner amend, vary, alter or revoke any such order.

(3) Every order of the Chief Justice under this section, and every amendment, variation, alteration or revocation of any such order shall be published in the *Gazette*."

Commenting on the above quoted section 22(1) and (3) of the 1876 Ordinance, Kpegah JSC in this case said:¹⁰⁹

"Although the Chief Justice has authority to create a Judicial Division 'by order under his hand' any such order shall be published in the *Gazette*. *In present times this will be done through a legislative instrument and published in the Gazette. This is because consistent with legal thought on the subject, he cannot be allowed to do this administratively.*"

Having so observed, Kpegah JSC proceeded to quote section 24(1) of Cap 4 which specifically dealt with the creation or establishment of the Land Division of the Supreme Court (High Court). The said section 24(1) of the Courts Ordinance, 1935 (Cap 4) also provided:

¹⁰⁹ Ibid at p 240 (my emphasis).

"24.(1) There shall be a Division of the Supreme Court (High Court), to be known as the Lands Division, which shall exercise within such area or areas as the Governor may from time to time by order specify, jurisdiction in all causes and matters relating to the ownership, possession or occupation of lands, specially assigned to the Lands Division by this or any other Ordinance. The Judges of the Lands Division, to be known as Lands Judges, shall be, and shall be deemed always to have been, the Chief Justice and so many Puisne Judges as the Chief Justice may from time to time assign to the Lands Division."

After considering the above quoted section of the Courts Ordinance, 1935 (Cap 4) and also section 20A of the Courts Ordinance, 1876 which empowered the Governor-in-Council to declare from time to time, by order, published in the *Gazette*, the jurisdiction of the Supreme Court (High Court), Kpegah JSC, supporting the decision of the majority founded on the principle of legislative history, concluded:¹¹⁰

"Indeed, all the Ordinances considered in my historical analysis of our legal landscape, namely, the Courts Ordinance, 1876 (No 4 of 1876) and the Courts Ordinance, 1935 (Cap 4), *comply with the composition of the divisions as contemplated under article 139(3); the number of the divisions were apparent, so also the judges who would sit in these divisions.*"

This pronouncement by Justice Kpegah and the earlier pronouncement stated above (see the dicta to footnotes 102 and 109 above), referring to "legislative history" as a tool for law making call for comments. It appears, in its context, the term "legislative history" as used by the judge, can reasonably bear two meanings. On one hand, one may understand the judge as referring to the art of creating laws by Acts of Parliament in the English common law

¹¹⁰ Ibid at page 246 (my emphasis.)

tradition which Ghana inherited on attainment of political independence. The judge must thus not be understood as talking about the legislative history of a particular Act of Parliament but of the constitutional institution/requirement that laws are not created by mere administrative decrees as the Chief Justice did in this case in creating the Fast Track High Court. On the other hand, it could be argued that given the context in which Justice Kpegah used the term “legislative history”, he may be understood as specifically referring to the “legislative history” of article 139(3) of the 1992 Constitution, the subject-matter of interpretation before the court.

Be that as it may, ie in whatever sense Justice Kpegah must be understood as using the term “legislative history”, that it is *non sequitur* for their lordships in the majority (excluding Ampiah JSC) to hold in the *Tsatsu Tsikata (No 1)* case, that because under the provisions in the 1876 and 1935 Court Ordinances, a division of the Supreme Court (High Court) could be validly created by either the Governor or the Chief Justice by order (legislation) published in the *Gazette*, it is equally required that under article 139(3) of the 1992 Constitution, the Chief Justice is empowered to create a division of the High Court by legislation in the form of legislative or constitutional instrument and not administratively.

A closer examination of the provisions in sections 22(1) and (3) and 24(1) of the 1935 Court Ordinance shows quite conclusively that these sections cannot be relied upon as affording legislative history of article 139(3) of the Constitution, 1992. The provisions in sections 22(1) and (3) and 24(1) of the 1935 Ordinance are not the same as the provision in article 139(3) of the Constitution. They are completely different!! Under section 22(1), "the Chief Justice, *with the approval of the Governor may by order under his hand* provide for the formation of Judicial Divisions."¹¹¹ In contrast, article 139(3) of the Constitution, 1992 provides: "There shall be in the High Court such divisions consisting of such number of Justices respectively as

¹¹¹ My emphasis.

the Chief Justice may determine."¹¹² Surely, there is a world of difference between creating a division (under section 22(1) of Cap 4) "with the approval of the Governor... by order under his hand" and creating a division (under article 139(3) of the Constitution) "as the Chief Justice may determine." Whereas section 22(1) of Cap 4 calls for resort to delegated legislation, section 139(3) calls for a mere exercise of discretion by the Chief Justice in creating a division of the High Court.

Furthermore, section 24(1) of the 1935 Ordinance (Cap 4) on its plain meaning, had the effect of itself having created a division of the High Court, namely, the Lands Division. Under the section, the Chief Justice was not required to create the Lands Division of the High Court. All that the Chief Justice was required to do was to administratively "from time to time assign to the Lands Division" Puisne Judges. Under section 24(1) of the 1935 Ordinance, the Lands Division was to consist of judges known as the Judges of the Lands Division and the Chief Justice and the Puisne Judges "shall be deemed always to have been" members of the Lands Division. And under section 24(1), the Governor was to specify "from time to time by Order" the area or areas where the Lands Division of the Supreme Court (High Court) "shall exercise its jurisdiction in all causes and matters relating to the ownership, possession or occupation of lands."

It may be concluded (as shown by the above comparisons) that the provisions in sections 22(1) and (2) and 24(1) of the 1935 Ordinance and 20A of the 1876 Court Ordinance were not the same as those in article 139(3) of the Constitution, 1992. The former cannot therefore (with great respect) be described as affording a basis for the legislative history of the latter. Atuguba JSC in his dissenting opinion from the majority decision in the same *Tsikata Tsikata No 1* case, arrived at the correct conclusion when he said:¹¹³

¹¹² My emphasis.

¹¹³ [2001-2002] SCGLR 189 at 301.

"The power of establishing judicial divisions in Ghana under article 139(3) of the 1992 Constitution is different from its counterparts in past legislation in Ghana such as the Courts Ordinance, 1935 (Cap 4) or the Supreme Court of Judicature (Consolidation) Act, 1925 of England, and extreme care must be taken in relating them to this case."

It seems to me that the legislative history of article 139(3) of the 1992 Constitution is not to be found in the provisions of the 1876 and 1935 Court Ordinances on the question of mode of creating divisions of the High Court. It is to be found rather in the Second and Third Republican Constitutions of 1969 and 1979 respectively. The provision in article 139(3) of the Constitution, 1992 (as earlier stated), provides: "139(3) There shall be in the High Court such divisions consisting of such number of Justices respectively as the Chief Justice may determine." This provision is more or less the same as article 112(3) of the Constitution, 1969 which stated:

"112(3) There shall be in the said High Court such Divisions consisting of such number of Justices respectively as may be assigned thereto by the Chief Justice; and sitting in such places in Ghana as the Chief Justice may determine."

The above provision was reproduced verbatim as article 124(3) of the 1979 Constitution. One may compare the above provisions relating to the creation of divisions of the High Court by the Chief Justice in the 1969 and 1979 Constitutions with the provisions in the 1979 and 1992 Constitutions relating to the creation of a division of the Court of Appeal by the Chief Justice. Thus article 136(4) of the 1992 Constitution which is more or less the same as article 139(3)

states: "136(4) The Chief Justice may create such divisions of the Court of Appeal as he considers necessary to sit in such places as he may determine." The provision in article 136(4) may be contrasted with that of articles 109(4)(b) of the 1969 Constitution and 121(4)(b) of the previous 1979 Constitution also dealing with the creation of divisions of the Court of Appeal. Both articles in identical words stated:

"The Chief Justice may create such Divisions of the Court of Appeal as he may consider necessary,

(b) sitting at such places in Ghana as the *Chief Justice may,*

by constitutional instrument, determine."¹¹⁴

The change in wording in articles 109(4) (b) of the 1969 Constitution and 121(4)(b) of the 1979 Constitution - namely, the requirement of mode of creating a division of the Court of Appeal "by constitutional instrument" may be contrasted with the provision in article 136(4) of the 1992 Constitution, namely, "create such divisions of the Court of Appeal as he considers necessary to sit in such places as he may determine." This provision in article 136(4), particularly the words "as he may determine" should not be lost sight of by any person interested in legislative history of article 136(4) of the 1992 Constitution (the same more or less as article 139(3) of the Constitution dealing with the creation of division of the High Court.) Whereas under the 1969 and 1979 Constitutions, there was requirement of a creation of a division of the Court of Appeal by constitutional instrument, there is no such requirement for the creation of a division of the Court of Appeal by constitutional instrument under article 136(4) of the 1992 Constitution. In effect, there was a definite shift in policy: no need for the Chief Justice to determine or create by constitutional instrument a division of the Court of Appeal.

¹¹⁴ My emphasis.

The above was the state of the law on the creation of a division of the Court of Appeal or the High Court when article 139(3) of the Constitution, 1992 was enacted. The applicable rule of interpretation in construing article 139(3) was stated by the Supreme Court in the case of *Patu-Styles v Amoo-Lamptey*.¹¹⁵ The issue was whether the ordinary bench and the full bench of the Court of Appeal in existence before the coming into force of the Constitution, 1979 were to be regarded as one court for purposes of review proceedings. Such review proceedings were deemed to be an appeal pending before the Supreme Court under section 5 of Schedule I of the Constitution, 1979. The Supreme Court in this case held that the lawmakers must be deemed to have known the state of the law when they were writing section 5 of the transitional provisions of the 1979 Constitution.¹¹⁶ They knew the Court of Appeal had two arms: the ordinary bench and the full bench. Yet they chose to mention expressly one arm: the full bench, not both arms of the Court of Appeal generally. The said section 5 of Schedule I of the 1979 Constitution stated:

"Any review pending before the full bench of the Court of Appeal immediately before the coming into force of this Constitution shall, subject to section 3 of this Schedule, be deemed to be an appeal pending before the Supreme Court."

In applying the principle that the lawmakers must be deemed to have known the state of the law when enacting section 5 of the 1979 transitional provisions, the Supreme Court held that for the purpose of review proceedings, the two divisions of the Court of Appeal: the ordinary and full bench could not be regarded as one court.

¹¹⁵ [1984-86] 2 GLR 644.

¹¹⁶ This law of presumption was indeed so stated very briefly by Kpegah JSC in his opinion in the instant *Tsatsu Tsikata (No 1)* case when he said: "But we must always remember that the legislature is always presumed to know the existing state of the law."

Similarly it could be contended that in enacting article 139(3) of the 1992 Constitution, the lawmakers knew of the state of the law under the 1979 Constitution whereby the Chief Justice could determine or create a division of the High Court without a constitutional instrument. They also knew of the earlier provision in the same 1992 Constitution, ie article 136(4), namely: "The Chief Justice may create such divisions of the Court of Appeal as he considers necessary to sit in such places as he may determine." This provision, as earlier pointed out, showed a shift in policy from the analogous provision, namely, article 109 (4b) of the 1969 Constitution and article 121(4) of the 1979 Constitution which provided that the Chief Justice "may create such Divisions of the Court of Appeal... by constitutional instrument..."

Denuded of the contention by their lordships in the majority in the *Tsatsu Tsikata (No 1)* case that article 139(3) of the Constitution 1992 had a legislative history founded on the relevant provisions of the 1876 and the 1935 Court Ordinances, one is left with the conclusion that, given the plain meaning of the provision in article 139(3), the Chief Justice may administratively create a division of the High Court. And he could call it Fast Track High Court if he so wishes without the prior requirement of a constitutional or legislative instrument.¹¹⁷

As previously noted above, Ampiah JSC, a member of the majority who upheld the plaintiff's claim, was of the view that the Chief Justice has the power to administratively create a division of the High Court under article 139(3). One may therefore agree with Acquah JSC in his dissenting when he said:¹¹⁸

¹¹⁷ Such a court could, with respect, be described as Fast Track High Court or Supersonic High Court, if the Chief Justice so decides. It seems to me it does not matter how it is described.

¹¹⁸ Ibid at 275-276 (my emphasis).

"It is clear that... while article 157(3) prescribes the method by which the Rules of Court Committee should make rules, article 139(3) does not prescribe any method by which the Chief Justice may set up divisions in the High Court. He is given the discretion to do so. And article 296(c) which regulates the exercise of discretionary power makes it clear that in the case of the discretion vested in the Chief Justice, he is *not*, by virtue of the fact that he is a judge, to do so by constitutional or statutory instrument...

Thus the Chief Justice in the exercise of his discretion under article 139(3) may adopt any method he deems necessary. He can do so in writing or even orally. He can indeed call the Chief Registrar and instruct him that henceforth all tax cases should be put before the High Court²⁰ and that that court should now be Tax High Court. He can do the same for commercial, family and criminal cases. Or he may by a letter under his hand set up such divisions."

It should be pointed out that the majority decision of the Supreme Court in *Tsatsu Tsikata (No 1)* case in favour of the plaintiff and given on 28 February 2002, was challenged by the defendant, the Attorney-General, a day after the decision. He filed in the Supreme Court, on 1 March 2002, an application for a review of the majority decision.¹¹⁹

The application for a review of the majority decision

The application was founded on the general ground of "exceptional circumstances which have resulted in a miscarriage of justice" in terms of rule 54(a) of the Supreme Court Rules, 1996 (CI 16). The applicant, in a subsequent supplementary statement of case, expatiated on the particulars of the "exceptional circumstances." First, the applicant relied on the fact that the Supreme Court had, previously on 21 November 2001, dismissed an interlocutory appeal

¹¹⁹ See *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620.

in the case of *Selormey v The Republic*;¹²⁰ and had remitted the case to the Fast Track High Court for the trial of the appellant, the accused, to continue in that court. The applicant contended that in determining that interlocutory appeal, the Supreme Court could have raised the issue of the competence of the Fast Track High Court to try the accused, Mr Selormey. Consequently, the applicant argued that not having done so, the same Supreme Court, could not uphold, as it did by its majority decision in the instant *Tsatsu Tsikata (No 1)* case, the plaintiff's claim that the Fast Track High Court was unknown to the Constitution.

In reply, counsel for the respondent, argued that the reference to the hearing of the *Selormey* interlocutory appeal by the Supreme Court was irrelevant to the application for review because the issue of the constitutionality of the Fast Track High Court had not been raised before the Supreme Court in determining the interlocutory appeal. He also contended that the remitting of the *Selormey* case by the Supreme Court to the Fast Track High Court did not mean that the court was competent to hear the case.

Second, in proof of existence of "exceptional circumstances, the applicant argued, in his supplementary statement of case that "the decision rendered by the court was fundamentally wrong in that multiple errors of interpretation were committed by the court." In particular, the applicant contended that the declaration by the majority of the Supreme Court that Divisions of the High Court could not, under article 139(3) be administratively created by the Chief Justice, but only by an Act of Parliament or constitutional or statutory instrument was untenable and fundamentally flawed.

¹²⁰ [2001-2002] SCGLR 848. The interlocutory appeal was from the decision of the Court of Appeal, which had dismissed the accused, Mr Selormey's appeal against the decision of the Fast Track High Court to the effect that a particular witness was not qualified to testify as a defence witness.

The application for review of the majority decision in *Tsatsu Tsikata (No 1)* lodged on 1 March 2002, (ie a day after the majority decision given on 28 February 2002) was upheld by a majority decision of six to five given on 26 June 2002 in *Attorney-General(No 2) v Tsatsu Tsikata (No2)*.¹²¹ The majority held that the effect of article 126(1) of the Constitution was that Parliament had no power to create a law establishing superior courts; and that there was no constitutional provision authorising the establishment of a High Court by an Act of Parliament or by constitutional or statutory instrument; and that Parliament had power under article 126(1) to establish only lower courts or tribunals. The majority further compared the provisions on establishment of the High Court and the Court of Appeal in the 1969 and 1979 Constitutions with that in the 1992 Constitution. The majority concluded that the effect of articles 136(4) and 139(3) of the 1992 Constitution was that, contrary to the earlier majority decision of the court, the Chief Justice had the discretion to establish divisions of the Court of Appeal and the High Court respectively without recourse to any Act of Parliament or constitutional or statutory instrument. The majority therefore held that the fundamental declaration by the ordinary bench of the Supreme Court given on 28 February 2001-the reasons thereof given on 20 March 2002- to the effect that a division of the High Court could not be established except by an Act of Parliament or constitutional or statutory instrument, was “palpably erroneous and unconstitutional.” In delivering the leading opinion of the majority, Acquah JSC (as he then was) said:¹²²

“The majority’s insistence on putting words into article 139(3) of the Constitution, 1992 when such words are not in the article, with a view to imposing restrictions on the exercise of the Chief Justice’s discretion, is not a permissible exercise of the judicial function. *If the repealed colonial laws*

¹²¹ [2001-2002] SCGLR 620 (per Edward Wiredu CJ, Acquah, Atuguba, Sophia Akuffo, Lamptey and Afreh JJSC – Bamford-Addo, Ampiah, Kpegah, Adjabeng and Adzoe JJSC dissenting.)

¹²² Ibid at 639 and 640 (my emphasis).

of this country and the archaic English law and practice, required Acts of Parliament or constitutional or statutory instruments for the establishment of divisions in the High Court, the 1992 Constitution of modern Ghana does not say so in its article 139(3).”

In the same vein, Lamptey JSC also for the majority, said:¹²³

“[T] here cannot be any doubt that the power and authority granted to the Chief Justice by and under article 142(1) and (2)(c) regarding the establishment of regional tribunals, is in every respect the same power and authority that is to be exercised by him pursuant to article 139(1)(c) and (3). *It is unwarranted and erroneous to read into these specific provisions a legal requirement that to exercise the powers and authority granted by these specific provisions of the Constitution, the Chief Justice must consult Parliament or must resort to the use of a constitutional or legislative instrument.*”

In a more direct rejection of the argument of the majority of the ordinary bench founded on the legislative history of article 139(3) of the Constitution – an issue already examined in detail in our analysis of the earlier majority decision – the late Afreh JSC in his opinion in support of the grant for the application for review said:¹²⁴

“If one studies the history of the powers of the Chief Justice to create divisions and lower courts, one can see that over the years limitations on the powers of the Chief Justice have progressively been relaxed or abolished. Thus while in the

¹²³ Ibid at 675 (my emphasis).

¹²⁴ Ibid at page 694-695.

colonial era he had to get the approval of the Governor before he could establish divisions, in the 1969, 1979 and 1992 Constitutions, he does not need the approval of the executive or the legislature to do so... If the words of article 139(3) of the Constitution, 1992 are given their ordinary and natural meaning, as they should, the divisions of the High Court cannot be limited to territorial and subject-matter divisions, and the Chief Justice is not required to seek parliamentary approval of his powers under that provision. The majority erred when they came to a contrary decision.”

The crucial issue for determination in review application

It should be stressed that the crucial and fundamental issue before the review bench was the same as that which the ordinary bench had to contend with. The review bench in the *Tsatsu Tsikata* case also had to determine the constitutionality or otherwise of the Fast Track High Court; or put differently, the court had to determine the proper interpretation to be placed on article 139(3) of the Constitution, 1992: whether or not the Chief Justice had an administrative discretion under article 139(3) to create a division of the High Court - referred to as the Fast Track High Court – as contended by the defendant; or that the Chief Justice could do so only by an Act of Parliament or constitutional or statutory instrument as contended by the plaintiff. That was the issue which Atuguba JSC in his opinion in support of the grant of the application for review metaphorically referred to as “the battle of Waterloo.” And in his dissenting opinion from the majority decision in the review application, Adzoe JSC identified the same crucial issue when he said:¹²⁵

“... the *learned Attorney-General himself anchors his defence on article 139(3), which the court and the parties rightly accepted as the root of the litigation and*

¹²⁵ Ibid at page 747-748 (my emphasis).

the learned Attorney-General himself again agrees with Kpegah JSC that ‘*the issue at stake here* is the meaning of article 139(3)...’

Given the above crucial issue raised for determination, it is regrettable that all judges in the minority in the review application, with the exception of Ampiah JSC, did not find it necessary to throw further light in defence or review of their stance on the proper interpretation to be placed on article 139(3) of the Constitution. Their lordships in the minority simply ignored the crucial issue altogether.¹²⁶ Adzoe JSC in his dissenting opinion specifically declined further comment on the crucial issue when, in response to the errors of law complained of by the applicant for review, he said:¹²⁷

“Thirdly, he argues *that the majority decision that article 139(3) does not give the Chief Justice authority to establish a division of the High Court using his administrative powers, is erroneous...* He also alluded to certain other minor factors which he claimed amounted to errors in the judgments of the majority. *I do not think it is necessary to answer the substances of these issues on the errors.*”

¹²⁶ Kpegah JSC, however, held as untenable other errors of law complained of by the applicant for review, namely issues relating to, inter alia: (i) reference to the interlocutory appeal determined by the Supreme Court in *Selormey v The Republic*; (ii) effect of the guidelines on the Fast Track High Court dealing with practice and procedure in the Fast Track High Court as being contrary to article 157(2) of the Constitution on making rules and regulations by the Rules of Court Committee; and (iii) effect of the criminal summons served on the plaintiff as being unconstitutional.

¹²⁷ Ibid at p 741-742 (my emphasis). Given the argument of the applicant for review that the construction placed by the majority of the ordinary bench on article 139 (3) was a fundamental error of law constituting an “exceptional circumstances”, his lordship was (with respect) bound to consider the matter in the interest of justice and in vindication of the law.

One cannot simply ignore adverse comment on the refusal or failure of the minority judges in the review application to address the fundamental declaration of the law on the true effect of article 139(3) made by them as the judges in the majority in the earlier proceedings. If the declaration on article 139(3), which informed their decision in favour of the plaintiff, constituted a fundamental error of law (as held by the majority in the review application), that then would constitute “exceptional circumstances resulting in a miscarriage of justice” in terms of rule 54(a) of the Supreme Court Rules, 1996 (CI 16). That undoubtedly, constitutes a proper ground for the grant of the application for review.¹²⁸

It also seems to me that the fundamental interpretation placed on article 139(3) by the majority of the Supreme Court in the earlier proceedings, as to the true effect of article 139(3) of the Constitution, was very much weakened by the crucial fact that one of the five judges in the majority, Ampiah JSC, in fact, (as earlier pointed out) agreed with the minority’s interpretation of article 139(3). Thus in his dissenting opinion on the review application, Ampiah JSC reiterated his earlier stance on the effect of article 139(3). He consistently maintained (to his great credit and honour and in clear dissent from the position of his fellow judges in the minority), that the Chief Justice could administratively create a Division of the High Court under article 139(3). His lordship said:¹²⁹

“I agree with the applicant save that to establish a proper ‘division’ of the High Court under article 139(3) of the Constitution, other provisions of the Constitution must be complied with to make it legal. *I do not share the view that such ‘divisions’ must have to be determined by a parliamentary sanction. The law vests the right or authority to determine the ‘divisions’ solely in the Chief*

¹²⁸ See Supreme Court decision in *In re Krobo Stool (No 2); Nyamekye (No 2) v Opoku* [2000] SCGLR 567; and *Republic v High Court, Kumasi; Ex parte Abubakari (No 3)* [2000] SCGLR 45.

¹²⁹ Ibid at p 709 (the emphasis is mine).

Justice. It is an administrative discretion. This was my view in the opinion expressed in the judgment of the court.”

Since the five judges in their opinions in support of the majority decision (impugned in the review application) were not *ad idem* on the cardinal issue of the legal effect of article 139(3), it seems that the majority decision founded on article 139(3) could not represent the binding judgment of the majority of the court. No majority decision could be founded on it. In that respect, the words of Taylor JSC (easily the best exponent of the review jurisdiction of the Supreme Court) in *Bisi v Kwayie*¹³⁰ ring true:

“In our system of adjudication the majority view of a plural bench of a court represents the binding judgment of the court, even if it can subsequently be demonstrated to be vulnerable to attacks.”

In the light of the above considerations, it appears that the majority decision (impugned in the review application), upholding the plaintiff’s claim that the Fast Track High Court was unknown to the Constitution, was founded on a fundamental mistaken assumption that all the judges in the earlier majority decision had taken the view that the Chief Justice could not administratively create a division of the High Court under article 139(3).¹³¹ If that is conceded, then it logically follows that the binding judgment of the court, ie the plural bench, on the true effect of article 139(3), was the opinion of the four minority judges of the ordinary bench. Ampiah JSC was not a party to that decision. In effect, the plaintiff in the substantive action in the *Tsatsu Tsikata (No 1)* case lost the claim, at least in part; and the defendants, the

¹³⁰ [1987-88] 2 GLR 295 at 297, SC (author’s emphasis.)

¹³¹ It is interesting to observe that all the six justices forming the majority in the review application also wrongly assumed that all the justices in the majority of the ordinary bench had ruled that the Chief Justice could not administratively create a division of the High Court under article 139(3) of the Constitution.

Chief Justice and the Attorney-General, won the case, also at least in part¹³². In so far as the majority of the ordinary bench founded their decision on the wrong assumption that all the five judges in the majority had construed article 139 (3) as meaning that the Chief Justice could not administratively create a division of the High Court, they committed a fundamental error of law justifying the grant of the application for review.¹³³

It must be further pointed out that, apart from the question of the true effect of article 139(3), the majority of the Supreme Court granted the application for review after considering the arguments of the parties (earlier referred to,) in relation to the hearing of the interlocutory appeal by the Supreme Court in the *Selormey* case. The majority conceded that in hearing the interlocutory appeal by Mr Selormey, the parties had not raised before it, the issue of the

¹³² The judgments and the reasons of the ordinary and review bench in the *Tsatsu Tsikata* case, teach us a lesson: it is very dangerous to give a definitive assessment and comment on a court decision without reading the judgments and the reasons thereof. Commenting on the *Tsatsu Tsikata* case, one Steven Abugri, described as a “Ghanaian constitutional lawyer in the UK” (see *West Africa*, 23- 29 September 2002 at page 11) , was quoted in an article by a journalist Bernald Otabil titled: “The rule of law: myth or reality” as having said that: “ I can tell you for a fact that among most of my friends we knew for sure that there was no way that the [Ghanaian] government was going to lose the judicial review on the ruling on the country’s Fast Track courts as unconstitutional [earlier this year]. So many changes happened before the review and why did all this not happen before the original hearing itself? The verdict was so obvious that I did not bother to read even the reasons given by the judges after the review. The best thing could have been for the review panel to have upheld the original decision by the Supreme Court, given the reasons granted in the case.” As demonstrated by our analysis of the reasons given by the majority of the judges in the original substantive application, the plaintiff in fact lost the case on the crucial issue of the power of the Chief Justice to administratively create a Division of the High Court. On that ground, the application for review was more than justified.

¹³³ See dictum of Bamford-Addo JSC in *Republic v High Court, Kumasi; Ex parte Khoury* [1992-93] 4 GBR 1565 at 1577, namely: “I feel strongly that the power of review must only be invoked when exceptional circumstances exist to *correct an obvious error* or *injustice* and not invoked anytime a party loses a case...” See also the dictum of Francois JSC in *Ribeiro v Ribeiro (No 2)* [1989-90] 2 GLR 130 at 143, SC namely: “... our attempts to halt the abuse of the review jurisdiction of this court ... *must be matched by an equally genuine willingness for introspection. And where a fundamental error has occurred, to be prepared to admit and correct it...*” (my emphasis).

jurisdiction of the Fast Track High Court. The majority held, however, that in hearing the interlocutory appeal, the Supreme Court was duty bound to consider the jurisdiction and competence of the Fast Track High Court in trying the accused, Mr Selormey; that once the Supreme Court in that case did not question the jurisdiction of the Fast Track High Court to try the accused when his appeal came before the court, it meant that the Supreme Court had been fully satisfied that the Fast Track High Court was a court of competent jurisdiction, vested with all the jurisdiction of the High Court as provided in article 140(1) of the Constitution. In support of the majority decision, granting the application for review, Afreh JSC said:¹³⁴

“The plaintiff says the reference to the *Selormey* case is irrelevant because no issue as to the constitutionality of the court was raised before the Supreme Court in the case... But it is relevant. The trial of this case and other cases ... in the High Court raised the presumption that what was done in the Fast Track High Court was done rightly and regularly (*omnia praesumuntur rite et solemniter esse acta...*)”

It should be pointed out, however, that in his dissenting opinion from the majority decision granting the application for review, Kpegah JSC sharply disagreed with the majority decision on the constitutionality of the Fast Track High Court founded on the reference to the hearing of the interlocutory appeal in the *Selormey* case. His lordship said:¹³⁵

¹³⁴ Ibid at p 685.

¹³⁵ [2001-2002] SCGLR 620 at 725. In the subsequent case of *Ali Yusuf Issa (No 2) v The Republic (No 2)* [2003-2004] SCGLR 174, the Supreme Court affirmed its earlier decision in *Attorney-General (No 2) v Tsikata (No 2)* [2001-2002] SCGLR 620 that the Fast Track High Court was part of the High Court as established under article 140(a) of the 1992 Constitution.

“This, ie the constitutionality of the Fast Track High Court, was not an issue to be raised by this court *suo motu*. If the issue had been raised *suo motu*, it would have amounted to invoking our original jurisdiction and enforcement jurisdiction ourselves. I believe neither the language in article 2(1)(b), which deals with the enforcement of the Constitution, 1992 nor that of article 130(1)(b), which relates to our original jurisdiction, permit such a course of action on our part.”

Rationalization of the ordinary and review bench decisions in the *Tsatsu Tsikata Case*

It seems to me that the question of the *creation of the division of the High Court* by the Chief Justice under article 139(3), must be distinguished from the question of the *jurisdiction, practice and procedure of the Fast Track High Court*. In the instant case, the majority of the ordinary bench in the *Tsatsu Tsikata (No 1) v Attorney-General (No 1)* case held that since the jurisdiction given to the Fast Track Court at the time of its creation as stated in the guidelines was exclusively civil and not criminal, the court could not try the plaintiff for the criminal charges levelled against him. In support of that majority decision, Bamford-Addo JSC said:¹³⁶

"With legal courts, the stated jurisdiction cannot be changed on ad hoc basis without any legal backing as the guidelines for the Fast Track Court seek to do. With legal courts, rules of practice and procedure are made only by the Rules of Court Committee under article 157... See also section 80 of Act 45) which makes the same provision. The Fast Track Court did not comply with the ... legislation but rather provided in the said guidelines certain rules of practice and procedure for the said court..."

¹³⁶ [2001-2002] SCGLR 189 at 210-211.

On its plain meaning, article 139(3) of the Constitution does not empower the Chief Justice to determine the jurisdiction, let alone the practice and procedure of any division of the High Court administratively created by the Chief Justice. It seems to me that the majority of the ordinary bench was right in so holding. However, under article 140(1) of the Constitution, the High Court, "subject to the provisions of the Constitution," has "jurisdiction in all matters, and in particular, in civil and criminal matters..." Logically therefore, a division of the High Court created under article 139(3), must be taken to have the same jurisdiction of the High Court under article 140(1). If this is conceded, then the guidelines issued by the Chief Justice, in so far as it is not exclusionary but only lists civil matters (subject to future increases) that could be determined by the Fast Track Court, cannot, on that ground, be struck down by the majority of the ordinary bench of the Supreme Court as unconstitutional. The guidelines in that respect, do not offend against article 140(1). It appears therefore that the decision of the majority of the ordinary bench in the *Tsatsu Tsikata (No 1)* case in holding otherwise cannot, with respect, be supported as proper in law. However, it seems to me that the majority of the ordinary bench was right in law in holding that in so far as the guidelines purported to lay down practice and procedure in the Fast Track Court, they were unconstitutional as being ultra vires article 157 (2) of the Constitution. That article provides that:¹³⁷ "The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the *practice and procedure of all courts in Ghana*."

It must be pointed out, however, that in his opinion in support of the granting of the application for review of the majority decision of the ordinary bench, Afreh JSC was at pains to demonstrate that the *Guidelines* on the Fast Track High Court, tendered in evidence by the defendant, were not meant "to be legally binding constitutional instrument or rules of court"; that they were tendered "to instruct and set standards for court clerks, ushers, machine operators and to advise participants in court activities..."; that the guidelines were not meant

¹³⁷ My emphasis.

for judges but merely administrative “to try to set standards that would ensure the most cost-effective use of the equipment of the Fast Track High Court.” If, indeed, the purpose of the guidelines were merely for administrative purposes as stated by Afreh JSC, then no valid objection could be raised against the guidelines.

In any case, the majority of the court in granting the application for review of the earlier majority decision of the ordinary bench, agreed, in effect, with the decision of the ordinary bench, that the Fast Track High Court is to apply only the practice and procedure of the High Court as laid down in the Civil Procedure Rules of the High Court and the rules of evidence. As Acquah JSC rightly put it in his opinion in support of the majority decision on the application for review of the decision of the ordinary bench:¹³⁸ “The *guidelines* never and could not have exempted the Fast Track High Court of any of the ... essential characteristics of a High Court.”

CONCLUSION

It could be concluded from the discussion in this chapter, that the Supreme Court has made appreciable contribution to the all-important question of the ambit of power of judicial review of legislation, particularly the court’s attitude to ouster clauses (such as section 34(3) of the transitional provisions to the Constitution, 1992), the legality of coup d’etats and the constitutionality or otherwise of the Fast Track High Court. While the Supreme Court must be commended for enhancing its power of judicial review of legislative action as shown by the decision in *Mekkaoui* case (supra), the court must also be criticized for its subsequent decision in the *Amidu* case (supra). As argued, the decision constitutes a self-imposed limitation of its power of judicial review under article 130(1) of the Constitution, 1992.

¹³⁸ [2001-2002] SCGLR 620 at 644.

CHAPTER 6

THE SUPREME COURT AND THE POWER OF JUDICIAL REVIEW OF EXECUTIVE ACTION

INTRODUCTION

Given the provisions of articles 2 (1)-(4) and 130 (1) of the Constitution, 1992 it is clear that the Supreme Court is vested with jurisdiction to entertain suits challenging the constitutionality of the executive actions or omissions of the President. The law as stated has been reinforced by the provision in article 58 (1) of the Constitution which states that: “The executive authority of Ghana shall vest in the President and *shall be exercised in accordance with the provisions of [the] Constitution.*”¹ The executive authority as vested in the President shall, under article 58 (2) “extend to the execution and maintenance of [the] Constitution and all laws made under or continued in force” by the Constitution. Under article 58 (3), the President, subject to the provisions of the Constitution, may exercise his executive functions either directly or through subordinate officers. And article 58 (4) provides that: “Except as otherwise provided by [the] Constitution or by law not inconsistent with the Constitution, all executive acts of the Government shall be expressed to be taken in the name

¹ My emphasis. Section 76(1) of the 1997 Gambian Constitution contains a similar provision, except that the all important words, namely, “ shall be exercised in accordance with the provisions of the Constitution” are excluded. For the exercise of the power of judicial review of executive action in the Commonwealth Caribbean countries: see Fiadjoe, *A Commonwealth Caribbean Public Law* (2nd ed) 1999, Cavendish Publishing Ltd at page 122 where he said: “Caribbean courts have shown a long standing propensity to review the exercise of administrative powers by the executive” -citing inter alia, *Hochoy v NUGE* (1964) 7 WIR 174; *Lennox Phillips v AG* [1992] 1 AC 545; and *Williams Construction Ltd v AG* [1994] 4 LRC 216, PC. Commenting on the *Williams* case, the learned author also said at page 126: “ This case stands for the proposition that, despite the constitutional position of the Cabinet in the constitutional scheme of things, which thus insulates it generally from review because it is the instrument of governmental policy, where it purports to exercise

of the President.” We may conclude that executive acts or omissions could relate not only to the acts or omissions of the President but also that of the entire executive arm of the government, including the institutions constituting the Public Services of Ghana.

The Supreme Court has been called upon to determine the constitutionality or otherwise of executive actions or omissions in a number of cases. In this chapter, attention shall be focused on three main issues relating to executive actions, namely: (i) challenge to executive action relating to compulsory retirement of public officers; (ii) challenge to executive action relating to local government administration; and (iii) the question whether or not the President of the Republic can be personally sued in court for any infringement in the exercise of his executive functions. We shall proceed to examine these issues *seriatim*.

THE SUPREME COURT AND CHALLENGE TO EXECUTIVE ACTION RELATING TO COMPULSORY RETIREMENT OF PUBLIC OFFICERS

Introduction

A constitutional question of extreme importance to all public officers in Ghana is whether or not, on the coming into force of the 1992 Constitution, particularly article 199(1) thereof, the compulsory retiring age for all public officers is 60 years except the holders of the public offices specifically mentioned in the Constitution itself. The said article 199(1) of the 1992 Constitution provides as follows:

“A public officer shall, except as otherwise provided in this Constitution, retire from the public office on attaining the age of sixty years.”

administrative authority under the aegis of a statute then it is as much a subject of judicial review as any other public authority.”

The phrase "except as otherwise provided in this Constitution" refers to public officers who (as specified by the Constitution itself) can continue to work beyond the compulsory retiring age of 60 years. The category of such public officers are: (a) under article 145, the compulsory retiring age for judges of the Supreme Court and the Court of Appeal is 70 years; whilst that of the High Court and the Chairmen of Regional Public Tribunals is 65 years;² (b) under article 194(5), the compulsory retiring ages of the Chairman and Vice Chairman of the Public Services Commission are the same as those of the Court of Appeal Judge and the High Court Judge respectively; and (c) under article 223(2), the compulsory retiring ages of the Commissioner and Deputy Commissioners of the Commission on Human Rights and Administrative Justice (CHRAJ) are 70 and 65 years respectively.³

It should be pointed out that, apart from the above specified public officers - not affected by the compulsory retiring age of 60 years - there are other public officers who before the coming into force of the Constitution were entitled to retire at the age of 65 years, either under their conditions and terms of employment or under the existing law, ie the law in force immediately before the coming into force of the Constitution, eg the Legal Service Law, 1993 (PNDCL 320), s 7 which provides:

“A member of the Service may on attaining the age of 60 years continue in the Service unless the Council otherwise determines and shall retire from the Service on attaining the age of 65 years.”

² It must be noted that, under article 126(1) of the 1992 Constitution, Regional Tribunals form part of the Superior Courts of Judicature.

³ Even though like the Chairman and Deputy Chairman of the CHRAJ, the terms and conditions of service of the Chairman and Deputy Chairman of the National Commission for Civic Education (NCCE) are, under article 235(1) of the Constitution, the same as that of the Justice of the Court of Appeal and Justice of the High Court respectively, the Constitution did not specify their compulsory retiring ages (unlike the Chairman and Deputy Chairman of the CHRAJ).

It is suggested that, these public officers who were entitled to retire at 65 years of age before the coming into force of the 1992 Constitution, have the accrued right to do so under section 8(1) and (7) of the transitional provisions of the Constitution, 1992 and within the meaning of section 8(1)(c) of the Interpretation Act, 1960 (CA4).⁴

The pertinent question which is to be examined in detail is whether or not the right to retire compulsorily on attainment of 60 years of age under article 199 (1) is to be enjoyed by all public officers at post or as at the time of the coming into force of the Constitution. In other words, where under the existing law, that is, the law in force before the coming into force of the Constitution on 7 January 1993, a public officer was required to retire at an age below 60 years, that is, at 55 years as was the case of police officers,⁵ can the public officer claim the constitutional right to retire compulsorily at the enhanced age of 60 years in terms of article 199 (1) of the Constitution? This question was argued before the nine-member panel of the Supreme Court in the case of *Yovuyibor v Attorney-General* ⁶

⁴ On the issue of accrued rights generally: see Bimpong-Buta, S Y *The Law of Interpretation in Ghana (Exposition & Critique)* 1995 Advanced Legal Publications (ALP) Accra, chap 5. It is to be noted that the accrued right to retire at the age of 65 years is also applicable to lawyers in the employment of the Council for Law Reporting, ie the Editor and the Assistant Editors of the Ghana Law Reports by virtue of section 9A of the Council for Law Reporting (Amendment) Law, 1990 (PNDCL 234) which provides: “Notwithstanding any provision of this Decree the lawyers of the Council employed in their capacity as professional lawyers shall have applicable to them the same conditions of service as are applicable to lawyers in the Legal Service.”

⁵ Under the Police Service Act, 1970 (Act 350), as amended by the Police Service (Amendment) Decree, 1974 (NRCD 303), and the regulations made thereunder, ie the Police Service (Administration) Regulations, 1974 (LI 880).

⁶ [1993-94] 2 GLR 343; coram: Archer CJ, Adade, Francois, Amua-Sekyi, Aikins, Edward Wiredu, Bamford-Addo, Charles Hayfron-Benjamin and Ampiah JJSC.

The facts and issue in Yovuyibor Case

The two plaintiffs, Messrs Yovuyibor and Bonuedi, were Superintendents of Police in the Ghana Police Service, which under article 190(1) of the 1992 Constitution, was part of the Public Services of Ghana. Both plaintiffs were therefore public officers aged 54 years but not yet 55 on 7 January 1993 when the 1992 Constitution came into force. Subsequently, they both received identical letters from the Inspector-General of Police (IGP), Chief Executive of the Ghana Police Service, dated 17 September 1993 - informing them that, having attained the age of 55 years after the coming into force of the Constitution, they and other police officers had been compulsorily retired from the Police Service.⁷ The Inspector-General of Police sought justification for the compulsory retirement of the plaintiffs at the age of 55 years under the Police Service Act, 1970 (Act 350) as amended by the Police Service (Amendment) Decree, 1974 (NRCD 303), and the regulations made under the Act, that is, the Police Service (Administration) Regulations, 1974 (LI 880), and section 8 (2) of the transitional provisions of the 1992 Constitution.

Dissatisfied with their removal from the Police Service on compulsory retirement at the age of 55 years, the plaintiffs sued in the Supreme Court for a declaration, inter alia, that on the coming into force of the Constitution, 1992 on 7 January 1993, their compulsory retiring age at 55 years under Act 350 and LI 880 had been extended to 60 years by virtue of article 199 (1) of the Constitution; and that their purported compulsory retirement at 55 years of age was in contravention of the said article 199 (1) and therefore a nullity. In reply, the defendants contended that the compulsory retiring age of all officers in the Police Service continued, by virtue of section 8 of the transitional provisions to the 1992 Constitution, particularly section

⁷ As chief executive, the Inspector-General of Police is deemed to have exercised the executive authority of Ghana vested in the President under article 58(1) of the Constitution. Under article 58(3), the executive authority may be exercised by the President by him directly or through subordinate officers.

8(2), to be governed by the provisions of Act 350 as amended by NRCD 303 and the regulations made under the enactment, that is, LI 880; and that under those provisions, the compulsory retiring age of the plaintiffs was still 55 years.

Consequently, the issue raised in this case for determination by the Supreme Court was whether the plaintiffs were properly retired on reaching the compulsory retiring age of 55 years as required by the law in force as at the coming into force of the Constitution, namely, Act 350 as amended by NRCD 303 and LI 880; or whether they were entitled, on the coming into force of the 1992 Constitution, to retire compulsorily at the enhanced age of 60 years in terms of article 199(1) of the Constitution

The decision in *Yovuyibor Case*

In view of the fact that the decision of the Supreme Court on the issue raised for determination turned on the true meaning and effect of section 8 (1) - (3) of the transitional provisions to the Constitution, 1992 (relied upon by the defence), it is necessary to set out the provisions of that section in full:⁸

“8. (1) A person who immediately before the coming into force of this Constitution held or was acting in an office in existence immediately before the coming into force of this Constitution, shall be deemed to have been appointed as far as is consistent with the provisions of this Constitution, to hold or act in the equivalent office under this Constitution.

(2) A person who before the coming into force of this Constitution would have been required under the law in force to vacate his office at the *expiration of a period* of service shall, notwithstanding the provisions of

⁸ My emphasis.

subsection (1) of this section, vacate his office at the expiration of that period.

- (3) This section shall be without prejudice to any powers conferred by or under this Constitution or any other law not being inconsistent with any provision of this Constitution, upon any person or authority to make provision for the abolition of office, for the removal from office of persons holding or acting in any office and for requiring those persons to retire from office.”

The unanimous decision of the nine-member panel of the Supreme Court - allowing the plaintiffs' claim - was founded entirely on the leading opinion delivered by Amua-Sekyi JSC as to the true meaning of section 8 (1) and (2) of the transitional provisions. His lordship's opinion was supported by the Chief Justice and all the other seven Justices of the Supreme Court.

After setting out the provisions of section 8 (1) - (3) of the transitional provisions as reproduced above, Amua-Sekyi JSC posed the following question:⁹ "The defendants justify the decision to retire the plaintiffs by relying on section 8(2). The question is whether they are right." In answering this question, Amua-Sekyi JSC said:¹⁰

“It is to be observed that there are two types of employees in the public services: those holding appointments for fixed periods, usually computed in years; and those holding permanent appointments, ie appointments for periods not limited in terms of years. To the former category belong persons holding contract appointments. These contracts are usually of two years' duration, but they may be for as long as five years. To the latter category belong the mass of employees who by the terms of their employment can look forward to a lifetime engagement in one public office or the other. These are the career

⁹ [1993-94] 2 GLR 343 at 347.

¹⁰ My emphasis.

officers in the various public services who, subject to the needs of the public services, and their own competence and good behaviour can expect to be kept in employment until they reach the prescribed retiring age.

Section 8 (1) of the transitional provisions of the Constitution, 1992 caters for both of these categories of public officers. It provides that a person who before the coming into force of the Constitution, 1992 held or was acting in an office shall be deemed to have been appointed to hold or act in the equivalent office under the Constitution. *Section 8 (2) of the transitional provisions of the Constitution, 1992 caters for the first category only by requiring those holding appointments for fixed periods to vacate their offices in accordance with the terms of their engagement. Section 8 (3)... caters for the second category by requiring those holding pensionable appointments to retire if their offices should be abolished or they are removed from office. The view that section 8 (2)... applies to pensionable officers is erroneous and must be rejected.*¹¹

In the light of the interpretation placed by the court on section 8 (1) and (2) of the transitional provisions of the 1992 Constitution, the court unanimously held that as public officers holding pensionable appointments, the plaintiffs were entitled to retire at the compulsory retiring age of 60. Consequently, their purported retirement from the Police Service at the age of 55 years by the Inspector- General of Police, was in breach of article 199 (1) of the Constitution and therefore a nullity.

¹¹ The interpretation placed on section 8 (1) and (2) was unanimously agreed to by all their lordships of the nine-member panel.

Can the decision in *Yovuyibor Case* be supported?

Three of their lordships in the instant case of *Yovuyibor*, that is Aikins, Edward Wiredu and Ampiah JJSC, in their individual concurring opinions, advanced some interpretative reasoning in support of the construction placed on section 8 (1) and (2) by the leading judgment. It seems their reasoning could be regarded as the missing link in the chain in the reasoning advanced by the leading opinion in support of the construction placed on section 8(1) and (2). Regrettably, however, it seems Amua-Sekyi JSC and the other five members of the nine-member panel of the Supreme Court,¹² had no prior knowledge of the reasoning of the other three judges - judging from the fact that their lordships in their terse concurring opinions made no reference whatsoever to the interpretative reasoning of Aikins, Edward Wiredu and Ampiah JJSC. The opinions of the three Justices of the Supreme Court could therefore at best be described as their individual opinions which are merely of persuasive effect and not binding on the Supreme Court or any other court.¹³

In his concurring opinion in support of the leading judgment, Aikins JSC resorted to legislative history of section 8 (2) of the transitional provisions (what his lordship referred to as "early constitutional enactments") in support of his opinion that section 8 (2) (which his lordship described as "cloudy and obscure"), was referable only to public servants holding fixed and contract appointments and not those holding permanent appointments, that is, career officers such as the plaintiffs. His lordship found that the precursor of section 8 (2) of the 1992

¹² Namely, Archer CJ, Adade, Francois, Bamford-Addo and Charles Hayfron-Benjamin JJSC.

¹³ On the importance of the judges in a panel knowing before delivery of their judgments, the reasoning of the other judges on the same panel: see Bimpong-Buta S Y, "Practice in the Delivery of Judgments in the Appellate Courts" [1984-86] GLRD iii.

transitional provisions was section 9 (2) of the transitional provisions to the Constitution, 1969. This section provided as follows:¹⁴

“9 (2) Any person who, before the coming into force of this Constitution, would have been required under the law in force to vacate his office *at the expiration of any period or on the attainment of any age* shall, notwithstanding the provisions of the preceding subsection, vacate his office *at the expiration of that period or on the attainment of that age.*”

It should be noted that under the Constitution, 1969, art 142 the Police Service was (it is still the position under the Constitution, 1992) made part of the Public Services of Ghana.

Aikins JSC reasoned that, given the provision in section 9 (2) of the 1969 transitional provisions, the framers of the Constitution, 1969 had in mind two categories of officers in the Public Service who were to be affected by the provision in section 9 (2), namely: (a) officers on limited engagement who were to vacate their office at the expiration of a period; and (b) officers on permanent engagement who had to vacate their office on the attainment of a particular age, ie those looking forward to a "lifetime engagement." His lordship reasoned further that since section 9 (1) of the 1969 transitional provisions (like section 8 (1) of the 1992 provisions) also provided for the re-appointment of all existing public officers on the coming into force of the 1969 Constitution, it was clear that the effect of section 9 (2) of the 1969 provisions, was to affect the two categories of public officers, namely, (i) persons holding office which would expire at the end of a stated period, that is, those on limited engagement; and (ii) persons holding office which would expire on the attainment of a specific age, that is, those on permanent engagement. His lordship found that the second

¹⁴ My emphasis.

category of public officers, that is, those holding office "on the attainment of any age" was omitted from the 1979 version of the transitional provisions, that is, section 7(2) thereof - a provision which was repeated verbatim as the present section 8(2) of the 1992 transitional provisions. Aikins JSC further found that unlike the 1969 Constitution, the Constitution, 1979 art 154(1) excluded the Police Service from the category of Public Services of Ghana. In effect, the Police Service under the Constitution, 1979 was, in any case, not part of the Public Services of Ghana, and therefore not affected by the compulsory retirement age of 60 years for public officers under article 162(1) of the 1979 Constitution, which was the same as article 199(1) of the present Constitution, 1992. His lordship therefore concluded that since section 7(2) of the 1979 transitional provisions had been reproduced verbatim as section 8(2) of the 1992 provisions, with omission of the 1969 formulation, "on the attainment of any age" that is, those looking forward to a lifetime engagement; and since under article 190(1) of the Constitution, 1992 the Police Service was now part of the Public Services of Ghana, the plaintiffs, as officers of the Police Service, were entitled to retire compulsorily at the enhanced age of 60 years under article 199(1) which is a verbatim reproduction of article 162(1) of the Constitution, 1979. His lordship therefore concluded that the plaintiffs' right to retire compulsorily at the age of 60 years could not be affected by the provisions in section 8 (2) which, by the examination of its legislative or parliamentary history, had been construed as affecting officers on limited engagement or a "period of service."

It is suggested that the interpretation placed on section 8 (2) by Aikins JSC by resorting to its parliamentary or legislative history is arguably sound in law. It is supported by the majority decision of the Supreme Court in *Ali-Jiagge v Inspector-General of Police*.¹⁵ In that case the majority, in holding that the Police Service was not part of the Public Services of Ghana within the meaning of article 154(1) of the 1979 Constitution, resorted to the legislative history of the

¹⁵ Supreme Court, Suit No 16/81, 26 March 1990, unreported.

enactments which dealt with the status of the Police Service, namely, the relevant provisions in the 1960, 1969 and 1979 Constitutions.

As earlier pointed out, it was not only Aikins JSC who gave reasons in support of the leading opinion delivered by Amua-Sekyi JSC. In his concurring opinion, Edward Wiredu JSC gave three reasons in support of the leading opinion that section 8 (2) of the transitional provisions must be construed as affecting only public officers engaged on contract or within specified periods. First, his lordship observed that the interpretation which the defence sought to place on section 8 (2) namely, that the section was also applicable to public officers on permanent engagements such as the plaintiffs, would mean that (with the exception of members of the Legal and Judicial Services),¹⁶ no public officer in any of the public services listed under article 190 (1) of the Constitution could enjoy the right to being "deemed to have been appointed" granted by section 8(1). As his lordship put it:¹⁷

“The benefit created by the provision in section 8(1) cannot enure to the benefit of any public office holder who 'held or was acting in an office in existence' within

¹⁶ Under the law in force immediately before the coming into force of the 1992 Constitution, ie the Judiciary (Retiring Ages) Law 1986 (PNDCL 161) and the Legal Service Law, 1993 (PNDCL 320), the compulsory retiring age for members of the Judicial Service and Legal Services respectively was 65 years. In effect, the members of the two services would still remain in office over and above the compulsory retiring age of 60 years for other public officers under article 199(1) even if section 8(2) was applicable to them. The same exception referred to Edward Wiredu JSC applies to the Editor and Assistant Editors of the Ghana Law Reports who, under the Council for Law Reporting Decree, 1972 (NRCD 64) as amended by the Council for Law Reporting (Amendment) Law, 1990 (PNDCL 234), who were entitled to retire at the age of 65 years before the coming into force of the 1992 Constitution. It seems Edward Wiredu JSC was right in expressing the view, that employees on permanent engagement in the Legal and Judicial Services fall into the category of public servants holding permanent appointments under section 8(1) of the transitional provisions.

¹⁷ [1993-94] 2 GLR 343 at 351-352.

the language of that section... It would also mean that section 8(2) is a caveat on section 8(1) and therefore make it otiose.”

Edward Wiredu JSC further held the view that if section 8(2) were construed as qualifying section 8(1) and thus applicable to police officers holding permanent appointments, it would create a disparity between two categories of police officers: those at post as at the time of the coming into force of the Constitution would retire compulsorily at the age of 55 years under Act 350 as amended; whilst the newly employed officers would retire compulsorily at the age of 60 years under article 199(1) of the Constitution. Such a conclusion would lead to an absurdity which could not reasonably have been intended by the framers of the Constitution. To avoid that absurd situation, his lordship held that the court should "adopt an innocuous liberal and benevolent construction of section 8(1) and (2) of the transitional provisions, by resorting to the provision in article 11(6) of the Constitution. That provision enjoined the court to construe the existing law, in the instant case, Act 350 as amended by NRCD 303, with modifications, adaptations, qualifications and exceptions necessary to make it conform with any changes effected by the Constitution. The result was that all officers in the Police Service would retire compulsorily at the age of 60 in accordance with article 199(1) of the Constitution. Such an approach would, in the words of Edward Wiredu JSC, "achieve a uniform and harmonious operation of the Constitution in so far as they affect the tenure of office of all personnel in the Public Service."

It is suggested that the approach adopted by Edward Wiredu JSC (as he then was), in resolving the doubt arising from the application of the provisions in section 8(1) and (2) of the transitional provisions is to be welcomed. The approach in effect invokes two well-established principles of statutory interpretation: First, the need to adopt a liberal and benevolent construction of a national constitution as a political document capable of growth to meet the aspirations of the people. This reasoning was adopted by the Court of Appeal (sitting as the Supreme Court) in

Tuffuor v Attorney-General.¹⁸ A similar approach was adopted by the Supreme Court of Zimbabwe in *A Juvenile v The State*¹⁹ where Dumbutshena CJ, speaking for the court said:²⁰ "Since Independence this court has consistently given a broad and benevolent interpretation to provisions of the Constitution on human rights and fundamental freedoms." Second, Edward Wiredu JSC's approach was in effect an invocation of the application of *ut res magis valeat quam pereat* rule of construction.²¹ The rule, briefly stated, is that where a statutory provision (such as section 8(1) and (2) of the transitional provisions) is susceptible to alternative constructions which are equally open, the courts should rather adopt the alternative construction which would bring about the smooth and harmonious operation of the law; and reject the alternative construction which would create an absurdity, confusion, uncertainty and disparity in the operation of the law.²²

Apart from the reasons given by Aikins and Edward Wiredu JJSC as examined above, Ampiah JSC simply and summarily dismissed the provisions in section 8(1) and (2) of the transitional provisions as irrelevant to the issues raised for determination. No reason was given by his lordship for so holding. Having wrongly dismissed section 8(1) and (2) as not relevant to the case, his lordship construed Act 350 as amended by NRCD 303 as inconsistent with article 199(1) of the Constitution and thus a nullity. His lordship therefore arrived at the

¹⁸ [1980] GLR 637, CA sitting as the Supreme Court.

¹⁹ [1989] LRC (Const) 774, SC. For a detailed application of the need to give a broad and liberal interpretation to constitutional provisions: see Chapter 4.

²⁰ Ibid at 785.

²¹ For a detailed examination of this rule of construction as an aid to interpretation: see Bimpong-Buta, S Y, op cit chapter 3 at 123-128.

²² See also the decision of the Privy Council in *Shannon Realties Ltd v Ville de St Michel* [1924] AC 185 at 192 and the decision of the House of Lords in *Nokes v Dancaaster Amalgamated Collieries Ltd* [1940] AC 1014, HL.

same conclusion that the plaintiffs, as public officers, were entitled to be retired compulsorily at the age of 60 years and not at 55 years as contended by the defendants.

It is suggested that section 8(1) and (2) is susceptible to the two differing constructions advanced by counsel for the parties. On the one hand, when literally construed, section 8(2) would appear to affect public officers such as the plaintiffs, who under the law in force (governing their compulsory retiring age) as at the time of the coming into force of the 1992 Constitution, were required to retire “at the expiration of a period of service” – regardless of the nature of engagement, be it on a contract or permanently. Such officers had to retire compulsorily at the age of 55 years, ie below the compulsory retiring age of 60 years, if the law in force so required. That was the position taken by the defendants in that case.

On the other hand, given the need to avoid absurdity, inconsistency and inequality of treatment of the two categories of public officers within the same Police Service (as held by Edward Wiredu JSC); and also given the resort to the legislative history of section 8(2) as an aid to its construction (as was done by Aikins JSC), section 8(2) may be construed in its secondary meaning, that is a meaning other than its literal meaning. When so construed, it may be held as applicable only to public officers on limited engagement or on contracts, that is “a period of service” and not officers holding permanent appointment (such as the plaintiffs), who could retire compulsorily at the enhanced age of 60 years under article 199(1) of the Constitution.

It is very interesting to observe that the interpretation unanimously placed by the Supreme Court on section 8(1) and (2) of the transitional provisions in the *Yovuyibor* case, was subsequently endorsed and followed by the court in its decision in *Nartey v Attorney-General*

and Justice Adade.²³ The Supreme Court held by a majority decision²⁴ - applying the decision in the *Yovuyibor* case – that as at the coming into force of the Constitution, 1992 there were two categories of Justices of the Supreme Court: those on permanent engagement and those on limited or fixed period of engagement; and that section 8(2) of the transitional provisions was applicable to public officers on limited engagement or fixed period of appointment as construed in the *Yovuyibor* case. The majority went on to hold that since the judiciary was part of the Public Services of Ghana, section 8(2) was applicable to the judiciary. It was therefore concluded that since Mr Justice Adade had admittedly been on limited engagement for one year as at the coming into force of the Constitution, he ought to have retired at the expiration of that year. In arriving at this conclusion, Acquah JSC, in delivering the opinion of the majority of the court said:²⁵

“...the Judiciary and especially judges of the Superior Court were not exempted from the purview of section 8(2), and that the second defendant who on the coming into force of the 1992 Constitution was on limited engagement for one year ought to have retired at the expiration of that year.

The fact that the period of that limited engagement was to be taken into

²³ [1996-97] SCGLR 63. It should be mentioned that I had previously subjected the reasoning or rather the want of it for the interpretation adopted in *Yovuyibor* case - not the decision itself - to some searching criticism. The basic point made was that the court per the leading opinion simply assumed instead of giving the legal basis for the interpretation placed on section 8(1) and (2) of the transitional provisions of the 1992 Constitution: see Bimpong-Buta S Y, op cit at pp 357-358 and 364. The criticism was itself subjected to detailed criticism by Acquah JSC who delivered the leading opinion in the subsequent case of *Nartey v Attorney-General & Justice Adade*: see [1996-97] SCGLR 63 at pp 105-108. The missing reasoning for the decision in *Yovuyibor* case was adequately given in the subsequent *Justice Adade* case.

²⁴ Per Acquah, Kpegah and Sophia Akuffo JJSC - Edward Wiredu and Adjabeng JJSC dissenting.

²⁵ Ibid at 113.

consideration in calculating his retiring benefits does not transform that fixed period into a permanent one.”

It should be pointed out, however, that the second defendant, Justice Adade, had put forward another argument to the plaintiff’s claim that he ought to have retired at the end of his one year period of extension. He argued that the question of his compulsory retiring age, should be governed by the provision in section 4 (1) of the transitional provisions, and not that in section 8 (1). He therefore argued that, properly construed, section 4 (1) had the effect of empowering him to continue in office up to the compulsory retiring age of seventy years for Justices of the Supreme Court as provided by the 1992 Constitution. The said section 4 (1) of the transitional provisions states that:

“4 (1) A Justice of the Supreme Court, the Court of Appeal or the High Court holding office immediately before the coming into force of this Constitution, shall continue to hold office as if appointed to that office under this Constitution.”

The construction, which Justice Adade sought to place on section 4 (1) of the transitional provisions, was rejected by the majority of the Supreme Court. It was held that the purpose of section 4 (1) was to protect judges who, on the coming into force of the Constitution, had not reached the compulsory retiring age and would have continued in office had the Constitution not come into being; that judges like Justice Adade, who had reached their compulsory retiring age but were only on limited engagement, had no need for such protection because they had already exhausted their real term of office.

However, their lordships in the minority, Edward Wiredu and Adjabeng JJSC, construed section 4 (1) differently. Edward Wiredu JSC (as he then was), was of the view that the

language of section 4 (1) did not admit of any group of categories of the Justices of the Supreme Court as held by the majority. His lordship said:²⁶

“Once it was established as a fact that one was holding office as a Justice of the Supreme Court and was exercising his duties as such, one qualifies under the true and ordinary meaning of the language of section 4 (1)...”

His lordship Adjabeng JSC in his dissenting opinion, also said:²⁷

“...the language of section 4 (1) of the transitional provisions is clear and unambiguous. That is the section which applies to the second defendant, and not section 8(2) as claimed by the plaintiff. And even if in a wider sense it can be said that section 8 (2) can apply to the second defendant, section 4 (1), being a provision specifically made for only Superior Court Judges, will override the general provision in section 8 (2), as the second defendant is a Superior Court Judge, and he was so at the time the 1992 Constitution came into force.”

The two decisions examined above: *Yovuyibor and Justice Adade* assert that there were two categories of employees in the public service on the coming into force of the Constitution, 1992. First, those holding limited or fixed periods of engagement like Mr Justice Adade. Second, those holding permanent appointments like the plaintiffs in the *Yovuyibor* case. The position as to the two categories of public employees was made clearer by Edward Wiredu JSC in his concurring opinion in the *Yovuyibor v Attorney-General* where he said:²⁸

²⁶ Ibid at 76.

²⁷ Ibid at 97.

²⁸ [1993-94] 2 GLR 343 at 352.

“I therefore accept the view that section 8(1) of the transitional provisions of the Constitution, 1992 should be construed as concerning all personnel in the public service whose retiring ages are fixed and 8(2) of the transitional provisions of the Constitution, 1992 to be referable to personnel in the public service with limited engagement and whose engagement are not referable to any retiring age but are governed by a “period of service”, ie persons engaged on contracts or within specified periods.”

Attention is now to be turned to actions instituted in the Supreme Court which raise questions regarding the constitutionality or otherwise of decisions taken by the President in matters relating to local government administration.

CHALLENGE TO EXECUTIVE ACTION RELATING TO LOCAL GOVERNMENT ADMINISTRATION

Introduction

There is no doubt that effective local government administration is a *sine qua non* for the overall effective administration of the whole country. Not surprisingly, the Constitution, 1992 in chapter 20 contains detailed provisions on decentralization and local government. Thus for the purposes of local government, Ghana is divided into districts known as district assemblies which shall, under article 241 (3) of the Constitution, “be the highest political authority in the district, and shall have deliberative, legislative and executive powers.” Each district assembly shall be headed by a district chief executive, who under article 243 (2) (c) of the Constitution, shall “be the chief representative of the Central Government in the

district.”²⁹ It is for these reasons that the President of the Republic of Ghana is very much politically interested in the appointment of the persons who represent him at the district assembly. The Supreme Court has, in two related decisions coming closely after each other, made it clear that the executive actions of the President relating to local government administration, are subject to judicial review and could thus be challenged. The two cases are: *New Patriotic Party v Electoral Commission*³⁰ and *New Patriotic Party v President Rawlings*.³¹

Examination of the cases relating to local government administration

In the case of *New Patriotic Party v Electoral Commission*, the plaintiffs sought a declaration that the intended holding by the Electoral Commission of elections to the office of district chief executive between 18 and 30 August 1993 of persons nominated as chief executives by the President, was inconsistent with and in contravention of the Constitution, 1992 - especially articles 242, 243 and 246 thereof and was therefore unconstitutional and void. The declaration was unanimously granted by the Supreme Court on 17 August 1993 and on 16 September 1993, the court gave, inter alia, two reasons for the decision.

First, it was held that the district assemblies as established under the Local Government Law, 1988 (PNDCL 207), as amended by PNDCL 272 and 306 were not competent, in addition to

²⁹ For an interesting examination of “Local Government in the Democratic Process” see Professor Boateng, E A: *Government and the People: Outlook for Democracy in Ghana 1996* Institute of Economic Affairs Ghana pp 125-139.

³⁰ [1993-94] 1 GLR 124 and an aspect of which was dealt with in chapter 4 on the question of the Directive Principles of State Policy as a tool of constitutional interpretation.

³¹ [1993-94] 2 GLR 193, SC.

exercising their functions under section 6 of PNDCL 207, to hold elections for the purpose of approving candidates for appointment as district chief executives under article 243(1) of the Constitution. Second, under article 242 of the Constitution, the composition of district assemblies differed in substance and form from the composition of the district assemblies established under section 3(1) of PNDCL 207. Consequently, the district assemblies established under PNDCL 207 were completely different bodies from the district assemblies which were yet to be established under article 242 of the Constitution. It was therefore held that the district assemblies, as then constituted, could not take a decision in a matter which had been specially preserved for a differently constituted district assembly envisaged under article 242. In the words of Amua-Sekyi JSC in his opinion in support of the unanimous decision of the court:³²

“The position ... is that the present district assemblies continue to exercise the powers given them by PNDCL 207, as amended, until such time that the district assemblies envisaged by the Constitution, 1992 have been established. This is a far cry from saying that they are entitled to exercise powers that are to be found only in the Constitution, 1992.”

Interestingly enough, on 17 September 1993, that is, just a day after the Supreme Court had given its decision in the above case, the then President of the Republic, Flt Lt J J Rawlings (retired), appointed the same persons (whom he had unsuccessfully nominated for elections as district chief executives) as district secretaries under section 21(1) of the Local Government Law, 1988 (PNDCL 207). Consequently, the same plaintiffs, as in the earlier action which had challenged the action of the same President, instituted the second action, that is, *New Patriotic*

³² [1993-94] 1 GLR 124 at 135.

Party v President Rawlings (supra), in the Supreme Court under article 2 of the 1992 Constitution, challenging the right of the President to make the appointments. They sought a declaration that: (a) the appointments made by the President were inconsistent with and in contravention of articles 242-243 and 246-247 of the Constitution; (b) an order setting aside the appointment; and (c) an order of injunction prohibiting the President from nominating, appointing or electing district secretaries to perform the functions set out in the Constitution to be performed by district chief executives. The declaration sought by the plaintiffs were, this time, unanimously dismissed by the Supreme Court in the leading judgment delivered by Amua-Sekyi JSC.

In delivering the opinion of the court, Amua-Sekyi JSC observed that article 242 of the 1992 Constitution dealt with the composition of district assemblies; article 246 with the term of office of members of district assemblies; whilst article 247 empowered Parliament to make laws on the qualifications and the procedures of a district assembly. The judge said that before the enactment, on 24 December 1993, of the local Government Act, 1993 (Act 462), PNDCL 207 continued to have full force and effect as an existing law; and that the President had properly exercised the power to appoint the district secretaries under section 21(1) by virtue of section 23(1) of the transitional provisions to the 1992 Constitution. That section provided that:

“23(1) Until Parliament otherwise provides by law, existing laws regulating the operation of District Assemblies and other local authorities shall continue to regulate their operation.”

The court construed the words in section 23(1) as meaning that until Parliament enacted a law to regulate district assemblies in accordance with chapter 20 of the Constitution, the provisions in PNDCL 207 were to continue in operation regardless of whether or not its terms were in

conformity with the Constitution. In giving the rationale for the unanimous decision, Amua-Sekyi JSC said:³³

“The provision in section 23(1) is a recognition of the need for government business at the local level to continue while Parliament deliberated on the matter and made the necessary changes in the existing law. The alternative would have been to incorporate the entire body of laws on local government in the Constitution, 1992.”

It should be observed that in the case of *New Patriotic Party v President Rawlings*, as discussed above, the Supreme Court also had to grapple with the question whether or not the President of the Republic of Ghana could be sued personally or be made a party to court proceedings whilst in office in the performance of his executive functions. This is the next issue for our discussion.

CAN THE PRESIDENT BE SUED PERSONALLY IN THE EXERCISE OF HIS EXECUTIVE FUNCTIONS?

Introduction

As indicated above in the case of *New Patriotic Party v President Rawlings*, a question of extreme political and constitutional importance for the development of Ghana Constitutional Law arose. The additional question argued by counsel for the parties was whether or not the President was properly sued in court as the first defendant together with the Attorney-General as the second defendant in the action. In other words, the question was whether the President, in the performance of his executive functions, was amenable to court proceedings as a party or should he be represented in all court proceedings by the Attorney-General.

³³ [1993-94] 2 GLR 193 at 201-202.

Examination of the question whether President amenable to court proceedings

The relevant provisions are to be found in articles 2 (1) (b), 57(4) and (5) and 88(5) of the 1992 Constitution. These articles respectively state that: ³⁴

“2 (1) A person who alleges that-

(b) any act or omission of any person

is inconsistent with, or is in contravention of a provision of this constitution, may bring an action in the Supreme Court to that effect.”

“57(4) *Without prejudice to the provisions of article 2 of this Constitution, and subject to the operation of the prerogative writs, the President shall not, while in office, be liable to proceedings in any court for the performance of his functions, or for any act done or omitted to be done, or purported to be done, or purported to have been done or purporting to be done in the performance of his functions, under this Constitution or any other law.*”

(5) The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.”

“88 (5) The Attorney-General shall be responsible for the institution and conduct of *all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant.*”³⁵

³⁴ (My emphasis).

³⁵ The provisions in articles 57 (4) and (5) and 88 (5) may be compared with analogous provision in section 69 (1) and (2) of The Gambian 1997 Constitution which states: “69(1) Except as provided in subsection (2), no civil or criminal proceedings shall be instituted or continued against any person while performing the functions of the office of the President in respect of anything done or omitted to be done by him.” “(2) Nothing in subsection (1) applies to an action for a declaration under section 5 (enforcement) of the Constitution, and

It should be stressed that whereas the Supreme Court in the case of *New Patriotic Party v President Rawlings* was (as earlier indicated) unanimous in holding that the President had properly appointed the district secretaries under PNDCL 207, s 21(1), the five-member panel disagreed on the related question as to whether or not the President was properly joined as a defendant in the action. It was held by a majority decision (per Abban, Bamford-Addo and Ampiah JJSC with Amua-Sekyi and Aikins JJSC dissenting) that the President could not be sued; that is, he had not been properly joined to the action and that the Attorney-General who had been sued as the second defendant was the proper person to have been sued; and that in the circumstances, the President's name would be struck out from the writ as a party.

Reasoning for the majority and minority opinions in *NPP v President Rawlings*

What were the reasoning of the majority and the minority in support of their respective decisions? It was held by all the judges that the immunity from court proceedings granted to the President in the performance of his executive functions under article 57(4) (what Abban JSC described as "substantive immunity"), did not extend to: (a) court proceedings for prerogative writs; or (b) actions brought under article 2 of the Constitution relating to the enforcement of the Constitution. In effect, all the judges agreed that the executive acts of the President, whilst in office, could, under article 57(4), be challenged by means of prerogative writs or by an action brought in the Supreme Court under article 2. The point of departure, however, was that whereas the majority were of the view that in such circumstances, it would

any proceedings under that section against the President or the person performing the functions of that office shall be brought against him or her by his or her official title or style, and he or she shall appear by, the Attorney-General." It is clear that under the Gambian provision, the Attorney-General is the person to be sued and not the President personally. Cf section 3 (1) of the 1990 Namibian Constitution which grants the President no immunity from court proceedings. It states: "No person holding the office of the President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity."

not be proper to make the President a party to the action as the defendant, the minority judges (per Amua-Sekyi and Aikins JJSC) thought otherwise.

The judges in the majority were of the view that even though under article 57(4), the official acts of the President could be challenged by prerogative writs and actions brought in the Supreme Court under article 2, such actions should be brought against the Attorney-General only as the defendant for and on behalf of the Government of Ghana, and not against the President, in accordance with article 88(5) of the Constitution. Their lordships Abban and Bamford-Addo JJSC were further of the view that the President should not be made a party to court proceedings so as to preserve the dignity and the aura of respectability of the President as Head of State. Bamford-Addo JSC cited, in support of that view, paragraph 34 of the 1991 Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana which stated:³⁶

“34 The Presidential immunity from legal proceedings provided in article 44 clause 9-22 of the 1979 Constitution [the same as article 57(4)-(6) of the 1992 Constitution] is meant to preserve the dignity of the office of the President *but should not preclude proceedings against the State in appropriate cases*. The proper procedure in such cases is to institute proceedings against the *Attorney-General*, as the official representative of the Republic.”

Abban JSC (as he then was), also supported the view that article 57(4) provided the President with procedural immunity. And in further support of the reasoning which was founded on the need to preserve the dignity and aura of respectability attached to the office of the President,

³⁶ My emphasis. The Proposals for a Draft Constitution of Ghana submitted by the Committee of Experts appointed under the Committee of Experts (Constitution) Law, 1991(PNDCL 252), were debated and amended by the Consultative Assembly. The Proposals were subsequently approved by the people in a Referendum.

the judge cited the decision of the Supreme Court in *Sallah v Attorney-General*,³⁷ relying heavily on the dicta by Apaloo, Sowah and Archer JJA in that case.

In the *Sallah* case, the Attorney-General,³⁸ as counsel for the State, raised a preliminary objection to the plaintiff's writ. The plaintiff had challenged his dismissal as a manager of a statutory corporation on the orders of the Presidential Commission, which was then performing the functions of the President under the 1969 Constitution. The main ground for the preliminary objection was that the proper defendants ought to have been the Presidential Commission and not the government represented by the Attorney-General.³⁹ The Attorney-General further argued that the effect of article 36(6) and (7) of the 1969 Constitution (the same as article 57(4) and (5) of the 1992 Constitution) was that the actions of the Presidential Commission (performing in the interim, the functions of the President) were immune from question in any court while the President remained in office. The Supreme Court unanimously dismissed the preliminary objection on the grounds (per Apaloo, Sowah and Archer JJA) that article 36(6) of the 1969 Constitution (the same as article 57(4) of the 1992 Constitution), merely provided a procedural, not substantive, immunity to the President; that it meant that the official acts of the President could be challenged but he could not be made a defendant in court proceedings nor be made liable for the result of the proceedings. The three judges in *Sallah v*

³⁷ (1970) CC 55; (1970)2 G&G 493.

³⁸ Hon Mr N Y B Adade, now retired Justice of the Supreme Court.

³⁹ It is interesting to note that whereas in the *Sallah Case*, the then Attorney-General argued that the proper defendant to the action ought to have been the Presidential Commission (performing the functions of the President under the 1969 Constitution) and not the Attorney-General; in the instant case of *New Patriotic Party v President Rawlings*, the Attorney-General, Dr Obed Asamoah, argued to the contrary, namely, that he alone was the proper defendant by virtue of article 88(5) of the Constitution.

Attorney-General, namely Apaloo, Sowah and Archer JJA,⁴⁰ in their separate opinions, made it very clear that the proper person to defend actions against the President in those circumstances, was the Attorney-General by virtue of article 68(2) of the Constitution, 1969 the same as article 88(5) of the Constitution, 1992.

In further support of the majority decision in the instant case, Abban JSC relied on the oft-cited case of *Tuffuor v Attorney-General*.⁴¹ His lordship drew attention to two comparisons present in both *Tuffuor* and *New Patriotic Party v President Rawlings*: Just as in the instant case in which, the plaintiff challenged the act of the President, namely, the appointments of the district secretaries as unconstitutional, so in the *Tuffuor Case* the plaintiff had challenged as unconstitutional the act of the President, namely, his purported nomination of Justice Apaloo for approval by Parliament in respect of his appointment as Chief Justice of Ghana. Given these challenges, just as in the instant case in which the plaintiffs brought the proceedings in the Supreme Court under article 2 of the 1992 Constitution, so in the *Tuffuor Case*, the plaintiff brought the proceedings in the Supreme Court under article 2 of the 1979 Constitution.⁴²

⁴⁰ Apaloo JA was later appointed Chief Justice of Ghana, succeeded by Sowah JA who was in turn succeeded by Archer JA as the Chief Justice; he was in turn succeeded as the Chief Justice by Abban JSC.

⁴¹ [1980]GLR 637 SC.

⁴² The action in *Tuffuor* was, in fact, brought under section 3 of the First Schedule of the 1979 Constitution and not under article 2 of the 79 Constitution as wrongly stated by Abban JSC in *New Patriotic Party v President Rawlings*. It must also be explained that section 3 of the First Schedule of the 1979 Constitution empowered the Court of Appeal in being immediately before the coming into force the 1979 Constitution, to exercise the functions or jurisdiction of the Supreme Court pending its establishment under article 114(5) of the Constitution. One of the functions of the Supreme Court was under article 118(1) of the 1979 Constitution. The said article 118(1), the same as article 130(1) of the 1992 Constitution, vested the Supreme Court with exclusive jurisdiction to determine all matters relating to the interpretation and enforcement of the Constitution and whether an enactment was made in excess of powers by the Constitution or any other law.

It was in the light of those comparisons, that Abban JSC in *NPP v President Rawlings* concluded:⁴³

“But in the *Tuffuor Case*... *President Limann* was not made a party to the suit, even though it was his acts which were called in question in that suit. It was the Attorney-General, as the principal legal adviser of the government, who was made a defendant. That was the right procedure.

The plaintiff, in the present case, did the right thing by suing the Attorney-General. But it was improper to join President Rawlings as a defendant. This is one of the situations where it can be said that the President had procedural immunity.”

However, in the view of Amua-Sekyi and Aikins JJSC, who delivered the minority opinion, there was no such procedural immunity for the President under article 57(4) for the following reasons: First, Amua-Sekyi JSC sought to distinguish the instant case from the Supreme Court decision in *Sallah v Attorney-General*, which was relied upon and applied by the majority, and cited dicta from the opinions of Sowah and Archer JJA in the *Sallah v Attorney-General* (which were in fact against his position), which supported the view that the effect of article 36(6) of the Constitution, 1969 (analogous to article 57(4) of the Constitution, 1992), was to grant the President, who was the fount of honour, immunity from court proceedings in the performance of his executive powers. His lordship sought to discount the effect of the dicta by Sowah and Archer JJA on the ground that those statements reflected the fact that under the Constitution, 1969 the President was a mere figure-head, a Ceremonial President, who wielded no executive power, unlike the President under the Constitution, 1992 under which the President

⁴³ [1993-94] 2 GLR 193 at 210, SC (my emphasis.)

is vested with the executive powers of the State. The implication sought to be drawn by his lordship was that a mere Ceremonial President should not be dragged to court whilst the President - exercising real executive power under the Constitution, 1992 - could be sued in court in the performance of his executive functions. This argument is, with the utmost respect, unconvincing simply because the office of the Executive President, like the Ceremonial President, is also one of dignity and high respect which must be revered. It is highly debatable whether the distinction drawn by his lordship should make any difference.

Second, as earlier noted, their lordships in the minority were also (like their lordships in the majority) of the view that the immunity from court proceedings given to the President in the performance of his functions, did not extend under article 57(4) to: (a) prerogative applications, eg a writ of mandamus; or (b) applications brought under article 2 of the Constitution - particularly article 2 (1) (b) which provides:

“2(1) A person who alleges that - ...

(b) any act or omission of any person

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.”

In the view of Amua-Sekyi JSC (agreed to by Aikins JSC), the words "any person" in article 2(1) (b), should be construed to include the President of the Republic and, if it is so conceded, then there is no reason why the President should not be sued personally. His lordship made the position very clear when he said :⁴⁴

“If words have any meaning, the term ‘any person’ must include the President of the Republic; and, if it does, then there is no reason why he cannot be called upon

⁴⁴ Ibid at 205-206

to answer for alleged infringements of constitutional provisions. I venture to say that it would be a breach of the *audi alteram partem* rule not to make him a party to such an action.

Although the President is the first citizen, he is not above the law. The medieval fiction that the “King can do no wrong”, which the sophist interpreted to mean that if the action was wrong then it was not that of the king, has no place in a republican setting which prides itself on all citizens being equal under the law and therefore obliged to act in conformity with it. We recognise that the executive President being the most powerful person in the state is the one who has the greatest capacity for wrong-doing. We do not need a petition of right or a notional defendant like the Attorney-General before we can exercise our democratic right of calling an erring President to order under article 2 of the Constitution, 1992 which not only commands him to obey any order or direction this court may give, but also makes his failure to obey any order or direction a ground for his removal from office.”

It is suggested that, their lordships in the minority were right in holding that the words "any person" in article 2(1) (b) should be construed to include the President; that the President is liable for infringement of the Constitution under article 2; that he is subject to actions for prerogative writs and that he is not above the law; on the contrary he is subject to the Constitution. However, the effect of the minority opinion was, with great respect, to confuse the liability of the President for official or executive acts or conduct (for which actions for prerogative writs and applications under article 2 could be instituted) with the procedure for bringing such actions. As already pointed out, the effect of the unanimous decision of the Supreme Court in the *Sallah Case* (applied by the majority in the instant case) was to confer on the President, procedural immunity in respect of such actions. In the words of Sowah JA in the *Sallah Case* quoted by Amua-Sekyi JSC in the instant case:

“... Though the Presidency cannot be inducted into the legal arena, the Government of Ghana can be and is answerable for the lawful performance of the executive powers vested in the President.”

In the same vein, Archer JA in the *Sallah Case* also said, as quoted by his lordship Amua-Sekyi JSC:

“In my view, the article [36(6) of the 1969 Constitution, the analogous provision in article 57(4) of the 1992 Constitution] confers on the President nothing more than procedural immunity. This article does not confer substantial immunity. It means that official acts of the President can be challenged but he cannot be made a defendant in judicial proceedings or be made personally liable for the result of the proceedings”

Amua-Sekyi JSC in his opinion, conceded that Apaloo JA was a party to the decision in the *Sallah Case*. As earlier indicated, the court in that case held that the government, represented by the Attorney-General, had been properly sued for the act of the Presidential Commission complained of by the plaintiff. His lordship, however, quoted a portion of the dicta of Apaloo JA to support his conclusion that, in the view of Apaloo JA in the *Sallah Case*, an application for prerogative writ could be brought against the President, and not the Attorney-General, if the President failed or refused to perform a public duty. The said dicta by Apaloo JA in the *Sallah Case*, relied upon by Amua-Sekyi JSC in the instant *Rawlings* case, were as follows:

“It ought, however, to be borne in mind that the immunity from legal proceedings granted to the President in the performance or purported performance of his constitutional or other legal duty is not absolute. His immunity from court does not extend to proceedings taken against him by any of the prerogative writs. It would follow from this that if the President failed or neglected to perform a public

duty imposed on him by law, a person affected by his failure can compel him in court by the prerogative order of mandamus.”

It should be observed that the above statement by Apaloo JA in the *Sallah* case (relied upon by Amua-Sekyi JSC in the instant case) was clearly obiter; given the fact that the claim in the *Sallah* case was not at all concerned with an application for a prerogative order against the Presidential Commission but a claim to the effect (like the instant case), that the act of the Presidential Commission was unconstitutional. In any case, immediately after making the above statement, Apaloo JA in his judgment in the *Sallah* case continued and made the following all-important observation which is, in fact, against the minority opinion in the instant case. His lordship said:⁴⁵

“In holding that this action was properly brought against the government, I share the unanimous opinion of my brothers. If that action was properly brought it cannot be doubted that it was properly brought against the Attorney-General on its behalf. In my opinion, the preliminary objection was an unmeritorious one and ought to have been as indeed was dismissed.”

A reading together of the above stated dicta from the judgment of Apaloo JA, would show quite clearly that, like Sowah and Archer JJA in the *Sallah* case, Apaloo JA was clearly of the view that it was proper to sue the Attorney-General for the act of the Presidential Commission complained of in that case.

It should be observed that despite the clear statement of Ghana Constitutional Law as determined by the Supreme Court in *Sallah v Attorney-General* and *New Patriotic Party v*

⁴⁵ My emphasis - a dictum also quoted by Abban JSC in support of the majority decision in *NPP v President Rawlings*.

President Rawlings (as discussed above), namely, that the President cannot be personally sued for any infringement of his executives functions and powers, the question was relitigated in the recent case of *Amidu v President Kufuor*.⁴⁶

In the *Amidu* case, the plaintiff, (the former Deputy Attorney-General in the Rawlings Government),⁴⁷ challenged the decision of Mr J A Kufuor, the newly elected President of Ghana, to appoint three persons to assist him in the Office of the President in the performance of his official functions.⁴⁸ The plaintiff issued his writ in the Supreme Court under article 2 of the 1992 Constitution, against Mr J A Kufuor, the President of Ghana, as the first defendant; the Attorney-General as the second defendant; and the three persons whose appointments had been announced, as the third, fourth and fifth defendants respectively. The plaintiff sought a declaration that:

- (a) on a true and proper interpretation of articles 58 (1) and (2), 91 (1) and (2) and 295 of the 1992 Constitution and sections 2 – 4 of the Presidential Office Act, 1993 (Act 463), the third, fourth and fifth defendants could not be appointed by the President as Staff of the Presidential Office without consultation with the Council of State as required by article 91(1) of the Constitution; and

⁴⁶ [2001-2002] SCGLR 86-this time round before a nine-member panel of the Supreme Court: Edward Wiredu Ag CJ, Bamford-Addo, Ampiah, Kpegah, Adjabeng, Acquah, Atuguba, Sophia Akuffo and Lamptey JJSC. An aspect of *Amidu v President Kufuor* relates to the question of the application or otherwise under Ghana constitutional law of the doctrine of mootness discussed in chapter 3.

⁴⁷ The Rawlings Government now in opposition, had lost the December 2000 Presidential and Parliamentary Elections which were won by the New Patriotic Party led by Mr J A Kufuor, sworn in as the new President of Ghana on 7 January 2001.

⁴⁸ Two of the three persons, namely, Mr Jake Obetsebi-Lamptey and Miss Elizabeth Ohene were, in fact, nominated by the President and subsequently approved by Parliament as Ministers of State.

- (b) the conduct of the President, the first defendant, in making the appointments, was inconsistent with and in contravention of the letter and spirit of the Constitution.

In defence, the Attorney-General raised a preliminary objection to the institution of the writ on the grounds, inter alia, that the President had been wrongly sued as the first defendant, and that the President was, under article 58(4) of the Constitution, immune from legal proceedings while in office. In response, the plaintiff contended that the President could be personally sued because the claim had been instituted under article 2 of the Constitution.⁴⁹

These opposing arguments were considered by a nine-member panel of the Supreme Court. The attention of the court was drawn to all the relevant previous decisions of the court.⁵⁰ The court, by a majority decision of six to three, upheld the preliminary objection to the plaintiff's writ. The action was dismissed. The majority of the court held that⁵¹ even though the executive acts of the President could be challenged as unconstitutional in an action brought

⁴⁹ It is very interesting to note that the plaintiff, Mr Martin Amidu, had (together with the then Attorney-General, Dr Obed Asamoah, in the Rawlings Government), put up a contrary argument as defence counsel in the case of *New Patriotic Party v President Rawlings* [1993-94] 2 GLR 193, SC-examined in detail above. They had argued, as defence counsel, in an action also brought under article 2 of the Constitution, that President Rawlings had been wrongly sued; and that the proper defendant to the suit was the Attorney-General by virtue of article 88 (5) of the Constitution. Interestingly enough, that argument was in sharp contrast to the argument proffered by the then Attorney-General, Hon Mr N Y B Adade (as he then was), in the *Sallah* case (1970) 2 G & G 493. He had argued in that case that the proper defendant ought to have been the Presidential Commission (performing the functions of the President under the 1969 Constitution) and not the Attorney-General. It appears the argument had always depended on which side the wind was blowing at the material time of the case. That regrettably gave the impression that the Constitutional Law of Ghana was in a state of flux.

⁵⁰ Namely, *Sallah v Attorney-General* (1970) 2 G & G 493, SC under the 1969 Constitution; *Tuffuor v Attorney-General* [1980] GLR 637, SC under the 1979 Constitution; and *New Patriotic Party v President Rawlings* [1993-94] 2 GLR 193, SC under the 1992 Constitution.

⁵¹ Per Edward Wiredu Ag CJ and Bamford-Addo, Acquah, Atuguba, Sophia Akuffo and Lamptey JJSC-Ampiah, Kpegah and Adjabeng JJSC *dissenting*.

under article 2 of the Constitution or by an application for a prerogative writ,⁵² the President could not be personally sued. The majority held, applying the previous majority decision in *New Patriotic Party v President Rawlings* (supra), that the proper person to sue would be the Attorney-General. In support of the majority decision, Acquah JSC said:⁵³

“Apart from actions brought under article 2 and those seeking prerogative orders, the President has immunity from legal proceedings in the performance of his functions under the Constitution...But ...the grant of the immunity to the President does not mean that legal proceedings cannot be instituted for relief arising from any damage, harm or otherwise caused to the individual in exercise of the executive authority of the President. In the event of such situations, actions may be instituted against the Attorney-General ...as provided by article 88 (5) of the Constitution...What the immunity granted by article 57 (4) does is to prevent the institution of such actions against the President personally.”

In support of the majority decision in the same *Amidu* case, Atuguba JSC also said:⁵⁴

“I would hold that the way to avoid a conflict between the provisions conferring immunity from suits on the President and article 2 of the Constitution, is to hold that the President’s immunity shields him from suit in respect of performance of his functions, actual or purported under the

⁵² An application for a prerogative order such as *mandamus*, prohibition, *certiorari* and *quo warranto* could be brought before the Supreme Court under article 132 of the 1992 Constitution: see *Republic v High Court, Ex parte Attorney-General (Delta Foods Case)* [1998-99] SCGLR 595, SC where the Supreme Court held that the Attorney-General was the proper person to be sued in applications for supervisory orders.

⁵³ [2001-2002] SCGLR 86 at page 104.

⁵⁴ [2001-2002] SCGLR 86 at 112.

Constitution but his acts in those respects can still be challenged by suing the Attorney-General under article 88, particularly under clause (5) thereof...”

It should be stressed that in support of the majority decision in the *Amidu* case, Sophia Akuffo JSC did address the concern raised by Amuah-Sekyi JSC in his dissenting opinion in *New Patriotic Party v Rawlings*. That concern embodied in his opinion earlier quoted above (see footnote 44), was this: since the failure by the President to obey an order addressed to him by the Supreme Court under article 2 of the Constitution would constitute a ground for his removal from office, the holding that the President could not be sued personally might offend against the *audi alteram partem* rule. In response to that concern, Sophia Akuffo JSC expressed the view that the regime created by article 2 of the Constitution was an exception to the *audi alteram partem* rule; because the mere existence of such ground for removal of the President from office, would not automatically remove the President. The reason was that the Constitution has provided specific procedures for the removal of the President from office.

However, it should be pointed out that, Ampiah JSC did dissent from the majority decision in the *Amidu* case. His lordship did so despite the fact that he had joined the majority in *New Patriotic Party v President Rawlings* in holding that the President could not be personally sued for any infraction in the performance of his functions. In articulating, as it were his change of heart, on the now vexed issue of whether or not the President could be personally sued, Ampiah JSC in his dissenting opinion in the *Amidu* case said:⁵⁵

“Save for matters or acts done within article 2 of the Constitution or matters for which a prerogative writ could be issued, all other actions against the President, while in office, should be brought against the Attorney-

⁵⁵ Ibid at 134 (author’s emphasis).

General...*I had an occasion to give an opinion on this issue in New Patriotic Party v President Rawlings. In that case, I stated ...that no action could be brought against the President in his personal capacity. That was a case under article 2 of the Constitution. I have since reconsidered my opinion. I am now in agreement ...that if the action fell within article 2 or prerogative proceedings were brought against the President, the President could be sued in his personal capacity.*”

Regrettably, his lordship gave no reason, as he was (with respect) bound to do under article 129 (3) of the Constitution, for changing his mind and thereby departing from the binding majority of the Supreme Court in *NPP v President Rawlings*, not to mention the equally binding decision in *Sallah v Attorney-General*.

It may also be necessary to draw attention to the reasons given by Kpegah JSC in dissenting from the majority decision in the *Amidu* case. His lordship said:⁵⁶

“What happens when the President refuses to perform a public duty imposed upon him by statute? He must, like anybody, be amenable to the prerogative writ of mandamus to him to discharge that duty.”

Kpegah JSC quoted the following observation made by Apaloo JA (as he then was) in *Sallah v Attorney-General*:⁵⁷

⁵⁶ Ibid at 151.

⁵⁷ Amua-Sekyi also quoted the same words in his dissenting opinion in the *Rawlings* case. As earlier pointed out, the observation by Apaloo JSC was an obiter dictum. It could not (with respect) be relied upon as a binding authority.

“If the President failed or neglected to perform a public duty imposed on him by law, a person affected by the failure can compel him in court by the prerogative order of mandamus.”

Regrettably, however, his lordship did not also point out the more crucial fact that despite making the above observation, Apaloo JA had supported the majority view in the *Sallah* case that the President could not be personally sued in an action brought under article 2 of the Constitution.

Rationalization of the majority and minority opinions on the vexed issue of whether or not the President can be personally sued.

The minority opinions in both the earlier decision of the Supreme Court in *New Patriotic Party v President Rawlings* and the later decision in *Amidu v President Kufuor* suffer from one major defect: the decisions could not be supported by one single binding authority. On the contrary, their lordships were rather bound by the previous binding decisions of the Supreme Court in the three previous successive cases: *Tuffuor v Attorney-General*; *Sallah v Attorney-General*; and *New Patriotic Party v President Rawlings*. That apart, the fundamental question that needs to be addressed by the proponents of the minority view is this: is there any irrefutable and convincing policy reason why the President of the Republic must be personally sued in an action brought under article 2 of the Constitution or in an action for a prerogative order? Does the prospective plaintiff suffer any diminution in his or her claim if he or she were to sue the Attorney-General as the nominal defendant for the alleged unconstitutional acts or omissions of the President? The answers to these questions appear to be in the negative. Atuguba JSC was right when, in his opinion in support of the majority decision in *Amidu v President Kufuor*, he said:⁵⁸

⁵⁸ Ibid at 113.

“[S]ince the same acts of the President can be challenged under article 2 against the State rather than against the President, it is difficult to think that article suffers any real prejudice by reason of the Presidential immunity from suit.”

One other crucial question to be answered is this: whenever the President acts in his official capacity, does he not do so as the agent of the government?⁵⁹ Since “government” in article 295 (1) has been defined as meaning “any authority by which the executive authority of Ghana is duly exercised”, why should the President be sued personally for performing his official functions? In the words of Sowah JSC (as stated in his opinion in *Tuffuor v Attorney-General*), one were to have “recourse to the Constitution as a whole”⁶⁰- particularly articles 2 (1) (b), 57 (4) and (5) and 88 (5) (earlier quoted in full),⁶¹ one would be led irresistibly to the conclusion that the President cannot be sued personally in an action brought under article 2 and in applications for prerogative writs.

The provision in article 57 (5) needs to be quoted again for more emphasis:

“57 (5) The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.”

Commenting on this article in his concurring opinion to the majority decision in the *Amidu* case, Lamptey JSC said:⁶²

⁵⁹ That question was answered in the affirmative by Sowah JA in his opinion in the *Sallah* case (1970) 2 G&G 493, SC “...when the President executes any of the provisions of the Constitution falling within his power, he does so for and on behalf of and in the name of the Government of Ghana...”

⁶⁰ See [1980] GLR 637 at 648.

⁶¹ See page 326 *ante*.

⁶² Ibid at 127.

“In my opinion, the provision in article 57 (5) clearly and plainly guarantees to the President while in office *qua* President, total and complete immunity from the jurisdiction of the courts ...the President cannot be sued in the civil courts.”

Lamprey JSC further observed that the Kenyan Constitution grants absolute immunity to the President as shown by article 14 (2) of the 1992 Constitution of Kenya as revised in 1998. The article states that:

“No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the President.”

It is suggested that the “same absolute immunity” ascribed to the President of Kenya may be ascribed to the President of Ghana by virtue of article 57 (5) of the Ghana Constitution because this article epitomises the provision in the Kenyan Constitution. The words “any civil or criminal proceedings” in article 57 (5), must be literally construed to include actions brought under article 2 or applications for prerogative writs. Unless so construed, the article would be rendered ineffective in its application – contrary to the application of the rule of statutory interpretation embodied in the maxim *ut res magis valeat quam pereat*.⁶³ It seems clear that if the framers of the Constitution had intended to exclude actions brought under article 2 and applications for prerogative orders from the immunity given to the President while in office, they would have used words like “Except as

⁶³ See the Supreme Court decision in *Republic v High Court, Accra; Ex parte Adjei* [1984-86] 2 GLR 511 per Adede JSC on the need to apply the rule of presumption embodied in the maxim so as to make legislation effectual and not otiose- a rule examined in detail in relation to the Constitution in chapter 4.

provided [in article 2] or this Constitution” similar to the words used in article 58(4) of the 1992 Constitution and not the words used in article 57(4), namely, “Without prejudice to the provisions of article 2 of this Constitution.” It seems clear therefore that the words used in article 57(4),⁶⁴ cannot and may not be construed as meaning “save for” as impliedly so construed by Ampiah JSC in his dissenting opinion in the *Amidu* case in the passage quoted above. It would be recalled that in that passage the learned judge did indicate that he had changed his mind on the question of whether or not the President can be sued personally in court to answer for any infringement of his executive functions. The two decisions of the Supreme Court in *Yovuyibor and Justice Adade* have the effect of clarifying the Ghana Constitutional Law on the all important question of the compulsory retiring age of public officers for all categories of public servants as of the coming into force of the Constitution, 1992.

CONCLUSION

This chapter has sought to examine the power of the Supreme Court to review executive action. The decisions of the Supreme Court in the cases of *Yovuyibor and Adade* (supra), have the effect of clarifying the Ghana Constitutional Law on the all important question of the compulsory retiring age of public officers for all categories of public servants as of the coming into force of the Constitution, 1992.

It is suggested that the unanimous decision of the Supreme Court in *New Patriotic Party v President Rawlings*, affirming the constitutional right of the President to appoint district secretaries under PNDCL 207, s 21, was properly made. If the decision had been otherwise, a hiatus in the law governing local government administration would have been created. It is

⁶⁴ Article 57(4) provides as follows: “Except as otherwise provided in this Constitution or by a law not inconsistent with this Constitution, all executive acts of Government shall be expressed to be taken in the name of the President.”

clear that local government administration would have ground to a halt for a considerable time, with no political head representing the Central Government at the district level until the enactment of the then proposed Local Government Bill. The country would have been saddled with the absurd situation where the President would have had no power to nominate persons for election as district chief executives as rightly decided by the Supreme Court in *New Patriotic Party v Electoral Commission*; nor would he have had the right to appoint district secretaries under PNDCL 207, s 21 if the declaration sought by the plaintiffs in the instant proceedings had been granted. It seems quite clear that such an absurd situation could not have been intended by the framers of the 1992 Constitution. The decision in *New Patriotic Party v President Rawlings* –influenced, no doubt, by the earlier decision in *New Patriotic Party v Electoral Commission* referred to by the court- was, in that regard, unexceptionable and may be viewed as a progressive development of Ghana Constitutional Law.

It could be concluded from the Supreme Court decision in *New Patriotic Party v President Rawlings* (supra) that the President cannot be personally sued in the exercise of his executive actions and that he should be represented in all court proceedings by the Attorney-General by virtue of article 88(5) of the Constitution, 1992.

CHAPTER 7

THE SUPREME COURT AND THE ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

INTRODUCTION

In most democratic countries founded on a written constitution, the fundamental human rights and freedoms of the citizens, are clearly spelt out in the constitution.¹ Thus in the case of the United States of America, for example, the fundamental human rights of the citizens, are set out in the Bill of Rights, as amended by the first eight and the fourteenth Amendments of the Constitution of 1776.² These Amendments, which were enacted in 1791, provide, inter alia, for the preservation of fundamental rights of the individual, such as the right to freedom of religion, speech, the press, peaceful assembly, and the fact that there should be no deprivation of property, life and liberty, without due process of law. Likewise, the fundamental human rights and freedoms of all Ghanaian citizens are clearly stated in chapter 5 of the Constitution, 1992.³

¹ Citizens in democratic countries without a written constitution as the fundamental law, like the United Kingdom, are also entitled to enjoyment of these rights. Thus Professor D C M Yardley, in his book: *British Constitutional Law* (7th ed) Butterworths, discusses the existence of fundamental human rights in the U K. The author lists these at page 96 as including: equality before the law, freedom of property, the right to free elections, freedom of public worship, freedom of assembly and association and freedom of speech.

² The first eight amendments apply to federal rights whilst the fourteenth amendment applies to the states.

³ It should be noted that these rights are not to be enjoyed by only Ghanaian citizens but as stated in article 12(2) of the Constitution, 1992 “Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.”

We shall in this chapter, consisting of Parts A and B, demonstrate that the Supreme Court has made distinctive contribution to the enforcement, promotion and enjoyment of fundamental human rights and freedoms. In Part A, the following issues would be examined: (i) historical background to enjoyment of fundamental human rights and freedoms; (ii) enjoyment of fundamental human rights and freedoms before the coming into force of the Fourth Republican Constitution of 1992; (iii) enjoyment of fundamental human rights under the Constitution, 1992; and (iv) fundamental human rights distinguished from the directive principles of state policy as stated in chapter 6 of the Constitution, 1992.

Part B under the heading: General Fundamental Human Rights and Freedoms, would focus on the following issues: (i) the right to or protection of personal liberty and other related issues such as limitations to enjoyment of personal liberty; and the right of a person arrested for committing a crime or actually charged before a court for a fair trial within a reasonable time; (ii) observance and enjoyment of administrative justice; (iii) freedom of assembly and the right to demonstrate; (iv) freedom of association including freedom to form and join trade unions; (v) the nature and meaning of freedom of speech and expression, including freedom of the press and other media; (vi) the fundamental right to freedom of speech and expression: Ghana experience; and (vii) limitations on enjoyment of fundamental human rights and freedoms. The issues raised in Parts A and B would be examined *seriatim*.

PART A

1. HISTORICAL BACKGROUND TO ENJOYMENT OF FUNDAMENTAL HUMAN RIGHTS

The first notable occasion in the history of the Ghana Constitutional Law, when an attempt was made by the citizen to insist on his right not to be detained without the due process of law, arose in the case of *In re Akoto*.⁴ The appellant and seven others in this case, were detained under an

⁴ 1961] 2 GLR 523, SC.

order made by the Governor- General and signed on his behalf by the Minister of the Interior under the Preventive Detention Act, 1958.⁵ An application for the writ of *habeas corpus*, challenging their detention was dismissed by the High Court. They appealed to the Supreme Court against the dismissal on the grounds, inter alia, that the Preventive Detention Act, 1958 was unconstitutional as being in contravention of the declaration of fundamental principles made by the President on assumption of office and as contained in article 13(1) of the Constitution, 1960. The said article 13 (1) stated:⁶

"13 (1) Immediately after his assumption of office the President shall make the following solemn declaration before the people -

On accepting the call of the people to the high office of President of Ghana I ... solemnly declare my adherence to the following fundamental principles -

That the powers of Government spring from the will of the people and should be exercised in accordance therewith.

That freedom and justice should be honoured and maintained ...

That no person should suffer discrimination on ground of sex, race, tribe, religion or political belief...

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

That no person should be deprived of his property save where the public interest so requires and the law so provides."

⁵ No 17 of 1958.

⁶ The emphasis is mine. And it should be noted that article 13(1) carried in its marginal notes, the words: "Declaration of fundamental principles."

In dismissing the appeal, the Supreme Court held that the declaration by the President on the assumption of office, was similar to the Coronation Oath of the Queen of England and that such a declaration did not constitute a bill of rights, creating legal obligations enforceable in a court of law. The Supreme Court delivered itself of an opinion which very much influenced the interpretation placed on article 13(1). The court said, (per Sir Arku Korsah CJ):⁷

“In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve... *The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The People's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.*”

It appears by this reasoning, the Supreme Court overly stressed the political underpinnings of the fundamental declarations of the Constitution, 1960. Nobody can deny the political nature and dimension of a national constitution such as the Constitution, 1960.⁸ Even if the Supreme Court were right in so holding, its decision to use it as the basis for holding that article 13(1) merely created a moral right, and not a legally enforceable right was, to say the least, indefensible. By this interpretation, the court declared itself as being impotent to interfere or

⁷ [1961] 2 GLR 523 at 535 (emphasis is mine).

⁸ See in that regard the dictum of Charles Hayfron-Benjamin JSC in *New Patriotic Party v Inspector –General of Police* [1993-94] 2 GLR 459 at 494: “This court-and indeed all courts-is therefore entitled to take into consideration political matters in ‘applying or interpreting this Constitution’... Suffice it to say that this court cannot ignore the fact that at the close of this second millennium of the modern era the attainment and enjoyment of fundamental human rights have become prime instruments of international relations. In rendering this opinion therefore, we must take into serious consideration the struggles, exploits and demands of the oppressed and struggling peoples in Africa, America and elsewhere led by men such as Nelson Mandela and Dr Martin Luther King, Jr in their fight for fundamental human and civil rights.”

examine the propriety and legality or otherwise of a citizen's detention by the State. If the declarations in article 13(1) were merely moral, bereft of any legal rights enforceable in the courts, why did the framers of the Constitution describe them as "fundamental principles?" If the people's remedy for any infraction of the "fundamental principles" was, in the words of the court, "through the use of the ballot box", what was the purpose of the provision that "no person should be deprived of freedom of religion, of the right to move and assemble without hindrance or of the right of access to courts of law?" Surely these words and the other words like: "I solemnly declare my adherence to the following fundamental principles" were not meant to be mere political rhetoric!

It is suggested that having taken due account of the political character of the fundamental principles of the Constitution, the Supreme Court in *Re Akoto* should have used it as a basis for giving a generous and broad interpretation to the declarations in article 13(1), namely, that it sought to give to the individual a legal right enforceable by the courts.⁹

We had earlier, in chapter 1, drawn attention to the scathing criticisms levelled at the Supreme Court decision in *Re Akoto* by academics, text writers and some Justices of the present Supreme Court established under the Constitution, 1992. As pointed out then, the decision in *Re Akoto* was subjected to criticism by Charles Hayfron-Benjamin JSC in his opinion in support of the unanimous decision of the Supreme Court in *New Patriotic Party v Inspector-General of Police*.¹⁰ The decision in *Re Akoto* was severely criticised by the judge for having undermined the very fabric of the Constitution, 1960 and thus pushed aside certain principles

⁹ As a commentator, Dr Kwame Frimpong, put it in his article: "Review of the Constitution of the Courts to Government" (1981-82) 13 & 14 RGL 239 at 240: "Under the Nkrumah era, 1957-66, the independent and impartial judiciary established by the Independence Constitution that the citizen looked up to *for the protection of his liberty and fundamental rights failed him miserably in the Re Akoto case.*"

¹⁰ [1993-94] 2 GLR 459, SC.

and fundamental human and civil rights which have become the bulwark of the Constitution, 1992. In the words of Hayfron-Benjamin JSC:¹¹ "In 1961 in the *Akoto* case, our Supreme Court missed the opportunity to designate article 13 of the 1960 Constitution as a Bill of Rights." In the same vein, Kpegah JSC in the case of *Amidu v President Kufuor* said:¹²

“Every student of the Constitutional Law of Ghana might have felt, after reading the celebrated case of *In re Akoto*, that if the decision had gone the other way, the political and constitutional development of Ghana would have been different. ‘Different’ in the sense that respect for individual rights and the rule of law might well have been entrenched in our land.”

And in his observation on the decision in *Re Akoto* Professor Adu Boahen, in a contribution to a symposium on the concept and practice of Human Rights in Ghana organised by the Ghana Academy of Arts and Sciences on 18 November 1980, also said:¹³

“One of the reasons why democracy has not done too well in this country and why human rights have often been trampled upon has been the rather timid and conservative role played by the Judiciary. According to many informed legal opinions, had the Supreme Court ruled otherwise in the case of *Re Akoto* ... the course of history would have been different.”

¹¹ Ibid at 505.

¹² [2001-2002] SCGLR 86 - earlier quoted in chapter 1 under the heading "Statement of the Central Theme."

¹³ *Human Rights and the Democratic Process*, Accra, 1993 at page 33, Ghana Academy of Arts and Sciences.

It has also been observed that members of the Bar as distinct from the Judiciary, did contribute, in large measure, to the decision in *Re Akoto*. As noted by Professor E V O Dankwa:¹⁴

“Those decisions (such as *Re Akoto*) originated from views expressed and canvassed by lawyers. Thus, we are equally guilty for such detestable cases. The lesson is that if democracy is to work through cases, lawyers must canvass positions that would ensure the attainment of this goal.”

The decision of the Ghana Supreme Court in *Re Akoto* may be contrasted with the decision of the Supreme Court of Mauritius in the case of *Societe United Docks v Government of Mauritius*.¹⁵ The court was called upon to decide the legal effect of a similar declaration of fundamental rights in section 3(c) of the Mauritius Constitution, 1968. In this case, the Government of Mauritius passed a new legislation, the Mauritius Sugar Terminal Corporation Act, 1979.¹⁶ The Act introduced a new method of loading sugar and thus created a new sugar corporation vested with monopoly in the storing and loading of sugar. The effect was to render redundant, the storing and loading of sugar business of the plaintiff company. Under the Act, the employees of the plaintiff company were to receive compensation but not the company itself. The plaintiff company therefore sued for compensation, claiming that the Act had deprived it of its business of storing and loading of sugar contrary to section 3(c) of the Constitution, 1968 which provided, inter alia, that:

¹⁴ Op cit at page 50. See also Kumado, Kofi in “Assessment and Prospects of the Media” chapter 6, *Six Years of Constitutional Rule in Ghana 1993-96* at page 107 Friedrich Ebert Foundation (1999), Accra where he stated: “*Re Akoto* decision determined the subsequent dictatorial course of the Nkrumah regime.”

¹⁵ [1985] Law Reports of the Commonwealth (LRC) (Const) 801.

¹⁶ No 6 of 1979.

“It is hereby recognised and declared that in Mauritius there existed and shall continue to exist. ... the following human rights and fundamental freedoms, namely - the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation...”

In raising a preliminary objection to the action, the Government of Mauritius contended that the facts disclosed no violation of the fundamental rights protected by the Constitution and that section 3 thereof relied upon, was merely an "initial declaratory section" - having no operative effect and that the fundamental human rights provisions including section 3, had been limited by subsequent sections including section 8 which specifically offered protection and gave "compensation" only where property was "compulsorily acquired" in the interest of the public.¹⁷ The Supreme Court held (and subsequently affirmed by the Privy Council) that section 3 of the Constitution which began chapter II of the Constitution headed "Protection of Fundamental Rights and Freedoms of the Individual" and which recognised and declared the existence of basic human rights and freedoms, was not a mere preamble or introduction but an enacting section; that the words "have effect" in the section, had the effect of affording protection "to the rights and freedoms" referred to in the section. More importantly, it was further held that a constitution protecting fundamental rights and freedoms should not be narrowly construed but should receive a generous and purposive construction.

¹⁷ It is very interesting to note that the same argument had been raised by the defence in the Ghana case of *Re Akoto* (supra).

Rault CJ said:¹⁸

“I find nothing either within the four corners of section 3 or in the context where it occurs to suggest that it is a mere zombie without an independent life of its own. Such a construction appears to me completely foreign to the spirit in which we are wont to read a Constitution. The fundamental rule is that a Constitution is a meaningful document: its voice carries higher and further than ordinary legislation, and it is unthinkable to dismiss the solemn pronouncements of section 3 as so much hot air.

Apart from the general rule that every pronouncement of a Constitution must be presumed to enshrine a principle of abiding value, there exist in the language of section 3 itself reasons to give it its full effect.”

In upholding the decision of the Supreme Court of Mauritius, the Privy Council, per Lord Templeman said:¹⁹

“The right which by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies.”

¹⁸ Ibid at 815.

¹⁹ Ibid. On the need for construing a national constitution benevolently and broadly: see chapter 4.

We may conclude the discussion on the historical background to the enjoyment of fundamental human rights in Ghana by emphasising the historical importance of the Supreme Court decision in *Re Akoto*. Notwithstanding the damning criticism levelled against the decision, *Akoto* itself and the provision in article 13 (1) of the Constitution, 1960 very much influenced the formulation of the enforceable fundamental human rights and freedoms enshrined in chapter 5 of the Constitution, 1992. Charles Hayfron-Benjamin JSC drew attention to this point in his opinion in support of the Supreme Court decision in *New Patriotic Party v Inspector- General of Police* when he said:²⁰

“*Re Akoto* ...is often considered as a case on the validity of the Preventive Detention Act, 1958 (No 17 of 1958). What many fail to appreciate is that article 13 (1) of the Constitution, 1960 contained many provisions which in later Constitutions have been expanded into substantive articles.”

2. ENJOYMENT OF FUNDAMENTAL HUMAN RIGHTS BEFORE COMING INTO FORCE OF CONSTITUTION, 1992

A very important issue which needs to be addressed is: whether before the coming into force on 7 January 1993 of the Ghana Fourth Republican Constitution, 1992 a person could bring an action in the courts seeking redress for an alleged breach of his fundamental human rights.

²⁰ [1993-94] 2 GLR 459 at 489-decision to be examined in detail later in this chapter on the enjoyment of the fundamental right to freedom of assembly under article 21(1)(d) of the Constitution, 1992.

Ghana was a signatory to a number of international conventions or instrument prescribing fundamental human rights and special rights.²¹ There was, however, no specific legislation providing for the enforcement in Ghana of those rights *with the exception of* the Habeas Corpus Act, 1964 (Act 244); the short-lived Constitution, 1969, art 28; the Constitution, 1979, art 35; and perhaps the provisions in the Constitution, 1960, art 13(1) which were, however, declared unenforceable by the Supreme Court decision in *Re Akoto*.

The exercise of judicial power by the High Court in the form of issuing orders and directions aimed at enforcing fundamental human rights and freedoms had been conferred on the High Court under the Constitution, 1969, art 28 and the Constitution, 1979, art 35. However, the High Court and the Supreme Court did not have the opportunity to exercise that jurisdiction as conferred by the Constitutions of 1969 and 1979 with the exception of few applications.²² It seems that the jurisdiction to enforce the fundamental human rights and freedoms did not survive the suspension and abrogation of the 1969 and 1979 Constitutions.²³

It is conceded that under sections 4(1) and 9(1)(a) of the PNDC (Establishment) Proclamation, 1981 the courts in existence immediately before 31 December 1981 were to continue to exist and exercise the same powers as they had before the suspension of the Constitution, 1979.

²¹ Some of the Conventions are: Convention on the Prevention and Punishment of the Crime of Genocide (1966); Convention on the Political Rights of Women (1952); International Convention on the Elimination of all Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child (1989); African Charter on Human and Peoples' Rights (1981) and the Charter of the United Nations and the Universal Declaration of Human Rights.

²² See eg *Spokesman (Publications) Ltd v Attorney-General* [1974] 1 GLR 88 and *Republic v Director of Prisons; Ex parte Shackelford* [1981] GLR 554.

²³ Under the National Redemption Council (Establishment) Proclamation, 1972, s 2(1); the PNDC (Establishment) Proclamation, 1981, s 3(1) and PNDCL 42, s 66(1).

But those powers were to be exercised subject to the provisions of the Proclamation and Laws issued under it. However, the provisions of the (Establishment) Proclamation, 1981 as amended by PNDCL 42 and other Laws such as the Habeas Corpus (Amendment) Law, 1984²⁴ showed quite clearly that the fundamental human rights and freedoms guaranteed by articles 19 to 34 of the Constitution, 1979 were no longer to operate. The only exception was the provisions in article 32 relating to the equal rights of mothers, spouses and children. That article 32 was specifically saved by the PNDC (Establishment) Proclamation, 1981, s 24 which provided:

“Notwithstanding the suspension of the 1979 Constitution and until provision is otherwise made by law, Article 32 of the said Constitution relating to the equal rights of mothers, spouses and of children shall continue to have effect.”

The legal effect of that provision appears to be this: the jurisdiction and powers vested in the High Court under article 35(1) and (2) of the suspended Constitution, 1979 to enforce the fundamental human rights of mothers, spouses and their children should continue to be exercised and enforced by the High Court. On the application of the *expressio unius est exclusio alterius* rule of statutory interpretation, the fact that the Proclamation, 1981 expressly saved the fundamental human rights as conferred by article 32 but was silent on the continued operation of the other fundamental rights, meant that they had been impliedly denied and no longer operable.²⁵ Furthermore in *Spokesman Publications Ltd v Attorney-General*,²⁶ the full bench of the Court of Appeal unanimously held that following the suspension of the Constitution, 1969 by section 2(1) of the NRC (Establishment) Proclamation, 1972 the

²⁴ PNDCL 91 subsequently repealed by the Public Order (No 2) Law, 1992 (PNDCL 288).

²⁵ See on the application of the *expressio unius* maxim: *Patu-Styles v Amoo-Lampitey*, [1984-86] GLRD 138; [1984-86] 2 GLR 648; and *Ghana Industrial Holding Corporation v Vincenta Publications Ltd* [1971] GLR 24, CA.

²⁶ [1974] 1 GLR 88, CA (full bench).

operation of the entrenched provisions of the Constitution relating to fundamental human rights, upon which the plaintiffs had based their claim, ceased to have any effect.

In the light of the law as expounded above, did the High Court possess the jurisdiction to make the declaration sought by the plaintiffs in the case of *Gbedemah v The Interim National Electoral Commission*?²⁷ The claim in this case was: first, a declaration that the Political Parties Law, 1992²⁸ was a violation of their fundamental human rights of freedom of association and that the Law was void, of no effect and consequently unenforceable; second, the plaintiffs sought an order of perpetual injunction to restrain the defendants, Independent Electoral Commission (INEC), from carrying out the registration of political parties in accordance with the provisions of the Political Parties Law, 1992 or taking any steps under the provisions of the law. Counsel for the plaintiffs, argued, inter alia, that the High Court had the jurisdiction to determine the claim under the law existing before the coming into force of the Constitution, 1992 namely, section 4(2) of the PNDC (Establishment) Proclamation, 1981 and section 14(1) of the Courts Act, 1971.²⁹ He argued that the effect of those provisions was to save the powers which the courts possessed before the coming into force of the PNDC Proclamation, 1981. Counsel further referred to the provisions in section 1(1)(b) of PNDCL 42, article 33 of the Constitution, 1992 (which was yet to come into force) and section 29 of its transitional provisions and submitted that on the basis of those enactments, the High Court had the power to entertain the plaintiffs' claim. As the court put it at page 7 of the unreported judgment in the case:

²⁷ High Court, Accra, 26 May 1992, Suit No 1087/92 unreported per Kwadu-Amponsem J.

²⁸ PNDCL 281.

²⁹ Now repealed and re-enacted as the Courts Act, 1993 (Act 459).

“...at the heart of plaintiffs' arguments was that the unfettered powers of the PNDC came to an end on 28 April 1992... Counsel went on to say that the choice of 28 April 1992 had created a novel situation in the country and that public policy required that between 28 April 1992 and 7 January 1993 [when the Constitution is to come into force] nothing should be done by any of the organs of State which derogates from the provisions of the 1992 Constitution.”

The arguments of counsel for the plaintiffs raised two issues: (a) what is the law as to the commencement date of legislation; and (b) whether the High Court had the jurisdiction to make the declaration as to the alleged violation of the fundamental human rights of freedom of association.

It is well-settled that the commencement date of an enactment is a condition precedent for its enforcement. Therefore the Constitution, 1992 relied upon by counsel could not simply be enforced before the commencement date. The issue relating to the commencement date of legislation arose in the Supreme Court case of *Mekkaoui v Minister of Internal Affairs*³⁰ which turned on the validity of the Ghana Nationality (Amendment) Decree, 1979 (AFRCD 42). The Decree had been signed on 17 September 1979 by the Chairman of the Armed Forces Revolutionary Council (AFRC) without any indication as to the commencement date. However, after the 1979 Constitution had come into force, ie after 24 September 1979, the Attorney-General's Office inserted 4 September 1979 on the Draft Decree as the commencement date. The Draft Decree was printed and published in October 1979 in *Gazette* No 45 which was, however, dated 22 September 1979.

³⁰ [1981] GLR 664, SC.

The Lebanese plaintiff, denaturalised by AFRCD 42, sued in the Supreme Court, claiming that the Decree was null and void for want of commencement date. The claim was upheld by a majority decision of three to two.³¹ It was held, *inter alia*, that after 24 September 1979, when the Constitution, 1979 came into force, neither the AFRC nor its chairman and members or agents could make any insertions into AFRCD 42 as to its commencement date. It was further held that AFRCD 42 as signed by the chairman did not reserve power to any body to appoint a date for its commencement. The Supreme Court therefore declared AFRCD 42 a nullity and unenforceable for its infringement of section 3(7) of the AFRC Proclamation, 1979. That section provided that where the date of commencement had been provided in the Decree, then it should take effect from that date; but where no date had been stated, then it should take effect from the date of publication. In his opinion in support of the majority decision, Archer JSC (as he then was) said:³²

“We are then left with the original Decree signed by the Chairman but without a date of commencement and without any power reserved to any person or body to appoint a date of commencement. That Decree can best be classified as an unnumbered, ungazetted and unpublished law without a date of commencement.... AFRCD 42 was not the Decree signed by the Chairman. However, what the Chairman signed is still valid law but without a date of commencement. That Decree has never been published so as to bring it into operation.”

³¹ Per Archer, Charles Crabbe and Taylor JJSC - Sowah and Adade JJSC *dissenting*.

³² [1981] GLR 664 at 687.

In his opinion in support of the majority decision, Taylor JSC also said:³³

“... the decree which was signed by the Chairman of the AFRC on 17 September 1979, was a valid Decree when it was made; but it is a Decree which ... was not given any commencement date. It is therefore clear that it is a Decree which has never come into force...”

It seems therefore clear that on the application of the Supreme Court decision in the *Mekkaoui Case*, as to commencement date of legislation and on the basis of the existing law (as earlier expounded) before the coming into force of the Constitution, 1992 Kwadu-Amponsem J was perfectly right in holding in the *Gbedemah v The Interim National Electoral Commission (The 28 Politicians Case)* (supra) that the High Court had no jurisdiction to declare PNDCL 281 as being in violation of the plaintiffs' fundamental human rights of freedom of association and thus unenforceable.

In any case, the Supreme Court in its decision in *Fattal v Minister for Internal Affairs*³⁴ had held that the court was "supreme" only within the bounds of the Constitution. The court had not within its environment nuances of supremacy, sovereignty or omnipotence. Similarly it seems that the High Court could declare PNDCL 281 as being in violation of the fundamental human rights as to freedom of association only within the bounds of its jurisdiction under the existing law prior to the coming into force of the Constitution. It is suggested that, there was no such jurisdiction under the then existing law.

³³ Ibid at 720.

³⁴ [1981] GLR 104, SC.

3. ENJOYMENT OF FUNDAMENTAL HUMAN RIGHTS UNDER THE CONSTITUTION, 1992

Introduction

It seems that,³⁵ the decision of the Supreme Court in *Re Akoto*³⁶ on the true effect of article 13(1) of the Constitution, 1960 very much influenced the insertion of the unambiguous provisions of the Republican Constitutions of 1969, 1979 and 1992 to the effect that fundamental human rights and freedoms were and are enforceable by the courts; and that they are no longer moral obligations to be satisfied by the President and the executive.³⁷ Thus under article 12(1) of the Constitution, 1992 the fundamental human rights and freedoms as enshrined in the chapter 5 of the Constitution: "shall be respected and upheld by the Executive, Legislature and the Judiciary and all other organs of government and its agencies and, ...shall be enforceable by the courts..." It should also be noted that under article 69(1) of the Constitution, 1992 the President is liable to be removed from office if he wilfully violates any provision of the Constitution, inclusive of the provisions relating to fundamental human rights and freedoms.

Jurisdiction to enforce fundamental human rights

Under articles 33(1), 130(1) and 140(2) of the Constitution, a person who alleges a breach of the fundamental human rights and freedoms as enshrined in chapter 5 of the Constitution, may

³⁵ As earlier pointed out, in concluding the discussion on the historical background to the enjoyment of fundamental human rights in Ghana.

³⁶ [1961] GLR 523, SC.

³⁷ See Constitution, 1969, art 28; Constitution 1979, art 35 and Constitution 1992, arts 12 and 33.

apply to the High Court for redress.³⁸ Quite apart from the specified constitutional provisions, section 15(1)(d) of the Courts Act, 1993 (Act 459), as amended by the Courts (Amendment) Act, 2002 (Act 620), vests the High Court with “jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution.”

Rights declared as constituting fundamental human rights and freedoms

The fundamental rights protected under Chapter 5 have been clearly set out in articles 12 to 33 of the Constitution. They include: protection of right to life - article 13; protection of personal liberty subject to specified exceptions such as "upon reasonable suspicion of having committed or being about to commit a criminal offence under the laws of Ghana"; where a person is arrested and detained upon reasonable suspicion of having committed an offence, he is entitled to be tried within a reasonable time - article 14; respect for human dignity - article 15; protection from slavery and forced labour - article 16; protection of privacy of home and other property - article 18; right to equality before the law and freedom from discrimination - article 17; right to fair trial - article 19;³⁹ protection from deprivation of property - article 20; property rights of spouses, women's rights, children's rights, the rights of the disabled and of the sick -articles 22, 27 and 28-30 respectively; the rights of persons detained or restricted by virtue of a law made pursuant to a declaration under article 31 of a State of emergency in any part of Ghana article - 30; the right to administrative justice and economic, educational and cultural rights - articles 23 - 26 respectively.

³⁸ See chapter 8 for a detailed discussion on the question of the court vested with jurisdiction to enforce fundamental human rights as distinct from the question of enforcement of the Constitution itself.

³⁹ For detailed examination of article 19, see Baddoo, S G (now Justice of the Supreme Court): "The Right to Fair Trial under the Fourth Republican Constitution" in *Lectures in Continuing Legal Education 1993-94* (Bimpong-Buta, SY ed) 1997 Ghana Bar Association, Accra at page 59.

The last but not the least, all persons in Ghana have the right to the general fundamental freedoms which are detailed in article 21 of the Constitution. Thus all persons have the right to: (a) freedom of speech and expression - including freedom of the press and other media; (b) freedom of thought, conscience and belief which includes academic freedom; (c) freedom to practice any religion and to manifest such practice; (d) freedom of assembly including freedom of taking part in processions and demonstrations; (e) freedom of association which includes freedom to form or join trade unions or other national and international associations aimed at protecting their interest; (f) right to information but this right is subject to such qualifications and laws which are necessary in a democratic society; and (g) freedom of movement, ie the right to move freely in Ghana, and the right to leave and enter Ghana and immunity from being expelled from Ghana.

We shall proceed to examine some of these rights and freedoms. Before then, however, we must distinguish between fundamental human rights and freedoms and directive principles of state policy as enshrined in chapters 5 and 6 respectively of the Constitution, 1992.

4. FUNDAMENTAL HUMAN RIGHTS DISTINGUISHED FROM DIRECTIVE PRINCIPLES OF STATE POLICY

Apart from the usefulness of resorting to the provisions of the Directive Principles as a tool for constitutional interpretation,⁴⁰ there is also the relevant issue of whether or not the Directive Principles of State Policy as stated in chapter 6 of the Constitution are, like fundamental rights and freedoms, also justiciable or legally enforceable. Chapter 6 commences with article 34 (1), which states:

⁴⁰ See chapter 4 where the question of resorting to Directive Principles of State Policy as a tool for constitutional interpretation is examined.

“34 (1) The Directive Principles of State Policy contained in this Chapter shall guide citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying and interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.”

These Directive Principles of State Policy, as clearly stated in chapter 6 of the Constitution, 1992 include: political objectives – article 35; economic objectives- article 36; social objectives- article 37; and educational and cultural objectives- articles 38 and 39 respectively. Also included in the list of matters forming part of the Directive Principles are the objectives stated in article 40 on international relations such as: the Government of Ghana, shall “ promote and protect the interests of Ghana” and also “ adhere to the principles enshrined in or as the case may be, the aims and ideals of international organisations such as the Charter of the United Nations.” The last article in chapter 6 namely, article 41 deals with the duties of citizens, such as that “ it shall be the duty of every citizen- to promote the prestige and good name of Ghana and respect the symbols of the nation.”

Are these objectives justiciable and enforceable? In fact, it had earlier been suggested by the Committee of Experts on the Draft Constitution of 1992, that the Directive Principles of State Policy are in themselves not justiciable and enforceable; they are merely guides or aids to interpretation or construction. As was pointed out in paragraph 95 of the 1991 Report of the Committee of Experts on the Constitution, 1992:

“By tradition Directive Principles are not justiciable; even so, there are at least two good reasons for including them in a Constitution. First, Directive Principles enunciate a set of fundamental objectives which a people expect all bodies and persons that make or execute public policy to strive to achieve. In the present

proposals, one novelty is the explicit inclusion of political parties among the bodies expected to observe the principles. The reason for this is that political parties significantly influence government policy. A second justification for including Directive Principles in a constitution is that, taken together, they constitute, in the long run, a sort of barometer by which the people could measure the performance of their government. In effect they provide goals for legislative programmes and a guide for judicial interpretation.”

What is the contribution of the Supreme Court to the question of the legal effect of the Directive Principles of State Policy? The question was raised for determination by the Supreme Court in the case of *New Patriotic Party v Attorney-General (Ciba Case)*.⁴¹ The plaintiffs, a registered political party, sued in the Supreme Court under article 2(1) of the Constitution, 1992 for a declaration, inter alia, that the Council of Indigenous Business Associations Law, 1993 (PNDCL 312), was inconsistent with and in contravention of some specified articles of the Constitution, 1992 including articles 35(1) and 37(2)(a) and to the extent of that inconsistency, was void. The Attorney-General raised a preliminary objection to the claim on the grounds, *inter alia*, that articles 35(1) and 37(2)(a) relied upon by the plaintiffs, fell under chapter 6 of the Constitution, ie the Directive Principles of State Policy, which were not justiciable.

The Supreme Court dismissed the preliminary objection on the grounds, inter alia, that even though the directive principles, were not of and by themselves legally enforceable by any court, they had the effect of providing goals for legislative programmes and a guide for judicial interpretation.⁴²

⁴¹ [1996-97] SCGLR 729.

⁴² See also the views of Charles Hayfron-Benjamin and Bamford-Addo JJSC in *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35, SC to the effect that the Directive Principles are not justiciable but indicate the spirit and conscience of

However, the court in this case (per Bamford-Addo and Sophia Akuffo JJSC), drew a clear distinction between some provisions of the Directive Principles, which form an integral part of some of the enforceable provisions relating to fundamental human rights and freedoms because they qualify them, and those provisions of the Directive Principles, which can be held to be rights in themselves. In the case of the former, they can be considered as also justiciable and enforceable; whilst with the latter, they are not to be so considered. Sophia Akuffo JSC in that case gave as examples: the fostering of the right to own property, freedom of association, the prohibition of discrimination, declared in the Directive Principles, are also made enforceable by specific guarantees contained in other provisions. However, as further pointed out, there are some principles, such as that provided in article 36, namely the economic objectives, which are by their broadly stated nature, intended to be policy guidelines or ultimate standards for measuring government performance. The court further held that the case before it provided a good example of the special case where a provision in the Directive Principles, namely, article 37(2) (a) and (3), a social objective, read together with article 21 (1)(e), a fundamental human right provision, ie freedom of association, could be said to be an enforceable right. The said article 37 (2) (a) and (3) of the 1992 Constitution provides as follows:

“37 (2) (a) The State shall enact appropriate laws to assure -

(a) the enjoyment of rights of effective participation in the development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to the development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in the development processes;...

the Constitution and provide goals for legislative programmes and also guide for judicial interpretation.

(3) In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.”

The Supreme Court held that the words in article 37 (2) (a), namely, “rights of people to form their own associations free from state interference” had the effect of creating a “right” which could be held as a qualification of article 21 (1) (e) in respect of freedom of association protected and enforceable under article 33 of the Constitution.

The decision of the Supreme Court in *New Patriotic Party v Attorney-General (Ciba Case)* (supra), to the effect that a social objective of the Directive Principles such as article 37 (2) (a) as qualified by article 21 (1) (e) is enforceable, is comparable to the decision of the Supreme Court of India in the case of *Miners of Mills v Union of India*.⁴³ In this case the court held (per Bhagwati J) that the Directive Principles in the Indian Constitution impose an obligation on the State to take positive action for creating socio-economic conditions in which there shall be egalitarian social order and economic justice for all.

Reference may also be made to article 39A of the Directive Principles of the Indian Constitution which provides:

“Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

⁴³ (1980) SC 1847.

The Supreme Court of India in its 1987 decision in *Centre for Legal Research v The State*⁴⁴ held that the Directive Principles of State Policy in article 39A of the Indian Constitution, imposed an obligation on State Governments to set up comprehensive and effective legal aid programmes to promote equal access to justice; and therefore voluntary organisations and groups should be supported by the State Governments in operating legal aid programmes. It is conceded, however, that the wording in article 39A of the Indian Constitution is vastly different from the wording in article 34 (1) of the 1992 Constitution. The words “shall secure” in article 39A is a far cry from the word “guide” in article 34 (1) of the Constitution, 1992.

In conclusion, the question may be raised as to the true legal effect of article 35 (4) of the Directive Principles relating to political objectives which states: “The State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person.”

Notwithstanding the view expressed above that the Directive Principles of State Policy are not justiciable, it is merely academic to argue that this particular provision and the provision in article 41(1)(b), namely: “to uphold and defend this Constitution and the law” are also merely for the guidance of the courts in interpreting the Constitution and therefore not justiciable and enforceable. It is suggested that, it is not enough for Ghanaians to have respect for fundamental human rights and freedoms. As provided in article 12(1) of the Constitution, 1992 the fundamental human rights and freedoms, as enshrined in chapter 5, are not only to be respected by the executive, legislature and the judiciary and all natural and legal persons; they shall also be enforceable by the courts. It is therefore arguable that given the provisions in chapter 5 of the Constitution, particularly article 12 (1), it appears that the provision in articles 35(4) and 41(1)(b), relating to cultivating respect for fundamental human rights and freedoms and upholding and defending the Constitution respectively, do not merely "guide" the courts in

⁴⁴ (1987) LRC (Const) 544.

the interpretation of the Constitution; they are equally enforceable. It seems to me that this conclusion is in line with the views of Bamford-Addo and Sophia Akuffo JJSC in *New Patriotic Party v Attorney-General (Ciba Case)* as discussed above.

PART B GENERAL FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

1. RIGHT OR PROTECTION OF PERSONAL LIBERTY

We shall discuss the question of the right to or protection of personal liberty under the following sub-heads: (a) limitations to enjoyment of personal liberty; (b) the right of a person arrested for committing or about to commit a criminal offence to a fair trial within a reasonable time; and (c) right of a person actually charged before a court to a fair trial within a reasonable time.

Limitations to enjoyment of personal liberty

Under article 14(1) of the 1992 Constitution, every person is entitled to his personal liberty as a fundamental human right and freedom. There are, however, limitations to the enjoyment of the right not to be deprived of one's personal liberty.

These limitations or exceptions are specified in article 14(1). They include: (a) in execution of a sentence or order of a court in respect of a conviction for a criminal offence; or (b) in execution of an order of a court punishing a person for contempt of court; or (c) for the purpose of bringing a person before a court in execution of a court order; or (d) for the purpose of the care or treatment of a person who is suffering from either an infectious or contagious disease, of unsound mind, addicted to drugs or alcohol or a vagrant; or for the purpose of protecting the community from such a person; or (e) for the purpose of the education or welfare of a person below eighteen years of age; or (f) for the purpose of

preventing the unlawful entry into Ghana of a person being a non-citizen of Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting such a non-citizen while being lawfully conveyed through Ghana in the course of that person's extradition or removal from one country to another country; or (g) for the purpose of the arrest upon reasonable suspicion of a person having committed or being about to commit a criminal offence under the laws of Ghana. For the ordinary Ghanaian this is the most significant and important limitation to enjoyment of personal liberty.

Right of a person arrested for committing or about to commit a criminal offence to a fair trial within a reasonable time

Under article 14(2) of the Constitution, a person arrested, restricted or detained is entitled to be informed *immediately*, in a language he understands, of the reasons of his arrest or detention. The person is also entitled to a lawyer of his own choice. Under article 14(3)(b) of the Constitution, where a person is arrested upon reasonable suspicion of his having committed or being about to commit a criminal offence and such a person is not released, he must be brought before a court within forty-eight hours after the arrest. He is also entitled under article 14(4) of the Constitution to a fair trial within a reasonable time. The wording of article 14(3)(b) and (4) of the 1992 Constitution is as follows:

“(3) A person who is arrested, restricted or detained -

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence ... and who is not released, shall be brought before court within forty-eight hours after the arrest, restriction or detention...

(4) Where a person arrested, restricted or detained under paragraph (b) of clause (3) ... is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally or upon reasonable conditions... to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

There is the need to examine in detail, the provision in article 14(3)(b) and (4). It should be noted that the provision in article 14(3)(b) and (4), is also provided for more or less in the national Constitutions of The Gambia, Jamaica, Mauritius and Kiribati.⁴⁵ It seems to me that the interpretation placed by the courts in these jurisdictions on the same constitutional provision, on the question as to the factors to be considered in determining unreasonable delay, and also the time for commencement of the unreasonable delay for trial within a reasonable time, should be of interest to the Ghana Supreme Court. Does the period of unreasonable delay commence from the date of arrest or the date when the accused is arraigned before the court for trial?

Before delving into a discussion of this issue, it should be pointed out that the Ghana High Court, in an earlier decision given in the case of *Owusu v The Republic*⁴⁶ had ruled on the effect of article 21(3)(b) and (4) of the Constitution, 1979 which was couched in the same language as article 14 3 (b) and (4) of the present Constitution, 1992.

The applicants had been in custody for more than three years, awaiting trial for abetment of murder. They brought an application for bail pending trial. The prosecution opposed the

⁴⁵ See section 19(5) of the 1997 Gambian Constitution – the same as section 20(1) of the 1970 Constitution; Schedule 2, s 20(1) of the 1962 Jamaica (Constitution) Order in Council; section 10(1) of the 1981 Constitution of Mauritius; and section 10(1) of the Kiribati Constitution.

⁴⁶ [1980] GLR 460.

grant of bail on the grounds that section 96(7)(a) of the Criminal Procedure Code, 1960 (Act 30), as amended, prohibited the grant of bail in a case of murder. The application for bail was granted by the High Court. It was held that Parliament could not by virtue of section 96(7)(a) of Act 30 as amended, purport to take away or restrict the power conferred on the courts by the Constitution, 1979 to grant bail when a person has not been tried within a reasonable time as provided by article 21(3)(b) and (4) of the Constitution; that three years incarceration without trial was an unreasonable time, especially when it was said to affect the health of the applicants.

The question as to the right to a fair trial within a reasonable time of a person arrested for committing a crime has not been considered by the Ghana Supreme Court, but it has come before courts in other jurisdictions.

Thus the question was considered by the Gambian Supreme Court (High Court) per Ayoola CJ in the case of *Clarke & Garrison v Attorney-General*.⁴⁷ The applicants, United States citizens, were arrested on 4 February 1990. On 8 February, they were arraigned before a magistrate on several charges which included the cultivation of the plant *cannabis sativa*, contrary to section 9(1)(c) of the Dangerous Drugs Act. The trial was abandoned by the prosecution. The applicants were rather arraigned before the same court on 2 April 1990 on the same charges. Proceedings were, however, later terminated by the prosecution entering a *nolle prosequi*. In June 1990, however, the applicants were again put before a magistrate court for trial on charges which did not include the charge of cultivation of cannabis. The applicants were convicted on those other charges and sentenced to a fine. Subsequently, however, on 7 January 1992, the applicants were again arrested by the Gambian Gendarmeries and put before another magistrate court for trial in respect of the cultivation charge. Whilst that proceedings were pending, the applicants brought a motion before the

⁴⁷ [1960-93] GR 448.

court for a declaration that their right to a fair trial within a reasonable time had been infringed contrary to section 20(1) of the Gambia Constitution.

On the facts of the case, the court held that the applicants' right to a fair hearing within a reasonable time had been infringed; that on giving a generous and purposive construction to section 20(1) of the Constitution (the same more or less as article 14(3)(b) and (4) of the Ghana Constitution, 1992) the benefit of that section should accrue to any person firmly accused of a criminal offence whether or not he had been charged before a court. In effect, the court held that the time for calculating the period of unreasonable delay should commence from the date of arrest and *not* the date the accused was put before court. In so holding the Supreme Court of the Gambia, per Ayoola CJ, applied the decisions in four jurisdictions: First the decision of Jones CJ, of the Supreme Court of Kiribati in *Republic v Taabere*,⁴⁸ touching on section 10(1) of the Constitution of Kiribati; second, the decision of the Privy Council in *Bell v Director of Public Prosecutions*⁴⁹ in relation to section 20(1) of the Jamaican (Constitution) Order-in-Council, 1961, Sch 2; third the decision of the Privy Council in the case of *Mungroo v R*⁵⁰ in respect of section 10(1) of the Constitution of Mauritius; and fourth the decision of the United States Supreme Court in the case of *Barker v Wingo*.⁵¹ Ayoola CJ in *Clarke & Garrison v Attorney-General* made the position clearer when he said:⁵²

“In my judgment, any reading of section 20(1) which will confine the protection afforded by that subsection only to persons charged before a court and from the date of his being arraigned must be rejected. The right to a speedy trial is a right

⁴⁸ [1985] LRC (Crim) 8.

⁴⁹ [1985] 2 All ER 585; [1985] 3 WLR 73, PC.

⁵⁰ [1991] 1 WLR 1351.

⁵¹ [1972] 406 US 514, US.

⁵² [1960-93] GR 448 at 455-456 (my emphasis).

which accrues to an accused person from the time a decision to prosecute him has been manifested by his arrest... Delay to offer an accused for trial within a reasonable time is itself an infringement of his right to have the case against him heard within a reasonable time. *In my judgment, a generous and purposive construction to support that conclusion ought to be put on section 20(1)."*

On the issue of determining whether an accused person (such as the applicants) has been deprived of his right to a fair trial within "a reasonable time", Ayoola CJ in the *Clarke & Garrison* case (supra) identified the following guidelines gleaned from the decided cases: First, the four factors suggested by the United States Supreme Court in *Barker v Wingo*, namely: (i) the length of the delay; (ii) reasons given by the prosecution as justification for the delay; (iii) the responsibility of the accused for asserting his rights; and (iv) prejudice to the accused. Second, in considering whether reasonable time has elapsed, regard must be had to the past and current problems affecting the administration of justice in the particular country as suggested by the Privy Council in both *Bell v Director of Public Prosecutions* and *Mungroo v R*; third, that what is "reasonable time" cannot be prescribed but must be determined from case to case having regard to the circumstances of each case. Ayoola CJ also held that where there was no justification for the delay for a fair trial within a reasonable time, the absence of *mala fide* on the part of the prosecution, would not make such delay reasonable; and that it was unnecessary for an applicant for a declaration under section 20(1) of the Gambia Constitution to prove *mala fide* on the part of the prosecution.

Given the heavy reliance placed by Ayoola CJ on the Privy Council decisions in *Bell v Director of Public Prosecutions* and *Mungroo v R*, it is desirable to examine in detail the two decisions.

The case of *Bell v Director of Public Prosecutions* came before the Privy Council on appeal from the decision of the Jamaican Court of Appeal. The applicant was arrested in May 1977

and charged with possession of firearm, ie the offence of possession of ammunitions and other offences. His appeal against his subsequent conviction was allowed by the Jamaican Court of Appeal which ordered a retrial. The retrial was subsequently delayed by the prosecution, which offered no explanation for the delay and the appellant was discharged. He was re-arrested for the same offences and charged to be retried.

The appellant brought an application before the Supreme Court (High Court), asserting a breach of his fundamental right to a fair trial within a reasonable time under section 20(1) of the Jamaican Constitution (the analogous provision in article 14(3)(b) and (4) of the Ghana 1992 Constitution). The application was dismissed and his further appeal to the Jamaican Court of Appeal was also dismissed.

In a further appeal to the Privy Council, it was held, reversing the decision of the Jamaican Court of Appeal, that the appellant's constitutional right to a fair hearing within a reasonable time by an impartial court had been infringed. The Privy Council adopted the four factors suggested by the United States Supreme Court in *Barker v Wingo* in determining whether a particular accused had been deprived of his right to a fair trial within a reasonable time – the same four factors which we have enumerated above and which were also adopted by the Gambian Supreme Court in *Clarke & Garrison v Attorney-General* (supra). In addition to the four factors suggested in *Barker v Wingo*, the Privy Council also took into account the prevailing economic, social and cultural conditions in Jamaica in determining delay for speedy trial within a reasonable time. In so holding, Lord Templeman said:⁵³

“Their Lordships ... acknowledge the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused person

⁵³ [1985] 3 WLR 73 at 81 author's (emphasis).

from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.”

The factors considered as relevant in determining whether or not there has been unreasonable delay as applied in *Bell v Director of Public Prosecutions*, were re-iterated by the Privy Council itself in the subsequent case of *Mungroo v R* (supra) on appeal from the decision of the Supreme Court of Mauritius. The case turned on section 10(1) of the 1981 Constitution of Mauritius which conferred the right to a fair trial within a reasonable time. The appellant complained of four years’ delay between the time of arrest and his trial for forgery. He was arrested in 1981 and charged with the offence of forgery in 1983. That charge was withdrawn. In 1985 a new charge of swindling based on same facts was brought against him. He appealed against the conviction for swindling by the trial magistrate. His appeal to the Mauritius Supreme Court was dismissed on the ground that the delay had resulted from the complexity of the investigations and that the prosecution of the defendant was not unconstitutional. He appealed to the Privy Council from that decision but the appeal was dismissed. The Privy Council did not interfere with the findings of the courts in Mauritius that the delay had been caused by the problems confronted by the prosecution and that the delay had occasioned the defendant no prejudice; it was therefore held that his constitutional right to a fair trial within a reasonable time had not been infringed. Giving the opinion of the Board, Lord Templeman said:⁵⁴

“The expressed constitutional right contained in section 10 to a hearing of a criminal case within a reasonable time injects the need for urgency and efficiency into the prosecution of offenders and demands the provision of adequate resources for the administration of justice, but in determining whether the constitutional rights of an

⁵⁴ [1991] 1 WLR 1351 at 1355.

individual have been infringed, the courts must have regard to the constraints imposed by harsh economic reality and local conditions.”

In conclusion, it seems to me that the factors considered by the Privy Council in the Jamaican case of *Bell v Director of Public Prosecutions* and in the Mauritius case of *Mungroo v R* and which were followed by the Supreme Court of the Gambia in *Clarke & Garrison v Attorney-General*, are relevant in determining whether the constitutional right to a fair trial within a reasonable time under article 14(3)(b) and (4) of the 1992 Constitution has been infringed.

It is suggested that the Ghana Supreme Court, in contributing to the development of criminal justice, may legitimately consider those factors in balancing the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice.

Right of a person actually charged before court to a fair trial within a reasonable time

The right to a fair trial within a reasonable time of a person arrested upon a reasonable suspicion of having committed a crime (as discussed above under article 14(3)(b) and (4) of the Constitution), is even more compelling when a person is actually charged with a criminal offence before a court. This right is confirmed under article 19(1) of the Constitution which provides that: “A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.”

What are the salient features and effect of the right to a fair trial within a reasonable time when a person is charged before a court? We shall proceed to examine this right to a fair trial within a reasonable time of a person charged before a court under the following subheads, namely: (i) the right of a person not to be tried in absentia as conferred under article 19(3); (ii) no person shall be convicted for criminal offence unless the offence is defined and the penalty

prescribed; and (iii) the right under article 19(2)(d) of a person to be informed immediately in a language he understands as to the nature of offence charged; and (iv) the general question of the right of an accused person to be given reasons by the trial court for convicting him of a criminal offence.

The right of a person not be tried in absentia

A person also has the right on being charged before a court to be present at his trial. However, article 19(3)(a) and (b) provides for the circumstances in which a person could be tried in absentia. First, the accused person must be notified to appear before the court for trial but if he refuses to do so, or if present at the trial, he conducts himself in such a manner that it is impracticable to continue with the trial in his presence; or if the court orders the removal of the accused from the court for the trial to proceed in his absence.

The true effect of article 19(3)(a) of the 1992 Constitution, on the question of trial in absentia of an accused, was considered by the Supreme Court in *Bonsu alias Benjilo v The Republic*.⁵⁵ Five persons, including the second accused and two Nigerians (the first and fifth accused persons), were first arraigned before a lower court, the Greater Accra Circuit Tribunal. All the accused persons had, before their arraignment been notified of the charges. They were charged with three drug related offences, including unlawful possession of a narcotic drug contrary to section 2(1) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL 236). All the accused persons were subsequently granted bail pending trial by the circuit tribunal.

The case was, however, transferred to a higher court, the Greater Accra Regional Tribunal for trial. By then, the two Nigerians, the first and fifth accused, had jumped bail and absconded

⁵⁵ [1998-99] SCGLR 112.

from Ghana. Nevertheless, the two Nigerians were tried in absentia on the same drug charges by the higher court, the regional tribunal, together with the three remaining Ghanaian accused persons including the second accused. All the accused persons were found guilty and convicted on the three drug charges and sentenced accordingly.

Subsequently, the second accused and the other two accused persons, appealed to the Court of Appeal against their conviction and sentence but the appeal was dismissed. On a further appeal to the Supreme Court, counsel for the second accused argued that the trial regional tribunal had erred in trying the second accused and the other two accused persons together with the two Nigerians who had absconded and who had, indeed, not been notified of their trial in absentia before the regional tribunal, contrary to article 19(3)(a) of the Constitution. It was further argued that the error had vitiated the whole trial.

The appeal was unanimously dismissed by the Supreme Court. The court, in a clear bid to develop the law on criminal trial in *absentia* of an accused person, reasoned that by absconding and thus refusing to attend their trial at the lower court, the two absconding Nigerians had made it clear that they were not prepared to appear before any trial despite knowing that they were to be tried for drug offences. The subsequent transfer of the case from the lower tribunal to the higher tribunal, did not affect their intention to abscond. In effect, the transfer did not affect the fact that they had earlier been notified of their trial as required by article 19(3)(a) of the Constitution. By their own conduct of leaving the court's jurisdiction, the two absconding accused persons had refused to stand trial and thus intentionally prevented service on them of any further documents. They must thus be held to have known of their trial in absentia. In any case, the Supreme Court held that even if their trial in absentia was in error, that error could not inure to the benefit of the second accused. His conviction and sentence were thus upheld.

It must also be pointed out that the requirement of fair trial means (as stated in article 19(b),) that no penalty or punishment can be imposed on a convicted person which is more severe in degree or description than the maximum penalty that could have been imposed for that offence at the time of the commission of the offence.

No conviction for criminal offence unless defined and penalty prescribed

A very important aspect of fundamental human rights vis-à-vis the requirement of fair trial for a criminal offence is captured in article 19(11) which provides that: “No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.”

In *British Airways v Attorney-General*⁵⁶, the Supreme Court made a very significant contribution of the law as encapsulated in article 19(11) of the Constitution in the light of the existing law, namely, section 8(1)(e) of the Interpretation Act, 1960 (CA 4). The said section 8(1)(e) states:

“8(1) The repeal or revocation of an enactment shall not –
 (e) affect any investigation, legal proceeding or remedy in
 respect of any such rights, privilege, obligation, liability, penalty,
 forfeiture or punishment,
and any such investigation, legal proceeding or remedy may be instituted,
continued or enforced, and any such penalty, forfeiture or punishment may
be imposed, as if the enactment had not been repealed or revoked.”

⁵⁶ [1996-97] SCGLR 547.

The facts in the *British Airways v Attorney-General* were as follows: British Airways, operating in Ghana as an external company, was arraigned before a circuit tribunal, together with its manager, and charged with a criminal offence of refusing to pay rent in convertible currency, contrary to sections 4 and 9(1) and (3) of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150). While the criminal proceedings were pending, the law under which the accused had been charged, was repealed by the Statute Law Revision Act, 1996 (Act 516). However, there was no clause in Act 516 saving the offences created under PNDCL 150 before its repeal. The accused raised an objection to their continued trial but the objection was overruled by the trial circuit tribunal.

Consequently, the accused, as the plaintiffs, sued in the Supreme Court under articles 2(1)(a) and 130 of the 1992 Constitution. They claimed for a declaration that their continued prosecution under PNDCL 150 was unlawful and also for an order for the prosecution to discontinue the criminal proceedings. The defendant, the Attorney-General, resisted the claim. He contended that the continued prosecution of the plaintiffs could be justified under the Interpretation Act, 1960 (CA 4), s 8(1)(e). The effect of that section was that a person could still be prosecuted under a repealed enactment because the section has preserved any pending proceedings or punishment under the repealed enactment. The Supreme Court ordered the discontinuance of the criminal trial of the plaintiffs on the ground that their continued prosecution under the repealed PNDCL 150 was unlawful. The Supreme Court held that the provision in article 8(1)(e) of the Interpretation Act, 1960 was inapplicable because under article 19(11) of the 1992 Constitution, no person could be convicted or punished unless a written law had defined the offence or provided sanctions for same. The Supreme Court construed the provision in section 8(1)(e) as being inconsistent with article 19(11) in respect of criminal offences contained in a repealed law such as PNDCL 150. The court explained that the position would have been different if the plaintiffs had been convicted before the repeal of PNDCL 150 by Act 516; or if the repealing Act, ie Act 156, had saved

offences committed before the repeal of PNDC 150. The Supreme Court therefore held that the consequences of a repeal (as stated in section 8(1)(e) of the Interpretation Act, 1960) were inapplicable because article 19(11) of the Constitution was only concerned with criminal cases in which the accused such as the plaintiffs, were yet to be tried, convicted and sentenced. The court thus held that the consequences of a repeal as stated in section 8(1)(e) of the Interpretation Act, 1960 were still applicable in respect of civil matters. In so holding, the Supreme Court (per Acquah JSC (as he then was)), in concurring with the unanimous judgment of the court delivered by Bamford-Addo JSC)⁵⁷ said:

“Note that the verb used in article 19(11), is “is” and not “was.” If it had been “was” the formulation could have referred to the past and not the present. The use of ‘is’ clearly shows that the formulation looks beyond the time of the commission of the offence to ensure the legality of what happens thereafter. If at any stage before conviction, the law creating the offence and the punishment is totally repealed without any saving, the investigation and proceedings cannot be continued.”

The true interpretation and effect of the provision in article 19 in general, and of sub-article (11) of article 19 in particular, relating to the right to the trial of a person charged with a criminal offence, were further considered by the Supreme Court in the recent case in *Ali Yusuf Issa (No 2) v The Republic (No 2)*.⁵⁸

The appellant, Ali Yusuf Issa, was the Minister of Youth and Sports in the J A Kufuor Government sworn into office on 7 January 2001. Not long after the appointment, it was decided that the Ghana national football team, The Black Stars should participate in the FIFA World Cup Football qualifying match against Sudan to be held on 25 February 2001 in

⁵⁷ [1996-97] SCGLR 547 at 561-562.

⁵⁸ [2003-2004] SCGLR 174.

Khartoum. The appellant travelled on 23 February 2001 by air to Sudan for the match. Before then, he was entrusted with the sum of US\$46,000 to be used for payment of winning bonuses and imprest for players and officials. The appellant claimed that, before emplaning for Sudan, he had packed the amount of US\$46,000 into his suitcase, not in his hand bag. The money eventually got missing. The appellant claimed that he could not discover the money inside the suitcase on arrival of the suitcase at the airport in Khartoum, Sudan. The appellant was unable to reasonably account for the missing money.

Consequently, the appellant was arraigned before the Fast Track High Court on two charges of stealing and fraudulently causing financial loss of US\$46,000 to the State, contrary to sections 124(1) and 179A(3)(a) of the Criminal Code, 1960 (Act 29), as amended by the Criminal Code (Amendment) Act, 1993 (Act 458), respectively. The appellant pleaded not guilty to the charges. The trial court, however, found him guilty on both charges. The trial court sentenced the appellant to, inter alia, a four-year jail term on each charge plus a fine of ten million cedis on each charge. The appellant appealed to the Court of Appeal against both the conviction and sentence. The Court of Appeal on 23 October 2001, upheld the conviction but varied the sentence.

The matter came before the Supreme Court on appeal by the appellant against the conviction and sentence as upheld by the Court of Appeal. His counsel argued, inter alia, that the trial High Court had conducted the trial in such a manner as to deny him the constitutional right to a fair trial as required by article 19 of the Constitution. Counsel particularised the instances of want of fair trial as including: (i) the refusal of the trial court to stay proceedings pending the determination of the appeal by the Supreme Court against the decision of the Court of Appeal, upholding trial court's submission of no case to answer; (ii) the question of the constitutionality or otherwise of the second charge of the offence of causing financial loss to the State; (iii) the refusal of the trial court to grant the application for necessary adjournment

to facilitate the preparation of the appellant's defence at the trial; and (iv) the right to fair trial had been hampered by the higher fees being charged at the Fast Track High Court.

The appeal was unanimously dismissed by the Supreme Court. The court held that the trial court had the discretion to grant or refuse the application for an order of stay of proceedings; that in the instant case, the trial court had sound reasons for refusing the application. The court concluded that the trial court had acted judicially in refusing the application for stay of proceedings and, therefore, there was no denial of the right to a fair trial under article 19.

As to the issue of the refusal of the trial court to adjourn the matter for preparation of defence, it was held that adjournments were within the sole discretion of the trial court; and that the mere refusal of the trial court to grant the application for adjournments, could not, of itself, constitute a denial of the right to a fair trial under article 19, particularly, given the peculiar circumstances of the trial in the Fast Track High Court where it was possible to produce transcripts of the records of the previous days' proceedings within a matter of hours. It was further held that the higher fees being charged at the Fast Track High Court could not justify a conclusion that such fees constituted a denial of the right to a fair trial under article 19.

It should be stressed that the Supreme Court, in determining the appeal in *Ali Yusuf Issa (No 2) v Attorney-General (No 2)* (supra), did not base its decision solely on the issue of want of fair trial as required by the general provision in article 19 of the Constitution. The court further held that the second charge under which the appellant was tried, namely, the charge of fraudulently causing financial loss to the State, contrary to section 179A(3)(a) of the Criminal Code, 1960 (Act 29), as amended by the Criminal Code (Amendment) Act, 1993 (Act 458), had been properly brought and had in no way infringed the specific provision in article 19(11) of the 1992 Constitution – the subject-matter of interpretation in the earlier case of *British Airways v Attorney-General* (supra).

In support of its decision that the second charge had not infringed article 19(11) which provides that: “No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in written law”, the Supreme Court fully adopted and affirmed the reasons for the same decision given by the Court of Appeal in *Ali Yusuf Issa (No 1) v Attorney-General (No 1)*.⁵⁹

The matter in the *Ali Yusuf Issa (No 1)* case came before the Court of Appeal,⁶⁰ on appeal from the decision of the Fast Track High Court, overruling the appellant’s preliminary objection at the commencement of the hearing before the High Court. The appellant’s objection was on the grounds, inter alia, that the second charge of fraudulently causing financial loss to the State, contrary to section 179A(3)(a) of the Criminal Code, 1960 (Act 30), as amended by the Criminal Code Amendment) Act, 1993 (Act 458), was unconstitutional because it contravened article 19(11) of the Constitution.

The Court of Appeal dismissed the appeal and upheld the dismissal of the preliminary objection founded on alleged infringement of article 19(11) of the Constitution. The Court of Appeal unanimously held (and this was, as earlier pointed out, fully adopted by the Supreme Court in *Ali Yusuf Issa (No 2) Case* (supra)), that any objective reading of section 179A(3)(a) of Act 29 as amended by Act 458,⁶¹ should lead to the natural and obvious conclusion that the nature of the act or omission contemplated by the section could only be one that caused the State to incur financial loss. Consequently, the Court of Appeal held that section 179A(3)(a) had given an indication of the nature of the act or omission, namely, one that had caused financial loss to the State. It was held that, to the extent that the act or omission was

⁵⁹ [2003-2004] SCGLR 189.

⁶⁰ *Coram*: Brobbey, Baddoo and Amonoo-Monney JJA.

⁶¹ The said section 179A(3)(a) provided that: “Any person through whose wilful, malicious or fraudulent action or omission
(a) the State incurs a financial loss commits an offence.”

stated to be confined to the specific case of causing financial loss to the State, the act or omission had been defined and therefore the charge did not contravene article 19(11) of the Constitution. On the specific issue of the proper interpretation of the word “defined” in article 19(11) of the Constitution and of the words “financial loss” in section 179A(3)(a), the Court of Appeal, per Amonoo-Monney JA, said:⁶²

“I am of the view that the word "defined" in article 19(11) of the Constitution cannot and does not connote or require a comprehensive semantic signification of every single word in an offence-creating provision. Some offences contain in the provisions creating them the very definitions or descriptions of those offences or indications of what ingredients or elements constitute the offences without the necessity for additional or special "interpretation" or explanatory provisions. The words constituting the offences have effect and are applied in accordance with their everyday usage ... [And] section 179A(3)(a) of Act 29 as amended by Act 458 determines the essential qualities of the offence created by that statutory provision and also defines it by declaring that a certain act (or omission) constitutes an offence... The words "Any person" and the "State" in section 179A(3)(a) pose no difficulties of definition or interpretation... The expression "financial loss" is not a term of art and one does not need any profound erudition or a course in macroeconomics to understand it... The words "the State incurs a financial loss" postulate a result, the end-product of an anterior or antecedent activity ...; and from the wording of the section a causative human factor or activity brings about or produces, or is responsible for, or is the reason for, the result or the event.”

It must also be pointed out that the Court of Appeal in *Ali Yusuf Issa (No 1) v The Republic (No 1)*, was also called upon by counsel for the appellant to rule on the true interpretation and

⁶² 2003-2004] SCGLR 189 at 216 and 218.

effect of article 19(2)(d) of the Constitution. This raises an issue to be examined in detail below.

Right of a person charged with offence to be informed immediately as to nature of the offence in a language he understands

The said article 19(2)(d) states:

“(2) A person charged with a criminal offence shall –
(d) be informed immediately in a language that he understands, and in detail, of the nature of the offence charged.”

It is interesting to observe (as indicated above), that counsel for the appellant, in support of the appeal before the Court of Appeal in *Ali Yusuf Issa (No 1) v The Republic (No 1)* (supra), also argued that even if section 179A(3)(a) of Act 29 as amended by Act 458 were constitutional, the second charge founded on the section did not contain sufficient details to meet the requirements of article 19(2)(d).

The argument was unanimously rejected by the Court of Appeal. It was held that the particulars of the second charge, founded on section 179A(3)(a) of Act 29 as amended by Act 458, did not contravene article 19(2)(d) of the Constitution. The Court of Appeal reasoned that the provision in article 19(2)(d), namely, that the accused should “be informed immediately in a language he understands, and in detail, of the nature of the offence charged” must necessarily be construed as implying that the information was to enable the accused to adequately prepare for his defence to the charge. The court explained that there could be no other reason why the accused should be given the information as to the nature of the offence

than to enable him to adequately prepare his defence to the charge. The court also rejected the appellant's argument that the charge should have contained details of what act or omission should constitute the offence because in preparing criminal charges, there was obligation to state the detailed evidence. The court also (per Amonoo-Monney JA) held that: "The provision in article 19(2)(d) does not say the information must be in writing and from the purport of the provision, the information cannot but be oral."

As pointed out above, the reasoning of the Court of Appeal in the case of *Ali Yusuf Issa (No 1)* on the meaning and effect of article 19(2)(d) (like the reasoning of the court in the same case on the interpretation of article 19(11)) was fully adopted and upheld by the Supreme Court, on appeal from the Court of Appeal, in *Ali Yusuf Issa (No 2) v The Republic (No 2)* (supra).

A pertinent observation which arises is whether the interpretation placed by the Court of Appeal on article 19(2)(d) and (11) of the Constitution can be adopted and upheld by the Supreme Court. It seems not. Since under article 130(1)(a) of the Constitution, the Supreme Court has exclusive jurisdiction on all matters relating to the enforcement or interpretation of the Constitution, the Court of Appeal, it appears, was in error in failing to refer the question of the interpretation of article 19(2)(d) and to the Supreme Court for its interpretative ruling as required of it under article 130(2) of the Constitution. It could be argued, however, that there was no need for the Court of Appeal to refer the question of interpretation of article 19(2)(d) to the Supreme Court because the wording in article 19(2)(d) was so plain that there was nothing left to be interpreted by the Supreme Court.

Right of an accused to be given reasons by trial court or his conviction for criminal offence

Another pertinent question which needs to be addressed is: Does the fundamental right to a fair trial under article 19 of the Constitution require or imply that the convicted person be given the reasons for the conviction? Given the accused person's right to a fair trial in terms of article 19(2)(d) and (11) as discussed above, it seems that public policy requires that an accused person must be given reasons by the trial court for his conviction for the offence which must be "defined" and the penalty for it "prescribed in a written law" in terms of article 19(11).

The question as to the necessity or otherwise for reasons to be given by a trial court upon conviction of a criminal offence, was addressed by the Supreme Court in *Tetteh v The Republic*⁶³ and on review from that decision, in *Republic v Tetteh*.⁶⁴

The appellant in the case of *Tetteh v Republic*, was a corporal in the Ghana Armed Forces. The complainant was a colonel and the Provost Marshal of the Ghana Armed Forces. The complainant alleged that whilst driving his car towards Burma Camp, the Army Headquarters,

⁶³ [2001-2002] SCGLR 854.

⁶⁴ [2003-2004] SCGLR 140.

he saw the appellant, also driving a car, jump the red lights at the Burma Camp Traffic Lights. He drove on and followed the appellant and caught up with him at the appellant's residence at Burma Camp. He confronted the appellant for jumping the red traffic lights. The appellant denied the accusation. In the ensuing violent confrontation between the appellant and the complainant, the complainant alleged that he was assaulted by the appellant. The appellant was subsequently arrested by the military police on a complaint lodged by the complainant. The appellant was therefore charged with three military offences, namely: (i) striking a superior officer; (ii) use of violence against a superior officer; and (iii) conduct prejudicial to good order and discipline.

The appellant denied the charges when he appeared before the Disciplinary Court-Martial. He was summarily tried before the court-martial which, at the end of the summary trial, simply ruled as follows: "The court finds the accused guilty on three counts." The court-martial proceeded to pass on the appellant a sentence of dismissal from the Ghana Armed Forces without giving any reasons.

The appellant appealed to the Court of Appeal on the ground that the court-martial had erred in failing to give a reasoned judgment for convicting him on the three charges. The Court of Appeal dismissed the appeal on the ground that the omission to give reasons for the judgment was not essential because there was sufficient evidence on record to justify the decision of the court-martial.

The appellant appealed to the Supreme Court from the judgment of the Court of Appeal. The Supreme Court allowed the appeal on the grounds, inter alia, (Atuguba JSC dissenting on that ground) that the court-martial, after trying the appellant summarily, was required under section 177(1) of the Criminal Procedure Code, 1960 (Act 30), to give its decision convicting

the appellant, in the form of reasoned judgment. The Supreme Court therefore held that the conviction had been vitiated by the failure of the court to give reasons for the conviction. The appeal was allowed and the conviction was quashed. In support of the decision, the Supreme Court, per Adzoe JSC, said at page 864 of the Report:⁶⁵

“What the rule in section 177(1) of Act 30 means is that the trial court must, at least, resolve the facts in issue and give reasons why it prefers the prosecution's case to that of the accused. The reasons are necessary unless it is clearly obvious that guilt must be inferred from the facts and circumstances of the case... The courts have thus consistently held that where a case is contested because the accused maintains that he is innocent, as in the instant case, the court must give reasons for convicting the accused.”

It should, however, be pointed out that the above decision of the Supreme Court in *Republic v Tetteh* given on 11 April 2002, was, on an application for review, reversed by the Supreme Court in *Tetteh v Republic*⁶⁶ on the ground that the earlier decision had been given *per incuriam*. It was held that the previous decision, quashing the conviction of the appellant for the failure of the court-martial to give reasons for the conviction, must itself be quashed and set aside because the Supreme Court in the earlier decision, had failed to take into account, the provision in the Armed Forces Regulations, CI 12, art 112.42(2), namely, that the court-martial shall make findings “of guilty or not guilty without the addition of further words.” This provision was construed in the review case of *Republic v Tetteh* as meaning that the court-martial shall give no reasons for the decision. The Supreme Court therefore restored the decision of the Court of Appeal, dismissing the appellant’s appeal against the conviction and sentence of dismissal from the Ghana Armed Forces.

⁶⁵ [2001-2002] SCGLR 854 – concurred by Ampiah, Kpegah and Acquah JJSC – Atuguba JSC dissenting on that ground.

⁶⁶ [2003-2004] SCGLR 140.

The Supreme Court in the review decision in *Republic v Tetteh* should, with the utmost respect, have addressed the question of the true effect of the provision in article 112.42(2) of the Armed Forces Regulations, CI 12, in the light of the fundamental right of an accused to a fair trial under article 19 of the Constitution. Public policy requires that a person must be given reasons by a trial court (including even a court-martial) for convicting him for any criminal offence, in the light of the fundamental rights conferred on the accused under article 19, particularly under article 19(2)(d) and (11) as examined above. Viewed in that light, the Supreme Court, in the interest of criminal justice, might as well have held (in the exercise of its enforcement jurisdiction under articles 2(1) and 130(1) of the 1992 Constitution) that, as an existing law, the provision in CI 12, must be construed as being inconsistent with or in contravention of the Constitution on the grounds that it is incompatible with the spirit behind the provisions in article 19(2)(d) and 11 of the 1992 Constitution.

As was rightly noted by the Supreme Court in the earlier decision in *Republic v Tetteh* the courts have consistently held that where a case is contested because the accused maintains that he is innocent, the trial court must give reasons for convicting the accused.⁶⁷ In the instant case, the need for giving the appellant reasons for the conviction was even more compelling in the light of the very severe punishment of outright dismissal from employment imposed on him. Having suffered the highest and toughest sanction of dismissal from employment, questions such as whether the complainant suffered severe bodily injuries or slight abrasions at the hands of the appellant; or whether he acted in self-defence were relevant.

The principle of law relating to the need for giving reasons for a conviction enunciated in the earlier case of *Tetteh v The Republic* is sound and there is no policy reason why it should not

⁶⁷ Citing in support *Mensah & Ankrah v The State* [1961] GLR 64 at 78.

apply to decisions of a court-martial. Convictions made against the officers and men and women of the Ghana Armed Forces by disciplinary court-martials, especially in peace time in contradistinction to a volatile situation where troops are engaged in a state of war, must be backed by reasons. In any case, there is the urgent need to reform the law as embodied in CI 12, art 112.42(2) in the light of the sound reasons given by the Supreme Court in its earlier decision in *Republic v Tetteh*.

2. OBERVANCE AND ENJOYMENT OF ADMINISTRATIVE JUSTICE AS A FUNDAMENAL HUMAN RIGHT

A very important aspect of Ghana Constitutional Law, which would enhance democratic governance, is the observance and enjoyment of administrative justice in terms of article 23 of the 1992 Constitution. Article 23 forms part of the Fundamental human rights and Freedoms enshrined in chapter 5 of the Constitution, 1992. It states:

“23. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.”

In the recent case of *Aboagye v Ghana Commercial Bank Ltd*⁶⁸ the Supreme Court did more than enforce the observance of administrative justice in terms of article 23: the court also did clarify the law relating to administrative justice.

⁶⁸ [2001-2002] SCGLR 797.

The plaintiff-appellant was a senior manager of the defendant bank. On 25 March 1994, the plaintiff received two queries from the inspection/audit division of the bank. The queries related to two separate sums of money: £GBP15,000 and over US\$13,000 paid into the bank account of two customers of the bank. The plaintiff in his answer to the queries admitted that he had authorised the payments in the course of his normal duties. The bank, however, took the view that the payments had been fraudulently authorised. The plaintiff was therefore suspended from work.

Subsequently, the disciplinary committee of the bank initiated disciplinary proceedings under the Bank Staff Conduct Disciplinary Rules against the plaintiff in connection with the alleged fraudulent payments. No disciplinary charges or notice of the holding of the proceedings were served on the plaintiff. The disciplinary committee, on conclusion of the disciplinary proceedings, recommended to the executive committee of the bank, that the plaintiff should be warned for “negligence of duty” and that his salary “should be reduced by one notch of the present salary scale.” The matter was further considered by the executive committee. That committee also gave no hearing notice to the plaintiff. Nevertheless, the executive committee also recommended to the disciplinary authority of the defendant bank, ie the board of the bank, that the plaintiff should be warned for being negligent and that he should “be reduced by four notches of his grade” instead of one as recommended by the disciplinary committee. However, the board, in considering the matter, gave no opportunity to the plaintiff to be heard in his defence. But, the board, after taking notice of “the extent of the plaintiff’s involvement in the malpractices at the Foreign Operations Branch”, dismissed the plaintiff from the services of the bank for “gross misconduct.”

The plaintiff, alleging breaches of the rules of natural justice, sued in the High Court, Accra for damages for unlawful dismissal. The High Court upheld the claim. An appeal by the defendant bank to the Court of Appeal from the decision of the High Court was upheld and

the decision in favour of the plaintiff was reversed. The plaintiff in turn, appealed to the Supreme Court from the decision of the Court of Appeal.

The Supreme Court unanimously allowed the appeal. The court held that all courts and adjudicating bodies and authorities were required under article 19(13) of the Constitution, 1992⁶⁹ to give a fair hearing within a reasonable time. Expatiating on that decision, Bamford-Addo JSC said:⁷⁰

“This requires that notice of proceedings be given to the person affected by any decision of the adjudicating authority and that he be given the opportunity to defend himself. Furthermore, article 23 says that administrative bodies and officials shall act fairly. And acting fairly implies the application of the rules of natural justice, which have been elevated to constitutional rights and are binding on all adjudicating and administrative bodies as well as courts and tribunals.”

In the light of the above pronouncement, the Supreme Court held that the defendant bank, having taken disciplinary action against the plaintiff under the bank’s disciplinary procedure rules, should have followed that procedure, particularly rule 4:3 of the Staff Conduct and Disciplinary Rules which stated that:

⁶⁹ The said article 19(13) of the Constitution, 1992 states: “19(13). An adjudicating authority for the determination of the existence or extent of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial; and where proceedings for determination are instituted by a person before such an adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

⁷⁰ [2001-2002] SCGLR 797 at 806.

"The executive committee should carefully consider the investigation report, the employees' defence statements, the reasoned recommendations of the disciplinary committee and examine whether the facts have been brought out in a *fair* and impartial manner. Based on its assessment, the executive committee may arrive at its own conclusions and may even differ with the recommendations of the disciplinary committee. It may fix a reduced or enhanced penalty or may approve of the recommendations of the disciplinary committee. In cases where the penalty is enhanced, the executive committee may do so after granting a personal hearing for the employee if no such hearing was given by the disciplinary committee."

The Supreme Court therefore held that by failing to comply with rule 4:3, the board of the bank breached the rules of fair play contrary to the *audi alteram partem* rule. Bamford-Addo JSC, said:⁷¹

"In this case the administrative body trying the plaintiff, who suffered the highest and toughest sanction of dismissal, should in the course of fair trial have been served with proper disciplinary charges and give adequate notice of the date of hearing as well as be given the opportunity to be heard. The mere fact that the rules of the bank did not mention this does not relieve the defendant of the duty to comply with the rules of natural justice and fair trial."

More significantly, the Supreme Court held that in considering the question whether or not in any particular case, there had been a failure of natural justice, the fact that there was evidence to support the charge preferred against the plaintiff, namely, negligence, was immaterial to the

⁷¹ Ibid at p 805.

determination of the issue whether the plaintiff had not been given a fair hearing. The Supreme Court also rejected the argument of the defendant bank founded on the effect of the query given to the plaintiff before the institution of the inquiry. It was held that the query did not constitute the hearing envisaged by the rules of natural justice or the bank's disciplinary rules. In support of the decision, Adjabeng JSC also said:⁷²

“It is clear from rule 4:1 of the defendant bank staff rules that the plaintiff was entitled not only to a hearing, but a personal hearing. Giving him a query would not, by any stretch of the imagination, be the same as giving him a personal hearing... There is nothing in the queries ... which suggested that there was going to be proceedings before any committee.”

Commenting on the relevance of giving of queries vis-à-vis the rules of natural justice, Adzoe JSC was also of the view that the contents of every query and the answer thereto would have to be examined to see if they satisfied the requirements of a hearing.

In the light of the above considerations, the Supreme Court concluded that since the authorities of the bank failed to apply the rules of natural justice, there was no fair trial. Consequently, the dismissal of the plaintiff was wrongful. Bamford-Addo JSC,⁷³ cited in support, the dictum of Lord Denning in the case of *Abbot v Sullivan* on the question of the duties of administrative bodies:⁷⁴

⁷² Ibid at p 816.

⁷³ Ibid at 804-805.

⁷⁴ [1952] 1 KB 189.

"These bodies, however, which exercise a monopoly in the important sphere of human activity with the power of depriving a man of his livelihood must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence and any agreement or practices to the contrary would be invalid."

It could be argued that, this is one area where, given the paucity of litigation concerning the scope of the protection afforded by article 23, the Supreme Court has not as yet left an indelible mark. Nevertheless, it is suggested that the decision of the Supreme Court has contributed to the development of Ghana Constitutional Law with special reference to administrative justice in terms of article 23 of the Constitution, 1992. As rightly held by the Supreme Court, the requirement for administrative bodies and officials to act "fairly implied the application of the rules of natural justice which had been elevated to constitutional rights..." And, as decided by the Supreme Court, the giving of queries is no answer to the requirements of prior hearing before condemnation under the *audi alteram partem* rule. And the existence of evidence in support of disciplinary charges is immaterial in determining whether or not an aggrieved person has been given a fair hearing within the meaning of article 19(13) of the Constitution, 1992. These decisions are significant developments in the law which must be underlined.

3. FREEDOM OF ASSEMBLY AND THE RIGHT TO DEMONSTRATE

Freedom of assembly and the right to demonstrate as a fundamental right, is guaranteed to every person under article 21 (1) (d) of the Constitution, 1992 which states: "All persons shall have the right to - (d) freedom of assembly including freedom to take part in processions and demonstrations." The enjoyment of this right is subject to restrictions as specified in article 21 (4) (a) and (c) of the Constitution, 1992 which also states:

“ (4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision – for the imposition of restrictions by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons...”

The true legal effect of article 21(1)(d) and (4) (a) and (c) was considered by the Ghana Supreme Court in *New Patriotic Party v Inspector- General of Police*.⁷⁵ In this case the plaintiffs, a registered political party, were granted a police permit on 3 February 1993 to hold a political rally. However, before they could do so, the police withdrew the permit. Two weeks later, that is, on 16 February, the plaintiffs, together with other political parties, embarked on a peaceful demonstration in Accra to protest against the 1993 budget of the government. But the demonstration was broken up by the police. Some of the demonstrators were arrested by the police and arraigned before the circuit court on charges of demonstrating without police permit contrary to sections 8, 12 (c) and 13 of the Public Order Decree, 1972 (NRCD 68).⁷⁶ The next day, that is, on 17 February, the plaintiffs were granted a police permit to hold a political rally to commemorate the 28th anniversary of the death of Dr J B Danquah, the

⁷⁵ [1993-94] 2 GLR 459.

⁷⁶ Section 8 of NRCD 68 provided that the holding of all public processions and meetings and the public celebration of any traditional custom should be subject to obtaining the prior police permit; section 12 empowered a superior police officer to stop or disperse such a procession or meeting; and section 13 made it an offence to hold such processions, meetings and public celebrations without such police permission.

political idol of the plaintiffs,⁷⁷ but the permit was withdrawn and the planned rally was rather prohibited by the police.

Dissatisfied with the above decisions and actions of the police, the plaintiffs sued in the Supreme Court for a declaration that: (i) sections 7, 8, 12(a) and 13 of NRCD 68 were inconsistent with and in contravention of the Constitution, 1992 particularly article 21(1) (d) and therefore void and unenforceable; and (ii) under the Constitution, no permission was required from the police or any other authority for the holding of a rally or a demonstration or procession or the public celebration of any traditional custom by any person, group or organisation. At the hearing, counsel for the plaintiffs submitted that sections 7 and 8 of NRCD 68 derogated from the plaintiffs' fundamental human rights and freedoms, especially their right, under article 21 (1) (d) of the Constitution, to freedom of assembly, including freedom to take part in processions and demonstrations.

In response, the defendant admitted the above facts. Counsel, however, argued that the right to freedom of assembly contained in article 21(1) (d) of the Constitution, 1992 was not absolute but subject to the restrictions contained in article 21 (4) and that sections 7,8, 12 (c) of NRCD 68 constituted restrictions reasonably required in terms of article 21 (4)(c) of the Constitution which states that:

⁷⁷ The late Dr J B Danquah, best described as the doyen of Ghana politics, was the counsel for the plaintiff in the celebrated case of *Re Akoto*, earlier examined in discussing the historical background of the enforcement of fundamental human rights in Ghana. It is very ironical and significant that, the late Dr J B Danquah, who as plaintiff's counsel in *Re Akoto*, argued unsuccessfully before the Supreme Court, for the enforcement and protection of fundamental human rights, should be the catalyst for plaintiffs' action in the instant case of *NPP v IGP*. He was also one of the *Big Six* of Ghana's colonial struggle for political independence, namely: Dr Kwame Nkrumah, Dr J B Danquah, William Ofori-Attah, Edward Akufo-Addo (later Chief Justice of Ghana), Obestebi-Lamptey and Ako Adjei.

“21(4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision –

(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or...”

The Supreme Court unanimously granted the plaintiffs a declaration that certain sections of the Public Order Decree, 1972 (NRCD 68) were inconsistent with and in contravention of article 21(1)(d) of the Constitution, 1992 and were to the extent of such inconsistency null and void. The nullified sections included: section 7 which gave the Minister of Interior the power to prohibit the holding of public meetings or processions for a period in a specified area; section 8 which provided that the holding of all public processions and meetings and the public celebration of any traditional custom should be subject to the obtaining of a prior police permit; section 12(a) which gave a police officer an unfettered power to stop and cause to be dispersed any meeting or processions in any public place in contravention of sections 7 and 8; and section 13(a) which made it an offence to hold such procession, meetings and public celebration without permission.⁷⁸

⁷⁸ It is interesting to observe that the Supreme Court of Zimbabwe was reported to have decided on 25 February 1994 (see *Daily Graphic*, 3 March 1994 and *The Ghanaian Times*, 3 March 1994) (like the Ghana Supreme Court) that a section of the Law and Order (Maintenance) Act which prohibited demonstrations and processions except with police permission and under police control was unconstitutional as being in contravention of the Zimbabwean Constitution - guaranteeing freedom of expression and association. The Supreme Court was quoted as having held that while the Constitution allowed controls on those freedoms in the interest of public safety and order, the court found the controls "too sweeping and undefined and hence unreasonable in a democratic society." The court so decided when six trade unionists brought an application - challenging their prosecution for organising a demonstration in 1992 against labour laws in defiance of a police ban.

In the course of his judgment, Charles Hayfron-Benjamin JSC said:⁷⁹

“ In construing article 21 (1) (d) and (4) of the Constitution, 1992 therefore, it is clear that (1) the concept of consent or permit as prerequisites for the enjoyment of the fundamental human right to assemble, process or demonstrate is outside their purview. Sections 7 and 8 of NRCD 68 are consequently patently inconsistent with the letter and spirit of the provisions of article 21 (1) (d) of the Constitution, 1992 and are unconstitutional, void and unenforceable; and (2) some restrictions as are provided for by article 21 (4) of the Constitution, 1992 may be necessary from time to time and upon proper occasion. But the right to assemble, process or demonstrate cannot be denied.”

The learned judge continued:⁸⁰

“It will be noted that for the first time in the history of our constitutional development, article 21 (1) (d) of the Constitution, 1992 provides for the right of the citizen to demonstrate...Once again, whereas in the former Constitutions the citizen was not to be ‘hindered’ in the enjoyment of his fundamental freedoms, in the Constitution, 1992 there is a ‘right’ conferred on the citizen in the enjoyment of his freedoms. This positive attitude towards the enjoyment of the freedoms cannot be abridged by a law which prevents the citizen from delivering his protest even to the seat of government.”

Earlier in his opinion, Charles Hayfron-Benjamin JSC compared the enjoyment of the fundamental freedoms under article 21 of the Constitution, 1992 with such freedoms under the Constitution, 1969, art 23(1) and the Constitution, 1979, art 29(1).

⁷⁹ [1993-94] 2 GLR 459 at 509.

⁸⁰ Ibid at 500-501 (my emphasis).

He went on to observe:⁸¹

“ It is evident that the public order laws in one form or the other have existed during the period of all four Republican Constitutions ...Yet, it seems it is only now that a challenge has been raised as to their constitutionality. The answers are clear...*In re Akoto* ...denuded article 13 (1) of the Constitution, 1960 of any constitutional force. *Next, the relevant articles in the Constitutions of 1969 and 1979 did not confer the right to process. The right of assembly and association was “for the protection of the citizen’s interest.”* Article 23(1) of the Constitution, 1969 and article 29(1) of the Constitution, 1979 are in exactly similar language and read:

‘29 (1) No person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other person and in particular to form or belong to trade unions or other associations, national and international, for the protection of his interests.’

It is clear from the above article that the Constitutions, 1969 and 1979 only granted limited freedoms. Further, there was no constitutional right to form or hold a procession or demonstration in a public place.”

In assessing this positive development in the law of demonstrations, it must be stressed that Charles Hayfron-Benjamin JSC emphasized the exceptions to the right to process and demonstrate. It must therefore be stressed that (contrary to general belief) the decision did not render the police entirely impotent in the maintenance of law and order in the country. Charles Hayfron-Benjamin JSC clearly indicated, what he referred to as "inherent limitations" and restrictions on the enjoyment of the right as conferred by article 21(1)(d). First, the operation of the right to demonstrate without permission did not affect the continued operation of section

⁸¹ Ibid at 492 (my emphasis).

12(c) of the Public Order Decree, 1972 which dealt with the powers of the police and other authorised public officers to stop and disperse *unlawful* assemblies. In the words of the judge:⁸²

“ ...we could not grant a declaration in favour of the plaintiff affecting section 12 (c) of NRCD 68. It would have been irresponsible for a court to order in the light of section 12 (c)..., that the police should remain helpless on-lookers in a situation in which a “breach of the peace has taken or is taking place or is considered by the officer as likely to take place.”

Second, there were inherent limitations to the enjoyment of the right of assembly, procession or demonstration, namely, the obligation to observe the law - particularly the observation of the public peace under the Criminal Code. Third, the right under article 21(1)(d) was subject to the restrictions laid down in article 21(4)(a)-(e). Under article 21(4)(a), the right to process and demonstrate could be restricted by or under the *authority of law passed by parliament* providing for the imposition of restrictions by *court order* in the interest of defence, public safety or public order. The Supreme Court held that "public order" within the meaning of article 21(4)(a) must be construed widely as would protect the constitutional rights of other citizens.

It should be observed that, subsequent to the Supreme Court decision in *New Patriotic Party v Inspector-General of Police*, the President signed into law, the Public Order Act, 1994 (Act 491), which repealed the Public Order Decree, 1972 (NRCD 68) and the Public Order (Amendment) Law, 1983 (PNDCL 48.) Sections 1-3 of Act 491 govern the holding of what is referred to as "special events." Section 10 of the Act defines "special event" as meaning:

⁸² Ibid at 498.

“procession, parade, carnival, street dance, celebration of traditional custom, out-dooring of traditional ruler, demonstration, public meeting and similar event but does not include -

(a) religious meeting;

(b) charitable, social or sporting gathering;

(c) any lawful public entertainment or meeting.”

Section 1 of Act 491 of 1994 requires any person who desires to hold a special event to notify in writing the police of his intention to do so not less than five days before the date of the special event. The notification should give details of the place, hour, nature, time, the proposed route and destination, if any, and the proposed time of the special event. Under section 1(4) where a police officer, notified of a special event, has reasonable grounds to believe that the holding of a proposed special event might "lead to violence or endanger public defence, public order, public safety, public health or the running of essential services or violate the rights and freedoms of other persons" he may request the organisers of the special event to postpone the event to any other date or to relocate it. Under section 1(6), where the organisers of the special event refuse to comply with the request, the police officer may apply to any judge or a chairman of a tribunal for an order to prohibit the holding of the special event on the proposed date or at the proposed location. The judge or tribunal may issue the judicial order - prohibiting the holding of the special event on the grounds specified in section 1(4) above.

It is suggested that the provisions in sections 1-3 of the Public Order Act, 1994 (Act 491) are constitutional as being in line with article 21(4) (a) as endorsed by the Supreme Court in *New Patriotic Party v Inspector-General of Police*.

There are other limitations on the fundamental right to demonstrate as specified in article 21(4)(b)-(e): Under article 21(4)(b), a court may impose restrictions on the movement or residence within Ghana of a person either following his conviction of a criminal offence or to

ensure his appearance in a court for trial for a criminal offence or for proceedings regarding his extradition or lawful removal from Ghana; under article 21(4)(c) restrictions that "are reasonably required in the interest of defence, public safety, public health or the running of essential services" may be imposed by law on persons as to their movement or residence within Ghana; and under article 21(4)(d) restrictions by law may be imposed on non-citizens of Ghana as to their freedom of entry into or movement in Ghana.

It should be stressed again that the Supreme Court in *New Patriotic Party v Inspector-General of Police* decided that the citizen's right to freedom such as the right to demonstrate without permit could not be denied but it was, however, subject to the inherent limitations and restrictions within the meaning of article 21(4). It must be noted that Amua-Sekyi JSC dissented from the view of Charles Hayfron-Benjamin JSC (concurring in by the other five judges) as to the restrictions placed on freedom of assembly including the right to demonstrate under article 21(1)(d). In his view, article 21(4) did not sanction the placing of any curbs on freedom of assembly. Amua-Sekyi JSC therefore drew a distinction between *freedom of assembly* defined as the right of individuals to come together and to take part in demonstrations and processions *and* freedom of movement defined as the right of every individual freely to enter and to leave the country. It seems that the view of the majority on the issue of restrictions in terms of article 21(4)(a)-(e) is preferable because it is obvious that a person cannot assemble and demonstrate without moving from one place to the other.

4. FREEDOM OF ASSOCIATION INCLUDING FREEDOM TO FORM AND JOIN TRADE UNIONS

The fundamental right to the enjoyment of freedom of association including freedom to form and join trade unions is provided for in articles 21(1) (e) and 37(2) (a) of the Constitution, 1992 as follows:

“ 21.(1) All persons shall have the right to –
(e) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest.”

“ 37(2)(a) The State shall enact appropriate laws to assure -
(a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in the development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities.”

The true legal effect of the above provisions was decided and expatiated upon by the Supreme Court in two cases: *Mensima v Attorney-General*⁸³ and *New Patriotic Party v Attorney-General (Ciba Case)*.⁸⁴

The plaintiffs in *Mensima v Attorney-General* were members of a registered co-operative union. They broke off from the union and formed a limited liability company. The object of the company was to distil a locally manufactured gin called *akpeteshie*. They were prevented

⁸³ [1996-97] SCGLR 676-a case earlier examined in chapter 3 in discussing the question of the supremacy of the Constitution, 1992.

⁸⁴ [1996-97] SCGLR 729- a case also earlier examined in this chapter in discussing whether the Directive Principles of State Policy are justiciable.

from distilling *akpeteshie* by the officers of the co-operative union; they were also harassed and their products were impounded by the officers on the grounds that they did not belong to any registered distiller's co-operative union as required by regulations 3 (1) and 21 of the Manufacture and Sale of Spirits Regulations, 1962 (L I 239), being regulations made under the Liquor Licensing Act, 1970 (Act 331). The said regulation 3(1) provided that: "Every applicant for the issue of a distiller's licence shall be a member of a registered Distiller's Co-operative." And regulation 21 made it obligatory for a distiller to dispose of his products to specified persons or bodies by providing that:

" 21. Every distiller shall dispose of the whole of his production of spirits either to a registered co-operative or to a distiller or distillers directed to be placed under the control of the Excise Ordinance 1953 (No 31 of 1953) in pursuance of the provisions of the Act."

The plaintiffs, aggrieved by the conduct of the officers of the union, sued in the Supreme Court, under article 2 (1) of the Constitution, 1992 for a declaration that regulations 3(1) and 21 of LI 239 were inconsistent with the letter and spirit of the Constitution, particularly the exercise of their fundamental right of freedom of association guaranteed under article 21(1)(e) of the Constitution. The defendants denied the claim. They contended that regulations 3(1) and 21 of LI 239 were laws reasonably necessary for the security, safety and public health of the consumers of the local gin, *akpeteshie*, in terms of article 21(4)(c) of the Constitution, 1992. The defendants also sought to justify regulation 21 as law reasonably necessary under article 24(4) of the Constitution, 1992 which stated that:

"24(4) Restrictions shall not be placed on the exercise of the right conferred by clause (3) [ie the right to form or join a trade union of one's choice for promotion of his economic and social interests] except restrictions prescribed by law and reasonably necessary in the interest of national

security or public order or for the protection of the rights and freedoms of others.”

The Supreme Court by a majority decision of three to two, upheld the plaintiffs’ claim in part. First, the court held that regulation 3(1) of L I 239 was inconsistent with the letter and spirit of article 21(1) (e) of the Constitution because its mandatory requirement that an applicant for a distiller’s licence, must belong to a registered distiller’s co-operative society could not be justified under article 21(4)(c). In other words, membership of a co-operative society was not a restriction “reasonably required in the interest of defence, public safety, public health” within the meaning of article 21(4) (c) of the Constitution. In the words of Acquah JSC:⁸⁵

“ Indeed, elaborate provisions are made in Act 331 [the parent Act] and L I 239 to ensure the health, safety and security of the public. And in all those provisions, a registered distillers co-operative plays no part...”

The majority of the court conceded that the executive had the power to regulate the economic activities of the country for the public good. However, they pointed out that the executive power must be exercised in such a way as not to erode the fundamental right of the plaintiffs to freedom of association guaranteed in article 21(1) (e).

In dissenting from the majority decision, declaring regulation 3(1) inconsistent with article 21(1)(e) and therefore void and unenforceable, Bamford-Addo JSC said (Kpegah JSC concurring):⁸⁶

⁸⁵ Ibid at 720.

⁸⁶ Ibid at 693-&94.

“It is to be noted that section 2 of NLCD 252 [Co-operatives Societies Decree, 1968] is permissive, not mandatory, and does not compel registration; but in the case of distillers of spirits, it is a requirement under regulation 3(1) of LI 239 for obtaining the necessary licence to distil that the applicant must be a member of a registered distiller’s co-operative. This is to enable effective monitoring of the mode of production and the quality of the spirit produced in the interest of public health, a government economic policy...Considering the potential dangerous effect on consumers of unwholesome *akpeteshie*, it seems it is necessary to ensure the quality of *akpeteshie*. Therefore, regulation 3(1) of LI 239 is not only desirable but most reasonable in the interest of public health.”

It must be emphasised, however, that the Supreme Court in this case was unanimous as to the legal effect of regulation 21 of LI 239 (also complained of by the plaintiffs) which required a distiller to dispose of his products to specified persons. It was held that regulation 21 was consistent with and did not violate the freedom of association guaranteed in article 21(1) (e) because although restrictive in nature, it did not leave the distiller without a choice; he was at liberty to sell his products to a registered co-operative or any of the distillers placed under the Excise Ordinance, 1953 (No 31 of 1953).

Bamford-Addo JSC observed that the purpose of regulation 21 was to ensure easy and effective collection of taxes on locally manufactured spirits, considering the fact that it was the duty of citizens to satisfy all tax obligations under article 41(j) of the Constitution, 1992. The court therefore concluded that regulation 21 was justifiable under article 21(4) (c) of the Constitution as a law reasonably required in the public interest for the protection of public health and public order. In mapping out the rationale for that conclusion, Bamford-Addo JSC said:⁸⁷

⁸⁷ Ibid at 698.

“To hold otherwise would be to prescribe the recipe for chaos in the *akpeteshie* distillation industry, as well as other occupations which need to be regulated in the public interest...It would also amount to subordinating the general public interest to private economic interest of a small group of people whose school of thought happens to be different from government policy. This is not to be taken as allowing any or all economic regulatory enactments. No! This is because they are subject to the limitations specified in the Constitution.”

It seems to me that the decision in *Mensima v Attorney-General*, upholding regulation 21 as constitutional and therefore enforceable on the ground that it was a law reasonably required in the economic interest of the public, is a very significant development in the law relating to enjoyment of the fundamental right to freedom of association. The decision constitutes a recognition by the Supreme Court that the fundamental right to freedom of association might be subordinated to the economic interest of the public, and not that of the individual.

It will be recalled that the Supreme Court in *Mensima v Attorney-General* had upheld regulation 21 of L I 239 as not infringing article 21(1) (e) of the Constitution because, as a regulatory measure, L I 239 gave the distiller the choice of selling his product either to a registered co-operative or any of the distillers placed under the Excise Ordinance. It was this want of choice in the membership of an organization which was frowned upon and condemned by the Supreme Court in the subsequent case of *New Patriotic Party v Attorney-General (Ciba Case)* earlier referred to.⁸⁸

In the *Ciba Case*, the plaintiffs, a political party, sued in the Supreme Court under article 2 of the Constitution, 1992 for a declaration that the Council of Indigenous Business Associations, 1993 (PNDCL 312), particularly, section 4 (1) thereof, was inconsistent with and in

⁸⁸ [1996-97] SCGLR 729.

contravention of the Constitution, 1992 especially articles 21 (1) (e) and 37 (2) (a) and that to the extent of such inconsistency, void and unconstitutional. The said section 4 (1) of PNDCL 312 provided that: “ The associations specified in the Schedule to this Law shall be registered with the Council.”

The Attorney-General, the defendant, raised a preliminary legal objection to the institution of the action on the grounds, inter alia, that PNDCL 312 had been enacted upon the petition and consent of the associations listed in the schedule to the Law to enable them operate freely under the umbrella of a council similar to the Trades Union Congress.

The Supreme Court dismissed the preliminary objection by a majority decision of four to one, Kpegah JSC dissenting, on the ground, inter alia, that section 4 (1) of PNDCL 312, in so far as it compelled the listed organizations to register with the council was inconsistent with and offended against articles 21 (1) (e) and 37 (2) (a) of the Constitution, 1992 and therefore unconstitutional and void. Judge Bamford-Addo explained that it was immaterial that those mandated to register were organizations, seeing that those organizations were composed of individual persons; that the freedom of association of the individual members of the stated organizations had been effectively taken away by the compulsion of the stated organizations to join the Council of Indigenous Business Associations (CIBA) under PNDCL 312, s 4 (1). The majority also dismissed as untenable the defence contention that PNDCL 312 had been enacted upon the petition and consent of the associations listed in the schedule to the Law. The contention was dismissed by the majority (per Bamford-Addo JSC) as irrelevant to a consideration of the question whether the Law as it stood violated the freedom of association of those organizations.

There is no doubt that the decisions of the Supreme Court *Mensima v Attorney-General and the Ciba Case* have contributed significantly to the development of the Ghana Constitutional Law relating to the fundamental right to freedom of association within the meaning of articles 21(1) (e) and 27(2) (a) of the Constitution, 1992 . As Atuguba JSC, in support of the majority decision in the *Ciba Case*, observed:⁸⁹

“ I have no hesitation in striking down section 4 (1) of PNDCL 312 ...The effect of this, coupled with the other ensuing regulative provisions, is to compel association by conscription with the council established by the Law. *This negates rather than restricts the right to freedom of association.*”

5. FREEDOM OF SPEECH AND EXPRESSION, INCLUDING FREEDOM OF THE PRESS AND OTHER MEDIA

Introduction

The fundamental right to freedom of expression is conferred on all persons by article 21(1) (a) of the Constitution, 1992 which states that: “ All persons shall have the right to – (a) freedom of speech and expression, guaranteeing freedom of the press and other media.” The provision in article 21(1)(a), guaranteeing freedom of speech and expression and other media including the electronic media, namely, radio and television, is reinforced by the provision in article 162(1)-(4), which provides that:

⁸⁹ Ibid at 789 (emphasis is mine).

“162. (1) Freedom and independence of the media are hereby guaranteed.

(2) Subject to this Constitution and any other law not inconsistent with this Constitution, there shall be no censorship in Ghana.

(3) There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.

(4) Editors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications.”

Nature of freedom of expression

The question of freedom of speech and expression is so fundamental in any system of democratic governance that we should explore its nature as well as the true extent of its application. The question was considered by the Supreme Court of Zimbabwe in the case of *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation*.⁹⁰ The applicant sought to establish a mobile cellular telephone service in Zimbabwe. The application for a licence for that purpose was refused by the respondent corporation, a statutory body, which had the monopoly, under section 26(1) of the Postal and Telecommunication Services Act of (Cap 250) of Zimbabwe, regarding the establishment, maintenance and operation of telephone systems in that country. The applicant therefore sued in the Supreme Court of Zimbabwe, under section 24(1) of the Constitution of Zimbabwe, 1980 for a declaration that section

⁹⁰ [1996] 4 LRC (Const) 489.

26(1) of Cap 250 was inconsistent with section 20(1) of the Constitution and therefore invalid. The said section 20(1) guaranteed freedom of expression including the “right to hold opinions and receive and impart ideas and information without interference.” The provision was, however, made subject to section 20(2)(b)(iv) which allowed the right to be restricted by a law making provision for the purpose of: “Regulating the technical, administration, technical operation or general efficiency of telephony...or creating ...any monopoly.” The law creating the restriction was, however, itself subject to the proviso that, it would be invalid if “shown not to be reasonably justifiable in a democratic society.” The respondent corporation denied the claim and argued that there were advantages to the public in maintaining its monopoly over the establishment of the electronic media. The parties agreed that there was the pressing need for an efficient cellular telephone service and that the existing service being offered by the respondent corporation was poor and inadequate.

The Supreme Court of Zimbabwe allowed the claim and called upon the Attorney-General to show cause why section 26(1) of Cap 250 should not be declared unconstitutional. The court held, inter alia, that the right of freedom of expression was fundamental to democracy and the indispensable condition of nearly every other form of freedom. It further held that freedom of speech serves four broad purposes: (a) it helps individuals to attain self-fulfillment; (b) it assists in the discovery of truth; (c) it strengthens the capacity of the individual to participate in decision-making; and (d) it provides a mechanism by which it is possible to establish a reasonable balance between stability and social change. The court also held that, section 20(1) of the Constitution enjoined that persons should be free and not hindered in their means to do so. It was thus held that a restriction imposed on the means of transmission or reception necessarily interfered with the right to receive and impart information; and that any monopoly which had the effect of hindering the right to receive and impart ideas and information, constituted a violation of that paramount right.

The court also identified the matters to be considered in determining whether a restriction on a constitutional right was permissible as being reasonably justifiable in a democratic society, namely: (i) whether the legislative objective was sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective were rationally connected to it and not arbitrary, unfair or based on unreasonable conditions; and (iii) the means used to impair the right or freedom were no more than was necessary to accomplish such objective. On the facts of the instant case, the court found that the benefits enjoyed by the defendant corporation, in its existing monopoly would not be lost if others were permitted to establish a cellular telephone service. The court concluded that the objectives advanced by the respondent corporation were not of sufficient importance to warrant a serious inroad into the constitutional right of freedom of expression.

Further light on the nature of freedom of speech and expression was shed by the Supreme Court of Sri Lanka in the case of *Perera v The Attorney-General*.⁹¹ The three petitioners in this case (one of them, a one-time Lecturer in History at the University of Colombo), had been billed to deliver lectures at a public meeting. Two days before the meeting scheduled for 26 June 1986, a pamphlet was distributed, accusing the ruling government for giving no funds to be spent on free education and calling upon “witch-haunted teachers, progressive students and parents to attend the meeting, to get together and establish their rights...” Before the commencement of the meeting, the police invaded the meeting place, dispersed the crowd and arrested the three petitioners, who were subsequently detained. The petitioners sued in the Supreme Court, complaining that, the fundamental rights guaranteed to them under articles 12(2), 13(1) and 14(1) of the Constitution, namely, freedom from arbitrary arrest, detention and freedom of speech and expression respectively had been violated. The

⁹¹ [1992] 1 Sri LR 199, SC.

defendants sought to justify the arrest and detention under regulations 18 and 19 of the Emergency Regulations (No 6 of 1986).⁹²

The Supreme Court of Sri Lanka, held by majority decision that there was no illegal arrest and detention. The court was, however, unanimous that the respondents' right to freedom of speech and expression secured under article 14(1) of the Constitution had been violated. In shedding light on the nature of freedom of speech and expression, the court, per Sharvananda CJ said:⁹³

“The freedom of speech and expression is not only a valuable freedom in itself, but is basic to a democratic form of Government which proceeds on the theory that the problems of government can be solved by the free exchange of ideas and by public discussion - Servai, Indian Constitution, 3rd Ed Vol 1 at 491. Free discussion of governmental affairs is basic to our constitutional system. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association, the People are the sovereign, not those in the seat of power. It is the voice of the People which ultimately prevails. *Free political discussion is thus necessary to the end that government may be responsive to the will of the people and changes may be obtained by peaceful means. The Constitutional protection for speech and expression was fashioned to bring about political and social changes desired by the people.*

⁹² Regulation 18 of the Emergency Regulation authorises the arrest without warrant and detention for purpose of search any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in committing an offence under the Emergency Regulation.

⁹³ Ibid at 223-224 (emphasis is mine).

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read, what it needs. No one can doubt that if democracy is to work satisfactorily that the ordinary man and woman should feel that they have some share in Government.”

Meaning of freedom of speech and expression

What constitutes freedom of expression was addressed by the Commonwealth Statement on Freedom of Expression.⁹⁴ It was noted that: “Freedom of expression is the primary freedom, an essential precondition to the exercise of other freedoms. It is the foundation upon which other rights and freedoms arise.” The Commonwealth Statement also identified certain principles constituting a “basis for the recognition of freedom of expression in democratic legal system.”⁹⁵ These include: First, the existence of constitutional protection of freedom of expression such as is clearly guaranteed by the Ghana Fourth Republican Constitution, 1992 in articles 21(1)(a), 162 and 163. Second, the availability of pluralism in the ownership of the mass media. It was noted that a branch of the mass media, such as the electronic media, should operate under a licensing mechanism. On the issue of licensing, the Commonwealth Statement on Freedom of the Press also said:⁹⁶

⁹⁴ See *Annex to the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth* at p 11, Commonwealth Secretariat, London June 1998.

⁹⁵ Ibid at pp 11-17.

⁹⁶ Ibid at p 12 (emphasis is mine).

“State licensing of broadcasters is the norm in the world today. The licensing body should be autonomous and independent of direct government control. *Licences must be awarded, denied, cancelled or suspended according to established and published criteria. The process of the licensing body must be open and non-discriminatory. It is legitimate for a state to establish licensing criteria that deny broadcasting to non-citizens.*”

And third, the law should provide for a right of reply for opposing sides and the ventilation of divergent viewpoints on controversial issues.

6. FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION: GHANA EXPERIENCE

It is interesting to note that prior to the issuing of the Commonwealth Statement on Freedom of the Press, questions on the need for ventilation of divergent and opposing viewpoints and also the need for uninhibited right to establish an electronic media had been raised for adjudication before the Ghana Supreme Court in two cases: First in *New Patriotic Party v Ghana Broadcasting Corporation*,⁹⁷ and second in *Republic v Independent Media Corporation of Ghana (Radio Eye Case)*.⁹⁸

The presentation of the 1993 Budget Statement of the Government of Ghana served, as it were, as the catalyst for the institution of the plaintiff's claim in the case of *New Patriotic Party v Ghana Broadcasting Corporation*. The government budget statement was subjected to severe criticism by the general public including the plaintiff, the main opposition party in

⁹⁷ [1993-94] 2 GLR 354.

⁹⁸ [1996-97] SCGLR 258.

Ghana. In response to the mounting criticisms of the budget statement, the Minister of Finance appeared on radio and television for two hours, twice in succession, that is, on 23 and 24 January 1993, and put in a spirited defence and explanation of the budget statement. Subsequently, the plaintiff applied to the Ghana Broadcasting Corporation, the statutory body responsible for radio and television broadcasting, under the Ghana Broadcasting Corporation Decree, 1968 (NLCD 226), to be given time for it to air its views on the same budget statement. The plaintiff's request was simply refused by the broadcasting corporation.

The plaintiff therefore sued in the Supreme Court for a declaration that: (a) by virtue of articles 55 (11) and 163 of the Constitution, 1992 the Ghana Broadcasting Corporation (GBC), as one of the state-owned media, had a duty to afford it, ie the New Patriotic Party, fair opportunities and facilities for presentation of its views - especially when they were divergent from those of the government or the National Democratic Congress (NDC), the then ruling party in Ghana; and (b) the refusal of the GBC to afford it equal time on radio and television to present its views on the 1993 budget as accorded the ruling party, National Democratic Congress, on 23 and 24 January 1993 was a violation and contravention of the Constitution, 1992. The said articles 55(11) and 163 of the Constitution provide as follows:

“55.11 The State shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media.”

“163 All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.”

In a unanimous decision given on 22 July 1993, the Supreme Court granted the declaration sought by the plaintiff and ordered the defendant corporation, a state-owned media, to afford

the plaintiff within two weeks of the date of the order, fair opportunity and equal access to the facilities of the defendant corporation for the articulation of the plaintiff's views on the 1993 budget in as like manner as it accorded the NDC on the following grounds: First, that article 163 in mandatory terms had imposed the duty on the defendant to afford the plaintiff fair opportunities and facilities for presentation of divergent views and dissenting opinions; and that the *defendants had no discretion in the matter*. Second, the Supreme Court held⁹⁹ that the Constitution had spelt out unambiguously, a primary objective of making information readily available to allow for valued judgments from all citizens. That objective was only possible if there was a free ventilation of views – a duty which was in mandatory terms placed on all the state-owned media by the use of the words “shall” in article 163 of the Constitution. It was therefore held that the denial of the plaintiff's right to present or express divergent and dissenting opinions, constituted an interference with the freedom of the people and a violation of articles 21(1)(f) and 163 of the Constitution. A contrary conclusion would mean a right given to persons, bodies or institutions to exercise censorship which could block avenues of thought and foreclose the citizen's right of choice contrary to the prohibition of censorship specified in article 162(2) of the Constitution. In the words of Francois JSC¹⁰⁰:

“[T]he free exchange of views is necessary to give the electorate an opportunity to assess the performance of the government in power as against the potential of an opposition in the wilderness. It keeps a government on its toes and gives the neutral, apolitical citizen an opportunity to make up his mind either to consign the disenchanted noises he hears around, to mere rabid ranting that proceed from electoral defeat or give it the evocative distinction of demonstrating the quality that unfortunately missed the boat through bad electoral judgment, and therefore

⁹⁹ (Per Francois JSC, Archer CJ, Edward Wiredu and Bamford-Addo JJSC concurring).

¹⁰⁰ [1993-94] 2 GLR 354 at 366.

deserving of a second chance at the next ballot. In a truly democratic environment, this testing ground is a sine qua non to the survival of a free, pluralist society.”

Later in his opinion, Francois JSC also said¹⁰¹:

“ A denial of opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is one step removed from a one-party government. There is a historical precedent of such a retrogressive descent. Obviously, any state agency which fosters the situation that would lead to the creation of one-party state, is seriously out of step with the spirit and constitutional realism of today... Consequently, any act of the state-owned media that smacks of a party bias or fits the description of unexamined adulation , would be the incipient pimple which this court must view with the gravest suspicion if our duty as the defenders of the Constitution, 1992 is to be honourably discharged.”¹⁰²

In the light of the above conclusions and observations, it could be concluded that the Supreme Court decision in *New Patriotic Party v Ghana Broadcasting Corporation*, is a clear judicial endorsement, of the mandatory duty of the state-owned media under article 163

¹⁰¹ Ibid at 368-369 (my emphasis).

¹⁰² In arriving at the above conclusions, Francois JSC cited with approval the following dictum of Justice White in the United States Supreme Court case of *Red Lion Broadcasting Co v Federal Communications Commission* 395 US 367 at 390 (1969): “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount...It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experience which is crucial here.” Francois JSC also cited with approval the dictum of Justice Cardozo, an eminent jurist of the US Supreme Court in *Palko v Connecticut* 302 US 319(1937): “of that freedom[freedom of speech] one may say that it is the matrix, the indispensable condition of nearly every other form of freedom.”

of the Constitution to “afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.”

In the second case earlier referred to, that is, *Republic v Independent Media Corporation of Ghana (Radio Eye Case)*,¹⁰³ the right to establish electronic media free from governmental control in terms of article 162(1) and (3) was pressed on the Supreme Court. The provisions of article 162 (1) and (3) of the Constitution, 1992 were as follows:

“162 (1) Freedom and independence of the media are hereby guaranteed.

(3) There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.”

It is important to note that the provisions in article 162 (1) and (3) are qualified by a limitation clause in article 164 which states as follows:

“ 164. The provisions of article 162 and 163[dealing with responsibility of state-owned media] of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

¹⁰³ [1996-97] SCGLR 258,SC.

It is also important to draw attention to the fact that the existing law had provided for the need to obtain a licence as a condition for the operation of radio frequency. Thus the Telecommunications (Frequency Registration and Control) Decree, 1977 (SMCD 71), section 15(b) stated that:

“15 Any person who -
uses any radio frequency without the written consent of the Board...shall be
guilty of an offence and liable on summary conviction to a fine ...or to
imprisonment...”

In the instant case of the *Republic v Independent Media Corporation of Ghana*, the accused persons took steps to establish a private radio station, called *Radio Eye*, without the written consent of the Ghana Frequency Registration and Control Board established under SMCD 71. They were therefore arraigned before the circuit court on a charge of unauthorized use of radio frequency contrary to section 15(b) of SMCD 71.

At the hearing, counsel for the accused persons raised a preliminary objection. He challenged the constitutionality of section 15(b) of SMCD 71 on the ground that it was inconsistent with article 162(3) of the Constitution. The trial court decided to stay the proceedings and make a reference to the Supreme Court (as required by article 130(2) of the Constitution) for the determination of the following question: whether or not section 15(b) of SMCD 71 was inconsistent with article 162(3) and therefore void and of no effect. At the hearing of the reference before the Supreme Court, counsel for the accused argued, inter alia, that section 15(b) of SMCD 71 was unconstitutional under article 162(3) because it fettered the right of the individual to establish a radio station without written consent.

The Supreme Court by a majority decision of four to one, ordered the continuation of the trial of the accused persons before the circuit court on a charge of unauthorised use of radio frequency contrary to section 15(b) of the Telecommunications (Frequency Registration and

Control) Decree, 1977 (SMCD 71). The court held that section 15(b) of SMCD 71 (which had created the offence of using any radio frequency without the written consent of the Ghana Frequency Registration and Control Board) was constitutional and not inconsistent with article 162(3) of the 1992 Constitution. The majority of the court conceded that section 15(b) was a regulatory provision; that it had imposed a prior restriction on the freedom from impediments and the need for obtaining a licence as a prerequisite for establishing a newspaper or media for mass communication granted under article 162(3). However, the majority held that, “given the physical realities and the very nature of the medium of communication” that impediment was a restriction reasonably required for the protection of “national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons” within the meaning of article 164. Expatiating further on the true legal effect of that article, Kpegah JSC said:¹⁰⁴

“In Britain, for example, the government regulates not only frequency allocation, but under the concept of ‘public service broadcasting’ also regulates programme content to some extent...[I]t appears we are being invited to be more royal than the Queen: *our radio spectrum should be unregulated and left open so that the philosophy of the fittest with its accompanying anarchy can operate in the name of fundamental human rights and freedoms...* The Government of Ghana is obligated to comply with the International Telecommunications Union Conventions which regulate the co-ordination, notification and registration of frequencies... *I do not think our government can realistically and meaningfully discharge its obligations under ITU Regulations without having the power to license the use of frequencies allocated to it by ITU, considering the limitations inherent in the nature of radio.*”

¹⁰⁴ Ibid at 280-281 (my emphasis).

Acquah JSC also said:¹⁰⁵

“[E]ven in the United States of America where the First Amendment to its Constitution guarantees, inter alia, freedom of the press and media without any limiting clause like our article 164, *some form of regulatory measures and limitations have been acknowledged to be essential to ensure sane and healthy establishment and operation of broadcasting services.* ... Having regard to the undisputed fact that the air waves are not in sufficient abundance for all citizens to utilize, it is in the national interest that there should be such regulatory measure either in the form of obtaining the written consent or licence from the relevant body before one sets up a broadcasting service.”

It seems to me that the decisions of the Supreme Court in *New Patriotic Party v Ghana Broadcasting Corporation* and the *Radio Eye Case* are very significant for two reasons. First, the decisions are in line with the Commonwealth Statement on Freedom of the Press. Second, they may be welcomed as timely and effective contribution to the development of the law relating to the enjoyment of the fundamental right to freedom of speech and expression. By these two decisions, what the Supreme Court appears to have laid down as the law is this: for the establishment and operation of the print media, there is no requirement for a prior application for grant of a licence. However, for the establishment and operation of the electronic media, ie for radio and television broadcasting, there is the need for some regulatory measure in the form of obtaining the written consent or licence from the regulatory body.

A subsequent decision by the Supreme Court, given on 26 January 2000, has reinforced the fundamental right to freedom of speech and expression and freedom and independence of the

¹⁰⁵ Ibid at 283 (emphasis is mine).

media. The case dealt with the issue: in whom is vested the right to appoint the governing bodies of state-owned media? The issue was raised in the case of *National Media Commission v Attorney-General*.¹⁰⁶ The facts of the case were as follows: The National Media Commission, set up under article 166 of the 1992 Constitution, had observed that the President had, in 1994 and thereafter, been appointing, in consultation with certain authorities (by virtue of his alleged powers of appointment under article 195(1) of the Constitution), the chairmen, chief executives and other members of the governing bodies of the public corporations managing the state-owned media, namely, the New Times Corporation, the Graphic Corporation, the Ghana Broadcasting Corporation and the Ghana News Agency. The commission, in a memorandum to the Attorney-General, protested at those appointments. At a subsequent meeting held with the Attorney-General in August 1994, the Attorney-General made it clear that the government had authority under the Constitution to make the appointments complained of by the commission. Thereafter, the President, in 1995, appointed the chief executives for three of the said corporations. The government also directed the Acting Director-General of the Ghana Broadcasting Corporation to proceed on indefinite leave. He was later recalled from leave by the government.

In the circumstances, the commission, in January 1996, sued in the Supreme Court for a declaration that:

“(a) on a true and proper construction of the Constitution of Ghana, 1992 and specifically of articles 168 and 195(1) thereof, the power to appoint the chairmen and other members of the governing bodies of public corporations managing the state-owned media, including the chief executives of such public corporations, however designated, where such chief executives are members of the governing bodies of such public corporations, is vested

¹⁰⁶ [2000] SCGLR 1.

exclusively in the National Media Commission acting in consultation with the President and not in the President either acting alone or in consultation with any other person or authority; and (b) the exercise by the President of the power to appoint the chief executives of public corporations managing the state- owned media who are also members of the governing bodies of such public corporations, whether alone or in consultation with other person or authority, is inconsistent with and in contravention of the letter and spirit of articles 162, 167(c) and 168 of the Constitution of the Republic of Ghana, 1992, and accordingly, appointments made by the President in the purported exercise of such power are null and void and of no effect; and (c) an order setting aside all appointments made by the President of chief executives of corporations managing the state-owned media in violation of the letter and spirit of the Constitution of the Republic of Ghana, 1992.”

The Supreme Court referred to article 168 of the Constitution, 1992 which states that:

“The Commission shall appoint the chairman and other members of the governing bodies of public corporations managing the state-owned media in consultation with the President.” ¹⁰⁷

¹⁰⁷ Apart from article 168, the other functions of the Ghana National Media Commission are spelt out in article 167 of the Constitution, 1992. These include: (i) promoting and ensuring the freedom and independence of the media; (ii) establishment and maintenance of the highest journalistic standards in the mass media; (iii) registration of newspapers and other publications except that the commission shall not exercise any control over the professional functions of persons engaged in the production of newspapers; and (iv) insulate the state-owned media from governmental control. In contrast, the Gambia National Media Commission, established under the National Media Commission Act , 2002 (No 7 of 2002), has the stated functions of the Ghana Media Commission with the following notable *differences*: unlike Ghana law, the Gambia National Media Commission is not empowered by the Act to appoint the governing board of the state-owned media; nor is it empowered to

In the light of the above stated provision, the Supreme Court unanimously held that on the plain and unambiguous language of article 168 of the Constitution, 1992 the authority to appoint the chairmen and other members of the governing bodies of public corporations managing the state-owned media, including chief executives, who were members of such governing bodies, was the National Media Commission, acting in consultation with the President and not the President either acting alone or in consultation with any other person or authority.

To reinforce its decision as to the true legal effect of article 168, the Supreme Court referred to article 297(a) of the Constitution which states:

“ 297. In this Constitution and in any other law-

- (c) the power to appoint a person to hold or act in an office in the public service shall include the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove the persons from office...”

The court construed article 297(a) as meaning that whoever had the power to appoint a person to an office in the public service, also had the power to confirm or withdraw the said appointment and to take disciplinary measures against him or both. The Supreme Court therefore concluded that it was the National Media Commission, and not the President as contended by the Attorney-General, which was entitled to exercise the powers specified in article 297(a) in relation to the chairman, chief executives and other members of the

insulate the state-owned media from governmental control. Finally section 8(e) of the Act provides that the commission shall register newspapers but unlike the Ghana constitutional provision, the Act does not say that the commission cannot exercise control over the professional functions of persons engaged in the production of newspapers.

governing body of public corporations managing state-owned media. In delivering the leading opinion of the Supreme Court in the case, Acquah JSC said:¹⁰⁸

“The language of article 168 is so plain and unambiguous that it means nothing more than what it says. And it accords with the overall objective of securing the independence and freedom of those public corporations from governmental control. To interpret it otherwise would be doing violence to the language of the article and further subverting the noble intentions of the framers of the 1992 Constitution.”

There is no doubt that the decision of the Supreme Court in *National Media Commission v Attorney-General*, affirming the power of the National Media Commission to appoint the governing bodies and the chief executives of the public corporations managing the state-owned media, is a positive and progressive step which affirms the freedom and independence of the media in Ghana.

The examination has focused on the nature and meaning of the fundamental right to freedom of speech and expression; and also the Ghana experience in relation to the enjoyment or otherwise of this freedom including the freedom and independence of the media. We shall next examine in detail the all important question relating to the limitations on the enjoyment of this right which, as conceded on all sides, is an indispensable attribute of a truly democratic society.

¹⁰⁸ Ibid at 15.

7. LIMITATIONS ON FREEDOM OF SPEECH AND EXPRESSION

Introduction

The issue to be addressed in this section is whether there is an absolute enjoyment of freedom of speech and expression as a fundamental human right and freedom and independence of the media as conferred under articles 21(1)(a) and 162(1) of the Constitution, 1992 respectively. Professor Yardley gives an answer to this question in relation to British Constitutional Law when he wrote:¹⁰⁹

“As far as British Constitutional Law is concerned, our main task is to determine in what ways individual liberty is restricted by law, and not how it is preserved...Some limitations upon the foregoing list [the list included freedom of assembly and association and freedom of speech] are obvious and need not be further explained. *Thus freedom of speech and writing must of necessity be restricted by the law of defamation, which in itself is protecting other individuals, and by such laws as those of sedition, censorship, contempt of court, obscenity, and the prevention of disclosure of matters concerning national security.*”

In relation to the Ghana Constitutional Law, Adjabeng JSC in his opinion in *Republic v Tommy Thompson Books Ltd, Quarcoo and Coomson*¹¹⁰ makes the same point, more or less, as made by Yardley, when he said:¹¹¹

¹⁰⁹ See Yardley, DCM, *British Constitutional Law* (7th ed) Butterworths, London at pp 96-97 (emphasis is mine).

¹¹⁰ [1996-97 SCGLR 804-case to be examined in detail in this chapter.

¹¹¹ *Ibid* at 868.

“I think that one very serious mistake that people in this country make is to think and behave as if constitutional rule or democracy and/or freedom of speech or expression of the press mean freedom to do whatever one likes.”

Limitations under the Constitution, 1992 and the existing law

There are undoubtedly, under the Constitution, 1992 itself and the existing law, some limitations on the enjoyment of freedom of speech and expression. First, article 21(1)(a), which guarantees “freedom of speech and expression, which shall include freedom of the press and other media,” is subject to the provision in article 21(4) (c) and (e), namely, a law which is:

“(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, or the movement or residence within Ghana of any person or persons generally, or any class of persons;”¹¹² or

“(e) reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols, emblems, or incites hatred against other members of the community.”

Second, the provision in article 162 is subject to the limitation specified in article 164, namely: “laws that are reasonably required in the interest of national security, public order,

¹¹² As earlier discussed in this chapter in respect of enjoyment of freedom of association, the Supreme Court in *Mensima v Attorney-General* [1996-97] SCGLR 676, held that regulation 3(1) of LI 239 could not, as a law limiting the right to freedom of association, be upheld as reasonably required in terms of article 21(4)(c).

public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

It must be observed that, quite apart from the limitations on freedom of speech and expression as stated in articles 21 (4) (c) and (e) and in 164 as limiting the freedom and independence of the media guaranteed under article 162, the issue of justifiable limitations on freedom of speech and expression, was specifically addressed by the Committee of Experts in their Report on the Draft Proposals for the 1992 Constitution. In paragraphs 186 and 191 of the Report they stated:¹¹³

“186... Freedom of the press and expression also means that any citizen who has anything to say about national affairs should have access to the public sector mass-media, limited only by practical considerations of space and time, and by existing laws of *sedition, criminal libel and those protecting privacy, etc.*”

“191. Finally, the Committee appreciates that press and media freedom and independence has to be matched by the highest journalistic standards. *A venal and irresponsible press is a danger to democracy. Newspapers which publish lies, knowing them to be lies must run the risk of being suppressed by the courts. Those who operate the media are not immune from the exacting and all pervasive standards of probity and accountability.*”

It is quite clear from the above passages that apart from the constitutional limitations specified in articles 21(4) (c) and (e) and 164, there were, in the existing law, before the coming into force of the Constitution, 1992 certain laws that clearly limited the enjoyment of the freedom

¹¹³ The emphasis is mine.

of speech and expression and freedom and independence of the media. These included: criminal law of libel and sedition laid down in sections 112(2), 114(1) and 185 of the Criminal Code, 1960 (Act 29) respectively;¹¹⁴ the law of contempt of court, ie contempt by scandalising the court and eroding public confidence in the administration of justice;¹¹⁵ and the tort of defamation.¹¹⁶

Repeal of criminal law of libel and sedition by Act 602 of 2001

It should be emphasized that there were incessant calls during the period of the PNDC military government, and even more so, during the period of constitutional rule under the Rawlings government, for the removal from the statute books of the criminal law of libel and sedition on the grounds that they constitute an unjustifiable infringement of the right of freedom of speech and of the press and are therefore unconstitutional.¹¹⁷ Professor Kumado

¹¹⁴ For recent decisions of the Supreme Court touching on the criminal libel as laid down in sections 112(2) and 114(1) of Act 29 and also the offence of sedition as laid down in section 185 of the Code see respectively: *Tommy Thompson Books Ltd (No 1) v The Republic* [1996-97] SCGLR 312; *Republic v Tommy Thompson Books Ltd (No 2)* [1996-97] SCGLR 484 where Acquah JSC said at pp 498-499: "I have no doubt criminal libel constitutes a restriction on the freedom and independence of the media;" and *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson* [1996-97] SCGLR 804.

¹¹⁵ See K Kumado and E V O Dankwa, *The Rights of Journalists* (1997) Friedrich Ebert Foundation, Accra at p 17 where Kumado describes these existing laws as "chilling restrictions on freedom of speech and expression." – citing two "most worrying cases on contempt of court, namely: *Republic v Mensah-Bonsu* [1994-95] GBR 130; and *Republic v General Portfolio Ltd, High Court*, Misc 932/96, unreported per Dordzie J. See also Mensah-Bonsu, *HJAN Law and the Journalist* (1997) at pp 28- 29 Friedrich Ebert Foundation, Accra where the author lists criminal offences constituting restrictions on the press as including abetment of crime, obscenity, defaming the President, publication of false news and exciting prejudice as to proceedings pending before court.

¹¹⁶ See HJAN Mensah-Bonsu op cit at pp 1-14.

¹¹⁷ See eg article by Kabral Blay Amihere, the former President of the Ghana Journalist Association, entitled "Free Press' Satanic Verse" *The Independent* 14 February 1998 where he

also impliedly called for the abolition of the laws limiting freedom of speech and expression when he observed that:¹¹⁸

“The debate should not be whether the rights are subject to limitations. Rather the arguments would be over the legitimacy and timeousness of any limitation.”

It must be pointed out that the call for the abolition of the criminal law of libel and seditious laws was readily satisfied by the new the Government of the New Patriotic Party, headed by President J A Kufuor, sworn in on 7 January 2001 after the December 2000 Presidential and Parliamentary Elections held throughout Ghana.¹¹⁹ On 2 August 2001, the President gave his assent to the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602).¹²⁰ The preamble of Act 602 states as follows:

said inter alia: "I have faith that all perceived excesses of the entire media from the state-owned media through the private press which appears opposed to the government... will all come to pass without criminalising freedom of expression and calling for the blood of journalists.”

¹¹⁸ Ibid at p 5. See also Kumado, C E K op cit at page 108 where he wrote: “Our proposal for reform is that: Speech should be de-criminalised.”

¹¹⁹ For an earlier account of the process leading to the installation of the new government: see chapter 2 on the topic: Historical Background: Ghana Constitutional Evolution.

¹²⁰ The enactment of Act 602 was in apparent fulfilment of the promise made by the New Patriotic Party in its manifesto that it would abolish the criminal libel and seditious laws, if it were to win the December 2000 Parliamentary and Presidential Elections.

“ AN ACT to amend the Criminal Code, 1960 (Act 29), as amended, by the repeal of Chapter 7 of Part II on libel; section 182A on power of the President to ban organizations; section 183 on power to prohibit importation or publication of newspaper and sedition; section 183A on defamation of the President and section 185 on communication of false reports injuring the reputation of the State, in order to bring the laws on expression and the media into conformity with the provisions of the Constitution; and to provide for related matters.”

In furtherance of the objectives of the Act as noted in its preamble, section 1 of Act 602 further amended the Criminal Code, 1960 (Act 29), as amended, by the repeal of its sections 112 to 119, sections 182A, 183, 183A and 185. The amending Act 602 also made provision for cessation of any pending proceedings and action. Thus section 2 of Act 602 provides that:

“(a) any prosecution instituted under any of the repealed sections, the proceedings of which are pending before any court or tribunal shall cease; the accused person shall be discharged and no criminal proceedings shall be instituted in respect of the same facts;

(b) a person who has committed an offence under any of the repealed sections shall not be prosecuted.”

Needless to say, by these repeals, the criminal libel and seditious laws as were in force as part of the existing law before the coming into force of the Constitution, 1992 and as construed by the Supreme Court before the enactment of Act 602, are no longer to be considered as forming part of the limitations on freedom of speech and expression and freedom and independence of the media. What remains as a limitation on the enjoyment of these freedoms include the law of contempt of court, namely, contempt by scandalizing the court and eroding public confidence in the administration of justice and the civil law of defamation.

Notwithstanding the repeal of the criminal law of libel and seditious laws by Act 602, we shall proceed to examine the law as construed and enforced by the Supreme Court before the enactment of Act 602. We shall do so for two reasons: first to demonstrate that the Supreme Court did make some contribution to the development of these laws before they were repealed by Act 602; second to set the necessary background to the question whether or not the repeal of these laws constituted a good or bad omen for our fledgling democratic system of government. We shall also examine the law of contempt of court as a limitation on freedom of speech and expression.

The law of criminal libel as limitation on freedom of speech and expression before repeal by Act 602 of 2001

Could the criminal law offence of libel be regarded as a justifiable limitation on the fundamental right of freedom of speech and of the press before its' repeal by Act 602 of 2001? More specifically, could the Supreme Court uphold the criminal law of libel as justifiable limitation because in terms of article 164 of the Constitution, 1992 they "are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons"? The issue of the constitutionality or otherwise of the offence of intentional libel was considered by the Supreme Court in *Republic v Tommy Thompson Books Ltd (No 2)*.¹²¹

In this case, the accused persons were arraigned before a circuit court on a charge of criminal libel, contrary to section 112(2) of the Criminal Code, 1960 (Act 29), in respect of a newspaper publication made against Nana Konadu Agyemang Rawlings, the wife of the then President of Ghana, Fl Lt JJ Rawlings. At the hearing, the accused persons raised a preliminary objection on the ground that the sections 112(2) and 117(1)(h) of the Criminal

¹²¹ [1996-97] SCGLR 484.

Code, under which they were being tried, were inconsistent with and in contravention of the spirit and letter of the Constitution, particularly articles 162(1) and (4) and 164. These articles respectively state as follows:

“162 (1) Freedom and independence of the media are hereby guaranteed.

(4) Editors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications.”

“164. The provisions of articles 162 and 163 [on duties of state-owned media] of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

The trial court decided to refer the issue of interpretation, by way of case stated, to the Supreme Court. At the hearing of the reference before the Supreme Court, the accused contended, firstly, that both sections 112(2) and 117(1)(h) of the Criminal Code, 1960 (Act29), constituted an unreasonable limitation on freedom of the press and independence of the media guaranteed by article 162(1) and that they were not laws reasonably required in terms of article 164 of the Constitution. It should be noted, in parenthesis, that section 112(2) created the offence of criminal libel while section 117(1)(h) created the defence of absolute privilege under which an accused in his defence on a charge of criminal libel, could prove that the publication of a defamatory matter was not only true but that it was for the public benefit that it should be published. Second, the accused argued that the effect of section 112(2) was to penalize journalists in direct contravention of article 162(4). Third, the accused contended that the provision in section 117(1)(h) was unreasonable and that it was enough for the accused to establish only the truth of the publication and therefore the requirement of proving public interest was unnecessary and burdensome.

The Supreme Court unanimously dismissed the preliminary objections and ordered that the trial of the accused, which had been suspended pending the result of a reference from the circuit court to the Supreme Court, should proceed. The court unanimously held that although the offence of criminal libel was a limitation on freedom of the press and independence of the media, it was a law reasonably required in terms of article 164; that sections 112(2) and 117(1)(h) of the Code were constitutional and did not contravene the spirit and letter of the Constitution, particularly articles 162(1) and (4) because section 112(2) had the same objective of article 164, namely, *to protect the reputation of other persons from the publication of defamatory matters*. In an apparent bid to explain and develop the law on limitation on rights and freedoms in terms of article 164 vis-à-vis the criminal libel, Acquah JSC adopted a two-fold test as follows:¹²²

“From the language of article 164 and similar provisions like article 21(4)(c), the law in question must be ‘*reasonably necessary or required*’ in the public interest, national security, etc. This really implies that for any law to qualify as being reasonably necessary or required, the objective of that law must be of such *sufficient importance* as to override a constitutionally protected right or freedom. In other words, the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial. After this, it must be shown *that the law itself is a fairly proper means of achieving this important objective*. This will involve an examination of the provisions of the law to determine, inter alia, whether the provisions infringe any fundamental principle of law like natural justice, and whether they unduly impair the constitutional right. The nature

¹²² Ibid at 500-501(judge’s emphasis).

of the examination in this second stage will depend on the nature of the law and the issues at stake. On this two fold test, I will now proceed to examine whether the law of criminal libel falls within the limitations in article 164.”

On the question as to the objective of the law of criminal libel, Acquah JSC also said:¹²³

“The 1992 Constitution does not entitle anyone to unlawfully publish, either negligently or intentionally, a defamatory matter about any individual. And this is what the law of criminal libel in Act 29 seeks to prohibit.”

The view was also expressed that the object of section 117(!)(h) of the Code was to give meaning to the protection of one’s right to privacy, being also a fundamental human right guaranteed by article 18(2) of the Constitution. Supporting the decision of the court regarding the constitutionality of sections 112(2) and 117(1)(h), Sophia Akuffo JSC said:¹²⁴

“I fail to see any justification in holding that sections 112(2) and 117(1)(h) are unconstitutional. They may restrict the freedom with which the media may intentionally publish defamatory matter but they do not take away from the media their right to publish. In Ghana, media practitioners may publish whatsoever they please. However, they may not be irresponsible in their publications and must have due regard for the reputation and legitimate interests of others.”

The Supreme Court also dealt with the question as to the effect of article 162(4) in relation to the criminal law of libel. The court held that article 162(4) of the Constitution was not

¹²³ Ibid at 504.

¹²⁴ Ibid at 512.

intended and could not have been intended to confer on editors and publishers, immunity from the judicial process. Editors and publishers were not exempted, under article 162(4) from civil and criminal proceedings at the courts in respect of the contents of their publications. The court concluded that criminal libel as defined in Act 29 did not contravene article 162(4) of the Constitution, 1992.

It should be pointed out that the provision in section 117(1)(h) of the Ghana Criminal Code, requiring the accused to prove in his defence *that the publication of the defamatory matter was true* is also to be found in the Criminal Code of Canada, where the issue was considered in the case of *Andrews v R (Attorney-General of Canada)*.¹²⁵ The two appellants were the leader and secretary respectively of a white nationalist political organization in Canada called the Nationalist Party of Canada. The organization was the publisher of a bi-monthly *Nationalist Reporter*. The objective of the publication was to promote the theory of white supremacy.

The homes of the appellants were searched by the police as authorized by a search warrant. Some documents, bearing racist slogans were seized by the police during the search. The appellants were subsequently charged under section 319(2) of the Criminal Code, with the offence of unlawfully communicating statements, other than in private conversation, which willfully promoted hatred against an identifiable group. The appellants were convicted. Their appeal against conviction was dismissed by the Court of Appeal. They brought the instant appeal to the Canadian Supreme Court on the ground that section 319(2) of the Criminal Code had infringed section 2(b) of the Canadian Charter of Rights and Freedoms, which guaranteed freedom of expression. The appellants also contended that section 319(3)(a), under which the onus lay on the defendant to show by way of defence that the statements

¹²⁵ [1991] LRC (Const) 431.

communicated were true, also contravened the presumption of innocence entrenched in section 11(d) of the Charter.

The Supreme Court of Canada dismissed the appeal and upheld the conviction of the appellants under section 319(2) of the Criminal Code. The court held that although section 319(2) of the Code infringed the freedom of expression guaranteed by section 2(b)¹²⁶ and that section 319(3)(a) (under which the onus lay on the defendant to show by way of a defence that the statements communicated were true) infringed the presumption of innocence entrenched in section 11(d) of the Charter, both sections 319(2) and 319 (3)(a) could be upheld under section 1 of the Charter as “reasonable limits prescribed by law and demonstrably justified in a free and democratic society.”¹²⁷

The law of sedition as limitation of freedom of speech and expression before repeal by Act 602 of 2001

What was the attitude of the Supreme Court to the law of sedition as a limitation to the enjoyment of freedom of speech and expression before its repeal by Act 602? The law of sedition was laid down in section 185 of the Criminal Code, 1960 (Act 29) as follows:

“185.(1) Whoever communicates to any other person, whether by word of mouth or in writing or by any other means, any false statement or report

¹²⁶ The Canadian Charter of Rights, s 2(b) provided that: “Everyone has the following freedoms ... (b) the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

¹²⁷ The Canadian Charter of Rights and Freedoms provides by section 1 that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified.”

which is likely to injure the credit or reputation of Ghana or the Government and which he knows or has reason to believe is false, shall be guilty of second degree felony.

(2) This section does not apply to any statement which is absolutely privileged under section 117.

(3) It is no defence to a charge under this section that the person charged did not know or did not have reason to believe that the statement or report was false unless he proves that, before he communicated the statement or report, he took reasonable steps to verify the accuracy of the statement or report.

(4) A citizen of Ghana may be tried and punished for an offence under this section whether committed in or outside Ghana.”¹²⁸

In the case of *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson*,¹²⁹ the four accused persons published in two bi-weekly newspapers an allegation that the Government of Ghana had been involved in the criminal offence of drug peddling. The allegation was viewed by the government as false. The accused were therefore arraigned before the circuit court and charged with the offence of communicating false reports which were likely to injure the reputation of the government, contrary to section 185 of the Criminal Code, 1960.

¹²⁸ The criminal law of sedition, as was provided in section 185 of the Criminal Code, exists in varying forms in the Criminal Code of some other jurisdictions: such as sections 181 and 319(2) of the Canadian Criminal Code; section 64 of the Criminal Code of St Vincent and the Grenadines; section 8A(1) of the Printing Press and Publication Act 1984 of Malaysia; and section 51(1) of the Criminal Code, Cap 30, Laws of Eastern Nigeria. A comparison of the wording in section 185 of the Criminal Code with the provisions in other Codes such as the Canadian Code, shows quite clearly that whereas the Ghanaian Code extended the publication to cover private communications even between a man and wife, the Canadian Code expressly excludes private conversations or communications.

¹²⁹ [1996-97] SCGLR 804.

The accused raised a preliminary objection founded on want of jurisdiction to try them on the ground, *inter alia*, that section 185 was inconsistent with and contravened the spirit of the Constitution, 1992 particularly articles 21(1)(a) and 162(1) and (2) thereof. The trial court, under a reference made under article 130(2) of the Constitution, referred the issue of the alleged want of jurisdiction to the Supreme Court.

The court held, on the issue of constitutionality or otherwise of section 185 (per Kpegah, Adjabeng and Amuah JJSC with Sophia Akuffo JSC concurring in part and Edward Wiredu JSC dissenting) that section 185, which sought to punish false statements or reports communicated to another person, which were likely to injure the credit or reputation of Ghana or the government, and which the maker knew or had reason to believe that it was false, was not inconsistent with articles 21(1)(a) and 162(1) and (2) and the spirit of the Constitution; and that it was a law which was justifiable as reasonably required in terms of article 12(2) and 164 of the Constitution.

In support of the decision, both Kpegah and Adjabeng JJSC relied on the provision in article 41(a) of the Constitution, which imposes a duty on all citizens of Ghana, to “promote the prestige and good name of Ghana.” In the face of such a provision, Kpegah JSC expressed the view that a claim could not be made by the accused that section 185 of the Criminal Code, which sought to achieve the same objective as article 41(a), could be against the spirit of the Constitution. In the view of Adjabeng JSC, first, the making or publication of false statements or reports about Ghana or the government, which were likely to injure the credit of Ghana and the government, would not promote the prestige and good name of the country; and second, the publication of false reports about Ghana or the government would harm the public interest defined in article 295(1) of the Constitution as including “any right or advantage which enures or is intended to enure to the benefit generally of the people of Ghana.”

In support of the decision, the majority of the Supreme Court (per Kpegah, Adjabeng and Amuah JJSC) drew a distinction between a “mere untruth” which was not punishable and a “criminal untruth” which was punishable. It was held that the word “false” as used in section 85 was applicable to the latter and that criminal untruth was a deliberate or malicious falsehood. In the words of Amuah JSC:¹³⁰

“Section 185 is not meant for those who communicate false news but those who do so with knowledge that it is false. For this reason, I find that section 185 falls within each of the permissible restrictions specified in article 164 and that it is reasonably required for the interests stated therein.”

In dissenting from the majority decision, Edward Wiredu JSC (as he then was), said:¹³¹

“Section 185 in its present form, without a second look by an appropriate authority, will be very dangerous in a multi-party democracy in the hands of a tyrannical government, which is likely to use it to suppress freedom of speech and expression and stifle criticism...Section 185 cannot co-exist with the provisions of chapter 12 of the Constitution... It will curtail all forms of freedom of speech as entrenched in the Constitution. It invades the right of privacy as enshrined in article 18(2) of the Constitution. The word ‘communicate’ as used in section 185 is too wide. Its language negates its constitutionality. To communicate under section 185 may even be referable to private letters between parents and their children, husbands and wives ...; the communication may even be oral and private. This state of the law ought not to be constitutionally accepted.”

¹³⁰ Ibid at 875-876.

¹³¹ Ibid at 821 and 823-824.

In dissenting in part from the majority decision, Sophia Akuffo JSC distinguished the wording in section 185 from the wording in similar provisions in the Criminal Code of other Commonwealth countries, and said:¹³²

“Unlike the terms in section 181 of the Canadian Criminal Code, which came into question in the *Zundel case* (1992) 10 CRR193¹³³...; section 64 of the Criminal Code of St Vincent and the Grenadines, which came into question in the case of *Richards v Attorney-General of St Vincent and the Grenadines* (1991) LRC (Const) 311...;¹³⁴ or section 8A of the Printing Presses and Publications Act of Malaysia, which came into question in the case of *Public Prosecutor v Pung Chen Choon* (1994) 2 LRC 237□,¹³⁵ section 185 of our Criminal Code, 1960 makes criminal all deliberately

¹³² Ibid at 888.

¹³³ The said section 181 of the Canadian Code provides that: “Everyone who publishes a statement, tale or news that he knows is false that causes or is likely to cause injury” commits an offence. Whilst section 319(2) also provides: “Everyone who, by communicating statement, other than in private conversation, which willfully promotes hatred against any identifiable group is guilty of an indictable offence.”

¹³⁴ Section 64 of the Code of St Vincent and Grenadines provides that “Any person who publishes any false statement, rumour or report which is likely to cause fear or alarm or to disturb the public peace is guilty of an offence and liable to imprisonment for one year.”

¹³⁵ The said section 8A(1) of the Malaysian Act provides: “Where in any publication there is maliciously published any false news, the printer, editor and writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgits or both.”

false statements and reports, which are likely to injure the credit and reputation of Ghana and the government, whether the same be communicated in private between two individuals or broadcast by the mass media.,,

Retention or otherwise of law of sedition as a limitation on freedom of speech and expression

In the light of the Supreme Court majority decision in *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson*¹³⁶ as analysed above, and the call for statutory reform of section 185 of the Criminal Code, 1960 made by Edward Wiredu and Sophia Akuffo JJSC in that case, the question may be asked as to whether the criminal law of sedition as laid in the now repealed section 85 of the Criminal Code, ought to have been retained.

In addressing this question, it is profitable to refer to the decision and some pronouncements of the Court of Appeal of Malawi in the case of *Chihana v Republic of Malawi*.¹³⁷ In this case, the appellant was convicted and sentenced by the trial court, to a term of imprisonment for the offence of importing seditious publications and possession of the said publications contrary to section 51(1)(d) and (2) respectively of the Penal Code of Malawi, Cap 23. The publications included statement alleging, inter alia, that the President of Malawi and his government were the worst dictatorship in the whole of Africa. The appellant appealed against the conviction.

¹³⁶ [1996-97] SCGLR 804.

¹³⁷ [1996] 1 LRC (Const) 1.

In dismissing the appeal, the Court of Appeal affirmed the decision of the trial judge that the statements in the publications were, indeed, seditious because they were intended to arouse feelings of hatred, contempt or disaffection against the President and his government. The Court of Appeal also held that section 2(1)(iii) of the Constitution of Malawi recognised the sanctity of personal liberties, enshrined in the United Nations Universal Declaration of Human Rights 1948 and that the freedoms guaranteed in the Declaration, including freedom of speech and expression were enforceable in Malawi. However, the right to freedom of speech or expression, was not absolute; that is, it was under the limitation clause in section 2(2) of the Malawian Constitution (the same more or less as article 164 of the Ghana Constitution) subject to reasonable restrictions and limitations. The said section 2(2) of the Malawian Constitution provided:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy.”

In the light of the limitation clause in section 2(2) of the Constitution, the Court of Appeal held that the law of sedition stated in section 51 of the Penal Code of Malawi, was not necessarily inconsistent with the Constitution which had guaranteed the rights of freedom of expression. The Court of Appeal in the *Chihana* case, also referred to the decision of the Supreme Court of India in *Kedar Nath Singh*¹³⁸ where it was held that the law of sedition was constitutionally valid in spite of the restrictions it imposed on the fundamental freedoms of speech and expression. In so holding, the Court of Appeal of Malawi said:¹³⁹

¹³⁸ (1962) 2 SCR 769.

¹³⁹ [1996] 1 LRC (Const) 1 at 6.

“We are satisfied that the restrictions and limitations which the Criminal Law of Malawi imposes on the right of freedom of speech are no more a flagrant violation of the purposes and principles of the UN Universal Declaration of Human Rights any more than the principles of English common law and the European Human Rights Convention are.”

In the light of the above decision and pronouncements of the Court of Appeal of Malawi and the decision of the Indian Supreme Court cited by it, and the decision of the Ghana Supreme Court in *Quarcoo & Coomson* (previously examined in detail), should the law of sedition, as previously specified in section 185 of the Criminal Code, have been retained, subject to statutory modifications, instead of total abolition by Act 602?

It seems that what section 185 clearly criminalizes is false publication “which is likely to injure the credit or reputation of Ghana or the government.” The question, then, is whether or not, in a free democratic society such as we have in Ghana, section 185 of the Criminal Code, 1960 should have been retained as a limitation on freedom of speech and expression, which includes freedom of the press and other media. That question, in my submission, raises a more fundamental issue, namely, whether in a free democratic society, editors and publishers of newspapers should, in the exercise of their freedom of expression, be allowed to publish deliberate and conscious lies damaging or injurious to the credit and reputation of Ghana or the government.

It should be pointed out, that in a publication in the national newspaper,¹⁴⁰ there appeared a report entitled: “Uphold Ghana’s image against Foreign Saboteurs.” In that publication, the

¹⁴⁰ See *The Daily Graphic*, 3 February 1998, front page.

Chairman of Unilever Ghana Ltd,¹⁴¹ in a press interview, cautioned Ghanaians against allowing themselves being used by foreigners to damage the image and reputation of Ghana especially at the time when the country needed and still needs foreign investment to develop the economy.¹⁴²

The question of retention or otherwise of the now repealed section 185 of the Criminal Code is so important and crucial, that we should examine, further, how the Supreme Court resolved that question in *Attorney-General v Tommy Thompson Books Ltd, Quarcoo and Coomson* (earlier examined in detail.) Counsel for the accused in that case, argued against the retention of section 185 because “it does not meet the test of being reasonably justifiable in terms of the spirit of the Constitution and the needs for democratic society.” That argument was rejected by the majority of the court (per Kpegah, Adjabeng and Amuah JJSC). Amuah JSC relied on the answer given by Singh J in the case of *Richards v Attorney-General of St Vincent & the Grenadines*¹⁴³, where the court was faced with a similar argument as to whether section 64 of the Criminal Code of St Vincent & the Grenadines¹⁴⁴, was inconsistent with article 10 of the St Vincent Constitution under which a person was not to be hindered in the enjoyment of his freedom of expression. In that case Singh J said:¹⁴⁵

¹⁴¹ Mr Ishmael Yamson; he was then also the Chairman of the Executive Council of the University of Ghana, Legon.

¹⁴² In the said publication in the *Daily Graphic* of 3 February 1998, he referred to the publication in the foreign press about Ghana as being the sixth most corrupt country among 40 nations – a report purported to have emanated from a UK based organisation. He dismissed that report as baseless and quoted another report by another credible international organisation: *Transparency International*, which in its report on the 1997 Corruption Index dated 13 February 1998, did not even mention Ghana as a corrupt country.

¹⁴³ [1991] 1 LRC (Const) 311.

¹⁴⁴ Quoted in footnote 134 *ante*.

¹⁴⁵ [1991] 1 LRC (Const) 311 at 326-327.

“I do not see how, in a democratic society, a court can properly and justifiably strike down a law which seeks to protect and preserve a citizen’s fundamental rights guaranteed by the Constitution from deliberate abuse by another citizen of his fundamental right. I find section 64 to be reasonably justifiable in a democratic society.”

Adjabeng JSC in his opinion in the *Quarcoo & Coomson Case* in support of the majority decision on the constitutionality of section 185, also cited the same decision in *Richards v Attorney-General of St Vincent & the Grenadines* where Singh J said:¹⁴⁶

“The tendency in a democratic society to malign and/or recklessly to utter deliberate falsehood resulting in public or personal fear and/or alarm cannot and will not be sanctioned by any court.”

It should be stressed again that what section 185 sought to prohibit was deliberate and conscious lies. Under the repealed section 185(3), a person committed no offence if, in fact, he took reasonable measures to verify the accuracy of the statement or report. Where a person publishes lies, he stands the risk of being prosecuted for sedition, his right of freedom of expression notwithstanding. This was emphasized in paragraph 191 of the Report of the Committee of Experts earlier quoted, where they said that: “Newspapers which publish lies, knowing them to be lies must run the risk of being suppressed by the courts.”

One cannot agree more with the observation made by Adjabeng JSC in his opinion in the *Tommy Thompson Books Ltd, Quarcoo & Coomson Case* that:¹⁴⁷

¹⁴⁶ Ibid at 327.

¹⁴⁷ [1996-97] SCGLR 804 at 870.

“Criticism, in my view, means bringing out the things which somebody or the government is doing, in fact, and which the critic thinks are bad and so should be corrected. Criticism does not mean telling lies about others or about the government. If democracy or freedom of the press means telling lies about others, then I do not think we need this type of democracy or freedom of expression in this country. I am relieved that our Constitution does not allow that type of democracy or freedom of speech in this country.”

One may also agree with the opinion of Kpegah JSC in the same case on the issue of telling lies that:¹⁴⁸

“...the ethics of his profession enjoins the journalist to check and cross-check his facts before he comes out ... Because deliberate falsehood can set fire to the minds of a gullible, ignorant and unsuspecting public just as eloquence can set fire to reason. Terrorism by the press is as inimical to democracy as a dictatorial tendency is. Democracy needs protection from the irresponsible pressman.”

It should be pointed out, however, that the provision in section 185 of the Criminal Code, 1960, which prohibited communication of a false statement or report likely to injure the credit or reputation of Ghana or the government was similar to section 181 of the Criminal Code of Canada, which created the offence of willfully and knowingly publishing a false statement that causes or is likely to cause injury or mischief to the public interest. The actual wording of section 181 and that of section 319 (2) of the Canadian Criminal Code was as follows:

¹⁴⁸ Ibid at 863 (the emphasis is mine).

“ 181 Everyone who publishes a statement, tale or news that he knows is false that causes or is likely to cause injury commits an offence.”

Whilst section 319(2) of the Codes provides that:

“Everyone who, by communicating statement, other than in private conversation, which willfully promotes hatred against any identifiable group is guilty of an indictable offence.”

Whereas in the *Tommy Thompson Books Ltd, Quarcoo & Coomson* case, the Ghana Supreme Court upheld the provision in section 185 as a justifiable law which was reasonably required in terms of article 164, the Supreme Court of Canada in the case of *R v Zundel*¹⁴⁹ held otherwise.

In the *Zundel* case, the accused published a pamphlet suggesting that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. They were convicted of the offence of willfully and knowingly publishing a false statement contrary to section 181 of the Criminal Code. They appealed to the Ontario Court of Appeal. The appeal was, however, dismissed. They appealed further to the Supreme Court. The issue raised for determination was whether section 181 of the Code, which made it an offence for a person to willfully publish a statement, tale or news that he knew was false and that caused or was likely to cause injury or mischief to the public interest, violated section 2b of the Canadian Charter of Rights and Freedoms, and, if so, whether that infringement was justified under section 1 of the Charter.

¹⁴⁹ 10 CRR 2d 198.

The Supreme Court of Canada, by a majority decision of four to three,¹⁵⁰ held that section 181 of the Code violated freedom of expression contrary to section 2b of the Canadian Charter of Rights and Freedoms and was not justified under section 1 of the Charter which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The majority held further that the falsity of the publication did not take it out of the purview of section 2b of the Charter. They also rejected as unacceptable, the argument that the publication by the accused was not protected because, as a deliberate lie, it served none of the values underlying section 2b of the Charter. In the words of the McLachlin J:¹⁵¹

“Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s 2(b) ... I cannot accede to the argument that those who deliberately publish falsehoods are *for that reason alone* precluded from claiming the benefit of the constitutional guarantees of free speech.”

However, the minority held that¹⁵² the infringement of freedom of expression by section 181 was justified under section 1 of the Charter. The dissenting judges held that the objective of section 181 was to prevent the publication of false statements which caused or were likely to

¹⁵⁰ Per McLachlin J (La Forest, L’Heureux-Dube and Sopinka JJ concurring).

¹⁵¹ Ibid at 209 (the emphasis is mine).

¹⁵² Per Cory and Iacobucci JJ (Gonthier J concurring).

cause injury; and that specific objective promoted the public interest in furthering racial, religious and social tolerance; that the prohibition of the willful publication of deliberate lies was proportional to the importance of protecting the public interest in preventing the harm caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy. The minority concluded that section 181 was not overly broad. In effect, the decision of the minority of the Supreme Court of Canada in the *Zundel* case, that the infringement of freedom of speech by section 181 was justified under section 1 of the Charter of Rights, is in accord with the subsequent decision of the majority of the Supreme Court of Ghana in the *Quarcoo and Coomson* case to the effect that the repealed section 185 of the Criminal Code was a justifiable law under articles 12(2) and 164 of the Constitution, 1992.

In contrast, however, the majority of the Supreme Court of Canada in *R v Zundel* took the position that, contrary to the position taken by the Ghana Supreme Court in the *Tommy Thompson Books Ltd Case*, deliberate falsehood alone could not be a basis for denying the protection under section 1 of the Canadian Charter of Rights which, unlike the Ghana provision in article 164, has been couched in general terms without specific indication as to how to determine whether the law “falls within reasonable limits.”

It may be conceded, as rightly pointed out by Edward Wiredu JSC in his dissenting opinion in the *Tommy Thompson Books Ltd, Quarcoo & Coomson* case, that democracy could thrive in a society where the electorate was well-informed; and that the electorate could only be informed by a strong and vibrant press. For that reason, one may agree with Kumado that:¹⁵³

¹⁵³ See Kumado, C E K “The Right to Information (Part 1)” in *Legislative Alert*, Vol 4 No 4, October 1997 Parts 1 and 2, Institute of Economic Affairs, Ghana.

“The right to information is an integral part of freedom of expression’ and that freedom of expression as a means for the exercise of popular sovereignty is an empty vessel without access to information.”

It could be argued that since the law of sedition hinders the right to information, it should not be retained as a justifiable limitation in a free and democratic society. Thus in the Nigerian case of *Nwankwo v The State*,¹⁵⁴ the appellant was arraigned before the High Court on two charges of publishing and distributing seditious material contrary to section 51(1) (c) of the Nigerian Criminal Code which stated:

“51 (1) Any person who-

(c) prints, publishes, sells, offers for sale, distributes or produces any seditious publication shall be guilty of an offence...”

The appellant was convicted by the trial High Court Judge. The judge found that the appellant had written and published a book containing an accumulation of epithets accusing the Governor of the Anambra State of Nigeria of corruption, deception and thuggery, which was calculated to bringing the Government of Anambra to contempt and ridicule. The appellant appealed to the Court of Appeal (Enugu Division). The appeal against conviction was allowed. The Court of Appeal held that the law of sedition as laid in section 51(1) (c) of the Criminal Code was a derogation from the freedom of speech guaranteed by the Constitution; that Nigeria was no longer the illiterate or mob society the colonial masters had in mind when the laws of sedition was promulgated. Furthermore, it was held that the law of sedition would be a deadly weapon at the will of a corrupt government or a tyrant; that freedom of speech must be held to include freedom to criticize; that those in public office,

¹⁵⁴ (1983) NLPC 198.

should not be intolerant of criticism; and that where a writer has exceeded the bounds of criticism, there should be a resort to the civil law of libel; and that criticism was indispensable in a free society. In the words Olatawura JCA:¹⁵⁵

“The law of sedition which has derogated from the freedom of speech guaranteed under this Constitution is inconsistent with the 1979 Constitution ...To retain section 51 (1) of the Criminal Code, in its present form, that is, even if it is not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon and to be used at will by a corrupt government or a tyrant. I hereby express my doubt about its retention in our Criminal Code more so, and as ... there is adequate provision in the same Criminal Code for criminal libel. Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose.”

The above discussion on the pros and cons of the debate on the retention or otherwise of the law of sedition as a justifiable limitation on the enjoyment of freedom of speech and expression, including freedom of the press and other media, leads us to the question whether or not there was justification for the enactment of the Criminal Code (Repeal of Criminal Libel and Seditious Laws (Amendment) Act, 2001. The question comes to the fore and calls for objective and dispassionate debate given the fact that there is presently on the ground, flagrant abuse of freedom of speech and expression following the repeal of criminal libel and seditious laws.

¹⁵⁵ Ibid at C227.

Abuse of freedom of speech after repeal of criminal libel and seditious laws by Act 602 of 2001

The question which now needs to be addressed is: was the repeal of the Criminal libel and seditious laws by the Criminal Code (Repeal of Criminal Libel and Seditious laws) (Amendment) Act, 2001 (Act 602), a good or bad omen for the political, economic, social, peaceful, democratic and constitutional development of Ghana? Will the repeal contribute to the entrenchment of democracy in Ghana?

In a very recent publication,¹⁵⁶ President J A Kufuor was quoted to have said in an interview that:

“ My government decriminalized speech by repealing the criminal libel law under which countless journalists were incarcerated, especially in the last two decades.”

Significantly, the statement omitted to say that freedom of speech and expression, is not, with respect, an open-ended fundamental right but is subject to laws imposing restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services and for the purpose of protecting the reputations, rights and freedoms of other persons within the meaning of articles 21(4)(c) and 164 of the Constitution, 1992. The statement also omitted to say that the effect of the repeal was to set to nought the decisions of the Supreme Court in *Republic v Tommy Thompson Books Ltd (No 2)*¹⁵⁷ and in *Republic v*

¹⁵⁶ See *West Africa*, 3-9 March 2003 at page 8 (being a special report on Ghana at 46, ie on attainment of political independence).

¹⁵⁷ [1996-97] SCGLR 484.

*Tommy Thompson Books Ltd, Quarcoo & Coomson*¹⁵⁸ as to the true effect of articles 21(4)(c) and 164 in relation to laws which derogate from freedom of speech and expression.

Commenting on the repeal of the criminal libel and seditious laws and its effect on the government of the country under the Kufuor Administration, the Editorial of *West Africa*, stated:¹⁵⁹

“With the new lease of life, however, there have been abuses too. One of the problems can be seen with the repeal of the criminal law libel, which has given some unscrupulous journalists the licence to go too far sometimes in their reports and stories. In truth, the NPP Government should not have repealed the law but should have allowed it to stay while not applying it in the harsh manner of the previous regime [NDC Government under President Rawlings]. But in life you’ve got to win some and lose some, and in this case the NPP won political points but lost some control over media excesses.”

It is very interesting to note, however, that in the same *West Africa* publication,¹⁶⁰ a contributor to a nationwide survey organized by the weekly journal on Ghanaians’ verdict on the NPP Government (after being in power for fifteen months) ironically and with evident pride and satisfaction, wrote:

¹⁵⁸ [1996-97] SCGLR 804.

¹⁵⁹ 1-7 July 2002 Issue (the emphasis is mine).

¹⁶⁰ Ibid at page 15 per a contributor, one Nana Kusi-Appiah, Director of Marketing, Ghana Supply Commission, Accra.

“ ... with the freedom of the press that the country is enjoying now, with the repeal of the criminal libel law, for example, our politicians and public figures to-day are very careful in the way they handle their positions. This is because with the watchdog position of the media, you cannot afford to make a major mistake. This is what should make us proud today in Ghana...”

The high price which must be paid for unbridled enjoyment of freedom of speech and expression, for which all Ghanaians can be “proud” - quoting the word of the commentator- was subsequently highlighted by the same journal¹⁶¹ in an editorial commentary captioned. “The media and Reconciliation.” It was there stated as follows:

“There are several misfit journalists in the country whose actions must be severely brought under control, and who must be made to account for their misdemeanours sometimes. Some sadly call it freedom of speech and expression. But many of the so- called journalists would not survive a day in a more civilized and democratic country where freedom of speech is well defined and practised. Headline banners in some of the newspapers appear more like slogans for war, with most journalists seeking self- importance rather than reporting in an honest and unadulterated manner... The media have made everybody uncomfortable in the country. Members of the government are as aggrieved as the opposition.”

¹⁶¹ See *West Africa*, 9-15 September 2002 Issue at page 4.

The seriousness of the difficult problem raised by the gross abuse of press freedom as a direct result of the repeal of criminal libel and seditious laws, was captured in an Internet publication of Monday 3 March 2003, headed: "Military warns Journalists."¹⁶² The publication stated that Military Experts and Security Intelligence had warned Ghanaian journalists against what they perceived as irresponsible professional practices that tended to undermine the security and unity of the nation. The experts also observed that the repeal of the criminal libel laws was no licence for unguided and irresponsible reportage and commentary. They were also quoted as having observed that some recent journalistic practices were *potential ingredient for social disorder and destabilization*.¹⁶³ The Military Experts were also quoted to have advised journalists and the general public to seek security advice on reportage of intelligence information before putting it in the public arena. With specific reference to the reportage of the proceedings of the National Reconciliation Commission,¹⁶⁴ the experts expressed concern about some reportage that seemed to portray an orchestrated attempt to incite the public against the military and other security agencies. The Military Experts and Security Intelligence were further quoted as having stated in an interview held in Accra (probably a day or two before the internet publication of 3 March 2003) that:

¹⁶² See ([http:// www.ghanaweb.com/Ghana](http://www.ghanaweb.com/GhanaPage/NewsArchive) Page/News Archive-last visited 3 March 2003).

¹⁶³ The emphasis is mine.

¹⁶⁴ Established under The National Reconciliation Commission Act, 2002 (Act 611) and chaired by Hon Mr Justice K E Amua-Sekyi, a retired Justice of the Supreme Court. The object of the commission, under section 3(1) of the Act is: to seek and promote national reconciliation among the people of Ghana (a) by establishing accurate, complete and historical record of violations and abuse of human rights inflicted on persons by public institutions and holders of public office or persons purporting to have acted on behalf of the State during periods of unconstitutional government, namely from (i) 24 February 1966 to 21 August 1969; (ii) 13 January 1972 to 23 September 1979; (iii) 31 December 1981 to 6 January 1993. Under section 3(2) of the Act, the commission may, on an application by any

“Freedom, duties and obligations in journalism are bed fellows laid on the foundation of objectivity, factuality, neutrality and fairness, which must not be sacrificed on the altar of political party interest... Such irresponsible reportage of security information had affected and disrupted intelligent gathering and tracking... This you people must know and recognize your limits, as very soon we would crack down on journalists who interfere with security operations and leak security information to the public.”

It is very interesting to observe that in the same internet publication referred to above, the General Secretary of the Pan African Writers Association,¹⁶⁵ was quoted as having expressed similar sentiments attributed to the Military Experts and Security Intelligence. He was also quoted as having suggested that Ghanaian journalists should be held responsible for any social unrest and disorder in Ghana arising from abuse of freedom of speech and expression including freedom of the press. The general secretary was also quoted as having expressed his sentiments on abuse of press freedom in a keynote address delivered at the First Matriculation Ceremony of the African Institute of Journalism and Communications, Accra. He was also quoted as having hinted in that keynote address, his intentions to propose a private member's bill before Parliament to make provision for a law making journalists liable for any social disorder caused by abuse of freedom of speech and of the press. He was also quoted as citing as an example, the Rwandan genocide in 1994 which, according to Mr Okai, was incited by journalists.

After considering all these well-intentioned views for and against the retention of criminal law of sedition as a justifiable limitation on freedom of the press, it is submitted that section

person, pursue its object as stated in section 3(1) in respect of any other period between 6 March 1957 to 6 January 1993.

¹⁶⁵ Mr Atukwiei Okai, University of Ghana don and a renowned poet with immense international stature.

185 of the Criminal Code should be re-enacted as a justifiable limitation on the freedom of the press in a free democratic society subject to the following legislative reforms.

First, given the wording of the section as repealed, it could be applicable to private communications between spouses or parents and children or simply friends. One may therefore agree with the dissenting opinion of Edward Wiredu JSC (as he then was) in the *Tommy Thompson Books Ltd, Quarcoo & Coomson* that the word “communicate” as used in the section was too wide. One may also agree with the observation made by Sophia Akuffo JSC in the same case that the effect of section 185 was that “a deliberately false communication made by one spouse to the other in the private sanctity of their bedroom runs the risk of falling foul” of section 185; “and that such a sweeping criminalisation of speech” was not “in consonance with the letter of article 21(1)(a) or with the spirit of the Constitution.”

It is therefore suggested that section 185 should be re-enacted to read as follows: “Whoever communicates or publishes a false statement (other than in private conversation) commits an offence.” Similar wordings are to be found in section 319(2) of the Canadian Criminal Code which were upheld in *Andrews v Attorney-General of Canada*.¹⁶⁶ In any case, to the extent that section 185 of the Criminal Code as it stood before its repeal, covered private conversations, it should be deemed to be inconsistent with article 162(1) of the Constitution, which guarantees freedom and independence of the media. It is suggested that the Supreme Court should have so held in the *Tommy Thompson Books Ltd, Quarcoo and Coomson case*.

It is also suggested that section 185, if it were to be re-enacted, must be reformed in the area of punishment on conviction. A law imposing a prison term as an alternative to a fine cannot

¹⁶⁶ [1991] LRC (Const) 431 (earlier cited in our discussion on the law seditious as limitation on freedom of speech and expression before its repeal by Act 602).

be reasonably required in terms of article 164 of the Constitution. It is suggested that imposition of a fine, small or heavy, upon conviction, depending upon the gravity of the offence, would be appropriate.

What about the criminal law of libel? Since the civil law of libel gives redress in the form of damages, punitive or otherwise, for unjustifiable attack on one's reputation, it seems to me that a person who has been defamed whether or not a public officer could be adequately compensated by the civil court by the award of damages. Consequently, it seems to me that the criminal law of libel, which puts a person in jail when he could be made to pay adequate compensation to the aggrieved person, could not be said, after a balancing exercise by the courts, to be reasonably required within the meaning of article 164 of the Constitution. The inescapable conclusion is that the Kufuor Government must be commended for seeing to the repeal of the criminal law of libel by the enactment of Act 602.

However, it seems to me that where a public officer is defamed in the performance of his public duty, it is not right for him to be put to the expense of resorting to civil claims to maintain and safeguard his reputation unless all the legal expenses incurred in prosecuting the civil claim for libel would be borne by the government or the State institution where he works. In the absence of such remedy, the State should intervene by criminal prosecution with a view to seeking the imposition of a fine (in addition to award of compensation for the defamed public officer), instead of a jail term, as a punishment reasonably required within the meaning of article 164. To impose a jail term in respect of libel against a public officer or even a private person, as the law stood before the enactment of Act 602, would amount to using a sledge hammer to crack a nut, contrary to the proportionality test as suggested by the

Canadian Supreme Court in the case of *Canadian Broadcasting Corporation v Attorney-General of New Brunswick*.¹⁶⁷

The true ambit of article 164 of the Constitution on limitation of rights and freedoms

Article 164 of the Constitution, 1992 states:

“164. The provisions of articles 162 and 163 of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

The general effect of article 164 is that the enjoyment of freedom and independence of the media which is guaranteed under article 162(1) is subject to laws reasonably required in terms of article 164. The question which needs to be addressed is: what is the true ambit of article 164?

In answering this question, we must look at the actual wording of article 164 and give effect to its plain meaning and not to be unduly influenced or deflected from doing so by decisions and reasoning of other foreign courts on the question of the effect of the limitation clause in article 164.

For instance, the wording of the limitation clause in section 1 of the Canadian Charter of Rights and Freedoms is different from the Ghana formulation. The said section 1 “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law

¹⁶⁷ [1997] 1 LRC (Const) 521-a decision examined in detail below in discussing the true effect of article 164 of the Constitution, 1992 on justification of laws limiting enjoyment of

as can be demonstrably justified in a free and democratic society.” The question whether a law fell within “reasonable limits” was considered by the Supreme Court of Canada in the case of *R v Oakes*.¹⁶⁸ The accused was charged with the offence of possession of narcotics for the offence of trafficking contrary to section 4(3) of the Narcotic Control Act, RSC 1970. Section 8 of the Act required that, if the accused was found in possession of narcotics, the onus lay on him to prove that he was not in possession for the purpose of trafficking. The trial judge dismissed the charge on the ground that section 8 of the Act violated the guarantee to the presumption of innocence in section 11(d) of the Canadian Charter of Rights. The Crown appealed from that decision to the Ontario Court of Appeal but the appeal was dismissed. A further appeal was made to the Supreme Court.

The Supreme Court of Canada had to decide whether section 8 of the Narcotic Control Act, RSC 1970, which violated the guarantee to the presumption of innocence granted under section 11(d) of the Canadian Charter of Rights and Freedoms, could be a justifiable limitation, ie as a law within “reasonable limits” in terms of section 1 of the Charter of Rights and Freedoms. The court held, dismissing the appeal, that the burden of proving that an alleged limit, ie that a law was reasonable and demonstrably justified rested on the person seeking to uphold it. The court held that two central criteria must be satisfied to determine what constitutes “reasonable limits.” First, the objective of the limitation must be of sufficient importance to justify overriding the constitutional guarantee. Second, the means chosen must be reasonable and demonstrably justified, ie the proportionality test. Applying this test, the court held that section 8 of the Act could not be upheld as falling within the concept of “reasonable limit” under section 1 of the Charter.

rights and freedoms.

¹⁶⁸ [1987] LRC (Const) 477.

The decision of the Supreme Court of Canada in *R v Oakes* was applied by the Supreme Court of South Africa (Transvaal Provincial Division) in the case of *Government of the Republic of South Africa v The Sunday Times Newspaper*.¹⁶⁹ In June 1993 the then State President appointed a commission of inquiry, under the Commissions Act 1947, to investigate into and report on the circumstances surrounding a state tender for the supply of certain soya based products. The President also made some regulations under the Act in relation to the inquiry. Regulation 13 prohibited any person publishing the report of the commission of inquiry or any part of it “unless and until the State President had released the report for publication or until [it had] been laid upon the table in Parliament.”

The commission completed its work in August 1994. But as of October 1994, the President had still not released the commission’s report. However, information relating to the report got into the possession of the Sunday Times Newspaper. The newspaper decided to publish an article on the report. The government filed an application in court to prevent the newspaper from publishing the article on the ground that the State would suffer irreparable harm if the publication was made. Meanwhile the Constitution of South Africa, 1993 had come into force on 27 April 1994. Section 15 of the Constitution guaranteed the right to freedom of speech including freedom of the press subject to any limitations under section 33(1), which were “reasonable and justifiable in an open and democratic society.”

The question which the court had to decide was whether regulation 13 was contrary to the freedom of speech and expression and if so, whether it constituted reasonable and justifiable limit under section 33(1) of the Constitution, 1993. The Supreme Court (Joffe J) held, applying *R v Oakes* (supra), that the onus of proving that a limit on a right or freedom of speech guaranteed by the Constitution was reasonable and justified under section 33(1), was on the person seeking to uphold the limitation. The court also applied the *Oakes* criteria in

¹⁶⁹ [1995] LRC (Const) 168; 1995 (2) SA 221 (T).

determining whether regulation 13 constituted a reasonable and justifiable limit on freedom of speech and expression guaranteed under section 15 of the Constitution: (i) it had to be shown that the law pursued a sufficiently important objective; (ii) was rationally connected to that objective; and (iii) impaired the right no more than was necessary to accomplish such objective and did not have a disproportionately severe effect on the person to whom it applied. The court concluded that regulation 13 offended against freedom of speech and expression and also did not constitute reasonable and justifiable limit under section 33 (1) of the Constitution. The application by the government was therefore dismissed.

The *Oakes* test, ie the proportionality test had also been applied (even before its application by the South African Supreme Court in *The Sunday Times* case) by the Canadian Supreme Court itself in the subsequent 1996 decision in *Canadian Broadcasting Corporation v Attorney-General of New Brunswick*.¹⁷⁰ In this case, the court held that section 486 (1) of the Canadian Criminal Code, RSC, 1985 (which excluded the general public and the media from the court room during sentencing proceedings for sexual offences) infringed section 2(b) of the Charter of Rights - protecting freedom of the press. However, the court held that section 486(1) of the Code was reasonable and justified in a free and democratic society within the meaning of section 1 of the Charter. It did so by applying the proportionality test or inquiry which was broken down into three further requirements, namely: (i) the legislative measure had to be rationally connected to the objective; (ii) it had to impair the guaranteed right or freedom as little as possible; and (iii) there had to be proportionality between the deleterious effect of the measures and their salutary effect.

It is submitted that, the proportionality test adopted by the Canadian Supreme Court in the *Oakes* case and further applied in the *New Brunswick* case and also the South African case of *The Sunday Times* could be reasonably applied by the Ghana Supreme Court in deciding

¹⁷⁰ [1997] 1 LRC (Const) 521.

whether or not section 185 of the Criminal Code, 1960 (Act 29) or any other law which negates a fundamental right, could be justified as a law reasonably required under article 164 of the Constitution.

However, a note of caution should be sounded. The Supreme Court in Ghana must guard against a wholesale or blind adoption of the interpretation placed by the Supreme Court of Canada on section 1 of the Canadian Charter of Rights and Freedoms or on any other analogous limitation or by any other court in respect of the provisions of the Constitution, 1992. In effect, foreign decisions might be of assistance only in appropriate situations or circumstances.¹⁷¹ The court is respectfully invited to follow the approach suggested by Apaloo CJ in *Kwakye v Attorney-General*¹⁷² where he said:¹⁷³

“We must have regard to the terms of our particular Constitution whose specific points are largely unique to our national history. In this area ... judicial pronouncements in other jurisdictions on the particular facts of their experience are not likely to be of much assistance; the range of judicial wisdom embodied in them will, of course, influence our judicial reflections. I think originality is required of us in the exercise of our original jurisdiction if we are to attend to the letter and spirit of the Constitution as the basic law of our land. That originality must, ... be judicial and must not

¹⁷¹ See *State v Makwanyane* [1995] 1 LRC (Const) 269.

¹⁷² [1981] GLR 944, SC.

¹⁷³ Ibid at p 958. This dictum was quoted with approval by Acquah JSC in support of a five to two majority decision of the Supreme Court in *Edusei(No 2) v Attorney-General* [1998-99] SCGLR 753 at 779. Acquah JSC had also adopted that approach in *Republic v Tommy Thompson Books Ltd (No 2)* [1996-97] SCGLR 484 at 502 where he said: “Accordingly, notwithstanding the invaluable scholarship in foreign decisions, what is required of us is originality in the interpretation of our Constitution, paying particular attention to its language,

do damage to the plain and obvious meaning of the words used nor is it the province of this court to be astute to find some reason or other for depriving the constitutional provision of an effect clearly intended.”

It seems to me (bearing in mind the Apaloo approach) that having regard to the wording of article 164, a law which can be justified as reasonably required and thus capable of limiting freedom of expression and independence of the media guaranteed by articles 21(1)(a) and 162 must be: (i) a law which is in the public interest – judging from the use of the words “national security, public order and public morality” and (ii) it must be a law which seeks to protect the reputation of the individual arising from the expression “for the purpose of protecting the reputations, rights and freedoms of other persons.”¹⁷⁴ This interpretation is reinforced by article 12(2), which provides that all the Fundamental Human Rights and Freedoms, including article 21(1)(a), are “subject to respect for the rights and freedom of others and for the public interest.” The use of the words “rights and freedoms of others” as distinct from the words ‘public interest’ in article 12(2) and the words ‘protecting the reputations, rights and freedoms of other persons’ in article 164, clearly show the intention to protect not only the public interest but also the reputation, rights and freedoms of the individual.

It also seems to me that in determining whether a law limiting rights and freedoms, could be upheld as reasonably required in terms of article 164, the Supreme Court may appropriately

and construing the words in such a way as to advance the intent of the framers – intent nurtured on our peculiar history and social circumstance.”

¹⁷⁴ See K Afari-Djan, *The Ghanaian Constitution An Introduction* (1998) The Friedrich Ebert Foundation, Accra, Ghana at p 85 where he writes: “The Constitution allows limitations to be placed by law on the rights and freedoms of the media in two areas: in the interest of national security, public order and public morality; for purposes of protecting the reputation, rights and freedoms of the individual.”

follow the two-fold test propounded by it per Acquah JSC in *Republic v Tommy Thompson Books Ltd (No 2)* –earlier quoted but worth repeating:¹⁷⁵

“ From the language of article 164 and similar provisions like article 21(4)(c) the law in question must be ‘*reasonably necessary or required*’ in the public interest, national security, etc. This really implies that for any law to qualify as being reasonably necessary or required, the objective of that law must be of such *sufficient importance* as to override a constitutionally protected right or freedom. In other words, the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial. After this, it must be shown *that the law itself is a fairly proper means of achieving this important objective*. This will involve an examination of the provisions of the law to determine, inter alia, whether the provisions infringe any fundamental principle of law like natural justice, and whether they unduly impair the constitutional right. The nature of the examination in this second stage will depend on the nature of the law and the issues at stake. On this two fold test, I will now proceed to examine whether the law of criminal libel falls within the limitations in article 164.”

¹⁷⁵ [1996-97] SCGLR 484 at 500-501 (judge’s emphasis).

Need for a balancing exercise

In determining whether, in a free and democratic society such as in Ghana, a law is reasonably required in terms of article 164 as a limitation on freedom and independence of the media as guaranteed under article 162 (1), the Supreme Court, in applying the proportionality test, may also resort to a balancing exercise. In doing so, both the interests of society on one hand and that of the individual on the other hand, must be espoused and respected by the courts so as to ensure good governance in the country. It is therefore the duty of the Supreme Court to construe all existing and future legislation - creating limitations and impediments on the enjoyment of fundamental human rights and freedoms - in such a way as to promote good governance aimed at the rapid socio-economic, political and cultural development of Ghana. The need for resorting to a balancing exercise is called for by the provision in article 12(2) of the Constitution which states that: “Every person in Ghana ... shall be entitled to the fundamental human rights and freedoms of the individual ... but subject to respect for the rights and freedoms of others and for the public interest.”

It is for this reason that the resort to the balancing doctrine by Kpegah JSC in his opinion in support of the majority decision in *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson* is to be welcomed.¹⁷⁶ The court upheld section 185 of the Criminal Code as a law reasonably required as a limitation on freedom of speech. In the words of Kpegah JSC:¹⁷⁷

“The denial of the balancing doctrine will place the individual outside society and make an island of him ... There is the need for a meeting point between individual and societal rights for harmony. For, while an unbridled insistence on, and

¹⁷⁶ [1996-97] SCGLR 804.

¹⁷⁷ Ibid at 846.

enforcement of, personal rights have the great potential of leading to anarchy, so also has a similar insistence and enforcement of societal rights the potential of undermining the democratic values of a society.”

And on the rationale for resorting to the balancing exercise, Justice Kpegah in the same case, said:¹⁷⁸

“... the main justification for the ‘balancing concept’ is that it is not intended to directly control free speech, but rather to protect from evil and injurious consequences those interests which are lawfully within the sphere of governmental concern in any democratic society.”

Constructive criticism of government and need for a responsible media

It must be conceded that freedom of speech cannot be divorced from freedom to criticise, because constructive criticism is indispensable in a free democratic society. Where a newspaper publishes an article which has the effect of undermining public confidence in the conduct of public affairs by the government, that should be viewed as amounting to genuine criticism which should not attract any sanction.

The issue was determined by the Privy Council in the case of *Hector v Attorney- General of Antigua and Barbuda*.¹⁷⁹ The appellant, the editor of a newspaper in Antigua, was charged and convicted of the offence of printing a false statement in the newspaper contrary to section 33(B) of the Antigua Public Order Act 1972. That section created the offence, punishable by a

¹⁷⁸ Ibid at 847.

¹⁷⁹ [1991] LRC (Const) 237.

fine or a term of imprisonment, of making false statement likely “to undermine public confidence in the conduct of public affairs.” The appellant contended that section 33(B) violated his enjoyment of freedom of expression conferred under section 3 of the Constitution of Antigua and Barbuda, namely, the Antigua and Barbuda Constitution Order, 1981, Sch 1, SI 181/1106; and that section 33(B) was a limitation that could not be reasonably required under section 12(4)(a) of the Antigua Constitution, the wording of which is the same as article 164 of the Ghana Constitution, namely: a law that is “reasonably required (i) in the interests of defence, public safety, public order, public morality or public health; or (ii) for the purpose of protecting the reputations, rights and freedoms of other persons...” In allowing the appeal from the decision of the Court of Appeal of the Eastern Caribbean Supreme Court, the Privy Council held that the words “or to undermine public confidence in the conduct of public affairs” in section 33B violated the Constitution and it could not be upheld as reasonably required in the interests of public order under section 12(4)(a)(i) of the Constitution. It was in the light of this decision that the Privy Council expressed the view, per Lord Bridge of Harwich, that:¹⁸⁰

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which

¹⁸⁰ Ibid at 240.

criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.”

In effect, it could be said, in the light of the decision in the *Hector* case that criticism merely aimed at eroding public confidence in the government should not, in a democracy, attract any sanction, civil or criminal.

Contempt of court as limitation on freedom of speech and expression including freedom of the press

The discussion on the limitations on freedom of speech and expression, which includes freedom of the press and other media, would not be complete without a brief account of the law of contempt of court.

The right of the media in a free and democratic society to criticise the courts is subject to sanction imposed by the law of contempt of court. The superior courts have the power, under article 126(2) of the Constitution, 1992 to “commit for contempt to themselves.” Therefore in taking all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media as required of it under article 167(b) of the Constitution, the National Media Commission and, indeed, the Ghana Journalists Association (GJA), should caution media and newspaper editors to avoid falling foul of the offence of contempt of court, which, under the law, is a clear limitation on freedom of the press.

The offence of contempt of court may be committed by conduct that tends to bring the authority and administration of justice into disrespect or disregard and or to interfere with or prejudice parties to pending court proceedings or their witnesses.¹⁸¹ Thus the offence of

¹⁸¹ See *Oswald on Contempt* (3rd ed) at page 6.

contempt of court may be committed in different forms: including situations such as interfering with witnesses or jurors; frightening off parties to litigation; refusing to answer questions in court; commenting on pending proceedings in such a manner as to prejudice the outcome of the case; running down the courts and the judges; and refusing to obey an order of the court. And the offence of contempt of court falls into two categories : (a) civil contempt consisting of disobeying judgments, orders or other processes of the superior courts; or (b) criminal contempt consisting of acts that obstruct or interfere with the due administration of justice.

The offence of criminal contempt may take the form of contempt committed before the actual hearing of a case or while the case is pending; or it may take the form of contempt committed after the termination of court proceedings and the judge who sat on the case is subjected to scurrilous abuse. The latter form of contempt of court is described as the contempt of scandalizing the court. The commission or otherwise of the contempt of scandalizing the court was decided by the Ghana Supreme Court in the case of *Republic v Mensa-Bonsu; Ex parte Attorney-General*.¹⁸²

The case started when the Attorney-General filed a motion on notice in the Supreme Court for an order of committal or attachment of the first respondent, a private legal practitioner, and the second respondent, the Editor of the *Free Press*, a weekly newspaper, and to commit them to prison for contempt of court; and for an order that, the third respondent, the publishers of the newspaper, pay heavy fines for contempt of court.

¹⁸² [1994-95] GBR 130.

The charge of contempt of court laid against the respondents arose out of the publication in the *Free Press* of contumacious and scandalous matter concerning Mr Justice Isaac Abban,¹⁸³ a Justice of the Supreme Court, and a member of the nine-member panel of the Supreme Court that sat and determined the then politically charged case of *New Patriotic Party v Attorney-General (31st December Case)*.¹⁸⁴ The reasons for the court's decision were given on 8 March 1994. Before then, majority of the court had, on 29 December 1993, given judgment in favour of the plaintiffs, New Patriotic Party. Justice Abban, was one of the four minority judges, who gave judgment in favour of the Attorney-General, the nominal defendant for the then ruling Rawlings Government.

The first respondent, Mr Mensa-Bonsu, claimed he was present in court when Justice Abban read his reasons in support of the minority decision, dismissing the plaintiffs' claim. Justice Abban, in the course of reading his judgment, quoted a passage from a national newspaper, *The Daily Graphic*, of 24th February 1970 issue. That passage appeared to be against the plaintiffs' claim in the 31st *December Case*. The first respondent claimed he heard the judge, in the course of reading his judgment, attribute the passage in question to Dr Busia, the former Prime Minister of Ghana. He had his doubts whether the quoted passage could have been written by Dr Busia. The first respondent took steps to obtain from the Deputy Judicial Secretary, a copy of the signed judgment delivered by Justice Abban, to find out whether what he had heard read in court was correct. He was directed by the Deputy Judicial Secretary to get a copy of the signed judgment from another lawyer to whom he had earlier given a copy. The first respondent got a copy of the signed judgment. The first respondent made further inquiries at the Department of Archives. He found from his Archives inquiry that the

¹⁸³ Mr Justice Isaac K Abban, then Justice of the Supreme Court, was appointed the Chief Justice of Ghana in February 1995 and regrettably passed away in April 2001.

¹⁸⁴ [1993-94] 2 GLR 35, SC.

passage at page 28 of the judgment signed by the Justice Abban, attributed to Dr Busia, was in fact, the editorial view of the *Daily Graphic*.

Subsequently, on 9 May 1994, the respondent wrote a letter to Justice Abban, copied to the Chief Justice, accusing him of wrongly attributing at page 28 of his judgment, the editorial opinion of the *Daily Graphic*, to Dr Busia. The Chief Justice investigated the accusation made in the letter against Justice Abban. He requested the Registrar of the Supreme Court to send a “certified copy” of the judgment of Justice Abban to the first respondent. That certified copy showed that what the judge quoted at page 28 of his judgment, was the “Graphic view” and not that of Dr Busia as alleged by the respondent.

However, before the receipt of the Chief Justice’s letter containing the certified copy of the judgment of Justice Abban, the first respondent sent a copy of his letter of 9th May to the *Free Press*. That letter was published by the *Free Press* in its issue of 13 – 19 May 1994, together with its comments under the caption “Justice Abban is a liar.” The same publication accused Justice Abban of “political chicanery and bamboozlement” for lifting an editorial comment of *Daily Graphic* newspaper and portraying it as a speech made by Dr Busia, Ghana’s Prime Minister. There appeared in the *Free Press* another publication on the same matter under the caption, “Abban scandal.” A third publication also stated: “Justice Abban is accused of doctoring his version of his judgment as a subterfuge to free himself from scandal...Abban puts integrity of the bench on the line...”

The majority of the Supreme Court in this case held, per Bamford-Addo JSC, that the publication made by the respondents, which referred to Justice Abban as a liar, and a partial judge who used political and judicial chicanery to judge cases, constituted scurrilous abuse amounting to the contempt of scandalizing the court.

The majority of the court also rejected the argument of counsel for the first respondent that as between the respondent and Justice Abban, the first respondent must be the person to be credited with the truth as to what the respondent heard the judge say on the quoted passage, namely, the fact that the judge wrongly attributed the passage to Dr Busia. The majority held that truth was no defence in law in the case of contempt of court. In so holding, Bamford-Addo JSC, said:¹⁸⁵

“Once the matter published scandalizes the court, truth is no defence nor is justification. *The reason is that the contempt of scandalizing the court is committed against the administration of justice itself not against an individual judge, qua judge.* The mischief in publishing ‘scurrilous abuse’ about a judge is its tendency to bring the administration of the law into dispute, to lower the authority of the court and impair public confidence in the judiciary.”

The majority of the court in the *Mensa-Bonsu* case also considered the argument of the defence that the matter published was a fair criticism on a matter of public interest. Again Bamford-Addo JSC said:¹⁸⁶

“Criticism of the court and of judicial decisions however rambunctious, whether or not in good taste, and despite inaccurate statements of fact, would not amount to contempt of court and is within the limits of the inalienable right of every individual’s freedom of speech ...However, it should not be forgotten that there are limits to this freedom, and therefore even though one is in fact criticising, if imputation of improper motives are attributed to those taking part in administration of justice calculated to interfere with the administration of justice, a publisher of such matter would not be

¹⁸⁵ [1994-95] GBR 130 at 207 (my emphasis).

¹⁸⁶ Ibid at 208.

immune from contempt...I agree that freedom to criticise and the freedom of speech are inherent in any democratic society and even though criticism should not be stifled, I also believe that the integrity and independence of the judiciary should be upheld by all, especially the press which no doubt expects the courts to uphold and protect the right to freedom of speech. Free speech carries with it duties and responsibilities and is subject to conditions and restrictions prescribed by law including committal for contempt of court when this offence is committed.”

However, it must be conceded, as was conceded by Adade JSC in his dissenting opinion, that judges do, like any other group of human beings, make mistakes and should, and indeed, ought to be criticised. But, as cautioned by the judge, the language of criticism must be “temperate and measured.” If not, the media run the risk of being convicted and jailed or fined for the offence of contempt of court by scandalising the courts. Even though Adade JSC in the *Mensa-Bonsu* case, held that in his view, a case of contempt had not been made out, his lordship nevertheless sounded a note of caution to all, ie “the lay public, the legal profession and the judges themselves,” that they “have a stake in upholding the integrity, authority and respect of and for the judiciary and that if these should collapse, one of the surest foundations of our democracy would have vanished.”

It is respectfully suggested that even though judges of our superior courts have the undoubted power to commit editors and newspaper commentators for the contempt on the ground of scandalising the courts, that power should be used sparingly. Bamford-Addo JSC in the *Mensa-Bonsu* case, recognised this fact when she said:¹⁸⁷

“The power to commit summarily for contempt is indeed an effective but very powerful tool, which must be wielded only in very clear cases. It must

¹⁸⁷ Ibid at 202 (The emphasis is mine).

be noted, however, that it is not to be used from a tenderness of feeling or to vindicate any particular judge; it is used to protect the whole administration of justice and to keep the ‘blaze of glory’ round the courts for obvious reasons.”

Lord Denning has also cautioned that power of the judges to commit for contempt of court should be used sparingly.¹⁸⁸ It is suggested that to promote good governance in society, both the judges and the media must take heed of the advice given by Lord Denning MR in *R v Commissioner of Police of the Metropolis*. His lordship said¹⁸⁹:

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

¹⁸⁸ See Lord Denning, *The Due Process of Law* (1980) Butterworths, London at 34.

¹⁸⁹ [1968] 2 QB 150 at 154 quoted in op cit at pp 34-35.

Conclusion on the Supreme Court and the enforcement of fundamental human rights and freedoms

Chapter 7, consisting of Parts A and B, sought to examine the contribution of the Supreme Court to the all-important question of the enforcement of fundamental human rights and freedoms.

In Part A, attention was focused on the historical background to enjoyment of fundamental human rights; enjoyment of fundamental human rights *before the coming into force* of the Constitution, 1992 as distinct from the enjoyment of these rights *under* the Constitution; and in what ways fundamental human rights could be distinguished from directive principles of state policy.

Part B sought to examine the question of general fundamental human rights and freedoms under six sub-heads, namely: the right to or protection of personal liberty; observance and enjoyment of administrative justice; freedom of assembly and the right to demonstrate; freedom of association including freedom to form and join trade unions; freedom of speech and expression, including freedom of the press and other media; and the limitations on such freedoms.

The question of freedom of speech and expression is very crucial; it is an indispensable requirement for democratic governance. It is in that vein that one may appropriately adopt the words of the court in *Richards v Attorney-General of St Vincent and the Grenadines*¹⁹⁰ - cited with approval by Adjabeng JSC in *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson*,¹⁹¹ namely, that:

¹⁹⁰ [1991] LRC (Const) 311 at p 318.

¹⁹¹ [1996-97] SCGLR 804 at 871.

“There was no need to obtain government approval or consent before a man expressed himself, and government has no right to interfere with or to prevent anyone from writing, publishing and circulating a book or other pamphlet. Government could not keep ideas from being communicated, but it could, Blackstone thought, punish a man for what he said after he had said it. This is entrenched in all democratic institutions of free peoples and the idea behind it all is that there would be less abuse of governmental power if persons are free to speak in criticism of government and only made to undergo punishment for a distinct violation of the law. When the publication is in circulation for which punishment is sought to be inflicted all the world can see whether government is abusing its power and unjustly punishing a man merely for criticising or whether there is proper enforcement of the law.”

CHAPTER 8

THE SUPREME COURT AND THE ENFORCEMENT OF THE CONSTITUTION, 1992

INTRODUCTION

The greatest contribution to the development of Ghana Constitutional Law by the Supreme Court is to be found in its role in the enforcement of the Constitution itself, as distinct from the enforcement of fundamental human rights and freedoms.¹ Thus in the recent case of *Amidu v President Kufuor*² Acquah JSC said:³

“... where it is alleged before the Supreme Court that any organ of government or an institution is acting in violation of a provision of the Constitution, the Supreme Court is in duty bound by articles 2(1) and 130(1) to exercise jurisdiction, unless the Constitution has provided a specific remedy, like those of articles 33 and 99 for dealing with that particular violation. It follows therefore that no individual nor creature of the Constitution is exempted from the enforcement provision of article 2 thereof. No one is above the law. And no action of any individual or institution under the Constitution is immune from judicial scrutiny if the constitutionality of such an action is challenged.”⁴

¹ For discussion on Supreme Court and the enforcement of fundamental human rights and freedoms: see chapter 7.

² [2001-2002] SCGLR 86.

³ Ibid at 100.

⁴ See also *Ghana Bar Association v Attorney-General (Abban Case)* [2003-2004] SCGLR 250 where Edward Wiredu JSC said at 259: “The court as the repository watchdog of the Constitution, is enjoined to protect, defend and enforce its provisions and should not allow itself to be diverted to act as an independent arbiter of the Constitution.”

And in *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* Afreh JSC also said:⁵

“... where the jurisdiction of the Supreme Court has been invoked in an action which properly falls within a particular cause of action at a lower court, the Supreme Court shall refuse to assume jurisdiction in that action notwithstanding the fact that it has been presented as an interpretation or enforcement suit or both.

If these principles, applied by this court over a period of more than 30 years, had been applied in this case, the plaintiff’s claim for a declaration in this matter should have been dismissed *in limine*.”

In the light of the above stated dicta, the pertinent question is: what are these principles which are to be applied by the Supreme Court in the enforcement of the Constitution? The burden of this chapter is to explore these principles as elicited from the decisions of the court relating to the enforcement of the Constitution.

2. EVOLVING PRINCIPLES PERTAINING TO THE ENFORCEMENT OF THE CONSTITUTION

We shall proceed to examine these principles under the following sub-titles: (i) persons entitled to sue for enforcement of the Constitution; (ii) *locus standi* and proof of the existence or otherwise of personal interest or controversy or dispute and related issues pertaining to the question of *locus standi*; (iii) jurisdiction to enforce the Constitution as distinct from enforcing fundamental human rights and other related issues; (iv) enforcement of the Constitution in the face of injustice, illegalities and autocratic legislative action; (v)

⁵ [2001-2002] SCGLR 620 at 698 (my emphasis).

enforcement of the Constitution and delays in the delivery of justice and (vi) enforcement of the Constitution and the question of accrued rights. We shall proceed to examine these sub-titles seriatim.

Persons entitled to sue for enforcement of the Constitution

Article 2(1) of the Constitution, 1992 provides that where a person alleges that an enactment or anything contained in or done as authorised by that enactment or any other enactment, or that any act or omission of any person is inconsistent with or contravenes a constitutional provision, the person may sue in the Supreme Court for a declaration to that effect.

The question is: who qualifies as a “person” entitled to sue in the Supreme Court for a declaration in terms of article 2(1) of the Constitution? What is the meaning of “person” as used in article 2(1)? Does the meaning extend to a corporate person other than a natural person? These questions were determined by the Supreme Court in *New Patriotic Party v Attorney-General (Ciba case)*.⁶ The New Patriotic Party, a political party registered as a body corporate, sued in the Supreme Court under article 2(1) of the Constitution. They sought a declaration that section 4(1) of the Council of Indigenous Business Associations Law, 1993 (PNC DL 312), which provided that the association specified in the Schedule to the Law “shall be registered with the Council” was inconsistent with and in contravention of the Constitution, especially article 21(1)(e), and to the extent of that inconsistency, void. The said article 21(1)(e) provided that “All persons” shall have the right of freedom of association, including freedom to form or join trade unions or other associations.

⁶ [1996-97] SCGLR 729 – earlier examined in chapter 7 in discussing the question of freedom of association as a fundamental human right.

The defendant, the Attorney-General, raised a preliminary objection to the institution of the action, on the ground, inter alia, that only natural persons, not a corporate body like the plaintiffs, had the capacity to sue under article 2(1) of the Constitution, 1992.

The Supreme Court, by a majority decision of four to one,⁷ dismissed the preliminary objection. The majority held that all classes of persons (including natural persons and corporate bodies like the plaintiffs) had the capacity to seek for a declaration under article 2(1) for the enforcement of the Constitution. In giving the rationale for holding that both natural persons and corporate bodies could sue for a declaration under article 2(1), Bamford-Addo JSC said:⁸

*“Since rights and freedoms can be enjoyed by both natural as well as legal persons under the Constitution, the duty to defend same through the enforcement procedure under article 2(1) should be assured to all classes of persons, natural or legal... It would be more beneficial and in accordance with the intention of the framers of the Constitution and in the public interest to open the door widely to permit both natural and legal persons, like the plaintiffs access to the court. I would think that corporate bodies by reason of their important place in society are most suited both financially and otherwise to undertake the defence of the constitutional order by resort to judicial review when the constitutional order is being threatened.”*⁹

⁷ Per Bamford-Addo, Ampiah, Atuguba and Sophia Akuffo JJSC – Kpegah JSC *dissenting*.

⁸ [1996-97] SCGLR 729 at 739 and 741 (the emphasis is mine).

⁹ In so holding, the judge cited in support the broad meaning given to the word “person” in *Attorney-General v Antigua Times* [1976] AC 16, PC; and *Societe United Docks v Government of Mauritius* [1985] LRC (Const) 801, PC.

In the same vein, Sophia Akuffo JSC in her opinion in support of the majority decision also said:¹⁰

“In these present times, when there is, increasingly, the tendency for natural individuals to join together to form corporate bodies for the advancement and pursuit of their common interests,... the artificial legal person has become, and is increasingly becoming, a very important factor in the advancement of human endeavour... Furthermore, in our aspiration towards national economic development, wherein our economy, and indeed the global economy, is increasingly driven by corporate enterprise, rather than the enterprise of the natural individual, it is inescapable and even essential that the role of the artificial person be given its due weight.”

Kpegah JSC dissented from the majority decision which had construed “person” in article 2(1) as including both natural and artificial persons or corporate bodies. He said:¹¹

“It has to be appreciated that the word ‘person’ as used in article 2(1) of the Constitution is an ambiguous word which must be controlled by the context in which it finds itself... [I]f it is accepted that the word ‘person’ in a legal document can mean both a natural person and legal person, then, it is the context which must determine the sense in which it is used. One cannot therefore find solace in a submission that because the Interpretation Act, 1960 (CA 4) in section 32 defines ‘person’ to include legal entities, so the word ‘person’ as used in article 2(1) *does* include a body corporate. This does not make sense to me because section 32 of CA 4 is made subject to

¹⁰ [1996-97] SCGLR 729 at 793-794.

¹¹ Ibid at 766 (my emphasis).

section 1, which provides that section 32 will apply unless the context otherwise decides. The argument is not about whether ‘person’ can in law include artificial or corporate bodies or not, but whether in article 2(1) the context does permit both meanings to be imported into the word.”

***Locus standi* and proof of the existence or otherwise of personal interest or controversy or dispute**

Some principles have emerged from the examination of the relevant cases determined by the Supreme Court,¹² on the question of *locus standi* and proof of the existence or otherwise of personal interest or controversy or dispute. The Supreme Court has laid down the principle that it is necessary to show or prove the existence of personal interest in an action seeking enforcement of fundamental human rights and freedoms. However, there is no requirement for proving any such personal interest, nor is there a requirement for proving the existence of "controversy or dispute" in a claim by a Ghanaian citizen for a declaration under article 2(1) of the Constitution, 1992 namely, that an enactment or anything done under the authority of that enactment or that any act or omission of any person, is inconsistent with or in contravention of a provision of the Constitution.

¹² See *Bilson v Apaloo* [1981] GLR 24, SC; *Bilson v Attorney-General* [1993-94] 1 GLR 104, SC; *Sam (No 2) v Attorney-General* [2000] SCGLR 305; and *New Patriotic Party v National Democratic Congress* [2000] SCGLR 461.

The need to prove an act or omission or existence of controversy or dispute

The issue of whether or not there is the need for proof of controversy or dispute in a claim brought under article 2(1) of the Constitution, 1979 was considered by the Supreme Court in *Bilson v Apaloo*.¹³ The plaintiff sued, inter alia, for a declaration under article 2(1)(b) of the Constitution, 1979 that the purported declaration, judgment or decision of the Supreme Court in the case of *Tuffuor v Attorney-General*¹⁴, was null and void and of no legal effect because the whole trial had contravened article 44(9) of the Constitution.¹⁵

The Supreme Court, by a majority decision of three to two,¹⁶ held that article 2(1)(b) of the Constitution, 1979¹⁷ contemplated an “act or omission” of a person, alleged to be inconsistent with or in contravention of a constitutional provision; and that in the case before it, no act or omission of a person had been specified in the plaintiff’s pleadings or in evidence. In any case, the majority held that article 44(9) of the 1979 Constitution relied upon by the plaintiff, did not create a right of action, it merely conferred qualified immunity from suit on the President.

¹³ [1981] GLR 24, SC.

¹⁴ [1980] GLR 637.

¹⁵ In *Tuffuor v Attorney-General* [1980] 1 GLR 637 the Supreme Court held, inter alia, that upon the coming into force of the Constitution, 1979 the incumbent Chief Justice, Justice Apaloo, became, by virtue of article 127(8) and (9) of the Constitution, the Chief Justice by due process of law, holding the identical office as he held before the Constitution, 1979 came into force. It was further held that once Justice Apaloo was constitutionally in office, he could only be removed by the process of removal laid under article 128 of the Constitution.

¹⁶ Per Sowah, Anin and Charles Crabbe JJSC – Adade and Taylor JJSC *dissenting*.

¹⁷ The same as article 2(1)(b) of the Constitution, 1992.

In the subsequent case of *Bilson v Attorney-General*,¹⁸ the plaintiff set for himself a Herculean task. He sued in the Supreme Court under article 2(1) for a declaration, inter alia, that section 34 of the transitional provisions of the Constitution, 1992 the indemnity clause, was unconstitutional and unlawful. The said indemnity clause granted indemnity to the legislative, executive and judicial actions of the military regimes¹⁹ that had overthrown the elected governments of the First, Second and Third Republics of Ghana. The plaintiff also claimed for a declaration that it was part of the fundamental human rights and freedoms as stated in chapter 6 of the Constitution, 1979 that all persons in Ghana were equal before the law in terms of article 17(1).

The plaintiff's action was unanimously dismissed by the Supreme Court. It was held that the Supreme Court had jurisdiction to interpret the Constitution in the context of disputes; that the plaintiff could only seek an interpretation of section 34 of the transitional provisions if his action had been against a particular person in respect of an act or omission of that person; and if that person had relied on section 34 in defence in the action. The court held that on the pleadings, the writ had not disclosed any cause of action. In support of the unanimous decision, Adade JSC said:²⁰

“On the pleadings as they now stand, any declaration we make will be an empty declaration, a declaration in a vacuum. *Ours is to interpret the Constitution, 1992 in the context of disputes, broadly interpreted.*”

¹⁸ [1993-94] 1 GLR 104.

¹⁹ Namely, the National Liberation Council (NLC), National Redemption Council (NRC), the Supreme Military Council (SMC 1 and II), the Armed Forces Revolutionary Council (AFRC) and the Provisional National Defence Council (PNDC).

²⁰ [1993-94] 1 GLR 104 at 108, SC (emphasis is mine).

In the more recent decision of the Supreme Court in *New Patriotic Party v National Democratic Congress*,²¹ the issue turned, inter alia, on whether a mere intent by a person to do something in future constitutes an “act or omission” in terms of article 2(1)(b) of the Constitution. The facts of the case were as follows. On 6 June 2000, a publication appeared in *The Ghanaian Times*, a state-owned daily newspaper, to the effect that, the National Democratic Congress (NDC), the ruling party, had approved of the nomination of two public servants as the party’s candidates for the November 2000 Parliamentary Elections to be held throughout Ghana.²² Two days after the publication, the plaintiffs, the New Patriotic Party, one of the parties which were to contest the 2000 Parliamentary Elections, sued in the Supreme Court under article 2(1)(b) of the Constitution, 1992. They sought a declaration that the decision of the National Democratic Congress, the first defendant, to put forward, the second and third defendants, the Chief Director at the Ministry of Finance and Mines and Energy respectively, as their candidates in the November 2000 Parliamentary Elections, was inconsistent with and in contravention of the Constitution, 1992 particularly article 94(3)(b) and therefore null and void, and of no effect.²³

The defendants filed a preliminary objection to the institution of the action on the ground, inter alia, that the plaintiffs’ writ disclosed no cause of action because the publication, which had provoked the action, was, at best, a mere declaration of intent and nothing more.

²¹ [2000] SCGLR 461.

²² Article 94(3)(b) provided that a Member of the Public Services including the Civil Service shall not be eligible to be a Member of Parliament. The second and third defendants, as Chief Directors at the Ministries, were members of the Civil Service.

²³ Article 94(3)(b) provided that a Member of the Public Services including the Civil Service shall not be eligible to be a Member of Parliament. The second and third defendants, as Chief Directors at the Ministries, were members of the Civil Service.

The Supreme Court by a majority decision of three to two,²⁴ held that there was no proof of the existence of an “act or omission” in terms of article 2(1)(b) of the Constitution, 1992, which could be attributed to the defendants and which was inconsistent with article 94(3)(b) of the Constitution; that the declaration of intent by the NDC, the first defendant, to nominate in the future the second and third defendants as their parliamentary candidates, did not constitute an act but only a mere intention which was not justiciable. The court therefore held that as of the time the writ was issued, no act had been committed by all the three defendants and therefore the plaintiffs had no cause of action to sue them. Bamford-Addo JSC said:²⁵

“As can be perceived, it is the act of a defendant, not his intention, which is the prerequisite for the invocation of a constitutional action under article 2(1)(b) of the 1992 Constitution.”

Also in support of the majority decision, Kpegah JSC said:²⁶

“The law does not punish mere declarations of interest. To be amenable to the sanctions of the law, a person must have, at least, taken a decisive step towards the consummation of his intention so as to amount to at least an attempt in law. Or he must have crossed the Rubicon, or at least passed the stage referred to in law as *locus poenitentiae*.”

In dissenting from the majority decision, Acquah JSC said:²⁷

²⁴ Per Bamford-Addo, Kpegah and Atuguba JJSC – Ampiah and Acquah JJSC *dissenting*.

²⁵ Ibid at page 467.

²⁶ Ibid at page 494..

²⁷ [2000] SCGLR 461 at 508.

“[T]he plaintiff sees from the activities of the first and second defendants, a threatened breach of the Constitution, and therefore comes to court to prevent them from breaching the law. On this, the principle is ... that where one discovers from the acts and omissions of others that the same constitute a threat to a breach of the Constitution and the law, that person has right of access to the courts to forestall the said threat if the said acts or omissions are against a provision of the Constitution, then as Azu Crabbe JA (as he then was) said in *Gbedemah v Awoonor-Williams* [1969] G & G 438 at 440, SC it becomes: ‘The inescapable duty of the Supreme Court to suppress it by enforcing the Constitution.’ The same point was made by Kpegah JSC in his dissenting opinion in *Yeboah v JH Mensah* [[1998-99] SCGLR 492] at pp 517-518:

... any person who fears a threatened breach of the fundamental law ... [can] invoke our enforcement jurisdiction in a sort of *quia timet* action to avert the intended or threatened infringement of the Constitution. This is because our enforcement jurisdiction is premised on the consideration that, to quote from the Memorandum on the 1969 Constitution, ‘any person who *fears* a threatened infringement or *alleges* an infringement of any provision of the Constitution’ should be able to seek redress in this court.”

It is clear that the majority in *National Patriotic Party v National Democratic Congress* took the view that mere intent or threat to do something in the future, did not constitute an “act or omission” in terms of article 2(1)(b). However, the minority thought otherwise. It appears the majority of the court in *National Patriotic Party v National Democratic Congress*, did not take into account, the intention of the framers of the Constitution, namely, “any person who fears a threatened infringement or alleges an infringement of any provision of the Constitution

is entitled to seek redress in the court.”²⁸ Besides, a mere declaration of intent, not necessarily an act per se, can effectively convey a threat. Suppose an elected President were to announce that he would take steps to establish a one-party state in Ghana. Should a would-be applicant wait for the President to take steps to implement the declaration of intent before taking action in the Supreme Court under articles 2(1) and 130(1) of the Constitution? It seems, in the light of these considerations, that the majority in *National Patriotic Party v National Democratic Congress* ought, with respect, to have construed any “act or omission” in article 2(1)(b) as encompassing mere intent or threatened breach so as to effectuate the intention of the framers of the Constitution.²⁹ In that regard, it seems the minority view as per

²⁸ Per Kpegah JSC in *Yeboah v JH Mensah* [1998-99] SCGLR 492 at 517-518. It is very interesting to note that Justice Kpegah was a member of the majority in *NDC v NPP* who decided that mere intent or threat to do or take any action in the future did not constitute an “act or omission” in terms of article 2(1)(b). It appears the attention of Justice Kpegah was not drawn to his earlier dissenting opinion in *Yeboah v JH Mensah* to the effect that a person who fears a threatened breach of the Constitution was entitled to invoke the Supreme Court’s enforcement jurisdiction “in a sort of *quia timet* action to avert the intended threatened infringement of the Constitution.”

²⁹ See in that regard, the dictum of Sowah JSC (as he then was) in *Tuffuor v Attorney-General* [1980] GLR 637 where he said at 648: “... we must take cognizance of the age old fundamental principle of constitutional construction which gives effect to the intent of the framers of this organic law.”

Acquah JSC is preferable to the majority view which rejects mere intent or threatened breach as constituting an “act or omission” in terms of article 2(1)(b) of the Constitution.

In any case, the minority view of Acquah JSC in *National Patriotic Party v National Democratic Congress* (supra), to the effect that a threatened act, which constitutes a breach of the Constitution, is actionable under article 2 is supported by the earlier Supreme Court decision in *Kwakyere v Attorney-General*.³⁰ In the *Kwakyere* case, the plaintiff sued, invoking the original jurisdiction of the Supreme Court under article 2(1) of the Constitution, 1992 for a declaration that he was never tried, convicted and sentenced by any special court established under the Armed Forces Revolutionary Council (Special Courts) Decree, 1979 (PNDCL 3); and that his purported sentence of 25 years’ imprisonment was, inter alia, inconsistent with chapter 6 of the Constitution, 1979.

The Attorney-General, the defendant, raised a preliminary objection to the action. He sought to have it struck out on the grounds, inter alia, that the plaintiff had failed to give the Attorney-General one month’s prior notice of his intention to sue in accordance with the mandatory statutory notice under section 1 of State Proceedings (Amendment) Decree, 1969 (NLCD 352). The Supreme Court³¹ unanimously dismissed the preliminary objection. The court held that whereas under NLCD 352 no action was to be brought against the Republic until one month’s prior notice had been given to the Attorney-General, on a proper construction of article 2(1) of the Constitution, 1979, an applicant such as the plaintiff, was

³⁰ [1981] GLR 9, SC.

³¹ Strongly constituted: Apaloo CJ, Sowah, Archer, Anin, Charles Crabbe, Adade and Taylor JJSC.

entitled to invoke the jurisdiction of the Supreme Court as soon as the act complained of was committed or even threatened. The court explained that the unconstitutional act might even be one which demanded the timeous intervention of the court; yet the NLCD 352 had the effect of preventing him from seeking a timely assistance from the court; and in a case where time was of the essence of the matter, the object of seeking the court's intervention might be defeated.³²

The question, however, remains whether an allegation of mere intent or threatened act, not proved or backed by evidence, can be relied upon in an action, invoking the Supreme Court's enforcement and interpretation jurisdiction under article 2 of the Constitution, 1992. The issue was determined in the case of *National Democratic Congress v Electoral Commission of Ghana*.³³

In this case, the defendant the Electoral Commission, had published on 15 February 2001, a notice that it would hold elections on 20 March 2001. The purpose of the proposed elections was to elect Regional Representatives to the Council of State. The election was to be held under the Election (Regional Representatives on Council of State) Instrument, 1993 (CI 1). The Instrument provided that the elections should be carried out by an electoral college

³² See also the dictum of Apaloo CJ in *Yiadom I v Amaniampong* [1981] GLR 3 at 8: "If the plaintiff's case for interpretation is tenuous, her plea for enforcement is even more so. To enforce a provision of the Constitution, is to compel its observance. The plaintiff was not able to point to any provision of the Constitution which the first defendant has breached, or threatened to breach." See also *National Democratic Congress v Electoral Commission of Ghana* [2001-2002] SCGLR 954 where Atuguba JSC at 976 said: "... the defendant's notice ... was at the worst, a threatened act and actionable under article 2 of the 1992 Constitution."

³³ [2001-2002] SCGLR 954. It is interesting to note that the plaintiff, NDC in the instant case, the leading opposition party in Ghana, was, just less than two months before the institution of the writ, the ruling party, the NDC, which was sued as the defendant in the case of *New Patriotic Party v National Democratic Congress* [2002] SCGLR 461.

established in each of the regions of Ghana and including two representatives nominated by each district assembly in the region.

Soon after the publication of the defendant's notice, the plaintiff, the National Democratic Congress, brought an action in the Supreme Court under article 2 of the Constitution, 1992. The plaintiff sought for a declaration that the notice issued by the defendant, the Electoral Commission, was an act which was inconsistent with and in contravention of articles 89(2)(c) and 242(c) and (d) of the Constitution and therefore null and void.³⁴ In a supporting statement of case, the plaintiff contended that as at the time of the issue of the notice, the district assemblies, as contemplated under article 242, had not been properly constituted. The plaintiff also alleged that the Minister of Local Government had written letters, dismissing all district chief executives, being members of the district assemblies under article 242. The plaintiff also alleged that the regional ministers in their respective regions had written letters, declaring the removal from the district assemblies of all persons who had been appointed as members of the district assembly by the previous National Democratic Congress Government which had just been voted out of power. The letters relied upon were not exhibited in the proceedings; neither were the dates of the letters given. The defendant denied both the contention and the allegations.

Given the paucity of the evidence placed before the Supreme Court, the court dismissed the plaintiff's action. The court held that the plaintiff was required to produce sufficient, cogent and clear evidence that the defendant had breached the provisions in article 89(2)(c) and 242 of the Constitution; and that in the absence of such evidence, it had no jurisdiction to

³⁴ Article 89(2) provided for the composition of the Council of State. The membership under article 89(2)(c) included one representative from each region of Ghana, elected by an electoral college comprising two representatives from each of the districts in the region nominated by the district assemblies in the region. Article 242, on the other hand, provided for the

determine the plaintiff's action. In his opinion in support of the decision, Edward Wiredu Ag CJ said:³⁵

“Where an act or omission of any person is challenged under article 2 of the 1992 Constitution, such act or omission must be shown to have taken place, and it must be shown that such act or omission falls foul of a specific provision of the Constitution, or at the very least, the spirit of an actual provision.”

In a similar vein, Acquah JSC (as he then was),³⁶ in support of the decision also said:³⁷

“The substratum of the plaintiff NDC's complaint ... remains a mere allegation unsupported by any evidence necessary to prove its validity... The obvious purpose of the provision in rules 46(1) and 48(2) of the Supreme Court Rules, 1996 (CI 16), is to ensure that both parties to the suit are given the opportunity to address sufficient evidence in proof of whatever allegation necessary for the determination of the action.”

The need to prove personal interest in enforcement action

The question relating to the need to prove personal interest in an action brought under article 2(1)(b) of the Constitution was addressed by the Supreme Court in *Sam (No 2) v Attorney-*

composition of a district assembly as including (i) one person from each local government electoral area within the district; and (ii) the district chief executive of each district.

³⁵ [2001-2002] SCGLR 954 at 958.

³⁶ Hon Mr Justice Acquah, Justice of the Supreme Court was sworn in as the new Chief Justice of Ghana, as successor of Edward Wiredu CJ (retired on health grounds) on 4 July 2003.

³⁷ Ibid at 965-966.

*General.*³⁸ The plaintiff, a Ghanaian citizen, brought the action under article 2(1)(b) of the Constitution, 1992. He sought for a declaration that section 15 of the Divestiture of State Interests (Implementation) Law, 1993 (PNDCL 236), was inconsistent with or in contravention of articles 140(1) and 293(2) and (3) of the Constitution, and to that extent, it was void.

The Attorney-General raised a preliminary objection to the filing of the writ on the grounds, inter alia, that the plaintiff had no *locus standi* to sue because he had no personal interest in the outcome of the case; that the word “person” in article 2(1) was referable to an aggrieved person whose interest had been adversely affected by PNDCL 326. The defendant further argued that there was no “controversy or dispute between the parties relating to the interpretation of PNDCL 326.”

The Supreme Court unanimously dismissed the preliminary objection and granted the plaintiff’s claim. On the issue of the need for proof of personal interest and the resultant requirement for the existence of controversy or dispute, the court drew a clear distinction between an action to enforce the Constitution under article 2(1) and an action to enforce a fundamental human right under article 33(1). The court held that the words “in relation to him” and that “person” in the wording of article 33(1), implied that the plaintiff must have a personal interest in the litigation. Consequently, a person seeking redress for the infringement or intended infringement of his fundamental human rights must prove his “personal interest” in the case. However, the court held that its jurisdiction under article 2(1) of the Constitution, was a special jurisdiction available to only Ghanaian citizens irrespective of personal interest, entitling them to seek an interpretation and enforcement of the Constitution, in furtherance of

³⁸ [2000] SCGLR 305.

the duty imposed on all citizens "to defend the Constitution" under its articles 3(4)(a) and (b) and 41(b).

The question whether or not in an action for enforcement of the Constitution, an applicant should show personal interest³⁹ in the claim was also considered by the Supreme Court of The Gambia in *Jammeh v Attorney-General*.⁴⁰ In this case, the plaintiff, a Gambian citizen and minority leader in the National Assembly, sued in the Supreme Court. He invoked the original jurisdiction of the Supreme Court under sections 5 and 127 of the Gambian Constitution, 1997. He sought, inter alia, for a declaration that the Constitution of the Republic of Gambia, 1997 (Amendment) Act 2001 (No 6 of 2001), was null and void and of no effect because it was made in excess of the powers conferred on the National Assembly and the President. The Attorney-General raised a preliminary objection to the suit. He alleged that the court had no jurisdiction to entertain the claim on the ground, inter alia, that the plaintiff had no *locus standi* in bringing the action because he had no interest peculiar to himself and was thus a stranger to the case.

The Supreme Court of the Gambia unanimously dismissed the preliminary objection and allowed the claim of the plaintiff in part. The court held that the plaintiff, as a citizen, did not need to demonstrate any peculiar interest in order to vest him with *locus standi* to bring the claim, alleging a contravention of the Constitution, 1997. Wali JSC said:⁴¹

“A transgression or violation of the Constitution by the government is a wrong committed against the whole country and its citizenry. Even the

³⁹ As determined by the Ghana Supreme Court in *Sam (No 2) v Attorney-General* [2000] SCGLR 305.

⁴⁰ [1997-2001] GR 839.

⁴¹ At page 858. The Supreme Court was constituted by Lartey CJ, Jallow, Wali, Ogwuegbe and Amua-Sekyi JJSC.

Supreme Court of the United States is noticed now to be shifting from the strict adherence to the locus standi rule to the liberal emphasis of the court's function as a protector of public interest in the enforcement of constitutional limitation and will no longer be deterred by the mere plea of locus standi from considering a challenge to violation or transgression of the Constitution... Based on section 5(1)(a) and (b) of the 1997 Constitution of The Gambia, the plaintiff in his capacity as an ordinary citizen of The Gambia, is en clothed with legal right and locus standi to institute the present action to challenge the legality and constitutionality of the amendments to section 1(1) and paragraph 13 of Schedule II to the Constitution..."

In *Jammeh v Attorney-General*, the Supreme Court of The Gambia applied the reasoning of Fatayi-Williams CJN of the Supreme Court of Nigeria in *Adesanya v President of Nigeria*⁴² and its earlier decision in *United Democratic Party (No 1) v Attorney-General (No 1)*.⁴³

In the *United Democratic Party (No 1)* case, the first and second plaintiffs, registered political parties, and the third plaintiff, a Gambian citizen, invoked the Supreme Court's enforcement jurisdiction under sections 5(1), 6(2) and 127(1) of the Constitution, 1997. The plaintiffs, by the suit, sought to challenge the constitutionality of the removal from office of the Chairman and Member of the Independent Electoral Commission. The Attorney-General, the defendant, filed a preliminary objection to the plaintiffs' writ.

Jallow JSC, sitting as a single Justice of the Supreme Court in *United Democratic Party (No 1) v Attorney-General (No 1)* (supra), dismissed the preliminary objection. The court

⁴² [1981] NSCC 146 at 156-157 and 159-160.

⁴³ [1997-2001] GR 789 per Jallow JSC.

held that the plaintiffs' claim *prima facie* fell squarely within both the original constitutional interpretation and enforcement jurisdiction of the Supreme Court; that the plaintiffs were entitled to institute the action challenging a contravention of the Constitution without any requirement for them to show or allege an interest or injury to themselves over and above that of the ordinary Gambian citizen. In so holding, Jallow JSC said:⁴⁴

“What is alleged in this case, is a contravention of the 1997 Constitution, not merely a breach of a general public duty or violation of a public right falling outside the four corners of the Constitution. In my view, this is relevant factor to be borne in mind in dealing with the issue of *locus standi*. A Constitution is not any ordinary law. It is the fundamental law of the land, the *grundnom*, the source of legitimacy of all laws and of the exercise of executive and, indeed, of all power... Access to a court of competent jurisdiction, free from the restrictive technicalities with the rule of *locus standi*, is a *sine qua non* for the exercise of a right and the discharge of such a duty. The law cannot regard the ordinary citizen, who wishes to assert his right to challenge in a court of law what he perceives to be a contravention of the Constitution, as an interloper, a stranger to the case, a busybody who is meddling with what does not concern him... [A] person's interest as a citizen is legally sufficient to vest him with the competence to institute legal proceedings to challenge alleged contraventions of the Constitution with a view to ensuring respect for constitutional order.”

⁴⁴ Ibid at 803.

It is interesting to note that the question of *locus standi* in the enforcement of the Constitution and fundamental human rights was also considered by the South African Constitutional Court in the case of *Ferreira v Levin; and Vryenhoek v Powell*.⁴⁵ The Constitutional Court had to determine the validity of section 417 of the Companies Act, (No 61 of 1973). The section provided that a director of a company which had failed and which was subject to winding-up proceedings, was obliged to “answer any questions notwithstanding that the answer might incriminate him and [also] thereafter be used in evidence against him.” The issue turned on whether the applicant, who had not been accused of any crime, had the *locus standi* to bring an action, claiming that section 417 of the Companies Act was contrary to section 25 of the South African Bill of Rights. The said section 25 granted to accused persons the right against self-incrimination.

The Constitutional court held by a majority decision, that: “There was no good reason for adopting a narrow approach to the issue of *locus standi* in constitutional cases”; and that “a broad approach to *locus standi* would serve to ensure that constitutional rights enjoyed the full measure of protection to which they were entitled.” The majority further held that it was highly technical to assert that section 7(4) of the South African Bill of Rights,⁴⁶ “limited

⁴⁵ [1996] 1 BCLR 1 (CC).

⁴⁶ Section 7(4)(b) (iii)-(v) of the Bill of Rights provides that: “The relief referred to in paragraph (a) may be sought by - (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name; (iv) a person acting as a member of or in the interest of a group or class of persons; or (v) a person acting in the public interest.” Commenting on the provision in section 7(4), C R M Dlamani, Vice Chancellor of the University of Zululand in a Paper “Developments in the Law of New South Africa” *Rome Centro Di Studi E Ricerche Di Diritto Comparato E Straniero* 1997 at page 20 said: “This section is an extension of the *locus standi* rule. Traditionally, before a person can approach the court for relief he must prove interest in the claim. This restrictive approach has had the effect of curtailing the rights of people who might otherwise be entitled to bring an application. The significance of the present provision is that it enables a wider category of

constitutional challenges to persons whose constitutional rights had already been infringed or threatened.”⁴⁷

The question of want of *locus standi* in bringing an action to enforce the Constitution was also considered in the case of *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*.⁴⁸ The *Eins* case came before the South African Appellate Division on appeal from the decision of the Supreme Court of South West Africa/Namibia. The appellant contended that section 9(1) of the Residence of Certain Persons in South West Africa Act, 1985 was in conflict with the Bill of Fundamental Rights incorporated into the Namibian Proclamation (R 101 of 17 June 1985). The Act came into operation after the coming into force of the Proclamation.

The effect of section 9(1) of the Residence of Certain Persons in South West Africa Act was to restrict the right of certain persons to remain or stay in South West Africa/Namibia. The Act authorised the Cabinet to prevent, by notice, persons belonging to a certain class from remaining or entering the territory if they endangered “the security of the State ... or the maintenance of public order...” The applicant was not faced with expulsion at the time he brought the application. The defence contended that the applicant did not threaten the security of the State.

persons to bring an application for the infringement of a right. People whose rights have been infringed may not be in a position to approach the court for a variety of reasons like poverty, illiteracy and fear of the judicial process. The current provision makes it possible for those people to obtain redress through another person.”

⁴⁷ See also the decision of the Eastern Cape Division of the South African Supreme Court in the case of *Municipality of the City of Port Elizabeth v Prat* [1996] 9 BCLR 1240 (E) where it was held that a court “should be slow to refuse to exercise its jurisdiction in terms of section 7(4) of the Bill of Rights where a decision would be in the public interest and where it might put an end to similar disputes. It was further held that it was enough that an allegation of infringement of a guaranteed right had been made. See also in that regard, C Murray, “Litigating in the Public Interest: Intervention and the *Amicus Curiae*” in 1994 *South African Journal on Human Rights* 240 et seq.

⁴⁸ [1988] 3 SA 369(A).

On these facts, the Namibian Supreme Court held that the applicant had no capacity, ie lacked the necessary *locus standi* to bring the application to have the Act struck down as being in conflict with the Constitution. On appeal, the South African Appellate Division dismissed the appeal. The court held that in a matter such as this, the appellant could only be said to have “sufficient interest” and hence *locus standi*, once the executive exercised or intended to execute its powers in terms of the Act, and presumably only in relation to the applicant himself. The court concluded that it could not be called upon “to make a declaration which would be of mere academic interest as far as he (the applicant) was concerned.”

The decision in the *Eins* case was criticised by Professor Du Plessis.⁴⁹ In his view, the effect of the decision was to debar an individual from challenging the constitutionality of a controversial legislation because of want of *locus standi* in the ordinary, narrow or technical sense of the word. Du Plessis suggested the provision for an abstract review procedure at the instance of an individual so as to avoid the principle of *locus standi* being an obstacle in the individual’s claim to enforce a fundamental human right.

If the Du Plessis proposal or recommendation for providing for abstract review procedure were to be viewed as implying the existence of public interest, as distinct from personal interest, then it could be said to have been accepted by section 7(4) of the Bill of Rights,⁵⁰ which had provided for situations when an applicant could show the existence of *locus standi*, entitling him to apply for an enforcement of a bill of right as a fundamental right in South Africa.

⁴⁹ *Interpreting a Bill of Rights*, Kruger & Currin (ed) at pp 6-8, Juta & Co Ltd. Kenwyn, South Africa, 1994.

⁵⁰ The same as section 38 of the 1996 South African Constitution.

The discussion on proof of *locus standi* in an action to enforce the Constitution and the provisions of fundamental human rights and freedoms would not be complete without drawing attention to two other relevant principles developed by the Ghana Supreme Court. The first principle relates to the issue whether the Supreme Court can *suo motu* invoke its enforcement jurisdiction; and the second raises the question, whether the plea of estoppel by acquiescence and inaction could be allowed to prevent an applicant from taking action to enforce the Constitution.

Supreme Court and the invocation suo motu of its enforcement jurisdiction

The issue was considered by the Ghana Supreme Court in the recent case of *Attorney-General (No 2) v Tsatsu Tsikata (No 2)*.⁵¹ This case came before the Supreme Court on an application for a review of the majority decision of the ordinary bench given on 28 February 2002 (with the reasons thereof given on 20 March 2002) and reported as *Tsikata (No 1) v Attorney-General (No 1)*.⁵² The majority of the ordinary bench had granted the plaintiff's claim, inter alia, that there was "no Fast Track High Court established" under the Constitution, 1992.

The Attorney-General brought an application for a review of the majority decision of the ordinary bench. The grounds for the application for review were the existence of "exceptional circumstances which have resulted in miscarriage of justice." In support of that

⁵¹ [2001-2002] SCGLR 620 – being the decision on an application for review of the ordinary bench decision in *Tsatsu Tsikata (No 1) v Attorney-General (No 1)* [2001-2002] SCGLR 189. For detailed examination of the two decisions by the review and ordinary bench see: chapter 5 on the topic: "Constitutionality of the Fast Track High Court."

⁵² [2001-2002] SCGLR 189.

ground, the applicant referred to an interlocutory appeal in the case of *Selormey v The Republic*, which the Supreme Court had previously dismissed and had seen fit to remit it back to the Fast Track High Court for the trial of the accused, Mr Selormey, to continue in that court.⁵³ The applicant contended that if the Fast Track High Court were not a court of competent jurisdiction, the Supreme Court could have raised at the hearing of the interlocutory appeal in the *Selormey* case, the issue of absence of jurisdiction, but it did not do so. The applicant for review, therefore, contended that the same Supreme Court could not, in the present case, hold that the Fast Track High Court was unknown to the Constitution.

In defence to the application for review, counsel for Mr Tsikata, the respondent, argued that the hearing of the interlocutory appeal by the Supreme Court was irrelevant to the application because no issue as to the constitutionality of the Fast Track High Court had been raised at the hearing of the interlocutory appeal. He therefore contended that the remitting of the case by the Supreme Court to the Fast Track High Court did not mean that the latter was a competent court to hear the matter.

The application for review of the majority judgment of the ordinary bench was granted by a majority decision of six to five in the *Tsatsu Tsikata (No 2)* case.⁵⁴ The majority held that even if the parties had failed to raise the issue of the jurisdiction of the Fast Track High Court to try the accused, Mr Selormey, the Supreme Court was duty bound to consider the jurisdiction and competence of the Fast Track High Court in trying the accused. The majority of the court therefore concluded that once the Supreme Court had not questioned the

⁵³ *Selormey v The Republic* [2001-2002] SCGLR 848. Mr Selormey, the accused before the Fast Track High Court, was the former Deputy Minister of Finance in the Rawlings Government now in opposition to the Kufuor Government.

⁵⁴ Per Edward Wiredu CJ, and Acquah, Atuguba, Sophia Akuffo, Lamptey and Afreh JJSC.

jurisdiction of the Fast Track High Court to try the accused on the hearing of his interlocutory appeal, it meant that the Supreme Court was fully satisfied that the Fast Track High Court was a court of competent jurisdiction. In support of the majority decision, Afreh JSC said:⁵⁵

“The plaintiff says the reference to the Selormey case is irrelevant because no issue as to the constitutionality of the court was raised before the Supreme Court in that case; ... But it is very relevant. The trial of this case and other cases by Supreme Court Judges according to the rules of procedure and practice and evidence of the High Court as well as the ordinary laws applicable by and in the High Court raised the presumption that what was done in the Fast Track High Court was done rightly and regularly.”

In dissenting from the majority decision that the Supreme Court was bound to consider the constitutionality of the Fast Track High Court even if not raised at the hearing of the *Selormey* interlocutory appeal, Kpegah JSC said:⁵⁶

“This, ie the constitutionality of the Fast Track High Court, was not an issue to be raised by this court *suo motu*. If the issue had been raised *suo motu*, it would have amounted to invoking our original and enforcement jurisdiction ourselves. I believe neither the language in article 2(1)(b), which deals with the enforcement of the Constitution, 1992 nor that of article 130(1)(b), which relates to our original jurisdiction permit such a course of action on our part.”

⁵⁵ [2001-2002] SCGLR 620 at 685.

⁵⁶ Ibid at 725 (emphasis is mine).

In the light of the majority decision in *Tsatsu Tsikata (No 2)* case, it could be argued that the Supreme Court has now developed the principle, as can legitimately be inferred from the majority decision, that it could, itself, invoke *suo motu* its enforcement jurisdiction. There is no policy reason why the Supreme Court cannot do so. In the interest of justice and for a quick resolution of constitutional disputes, the Supreme Court could and should be able to invoke *suo motu* its enforcement jurisdiction in an enforcement action pending before it provided it gives the opportunity to the parties to the case to argue for and against the invocation of the courts powers of enforcement under article 2(1).

Plea of estoppel as bar to enforcement action

Where a person has refused or failed to assert his constitutional right, could his failure to do so be raised as a defence to an enforcement action subsequently brought by that same person? The issue was considered by the Supreme Court in the oft-cited case of *Tuffuor v Attorney-General*.⁵⁷ The plaintiff in this case sued, inter alia, for a declaration that: (i) on the coming into force of the Constitution, 1979 Mr Justice Apaloo, the incumbent Chief Justice, remained as the Chief Justice and was deemed to have been appointed the Chief Justice of Ghana and as such became the President and a member of the Supreme Court; and (ii) the application of the procedure in article 127(1) to Justice Apaloo and his purported vetting and rejection by Parliament were in contravention of article 127(8) of the Constitution.⁵⁸

⁵⁷ [1980] GLR 637, SC.

⁵⁸ Article 127(1) provided for the procedure for appointment of Chief Justice and Justices of the Supreme Court. Article 127(8) stated that: “Justice of the Superior Court of Jurisdiction holding office as such immediately before the coming into force of [the] Constitution shall be deemed to have been appointed as from the coming into force of [the] Constitution to hold office as such under [the] Constitution.”

At the hearing of the claim, the Attorney-General raised the defence of estoppel as a bar to the plaintiff's action. He argued that if the court were to find that Justice Apaloo remained the Chief Justice on the coming into force of the Constitution, then by his conduct in accepting the nomination and appearing before Parliament, he should be deemed to have waived any immunity provided by the Constitution and should accept the consequences of his own conduct; that every defence available against Justice Apaloo was equally available against the plaintiff who was also estopped from challenging the consequences of the conduct of Justice Apaloo.

The Supreme Court unanimously upheld the plaintiff's claim. The court dismissed the defence founded on estoppel by election. The court held that article 1(2) of the Constitution, 1979 had provided the constitutional criterion by which all acts could be tested and their validity or otherwise established. The said article 1(2) stated that the "Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of [that] Constitution shall, to the extent of the inconsistency, be void and of no effect." The Supreme Court therefore held that neither the Chief Justice nor any other person in authority could clothe himself with conduct not mandated by the Constitution; and that the decision of the Chief Justice to appear before Parliament could not make any difference to the interpretation of article 127(1) unless that decision was in accordance with the postulates of the Constitution. The Supreme Court therefore concluded that any act or conduct which was contrary to the express or implied provisions of the Constitution could not be validated by equitable doctrines of estoppel.

Despite the decision of the Supreme Court in the *Tuffuor v Attorney-General*, affirming that the plea of estoppel was no defence to an enforcement action, the defence of estoppel by

inaction and acquiescence was raised against the plaintiffs in the subsequent case of *New Patriotic Party v Electoral Commission*.⁵⁹

The relevant facts in this case were as follows. Article 242 of the Constitution, 1992 provided for the creation of district assemblies; whilst article 243 empowered those district assemblies to elect district chief executives for the district assemblies. Before the district assemblies could elect chief executives for the district assemblies in accordance with article 243, the Electoral Commission directed the existing district assemblies to hold elections in order to elect their district chief executives. It should be noted that the existing district assemblies had been empowered under the Local Government (Amendment) Law, 1993 (PNDCL 306), to continue in existence until such time as new assembly members were elected under article 243 of the Constitution, 1992.

Before the election of the chief executives could take place, the New Patriotic Party, a registered political party, sued the Electoral Commission and the Attorney-General for a declaration that the proposed election of district chief executives was illegal and in contravention of articles 242 and 243 of the Constitution, 1992.

In defence, the defendants contended, inter alia, that since the plaintiffs had not made any effort to prevent the said district assemblies from electing their representatives to the Council of State under article 89(2)(c) of the Constitution, 1992 they were estopped by inaction and acquiescence from challenging the competence of the existing district assemblies to elect district chief executives under article 243 of the Constitution, 1992.

The Supreme Court upheld the plaintiffs' claim. The Supreme Court held, inter alia, that the equitable defences of acquiescence, inaction or conduct were no bar to the interpretation and

⁵⁹ [1993-94] 1 GLR 124.

enforcement of the Constitution. The court therefore held that the failure of the plaintiffs to question the propriety of the action of the district assemblies established under the Local Government Law, 1988 (PNDCL 207), in electing representatives to the Council of State under article 89(2)(c) of the Constitution, could not prevent the plaintiffs from seeking the correct interpretation and enforcement of the provisions of the Constitution relating to district assemblies.

The court therefore concluded that the unlawful conduct of the Electoral Commission could not be validated by the equitable doctrine of estoppel. In so holding, the Supreme Court followed its previous decision in *Tuffuor v Attorney-General*, discussed above.⁶⁰

Jurisdiction to enforce the Constitution as distinct from enforcing fundamental human rights and freedoms

The question of the exercise of the jurisdiction of the Supreme Court to enforce the Constitution itself under articles 2(1) and 130(1), as distinct from the exercise of its jurisdiction to enforce a violation of fundamental human rights and freedoms, has come to the fore in a number of cases determined by the Supreme Court.⁶¹ It would appear from the examination of the cases, that in an action for enforcement of a fundamental human right, the applicant must bring the action in the High Court, and not, in the Supreme Court. However, in the situation where the citizen seeks to enforce the Constitution itself, not involving an infringement of a fundamental human right, the proper forum is the Supreme Court under article 130(1).

⁶⁰ [1980] GLR 637, Court of Appeal sitting as the Supreme Court.

⁶¹ See *Yiadom I v Amaniapong* [1981] GLR 3, SC; *Ghana Bar Association v Attorney-General (Abban Case)* [1995-96] 1 GLR 598, SC; [2003-2004] SCGLR 250; *Edusei v Attorney-General* [1996-97] SCGLR 1; *on review, Edusei (No 2) v Attorney-General* [1998-99] SCGLR 753; and *Yeboah v JH Mensah* [1998-99] SCGLR 492.

It must also be pointed out, that in discussing the Supreme Court powers of enforcement under article 2(1), the Supreme Court appears to have drawn a clear distinction between its jurisdiction regarding violations of a statute and its jurisdiction regarding violation of the provisions of the Constitution. Thus in *Amidu v President Kufuor*,⁶² the majority of the court, held⁶³ that to invoke the court's enforcement jurisdiction, the alleged violation must relate to a specific provision of the Constitution and not merely to violation of a statute such as the Presidential Office Act, 1993 (Act 463) as complained of by the plaintiff in that case.

We shall proceed to examine in detail the question of the jurisdiction of the Supreme Court to enforce the Constitution as distinct from enforcing fundamental human rights and freedoms under the following sub-heads: (a) the question of jurisdiction where an action is dressed as an interpretation or enforcement action; (b) time within which to seek an enforcement action; (c) jurisdiction to hear appeal from determination of an election petition by the High Court; and (d) the question of jurisdiction in redressing violation of fundamental human rights.

Jurisdiction where action dressed as an interpretation or enforcement action

Closely related to the distinction stated above, is the further principle developed by the Supreme Court that it would decline its enforcement or interpretation jurisdiction where an action, dressed or presented in the garb of an enforcement or interpretation action, is in substance and reality, an action which must be heard either by a chieftaincy tribunal or by the High Court in the exercise of its original jurisdiction or by a special body set up by the Constitution for that purpose.⁶⁴

⁶² [2001-2002] SCGLR 86.

⁶³ Per Edward Wiredu Ag CJ.

⁶⁴ That was the principle referred to by Afreh JSC in his dictum in *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620 at 698.

Thus in *Yiadom I v Amaniampong*⁶⁵ the first defendant was a Paramount Chief of Mampong Traditional Area in the Ashanti Region of Ghana and also a director of the Ghana Cocoa Marketing Board, a statutory body. He was alleged to have engaged in certain financial transactions as a director of the cocoa board. Adverse findings were made against him by the Committee of Inquiry into the affairs of the Ghana Cocoa Marketing Board.⁶⁶ The first defendant, by a petition, sought to have the adverse findings set aside by a special tribunal. The tribunal rather affirmed the adverse findings made against him and also directed that “the petitioner, ie the first defendant, should be disqualified from holding any public office in the country.”

Consequently, the plaintiff, a citizen of Mampong Traditional Area, relying on the adverse findings made against the first defendant, sued in the Supreme Court, invoking its original jurisdiction. She sought a declaration that the first defendant had disqualified himself from continuing in office as a paramount chief. She also by her pleadings, sought, under article 118(1)(a) of the Constitution,⁶⁷ an interpretation and enforcement of articles 161, 171 and 181 of the Constitution, 1979 and section 7(1) of its transitional provisions.⁶⁸ The first defendant raised a preliminary objection to the exercise of jurisdiction by the Supreme Court.

⁶⁵ [1981] GLR 3, SC.

⁶⁶ The Archer Committee of Inquiry-chaired by Hon Mr Justice P E N K Archer, Justice of the Supreme Court, as he then was.

⁶⁷ Article 118(1)(a) of the Constitution, 1979 was the same as article 130(1) of the present Constitution, 1992.

⁶⁸ Article 161 and section 7(1) of the transitional provisions sought to continue in office, after the promulgation of the Constitution, 1979 all holders of public and other offices on the eve of the coming into force of the Constitution. The object of article 177 was to guarantee the institution of chieftaincy; whilst article 181 provided a statutory definition of a chief as envisaged by the Constitution, 1979.

The Supreme Court unanimously upheld the preliminary objection and dismissed the plaintiff's claim on the ground, inter alia, that notwithstanding the way in which the plaintiff had couched her claim, it was, in substance, a claim to have it declared that the first defendant had ceased to be a paramount chief by operation of law. It was further held that the claim related to a dispute affecting chieftaincy, determinable by customary law and usage; and that under article 180(2) of the Constitution, 1979 and section 23(1) of the Chieftaincy Act, 1971 (Act 370), the judicial committee of a regional house of chiefs, had been specifically vested with jurisdiction to determine all matters relating to a paramount stool; that the Supreme Court had no concurrent jurisdiction with a regional house of chiefs in such matters. In arriving at this decision, the Supreme Court, per Apaloo CJ said:⁶⁹

“If the plaintiff's case for interpretation is tenuous, her plea for *enforcement* is even more so. To enforce a provision of the Constitution, is to compel its observance. The plaintiff was not able to point to any provision of the Constitution which the first defendant has breached, or threatens to breach. *What she apparently conceives as enforcement of the Constitution*, is the seeking of a declaratory relief which is permissible under section 2 of the Elections and Public Officers Disqualification Decree, 1978 (SMCD 206). It is that law which imposes the disqualification on which the plaintiff's case for interpretation and enforcement is grounded.

⁶⁹ [1981] GLR 3 at 8, SC (the emphasis is mine). The unanimous decision of the Supreme Court in *Yiadom I v Amaniampong* was delivered on 9 March 1981. Few months later, on 8 May 1981, the court in *Bilson v Apaloo* [1981] GLR 24, unanimously affirmed its decision in the *Amaniampong* case. Thus in *Bilson v Apaloo* the court (per Anin JSC) dismissed the plaintiff's claim for a declaration, under article 2(1)(b) of the Constitution, that the *Tuffour* case [1980] GLR 637, was a nullity because the claim was, in reality, an appeal masquerading as an action for a declaration.

The plain truth of the matter is that the original jurisdiction of this court has been wrongly invoked. We will accordingly accede to the challenge of our jurisdiction.”

The decision of the Supreme Court in *Yiadom I v Amaniampong* (supra), was followed by the court in the case of *Ghana Bar Association v Attorney-General (Abban Case)*.⁷⁰ The plaintiffs sued by invoking the enforcement jurisdiction of the Supreme Court under articles 2(1)(a) and (b) and 130(1) of the Constitution, 1992. They claimed, inter alia, for a declaration that: (i) on a proper interpretation of articles 2(1)(a), 128(4) and 144(1) of the Constitution, 1992 the President should not have nominated Justice Abban as Chief Justice because he was “not a person of high moral character and proven integrity” in terms of article 128(4); and (ii) the appointment by the President of Justice Abban, as the Chief Justice of Ghana, as well as the advice of the Council of State and the approval by Parliament of his nomination by the President as Chief Justice were each made in contravention of articles 91(1) and (2), 128(4) and 144(1) of the Constitution, 1992 and therefore a nullity. The defendants raised a preliminary objection to the assumption of jurisdiction by the Supreme Court.

The Supreme Court unanimously upheld the preliminary objection on the ground, inter alia, that the reliefs claimed by the plaintiffs, if successful, would result, not only in removing the Justice Abban as the Chief Justice, but also in removing him completely from the Bench. The court held that the special procedure laid down in article 146 of the Constitution for removing a superior court judge must be resorted to by the plaintiffs. The Supreme Court thus denied

⁷⁰ [2003-2004] SCGLR 250 – a case examined in detail (with the full facts stated) in chapter 3 in discussing the issues of the supremacy of the Constitution and the doctrine of non-justiciable political question.

the invocation of its enforcement jurisdiction. In support of the decision, Edward Wiredu JSC said:⁷¹

“The Supreme Court does not have original concurrent jurisdiction with the body empowered to exercise jurisdiction to adjudicate 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 recognize the limitations imposed on our powers by the Constitution.”⁷²

The decision of the Supreme Court in *Ghana Bar Association v Attorney-General (Abban Case)* may be compared and contrasted with the subsequent decision of the same court in *Nartey v Attorney-General & Justice Adade*.⁷³

This case raised the issue whether or not Mr Justice N Y B Adade, Justice of the Supreme Court in office immediately before the coming into force on 7 January 1993 of the 1992 Constitution, should remain in office until he attained the compulsory retiring age of 70 years under article 145(2)(a) of the Constitution.

Justice Adade was appointed in 1980 as a Justice of the Supreme Court under the Constitution, 1979 under which the compulsory retiring age was fixed at 65 years. The judge was born on 20 January 1927 and had to retire compulsorily at the age of 65 years on 20 January 1992. However, before then, the judge was granted one year extension, expiring on

⁷¹ Ibid.

⁷² See also the Supreme Court subsequent decision in *Yeboah v JH Mensah* [1998-99] SCGLR 492 in support of the same conclusion examined in detail below. This case had earlier been examined in detail in chapter 3 in discussing the question of the supremacy of the Constitution and the related issue of the enforcement of the Constitution.

⁷³ [1996-97] SCGLR 63.

20 January 1993, by the Government of the Provisional National Defence Council (PNDC) in the exercise of its discretion under section 1(2) of the Judiciary (Retiring Ages) Law, 1986 (PNDCL 161). However, before the judge could retire compulsorily on 20 January 1993, at the age of 65 years, the Constitution, 1992 came into force on 7 January 1993. He continued to sit as a Justice of the Supreme Court even after that date.

In July 1995, the plaintiff sued, invoking the Supreme Court's enforcement jurisdiction under articles 2 and 130(1) of the Constitution, 1992. He sought a declaration that the "continued holding on to office of a Justice of the Supreme Court after 20 January 1993" by Justice Adade was inconsistent with and in contravention of section 8(2) of the transitional provisions of the Constitution, 1992.

In his statement of defendant's case, Justice Adade contended that he was justified under section 4(1) of the same transitional provisions to remain in office as a Justice of the Supreme Court; and that section 8(2) was not applicable to him. The said sections 4(1) and 8(2) of the transitional provisions of the Constitution, 1992 state as follows:

"4 (1) A Justice of the Supreme Court, the Court of Appeal or the High Court holding office immediately before the coming into force of this Constitution, shall continue to hold office as if appointed to that office under this Constitution."

"8 (2) A person who before the coming into force of this Constitution would have been required under the law in force to vacate his office at the expiration of a period of service shall, notwithstanding the provisions of subsection (1) of this section, vacate his office at the expiration of that period."

At the hearing, counsel for Justice Adade,⁷⁴ argued that the provision in section 8(2) was inapplicable to the judge because the section did not fall under Part III of the transitional provisions headed ‘The Judiciary.’ It rather fell under Part IV headed ‘Miscellaneous.’⁷⁵

Given the argument by counsel, the issue which the Supreme Court had to decide was whether Justice Adade was justified in holding on to office under section 4(1) or ought to have vacated his office under section 8(2) of the transitional provisions.

The Supreme Court by a majority decision of three to two, granted the plaintiff’s claim,⁷⁶ namely, that the holding on to office by Justice Adade as Justice of the Supreme Court after 20 January 1993, was inconsistent with and in contravention of section 8(2) of the transitional provisions. The majority held that: (i) on the coming into force of the Constitution, 1992 there were two categories of Justices of the Supreme Court: those on permanent engagement and those on limited or fixed period of engagement; (ii) section 8(2) of the transitional provisions was applicable to public officers on limited or fixed period of

⁷⁴ Dr Seth Twum, now Justice of the Supreme Court, appointed in December 2002.

⁷⁵ Counsel could also have argued (but he did not do so) that, in substance and reality, the plaintiff’s action was not an enforcement action but it was meant to remove Justice Adade as a Justice of the Supreme Court; and that in line with the Supreme Court previous decisions in *Yiadom I v Amaniampong* and *Ghana Bar Association v Attorney-General (Abban Case)*, the court should decline jurisdiction on the ground that the special procedure for removing justices of the superior courts under article 146 had been provided for and must be resorted to. The flaw in this kind of argument is that under article 146(1) of the Constitution, 1992 the stated grounds for removal of justices of superior courts from office are “except for stated misbehaviour or incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind.” Since the plaintiff in the case of *Nartey v Attorney-General & Justice Adade* did not base its claim on any of these specified grounds, the Supreme Court could not validly decide that he should resort to the procedure for removal of justices instead of resorting to an enforcement action under article 2(1) of the Constitution, 1992.

⁷⁶ Per Acquah JSC, Kpegah and Sophia Akuffo JJSC concurring, Edward Wiredu and Adjabeng JJSC dissenting.

appointment; (iii) that since the judiciary formed part of the Public Services, it stood to reason that section 8(2) was applicable to the Judicial Service and therefore the judges of the superior courts were not exempt from the purview of section 8(2); (iv) since Justice Adade was on limited engagement for one year when the Constitution, 1992 came into force, he ought to have retired at the expiration of that one year limited engagement; and (v) the fact that under section 1(2) of PNDCL 161, the period of that limited engagement was to be taken into account in calculating his retiring benefits, did not transform the fixed one year period of engagement into a permanent one. In so holding, the majority cited in support the unanimous decision of the Supreme Court in *Yovuyibor v Attorney-General*.⁷⁷

The majority of the court in *Nartey v Attorney-General & Justice Adade* rejected the argument of counsel for Justice Adade to the effect that section 8(2) of the transitional provisions had not been placed as part of Part III headed: “The Judiciary” but rather placed under Part IV headed: “Miscellaneous.” The majority held that there was nothing in the wording of section 8(2), indicating that it was subject to any provision of the transitional provisions; and that the object of miscellaneous provisions, like section 8(2), was to cut across the whole spectrum of a statute and deal with matters like interpretation and others not specifically dealt with.⁷⁸ The majority also held that the object of section 4(1) of the

⁷⁷ [1993-94] 2 GLR 343 per a nine-member panel: Archer CJ, Adade, Francois, Amua-Sekyi, Aikins, Edward Wiredu, Bamford-Addo, Charles Hayfron-Benjamin and Ampiah JJSC. It is interesting and ironical to point out that Justice Adade, the second defendant in *Nartey v Attorney-General & Justice Adade*, was a member of the panel which decided the *Yovuyibor v Attorney-General* and which was applied against him. For the full facts and detailed examination and comment of the *Yovuyibor* case, see chapter 6 on the discussion of the topic “Supreme Court and challenge to executive action relating to compulsory retirement of public officers.”

⁷⁸ Thus it could be argued that the issue of a public officer on a limited engagement or fixed period of appointment and who must vacate his office at the expiration of that limited engagement dealt with under section 8(2), has not been specifically dealt with elsewhere in the transitional provisions; and that the object of section 8(2) was different from the object of section 4(1), which required the judges in office immediately before the coming into force of

transitional provisions was not to protect judges like Justice Adade, who had got to their compulsory retiring age and were on limited engagement; the purpose of section 4(1) was rather to protect the judges of the superior courts who had not reached their compulsory retiring age, and who would have continued to be in office, had the Constitution, 1992 not come into being. In support of the majority decision, Kpegah JSC said:⁷⁹

“On the coming into force of the 1992 Constitution, there were two categories of Justices of the Supreme Court: those on permanent engagement and those on limited or fixed period of engagement. The question is whether the latter class is within the contemplation of section 4(1) of the transitional provisions? I do not think so. For the purpose of section 4(1) is to avoid a situation where those on permanent engagement will have to be re-appointed by the incoming administration thereby giving it the chance to re-appoint its favourites and dispense with those it did not like.”

Sophia Akuffo JSC, in support of the majority decision, also said:⁸⁰

“Section 4(1) of the transitional provisions cannot be read so as to deviate from or limit the application of section 8(2) and transform the specifically limited duration of the second defendant’s holding of office or give that limited duration a further extension.”

the Constitution, 1992 to continue in office “as if appointed to that office.” For the meaning and effect of the phrase “as if appointed to that office” see: *Tuffour v Attorney-General* [1980] GLR 637, SC.

⁷⁹ [1996-97] SCGLR 63 at 82.

⁸⁰ Ibid at 116.

In dissenting from the majority decision, Edward Wiredu and Adjabeng JJSC, expressed a contrary view as to the true legal effect of section 4(1) of the transitional provisions of the Constitution, 1992. Edward Wiredu JSC was of the view that Justice Adade was entitled to continue as a Justice of the Supreme Court as if appointed under the Constitution, 1992 because he was still holding office as a Justice of the Supreme Court on the coming into force of the Constitution; that the language of section 4(1) did not admit of any group of categories of Justices Supreme Court; and that once it was established as a fact that one was holding office as a Justice of the Supreme Court and was exercising his/her duties as such, one qualified under the true and ordinary meaning of section 4(1) of the transitional provisions.

In support of the minority, Adjabeng JSC was also of the view that given the clear and unambiguous provision in section 4(1), it was that section, and not section 8(2), which was applicable to the second defendant, Justice Adade; that even if in a wider sense, it could be said that section 8(2) could be applicable to Justice Adade, section 4(1) being a provision specifically made only for Justices of the Superior Courts, would override the general provision in section 8(2) because Justice Adade was a superior court judge and he was so at the time the Constitution, 1992 came into force.⁸¹

In comparison, both decisions of the Supreme Court, namely, the earlier decision of *Ghana Bar Association v Attorney-General (Abban Case)* and the subsequent decision in *Nartey v Attorney-General & Justice Adade* (Justice Adade case), had one thing in common: the real nature of the action was to cause the removal from office of justice of a superior court. In the

⁸¹ Adjabeng JSC cited the Privy Council decision in *R v Ramassamy* [1965] AC 1 at 26; and the Supreme Court decision in *Kuenyehia v Archer* [1993-94] 2 GLR 525 where the court held that section 4(1) of the transitional provisions was applicable only to Justices of the Supreme Court who held office immediately before the coming into force of the Constitution, 1992 and who continued in office thereafter; and not applicable to Justices of the Supreme Court appointed after the coming into force of the Constitution.

Abban case, the action was unanimously dismissed on the ground that the Supreme Court had no jurisdiction to entertain such a claim no matter in what form, garb or disguise the action was mounted. But in the *Justice Adade* case, the action was upheld by a majority decision even though in substance and reality, the action was also aimed at removing a Justice of the Supreme Court from office.

The plausible reason for reaching a different conclusion in the *Justice Adade* case was that the question as to the true nature of the action was not argued in that case unlike the *Abban case* and the earlier decision of *Yiadam I v Amaniampong* – earlier discussed. Besides, unlike the *Abban case*, the action or the claim in *Justice Adade case* did not raise the question pertaining to grounds for removal from office of justices of the superior courts under article 146(1) of the Constitution, 1992. The plaintiff in the *Justice Adade* did not make any allegations pertaining to “misbehaviour or incompetence or on ground of inability to perform the functions of his office” in terms of article 146(1). The claim in the *Justice Adade case* did not also allege, like the *Abban case*, that Justice Adade was not a person of “high moral character and proven integrity” in terms of article 128(4) of the Constitution, 1992. The real issue in the *Justice Adade case*, as earlier indicated, was whether Justice Adade was justified in holding on to office under section 4(1) or ought to have vacated office under section 8(2) of the transitional provisions. Since the real issue in the two cases were different, the Supreme Court, rightly came to different conclusions.

The decision of the Supreme Court in *Ghana Bar Association v Attorney-General (Abban case)*, was cited with approval in the subsequent case of *Yeboah v J H Mensah*.⁸² The plaintiff in this case sought a declaration in the Supreme Court, in the exercise of its original jurisdiction, that Mr J H Mensah, elected on 7 December 1996 as the Member of Parliament for Sunyani East Constituency was not qualified to become a Member of Parliament in terms

⁸² [1998-99] SCGLR 492.

of article 94(1)(b) of the 1992 Constitution. It should be mentioned that prior to the plaintiff's action, two other persons had brought an election petition in the High Court, challenging the election of the same Mr J H Mensah. However, that action was dismissed as having been filed out of time. In any case, in the instant action, the defendant raised a preliminary objection to the action founded on section 16(1) and (2) of the Representation of the People Law, 1992 (PNDCL 284). The provision in section 16(1) and (2) was to the effect that the validity of parliamentary election may be questioned only by a petition brought before the High Court. The gist of the preliminary objection was that the plaintiff's action was, in substance and in reality, an election petition dressed in the garb of an enforcement action.

In upholding the preliminary objection and dismissing the plaintiff's action, the Supreme Court by a majority decision,⁸³ held that the High Court was the proper forum for determining the plaintiff's action which was, in fact, an action to challenge the validity of the defendant's election to Parliament; and that the plaintiff could not ignore the provision of article 99(1)(a), which has provided for a specific forum, ie the High Court, to determine disputes involving the validity of a person's election to Parliament. It was thus held that the plaintiff could not resort to the enforcement jurisdiction of the Supreme Court under articles 2(1) and 130(1) of the Constitution.

In so holding, the majority of the court criticised the earlier 1970 decision of the Supreme Court in *Gbedemah v Awonoor-Williams*⁸⁴ as wrongly decided. In this case, the Supreme

⁸³ Per Charles Hayfron-Benjamin, Ampiah, Acquah and Atuguba JJSC - Kpegah JSC dissenting.

⁸⁴ (1970) 2 G & G 438.

Court held that a person could resort to both the court's enforcement jurisdiction under article 2(1) and 106(1) of the Constitution, 1969 and an election petition in the High Court under article 76(1)(a) of the Constitution, 1969 and the Representation of the People's Decree, 1968 (NLCD 255). As Acquah JSC put it:⁸⁵

“... it is clear that the plaintiff cannot ignore the provisions of article 99(1)(a) of the 1992 Constitution and Part IV of PNDCL 284, and resort to the enforcement jurisdiction of the Supreme Court under articles 2(1) and 130(1) of the 1992 Constitution. For once the Constitution itself specifically provides a remedy under article 99(1) for resolving challenges to the validity of a person's election to Parliament, it is that remedy which must be pursued. Because if it was the intention of the framers of the Constitution to let the general enforcement jurisdiction of the Supreme Court be resorted to on the violation of every provision of the Constitution, they would not have provided specific remedy for specific matters, like that of article 99(1).”

⁸⁵ [1998-99] SCGLR 492 at 544-545.

In dissenting from this view, Kpegah JSC said:⁸⁶

“The fact that the action of the plaintiff may have the possible consequence of the removal of the defendant from Parliament does not turn his claim into an election petition. That is the wrong test to apply in determining what the real claim of the plaintiff is. In any case, such consequence will only demonstrate the supremacy of the Constitution in practical terms. If the enforcement of article 94(1)(b) of the Constitution against the defendant leads to his removal from Parliament, though unpleasant, I can live with that decision, for, I will be doing what my oath enjoins me to do - to defend and uphold the supremacy of the Constitution. The end result of the plaintiff’s claim should not scare and stampede us into declining what I see as a legitimate invitation to us to exercise our enforcement jurisdiction. It will only be a victory for the Constitution ipso facto, the rule of law. We cannot pretend that we are here dealing with an election petition rather than a claim for the enforcement of the Constitution to conveniently avoid the issue.”

The principle enunciated in *Yiadom I v Amaniampong* (supra) and *Yeboah v JH Mensah* (supra), namely, the rejection of assumption of jurisdiction where an action was dressed as enforcement action, was applied in *Adumua II v Adu Twum II*.⁸⁷

The plaintiff in this case sought a declaration, under articles 2(1) and 130(1) of the Constitution, 1992 that the defendant, admittedly a chief, was not qualified to be a chief under

⁸⁶ Ibid at 509 (the emphasis is mine).

⁸⁷ [2000] SCGLR 165.

article 275 of the Constitution; and also for an order to destool him and account for all stool properties.

The Supreme Court unanimously dismissed the action. The court held that the object and effect of the reliefs sought by the plaintiff was to seek his destoolment, an action which constituted a cause or matter affecting chieftaincy as defined in section 66 of the Chieftaincy Act (Act 370). The court held that notwithstanding the manner in which the plaintiff's action was presented, it was clear that its proper forum was the appropriate chieftaincy tribunal. Acquah JSC explained that if in the course of the determination of the action at that chieftaincy tribunal, the tribunal took the view that the meaning of article 275 was not clear and therefore needed the interpretation of the Supreme Court, that tribunal would be entitled, under article 130(2) of the Constitution, to refer the issue to the Supreme Court and stay its proceedings to await the opinion of the Supreme Court.

The Supreme Court in the instant case took the opportunity to stress that its enforcement jurisdiction, was a special jurisdiction not meant to usurp or to be resorted to in place of any jurisdiction of a lower court. It was rather a special jurisdiction meant to be invoked in suits raising genuine or real issues of constitutional interpretation; or enforcement of the Constitution; or the question whether an enactment was made ultra vires the powers conferred on Parliament or any other authority or person by law or under the Constitution.

Time within which to seek an enforcement of the Constitution

It should be stressed that in arriving at their decision in *Yeboah v J H Mensah*, the majority also laid down a very significant development of Ghana Constitutional Law relating to the time within which to seek an enforcement of the Constitution. The majority held that⁸⁸

⁸⁸ [1998-99] SCGLR 492 per Acquah JSC at 545.

unlike an election which could only be initiated by a specific person within a specific time limit, an action for the enforcement of the provisions of the Constitution might be initiated by any person at any time. Nor was it restricted to specified persons.

In so holding, the majority in *Yeboah v JH Mensah* stressed that the court's enforcement jurisdiction was not appropriate in challenging the validity of a person's election to Parliament. If that were so, it would imply (as the court noted) that a person from one corner of the country could resort to the Supreme Court's enforcement jurisdiction to challenge the validity of a person's election in Parliament in another remote corner of the country. And he could do so even years after the said election. However, challenges to the validity of a person's election must be initiated within the time as envisaged by article 99(1)(a) of the Constitution, 1992 and Part IV of the Representation of the People Law, 1992 (PNDCL 284).⁸⁹

Jurisdiction to hear appeal from determination of an election petition

In line with the decision of the Supreme Court in *Yeboah v JH Mensah* (supra), the High Court, as stated, is the proper forum, under article 99(1) of the Constitution, 1992 to determine an election petition. The question, however, is which court has the jurisdiction to hear an appeal from an election petition determined by the High Court? The answer is to be found in article 99(2) which states that: "A person aggrieved by the determination of the High Court... may appeal to the Court of Appeal." However, the pertinent and very crucial question is: whether or not there is a further right of appeal to the Supreme Court from an appeal in respect of an election petition determined by the Court of Appeal. The issue was

⁸⁹ Article 99(1)(a) states that: "The High Court shall have jurisdiction to hear and determine any question whether – (a) a person has been validly elected as a member of Parliament or the seat of a member has become vacant." And the grounds for such challenges and the procedure by which such challenges may be made are set out in Part IV of PNDCL 284.

considered by the Supreme Court in the very recent case of *In re Parliamentary Election for Wulensi Constituency; Zakaria v Nyimakan*.⁹⁰

In this case, one Mr Nyimakan contested the December 2000 Parliamentary Elections held on 7 December 2000. He was declared the elected Member of Parliament for the Wulensi Constituency. One Mr Zakaria, a registered voter in the constituency, filed an election petition in the High Court, Tamale under article 99(1) of the Constitution, 1992 challenging the election of Mr Nyimakan. The petition was granted by the High Court on 6 July 2001. The elected Member of Parliament, hereafter called the appellant, appealed to the Court of Appeal from the decision of the High Court. The appeal was dismissed by the Court of Appeal. The appellant further appealed to the Supreme Court against the decision of the Court of Appeal.

Consequently, Mr Zakaria, the registered voter, filed the instant application in the Supreme Court to dismiss the pending appeal on the ground that the Supreme Court had no jurisdiction to determine the appeal.

The Supreme Court by a majority decision of four to one,⁹¹ held that there was no right of further appeal to the Supreme Court from the appeal determined by the Court of Appeal in respect of the election petition granted by the High Court. The court held that it had no jurisdiction to adjudicate on the substantive appeal filed by the appellant for three reasons. First, that notwithstanding the general appellate jurisdiction of the Court of Appeal stated in article 137(1) of the Constitution, article 99(2) had expressly provided that a person aggrieved by the determination of an election petition by the High Court under article 99(1), might

⁹⁰ [2003-2004] SCGLR 1.

⁹¹ Per Edward Wiredu CJ, Acquah, Afreh and Dr Twum JJSC – Sophia Akuffo JSC dissenting.

appeal to the Court of Appeal; and that the provision in article 99(2) had the effect of taking it “out of article 137(1) jurisdiction of the Court of Appeal regarding appeals to the Supreme Court.” Second, the Supreme Court held, following its previous in *Yeboah v JH Mensah* (supra), that the Constitution, by article 99 had given a remedy and provided the fora, namely, only the High Court and the Court of Appeal for dealing with election petitions by providing for an appeal procedure which ended at the Court of Appeal. Third, the Supreme Court, on application of the maxim, *generalia specialibus non derogant* (general words do not derogate from special) held that the special provision set out in article 99(2), granting the right of appeal to the Court of Appeal from the determination by the High Court of an election petition under article 99(1), should supersede the general appellate jurisdiction of the Supreme Court under article 131(1)(a).

In delivering the judgment of the majority of the court in the *Wulensi* case, Dr Twum JSC said at page 14:

“Admittedly, in a wider sense, it may be said that article 131(1)(a) should give a further right of appeal to the appellant. But as we have pointed out ... article 99(1) creates a special remedy and in that remedy, the appeal process ends at the Court of Appeal under article 99(2).

It is quite clear that the framers of the Constitution, 1992 intentionally did that. It cannot be said that when they wrote article 99 in the form we find it in the Constitution, they were oblivious of the general appellate jurisdiction of the Supreme Court.”

It should be mentioned that Sophia Akuffo JSC dissented from the majority decision in the *Wulensi* case. The judge admitted that the provision in article 99(2) made no mention of a

further appeal to the Supreme Court from the decision of the Court of Appeal in respect of an election petition determined by the High Court. The judge was, however, of the view that given the language of article 131(1) and (2),⁹² and the structure of the Constitution, 1992 there was no need to do so. Sophia Akuffo JSC concluded that the mere fact no such mention was specifically made in article 99, could not justify the majority conclusion that an appeal could not lie from a decision of the Court of Appeal in an election petition.

The conclusion reached by the minority opinion was fortified, as pointed out by the judge, by the fact that when the Constitution intended to limit the right of appeal to the Court of Appeal alone, it did so specifically as in article 48(2). The said article provided that a person aggrieved by a decision of the Electoral Commission may appeal to a tribunal whose decision is appealable to the Court of Appeal “whose decision on the matter shall be final.”

Rationalising the majority and minority opinion in the Wulensi case

Given the reasoning proffered by the judges in support of the majority and minority opinions in the *Wulensi* case, the minority view is, on balance, more preferable and convincing. The interpretation placed by the minority on article 99(2) could be supported by the *expressio unius est exclusio alterius* maxim. Article 48(2) referred to by Sophia Akuffo JSC

⁹² Article 131(1) and (2) of the Constitution, 1992 provides: “131.(1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court -

(a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or (b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Notwithstanding clause (1) of this article, the Supreme Court may entertain application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant leave accordingly.”

specifically says that an appeal determined by the Court of Appeal in a matter involving demarcation of an electoral boundary “shall be final.” However, article 99(2) is silent on whether an appeal in respect of an election petition determined by the Court of Appeal is also final. On application of *expressio unius* maxim, if the framers had intended to exclude further appeal from the decision of the Court of Appeal, they would have expressly provided for such a case.⁹³ It could therefore be argued that a determination by the Court of Appeal under article 99(2), could be described as “a judgment of the Court of Appeal to the Supreme Court” within the meaning of article 131(1)(a). If such a conclusion is conceded, then the majority view that the provision in article 99(2) had the effect of taking article 99(1) “out of the article 137(1) jurisdiction of the Court of Appeal regarding appeals to the Supreme Court” cannot, with respect, be supported in law.

Second, it is quite clear that, given the divergent views placed on article 99(2), it is susceptible to two meanings: (a) giving the right of further appeal to the Supreme Court; or (b) denying further appeal and thus rendering a determination by the Court of Appeal final. The article therefore calls for a generous and purposive construction. If the majority of the Supreme Court in the *Wulensi* case had given a generous and purposeful construction to the provision in article 99(2), they would have held that the appellant in the *Wulensi* case had the constitutional right to further appeal to the Supreme Court from “a judgment of the Court of Appeal” within the meaning of article 131(1)(c) of the Constitution, 1992.⁹⁴

⁹³ See in support Ghana Court of Appeal decision in *Ghana Industrial Holding Corporation v Vincenta Publications* [1971] 2 GLR 24. For detailed examination and application of the *expressio unius est exclusio alterius* maxim: See Bimpong-Buta S Y, *The Law of Interpretation in Ghana [Exposition & Critique]* Advanced Legal Publications, 1995 pp 93-107.

⁹⁴ See chapter 4 for a detailed examination and application of the benevolent, broad liberal and purposive construction of a national constitution.

Third, given the plain and unambiguous provision in article 99(2), there was no need for the majority to put any gloss or any additional words to the words specified in the article. In my respectful submission, article 99(2) simply means that an aggrieved person has the right to appeal to the Court of Appeal from the determination of the High Court in respect of an election petition. The decision of the majority in the *Wulensi* case to the effect that the decision of the Court of Appeal shall be final constitutes an unjustifiable gloss on article 99(2), which is not reasonably justifiable. As was rightly observed by Kpegah JSC in his opinion in *Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba*.⁹⁵

“It is therefore important that the courts do not defeat the plain meaning of an enactment either by introducing their own words (judicial legislation) or by any extraneous considerations beyond a consideration of the mischief intended to be cured.”

Jurisdiction in redressing violations of fundamental human rights and freedoms

In arriving at the decision in *Yeboah v JH Mensah*⁹⁶, the majority of the court followed the two decisions of the court involving the same parties in the case, the first being *Edusei v Attorney-General*⁹⁷; and the second decision, on a review of the first decision, namely, *Edusei (No 2) v Attorney-General*.⁹⁸ Both decisions seem to support the principle – another significant development of Ghana Constitutional Law – that where the Constitution, 1992 has provided a specific remedy for redressing violations of the provisions on fundamental human

⁹⁵ [2001-2002] SCGLR 545 at 580.

⁹⁶ [1998-99] SCGLR 492.

⁹⁷ [1996-97] SCGLR 1.

⁹⁸ [1998-99] SCGLR 753.

rights and freedoms as enshrined in chapter 5 of the Constitution, the Supreme Court's enforcement jurisdiction under articles 2(1) and 130(1)(a) of the Constitution cannot be invoked.

Some time before the coming into force of the Constitution, 1992 the plaintiff, a Ghanaian citizen, in the case of *Edusei v Attorney-General* (supra), was alleged to have engaged in espionage activities on behalf of the Government of the United States. Under an agreement reached between the Governments of Ghana and the United States, the plaintiff and certain persons were allowed to leave Ghana for the United States. The plaintiff's Ghanaian passport was seized from him by the security agencies before leaving Ghana for the United States.

In 1994, the plaintiff expressed his desire to return to Ghana. He applied to the Ghana Ministry of Foreign Affairs for the return of his old seized passport to enable him apply for a new Ghana passport. He had no response to his application. The plaintiff therefore sued in the Supreme Court, invoking the original jurisdiction of the court, under article 130(1)(a), which states that:⁹⁹

“130(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution...”

⁹⁹ Earlier quoted, but worth repeating. See also article 140(2) of the Constitution which states: “The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.”

Sub-article (1) of article 33 of the Constitution referred to in article 130(1) also states:

“Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.”

The plaintiff in sought a declaration that: (i) certain provisions of the Passport and Travel Certificates Decree, 1967 (NLCD 155), were in contravention of articles 17(1)-(3) and 21(1)(g) of the Constitution, 1992¹⁰⁰; and (ii) as a Ghanaian citizen by birth, he had the right to enter and leave Ghana and a fortiori to a passport to enable him exercise that right.

The defendants raised a preliminary objection to the claim. They contended that the plaintiff by the claim, was seeking an enforcement of his right of freedom of movement in terms of article 21(1)(g), being a fundamental human right; that the Supreme Court had no jurisdiction to determine the claim because under articles 33 (1) and 130(1)(a), it was the High Court, not the Supreme Court, which had jurisdiction to hear the claim.

The Supreme Court, by a majority decision of three to two, upheld the preliminary objection and dismissed the plaintiff’s claim.¹⁰¹ The majority held that the High Court had been vested with exclusive jurisdiction under articles 33(1), 130(1) and 140(2), in the enforcement of fundamental human rights and freedoms; that the Supreme Court had only appellate

¹⁰⁰ Article 17(1)-(3) provided for equality before the law and freedom from discrimination on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic states; whilst article 21(1)(g) provided for freedom of movement – both articles being part of chapter 5 on Fundamental Human Rights and Freedoms.

¹⁰¹ Per Ampiah, Kpegah and Adjabeng JJSC – Amua-Sekyi and Charles Hayfron-Benjamin JJSC dissenting.

jurisdiction in such matters and that it had no original concurrent jurisdiction with the High Court in the enforcement of fundamental human rights contained in chapter 5 of the Constitution, 1992. In support of the majority decision, Adjabeng JSC said:¹⁰²

“The words of this constitutional provision [article 130(1)] are quite plain. In my view, by this provision, the enforcement of the fundamental human rights and freedoms is completely excluded from the original jurisdiction granted to the Supreme Court. It means ... that this court lacks original jurisdiction to entertain an action for the enforcement of a fundamental human right or freedom.”¹⁰³

The majority also dismissed the plaintiff’s claim for a right to enter and leave Ghana and a fortiori to a passport. The ground for so holding was that¹⁰⁴, in truth and substance, the action was for the enforcement of his fundamental human rights, which had been framed to appear as a constitutional matter to be determined by the Supreme Court, namely, as an interpretation and enforcement of articles 17(1)-(3) and 21(1)(g).

Kpegah JSC applied the court’s earlier decision in a case earlier examined in detail, namely, *Yiadom I v Amaniampong*. The learned judge strongly criticized the previous decision of the Supreme Court in *New Patriotic Party v Inspector-General of Police*.¹⁰⁵ It might be recalled

¹⁰² [1996-97] SCGLR 1 at 62.

¹⁰³ It must be noted that subsequent to the decision in *Edusei v Attorney-General*, section 15(1) of the Courts Act, 1993 (Act 459), was amended by the Courts (Amendment) Act, 2002 (Act 620), by the substitution of the old section 15(1) with a new section 15(1). Paragraph (d) of the new section 15(1) specifically vests the High Court with jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution.

¹⁰⁴ Per Kpegah and Adjabeng JJSC, applying *Yiadom I v Amaniampong* [1981] GLR 3 at 8; and also *Tait v Ghana Airways Corporation* (1970) 2 G & G 527.

¹⁰⁵ [1993-94] 2 GLR 459 – a case examined in detail in chapter 5 under the topic: “Freedom of assembly and the right to demonstrate.”

that in this case, the Supreme Court unanimously granted the plaintiffs' claim for a declaration that, certain provisions of the Public Order Decree, 1972 (NRCD 68) including section 7, which empowered the Minister of Interior to prohibit the holding of public meetings or processions for a period in a specified area, were inconsistent with and in contravention of article 21(1)(d) of the Constitution, 1992, providing for freedom of assembly and the right to demonstrate. In the view of Kpegah JSC, the decision in *New Patriotic Party v Inspector-General of Police* was given *per incuriam*. The majority were of the view that the court in *New Patriotic Party v Inspector-General of Police* acted without jurisdiction since it purported to exercise the enforcement jurisdiction of a provision of the Constitution pertaining to fundamental human right, ie article 21(1)(g), which could be enforced by only the High Court. In explaining the basis for the criticism, in the case of *Edusei v Attorney-General*, Kpegah JSC said:¹⁰⁶

“Although the Supreme Court cannot invoke its original jurisdiction to enforce fundamental human rights it could indirectly be properly seized with such an issue in the exercise of its reference jurisdiction. But the plaintiff in *New Patriotic Party v Inspector-General of Police* dressed up the case as if it was invoking the enforcement and interpretation jurisdiction of the Supreme Court...”

In dissenting from the majority decision in *Edusei v Attorney-General*, Amua-Sekyi and Charles Hayfron-Benjamin JJSC were of the view that, properly construed, articles 33(1) and 130(1) of the Constitution, had the effect of vesting concurrent jurisdiction, not exclusive jurisdiction, on the High Court in matters relating to the enforcement of fundamental human rights and freedoms. In other words, both the Supreme Court and the High Court could

¹⁰⁶ [1996-97] SCGLR 1 at 58.

concurrently enforce the human rights provisions of the Constitution. In the words of Amua-Sekyi JSC.¹⁰⁷

“The effect of article 130 is that although the Supreme Court has primary responsibility of enforcing or interpreting the Constitution or making pronouncement on the validity of enactments, a person may, ... seek enforcement of the human rights provisions in the High Court. Read together, it will be seen that articles 33 and 130 do no more than confer concurrent jurisdiction on the High Court in matters relating to the enforcement of the human rights provision of the Constitution.”

On the question of the true effect of article 33(1) of the Constitution, the other dissenting judge, Charles Hayfron-Benjamin JSC, also said:¹⁰⁸

“It is clear from the wording of ... [article 33(1)] that the High Court does not have exclusive jurisdiction in matters affecting the civil rights and fundamental freedoms of the citizen. Clearly that article does not cover an aggrieved party if he chooses not to commence his proceedings by resort to it as it is clearly stated that the exercise of his rights under that article are ‘without prejudice to any other action that is lawfully available.’”

Judge Charles Hayfron-Benjamin went on to draw attention to a very significant point not addressed by the majority in the case. He said even if the majority were right in holding that the plaintiff should have pursued his claims relating to the enforcement of his fundamental human right in the High Court, there was no prescribed method whereby the High Court could

¹⁰⁷ Ibid at 8.

¹⁰⁸ Ibid at 20.

be approached on human rights matters. That was because the Rules of Court Committee had not as yet complied with article 33(4) requiring the committee to make rules regarding the practice and procedure of the courts for purposes of enforcement of the provisions on fundamental human rights and freedoms. He said the policy reason behind the provision in section 33(4), was to prevent human rights cases being bogged down by the notoriously unnecessary adjournments and delays encountered in the superior courts, which would defeat the very purposes of chapter 5 of the Constitution, pertaining to fundamental human rights and freedoms. Charles Hayfron-Benjamin JSC was therefore of the view that: “There cannot be a failure of justice for want of a court.”

It must be pointed out that the majority of the court in *Edusei v Attorney-General* gave additional reason for holding that the Supreme Court could not entertain the plaintiffs’ claim relating to the enforcement of his fundamental human rights. The majority (per Ampiah and Kpegah JJSC) held that on the assumption that the Supreme Court had concurrent jurisdiction with the High Court in enforcing fundamental human rights and freedoms of the individual, the Supreme Court was precluded from assuming jurisdiction in the matter as a court of first instance. In support of that conclusion, the majority relied on paragraph 6 of the *1981 Practice Direction of the Supreme Court*,¹⁰⁹ which stated that where a cause or matter could be determined by a superior court, other than the Supreme Court, the jurisdiction of the lower court should first be invoked.

However, Amua-Sekyi JSC, dissenting, also took a contrary view as to the application of the *1981 Practice Direction*. He said that in the light of the *Practice Direction*, where the parties to a dispute took differing positions on the interpretation of the Constitution, 1992 and there were no binding decisions of the Supreme Court which might be relied on in proceedings before the High Court, it would be proper to commence the action in the Supreme Court.

¹⁰⁹ See *Practice Direction (Practice and Procedure of the Supreme Court)* [1981] GLR 1.

However, where no serious issue had been raised as to the interpretation of the Constitution, the High Court would be the proper forum.¹¹⁰ In further explanation of the true effect of the *Practice Direction* as applied by the majority in support of their decision in the case, Amua-Sekyi JSC, also dissenting, said:¹¹¹

“Thus, the man in Lawra or Bawku [Northern Ghana] who is kept in custody for longer than forty-eight hours in contravention of clause (3) of article 14 may seek redress in the High Court at Wa or Bolgatanga [Northern Ghana] instead of coming to the Supreme Court in Accra.

Speedy justice is what is aimed at, not a curtailment of the jurisdiction of the Supreme Court nor is it [*Practice Direction*] intended to give the timorous, the obsequious or the indolent an excuse for shelving the determination of cases and turning them over to another court or judge. Any foot-dragging here will only confirm the near-proverbial inability of our courts to deal with cases with dispatch.”

¹¹⁰ It appears this explanation of the 1981 *Practice Direction* might justify the assumption of the jurisdiction by the Supreme Court relating to the enforcement of a fundamental human rights, the right to demonstrate, in the case of *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459 a case severely criticised by the majority in *Edusei v Attorney-General*.

¹¹¹ [1996-97] SCGLR 1 at 9.

The plaintiff in *Edusei v Attorney-General* (supra), applied to the Supreme Court for a review of the majority decision in the case. The plaintiff contended that the majority of the ordinary bench erred in declining jurisdiction in the matter.

The issue which the review panel therefore had to decide in *Edusei (No 2) v Attorney-General*¹¹² was whether the Supreme Court had concurrent jurisdiction with the High Court in the enforcement of fundamental human rights and freedoms. In other words, whether the High Court was vested with exclusive original jurisdiction in the matter.¹¹³

The application in *Edusei (No 2) v Attorney-General* for a review of the majority decision of the ordinary bench in *Edusei v Attorney-General* was dismissed by a majority decision of six to one.¹¹⁴ The decision turned on the interpretation placed by the majority of the ordinary bench on articles 2, 33(1), 130(1) and 140(2) of the Constitution, 1992 the provisions of which had earlier been quoted.

The majority of the review panel held that the Supreme Court's power of enforcement under article 2 of the Constitution, 1992 did not extend to the enforcement of violation of fundamental human rights and freedoms; that jurisdiction had been expressly reposed in the High Court under article 33(1) of the Constitution; that read together, articles 33(1) and

¹¹² [1998-99] SCGLR 753.

¹¹³ The review panel consisted of Bamford-Addo, Charles Hayfron-Benjamin, Ampiah, Kpegah, Adjabeng, Acquah and Atuguba JJSC. In effect, the review panel consisted of three judges who formed the majority of the ordinary bench; one of the two dissenting judges of the ordinary bench; and three new judges to the case.

¹¹⁴ Atuguba JSC concurred with the majority in dismissing the application for review but dissented from the majority decision on the crucial issue of jurisdiction. Charles Hayfron-Benjamin JSC was the sole dissenting judge.

130(1) did not bear out, in any way, the contention expressed by the minority of the ordinary bench that the Supreme Court had concurrent original jurisdiction with the High Court in violations of fundamental human rights; that such a contention was clearly inconsistent with the exclusiveness of the original jurisdiction vested in the main part of the provision in article 130(1) of the Constitution; that the “subject to” part of article 130(1), precluded the Supreme Court from exercising original jurisdiction in the enforcement of human rights abuses, so as to preserve the exclusiveness of the Supreme Court’s original jurisdiction in the enforcement of the Constitution except those on fundamental human rights and freedoms.

In support of the majority, Acquah JSC¹¹⁵ addressed the true effect of the words “without prejudice to any other action that is lawfully available” and the words “may apply” in article 33(1) of the Constitution. It was held that the first expression in article 33(1) was referable to any possible cause of action which might arise from a violation of one’s fundamental right and freedom, independent of that victim’s constitutional right of seeking redress for that violation. Acquah JSC gave an example: if someone’s personal liberty was violated by his wrongful arrest and detention, the victim might, while in detention, resort to the High Court on a *habeas corpus* application for release and might thereafter sue for damages for unlawful arrest and detention in a court with jurisdiction to award the damages sought. The action for unlawful arrest and detention was one which was lawfully available to the victim, following the violation of his personal liberty. With regard to the word “may” in article 33(1), Acquah JSC held that the effect of the word was to give the person victimised by violation of human rights, the option of going to court to seek redress. The victim was under no obligation to seek redress in the courts. Acquah JSC continued:¹¹⁶

¹¹⁵ [1998-99] SCGLR 753 at 788-789.

¹¹⁶ Ibid at 789.

“[I]f ... the victim decides to go to court for redress ... he ought to apply to the High Court as provided in article 33(1) and confirmed in article 140(2) ... [which] provides: ‘The High Court have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by [the] Constitution.’ In no other court in the 1992 Constitution is such original jurisdiction vested...

It is also important to note, in relation to the expression ‘may apply’, that under the 1992 Constitution, apart from the judiciary, the Commission for Human Rights and Administrative Justice... is also empowered to handle complaints, investigate violations and offer redress in human rights issues. Thus a victim of human rights violation may decide not to seek redress at the courts but at the Commission for Human Rights and Administrative Justice, which is empowered under article 218 ... to ... investigate and take appropriate action to call for the remedying, correction and reversal of human rights abuses. It is clear therefore that there is nothing in article 33(1) that can support the contention that the Supreme Court has concurrent original jurisdiction with the High Court.”

It should be observed, however, that Charles Hayfron-Benjamin JSC dissented from the majority decision to the effect that the Supreme Court has no concurrent jurisdiction with the High Court in the enforcement of fundamental human rights and freedoms. The judge construed the expression “subject to” in the context of article 130(1) as meaning that if there was no other provision in the Constitution by which a remedy might be obtained, then, the High Court would have specific jurisdiction to grant redress where there was violation of fundamental human rights. In the words of Charles Hayfron-Benjamin JSC:¹¹⁷

¹¹⁷ Ibid at 762-763.

“The power conferred by article 130(1) is complementary to and not an ouster of any jurisdiction conferred on the Supreme Court by the Constitution. Nor would article 2 of the Constitution otherwise make sense... Clearly ... under article 2 of the 1992 Constitution, ‘any act or omission of any person’ with respect to the provision of ‘an enactment...’ which ‘is inconsistent with, or is in contravention of a provision of this Constitution’ ... [entitles an aggrieved person] to ‘bring an action in the Supreme Court for a declaration to that effect’ I do not see how such a clear provision of the Constitution – granting such exclusive jurisdiction to the court, may be abridged or ousted even by implication by the proviso to article 130.”

It should also be observed that even though Atuguba JSC concurred with the majority decision in *Edusei (No 2) v Attorney-General* that the application for review should be dismissed, he dissented from the majority decision on the crucial issue of jurisdiction of the Supreme Court to enforce violation of human rights. He was of the view that where the real substance of the action in the Supreme Court was not one of enforcement of fundamental human rights but touched an issue of fundamental human rights coincidentally, then, such an issue could well be entertained by the Supreme Court. In support of the dissenting view that the Supreme Court is vested with jurisdiction to determine claims alleging violation of fundamental human rights, Atuguba JSC said, inter alia:¹¹⁸

“I am also encouraged by S Y Bimpong-Buta, a keen Ghanaian legal scholar, who has stated at page 21 in his contribution to the book entitled *Lectures in Continuing Legal Education* 1993-94... that:

¹¹⁸ [1998-99] SCGLR 753 at 808.

‘It appears, given the wording of article 130 of the 1992 Constitution, that the Supreme Court has concurrent original jurisdiction with the High Court to determine and give redress in respect of an application by an aggrieved person – alleging in relation to him, a contravention of the Fundamental Human Rights and Freedoms enshrined in chapter 5 of the 1992 Constitution.’”

Evaluation of opinions on jurisdiction to enforce the Constitution as distinct from fundamental human rights and freedoms

There is no disagreement amongst the judges that the Supreme Court has exclusive jurisdiction in the enforcement of the Constitution itself as distinct from the provisions on fundamental human rights. However, the judges disagree on the question of the Supreme Court’s jurisdiction to give redress, as a court of first instance, in respect of claims alleging violation of fundamental human rights and freedoms. The weight of authority is in favour of the view that the Supreme Court has no concurrent jurisdiction with the High Court in the enforcement of violations of fundamental human rights and freedoms. That appears to be the case where the issue has been specifically raised and determined.¹¹⁹ However, it is also true to say that there have been cases where the Supreme Court has assumed jurisdiction in cases involving the enforcement of fundamental human rights. In those type of cases, the central question did not relate to the enforcement of fundamental human rights and freedoms as such. The principal issue in such cases was rather on the interpretation of constitutional provisions relating to the enjoyment of fundamental human rights and freedoms.¹²⁰ The assumption of

119 See *Edusei v Attorney-General* [1996-97] SCGLR 1; and on review, *Edusei (No 2) v Attorney-General* [1998-99] SCGLR 753.

120 ¹⁹ See, eg *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459 on interpretation and enforcement of articles 17(1)-(3) and 21(1)(g) relating to freedom of assembly and the fundamental right to demonstration; and *Mensima v Attorney-General* [1996-97] SCGLR 676 where the Supreme Court held that regulation 3(1) of the Manufacture

jurisdiction by the Supreme Court in such cases is in line with the realistic and persuasive formulation propounded by Atuguba JSC in *Edusei (No 2) v Attorney-General* earlier referred to. The formulation is worth repeating for emphasis. Atuguba JSC said in that regard:¹²¹

“[W]here the real substance of the action before this court is not one of the enforcement of fundamental human rights but touches an issue of fundamental human rights coincidentally, then, such an issue can as well be entertained by this court.”

One could appropriately sum up the discussion on the jurisdiction to enforce the Constitution, as distinct from jurisdiction to give redress for violations of fundamental human rights, in the words of Ampiah JSC in *New Patriotic Party v Attorney-General (Ciba case)* where he said:¹²²

“... [W]here there is a violation of a particular right and there is a request for enforcement, the courts have held that it is the High Court which has that jurisdiction to adjudicate on the issue ... But, where the action is for a mere declaration as to the contravention of or inconsistency with a provision of the Constitution, then any person ... has a right to seek that declaration. It is my considered opinion, ... that ... in the context in which the word ‘person is used, the plaintiff has locus standi to maintain an action under article 2(1) of the Constitution...”

and Sale of Spirits Regulations, 1962 (LI 239), was inconsistent with article 21(1)(e) relating to the enjoyment of freedom of association.

¹²¹ [1998-99] SCGLR 753 at 798.

¹²² [1996-97] SCGLR 729 at 757.

The enforcement of the Constitution in the face of injustice, illegalities and autocratic legislative action

The judiciary, under a democratic system of government and in furtherance of good governance,¹²³ must resolve the perennial conflict between law and justice. It may do so by upholding justice and the rule of law in disputes not only between individuals but also between the individual and the State. The courts should, by their decisions, let justice prevail over injustice.¹²⁴

The issue whether or not the Supreme Court should, by its decision give its blessing to a clear case of injustice came before the Supreme Court in *Kwakyie v Attorney-General*.¹²⁵ The plaintiff, Mr Kwakyie, was until 4 June 1979, the Inspector-General of Police and a Member of the Government of the Supreme Military Council (SMC), which was overthrown in a coup d'état by another military government, established by the Armed Forces Revolutionary Council (AFRC). On 21 September 1979,¹²⁶ the AFRC announced on radio that 68 persons had been tried *in absentia* and sentenced to various terms of imprisonment in accordance with the provisions of the Armed Forces Revolutionary Council (Special Courts) Decree 1979 (AFRCD 3), as amended by the Armed Forces Revolutionary Council (Special Courts)

¹²³ As explained and expatiated upon in chapter 1.

¹²⁴ See Fola Sasegbon on “Resolving Fundamental Issues of our Time” being Editorial Comment in *Nigerian Lawyer's Quarterly* Vol 1 Nos 1-4 where he wrote: “Law as an expression of what is just should cease to be harsh or oppressive. Our seat of justice should be purified and the light that shines from its tower should be made to radiate into our people a sense of honesty and fair play.” quoted in the Prelims to the *Nigerian Supreme Court Cases* (1979) Vol 12 by Deyi Sasegbon (ed).

¹²⁵ [1981] GLR 944 decided by the Supreme Court established under the Constitution, 1979.

¹²⁶ That is before 24 September 1979 when the AFRC Military Government handed over the reins of government to the Limann Government democratically elected under the Constitution, 1979.

(Amendment) Decree, 1979 (AFRCD 19). The details of the trial, in the form of a list of those tried in absentia, were published on 13 October 1979 in a press release. The plaintiff was listed as one of 25 persons tried *in absentia* and sentenced to 25 years' imprisonment.

Subsequently, the plaintiff, sued in the Supreme Court established under the Constitution, 1979 for a declaration that he was never tried, convicted or sentenced by any special court established under AFRCD 3 and that the purported imprisonment of 25 years constituted an infringement of his fundamental human rights, inconsistent with chapter six of the Constitution providing for fundamental human rights and therefore void and of no effect.

The defendant filed a statement of case and contended that the Supreme Court's jurisdiction to determine the claim had been ousted by section 15(2) and (3) of the transitional provisions of the Constitution, 1979 which stated:¹²⁷

“15.(2) For the avoidance of doubt it is hereby declared that no executive, legislative or judicial action taken or purported to have been taken by the Armed Forces Revolutionary Council or by any person in the name of that Council shall be questioned in any proceedings whatsoever, and, accordingly it shall not be lawful for any Court or other tribunal to make any order or grant any remedy or relief in respect of any such act.

(3) The provisions of subsection (2) of this section shall have effect notwithstanding that any such action as is referred to in that subsection was not taken in accordance with any procedure prescribed by any law.”

At the hearing, the defendant led oral and documentary evidence with a view to showing that judicial action or purported judicial action within the true intendment of section 15(2) had

¹²⁷ The analogous provision is in section 34(3) and (4) of the Constitution, 1992.

been taken against the plaintiff. The oral evidence by the first defendant's witness was that he was present during the trial *in absentia* of the plaintiff; that during the trial, charges against the plaintiff were read by the prosecution apparently from a file containing a dossier on the plaintiff; that the five-member panel of the special court conferred for about twenty to thirty minutes and thereafter found the plaintiff guilty of the charges levelled against him. The second witness was the former Chairman of the Armed Forces Revolutionary Council (AFRC), Flt Lt JJ Rawlings. His evidence was to the effect that if the plaintiff's name appeared on the official list issued by the AFRC Press Secretary, then the plaintiff must have been tried. No further evidence was led by the defence showing that any witness was called before the special court nor evidence led or presented to that court in proof of the charges read against the plaintiff as required by section 5 of AFRC D 3.¹²⁸ The plaintiff also led no evidence in support of his case.

The case turned on the issue whether the Supreme Court's jurisdiction to grant the plaintiff's claim had been ousted by the ouster clause in section 15(2) and (3) of the transitional provisions to the Constitution, 1979.

The Supreme Court, by a majority decision of five to two, dismissed the plaintiff's claim for a declaration that his purported trial, conviction and imprisonment by the AFRC Special Court under AFRC D 3 as amended by the AFRC 19 was a nullity.¹²⁹ The majority of the court held that, even though on the evidence placed before it, there was no proof of judicial action taken against the plaintiff, ie no action satisfying the requirements of the law procedurally and

¹²⁸ Section 5(6)-(8) of AFRC D 3 stated that: "(6) The evidence of any witness for the prosecution or the accused shall be given on oath or affirmation. (7) The Court shall receive all relevant evidence in proof or disproof of a charge against the accused. (8) The evidence of the prosecution shall be presented to the Court."

¹²⁹ Per Apaloo CJ, Sowah, Archer, Charles Crabbe and Adade JJSC – Anin and Taylor JJSC dissenting.

substantively, there was proof of judicial action or purported judicial action taken within the meaning of section 15(2) of the transitional provisions to the Constitution, 1979. The court defined purported judicial action as an action which looked like, or was intended to be, or which had the outward appearance of a judicial action. The majority of the court held that even though the trial and conviction of the appellant was a nullity because it did not match up to the criteria set up by section 5 of AFRCD 3, nevertheless, they upheld the conviction because it was a purported judicial action. In support of the majority decision, Sowah JSC said:¹³⁰

“A review of the facts in this case leads me to only one conclusion that the proceedings were intended to be judicial proceedings... *Even though I consider the trial, conviction and sentence of the plaintiff were a nullity because the trial itself did not match up to the criteria set by AFRCD 3, s 5, nonetheless, I hold the view that it was a ‘purported trial, a fortiori, a purported judicial action.’*”

Archer JSC in his opinion in support of the majority decision also said:¹³¹

“The true meaning of section 15(2) appears to be that whenever the court is satisfied that the AFRC took or purported to take an executive, legislative or judicial action, then that court *shall not question the validity, the correctness, the fairness or the justice of that decision or action. Simply, the court should not interfere.*”

¹³⁰ [1981] GLR 944 at 965-966.

¹³¹ Ibid at 976-977 (emphasis is mine).

The majority further held that the effect of section 15(3) of the transitional provisions was to prevent non-compliance with “any procedure prescribed by any law” being used as a necessary pre-condition for the operation of the ouster clause in section 15(2).

On the other hand, the minority of the court held that in the absence of evidence proffered to prove the guilt of the plaintiff, there could be no trial or appearance of a trial or a purported trial. In support of the minority decision, upholding the plaintiff’s claim, Taylor JSC said:¹³²

“What is a trial or what purports to be a trial is adequately shown in section 5 of AFRC D 3. In my opinion, section 5 is the decisive provision. The only way a court can try a case is to have evidence either orally or by affidavit or any other way expressly provided by law. In the absence of any of these, there is no trial or appearance of a trial or a purported trial. It is not just a procedural requirement; it is substantive requirement...

The supposed trial if a trial it must be called, was not therefore a trial under AFRC D 3. *It was a complete nullity and it is void... I do not see how any tribunal bent on doing justice to its citizens can escape the inevitable conclusion that the plaintiff... was never tried, convicted or sentenced by an AFRC Special Court...*”

It seems clear that both the majority and minority judges in *Kwakyere v Attorney-General* were *ad idem* on one basic fact: the whole proceedings of the special court leading to the conviction of Mr Kwakyere were a nullity. If so, could there be any justification in law for the majority to base their decision on the criminal trial declared by them as a nullity?

¹³² Ibid at 1053-1054 (my emphasis).

The majority felt constrained to dismiss the plaintiff's claim because of the provision in section 15(3) of the transitional provisions, which provided that the ouster clause in section 15(2): "Shall have effect notwithstanding that any such action ... was not taken in accordance with any procedure prescribed by any law."

It seems to me that the provision in section 15(3) properly construed, did not and could not mean that the special tribunal, in the course of the purported trial of Mr Kwakye could convict him in excess of its own jurisdiction. Since on the facts, no evidence was led before the special tribunal before it decided to convict Mr Kwakye of the charges levelled against him, the special court had no jurisdiction to convict him on the application of the Court of Appeal decision on *Karletse v Nuro* where Sowah JA said:¹³³

"In the instant case, it is my view that the court *acted in excess of its jurisdiction* when it entered judgment without hearing evidence as prescribed by the rule."

In a similar vein, the majority in *Kwakye v Attorney-General* ought to have held that the court set up under AFRC D 3 had no jurisdiction, in the absence of evidence proffered by the prosecution, to convict Mr Kwakye of the charges levelled against him after his trial or "purported" trial. Consequently, the Supreme Court should have upheld the plaintiff's claim for a declaration that he was never tried and convicted and sentenced by the special court set up under AFRC D 3 and that the purported sentence of 25 years' imprisonment was void and of no effect.

It seems clear that gross injustice was meted out to Mr Kwakye by the AFRC Special Court. Such gross injustice, judicially endorsed by the Supreme Court established under the

¹³³ [1979] GLR 194 at 208, CA.

Constitution, 1979 was and is clearly indefensible in a constitutional democracy such as was envisaged under the Constitution, 1979.¹³⁴ The nature and effect of the majority decision in *Kwakyere v Attorney-General* was captured by Taylor JSC, when in delivering his dissenting opinion in the case he said (apparently in anguish):¹³⁵

“I must confess that I am scandalised and ashamed that this court system of ours, which is one of the best in black Africa, which has imbibed all the best principles of the British common law tradition and which now has distilled into it by our Constitution, 1979 some of the best elements of the jurisprudence of the enlightened world, *can be said to be capable of entertaining the secret trial system which is the hallmark of the worst totalitarian regimes of some countries of the world. It must be a dark day indeed for our people and constitutionalism when we are able to say that this evil machine of tyranny and despotism has a place in our Constitution, 1979. If it is indeed so, then an evil genius must be in control of our destiny. But I think not.*”¹³⁶

¹³⁴ It is ironical that the Supreme Court established under the Constitution, 1979 which was strongly composed, included the renowned Apaloo CJ (later appointed Chief Justice of Kenya) and Sowah and Archer JJSC both of whom were later appointed Chief Justice of Ghana. But the strongly constituted court regrettably failed to uphold the rule of law and true justice for the benefit of all Ghanaian citizens.

¹³⁵ [1981] GLR 944 at 1055-1056 the (emphasis is mine).

¹³⁶ It should be observed that in his opinion in support of the majority decision of the Supreme Court in *New Patriotic Party v Attorney-General* (31st December Case) [1993-94] GLR 35, Amua-Sekyi JSC criticised the majority decision of the Supreme Court in the *Kwakyere* case as wrongly decided for its reliance on the ouster clause in section 15(2) of the transitional provisions of the 1979 Constitution (the same as section 34(3) of the 1992 Constitution, as the basis for dismissing the plaintiffs’ claim. No wonder, the majority decision in the *Kwakyere* case has been severely criticised by a commentator: see Kumado, Kofi in “Assessment and Prospects of the Media” op cit at page 107 where he stated: “The *Kwakyere*

Happily, it could be said that the Supreme Court has now redeemed itself on the issue of whether or not justice should prevail over injustice by its 1997 decision in *British Airways v Attorney-General*. In this case, the main issue was whether the criminal prosecution of the plaintiffs for the offence of refusal to pay rent in convertible currency in respect of landed property leased to them, contrary to sections 4 and 9(1) and (3) of PNDCL 150, could be continued after the repeal of the law, ie PNDCL 150, under which the trial had commenced.¹³⁷

It was argued for the Attorney-General that the criminal trial could continue by virtue of section 8(1)(e) of the Interpretation Act, 1960 (CA 4), which had the effect of preserving any pending legal proceedings or punishment under the repealed enactment. The Supreme Court held that the continued trial of the plaintiffs under the repealed enactment was unlawful. The court therefore ordered the discontinuance of the prosecution. The Supreme Court held that it had the constitutional duty to prevent timorously any breaches or even threatened breaches of the fundamental human rights of persons, who complained of such breaches or intended breaches in any matter before the court, especially in the case of the right to personal liberty, without which other rights could not be enjoyed to the fullest as intended under the Constitution. The words of Bamford-Addo JSC in the *British Airways case* (supra) must be quoted and underlined, namely:¹³⁸

case in the hint that it gave of judicial tolerance of impunity may have led to the abduction and murder of three judges and a retired army officer in the early 1980s.”

¹³⁷ Sections 4 and 9(1) and (3) of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150), created the offence of refusal to pay rent in convertible currency in respect of landed property. PNDCL 150 was subsequently repealed whilst the action was pending by the Statute Law Revision Act, 1996 (Act 516).

¹³⁸ [1996-97] SCGLR 547 at 553.

“It is my opinion that whenever in the course of any matter brought to this court, it is found that there exists in any lower court any matter which would in the long run result in injustice or in illegality, it is the duty of the court to at once intervene, and issue orders and directions, with a view to preventing such illegalities or injustice even before they occur.”

Bamford-Addo JSC also said in her opinion in support of the decision:¹³⁹

“It would be unfair and unjustified and an abdication of duty if this court in *a deserving case were to neglect to correct clear injustices and illegalities existing in lower courts*, and when relief is requested from the court. *No self-imposed limitation on our wide supervisory powers clearly granted by the Constitution, should be allowed to prevent us from exercising our powers in the supreme interest of justice; nor justice be sacrificed on the altar of technicalities.*”

Atuguba JSC, in his contribution to the decision, put the matter in a more forceful language, when he said:¹⁴⁰

“*In a compelling case, a court may take up judicial arms against an obvious injustice.* It is therefore not unknown that people who have never appealed against their convictions and sentences have been, in fitting cases, acquitted and discharged.”

¹³⁹ Ibid at 555 (emphasis is mine).

¹⁴⁰ Ibid at 565 (emphasis is mine).

In my view, the decision in *British Airways v Attorney-General* is one of the most outstanding contributions by the present Supreme Court to the enforcement of the rule of law which is indispensable in the promotion and sustenance of democracy in Ghana. The decision marks a major shift in policy from the Supreme Court's negative attitude to the promotion and enforcement of justice as exemplified by the decision in *Kwakyie v Attorney-General*, and also in *Fatal v Minister for the Internal Affairs*¹⁴¹ where Archer JSC said:

"This case prompts one to define the role of the Supreme Court when such matters come before it. Although SMCD 172 may appear unjust, unreasonable and even autocratic, yet it is not within the province of this court, to strike it down merely because it is unjust or unreasonable law. The days when the courts of law could embark upon such an exercise are over."

It should, however, be pointed out that, the courts, as a general principle, would not allow a party, be he the plaintiff or the defendant, to take an unfair advantage of a rule of law - statutory or otherwise - if it would be unjust to allow him to insist on his strict legal rights.¹⁴²

¹⁴¹ [1981] GLR 104 at 115. (The emphasis is mine). The plaintiffs in *Fattal v Minister for Internal Affairs* had acquired in 1973 Ghanaian citizenship by naturalisation under the Ghanaian Nationality Act, 1971 (Act 361). In 1978, the Government of the Supreme Military Council (SMC) enacted the Ghana Nationality (Amendment) Decree, 1978 (SCMD 172). The Decree revoked the acquired citizenship of the plaintiffs. They therefore sued in the Supreme Court established under the Constitution, 1979 for a declaration that SMCD 172 was a nullity because (i) it purported to revoke the citizenship of the plaintiffs without obtaining a judicial order of the High Court as required by Act 361; and (ii) the continued operation of SMCD 172 was inconsistent with the Constitution, 1979. The court held, inter alia, that although SMCD 172 was on the statute books as part of the existing law, it was no longer operative because whatever was intended to be done by the Decree, had been done and completed.

¹⁴² See the opinion of Atuguba JSC in *Nsiah v Amankwaah; Nsiah v Mansah (Consolidated)* [1988-99] SCGLR 131 at 137 citing in support of the general principle the dictum of Apaloo J (as he then was) in *Amankwa v Akwawuah* [1962] 1 GLR 324 at 326.

Thus in the case of *Djomoa v Amargyei*¹⁴³ cited by Apaloo J (as he then was), in *Amankwa v Akwawuah*,¹⁴⁴ the Supreme Court, in applying the principle, held that the defendant was estopped from relying on the cast-iron defence afforded him under the provisions of the Concessions Ordinance, Cap 136¹⁴⁵ because it would be improper, inequitable and unjust for him to do so.

It is suggested that even where it is proved conclusively that a person is entitled to a legal or equitable right to say, a piece of land, it is the duty of the Supreme Court not to grant to that person his legal or equitable right, if to do so would create injustice to or adversely affect another person. This principle of avoidance of injustice to a third party, was recognised by the Gambian Court of Appeal in *Wadda & Attorney-General v Kabba*.¹⁴⁶ The court found that the respondent was entitled to protection of equity by performing his obligation under a government lease, namely, by building a house on the land, valued at least twelve thousand and five hundred dalasis (D12,500) (local currency). However, the court held that he was not entitled to possession of the land trespassed upon by the appellant because to do so would be to “perpetrate injustice” to the appellant. The court found that the appellant had entered the disputed land and had erected substantial building valued, at least, four hundred and fifty-four dalasis (D454,000); that the entry was under a right of re-entry of the land for breach of covenant, exercised by the Gambian Government under section 19 of the Banjul and Kombo Saint Mary Act. In the words of Davies JA, the appellant: “had entered upon the land in the belief that he had a valid lease granted by the Minister who had lawfully re-entered the land and terminated the respondents possession.” The *Wadda* case involved a land dispute.

¹⁴³ [1961] GLR 170.

¹⁴⁴ [1962] 1 GLR 324 at 326.

¹⁴⁵ (1951) Rev.

¹⁴⁶ [1960-93] GR 349.

However, the principle laid down by the court, namely, the avoidance of injustice to third parties could be applied in resolving issues involving constitutional problems or litigation.

It is also suggested that the Supreme Court must strive to sustain its avowed policy to do and promote substantive and real justice by not insisting on the technicalities in the law. It is thus appropriate to underline the words of Atuguba JSC in *Nsiah v Amankwaah; Nsia v Mensah*:¹⁴⁷ “I would also dismiss [the] application, which is rooted ... in arid, puritanical, procedural fundamentalism.” It is equally appropriate to draw attention to the dictum of Sophia Akuffo JSC in *Okofoh Estates Ltd v Modern Signs Ltd*:¹⁴⁸

“Furthermore, as has been emphasised time and again by this court and other courts, it is the duty of courts to aim at doing substantive justice between the parties and not to let that aim be turned aside by technicalities.”¹⁴⁹

Second, the following words of Lord Denning must be emphasised, namely:¹⁵⁰

“... it is most important that the law should be just. People will respect rules of law which are intrinsically right and just, and will expect their neighbours to obey them, as

¹⁴⁷ [1998-99] SCGLR 132 at 140. See the famous dictum of Lord Penzance in the old case of *Combe v Edwards* (1878) LR 3PD 142 where he said: “The spirit of justice does not reside in formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice and inflexibility, which is the most unbecoming robe of law, often serves to render justice grotesque...”

¹⁴⁸ [1996-97] SCGLR 224 at 230.

¹⁴⁹ See also *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35 at 171 where Charles Hayfron-Benjamin JSC said: “This court has said times out of number that it will not allow technicalities to becloud or stultify the need to do justice to the parties appearing before it.”

¹⁵⁰ Lord Denning, *The Family Story*, Butterworths, London 1981 at page 183.

well of course as obeying the rules themselves: but they will not feel the same about rules which are unrighteous or unjust. If people are to feel a sense of obligation to the law, then the law must correspond, as near as may be, with justice.”¹⁵¹

The enforcement of the Constitution and delays in the delivery of justice

There is no doubt that the elaborate provisions in the Constitution, 1992 - guaranteeing the enjoyment of fundamental human rights and freedoms - would be rendered nugatory and ineffective unless constitutional claims and disputes are determined expeditiously. There is also no doubt that protracted and long delays in the delivery of judgments and rulings constitute a denial of justice, which is indispensable under a democratic system of government.¹⁵²

Regrettably, the problem of long delays in the hearing and disposal of cases has bedeviled the administration of law and justice in Ghana for a rather long time. Thus, in his Faculty of Law Anniversary Lecture,¹⁵³ the late Mr Justice A N E Amissah referred to one of the cases which had been pending in the courts for forty years and which he had to dispose of

¹⁵¹ See also *ibid* at page 181 where Lord Denning wrote: “When William Temple on one occasion went to address a gathering of lawyers at the Inns of Court he opened his remarks by saying, ‘I can’t say that I know much about the law, having been far more interested in justice.’ That was a piece of delicate irony directed at the lawyers present.”

¹⁵² Thus to the question: ‘How does the judiciary contribute to the development of democracy’ put to Mr Sam Okudzeto, the former Immediate Past President of the Ghana Bar Association, in an interview published in the February 1999 Newsletter of the Ghana Bar Association, he replied: “The Judiciary can contribute to the development of democracy by organising the judicial system to expedite cases as soon as it comes before it. The court should be organised to show the ordinary citizens that one can rely on the judiciary. (See *Newsletter of the Ghana Bar Association* Vol 1 No 3, February 1999).

¹⁵³ Entitled: “The Law, Lawyers, Litigants and Society” unpublished lecture delivered as part of the 50th Anniversary Celebrations of the University of Ghana, Legon, 1999.

expeditiously when he was first appointed to the Bench on 1 October 1966. It should also be mentioned that the late Chief Justice, Mr Justice I K Abban, on a number of occasions, spoke against undue delays in the administration of justice. Thus in his address delivered at the enrolment of thirteen newly qualified lawyers held on 26 February 1999, his Lordship said:

“Clients do not pay lawyers to go to court and ask for adjournments or make unnecessary and incessant interlocutory applications or file stay of execution in cases which do not merit appeal.”

The Chief Justice took the opportunity to remind the newly qualified lawyers that as officers of the court, they owed it as a duty to the profession and their clients to ensure that justice was expeditiously done and not delayed. That reminder should also be extended, with respect, to all the older members of the Bench and Bar with a view to ensuring that cases are disposed of expeditiously.

The question is: how do we ensure that cases, especially constitutional suits alleging violation of fundamental human rights, are disposed of expeditiously and without any undue delays? The truth of the matter is that there are inherent delays in the procedure and practice of the courts. Some of these were fully and adequately addressed by the late E D Kom.¹⁵⁴

However, the following suggestions may respectfully be made. Firstly as rightly observed by Kpegah JSC in his dissenting opinion in *Yeboah v J H Mensah*:¹⁵⁵ the “primary function of the Supreme Court is constitutional adjudication, and its special task one of promoting and safeguarding constitutional values.” In the light of this and more importantly, to promote and

¹⁵⁴ See E D Kom “Minimising Delays or Expediting Trial of Civil Cases” in *GBA Lectures in Continuing Legal Education 1993-94*, Bimpong-Buta (ed), Ghana Bar Association, 1997 at 197 et seq.

¹⁵⁵ [1998-99] SCGLR 492 at 513.

sustain the country's infant democracy, all available resources, human and logistical, are to be employed to hear, determine and dispose of all pending law suits without any further delay. In pursuance of this suggestion, a Special Constitutional Court Division of the Supreme Court may be created to hear and determine, as expeditiously as possible, all constitutional claims and disputes.

Second, the Rules of Court Committee should be reminded to make, as required of it, under article 33(4) of the Constitution, the long overdue rules of court regarding the practice and procedure of the superior courts relating to the enforcement of fundamental human rights and freedoms guaranteed under chapter 5 of the Constitution.¹⁵⁶ In this respect, attention should be drawn to what Charles Hayfron-Benjamin JSC said in his dissenting opinion from the majority decision in *Edusei v Attorney-General*.¹⁵⁷

¹⁵⁶ The Supreme Court Rules, 1996 (CI 16), made by the Rules of Court Committee on 11 September 1996 and gazetted on 27 September 1996, did not address the specific issue of practice and procedure relating to enforcement of Fundamental Human Rights. Happily, the new High Court (Civil Procedure) Rules, 2004 (CI 47), Order 67, made on 1 June 2004 provides for such procedure.

¹⁵⁷ [1996-97] SCGLR 1.

His lordship said:¹⁵⁸

“I am not aware that a little over three years since the coming into force of the Constitution, the Rules of Court Committee have complied with the provisions of article 33(4) of the Constitution. The High Court then even though has been invested with jurisdiction, there is no method whereby that court can be approached on human rights matters. I think that the policy reason behind the constitutional provision that the Rules of Court Committee should make rules with respect to the practice and procedure of the Superior Courts is to prevent human rights cases *being bogged down with the notoriously unnecessary adjournments and delay procedures, now encountered in the Superior Courts which will defeat the very purposes of Chapter 5 ... of the Constitution.*”

And third, there should be prompt delivery of judgments and rulings and the reasons thereof within the shortest possible time, preferably not more than one month, after conclusion of each case. The idea is to make the judgments and rulings readily available to the parties to the

¹⁵⁸ Ibid at p 19 (the emphasis is mine).

action and the general public on the same day or few days after delivery of same. The credibility and public perception of the courts as the fountain of justice would be enhanced by quick delivery of judgments.

It is in this respect that one should underline the decision of the Supreme Court in the case of *Boye-Doe v Teye*¹⁵⁹, relating to time for delivery of judgments and rulings by superior judges after attaining the compulsory retiring age. The Supreme Court in this case had to construe article 145 (2) and (4) of the Constitution, 1992 which provides:

"(2) A Justice of a Superior Court or a Chairman of a Regional Tribunal shall vacate his office —

(a) in the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years; or

(b) in the case of a Justice of the High Court or a Chairman of a Regional Tribunal, on attaining the age of sixty-five years; or

(c) *upon his removal from office in accordance with article 146 of this Constitution.*

(4) Notwithstanding that he has attained the age at which he is required by this article to vacate his office, a person holding office as Justice of a Superior Court or Chairman of a Regional Tribunal may continue in office for a period not exceeding six months after attaining that age, as may be necessary to enable him to deliver judgment or do any other thing in

¹⁵⁹ [2000] SCGLR 255 earlier examined in chapter 4 in discussing the issue of construing a national constitution as a document *sui generis* and not necessarily according to ordinary rules and presumptions of statutory interpretation.

relation to proceedings that were commenced before him previous to his attaining that age."

The *Boye-Doe* case came before the Supreme Court on appeal from the judgment of the Court of Appeal, which had affirmed the judgment of the trial High Court. The Supreme Court adjourned the case to 31 March 2000 for judgment after the conclusion of the arguments by counsel. However, before the delivery of the judgment, the Supreme Court, found on the evidence before it, that the trial High Court judge, who had been compulsorily retired under article 145(2), had not delivered her judgment in the case commenced before her within the stipulated time of six months as she was bound to do under article 145(4); and that the judgment of the retired judge, was, in fact, delivered two years after her retirement, by another sitting judge outside the constitutionally permissive period of six months.

Consequently, the Supreme Court, after giving counsel for the parties reasonable opportunity to be heard under rule 6(8) of the Supreme Court Rules, 1996 (CI 16), allowed the appeal and declared as a nullity the judgments of both the Court of Appeal and the High Court. Like the Supreme Court of Nigeria, which in *Ifezue v Mbadugha*¹⁶⁰ had to deal with a similar case of a judgment not having been delivered by the trial court within the time limits of three months after the conclusion of evidence and final addresses, the Ghana Supreme Court in *Boye-Doe v Teye*, set aside the judgments of both the Court of Appeal and the High Court and remitted the case to the High Court to be tried *de novo*. In so directing, the Supreme Court in *Boye-Doe v Teye*, held that the effect of article 145(2) and (4) of the Constitution, 1992 was that a retired superior court judge, who would otherwise have retired at the compulsory retiring age, would continue in office for a period not exceeding six months as might be necessary for him to deliver his judgment or to do any other thing in relation to the proceedings that had commenced before him prior to his retirement; that it was not the

¹⁶⁰ [1985] LRC (Const) 1141.

intention of the framers of the Constitution that a retiring judge should automatically continue for the maximum period of six months; the retiring judge might be given less than six months but any period given him should not exceed six months.

The Supreme Court's attitude to the enforcement of the statutory time limit for delivery of judgment and rulings by the High Court and lower courts is crucial to the policy of minimising, if not eliminating, delays in the delivery of judgment and hence in the delivery of justice under the Ghana legal system.

The statutory time limit for delivery of judgments in the High Court is governed by the High Court (Civil Procedure) Rules, 1954 (LN140A), as amended by the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107), Order 63, r 2A (1) – (7) which states:

"2A. (1) At the close of a case before it the Court shall fix a date, which shall not be later than six weeks after the close of that case, for the delivery of judgment thereon.

(2) It shall be the duty of the Court to deliver judgment as soon as possible after the close of each case before it, and in any event not later than six weeks after the close of any such case.

(3) For the purposes of this rule a case shall be deemed to be closed when the evidence has been given to the Court and the speeches subsequent thereto have been concluded.

(4) The times of the vacations in any year shall not be reckoned in the computation of the period of six weeks referred to in this rule.

(5) Where for any reason judgment has not been delivered within the period of six weeks referred to in the rule, the Court shall forthwith inform the Chief Justice in writing of that fact and shall state the reasons for the

delay in so delivering judgment and the date upon which it is proposed to deliver judgment.

(6) Where the judgment has not been delivered within the period of six weeks referred to in this rule, any party to the proceedings may in writing notify the Chief Justice of that fact and request that a date be fixed for the delivery of judgment.

(7) Upon receiving a notification from the Court or a party under paragraph (5) or (6) the Chief Justice may fix a date for the delivery of judgment by the Court and notify the Court accordingly, and it shall be the duty of such Court to ensure that judgment is delivered upon the date so fixed by the Chief Justice."

Special attention must be drawn to sub-rule (2) of rule 2A which states:

“(2) It shall be the duty of the Court to deliver judgment as soon as possible after the close of each case before it, and in any event not later than six weeks after the close of any such case.”

Rule 2A (2), as stated, simply means that “after the close of a case before” the High Court, it shall be the duty of the High Court to deliver its judgment “as soon as possible” but “not later than six weeks.” What is the true legal effect of rule 2A(2)? Should the rule be interpreted as mandatory or merely directory, ie purely administrative? If construed as mandatory, then any judgment delivered outside the statutory time limit or period, even for one day, will be void – a decision which would entail considerable inconvenience to the parties and their witnesses and increase the costs of litigation.

The Supreme Court of Ghana was called upon to construe rule 2A(2) in the case of *Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba*.¹⁶¹ This case involved a chieftaincy petition which was commenced before a chieftaincy tribunal, ie the Judicial Committee of the Central Regional House of Chiefs. The case related to a dispute over succession to a paramount stool. Hearing of the petition was concluded on 9 September 1996. Judgment was given on 23 September 1996 (with the reasons thereof reserved) by the chieftaincy tribunal in favour of the petitioners.

Before the tribunal could give its reasons for the judgment, the losing party, the respondents to the petition (hereinafter called the appellants), brought an application for certiorari in the High Court to quash the judgment. The ground for the application for certiorari was that the tribunal had failed to give its reasons simultaneously with the judgment contrary to the Chieftaincy (National and Regional Chiefs) Procedure Rules, 1972 (CI 27), rule 11 which stated that: “The Judicial Committee shall at the conclusion of the hearing of the petition deliver its judgment, giving reasons therefor.” However, before the High Court could give its decision in respect of the application for certiorari, the chieftaincy tribunal gave on 3 December 1996, its reasons for its judgment given on 23 September 1996. In effect, the regional chieftaincy tribunal gave the reasons for the judgment twelve weeks after the conclusion of the hearing of the petition on 9 September 1996.

Subsequently, on 22 September 1997, the High Court dismissed the application for certiorari. The High Court held that, contrary to the argument of counsel for the appellants, the chieftaincy tribunal had no mandatory duty to deliver its reasons for

¹⁶¹ [2001-2002] SCGLR 545.

the judgment simultaneously with the judgment; and that the tribunal was entitled to give its reasons after the delivery of the judgment.

The appellant appealed to the Court of Appeal from the decision of the High Court. However, the Court of Appeal dismissed the appeal, affirming the decision of the High Court, that rule 11 of CI 27 did not impose a mandatory duty on the chieftaincy tribunal to give its reasons simultaneously with its judgment. The Court of Appeal, however, went on to hold that by virtue of rule 28 of the same CI 27, ie the Chieftaincy (National and Regional Houses of Chiefs) Procedure Rules, 1972 the chieftaincy tribunal, namely, the judicial committee of the regional chieftaincy tribunal, was enjoined “to follow the practice and procedure prevailing in the High Court whereby six weeks is imposed by law as the period within which judgment shall be delivered.”

The practice and procedure rules of the High Court referred to by rule 28 of CI 27, was rule 2A of the High Court (Civil Procedure) Rules, 1954 (LN 140A), as amended by the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107), fully set out above. However, Court of Appeal simply did not apply to the appeal before it, the statutory limit of six weeks for delivery of judgment after conclusion of a case. In effect, the Court of Appeal failed to consider the effect of non-compliance with the requirement of six weeks limitation period within which the chieftaincy tribunal should have given its judgment and the reasons thereof.

The appellants therefore appealed to Supreme Court from the decision of the Court of Appeal on the ground, inter alia, that the Court of Appeal had misconstrued rule 11 of CI 27 by holding that the chieftaincy tribunal had no mandatory duty to deliver its reasons simultaneously with its judgment.

However, the appeal before the Supreme Court turned on a more important and crucial issue: the true legal effect of rule 2A(2) of Order 63 of the High Court rules, which provides for a statutory limit of six weeks for delivery of a judgment after the conclusion of a case. Is the rule mandatory or merely directory, ie purely administrative? The issue before the Supreme Court in the instant case of the *Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba* was clearly stated by Kpegah JSC in his opinion in support of the decision of the court as follows:¹⁶²

“[T]his is the first time this court is being called upon, as the highest court, to give an authoritative interpretation of the rule, rule 2A(2) of Order 63 and to determine its applicability to proceedings before chieftaincy tribunals. *The seismic effect of such decision on the judicial landscape must be obvious...*”

The Supreme Court unanimously held that the Court of Appeal had rightly construed rule 11 of CI 27 as meaning simply that the judicial committee of the regional house of chiefs should deliver its judgment after the conclusion of the hearing of the chieftaincy petition involving the parties; that the tribunal was not required to give its reasons immediately, ie simultaneously with its judgment. The reasons could be given later.

The Supreme Court, however, held that the judicial committee, ie the chieftaincy tribunal was, by operation of law, namely, rule 28 of CI 27, required to give its judgment within the statutory time limit of six weeks under rule 2A(2) of Order 63 as amended by LI 1107. The Supreme Court therefore held that the judicial committee of the regional house of chiefs was required to give its reasons for its decision given on 23 September 1996 within six weeks

¹⁶² [2001-2002] SCGLR 545 at 575 (the emphasis is mine.)

from 9 September 1996 when the hearing of the case was concluded, namely, on or before 21 October 1996. The Supreme Court found that the delivery of the reasons on 3 December 1996 by the chieftaincy tribunal, ie the judicial committee of the regional house of chiefs, was well outside the limitation period of six weeks as laid down by rule 2A(2) of Order 63 as amended by LI 1107.

The Supreme Court went on to hold that rule 2A of Order 63 as amended by LI 1107 was mandatory and not directory or “purely administrative”; that the rule was aimed at securing the delivery of judgments within six weeks, giving no discretion to the trial court to do so within reasonable time as had been the case before; that any judgment delivered outside the mandatory six weeks period without extension by the Chief Justice, would be a nullity. The Supreme Court therefore concluded that the reasons given by the judicial committee of the regional house of chiefs on 3 December 1996, outside the six weeks statutory period were invalid and thereby rendered null and void its judgment given on 23 September 1996.

In so holding, the Supreme Court cited its previous decision in *Boye-Doe v Teye*¹⁶³ and criticised as wrongly decided the Court of Appeal decision in *PS International Ltd v Godka Group of Companies*,¹⁶⁴ which had held that rule 2A(2) of Order 63 was merely directory and not mandatory. In his opinion in support of the unanimous decision of the Supreme Court, Kpegah JSC said:¹⁶⁵

“I have no doubt in my mind that the framers of our rule 2A of LI 1107 intended the rule to be binding on the courts because of the obvious reason that the courts

¹⁶³ [2000] SCGLR 255 examined in detail above. The court also considered the decision of the Supreme Court of Nigeria in *Ifezue v Mbadugha* [1984] NSCC 314.

¹⁶⁴ Court of Appeal, Civil Appeal No 27/98, 15 April 1999 unreported.

¹⁶⁵ [2001-2002] SCGLR 545 at 587-588.

have often inflicted on parties interminable delays in the delivery of judgments. It is the same thing as justice being delayed, which is usually referred to as a denial of justice.”

However, exactly a year after its decision in *Ex parte Aaba*, the Supreme Court was called upon in the case of *Republic v High Court, Accra; Ex parte Expendable Polystyrene Products Ltd*,¹⁶⁶ to revisit and depart from its previous decision in *Ex parte Aaba*.

The applicant in this case, was the defendant in an action instituted by the respondent in the High Court for, inter alia, damages for breach of contract. As of 28 January 2000, the parties had filed their addresses after the hearing of evidence in the case. The case was adjourned for judgment by the trial High Court. Judgment in favour of the respondent was not delivered until almost two years later, ie on 25 January 2002.

Consequently, the applicant brought the instant application in the Supreme Court for an order of certiorari to quash the judgment on the ground that it had not been delivered within the statutory time limit of six weeks as required by sub-rules (1)-(3) of rule 2A of Order 63 of LN 140A as amended by LI 1107. Counsel for the applicant sought to rely on the Supreme Court’s previous decision in *Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba* (supra). However, counsel for the respondent urged the court to depart from its previous decision in terms of article 129(3) of the Constitution, 1992.¹⁶⁷

¹⁶⁶ [2001-2002] SCGLR 749.

¹⁶⁷ Article 129(3) provides that: “The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.”

The Supreme Court unanimously decided to depart from its previous decision in *Ex parte Aaba* on the ground that, that decision was given *per incuriam* having regard to the provision in rule 2A of Order 63, read together with that in article 157(3) of the Constitution, 1992. The said article 157(3) states that:

“157. (3) Without prejudice to clause (2) of this article, no person sitting in a Superior Court for the determination of any cause or matter shall, having heard the arguments of the parties to that cause or matter and before judgment is delivered, withdraw as a member of the court or tribunal, or as a member of panel determining that cause or matter, nor shall that person become *functus officio* in respect of that cause or matter, until judgment is delivered.”

The Supreme Court thus held that rule 2A of Order 63 as inserted by LI 1107 could not be interpreted to make a delayed judgment null and void because such an interpretation would be in conflict rather than in conformity with article 157(3) of the Constitution, 1992. It was therefore held that a judge who had failed to deliver judgment within six weeks after the close of the case, did not cease to have jurisdiction over the case or become incompetent or *functus officio*. In explaining the interpretation placed on rule 2A of Order 63, Afreh JSC said:¹⁶⁸

“In the case of *Ex parte Aaba* (supra), this court decided that a judgment delivered by a High Court Judge or the judicial committee of a regional house of chiefs more than six weeks after the close of the case was null and void because in the view of the court, the requirements of rule 2A of Order 63 were mandatory. But in that case, the attention of the court was not drawn to article 157(3) of the Constitution, 1992. I am sure if the court’s

¹⁶⁸ Ibid at 759.

attention had been drawn to it, its decision would have been different. The decision in *Ex parte Aaba* was ... made *per incuriam* and therefore does not create a binding precedent.”

It must be observed, however, that in his opinion in *Ex parte Expendable Polystyrene Products Ltd*, Afreh JSC stressed (Adjabeng JSC concurring) that the decision must not be taken to mean that the court had declared rule 2A of Order 63 as unconstitutional. In the words of Afreh JSC:¹⁶⁹

“It is only when rule 2A is interpreted as imposing mandatory requirements, which would render any judgment given more than six weeks after the close of a case null and void, that the rule becomes unconstitutional. If the requirements *are regarded as directory* only, it is perfectly consistent with article 157(3).”

It is interesting to point out that the Supreme Court was called upon in the recent case of *Republic v High Court, Koforidua; Ex parte Eastern Regional Development Corporation*,¹⁷⁰

¹⁶⁹ Ibid (emphasis is mine).

¹⁷⁰ [2003-2004] SCGLR 21.

to re-visit the question of the true legal effect of rule 2A(1) and (2). In doing so, the court demonstrated that it would not allow the application of rules of procedure to cause injustice in any particular case.

In the *Ex parte Eastern Regional Development Corporation* (supra), the defendants-applicants brought an application in the Supreme Court for an order of certiorari to quash the judgment of the High Court given in favour of the plaintiff-respondents on the ground that the judgment had been given without complying with rule 2A(1) and (2) of Order 63 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), as amended by the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107). It would be recalled that the said rule 2A(1) and (2) of Order 63, had been the subject-matter of interpretation in the earlier cases of *Ex parte Aaba* (supra) and *Ex parte Polystyrene Products Ltd* case (supra).

There was no dispute in the case of *Ex parte Eastern Regional Development Corporation* case that the judgment in question, delivered by the High Court on 28 September 2001, had been delivered more than six weeks after the close of the case and the submission of the final addresses by counsel. However, the applicants relied on the earlier decision of the Supreme Court in the case of *Republic v Judicial Committee of the Central Regional House of Chiefs; ex parte Aaba*.¹⁷¹ As earlier pointed out, the Supreme Court had unanimously held in this case that any judgment delivered outside the period of six weeks as provided by Order 63, rule 2A(1) and (2) was invalid and a nullity. Regrettably, counsel for the applicants in *Ex parte Eastern Regional Development Corporation* case, did not know that the decision in *Ex parte Aaba*, upon which he relied, had, in fact, been declared by the Supreme Court, in the subsequent case of *Ex parte Expendable Polystyrene Products Ltd* case, as a *per incuriam* decision in the light of the provision in article 157(3) of the Constitution, 1992.

¹⁷¹ [2001-2002] SCGLR 545.

In any case, faced with the provisions in rule 2A(1) and (2) of Order 63 of LN 140A, as amended by LI 1107 and construed by the court in its earlier decision in *Ex parte Aaba*, the Supreme Court in the instant case of *Ex parte Eastern Regional Development Corporation*, refused, by a majority decision of four to one,¹⁷² to follow the decision in *Ex parte Aaba*. The court thus dismissed the application for certiorari on the ground that the decision in *Ex parte Aaba* had been given *per curiam*, namely, without reference again, to the provision in article 157(3) of the Constitution, 1992. As already pointed out, the Supreme Court had, in *Republic v High Court, Accra; Ex parte Expendable Polystyrene Products Ltd*¹⁷³ reached the same conclusion.

More importantly, in her opinion in support of the majority decision in *Ex parte Eastern Regional Development Corporation*, Sophia Akuffo JSC, recognised the three characteristics of civil procedural law, namely, its complementary, protective and remedial or practical character. Having made that recognition, the judge said:¹⁷⁴

“In its complementary character, civil procedure functions as a vehicle for the actualisation of substantive law and this role has been likened to that of ‘a handmaid rather than a mistress’ which must not be applied in such a hard and fast manner as to cause injustice in any particular case (see *In re Coles & Ravenshear* [1907] 1 KB 1 at 4 per Collins MR). In its protective character, rules of procedure promote order, regularity, predictability and transparency which are essential for the assurance of due process in the

¹⁷² Per Edward Wiredu CJ, Acquah, Atuguba and Sophia Akuffo JJSC – Ampiah JSC dissenting.

¹⁷³ [2001-2002] SCGLR 749. For similar conclusion: see *Godka Group of Companies v P S International Ltd* [2001-2002] SCGLR 918.

delivery of justice and judicial effectiveness. In its remedial or practical character, rules of procedure serve the purpose of facilitating the sound management of litigation and process efficiency. It is these basic characteristics of civil procedure rules that facilitate the realisation of the overall objective of the judiciary, *which is to assure access to justice for all.*¹⁷⁵

In the light of the above noted characteristics of rules of procedure, Sophia Akuffo JSC in *Ex parte Eastern Regional Development Corporation* (supra), was of the view that in the application of any procedural rule, it was often necessary for the court to take into account the function of that particular rule and the objective it was intended to serve. Having so observed Sophia Akuffo JSC continued:¹⁷⁶

¹⁷⁴ [2003-2004] SCGLR 21 at 47.

¹⁷⁵ The emphasis is mine. On the question of the rules of procedure being the handmaid of justice: see *Real Estates Developers Ltd v Fosua* [1984-86] 2 GLR 334 at 340 where Sowah JSC said: “Speaking for myself, I would observe *that these rules are ordained to be a handmaid of justice and unless counsel can demonstrate from the record that his client has suffered real or substantial justice by reason of non-compliance, I would not suffer it to have any effect on the appeal.*” (The emphasis is mine).

¹⁷⁶ Ibid (the emphasis is mine).

“The function of rule 2A of LI 1107 is to regulate the time for the delivery of judgments; and the objective is to assure that judgments are delivered with the least delay after the close of litigation in the High Court, so that parties might proceed with the ordering of their lives. In other words, once parties have completed their respective parts in the litigation, with the delivery of their closing arguments, it is the duty of the judge (pursuant to the rule) to ensure that he delivers his judgment therein within the time stipulated. *In character, therefore, these provisions serve to protect the rightful interest of parties (as well as the social interest) in timely and efficient delivery of justice, since justice delayed is justice denied.*”¹⁷⁷

There is no doubt that the decisions of the Supreme Court in *Boye-Doe v Teye* and the subsequent decisions in *Ex parte Expendable Polystyrene Products Ltd* and *Ex parte Eastern Regional Development Corporation* have clarified the law governing the delivery of judgments by the superior court judges when the judges, fail to deliver judgment within the statutory time limits. As noted by Afreh JSC in *Ex parte Expendable Polystyrene Products Ltd*.¹⁷⁸

“These requirements [in rule 2A of Order 63] are for the benefit of parties to causes and matters in the superior courts... to ensure that judges deliver

¹⁷⁷ See also the earlier decision of the Supreme Court in *Okyere v The Republic* [2001-2002] SCGLR 833 where the court per Adzoe JSC at page 844 said: “Rules of procedure must accord with the principles of natural justice. And the court must not merely require judicial bodies to comply with procedure prescribed for them by the statute which creates them; but must go further and insist that they keep faith with those procedural safeguards, that general practice and our accepted notions of justice dictate as necessary for the attainment of fairness.”

¹⁷⁸ [2001-2002] SCGLR 749 at 761.

judgments expeditiously. Any interpretation of these provisions which may deprive them of these benefits could not have been intended by the legislature.”

It is hoped that the pronouncements and decisions of the Supreme Court in the cases discussed above, would assist in the effective enforcement of the Constitution and help address delays in the delivery of justice.

Enforcement of the Constitution and the question of accrued rights

The relevant statutory provisions governing accrued rights are to be found in sections 8(1)(c) and 9(c) of the Interpretation Act, 1960 (CA 4). Thus section 8(1)(c) provides that a right acquired or accrued under the repealed enactment shall not be affected by the repealing enactment. And section 9(c) provides that:¹⁷⁹ "all proceedings taken under the repealed or revoked enactment shall be prosecuted or *continued under and in conformity with the substituted enactment, so far as consistently may be.*" The combined effect of sections 8(1)(c) and 9(c) with regard to pending proceedings, may, in the light of the decided cases, be stated thus: When the substantive law is altered by an enactment whilst an action is pending, the rights and obligations of the parties are to be decided in accordance with the law as it existed at the commencement of the action unless the new enactment shows a clear intention to vary such rights. However, subject to further developments in the law as examined below, the general rule is that where the new enactment effects alterations in the law as to procedure and practice of the courts, the provisions of the new enactment are to affect actions commenced before and after the commencement of the new enactment.¹⁸⁰

¹⁷⁹ My emphasis.

¹⁸⁰ See *Carson v Carson* [1964] 1 WLR 511; *Jivrag v Devrag* [1968] EA 263; *CFAO v Thome* [1966] GLR 107; *Dochie v The State* [1965] GLR 208; *Mena v The Republic* [1977] 1 GLR 346, CA; *Kramo v Afriyie* [1973] 1 GLR 95 and dictum of Lord Denning in *Attorney-General v Vernazza* [1960] AC 965 at 978.

Thus in English case of *Carson v Carson*,¹⁸¹ the parties H and W were married in 1953 in England. In 1958 W left H for United States where she lived with another man as husband and wife and thus became pregnant by that man. In 1961, however, W agreed to return to England with H. The couple once again lived as husband and wife. They shared the same bed but indulged in no sexual intercourse - all sexual advances were in fact rejected by W. In September 1962, W again left the matrimonial house and thus deserted H who subsequently sued for divorce on grounds of adultery. H in May 1963, filed a supplementary petition - alleging that the wife had deserted him and that even if he had condoned the earlier adultery committed by W, it had been revived by the 1962 desertion. However, in July 1963, whilst the action was pending, the Matrimonial Causes Act, 1963 was enacted. Section 3 thereof provided that "Adultery which has been condoned shall not be capable of being revived." The issue was whether even if H had condoned W's adultery, it could in law be revived in the light of the provision in section 3 of the 1963 Act. It was held by Scarman J (granting the petition for divorce), that the effect of the 1963 Matrimonial Causes Act was to effect an alteration in the substantive law; that since the Act had not expressly or by clear implication made the section retrospective, it would not retrospectively affect rights that had accrued before its enactment; and that since the conduct of W, constituting the revival of the condoned adultery took place before 1963, H had, before then, an accrued right to divorce. In so holding, Scarman J said:¹⁸²

“... the section that I am considering is not one which deals with adjectival law ... It is a section which has effected an alteration in the substantive law ... In the year 1962 ... the husband had ... an accrued right to divorce the wife upon the ground of the adultery which he had condoned but which was then revived. Then a year later came the passing of the Act. There is nothing in the language of the section,

¹⁸¹ [1964] 1 WLR 511.

¹⁸² Ibid at 518.

nothing in the statute read as a whole, which compels me to the view that Parliament, by section 3, intended to interfere with that accrued right.”

It must be further noted that the court, in an *obiter*, held that in considering the operation of the repealing enactment, ie section 3 of the 1963 Act, the date of the filing of the petition was immaterial. In the words of Scarman J:¹⁸³ "What is clear is that the right to seek a divorce must have accrued before the passing of the Act."

On the question of the change in the law as to the practice and procedure of the courts, we may cite the decision of the Ghana Court of Appeal in *Mena v The Republic*.¹⁸⁴ The appellant in this case was summarily tried and convicted on 29 June 1972 for the offence of robbery allegedly committed on 22 March 1971. Whilst the proceedings were pending and before the date of conviction, a new law, the Suppression of Robbery Decree, 1972 (NRCD 11) was enacted. Section 2 of the Decree which increased the penalty for robbery provided:

“Notwithstanding the provisions of section 49 of the Code and section 296 of the Criminal Procedure Code, 1960 (Act 30), where a person is convicted of the offence of robbery the Court shall impose on him a sentence of death or life imprisonment and no less.”

The appellant was sentenced to life imprisonment by virtue of NRCD 11, s 2. His appeal to the High Court against sentence was dismissed. On a further appeal to the Court of Appeal, he contended that the trial court had erred in applying to him the punishment laid down in NRCD 11, s 2 because the offence of robbery, allegedly committed by him, had taken place before the enactment of NRCD 11. The appeal was dismissed - the court holding that it was clear from

¹⁸³ Ibid at 519.

¹⁸⁴ [1977] 1 GLR 346, CA.

the provision of NRCD 11, s 2 that the principal object and effect underlying its enactment were mainly procedural. That the Decree was intended to be applied retrospectively to acts of robbery committed at any time before or after the coming into operation of the Decree; and that in the circumstances, his sentence to imprisonment for life was proper.¹⁸⁵ The Court of Appeal in *Mena v The Republic* in effect decided that the imposition of increased penalties for offences during the pendency of criminal proceedings before any court would constitute a procedural as opposed to a substantive change in the law - having both prospective and retrospective effect.

It must be pointed out that the rule that alterations in the existing law as to procedure and practice of the courts are to be applied both prospectively and retrospectively to affect all pending claims, as decided by *Mena v The Republic*, no longer represents the true state of the law on accrued rights in Ghana. There have been further developments in the law in that regard following the Ghana Supreme Court's decision in *Republic v High Court Kumasi; Ex parte Abubakari (No 1)*¹⁸⁶; and also the Privy Council decision in *Yew Bon Tew alias Yong Boon Tiew v Kendaraan Bas Mara*.¹⁸⁷

The facts in the Ghana Supreme Court case of *Ex parte Abukarari (No 1)* (supra), were as follows. On July 1996, the High Court, Kumasi gave a judgment in favour of the plaintiff, the respondent in the instant proceedings before the Supreme Court. Subsequently, on 10 December 1996, the defendant in the High Court, ie the applicant in the instant proceedings,

¹⁸⁵ Contrast the decision of the High Court in *Kramo v Afriyie* [1973] 1 GLR 95 where the rule in section 8(1)(b) of CA 4 that the repeal of the enactment shall not affect the previous operation of the repealed legislation was applied in preference to the rule that procedural enactment such as Act 372, s 19 must be applied retrospectively to affect pending actions.

¹⁸⁶ [1998-99] SCGLR 84.

¹⁸⁷ [1983] 1 AC 553, PC.

brought an action in the Supreme Court for an order of certiorari to quash the judgment of the High Court delivered on 31 July 1996 for want of jurisdiction.

The respondent raised a preliminary objection to the application on the ground that the application was filed out of time and could not be entertained because under rule 62 of the Supreme Court Rules, 1996 (CI 16), the applicant had no more than three months from the date of the judgment within which to invoke the Supreme Court's supervisory jurisdiction; that no party had vested interest in procedure and that all that a party had to do was to comply with any changes for the time being, in the procedure of the courts.

It is very interesting to note that in the course of the hearing of the preliminary objection, the Supreme Court drew the attention of counsel for the respondent, who raised the preliminary objection, to the fact that as of 31 July 1996 when the judgment of the High Court was delivered, section 121 of the Courts Act, 1993 (Act 459), was in force and therefore the previous practice and procedure rules, ie the Supreme Court Rules, 1970 (CI 13), should be the law in force and that, if at all, the applicant's rights with respect to the procedure to be adopted had crystallised. Nevertheless, counsel for the respondent contended that CI 16, having come into force on 11 September 1996, there had been non-compliance with the rules and that the applicant should have sought for an extension of time to apply for the order of certiorari as required by rule 62 of CI 16.

The Supreme Court unanimously dismissed the preliminary objection and granted the applicant extension of time to bring the application. The court held that when there was a right of appeal, such a right, unless statutorily barred, would crystallise on the date of judgment; and that a subsequent change in the procedure for exercising such a right would not affect the old procedure unless such subsequent procedure was made to operate retrospectively. The court held that similar considerations must apply to the articles of the Constitution, 1992 dealing with prerogative writs, ie articles 132 and 161 and also article 133 dealing with application for

review. The Supreme Court further held that the new Supreme Court Rules, 1996 (CI 16), had revoked the old Supreme Court Rules, 1970 (CI 13), simpliciter and did not by any means make the provisions of the former retrospective in operation. Consequently, rights acquired under the previous procedural rules and practice, would not be affected by the change in procedure.

In so holding, the Ghana Supreme Court cited with approval the dictum of Macnaughten J in the Privy Council case of *Colonial Sugar Refining Co Ltd v Irving*.¹⁸⁸

“The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? ... To deprive a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known existing principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.”

It must be observed that the attention of the Ghana Supreme Court in *Ex parte Abubakari (No 1)* (supra), was not drawn to the more recent decision of the Privy Council, which was in accord with its own decision, namely, the case of *Yew Bon Tew alias Yong Boon Tiew*¹⁸⁹ earlier referred to. The Privy Council had upheld the decision of the Federal Court of Malaysia

¹⁸⁸ [1905] AC 369 at 372.

¹⁸⁹ [1983] 1 AC 553, PC.

and dismissed the appeal brought before it. The Privy Council held that where a defendant had acquired an entitlement to plead a time bar, that entitlement would constitute an accrued right, which was protected by section 30(1)(b) of the Malaysia Interpretation Act, 1967; and that any later legislation providing for a longer limitation period (whether or not the legislation was to be classified as procedural) was not to be construed retrospectively so as to deprive the defendant of his defence unless such a construction was unavoidable on the language used; and that, accordingly, since on 5 April 1973, the defendant had an accrued right to plead that the plaintiff's action was barred by the old 1948 Ordinance; and since the new Act of 1974 could not be construed as depriving a defendant of a limitation defence, which he already possessed, the Act did not operate retrospectively and the action remained statute-barred. In throwing more light on the decision of the Privy Council, Lord Brightman said:¹⁹⁰

“Apart from the provisions of the Interpretation Act, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used... There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But expressions ‘retrospective’ and ‘procedural’ though useful in a particular context, are equivocal and can be misleading... A statute which is retrospective in relation to one aspect of a case... may at the same time be prospective in relation to another aspect of the same case...; and an Act which is procedural in one sense may in particular circumstances do far more

¹⁹⁰ Ibid at 558 (my emphasis).

than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.”

Later, in the course of his judgment, Lord Brightman continued:¹⁹¹

“Whether a statute has retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive...”

Their Lordships consider that the proper approach to the construction of the [new] Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations...

*In their Lordships’ view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.”*¹⁹²

In the light of the above decisions by the Ghana Supreme Court in *Ex parte Abubakari* (No 1), and of the Privy Council in *Yew Bon Tew* case¹⁹³ - both relating to accrued rights – the

¹⁹¹ Ibid at pp 562-563 (my emphasis).

¹⁹² Decision of the Privy Council in *Yew Bon Tew* was applied by The Gambian Court of Appeal in *Taal v Jallow* [1997-2001] GR 670. See also The Gambian Supreme Court decision in *Sabally v Inspector-General of Police* [1997-2001] GR 878; and *Sait Boye v Baldeh* [1997-2001] GR 861 on the question of accrued right.

¹⁹³ It is to be noted that decisions of the UK Privy Council is of persuasive effect only in Ghana under the Ghana Legal System discussed in chapter 2. See also article 129(3) of 1992 Constitution which states that: “The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.”

decision of the Ghana Court of Appeal in *Mena v The Republic* appears to have been seriously doubted, if not impliedly overturned. In any case the decision in *Mena v The Republic*, as an existing law, on the coming into force of the Constitution, 1992 is no longer good law. It offends against article 19(6) of the Constitution, 1992 which provides:

“19(6) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.”

Whatever the rationale for the change in the law as effected by article 19(6) of the Constitution, it seems clear that it has serious implications for the administration of criminal justice in terms of the felt need for an increase in punishment for grave crimes such as rape and robbery. An accused person convicted of, say, robbery (such as the appellant in the *Mena Case*) might appeal against his sentence of five years' imprisonment for robbery. Suppose that whilst the appeal against sentence is pending, a new law is enacted increasing punishment for robbery, to a mandatory punishment of death by hanging. In the light of the new constitutional provision in article 19(6), the appellant cannot be sentenced to death. However, another accused person, subsequently brought before the same court for the same offence of robbery after the promulgation of the new law but at the same time as the pending appeal proceedings against sentence, would, if convicted, be sentenced to the enhanced penalty of death for robbery. That would certainly not bring about consistency in application of the law in respect of punishment for the same offence. Besides, it would encourage criminals like the appellant in the *Mena* case to commit more offences after considering the existing laid down punishments for such offences as not deterrent enough. It is, however, conceded that such offences, if committed after the new law would be punished according to the provisions of the new law. It is suggested that the necessary steps be taken by the Attorney-General to have a second look at article 19(6) of the Constitution. Pending this suggested review, one would assume that article 19(6) expresses the feelings of the Ghanaian public in confirming the position of the common law – a

reaction against retrospective effect of laws. It is submitted that the *Mena* decision is bad law and policy.

In the light of the existing law on accrued rights as discussed above, what is the legal effect of the provisions in article 107 of the Constitution, 1992 which provides:

“107. Parliament shall have no power to pass any law -

(a) to alter the decision or judgment of any court as between the parties subject to that decision or judgment; or

(b) which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 to 182 of this Constitution.”

Article 107(a) and (b) of the Constitution, 1992 is an elaboration of the analogous provision in article 89 of the Constitution, 1979. Article 107 (a) in effect prohibits the passing of an enactment which has the effect of a "legislative judgment." That is the phrase used in article 89 of the Constitution, 1979. A good example of such a legislative judgment was section 60 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (PNDCL 42),¹⁹⁴ which provided that: "Notwithstanding any law to the contrary, the Ghana Nationality (Amendment) Decree, 1979 (AFRCD 42) shall be deemed to have come into effect on the 4th day of September 1979."

¹⁹⁴ PNDCL 42 was repealed by section 36(1) of the transitional provisions of the Constitution, 1992.

The effect of section 60 was, in effect, to nullify the majority decision of the Supreme Court in *Mekkaoui v Minister of Internal Affairs*.¹⁹⁵ That decision allowed the plaintiffs' claim that the Ghana Nationality (Amendment) Decree, 1979 (AFRCD 42), which sought to deprive them of their acquired Ghanaian citizenship by naturalisation under the Ghana Nationality Act, 1971 (Act 361) was null and void and of no legal consequence for want of commencement date as required by section 3(7) of the Armed Forces Revolutionary Council (Establishment) Proclamation, 1979.

In arriving at its decision in *Mekkaoui v Minister of Internal Affairs*, the Supreme Court found that section 3(7) of the AFRC Proclamation, 1979 had provided that where the date of commencement had been stated in the Decree, then it should take effect from that date; but where no date had been stated, then it should take effect from the date of publication. The court found, on the evidence, that the insertion of the date of commencement was made after the Constitution, 1979 had come into force. The court also found that the date of notification of AFRCD 42 in the *gazette* was stated as 22 September 1979 whereas in fact AFRCD 42 was published in the *gazette* in October 1979. The Supreme Court therefore held that what was published as AFRCD 42 in October 1979 was null and void and of no legal consequence.

The statement of the law as pronounced by the Supreme Court in favour of the plaintiffs in the *Mekkaoui* case, was retrospectively affected by the subsequent enactment of section 60 of PNDCL 42. As earlier pointed out, section 60 of the Decree, in effect, retrospectively took away the rights of the plaintiffs as pronounced by the Supreme Court in the *Mekkaoui* case. The effect of article 107(a) of the Constitution, 1992 is to prohibit the kind of legislation such as section 60 of AFRCD 42. Such legislation undermines the credibility of the courts as the final arbiter of disputes not only between individuals but also between the individual and the State.

¹⁹⁵ [1981] GLR 664, SC.

There is no doubt that the Supreme Court, in light of its previous decision in the *Mekkaoui* case, would pronounce any future legislation, such as section 60 of AFRCD 42, as a nullity and unenforceable with a view to enforcing the provision in article 107(a) of the Constitution, 1992.

It must be underlined that the prohibition against retroactive legislation does not, under article 107(b), extend to legislation enacted under articles 178 to 182 of the Constitution, namely, legislation dealing with: (1) withdrawal of moneys from the Consolidated Fund (article 178); (ii) authorisation of expenditure (article 179); (iii) expenditure in advance of the enactment of the Appropriation Act (Article 180); (iv) loans (article 181) and (v) public debt (article 182).

Under article 107(b), any legislation which retroactively "adversely affects the personal rights and liberties of any person" or "impose a burden obligation, or liability on any person" is void. It appears the effect of article 107(b) is to do away with the distinction clearly drawn by the courts between legislation which seeks to effect a change in the law as to practice and procedure of the courts and that which seeks to effect a change in the substantive rights and obligations of a person as discussed above.

It seems to me that given the plain and ordinary meaning of the words used in article 107(b), the words "personal rights and liberties of any person" may be construed as including both the substantive and procedural rights of a person. If that is conceded, then it could be argued that 107(b) may be construed as all-embracing, namely, that it prohibits retroactive legislation which affects both the substantive and procedural rights of any person.

The provision in article 107(a) and (b) of the Constitution of Ghana, 1992 may be compared and contrasted with the analogous provision in section 100(2)(c) of The Gambian Constitution, 1997 which states:

“100(2) The National Assembly shall have no power to pass a Bill –

- (a) to alter the decision or judgment of a court in any proceedings to the prejudice of any party to those proceedings, or deprive any person retroactively of vested or acquired rights, but subject thereto, the National Assembly may pass Bills designed to have retroactive effect.”

Given the Ghana and The Gambia formulation, ie article 107(a) and (b) of the Ghana Constitution, 1992 and section 100(2)(c) of The Gambian Constitution, 1997 it could be said that both Constitutions first, prohibit and frown upon “legislative judgment, ie enactments which have the effect of altering the decision or judgment of any court so as to adversely affect the rights of the parties to the judgment or court proceedings. Second, both Constitutions prohibit and frown upon enactments which retroactively affect the acquired or accrued rights of a person. The wording in the Ghana formulation which may be said to have that effect is (as stated in article 107(b)) namely, a law which “adversely affects the personal rights and liberties of any person or to impose a burden obligation or liability on any person.”

The Gambian formulation in section 100(2)(c) is put in much clearer terms: the prohibition of a Bill to “deprive any person retroactively of vested or acquired rights.” Third, The Gambian formulation does not impose a total ban on retroactive legislation because there is a proviso to section 100(2)(c), namely, “but subject thereto, the National Assembly may pass Bills designed to have retroactive effect.” This appears to mean that so long as a retroactive enactment does not adversely affect the rights of a person, Parliament may pass a retroactive Bill. However, under the Ghana formulation as stated in article 107, Parliament have no power to enact any legislation having retroactive effect in any form whatsoever.

The true effect of section 100(2)(c) of The Gambian Constitution, 1997 was considered by The Gambian Supreme Court in *Sabally v Inspector-General of Police*.¹⁹⁶ The plaintiff claimed that he was assaulted and injured by the State Security personnel in the course of some public disturbances which took place in some parts of The Gambia on 10 April 2000. The plaintiff therefore sued on 12 June 2000 in the High Court claiming damages for the alleged assault and injuries sustained at the hands of the State Security personnel.

Whilst the claim for damages was pending in the High Court, a new law was enacted on 2 May 2001, namely, the Indemnity (Amendment) Act, 2001 (No 5 of 2001). Section 1 of that Act stated that the Act “Shall be deemed to have come into force on 1 January 2000.” The Act also indemnified public officers and State Security agents against all claims in respect of actions taken during any period of public emergency, public disturbances or riotous situation.

Subsequently, relying on the provisions of the new Amendment Law, counsel for the defendants in the High Court proceedings, applied for an order to strike out the plaintiff’s claim for damages on the ground that the plaintiff had no cause of action. The trial High Court decided to make a Reference to the Supreme Court under section 127(1)(b) and (2) of The Gambian Constitution for the Supreme Court to determine the question “whether the Indemnity (Amendment) Act 2001 ... was made in excess of the powers conferred by the Constitution or any other law upon the National Assembly or any other person.”

The Supreme Court of The Gambia, after hearing the Reference, unanimously directed the High Court to dismiss the application for dismissal of the action filed by the defendants and to proceed with the hearing of the plaintiff’s claim for damages. The court held that where, as in

¹⁹⁶ [1997-2001], SC.

the instant case, a party had exercised the right and instituted legal proceedings, he had a vested right to continue with such proceedings; that any retroactive legislative measure purporting to nullify his right to do so, would constitute a contravention of the prohibition against retroactive deprivation of vested rights as provided for in section 100(2)(c) of the Constitution, 1997. It was therefore held that the Indemnity (Amendment) Act, 2001 which sought to terminate the legal proceedings brought by the plaintiff in the High Court and which were pending at the time of the enactment, was made in contravention of section 100(2)(c) and therefore in excess of the legislative competence of the National Assembly.

In arriving at this decision, the Supreme Court of The Gambia cited its previous decision in *Sait Boye v Baldeh*¹⁹⁷ and the decision of The African Commission on Human and People's Rights in *Constitutional Rights Project, the Civil Liberties Organisation and Media Rights Agenda against Nigeria*.¹⁹⁸

In *Sait Boye v Baldeh*, the Supreme Court of The Gambia held that the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (No 6 of 2001), complained of by the plaintiff, did not have the effect of impairing any vested, accrued or acquired rights of the plaintiff within the meaning of section 100(2)(c) of the Constitution, 1997. The ground for so holding was that the Act came into force on 4 June 2001, being the date of its publication in the *Gazette*, and it could not be said to be retroactive on the face of it; nor did it provide for any specific date, whether prior to its enactment or thereafter for entry into force. The court found that the impugned Act was made applicable to all vacancies occurring in the office of a district chief existing at or occurring after the entry into force of the Act; that in the instant case, there was no vacancy in the office of district chief for the particular district specified by the plaintiff

¹⁹⁷ [1997-2001] GR 861.

¹⁹⁸ Decision of The African Commission on Human and People's Right, 15 November 1999, Communication No 145/95.

at the time when the Act came into force. The Supreme Court therefore held that even if such vacancy existed, the plaintiff did not have a vested or accrued right to vote at or contest in election to fill such vacancy. In the words of Jallow JSC:¹⁹⁹

“A vested acquired or accrued right must be such right as is certain, complete, in existence and has matured. A right that is speculative, contingent or subject to a condition precedent, [such as in the instant case] cannot be regarded in law as having vested or as an acquired right... With no vacancy to which an election is to be held having been declared, with no notice of an election having been published by the IEC (Independent Electoral Commission), no nominations invited and no indication that even if such were, that the plaintiff has satisfied the requirements for nomination, the rights claimed can best be described as speculative.”

¹⁹⁹ [1997-2001] GR 861 at 873.

In his concurring opinion, Wali JSC also said:²⁰⁰

“Having regard to the provision in the old section 58(1) of the 1997 Constitution, can it really be said that the plaintiff has acquired vested or accrued right contemplated in section 100(2)(c) of the Constitution?... There must be a vacant office of a District Chief first, followed by satisfaction of the relevant sections of the Elections Decree, 1996 (Decree No 78). In addition ... he must, as a candidate, satisfy the condition in section 58(4).”

It is submitted that the interpretation placed on section 100(2)(c) of The Gambian Constitution, 1997 as to what constitutes an acquired or accrued right should be followed by the Ghana Supreme Court in construing article 107(a) and (b) of the Constitution, 1992.

In any case, it seems that the apparent policy and intention underlying the provision in article 107 of the Constitution, 1992 is not only to suppress and frown upon retroactive legislation;²⁰¹ it is also to respect and honour procedural and substantive rights which had been acquired and accrued before the coming into force of the Constitution.

²⁰⁰ Ibid at 875.

²⁰¹ As to what constitutes retrospective legislation rendered unconstitutional and unenforceable under article 107: see Supreme Court decision in *Patu-Styles v Amoo-Lamptey* [1984-86] 2 GLR 644 per Taylor JSC at 687 namely: “prima facie enactment repealing or revoking other enactment are prospective and not retrospective in their operation and thus embrace only prospective rights; they only cover rights which have already accrued if there is a clear intention specifically or by necessary implication that they are so operative.” See also the East African Court of Appeal case of *Somanis v Shrinkhanu* [1970] EA 580. The court held that the words “Shall come into operation on such date as the Minister may by notice appoint” in section 1(1) of the Kenya Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, Cap 301 showed that the Act was to operate prospectively. However, the words “shall be deemed to have come into operation” as stated in a Legal Notice issued under the Act, was to operate retrospectively; and therefore the legal notice was ultra vires the said section 1(1) of the Act.

It is in this light that we may consider the recent decision of the Supreme Court in *Fenuku v John-Teye*.²⁰² Mr and Mrs Fenuku, jointly purchased in 1954, a large tract of land (the disputed land), evidenced by a deed of purchase, exhibit B. The wife died in 1958. In 1974, the surviving husband, Mr Fenuku, sold the land (reserving a small portion which was gifted to his son) to one John-Teye. The sale transaction was evidenced by a deed of sale, exhibit F. Both Mr Fenuku, the seller, and Mr John Teye, the purchaser, died in 1975 and 1986 respectively. Subsequently, the plaintiffs, the representatives of the estate of Mr Fenuku, sued the defendants, the representatives of the estate of Mr John Teye, for a declaration of title to the disputed land and also for an order for cancellation and nullification of the 1974 deed of sale. The plaintiffs contended, inter alia,²⁰³ that since the disputed land had been jointly purchased by Mr and Mrs Fenuku, the husband alone, was not entitled to sell the whole land to Mr John Teye. The trial High Court gave judgment for the plaintiffs. The defendants appealed to the Court of Appeal which allowed the appeal. The plaintiffs in turn appealed to the Supreme Court.

The principal issue before the Supreme Court turned on the legal effect of exhibit B, the deed of conveyance executed in 1954. The defendants argued that exhibit B created a joint tenancy in favour of Mr and Mrs Fenuku because the conveyance was governed by the prevailing law in 1954, namely, the English common law rule which created a presumption of joint tenancy in the absence of any words of severance in exhibit B. However, the plaintiffs argued, first, that in 1974 when exhibit F was executed, the prevailing law, was the Conveyancing Decree, 1973 (NRCD 175), which came into force on 1 January 1974. Second, section 14(3) of NRCD 175, which had abolished the English common law of presumption of joint tenancy in favour tenancy in common, in the absence of words of severance in a conveyance, should be

²⁰² [2001-2002] SCGLR 985.

²⁰³ The plaintiff also founded the claim on an allegation of fraud which was found unproven by the majority of the court.

interpreted retrospectively to affect exhibit B so as to make the joint purchasers, Mr and Mrs Fenuku, tenants in common.

At the hearing, the Supreme Court found, as also found by both the trial High Court and the Court of Appeal, that there had been no partitioning of the disputed property by the joint purchasers during their lifetime and further that there were no words of severance in exhibit B, the deed of conveyance executed in 1954.

On these facts, the Supreme Court dismissed the plaintiffs' appeal by a majority decision of three to two. The court found that the memorandum to section 14(3) of the Conveyancing Decree, 1973 (NRCD 175),²⁰⁴ which had come into force on 1 January 1974, clearly evinced the intention of the legislature, namely, to reverse the presumption of a joint tenancy under English law, then applicable in Ghana, in favour of presumption of tenancy in common. The majority of the Supreme Court found (as also found by the minority) that the intention of the lawmaker in enacting NRCD 175 was to apply section 14(3) retrospectively to affect all existing transactions made before or after the coming into force of NRCD 175. However, more importantly and significantly, the majority held that since by the law existing at the time of the death of Mrs Fenuku, namely, the English common law rule of presumption of joint tenancy, the whole of the disputed property vested in the husband, it would be unjust to affect such right, sixteen years later, by the application of NRCD 175, which impliedly was to operate retrospectively. In the words of Ampiah JSC:²⁰⁵

²⁰⁴ The said memorandum to section 14(3) of NRCD 175 stated that: "Sub-section (3) reverses the presumption in favour of a joint tenancy found in English law and heretofore in Ghana: *Fynn v Gardiner* (1953) 14 WACA 260. The purpose of the change is to bring the presumption into conformity with the probable intentions of parties to such transactions in Ghana (see K Bentsi-Enchill (1964) page 242-247)."

²⁰⁵ [2001-2002] SCGLR 985 at 1001.

“...[S]ince the husband became the absolute owner of the property upon the death of his wife ... there was no need for a vesting assent before he could exercise whatever rights he had in the property; he could sell it. The Court of Appeal was therefore right in rejecting the plaintiffs’ claim on that issue.”

In dissenting from the majority decision, Atuguba JSC said:²⁰⁶

“I would stress that where, and to the extent to which, a clear retrospective intention is revealed, as in the case of section 14(3) of NRCD 175, notions of vested rights and obligations cannot stand in the way of the statute. Indeed, the very essence of a retrospective enactment is that it affects vested rights and obligations.”

It seems to me that the majority decision of the Supreme Court in *Fenuku v John-Teye* is far-reaching! It marks a significant development in the law on accrued rights vis-à-vis retrospective legislation. The Supreme Court, has, in effect, held that it would refuse to give effect to retrospective legislation even if Parliament has, by an existing law such as NRCD 175, clearly demonstrated that accrued rights of persons are to be retrospectively affected.

It should be pointed out, however, that the majority decision in *Fenuku* did not at all address the contrary view, expressed by the minority per Atuguba JSC, as to the true legal effect of section 14(3) of the Conveyancing Decree, 1973 (NRCD 175). The contrary view of Atuguba

²⁰⁶ Ibid at 1014, citing in support *Williams v Williams* [1971] 2 All ER 764 at 770; *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 at 836, PC.

JSC was founded on the Memorandum to the provision in section 14(3) of NRCD 175 which states:²⁰⁷

"Subsection (3) reverses the presumption in favour of a joint tenancy found in English Law and heretofore in Ghana. Fynn v Gardiner (1953) 14 WACA 260. The purpose of the change is to bring the presumption into conformity with the probable intentions of parties to such transactions in Ghana (see K Bentsi-Enchill, Ghana Land Law (1964) pages 242-247."

Given the provision in the Memorandum to section 14(3), Atuguba JSC, giving a minority opinion was of the view, rightly in my submission, that the common law principle of *jus accrescendi*, that is, the right of survivorship, was the “target” of section 14(3). If that is conceded, then it seems that Atuguba JSC was right in concluding that:²⁰⁸

“To say therefore that section 14(3) should not apply to exhibit B because the property therein had already vested in accordance with *jus accrescendi* is to exempt that conveyance from the purview of that section altogether, thus rendering it completely inoperative, a *brutum fulmen*, with regard to that conveyance. In any case, a court must always interpret a statute *ut res magis valeat quam pereat*.”

However, a further question remains to be addressed. That is: if under article 107(b), Parliament cannot enact any law “which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person”, can NRCD 175, as an existing law, be allowed to operate retrospectively to affect rights which had accrued

²⁰⁷ (The emphasis is mine).

²⁰⁸ [2001-2002] SCGLR 985 at 1017.

before it came into force as from 1 January 1974? Under the said article 107(b), NRCD 175 could not have been applied and enforced by the Supreme Court so as to deprive the right which the late Mr Fenuku possessed to sell the disputed land to the late Mr John-Teye. As an existing law, NRCD 175 had taken effect and already deprived Mr Fenuku of his accrued right to dispose of the disputed property absolutely. As an existing law, NRCD 175, s 14(3) was a spent force at the time the 1992 Constitution came into force as from 7 January 1993. Since the 1992 Constitution, itself, by article 107, frowns upon retroactive legislation, it cannot operate to deny the retrospective operation of NRCD 175, s 14(3). This argument or conclusion that section 14(3) of NRCD 175, as an existing law, had taken effect and deprived Mr Fenuku his accrued right before the coming into force of the Constitution, is in accord with the Supreme Court earlier decision in *Ellis v Attorney-General*²⁰⁹. The Supreme Court had held in that case that it could not declare the Hemang Lands (Acquisition and Compensation Law, 1992 (PNDCL 294)), a nullity under the 1992 Constitution, because the law had been passed and the plaintiffs' lands had been acquired and vested in the Republic under that Law before the coming into force of the Constitution, which could only be applied prospectively and not retrospectively.²¹⁰

In any case, the view that procedural and substantive rights, which had been acquired or accrued before the coming into force of the 1992 Constitution must be honoured, respected and enforced, is shown from the reading together of the provisions in article 107 and section 8(1), (2) and (7) of the transitional provisions of the Constitution, 1992. The provisions of section 8(1), (2) and (7) are as follows:

²⁰⁹ [2000] SCGLR 24. In so holding in the *Ellis* case [2000] SCGLR 24, the Supreme Court applied and followed its previous decision in *Fattal v Minister of Internal Affairs* [1981] GLR 104.

²¹⁰ In so holding in the *Ellis* case [2000] SCGLR 24, the Supreme Court applied and followed its previous decision in *Fattal v Minister of Internal Affairs* [1981] GLR 104.

“8.(1) Any person who immediately before the coming into force of this Constitution held or was acting in an office in existence immediately before the coming into force of this Constitution, shall be deemed to have been appointed as far as is consistent with the provisions of this Constitution, to hold or act in the equivalent office under this Constitution.

8(2) A person who before the coming into force of this Constitution would have been required under the law in force to vacate his office at the expiration of a period of service shall, notwithstanding the provisions of subsection (1) of this section, vacate his office at the expiration of that period.

(7) The terms and conditions of service of a person to whom subsection (1) of this section applies shall not be less favourable than those applicable to him immediately before the coming into force of this Constitution.”

It is very interesting to point out that the provision in section 8(2) of the transitional provisions, relating to the issue of compulsory retiring age of public officers, was invoked and enforced by the Supreme Court against Mr Justice Adade, a Justice of the Supreme Court, in the case of *Nartey v Attorney-General & Justice Adade*.²¹¹ In this case, the plaintiff sued in the Supreme Court for a declaration that “the continued holding on to office of a Justice of the Supreme Court after 20 February 1993” by Justice Adade was inconsistent with and in contravention of section 8(2) of the transitional provisions of the Constitution, 1992.

In his statement of defence, Justice Adade conceded that under the Constitution, 1979 under which he had been appointed as a Justice of the Supreme Court, the compulsory retiring age

²¹¹ [1996-97] SCGLR 63 – a case earlier examined in this chapter in discussing the question of the jurisdiction of the Supreme Court to enforce the Constitution as distinct from enforcing the fundamental human rights provisions of the Constitution.

of a Justice of the Supreme Court was 65 years and that he ought to have retired compulsorily at the age of 65 years on 20 February 1992; that the one year extension granted to him by the Government of the Provisional National Defence Council in the exercise of its discretion under section 1(2) of the Judiciary (Retiring Ages) Law 1986 (PNDCL 161), expired on 20 January 1993.²¹² However, Justice Adade contended that under the Constitution, 1992 which came into force on 7 January 1993, (ie thirteen days before the expiration of the one year extension granted to him under PNDCL 161), he was entitled to continue to sit, after 20 January 1993, as a Justice of the Supreme Court at the enhanced age of 70 years,²¹³ by virtue of section 4(1) of the transitional provisions which states that:

“4(1) A Justice of the Supreme Court, the Court of Appeal or the High Court holding office immediately before the coming into force of this Constitution, shall continue to hold office as if appointed to that office under this Constitution.”

Justice Adade therefore argued that the provision in section 8(2) of the transitional provisions was not applicable to him because section 8(2) had not been stated as falling under Part III of the transitional provisions headed “The Judiciary” but rather fell under the part of the transitional provisions headed “Miscellaneous.”

The Supreme Court by a majority decision of three to two, granted the plaintiff’s claim on the ground, *inter alia*, that section 8(2) of the transitional provisions was applicable to public officers on limited or fixed period of appointment; that since the judiciary formed part of the Public Services of Ghana, it stood to reason that section 8(2) was applicable to the Judicial

²¹² It must be noted that PNDCL 161 has now been repealed by the Statute Law Revision Act, 1996 (Act 516).

²¹³ Conferred under article 145(2)(a) of the Constitution, 1992.

Service; that since Justice Adade was on limited engagement for one year when the Constitution came into force, he ought to have retired at the expiration of that one year limited engagement, ie on 20 January 1993. In support of this decision, the majority of the Supreme Court in this case, cited the previous decision of the Supreme Court in *Yovuyibor v Attorney-General*.²¹⁴

There is, however, one other aspect of the law on the accrued rights of public servants which was not addressed by the Supreme Court in both *Yovuyibor v Attorney-General* and *Nartey v Attorney-General & Justice Adade* for the simple reason that the issue did not arise for determination in those two cases. The question relates to the combined legal effect of section 8(1) and (7) of the transitional provisions of the 1992 Constitution vis-à-vis public servants who were entitled under their conditions of service to retire at the age of 65 years immediately before the coming into force of the 1992 Constitution. These public servants include legal personnel in the employment of the Legal Service under the Legal Service Law, 1992 (PNDCL 320); or in the service of the Council for Law Reporting under the Council for Law Reporting (Amendment) Law, 1988 (PNDCL 194); or in the service of the General Legal Council and whose terms of employment is governed by the Judiciary (Retiring Ages) Law, 1986 (PNDCL 161).

It should be pointed out that in the recent case of *Bimpong-Buta v General Legal Council*,²¹⁵ the Supreme Court was called upon to determine, inter alia, the question of whether or not the

²¹⁴ [1993-94] 2 GLR 343.

²¹⁵ Supreme Court, Suit No SC4/2004, 24 March 2004, unreported. For a full quotation of the reliefs or claims sought by the plaintiff in the said suit and the brief comment on the case: see chapter 2 at page 56 under the sub-heading “Composition of the Supreme Court”, on the issue of the right of the Chief Justice to empanel the Supreme Court.

plaintiff had an accrued right to retire as the Director of the Ghana School of Law at the age of 65 years immediately before the coming into force of the 1992 Constitution under the combined effect of section 8(1) and (7) of the transitional provisions of the 1992 Constitution and other legislation including the Legal Profession Act, 1960 (Act 32), s 1(4) and the Legal Service Law, 1993 (PNDCL 320), ss 5 and 7.

As earlier noted,²¹⁶ the Supreme Court, after hearing arguments on the merits on 12 February 2004, adjourned the case to 24 March 2004 for the delivery of its judgment. On that day, the court *suo motu*, raised in its judgment, the issue of want of jurisdiction to determine the plaintiff's claims without affording the parties the prior opportunity to argue the question of want of jurisdiction or otherwise as required of the court by law.²¹⁷ Rather the court unanimously and out of the blue, as it were, held that it has no jurisdiction to determine the plaintiff's claims brought under articles 2(1) and 130(1) of the 1992 Constitution.²¹⁸

²¹⁶ See footnote 89 of chapter 2.

²¹⁷ See *Attorney-General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620 at 646 where the Supreme Court, per Acquah JSC, said: "*The issue of jurisdiction can be raised at any time, even after judgment. Thus whether the parties raised the issue of jurisdiction or not, the court is duty bound to consider it. And where the issue is not raised, the court is to raise it suo motu and call upon the parties to address that issue.*" (My emphasis).

²¹⁸ Regrettably, one is not in a position, as of now, ie as at 10 December 2004, to examine the reasons proffered by the court in support of its decision to decline jurisdiction to determine the case on its merits. This is simply because the certified true copy of the ruling of the court delivered by the five judges on 24 March 2004, ie more than eight months later, is still not ready to be issued out to the public by the Acting Registrar of the Supreme Court. The Acting Registrar so informed the plaintiff when the plaintiff called at the registrar's office to demand and collect the certified true copy of the ruling.

Conclusion on the Supreme Court and the enforcement of the Constitution itself

Chapter 8 sought to examine the role of the Supreme Court in enforcing the Constitution itself as distinct from the enforcement of fundamental human rights.

In the process, the court laid down the principles pertaining to the enforcement of the Constitution with reference to: persons entitled to sue for the enforcement of the Constitution; *locus standi* and proof of the existence or otherwise of personal interest or controversy or dispute; jurisdiction to enforce the Constitution as distinct from redressing violations of fundamental human rights; enforcement of the Constitution in the face of injustice; illegalities, autocratic legislative action and delays in delivering justice; and the enforcement of the Constitution and the question of accrued rights.

On the question of determining who qualifies as a “person” to sue for the enforcement of the Constitution, it appears that in the context in which the word “person” is used in article 2(1), the word “person” could include artificial persons like corporate bodies. Since a corporate body, like a registered political party or a limited liability company, could organise demonstrations and processions using its members, and in its corporate name, in the exercise of its constitutional rights under article 21(1)(d), it is logical for such corporate body to sue under article 2(1) for the enforcement of the Constitution. There is no policy reason to the contrary. It appears the majority opinion as to the meaning of the word “person” in article 2(1) is preferable to the minority opinion.

Regarding the question of the need to prove an act or omission or existence of controversy or dispute, the Ghana Constitutional Law relating to the enforcement and interpretation of the Constitution may be summed up as follows: There must be proof, as shown by cogent evidence, that the “act or omission” of a person is inconsistent with or in contravention of the

Constitution. The Supreme Court is, however, divided as to whether mere intent or declaration or threatened breach constitutes an “act or omission” in terms of article 2(1)(b) of the 1992 Constitution. The majority of the court in *New Patriotic Party v National Democratic Congress*, with respect, erred in law in failing to follow the earlier binding authority, namely, the *Kwakye* case, to the effect that an applicant, such as the plaintiff in the case, was entitled to invoke the jurisdiction of the court as soon as the act complained of was committed or even threatened.

On the question of the jurisdiction of the Supreme Court to enforce the Constitution itself as distinct from its jurisdiction to give redress for violations of fundamental human rights, the court came to a definitive conclusion in *New Patriotic Party v Attorney-General (Ciba Case)*. It was there pointed out that where a person complains of violation of a particular right and also seeks for its enforcement, it is the High Court which is vested with jurisdiction to determine that issue. However, where a person seeks a mere declaration as to a contravention of the Constitution or inconsistency with a provision of the Constitution, that person has the *locus standi* to maintain an action in the Supreme Court under article 1(2) of the Constitution.

Finally, on the question of the failure of the superior courts to deliver judgment within statutory time limits, the Supreme Court must be commended for clarifying the law governing the delivery of judgments by superior court judges as demonstrated in its decisions in *Ex parte Expendable Polystyrene Products Ltd* and *Ex parte Eastern Regional Development Corporation*.

On the question of the accrued right of public servants vis-à-vis the Constitution, it could be concluded that quite, apart from the law on the retiring age of public servants as propounded and explained by the Supreme Court in *Yovuyibor v Attorney-General* and *Nartey v Attorney-General & Justice Adade*, a public servant, such as those in the Legal Service under the Legal Service Law, 1992 (PNDCL 320); or in the service of the Council for Law Reporting under

the Council or Law Reporting (Amendment) Law, 1988 (PNDCL 194); or in the service of the General Legal Council and whose terms of employment is governed by the Judiciary (Retiring Ages) Law, 1986 (PNDCL 161), is entitled under these enactments to retire at the age of 65 before the coming into force of the Constitution, 1992. It is suggested that such a public servant has the accrued or acquired right to retire at the age of 65 years under the combined effect of section 8(1) and (7) of the transitional provisions and section 8(1)(c) of the Interpretation Act, 1960 (CA 4). In other words, that person would be entitled to enjoy the accrued right to retire at the age of 65 years beyond the compulsory retiring age of 60 years for public officers as required under article 199(1) of the 1992 Constitution.

CHAPTER 9

GENERAL CONCLUSIONS AND RECOMMENDATIONS

The theme running through the preceding chapters of this dissertation is that the Supreme Court, as explained in detail in Chapter 1, has a significant role to play in the promotion, enforcement and sustenance of a proper democratic system of government, good governance and fundamental human rights and freedoms in Ghana. The success of the Supreme Court ought to be judged by the extent to which its interpretation and enforcement roles advance the cause of such basic democratic values.

The study has established that the judiciary, spearheaded by the Supreme Court, has contributed to Ghana's democratic development and consolidation with particular emphasis on the attainment of good governance, the sustenance of the democratic system of government and overall development of Constitutional Law in Ghana. It must, however, be emphasised that the role in championing and sustaining democratic governance against the backdrop of a long period of military rule and dictatorship, is not the lone responsibility of the judiciary. It is clear that the body politic, all democratic institutions and, indeed, civil society and the military itself have important roles to play.¹ Furthermore the Supreme Court itself has recognised the distinctive role of lawyers and other state institutions in the development of

¹ President J A Kufuor, the incumbent President of Ghana, speaking at the graduation of 52 Cadet Officers at the Ghana Military Academy and Training School (MATs), Teshie, Accra on 5 September 2003, pointed out that the Armed Forces “must show and promote the national vision of constitutional democracy, good governance, development, peace and reconciliation; and that the success of democratic dispensation would depend on the level of commitment of all the citizenry including the military.” See *Daily Graphic*, 6 September 2003, front page.

Ghana Constitutional Law. Thus the court in *Ghana Bar Association v Attorney-General (Abban Case)*, per Edward Wiredu JSC, said that:²

“The history of the development of the constitutional law in this country from cases decided by the Supreme Court shows that no less than three holders of this high office of Chief Justice including the present Chief Justice have been spared the ordeal of having to be engaged in court proceedings either to defend their positions or to answer allegations of acts done in contravention of the provisions of the Constitution. In all such cases, the Supreme Court has boldly, in my view, determined each case confidently and has courageously proved equal to the challenge posed by those cases and has carried out its duty as enjoined on it by the various Constitutions of this country. Both the Ghana Bar Association and the Office of the Attorney-General have played no less significant roles in this area of our constitutional law development and must both be commended.”

Development of Constitutional Law in Ghana and the underlying concepts or principles of the Constitution

With regard to the development of constitutional law in Ghana, the picture which emerges, as demonstrated in the preceding chapters of this dissertation, is that the Supreme Court has made distinctive contributions, for example, the underlying concepts or principles of the 1992 Constitution as examined in Chapter 3, namely: the doctrines of the supremacy of the Constitution, of separation of powers, of non-justiciable political question and of mootness. The study demonstrates that the Supreme Court’s pronouncements and decisions on the application or otherwise of these concepts have thrown much light on and enriched the understanding of these concepts under Ghanaian Constitutional Law. As shown by the

² [2003-2004] SGCLR 250 at 265 (my emphasis).

analysis of the relevant cases in Chapter 3, the doctrines of supremacy of the Constitution and the separation of powers constitute the golden thread which runs throughout the gamut of Ghana Constitutional Law.

However, as argued in chapter 3, the judges in the Supreme Court are not *ad idem* on the application or otherwise of the doctrines of non-justiciable political question and mootness under the Constitutional Law of Ghana . In the light of the present authorities, however, it could be concluded that the doctrine of mootness is applicable under Ghanaian constitutional law; and that the Supreme Court may apply it or refuse to do so depending upon the circumstances of each particular case as exemplified by the decisions of the court in *J H Mensah v Attorney-General*³ and *Amidu v President Kufuor*.⁴

With regard to the application or otherwise of the doctrine of non-justiciable political question, it could be concluded that, in the light of the present authorities, it may be considered as inapplicable under Ghana constitutional law subject to one caveat which may be expressed as follows: where there is a textual commitment of a political question to the legislature and the executive, such as is provided in article 78(1) of the Constitution, 1992 relating to the appointment of Ministers of State by “the President with the prior approval of Parliament”, the Supreme Court is precluded from interfering with the matter under the doctrine of non-justiciable political question so long as the legislature and the executive

³ [1996-97] SCGLR 320.

⁴ [2001-2002] SCGLR 86.

operate within the prescriptions of the Constitution.⁵ It is submitted that the formulation of the application of the doctrine of non-justiciable political question as stated, would address the spirited and strong concerns in favour of its application under Ghanaian constitutional law, as expressed by Kpegah JSC in *Ghana Bar Association v Attorney-General (Abban Case)*.⁶

The role of the Supreme Court in interpreting a national constitution such as the Fourth Republican Constitution of 1992

Apart from contributing to the understanding of the concepts underlying the Fourth Republican Constitution, 1992 another area emphasised is the contribution of the Supreme Court to the interpretation of the Constitution. As demonstrated by the discussion in chapter 4, the Supreme Court has made a very distinctive contribution to the important and crucial question of the policy considerations for determining the interpretation of a national constitution. It is evident that the principles of constitutional interpretation, such as the need for a benevolent, broad, liberal and purposive construction of the 1992 Constitution as a political document, *sui generis* and capable of growth (as stated by the Supreme Court in

⁵ See, eg *J H Mensah v Attorney-General* [1996-97] SCGLR 320 where Ampiah JSC in his concurring opinion said at 356-357: “Provided ‘approval’ is given to the nominees of the President, in accordance with orders regulating Parliament’s procedure, such exercise of a right could not be unconstitutional. The Constitution itself has not regulated the procedure for approval. *It is a different matter if no approval at all is given for such appointments.*” (The emphasis is mine).

⁶ [1995-96] 1 GLR 598; [2003-2004] SCGLR 250. The Supreme Court in this case held (per Kpegah JSC, Bamford-Addo and Charles Hayfron-Benjamin JJSC concurring) that the principle of non-justiciable political question was applicable to the Constitution, 1992; that the principle was inherent in the concept of separation of powers where certain functions were committed to a specific branch of government. The court thus held that in such a situation, a political question could not evolve into a judicial question, ie the court would have no jurisdiction to determine the same.

cases such as *Tuffuor v Attorney-General*)⁷, would very much assist the court in the exercise of its exclusive original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution under its articles 2 and 130(1). As pointed out elsewhere,⁸ the 1992 Constitution as the fundamental law, must not be narrowly construed so as to avoid absurdity;⁹ and that the Constitution must be given: "... a wide, generous and purposive construction in the context of the people's aspirations and hopes and with special reference to the political, social and economic development of the country."¹⁰ Such an approach would, it is submitted, create the peaceful and congenial atmosphere necessarily required for addressing the challenges for national development in all its facets.

However, notwithstanding the commendable approach adopted by the Ghana Supreme Court on the question of constitutional interpretation as examined in chapter 4, the research findings identified one singular omission or perhaps shortcoming which needs to be pointed out. The

⁷ [1980] GLR 63, SC. See also *New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] 2 GLR 354 at 366 where Francois JSC said: "The Constitution, 1992 itself points the way to its liberal interpretation. It illustrates from the horse's own mouth, the spirit that should guide its construction. Thus in articles 165 and 33(5) of the Constitution, 1992 we are required not only to go by the written letter, but to adopt as well, the known criteria which attach to the democratic environment, so that the fundamental human rights guaranteed under chapter 5 of the Constitution, 1992 are not curtailed."

⁸ See Bimpong-Buta, S Y, "The Supreme Court and the Interpretation of the 1992 Constitution: (1991-92) 18 RGL 95 at 104.

⁹ See in that regard, the dissenting opinion of Sophia Akuffo JSC in *Tsatsu Tsikata (No 1) v Attorney-General (No 1)* [2001-2002] SCGLR 189 at 308 where she pointed out the need to avoid "absurdity and stultification of the organic dynamism that must inform constitutional development."

¹⁰ Commenting on the above quoted view, J Ebow Quashie, the Immediate Past President of the Ghana Bar Association, in an unpublished public lecture: "The Role of the Supreme Court under the 1992 Ghana Fourth Republican Constitution" delivered at the British Council Hall, Accra, 16 June 2003 as part of the Ghana Academy of Arts and Sciences/FES Public Forum, said: "It is my considered view that had the Supreme Court been guided by the admonitions of

Supreme Court has not as yet, indicated its willingness to resort to or apply international human rights standards such as the United Nations Universal Declaration of Human Rights;¹¹ or regional human rights instruments such as the American Convention on Human Rights (ACHR);¹² or the European Convention on Human Rights;¹³ or the African Charter on Human and Peoples' Rights,¹⁴ in construing the fundamental human rights provisions as enshrined in chapter 5 of the Constitution, 1992. Perhaps the judges of the Supreme Court are not as yet inclined to be guided by international conventions on human rights in construing the fundamental human rights provisions as enshrined in the Constitution because there is no specific provision in the Constitution which requires them to do so. As previously pointed out in chapter 4, there is no such provision, like, what is provided in section 35(1) of the 1996 Constitution of the Republic of South Africa, to the effect that when interpreting the Bill of Rights contained in the Constitution, the courts must consider public international law and "comparable foreign case law."¹⁵

In the absence of any such provision, it has been suggested in chapter 4 that the Ghana Supreme Court may, in interpreting the human rights provisions contained in chapter 5 of the

S Y Bimpong-Buta, the review application in the *Fast Track High Court Case* [2001-2002] SCGLR 189 and 650 would have been unnecessary."

¹¹ Adopted 10 December 1948, UNGA Resolution 217A (III), UN Doc A/810 at 71.

¹² 1144 UNTS 123 – adopted in 1969 by inter-governmental conference convened by the OAS and came into force in 1978.

¹³ Signed 4 November 1950, 213 UNTS, ETS 5.

¹⁴ Known as the Banjul Charter, was approved by the Organization of African Unity (OAU) – now known as AU – in 1981 and came into force in 1986. The charter was drafted in Banjul, The Gambia.

¹⁵ As pointed out in footnote 7 above, Francois JSC in *New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] 2 GLR 356 at 366 referred to the need for the court "to adopt as well, the known criteria which attach to the democratic environment." But he did not expatiate on what he meant by "the known criteria which attach to the democratic environment." Perhaps the judge had in mind the known international human rights standards such as the UN Declaration of Human Rights.

Constitution, take into account or adopt with profit, one of the Bangalore Principles issued at the Commonwealth Judicial Colloquium held in Bangalore, India in 1998, and which is worth repeating, namely:¹⁶

“It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.”

Indeed, in the case of *Unity Dow v Attorney-General of Botswana*,¹⁷ the question of resorting to public international law in construing the Constitution of Botswana was considered by the Botswana Court of Appeal. The trial court in this case had relied upon international obligations of Botswana in support of its decision that sex-based discrimination was prohibited by the Constitution. Before the Court of Appeal, the appellant raised an objection to the respondent's use of the African Charter on Human and Peoples' Rights and the European Convention for the Protection of Human Rights for the purpose of giving interpretative content to the applicable provisions in the Botswana Constitution. In giving the court's approach to the objection raised by the appellants, Aguda JA said:¹⁸

¹⁶ As quoted by Anthony Lester QC in “The Judicial Protection of Human Rights in the Commonwealth” in *Journal of Commonwealth Law and Legal Education*, Vol 1, No 1 December 2001, London Cavendish Publishing at pp 8-9.

¹⁷ Civil Appeal No 4/91 cited by Van Dyk et al in *Rights and Constitutionalism: The New South African Legal Order*, Juta & Co Ltd, Kenwyn, South Africa, 1994 at 127.

¹⁸ As quoted by Van Wyk et al op cit at 127 (my emphasis).

“Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land in so far as such relevant international treaties and conventions may be referred to as an aid to the construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner *in interpretation of what no doubt are some difficult provisions of the Constitution*. The reference made by the learned judge *a quo* to these materials amount to nothing more than that.”

Aside from the question of resorting to international treaties and conventions as a tool for interpretation of the Constitution, it should also be stressed that, it is not only the Ghana Supreme Court which has recognised the concept of the spirit of the Constitution as a tool for constitutional interpretation. It has been discovered that other Commonwealth jurisdictions follow similar principles. In the Gambian Court of Appeal case of *Jobe (No 1) v Attorney-General (No 1)*,¹⁹ for example, the decision was based on the rationale (or what may appropriately be referred to as the spirit) behind section 13 of the Gambian Constitution, 1970 and the preamble to the 1979 Special Criminal Court Act. Similarly the Supreme Court of Papua New Guinea emphasised the role of the spirit of the Constitution in the case of *NTN Pty Ltd & NBN Ltd v The State*,²⁰ where the court, per Barnett J, observed that all

¹⁹ [1960-1993] GR 178-upheld in part by the Judicial Committee of the Privy Council in *Attorney-General(No 2) v Jobe(No 2)* [1960-93] GR 208. It may be noted that the [1960-63] and [1997-2001] Gambia Law Reports (GR) were edited by S Y Bimpong-Buta in 2001-2003, ie during his two-year appointment as the Editor of The Gambia Law Reports, on secondment from the Ghana School of Law under the Commonwealth Fund for Technical Co-operation (CFTC) Programme.

²⁰ (1988) LRC(Const) 333 at 353.

governmental bodies, especially the Supreme Court, should endeavour to apply not only the letter of the law as stated in the Constitution but also its spirit as well.

The recognition by the Ghana Supreme Court of the spirit of the Constitution as existing or operating side by side with the actual letter of the Constitution, must be welcomed as a progressive development of constitutional law in Ghana. This development is strengthened by the fact that the Constitution itself presupposes the existence of the spirit as distinct from its letter. Thus, article 17(4)(d) thereof enjoins Parliament not to enact laws which are "inconsistent with the spirit of the Constitution." This means that a person could bring an action under article 2(1) of the Constitution for a declaration that the impugned act or omission is illegal and unconstitutional for being in contravention of not only a written provision of the Constitution but its spirit as well.²¹

It has been pointed out that in relying on the "the spirit of the Constitution" within the meaning of article 17(4) (d) as a tool for constitutional interpretation, the Supreme Court must bear in mind two considerations: First, it must take into account the social needs and mores of the society in which the constitutional norms operate.²² Secondly, the court must also consider the

²¹ It is heartening to note that the Executive in Ghana shares the view that the Constitution should not be strictly construed to the letter. On the occasion of the swearing in on 16 September 2003, of eight new justices of the superior courts (including one new Justice of the Supreme Court), the President, Mr J A Kufuor (as quoted in the *Daily Graphic* 17 September 2003, Issue at page 21), reminded "the new Supreme Court Judge not to interpret the Constitution strictly on the basis of black and white of the text." The President was also quoted as having said that: "the Constitution was very much a political document just as it was a legal document and advised him [the Supreme Court Judge, the Dr Justice Date-Bah] to be guided by jurisprudence and wisdom."

²² See Gyandoh, S O "The Role of the Judiciary under the Constitutional Proposals for Ghana" (1968) 5 UGLJ 133 at 136 where it is stated: "In a nutshell, the judicial function, especially at the constitutional level, consists of interpreting, in relation to *changing social mores and customs*, not only the letter of legislative norms but also the spirit of those norms." (The emphasis is mine).

ideals of good governance and the democratic system of government as discussed in chapter 1 of this dissertation.²³ In this regard, attention may, again, be drawn to a very significant observation made by Professor Nwabueze, a well known Nigerian academic, in his keynote address delivered at a seminar on stability of the Nigerian Third Republic held in September 1992 at Abuja where he said:²⁴

“The problem of democracy in Africa has to do not with its forms, its principles and institutions - but with our inability to imbibe its *spirit*. Democracy has not failed Africa, it is we who have failed democracy.”

It is therefore suggested that to ensure that Ghana succeeds in her fourth attempt at democratic and constitutional system of government under the 1992 Constitution, both the government in power and the opposition and, indeed, all Ghanaian citizens, should not only embrace but must also be seen to observe not only the letter of the Constitution but its spirit as well; its spirit as espoused by the Supreme Court in the exercise of its interpretative role, especially in its decisions relating to cases with politico-legal dimensions which tend to generate a lot of public interest and debate.²⁵

²³ See in support, the recent observation made by K B Asante, a retired Ghanaian diplomat and a keen commentator on societal and political issues in the *Daily Graphic*, 15 September 2003 at page 7 where he said: “We ask our governments to take action to advance the interests of the people and not to perpetuate themselves in power ... The people may ... rebel and get rid of the government or be repressed. Either situation is unsatisfactory... *The answer to such a sad state of affairs is democracy and good and open governance.*” (The emphasis is mine).

²⁴ Entitled "Foundations for Liberties and democracy": see *West Africa*, 14-20, September 1992 (author's emphasis).

²⁵ See for example: *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35, SC; and *Apaloo v Electoral Commission of Ghana (No Photo ID Card No Vote Case)* [2001-2002] SCGLR 1. In the latter case, the Supreme Court unanimously ruled on 4 December 2000 that both photo and thumbprinted identity cards (IDS), must be accepted by the Electoral Commission from voters in the conduct of the December 7, 2000 Presidential

As was rightly observed by Gyandoh many years ago:²⁶

“As recent events in Ghana and elsewhere in Africa have shown, governmental action that offends the spirit and intent of the fundamental law tends to subvert that law by encouraging its forcible overthrow.”

Furthermore, on the question of the role of the Supreme Court in construing the 1992 Constitution, the observations of Archibold Cox, an authority on constitutional and labour law in the United States, appear to be valid and relevant. Mr Cox states:²⁷

“Two centuries ago the Framers of the Constitution of the United States of America outlined a unique structure of government. Their majestic phrases fix limits and evoke historic ideals, but their genius also lay in leaving for the future questions upon which they could not agree and other questions they could not possibly foresee. In time, it thus fell to the Supreme Court of the United States to decide the unanswered questions as they arose.”

and Parliamentary Elections. Intense public interest in the case, before the delivery of the ruling, was captured by a publication in the *Daily Graphic*, 5 December 2000 Issue at page 3 headed “Police quell protest at Supreme Court.” The publication stated: “A chaotic situation was created at the precincts of the Supreme Court in Accra yesterday [4 December 2000] when an informant allegedly told a large crowd ... that the Supreme Court had ruled [falsely as it turned out] that only thumbprint ID cards will be used in the general elections. *The crowd, which obviously could not hide their disappointment and anger at the alleged ruling, broke into spontaneous noise-making, ranting and chanting of war songs.*” (The emphasis is mine).

²⁶ See S O Gyandoh, Jnr, “Principles of Judicial Interpretation of the Republican Constitution of Ghana” (1966) 3 UGLJ 37 at 60.

²⁷ See the front flap of his book: *The Court and the Constitution*, Archibold Cox; First Indian Reprint 1989 (Houghton Mifflin Company, Boston, MA, USA).

Thus it fell to the United States Supreme Court to decide these “unanswered questions” through the process of constitutional interpretation.²⁸ Similarly, the framers of the 1992 Fourth Republican Constitution, and indeed, those of the 1969 and 1979 Constitutions, vested the Supreme Court with the power to interpret and enforce the Constitution in terms of its article 2. But it has been left to the Supreme Court to evolve and lay down the principles to guide it in carrying out its jurisdiction relating to the interpretation or enforcement of the Constitution. The burden of this dissertation, as discussed in chapter 4, has been to show that the Supreme Court has lived up to expectation and has stated and expatiated on these principles of constitutional interpretation – a crucial and indispensable tool in the development of constitutional law in Ghana.

Supreme Court and judicial review of legislative action

The issue of the power of the Supreme Court to review legislation was examined in detail in chapter 5 with special reference to the ambit of the jurisdiction of the Supreme Court to review legislative action generally; the question of ouster clauses and the judicial review of legislative action; the legality of coup d’etats and judicial review of legislative action; and the constitutionality of the Fast Track High Court under article 139(3) of the Constitution, 1992.

With regard to the ambit of the power of the Supreme Court to review legislation generally, the conclusion reached after a detailed examination of the relevant cases²⁹, may be reiterated,

²⁸ See in that regard, Archibold Cox op cit, Part Three on “Constitutional Adjudication as instrument of Reform” pages 177 et seq, particularly cases such as *The Flag Salute Case*. In this case, the United States Supreme Court (as stated at page 178 of the book) “sustained the claim of freedom to refuse to salute the flag.”

²⁹ See, for example, *Amidu v Electoral Commission & Assembly Press* [2001-2002] SCGLR 595 and *Mekkaoui v Minister of Internal Affairs* [1981] GLR 664, SC.

namely, that the Supreme Court itself has regrettably imposed a limitation on its power of judicial review of legislative action under articles 2(1) and 130(1) of the Constitution, 1992.

The view has also been expressed that the Supreme Court's power of judicial review of a legislative action is very wide having regard to the plain meaning of the words in article 2(1)(b), namely "any act or omission of any person" which is "inconsistent with, or is in contravention of a provision" of the Constitution. It has been suggested that any act or omission of any person (such as back-dating a *gazette* containing notice to the public of the results of a parliamentary election, as occurred in *Amidu v Electoral Commission & Assembly Press*,³⁰ which adversely affects the constitutional rights of any person, may be questioned by the Supreme Court in the exercise of its original jurisdiction under article 2 (1) of the Constitution, 1992.

The issue of the attitude of the Supreme Court to coup d'états as examined in chapter 5 is very crucial to the practice and sustenance of the new democratic dispensation ushered in by the Fourth Republican Constitution of 1992. It would seem that the reasonable inference to be drawn from the Supreme Court majority decision in *Ekwam v Pianim*³¹ is that if a person can lead evidence before the Supreme Court, showing that his action and conduct amounted to resistance against the violent overthrow of the Constitution, he would be protected by the Supreme Court as having committed no offence in terms of article 3 (5) of the Constitution. The crucial question as to what happens when a person or group of persons succeed in overthrowing the Constitution as raised by Atuguba JSC in his opinion in the *Pianim (No 3)*

³⁰ [2001-2002] SCGLR 595.

³¹ [1996-97] SCGLR 120.

case,³² has been addressed by the provision in article 3 (4) (b): all citizens must do “all in their power to restore the Constitution after it has been suspended, overthrown, or abrogated.”

It may also be concluded, in the light of the discussion in chapter 5 that, the Supreme Court has at no time recognized the legality of coup d’etats aimed at a violent overthrow of a government democratically elected under the Constitution. After detailed examination of the decision of the Supreme Court in *Sallah v Attorney-General*,³³ it was also concluded that the Supreme Court did not find it necessary to give any definitive decision on the legal effect of a coup d’etat on Ghana’s legal system. It should also be observed that the fact that the Supreme Court has in the past recognized Decrees or Laws enacted by military regimes (such as in *Ellis v Attorney-General*),³⁴ should not be taken as an endorsement by the court of the legality of a military regime itself. It is suggested that all that it simply means is that the Supreme Court has in the past decided not to swim against the tide of political reality arising from the successful assumption of political power by violent means.

Attention must also be drawn to the finding reached on the question of the power of the Supreme Court to review legislative action vis-à-vis the indemnity clause in section 34(3) and the provision in 36(2) of the transitional provisions of the Constitution, 1992. In that regard, it is very important to stress the legal and political significance of the Supreme Court decisions in *Sam (No 2) v Attorney-General*³⁵ and *Attorney-General v Commission on Human Rights and Administrative Justice (No 2)*³⁶, on the question of indemnity for past

³² [1996-97] SCGLR 431.

³³ (1970) CC 55.

³⁴ [2000] SCGLR 24.

³⁵ [2000] SCGLR 305.

³⁶ [1998-99] SCGLR 894.

injustices and wrongs committed during the period of military rule. These decisions would help sustain the stability of the present democratic system of government after many years of military rule. By these two decisions, the Supreme Court drew a sharp line between the past and the present. The net effect is that the Government of the PNDC and other appointees of that government, cannot be held accountable for their stewardship simply because of the immunity granted to that government by section 34(1) of the transitional provisions of the 1992 Constitution.³⁷ However, the Government of the NDC, which was democratically elected under the 1992 Constitution, and headed by former President JJ Rawlings, must be held accountable for their stewardship during the eight-year rule under the same Constitution, 1992.³⁸

³⁷ These decisions of the Supreme Court must not be viewed as suggesting that members of the military governments and their appointees, who have committed crimes, must not be prosecuted because of the indemnity clause in section 34(1) of the transitional provisions. See in that regard, a publication in *Daily Graphic* of 2 June 2004, front page for a news story captioned: “Review Laws on Immunity.” In that publication, a Member of the Council of State, Nana Pra Agyensaim VI, who is a barrister, was quoted as having called for the review of all constitutional provisions and laws which give immunity to people who have committed atrocities in the past. He was also quoted as having said that: “We must revisit all the transitional provisions of our constitution and laws with the view to expunging them and put all suspects on trial as a deterrent to citizens of this country.” Nana Pra Agyensaim made these remarks at a launch held in Accra on 1 June 2004 for funds to manufacture and erect busts of the three High Court Judges who were abducted and murdered on 30 June 1982 together with Major Sam (Rtd) at the Bundase Military Range near Accra. The three judges were Mr Justice Fred Poku Sarkodee, Mrs Justice Cecilia Koranteng-Addo and Mr Justice Kwadwo Agyei-Agyepong.

³⁸ See on the need for accountability: the Preamble to the 1992 Constitution which states in part: “AND IN SOLEMN declaration and affirmation of our commitment to; Freedom, Justice, Probity and Accountability” (my emphasis). See also article 1(1) of the Constitution which states: “*The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in [the] Constitution*” (my emphasis).

It must be stressed, however, that witch-hunting and unnecessary acts of harassment against the members of the NDC Government (now in opposition), should not be countenanced and encouraged by the NPP Government which was also democratically installed under the Constitution, 1992.

The distinction made by the Supreme Court in the *Benneh* case³⁹ – a distinction also made in the earlier cases such as *Gbedemah v Awoonor-Williams*⁴⁰ and in recent cases such as *Ellis*⁴¹ and *Sam (No2)*,⁴² discussed in detail in chapter 5, marks a very significant development of constitutional law in Ghana: The ouster clause in section 34(3) of the transitional provisions is relevant and effective only in respect of legislative, executive and judicial action taken or purported to have been taken and completed by the Military Regimes before the coming into force of the Fourth Republican Constitution, 1992. However, the existing law (including laws passed by previous military regimes) can be declared void by the Supreme Court in the exercise of its power of judicial review of legislation notwithstanding the provision in section 34(3) of the transitional provisions if they are inconsistent with, or to borrow the words of Apaloo JA (as he then was) in the *Benneh* case (supra), if they do not “harmonise with the provisions of the Constitution. If they fall foul of it, they go.”

³⁹ [1974] 2 GLR 47, CA (full bench).

⁴⁰ (1969) 2 G & G 438.

⁴¹ [2000] SCGLR 305.

⁴² [2000] SCGLR 24.

Also undertaken in chapter 5 is the examination in detail of the question of the judicial review of legislative action in the light of the creation of the Fast Track High Court by the Chief Justice under article 139(3) of the Constitution, 1992. The conclusion may be drawn that the Chief Justice has power under article 139(3) of the Constitution to administratively create a division of the High Court described as the Fast Track High Court. But he has no power to regulate the practice and procedure of the Fast Track Court validly created by him in the exercise of his administrative discretion. It could also be concluded that, given the provision in article 140(1) of the Constitution, the Fast Track High Court has jurisdiction to determine all the matters listed in the guidelines issued by the Chief Justice.

Both the majority and minority opinions in the *Tsatsu Tsikata* case⁴³ have made some contribution to the development of constitutional law in Ghana. The judges must be commended for the painstaking manner with which they approached and resolved the issue raised for determination. They have clarified the law on the creation of the division of the High Court under article 139(3) of the Constitution. The majority opinion on the application for review of the decision of the ordinary bench has the commendable effect of sanctioning the Fast Track High Court as a court of competent jurisdiction under article 140(1) of the Constitution. But their lordships made it very clear that the question of practice and procedure in the Fast Track High Court is a matter to be determined by the Rules of Court Committee, and not by the Chief Justice.

Perhaps it is high time the Chief Justice created administratively under article 139(3) of the 1992 Constitution, the Fundamental Human Rights and Freedoms Division of the High Court. The elaborate provisions of the Constitution, 1992 guaranteeing the enjoyment of fundamental human rights and freedoms would be rendered nugatory, ineffective and

⁴³ [2001-2002] SCGLR 189 and 620.

derisory, unless all constitutional law claims and disputes, raising issues of enforcement of fundamental human rights, are determined expeditiously. The creation of such a Division of the High Court in Ghana would give teeth and support to the 10th December 2002 Human Rights Day statement issued by the Commonwealth Secretary General, Rt Hon Don McKinnon. As he put it:⁴⁴

“... human rights must be taken seriously in order to recognize the equal worth of human lives and the right of all people to fundamental, political and civil rights such as freedom of expression, association and assembly. ‘Respect for fundamental human rights is a core Commonwealth principle, enshrined in the Harare Commonwealth Declaration,’ ... ‘We celebrate Human Rights Day ...as a reaffirmation of our core commitment to the inherent dignity of all human beings. Any violation of human rights diminishes our own human dignity.’”

Supreme Court and judicial review of executive action

The issue of the power of the Supreme Court to review executive action was discussed in detail in chapter 6. It will also be recalled that in chapter 6, we did discuss the legal effect of articles 2(1)(b) read together with articles 57(4) and (5) and 88(5) relating to the executive powers of the President. We may conclude that the executive authority of Ghana is vested in the President, to be exercised by him directly or through subordinate officers and is expressed to be taken in the name of the President; that the phrase "all civil proceedings against the State" within the meaning of article 88(5) may be defined to include all civil claims pertaining to complaints against presidential acts or acts taken by subordinate officers in the

⁴⁴ See *Newsletter of the Human Rights Unit* of the Commonwealth Secretariat Issue No 1 January 2003 at p 2.

name of the President; and that all civil claims including prerogative writs and actions under article 2 of the Constitution, should be instituted against the Attorney-General for and on behalf of the Government of Ghana or the President in whom is vested the executive power of the State. It is expected that any prerogative orders or order issued by the Supreme Court or the High Court, directed at the President or any Minister of State, are to be complied with by the President or the government. As earlier indicated, “government” has been defined in article 295 (1) of the Constitution as meaning “any authority by which the executive authority of Ghana is duly exercised.”

It is also suggested that the majority opinions in *New Patriotic Party v President Rawlings*⁴⁵ and *Amidu v President Kufuor*,⁴⁶ discussed in chapter 6, holding that the Attorney-General and not the President is the proper defendant in actions for prerogative writs and applications under article 2, is the better view and may be regarded as having correctly stated the law.⁴⁷ The decision in the *Amidu v President Kufuor* is particularly important and must be welcomed in that it has resolved the apparent conflict between the provisions in article 57 (4) and (5), conferring on the President immunity from suits in the

⁴⁵ [1992-94] 2 GLR 193, SC.

⁴⁶ [2001-2002] SCGLR 86.

⁴⁷ The law was the same even during the period of Military Regimes in Ghana. Thus in considering the exercise of executive authority of Ghana as vested in the Chairman of the National Redemption Council Military Government established under the 1972 NRC Proclamation, Professor W C Ekow Daniels, in “The Meaning and Scope of Executive Power in Ghana Today” (1974) 11 UGLJ 109 at 116 said: “Whoever exercises the executive authority, whether the Chairman himself directly or indirectly through officers subordinate to him, that act is the act of the Government. Any person dissatisfied with or aggrieved by it can bring an action not against the Chairman who enjoys procedural immunity but against the Attorney-General as representing the Government of Ghana.”

performance of his executive functions on the one hand, and the provision in article 2, providing for enforcement of the Constitution on the other hand. These two decisions also ensure certainty in the law by following the previous decisions of the Supreme Court in *Sallah v Attorney-General*⁴⁸ and *Tuffuor v Attorney-General*.⁴⁹

It is further suggested that the procedure for removing the President from office for his failure to obey or carry out the terms of an order by the Supreme Court under article 2(4), is properly catered for by the procedure for the removal of the President stated in article 69 of the Constitution. The specified procedure does not at all involve suing the President directly or the Attorney-General for that matter. Where the presidential conduct calls for his impeachment, it would appear that the proper procedure would be to invoke the application of article 69, and not to bring an action under article 2 of the Constitution or an application for a prerogative order such as mandamus or prohibition.

Enforcement of Fundamental Human Rights and Freedoms as distinct from enforcement of the Constitution, 1992 itself

In chapter 7, we discussed in detail, what may be regarded as the most distinctive contribution of the Supreme Court, namely, the question of the Supreme Court and the enforcement and interpretation of the provisions relating to Fundamental Human Rights and Freedoms.

It has been found that the decisions and pronouncements of the Supreme Court on the provisions of the Constitution relating to the general fundamental Human Rights and

⁴⁸ (1970) CC 22; (1970) 2 G & G (Volume II, Part 2) 493, SC.

⁴⁹ [1980] GLR 637, SC.

Freedoms, as examined in detail in chapter 7, have enriched Ghanaian constitutional law in that regard. The epoch-making decisions such as: *New Patriotic Party v Inspector-General of Police*⁵⁰ on freedom of assembly and the right to demonstrate (article 21(1)(d) and (4)(a) and (c)); and the two cases of *Mensima v Attorney-General*⁵¹ and *New Patriotic Party v Attorney-General (Ciba Case)*⁵² on freedom of association including freedom to form or join trade unions (articles 21(1)(e) and 37(2)(a)), have contributed immensely to the deepening and sustenance of the new democratic dispensation for the record continuous period of more than ten years commencing from 7 January 1993.

Even more commendable is the enforcement by the Supreme Court of the freedom of speech and expression, including freedom of the press and other media as exemplified by another epoch-making decision: *New Patriotic Party v Ghana Broadcasting Corporation*⁵³ and the court's decision in *Republic v Independent Media Corporation of Ghana (Radio Eye Case)*.⁵⁴ The significance of these two cases may be reiterated: First, these two decisions are in line with the Commonwealth Statement on freedom of the press. Second, as pointed out, these two decisions appear to lay down the following statement of Ghana constitutional law: for the establishment and operation of the print media, there is no requirement for a prior application for a grant of licence. However, for the establishment and operation of the electronic media, namely, for radio and television broadcasting, there is the need for some regulatory measure in the form of obtaining the written consent or licence from the regulatory body.

⁵⁰ [1993-94] 2 GLR 459, SC.

⁵¹ [1996-97] SCGLR 676.

⁵² [1996-97] SCGLR 729.

⁵³ [1993-94] 2 GLR 354.

⁵⁴ [1996-97] SCGLR 258.

The significance of the decisions of the Supreme Court in *Republic v Tommy Thompson Books Ltd (No 2)*⁵⁵ and in *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson*⁵⁶ may also be underlined as to the true effect of articles 21(4)(c) and 164 of the Constitution in relation to laws which derogate from freedom of speech and expression. The effect of those two decisions by the Supreme Court is to make it clear that the fundamental right to freedom of speech and expression is not an open-ended right; it is very much subject to laws imposing restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services and for the purpose of protecting the reputations, rights and freedoms of other persons within the meaning of articles 21(4)(c) and 164 of the Constitution, 1992. The position taken by the Supreme Court in those two cases would promote democratic system of government. Furthermore, the Supreme Court, by those two decisions, has been vindicated, given the abuse of freedom of speech discussed in detail in chapter 7 in the wake of the enactment of the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602).⁵⁷

One may further underline the conclusion reached in applying the provision in article 164 as a limitation on freedom of speech and independence of the media, as guaranteed under article 162(1) of the Constitution 1992, namely, the need for a balancing exercise in applying the

⁵⁵ [1996-97] SCGLR 484.

⁵⁶ [1996-97] SCGLR 804.

⁵⁷ In that regard, see *Daily Graphic*, 17 September 2003, front page where the Minister of the Interior, Hon Mr Hackman Owusu-Agyemang, was quoted as having cautioned the media to be circumspect about the manner in which they report on issues concerning state security. The Minister was also quoted as having said that “much as the media would want to attract people to their news items, highlighting unconfirmed issues on national security would create unnecessary uncertainty and panic in the country.” See also *The Evening News*, June 28, 2004, at page 4 where under the topic: “Unbridled phone-in calls can plunge the country into chaos”, a High Court Judge, Hon Mr Justice L L Mensah was quoted as having said that: “The repeal of the criminal law libel was no licence for journalists to use slanderous language and that offenders could still be punished.”

provision in article 164. In applying the proportionality test as explained in chapter 7, the Supreme Court may also resort to the suggested balancing exercise. In doing so, both the interests of society on one hand, and that of the individual on the other hand, must be espoused and respected by the Supreme Court so as to ensure good governance in the country. It is therefore the duty of the Supreme Court to construe all existing and future legislation - creating limitations and impediments on the enjoyment of fundamental human rights and freedoms - in such a way as to promote good governance aimed at the rapid socio-economic, political and cultural development of Ghana. Indeed, the need for resorting to a balancing exercise is called for by the provision in article 12(2) of the Constitution which states that: “Every person in Ghana ... shall be entitled to the fundamental human rights and freedoms of the individual ... but subject to respect for the rights and freedoms of others and for the public interest.”

Given the detailed discussion on the question of the enforcement of fundamental human rights and freedoms, it may be concluded that the enjoyment of fundamental human rights and freedoms as pronounced upon and enforced by the Supreme Court and as guaranteed by the Constitution, 1992 is a most welcome legal development which must be upheld and defended by all citizens of Ghana in terms of articles 3(4) and 41(b) of the Constitution. It has been concluded that the progressive approach and bold stance adopted by the Supreme Court established under the 1992 Constitution, on the question of enforcement of fundamental human rights and freedoms, is a far cry from that adopted by the Supreme Court established under the 1960 First Republican Constitution.⁵⁸

⁵⁸ See, for example, the much-criticised decision of the Supreme Court established under the 1960 Constitution in *Re Akoto* [1961] GLR (Pt II) 523.

It is also evident that the democratic system of government as enshrined in the Constitution, 1992 and as enforced by the Supreme Court in its decisions relating to fundamental human rights and freedoms, would create the enabling environment for rapid socio-economic development of the country. There is no doubt that the economic development would be further enhanced if there is peaceful constitutional development of Ghana as reflected by the various decisions of the Supreme Court. It seems quite clear that there can be no such economic development without the observance and enforcement of fundamental human rights within the meaning of chapter 5 of the Constitution, 1992. As was rightly observed by the Committee of Experts in their Report:⁵⁹

“[The] resurgence of interest in human rights is hardly surprising. Apart from the obvious desire for a more democratic order and the universal yearning for human dignity, there is a growing realization that the enjoyment of the basic freedoms is conducive to the development and purposeful application of human resources and, indeed, the establishment of an environment that enhances development.”

The Supreme Court has been found to be commendably laying down and expounding on the principles pertaining to the enforcement of the Constitution in the exercise of the enforcement jurisdiction under articles 2(1) and 130(1) of the Constitution. Briefly, the Supreme Court made it clear that “person” within the meaning of article 2(1) is referable to not only to a natural person but also a corporate body like a registered political party or a limited liability company. The court has also made it very clear, as decided by cases such as *Sam (No 2) v Attorney-General*,⁶⁰ that it is necessary to show or prove the existence of personal interest in an action seeking enforcement of fundamental human rights and freedoms. But there is, however, no requirement for

⁵⁹ See The 1991 Report on Proposals for a Draft Constitution of Ghana, para 133 at page 63.

⁶⁰ [2000] SCGLR 305.

proving any such personal interest, nor is there a requirement for proving the existence of “controversy or dispute in a claim by a Ghanaian citizen for a declaration under article 2(1)(a).”

Attention should also be drawn to a very significant and novel proposition by the court as decided in the *Tsatsu Tsikata (No 2) case*,⁶¹ which is that the Supreme Court could itself invoke *suo motu*, in a pending action, its enforcement jurisdiction. As suggested in our concluding remarks, in the light of our discussion of the issue in chapter 8, there is no policy reason why the Supreme Court cannot do so in the interest of justice and for the quick resolution of constitutional disputes. Equally significant is the principle that a plea of estoppel is no bar to an enforcement action; nor is there a time limit within which a person could seek an enforcement of the Constitution.

In chapter 8 we did also address the issue of the enforcement of the 1992 Constitution, particularly, article 107 vis-à-vis the rights of a person which had accrued before the coming into force of the Constitution. As pointed out in the examination of the question of accrued rights, it seems that the apparent policy and intention underlying the provision in article 107 Constitution, 1992 is not only to suppress and frown upon retroactive legislation; it is also to respect and honour procedural and substantive rights which had been acquired and accrued before the coming into force of the Constitution. In that regard, the decision of the majority of the Supreme Court in *Fenuku v John-Teye*,⁶² (examined in detail in chapter 8) marks, as then suggested, a very significant development in the law on accrued rights vis-à-vis retrospective legislation. The Supreme Court, by its majority decision in *Fenuku v John-Teye* has, in effect, held that it would refuse to give effect

⁶¹ [2001-2002] SCGLR 620 (also described as *The Fast Track High Court Case*).

⁶² [2001-2002] SCGLR 985.

to retrospective legislation – very much in consonance with the spirit of the 1992 Constitution which frowns upon retroactive legislation - even if Parliament has, by an existing law such as the Conveyancing Decree, 1973 (NRCD 175), s 14(3) clearly indicated its intention that accrued rights of persons were to be retrospectively affected.

As seen in the discussion on the issue of enforcement of the Constitution as the fundamental law of the land in chapter 8, there is the perennial conflict between law and justice. The Supreme Court by its decisions appears to have resolved this conflict in favour of justice. This commendable leaning in favour of doing justice would contribute immensely to the development and sustenance of democracy in Ghana. In that regard, one could appropriately recommend the urgent need for the Supreme Court to champion and promote true justice under a constitutional democracy by adopting, in the resolution of future constitutional cases, the inspiring words of Edward Wiredu JSC in *Nartey v Attorney-General & Justice Adade*:⁶³

⁶³ [1996-97] SCGLR 63 at 79. (The emphasis is mine.) See also the dictum of Kpegah JSC in *Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba* [2001-2002] SCGLR 545 at 573: “...in our jurisdiction, judicial power must be conceived as of special type of public duty imposed upon the judge by our Constitution which vests the judicial power of the State in the judiciary. This power is to be exercised on behalf of the people from whom justice emanates. And, we the judges are obliged to exercise this power, in the performance of our duties, for the attainment of ‘Freedom and Justice’ for our people... The primary responsibility of a court, as I see it, is to do justice to those who appear before it according to law. And, any conduct on its part which is subversive of, or tends to undermine, this primary duty is to be decried.”

“The 1992 Constitution envisages that the implementation of its provisions as a living, vibrant and humane document would lead to harmonious, beneficent, healthy, just and fair results. These qualities are aimed at achieving justice. The Constitution abhors discrimination in any form, disparity and any inequitable results arising out of its implementation. It provides equality before the law and ensures that there is uniformity, discouraging all forms of arbitrariness. An absolute discretion as enjoyed under PNDCL 161 is alien to its letter and spirit. An interpretation of any of its provisions must be guided by the above objectives or requirements to achieve the desired results. We must therefore in embarking on our duty of interpreting the provisions of the Constitution avoid such construction as would breed discrimination, disparity, absurdity and where necessary adopt a more liberal approach to achieve just and fair results.”

It is suggested that the Supreme Court should not merely concern itself with the enforcement of the fundamental human rights and freedoms and the Constitution itself as discussed in detail in chapters 7 and 8; nor should it, as the highest constitutional and final appellate court, only be concerned with the maintenance of constitutionalism and the promotion of constitutional values; the court must be concerned with the growth of the law itself and the sustenance of a stable and democratic social order as a prerequisite to the establishment of a proper democratic government founded on the rule of law.⁶⁴

⁶⁴ On the need for a constitutional democracy founded on the rule of law: see *Amidu v President Kufuor* [2001-2002] SCGLR 595 where Adjabeng JSC in his dissenting opinion said at page 176 (my emphasis): “The Constitution makes it clear that everybody in this country, including His Excellency, the President, is under the Constitution and the law. This clearly is what we mean by the rule of law. *It is heartening that governance by the rule of law is one of the cornerstones of the policies of the present government. And I have no doubt that adherence to this policy will indeed bring about real democracy in this country and therefore real freedom, justice and prosperity.*”

It should be stressed, however, that the Supreme Court cannot contribute to the growth of the law without the required input by counsel as officers of the court. It is counsel, who by their arguments, informed by painstaking research and industry, would and should challenge the judges of the Supreme Court to deliver judgments that advance the developments and growth in the law.⁶⁵ However, the judges of the Supreme Court can best deliver the goods, as it were, if the researched arguments of counsel are matched by a change in orientation in the attitude and perception of the judges of the court itself. The judges must be seen, by such orientation, to be evolving the jurisprudential and philosophical principles on which their decisions are founded. In effect, we should aim at having in the Supreme Court, apolitical, logic-oriented and activist bench. The Supreme Court must, in determining constitutional issues thrown up by cases such as the *Fast Track High Court* case,⁶⁶ view as relevant, the social, economic and political implications of their decisions. In that regard, the composition of the Supreme Court should be a blend and balance of competent persons with varied experiences recruited from outside the bench with high academic credentials on the one hand, and on the other, competent superior

⁶⁵ Happily, the Supreme Court is very much aware of this duty: see *Apea v Asamoah* [2003-2004] SCGLR 226 where the court per Bamford-Addo JSC said: “I think that if submissions had been made before the Court of Appeal as confirmed in the record of appeal..., then it was the duty of the court to have discussed and considered the issues raised and to have given a considered opinion on those points, itself, rather than to simply rely on the decisions and findings made by the trial High Court, however correct and unimpeachable they may be.” In the same case, Brobbey JSC also said: “It seems fair to comment that where parties appearing before the appellate judges have filed arguments, cited cases, made submissions and stated their positions which differ from each other, the parties would reasonably expect that the court would give some indications in the form of reasons as to which of the conflicting positions of the parties have been accepted by the court to be the right one. In a situation like that, some reasoned opinion from the appellate judges will be expected by the parties. It may not be the best of practices to resort to judgment in the form of a memorandum which does not spell out detailed reasons for the stand taken by the appellate justices.”

⁶⁶ [2001-2002] SCGLR 189 and 620.

judges promoted from either the High Court or the Court of Appeal⁶⁷ or experienced legal practitioners from the Bar.

On the question of the role of the Supreme Court in the growth of the law as suggested above, attention should be focused on a very relevant observation made by Adzoe JSC in delivering the unanimous judgment of the Supreme Court in the recent case of *Okyere v The Republic*,⁶⁸ allowing the appeal against the appellant's conviction for forgery. The judge said:⁶⁹

“The task of the Supreme Court is to seek stability and growth of the law, and we think that it is the duty of the Supreme Court at all times to declare its opinion, if the opinion may usefully settle the law. This is what is envisaged in our Supreme Court Rules, 1996 (CI 16), s 6(7)(b) which provides that in deciding an appeal, the court should not confine itself to the grounds set forth by the appellant in his grounds of appeal, or be precluded from resting its decision on a ground not set forth by the appellant.”

It could be concluded that the Supreme Court, as demonstrated in this dissertation, has contributed, in the words of Adzoe JSC, to “the stability and growth of the law” particularly, in the area of Ghana Constitutional Law.

As to the contribution of the Supreme Court to the sustenance of a stable democratic social order, the point may further be illustrated by the Supreme Court decision in

⁶⁷ It is to be noted that Hon Mr Justice J N K Taylor, a very distinguished and now retired Justice of the Supreme Court was appointed to the Supreme Court in 1981 straight from the High Court without first being promoted to the Court of Appeal.

⁶⁸ [2001-2002] SCGLR 833.

⁶⁹ Ibid at 841. (The emphasis is mine).

Republic v High Court, Accra; Ex parte Afoda.⁷⁰ On 21 October 1969, the trial circuit court made an order for recovery of possession of the disputed house against the defendants. On 28 October, the defendants appealed to the Court of Appeal from the decision of the trial circuit court. The next day, the defendants also applied for a stay of execution of the order for possession pending the appeal.

Meanwhile, the plaintiffs, in whose favour the order for possession was made, also made an *ex parte* application for a writ of possession for recovery of the disputed house. The deputy sheriff, in pursuance of the grant of the writ of possession, ejected the defendants from the disputed house. But believing, in the words of the defendants, that “the exercise was unlawful as having been carried out when the motion for stay of execution pending appeal... had not been heard”, the defendants resorted to self-help by reinstating themselves in the house from which they had earlier been ejected by the deputy sheriff. The defendants were consequently cited in the High Court by the plaintiffs for contempt.

The High Court found the defendants liable for contempt but the case was adjourned for two weeks for sentence. Before the court could pronounce the sentence, the defendants applied to the Supreme Court for an order of certiorari and prohibition to respectively quash the conviction for contempt and to prohibit the trial High Court from proceeding to sentence them. The ground relied upon was that there was an error of law on the face of the record, namely, the writ of recovery of possession ought not to have been made because of the filing of the motion for stay of execution pending appeal.

⁷⁰ [2001-2002] SCGLR 786. My attention was drawn to this case at the tail-end of the study. It is necessary to examine this case in detail having regard to the important principle it illustrates.

The issue raised before the Supreme Court was whether a party to a suit, or a person to whom an order of a court of competent jurisdiction was directed, could justify his disobedience and, as it were, take the law into his own hands and disregard an order of a court on the grounds that the order or process was null and void, or erroneous, or improvidently made.

The Supreme Court unanimously dismissed the application for certiorari and prohibition. The court held that the fact that an order of, or process from, a court of competent jurisdiction was perceived and considered void or erroneous, should not give a party affected by the order or to whom the process was directed, the slightest encouragement to disobey it. It was further held that the party affected by the order, could not, when cited for contempt, justify the said disobedience by the fact that the order ought not to have been made or the process issued in the first place. The proper procedure to follow was to either obey or sue for declaration to the effect that the order had been improperly made; or apply to have the order or judgment set aside. In delivering the ruling of the court, Kpegah JSC said:⁷¹

“As a matter of public policy it is important that the authority of the court and the sanctity of its process be maintained at all times. It is too dangerous to give a litigant and his counsel the right to decide which orders or process of the court are lawful and therefore deserving of obedience, and if not, must be disobeyed. An order or process of a court of competent jurisdiction cannot be impeached by disobedience. That way, we would needlessly be empowering lawyers, in their various chambers, to have supervisory jurisdiction over the courts. That is an effective way to undermine, if not destroy, the administration of justice.”

⁷¹ Ibid at 773.

In his concurring opinion, Adzoe JSC also said:⁷²

“No litigant has the right to determine for himself whether or not a court order is valid to command his obedience to it. *Compliance with the orders of the courts is the only sure route to public order and peace which we need to sustain a stable democratic social order.*”

Furthermore, as suggested elsewhere,⁷³ in order to promote and sustain Ghana’s infant democratic system of government as now championed by the Supreme Court, all available resources – human and logistical – should be employed to hear, determine and dispose of all pending and future constitutional law suits quickly and without undue delay. In pursuance of this suggestion, there is the urgent need for the creation of a Special Constitutional Court Division of the Supreme Court, to determine, as expeditiously as possible, all constitutional law claims and disputes in the exercise of the court’s exclusive and original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution or judicial review of legislative action under articles 2(1) and 130(1) of the 192 Constitution. It should be stressed, however, that the creation of such a Special Constitutional Court Division of the Supreme Court should be distinct from the earlier suggestion for the creation of the Fundamental Human Rights Division of the High Court. As pointed out in chapter 8, the weight of authorities supports the view that, it is the High Court and not the Supreme Court, which has been vested with exclusive jurisdiction under articles 33(1), 130(1) and 140(2) of the Constitution to determine alleged breaches of fundamental human rights and freedoms as enshrined in chapter 5 of the Constitution. The provisions of the Constitution would remain

⁷² Ibid at 774 (my emphasis).

⁷³ See Bimpong-Buta, S Y, “The Role of the Judiciary in the Establishment of Democracy in Ghana” unpublished lecture (1999).

mere paper guarantees of abstract liberties unless the courts, spearheaded by the Supreme Court, took concrete steps to ensure that the citizenry enjoyed the constitutional protection needed to fight against despotism and its attendant arbitrariness and miscarriage of justice. The suggestion for the establishment of a Special Constitutional Court Division of the Supreme Court,⁷⁴ would give teeth to the timely observation by Kpegah JSC in his dissenting opinion in *Yeboah v J H Mensah* that: “the primary function of the Supreme Court is constitutional adjudication, and its special task of promoting and safeguarding constitutional values.”⁷⁵

⁷⁴ Commenting on the suggestion made as far back as 6 April 1992 for the creation of constitutional court division of the Supreme Court, the Editorial of *The Ghanaian Chronicle* of April 12-13, 1999 Issue at page 5 said: “*The Ghanaian Chronicle* strongly appeals to the Chief Justice..., the Attorney-General and other equally important stakeholders in the administration of justice to promptly heed Mr Bimpong-Buta’s call for the creation of a special constitutional law claims. As Mr Bimpong-Buta stressed, the prompt delivery of justice will not only make the denial of justice to sections of the populace a thing of the past, but, equally important, it ‘will enhance the credibility and public perception of the courts as the fountain of justice.’”

⁷⁵ [1998-99] SCGLR 492 at 513. The Special Constitutional Court Division being advocated, composed of at least seven justices, should be vested with exclusive original enforcement and interpretative jurisdiction in terms of article 130(1) of the 1992 Constitution. The court may be similar to the Constitutional Court established under section 166 of the 1996 Constitution of the Republic of South Africa (Act 108 of 1996). Section 167(1)-(3) thereof provides that: “(1) The Constitutional Court consists of a President, a Deputy President and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court –

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.”

Attention may also be respectfully drawn to the fact that co-operation has always been a central feature of democracy.⁷⁶ Therefore the judiciary, led by the Supreme Court, should, by their decisions, encourage mutual co-operation between the government and the press. Such mutual co-operation “would enhance our quest for a viable and just democracy.”⁷⁷ Such co-operation should also exist between the judiciary and the government to promote democratic governance. As the late Chief Justice, Mr Justice I K Abban, put it in his address delivered at the Fourth Speaker’s Breakfast Forum held on 16 February 1998: “The Independence of the judiciary does not mean that there should not be co-operation between it and other arms of government.”⁷⁸

It is also suggested that on the whole, the judiciary, championed by the Supreme Court, has so far made some appreciable and effective contributions to the development and sustenance of democracy in Ghana, as exemplified by some of the constitutional cases so far determined by it. However, it is important and desirable for the judiciary, headed by the Supreme Court (if one may borrow the words of Acquah JSC, as he then was, in *Yeboah v J H Mensah*)⁷⁹ to “maintain some consistency in the interpretation of the various provisions of the Constitution” and “where [they] find it necessary to depart from a previous decision, to do so on stated

⁷⁶ See Schmitter, P C and Karl, T L op cit at p 43.

⁷⁷ As noted in the Editorial of the *Daily Graphic*, 20 December, 1996.

⁷⁸ See *Ghanaian Times*, 17 February 1998, front page. The Chief Justice in his address debunked the public perception that the judiciary is part of the government. His lordship was quoted as having said that any time the government won a case in court, the perception was heightened but when it lost a case, the perception died a natural death. But “it is not possible that the government would lose all its cases at the court”, he said.

⁷⁹ [1998-99] SCGLR 492.

reasons.” It should be pointed out again that in this respect, the Supreme Court has, in some cases, been commendably consistent; whilst in others, it has regrettably been inconsistent. Thus, as earlier pointed out in chapter 3 on the question of the application in Ghana of the doctrine of political question, the court in *New Patriotic Party v Attorney-General (the 31st December case)*⁸⁰ held (by majority decision) that it had jurisdiction to determine political questions in the exercise of its constitutional duty. That jurisdiction was, however, denied by the same court in the subsequent case of *Ghana Bar Association v Attorney-General and Justice Abban*,⁸¹ only for it to be reasserted in *J H Mensah v Attorney-General*.⁸²

However, the Supreme Court has been consistent on one issue, namely, that it would decline its enforcement or interpretation jurisdiction under articles 2 and 130 of the Constitution, 1992 where an action, dressed or presented in the garb of an enforcement action or constitutional issue, is in substance and reality, an action which must first be heard either by a chieftaincy tribunal, or by the High Court in the exercise of its original jurisdiction, or by a special judicial body set up by the Constitution itself. The court so held in the earlier case of *Yiadom IV v Amaniapong*;⁸³ and in the recent cases of *GBA v Attorney-General and Justice Abban* (supra), *Edusei v Attorney-General*⁸⁴ and *Yeboah v J H Mensah*.⁸⁵ Where the Supreme Court is found to be inconsistent in its decisions, it shall, in the words of Acquah JSC in *Yeboah v J H Mensah*: “by [its] interpretation, render the Constitution incoherent and thereby disturb its smooth functioning.” That inconsistency in its approach to constitutional interpretation, would not augur well for the establishment and sustenance of democracy in

⁸⁰ [1993-94] 2 GLR 35, SC.

⁸¹ [1995-96] 1 GLR 598; [2003-2004] SCGLR 250, SC.

⁸² [1996-97] SCGLR 320.

⁸³ [1981] GLR 3, SC.

⁸⁴ [1996-97] SCGLR 1.

⁸⁵ [1998-99] SCGLR 492.

Ghana. It is suggested that to sustain the democratic system of government, their Lordships in the Supreme Court must constantly bear in mind the wise words of the now retired Mr Justice Charles Hayfron-Benjamin JSC in *Edusei v Attorney-General*:⁸⁶

“In my ... opinion, this court ought to be worldly wise, informing itself of public policy, public opinion, the affairs of daily living of our people and government policy and together create an atmosphere that will be conducive to good governance.”

One may also underline what Adjabeng JSC said in his dissenting opinion in *Ekwam v Pianim (No 2)*:⁸⁷

“It also clearly means that the framers of the 1992 Constitution, ie the Consultative Assembly and, indeed the people of Ghana, who approved the Constitution in a Referendum, did not intend to allow acts such as the conviction of the defendant in 1983 [for offence involving the security of the State] to be carried over into the new era. In other words, all those unpleasant acts and events of those turbulent days should not be allowed to cross over into the new era.

It [appears] that that was the reason behind the insertion of the unprecedented and sweeping indemnity in, especially section 34(1) of the transitional provisions of the 1992 Constitution. In his book, *The Law of Interpretation in Ghana (Exposition and Critique)*, Advanced Legal Publications, Accra (1995) at p 266 Bimpong-Buta writes as follows:

⁸⁶ [1996-97] SCGLR 1 at 32.

⁸⁷ [1996-97] SCGLR 120 at 150 (emphasis is mine).

“It must also be pointed out that even though the Consultative Assembly decided to include the whole of the transitional provisions in the Constitution without a word of debate, the Chairman of the Assembly’s Committee on State Policy, Mr Stanley-Pierre, was subsequently quoted by the *People’s Daily Graphic* [1 April 1992 No 12861] as having explained in an interview with the paper that:

‘The Consultative Assembly indemnified PNDC Members and appointees in the Transitional Provisions in the final draft of the Constitution because *it believes that the Fourth Republic should be started on a clean slate without sowing the seeds of rancour, litigation and retribution.*’

I believe that this is the spirit in which we all should handle the Fourth Republic and do our best to nurture it so that it can succeed and usher this rich and lovely country of ours into prosperity and modernity. *In my view, the earlier we forgot those unpleasant things of the past the better it would be for the health, growth and success of our young democracy and, therefore, the prosperity of our nation.*”⁸⁸

⁸⁸ See also the dictum of Baddoo JA (as he then was), when sitting as additional judge of the High Court in the case of *Commission on Human Rights and Administrative Justice v Social Security Bank Ltd*, [1994-2000] CHRAJ 61 where he said at page 76: “It is my considered opinion that the courts should actively support any act of the government aimed at redressing wrongs, correcting injustice and promoting reconciliation within the country. Such an act was the setting up of the Ato Ampiah Committee and the continuation of the committee’s work by the Commission for Human Rights and Administrative Justice.”

In conclusion, it is strongly suggested that the Supreme Court should, first, use its interpretative and enforcement jurisdiction or powers under articles 2 and 130(1) of the Constitution, 1992 with a view to promoting the much-needed reconciliation and the healing of wounds and the feeling of forgiveness among Ghanaians after decades of military rule. Second, and more importantly, the decisions and pronouncements of the court should imbue in Ghanaians a high sense of patriotism, devoid of partisanship so as to ensure a very stable, democratic and peaceful society. Such reconciliation and deep sense of patriotism, would bring about social peace which would, in turn, usher in the much-desired political, social and economic development and prosperity. Finally, one must underline one of the most distinctive contributions by the Supreme Court, as exemplified by decisions such as *British Airways v Attorney-General*, namely, its commendable determination to enforce the rule of law which is indispensable for the promotion and sustenance of democracy in Ghana. As pointed out in chapter 8, the decision of the Supreme Court in the *British Airways* case, marks a major shift in policy from the court's previous negative attitude, as shown by the decisions handed down in cases such as *In re Akoto*,⁸⁹ *Kwakyie v Attorney-General*⁹⁰ and *Fattal v Minister for the Internal Affairs*,⁹¹ to the positive approach aimed at the promotion and enforcement of the rule of law, the democratic system of government and the attainment of true justice in Ghana in line with the national motto: "Freedom and Justice."

⁸⁹ [1961] 2 GLR 523, PC.

⁹⁰ [1981] 1 GLR 944, SC.

⁹¹ [1981] GLR 104, SC.

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