LAW OF INTERPRETATION

(THE LAST ONE)

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CONSTRUCTION OF NON-STATUTORY DOCUMENTS

1.1. OTHER NON- STATUTORY DOCUMENTS

QUESTION THREE

A, who is an illiterate, sued B, a semi-illiterate who A asked to build a house for him.

A claimed against B, Gh¢60,000.00 representing the advance he paid to B, and expenses he would incur in demolishing the house because it was not built according to specifications given in the plan and general damages.

B, denied liability and in his defence, contended that A paid the advance in bits and pieces which prevented him from making bulk purchases for the construction as agreed and consequently he was overtaken by price increases, that he asked A to pay the balance of the cost price for him to complete the building but A refused, took away his building plan and drove away his workmen from the site and therefore he could not complete the building nor make good the defects.

The Agreement on the building did not include the number of rooms the building was to contain but A said the building was to contain twenty rooms in a two-storey house. B on the other hand, said A asked him to build a house for him which he A had seen him build for somebody else and that was what he was doing until A drove his workmen away. B counterclaimed for the excess cost he incurred in the construction of the building.

(a) Identify the issues that will be set down for the trial and evaluate same. How will you set out ascertaining the real intention of the parties' and what cannons of interpretation will you apply? **[13 Marks]**

(b) What presumptions are applicable in the scenario which justifies your conclusions in the case? **[12 Marks]**

[Total 25 Marks]

PART A

AREA OF LAW

- Interpretation of non-statutory documents.
- Canons of interpretation

ISSUES

1. Whether or not the parties being illiterate and semi-illiterate are bound by the express provisions of the agreement.

2. Whether or not the Plaintiff, A, can successfully enforce the agreement against B, the Semi-illiterate Defendant.

3. Whether or not extrinsic evidence may be admitted to ascertain the true intentions of the parties to effectuate the agreement.

APPLICABLE LAWS

The basic rules for the construction or interpretation of non-statutory documents were laid down in the case of **Biney v Biney [1974] 1GLR 318**, CA as follows;

1. **The construction must be as near to the mind and intention of the author as the law would permit.** – *the interpreter must start from the premise that it was not the intention of the maker of the document to achieve absurd and unfair results. Therefore, if in applying the grammatical or literal meaning the decision would be absurd, then the court may modify the literal meaning so as to avoid the absurdity and reach an interpretation that best effectuate the intention of the maker.* ***SEE*** *–* ***Re Amarteifio (Dec's); Amarteifio v Amarteifio -*** "GBP20 " to my wife. Applying strict literal meaning would have been absurd. The court modified the literal meaning by applying percentages to render the gift/bequest to the wife valid and sensible.

2. **The intention must be gathered from the written instrument itself,** and – *that it within the four corners of the document. Give meaning to what is expressed and not what ought to have been expressed. This rule seeks to avoid a situation where the court thinks for the parties and substitutes its wisdom with that of the maker of the document.* ***See Allan Sugar (products) ltd v Ghana Export Co. Ltd*** *– it is no function of the courts to rewrite an agreement for the parties by*

inserting terms that would have been beneficial but were overlooked especially when such an interpretation would amount to an interference with a third party's bargain.

1. **Technical words of limitation must have their strict legal effect**. *– where words or expressions have acquired technical meaning or considered as a term of art, the court must construe the words or expression in its special or technical meaning and not in its ordinary meaning.*

The 4th point

cases

- Furthermore, the case of **Najat Enterprises Ltd v Hanson [1982-83]** and **Boateng v VALCO** are to the effect that in construing documents and deeds, the document must read as a whole.

- **AG v Prince Ernest Augustus of Hanover** the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it.

That notwithstanding, there are supplementary rules to that posited in Biney's case supra in the area of interpretation of documents executed by illiterates. The cases are replete when it comes this are of the law. The locus classicus is **Kwamin v Kuffuor [1914]**, Lord Kinnear stated:

> *"When a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed to subvert it. But there is no presumption that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence".*

A more elaborate statement of the law was given in **Zabrama v Segbedzi [1991**] by **Kpegah JA** as follows:

> *" that where an illiterate executes a document which compromises his interest and this document is being cited against him by a party to it or his party, there is no presumption in favour of the proponent of the document, and against the illiterate person, that the latter appreciated and had an intelligent knowledge of the contents of the document, the party seeking to rely on the document must lead evidence in proof that the document was actually read and interpreted to the illiterate person who understood before signing same."*

Therefore, the established principle which has been enunciated by the courts is that

- "where an illiterate thumbprints or signs a document, the person who seeks to bind the illiterate to the document has to lead evidence to show that the document was explained and interpreted to him in the language that he understands before he signed or thumb printed it."

In the case of **Brown v. Ansah** (High Court, Cape Coast, 10 April 1989, unreported) it was held thus;

> "It is the ability to read and write the language in which the document is written which to me is relevant and not whether the fellow can be classified as **semiliterate** or **demi-semi-literate**."

- **The intention must be gathered from the written instrument itself**

According to Biney's case, the duty of the interpreter is to ascertain the intention of the parties from the written expression. That is, within the four corners of the document: maxim, ***animus hominus est anima scripta***; intention is the soul of an instrument. This rule seeks to avoid a situation where the court thinks for the parties and substitute its wisdom with that of the makers of the document.

In **BCM Ghana Ltd v Ashanti Goldfields Ltd [2005-2006],** Adinyira JSC observed respecting the interpretation of an arbitration clause in a contract thus:

> "the cardinal presumption in the interpretation of documents is that the parties are presumed to have intended what they have in fact said or written". As Jessel MR said in **Smith v Lucas (1881) 18 Ch D 531 at 542**: …*'one must consider the meaning of words used and not what one may guess to be the intention of the parties.'*

It follows therefore that, as a fundamental rule, the interpretation must at first instance be based on the text of the non-statutory document itself, i.e. *from the expressions used by the parties and not from the presumed intentions of the parties or what one may guess was intended by them; nor should it be sourced from any extrinsic or external source except as provided by law*.

When evidence of extrinsic circumstances is admissible in law

As a general rule, extrinsic or parole evidence is, as noted above, not ordinarily admissible in interpretation of written instruments at first instance to add to, vary or contradict the written terms. And the reason is largely to ensure certainty and therefore reliability of written instruments. However, in certain exceptional circumstances the law permits evidence to be admitted for purposes of interpretation even at first instance. These include:

1. Surrounding circumstances
2. Documents in foreign language

3. Trade usages and terms
4. Local or class usage
5. Ancient documents
6. Identification of parties and subject matter of transaction
7. As direct evidence of intention of party or parties in case of latent, not patent ambiguities.
8. To show the true nature of the transaction or legal relationship of parties.

- **Surrounding circumstances**

Although interpretation at first instance be based on the text of the document in context, the authorities on the subject, concede that in some instances, the meaning and application of the text will critically turn upon the circumstances surrounding the author(s) at the time when the words were used, and that evidence of such circumstances may be admissible for purposes of interpretation even at first instance.

In **Allan Sugar (Product) Ltd v Ghana Export Co. Ltd [1982-83]** the Court of Appeal held that evidence of ***antecedent or subsequent negotiations*** between the parties was inadmissible to interfere with the express terms of the written agreement between the parties, except in extreme cases of **genuine doubts**. **Francois JA** as he then was, citing ***Prenn v Simmonds [1971]*** noted:

> *".....where parties have reduced into writing their intentions, they are bound by their written word and the use of extraneous material as aids to interpretation can only be resorted to in **extreme cases of genuine doubt**."*

- **To show the true nature of the transaction or legal relationship of parties.**

This is also a special exception under which extrinsic evidence may be admitted to show the true nature of a transaction or the true legal relationship of the parties. In the case of **Manu v Emeruwa [1971]** the central issue was whether the transaction between the parties embodied in exhibit A, was a **pledge or a mortgage**, while Counsel for the Plaintiff insisted the transaction was in all the circumstances a pledge, counsel for the defendant contended that the court should confine itself to the four corners of that document and must not go outside the document to find the intention of the parties. In his judgment, **Abban J** noted:

> *" In cases of this kind, and especially where all the parties to the agreement are illiterate, the court should not restrict itself to the words used in the document to determine the true nature of the transaction intended by the parties. It is the substance of the transaction, and not the form, which must be looked at. The oral evidence and the circumstances surrounding the agreement must also be considered so far as they tend to disclose the actual intention of the parties."*

In effect, extrinsic evidence was held admissible to prove the actual intention of the parties.

ANALYSIS

Issue 1

The question whether or not the law recognizes a person as a semi-illiterate was resolved in the case of **Brown v Ansah** and subsequently in **In Re Bremansu; Akonu-Baffoe v Buaku & Vandyke** were it was held that**,** there is no such status as a semi or demi-illiterate. It is either a party can read and write the language in which the instrument was made and therefore a literate or he cannot read and write, thus an illiterate.

Based on the authorities espoused in the cases cited supra, the defendant, B, is in law an illiterate. Having concluded that both parties are illiterates, they are of, in the eyes of the law, equal status and bargaining power, hence both A and B are equally bound by the agreement they have so executed.

The conclusion would have been different if the Plaintiff was literate. In that case, the literate-plaintiff and not the illiterate-Defendant, would have been bound by the agreement on the authority of **Zabrama v Segbedzi.**

Issue 2

There is a fundamental presumption in the interpretation of documents which is that, parties are presumed to have intended what they have in fact said or written and thereby bound by their deed as posited by Adinyira JSC in **BCM Ghana Ltd v Ashanti Goldfields Ltd [2005-2006]** and in particular, **Section 25** of the **Evidence Act, 1975 (NRCD 323)** However, same cannot be said of a situation where the party against whom the document is being enforced is an illiterate. In that case there is no presumption in favour of the proponent of the document or against the illiterate defendant. Indeed it was the decision of Kpegah in the case of **Zabrama V Segbedzi** that; *…..that there is no presumption that an illiterate person appreciates the meaning and effect of a legal instrument or for that matter of any instrument or letter just because he has signed it.*

Based on the authorities espoused in the cases cited supra, the defendant, B, is in law an illiterate. Consequently, being an illiterate, the plaintiff seeking to enforce the agreement must show, by evidence, that B appreciated the nature and effect of the agreement and it does not matter whether the plaintiff is himself illiterate.

Since A is alleging that, the agreement was to build twenty (20) rooms, which allegation the defendant has denied, the onus thus lies on the plaintiff to prove his claim in order to succeed.

Issue 3.

It is also apparent from the facts that the agreement on the building did not include the number of rooms the building was to contain. It is this patent omission by the parties that has culminated in this dispute.

In the circumstances of this case, it will be impossible for the court to ascertain the intentions of the parties without resorting to extrinsic evidence. Thus, the facts of this case place the issue squarely within the exceptions to the rule of interpretation of non—statutory documents, which is that, the intention of the parties must be gathered from the four corners of the instrument.

The failure of the parties to expressly provide in the agreement the number of rooms to be constructed is very fundamental and such an egregious error can only be resolved by admitting or permitting the introduction of extrinsic evidence in order to give effect to the transaction.

Therefore, on the authority of **Allan Sugar (Product) Ltd v Ghana Export Co. Ltd [1982-83]** and **Manu v Emeruwa**, the court should not restrict itself to the words used in the document to determine the true nature of the transaction intended by the parties. Extrinsic evidence must be admitted.

CONCLUSION

- The defendant, B, is an illiterate in law. There is not such status as semi-illiterate.
- Being an illiterate against whom the agreement is enforced, the duty or onus of proof lies on the Plaintiff irrespective of whether he is a literate or illiterate. There is no presumption in favour of the illiterate-Plaintiff or against the illiterate-defendant.
- Since the intentions of the parties cannot be ascertained from the four corners of the document, extrinsic evidence should be permitted to effectuate the transaction.

Canons of interpretation

1. **Contra proferentem rule.**

Where there is an ambiguity in a deed or document, the rule is that it should be construed against the maker or grantor. It is a tool used as a last resort. This means where you can use any other tool, don't use it. This rule is applied in cases of ambiguities only and it should

be applied after all the known rules for interpretation have been applied but have failed to resolve the ambiguity.

It is used under three (3) circumstances;

1. Where there is an ambiguity in a covenant, it is resolved against the covenantor
2. Where there is ambiguity in a conveyance, it is construed against the grantor.
3. An ambiguity in contract of guarantee is construed in favour of the indemnified or the guarantor.

PART B

Presumptions

A presumption is a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact of group or facts. Presumptions may be rebuttable or irrebuttable. The effect of rebuttable presumption is that it imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact.

In the law of interpretation, presumptions are generally viewed as aids to interpretation. They are principles of law or interpretative criteria taken for granted or assumed by the courts to have been taken for granted. They may not be found expressly provided in a statute but like the spirit of reason or the spirit of the law, whenever the court sits, they are there.

The courts are assisted by these presumptions, and in a similar fashion as in the law of evidence, they afford the courts with the prima facie indication of the legislative intention.

the presumptions applicable in the scenario are;

1. Presumption against knowledge of contents of documents executed by illiterates.

2. Presumption that parties intended what they have in fact said or written in a deed or instrument.

- **Presumption against knowledge of contents of documents executed by illiterates.**

Where a document is prepared for an illiterate and there is no jurat indicating that it was read over to him or her, the presumption is that he/she shall not be bound by its content. Indeed **Section 4 of the Illiterates Protection Act, 1912(Cap 262)** requires that a

person making a document for an illiterate person, whether gratuitously or for a reward shall clearly read over and explain the letter or document or cause it to be read over and explained to the illiterate person.

In all the old cases, notable among which are; **Kwamin v Kufuor [1914] and Foli v Ayirebi [1966],** it was held that failure to provide jurat on a document prepared for an illiterate person or blind person rendered the document void. Therefore, the non-compliance with the Illiterate Protection Act was fatal and rendered the document void.

However, the position of the law on non-compliance with the Illiterate Protection Act regarding failing to provide jurat shifted from rendering the document void to the level of presumption in the case of **Zabrama v Segbedzi [1991].**

The Supreme Court followed the old decisions which rendered the failure to provide jurat void on document prepared for an illiterate or blind person in the case of **In Re Kodie Stool: Adowaa v Osei [1998/99] SCGLR 23**

The Supreme Court in its later decisions in the case of **Antie & Adjuwaah v Ogbo [2005-2006]** and **Duodo & Others v Adomako and Adomako [2012]** however departed from the old cases including its own decision in **In Re Kodie Stool: Adowaa v Osei [1998/99] SCGLR 23.**

The Wills Act, 1971 (Act 360)

Section 2(6)

Where the testator is blind or illiterate, a competent person shall carefully read over and explain to him the contents of the will before it is executed, and shall declare in writing upon the will that he had so read over and explained its contents to the testator and that the testator appeared perfectly to understand it before it was executed.

The presumption is that any document executed by a blind or illiterate person shall have a jurat clause else it would be invalid. This long-standing position of law was compromised by the Supreme Court in the case of **Duodu & Ors v Adomako & Adomako [2012] SCGLR 198,** where the Supreme Court held that the absence of a jurat merely raised a rebuttable presumption and not a conclusive presumption.

However, the Supreme Court by a single justice held in the case of **Otoo (No.2) & Others v Otoo [2013-2014],** following the old cases, a Will void for failing to conform to the Illiterate Protection Act.

In 2018, the decision in **Duodu v Adomako & Adomako** received further endorsement in

the case of **Sedzedo Akuteye V Ajoa Nyakoa J4/58/2017 dated 23rd May, 2018**.

For in that case Akuffo CJ was blunt when she held that:

"… there is indeed no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person. All it does is specify certain formalities that the physical author of the document must undertake. The jurat clause simply developed as a practice to evidence that the writer of the document has indeed fulfilled his/her formal statutory obligation under the Act, towards the protection afforded by the Act. That is why the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person**. Conversely**, that is also why the mere absence of a jurat clause cannot per se vitiate the deed of an illiterate person without any tangible proof that he/she did not understand the contents … In law, therefore, the issue as to whether or not an illiterate person fully understood and appreciated the contents of a document before executing same is a question of fact to be determined by the evidence on record".

- **Presumption that parties intended what they have in fact said or written in a deed or instrument.**

Refer to PART A.

1.2. CONSTRUCTION OF WILLS

Applicable laws

In Ghana, Wills are governed by the Wills Act, 1971 (Act 360). A will is a declaration in the prescribed manner of the intention of the person making it with regard to the matters which he wishes to take effect upon or after his death. In other words, a Will is an intentional document which contains the exact intentions of the maker and upon his death, effect must be given to those intentions.

The six (6) essential characteristics of a will are;

1. A will is not limited to the disposition of property but may also deal with other matters
2. It operates only as a declaration of the intention of the maker
3. It must be in the prescribed form as provided by the Wills Act, 1971 (Act 360)
4. It is always revocable
5. It takes effect only on death, and
6. It is ambulatory.

In Ghana only a person of eighteen (18) years and above and of sound mind and disposition is capable of making a valid will. However, in **Cartwright v Cartwright,** it was held that a person of unsound mind or who suffers from infirmity of mind can still make a Will provided the Will is made during a lucid interval and he or she understands the nature and effect of a will. It was held in the case of **In Re Sackitey** that, the law was that there should be a sound mind both at the time when instructions were given and when the will was executed.[1]

The case of **Hall v Hall [1868]** posited as follows *"to make a good will a man must be a free agent. In other words, a testator may be led but not driven and his will must be the off-spring of his own volition and not the record of someone else'."*

A will **shall be in writing** and signed by the testator or someone at his direction [2] and it must be witnessed by at least two witnesses. The only exception is that, members of the armed forces "while on active service" may make wills without compliance with the prescribed form. They are known as privileged wills and they are provided for under section 6 of the Wills Act, 1971(Act 360)[3]. In Supreme Court held in the case of **In Re Okine (Dec'd)** that, "*a will could be written for a testator or could be typewritten by the testator or some other person for the testator. The only requirement was that the will, by whomever it was written or typed, had to be duly signed by the testator or some other person at his direction provided there had been a proper execution animo testandi*."

A will is **ambulatory** in nature. This means that a will takes effect only on death of the testator. Therefore, until the death of the testator and the subsequent grant of probate with or without will annexed, the beneficiaries and executors have no interests whatsoever in the property of the testator covered by the Will. The ambulatory nature of a will also means that a Will is capable of dealing with property acquired after the date it was made, provided that the property is owned by the testator at his death. Under **section 7(1) of Act 360**, a Will is also ambulatory in the sense that in case of done by description it applies to the person who satisfies the description at the time of the testator's death.

Any disposition made to a person who predeceases the testator or which is contrary to law shall lapse and fall into residue, unless a contrary intention appears from the will. The only exception is where the disposition was made to a descendant who predeceased the testator leaving behind a child or issue surviving the testator. Under section 7(7) of Act 360, where a testator and a beneficiary die under circumstances which appears that their deaths were simultaneous or rendering it uncertain which of them survived the other, the beneficiary shall be deemed to have survived the testator. Generally, where a Will is made in accordance with the wishes of the testator, effect should be given to it. However, under section 13 of Act 360, a court can interfere with a will made by the testator where the testator did not

[1] In Re Sackitey
[2] In Re Okine [2010]
[3] Section 6 of Wills Act, 1971 (Act 360)

make reasonable provision whether in his lifetime of by his Will for the maintenance of the testator's mother, father, spouse or child under 18 years. An application may be made to the High Court to make reasonable provisions to the above-named persons within three (3) years from the date on which probate of the will is granted.

The Supreme Court case of **AKUA MARFOA v MARGARET AKOSUA AGYEIWAA** Suit No J4/42/2012, per Baffoe-Bonnie JSC also reiterated the same principle that for section 13 of the Act to be invoked the applicant must satisfy the court that:

a) *that the Appellant is a dependant on the testator*

b) *that the application has been brought within **three years** after the granting of the probate of the will*

c) *that the testator failed, either during his lifetime, or by his will, to make reasonable provision for the Appellant*

d) *that the Appellant is suffering, or likely to suffer hardship, and*

e) *that having regard to all the relevant circumstances the Appellant is entitled to support out of the estate of the testator.*

A will is an intentional document and in construing it, therefore, the courts must give effect to the intention of the testator as expressed by that testator in the actual words used by the testator[4]. Thus, generally, extrinsic evidence of a testator's declarations of intention as to the meaning to be put on the language used in his will ***was inadmissible as direct evidence of his testamentary intention.*** Hence evidence of instructions given by the testator for his will and any declarations made by him as to what he intended to do by his will was not admissible as direct evidence of his testamentary intention. However, such instructions were admissible in two situations accepted as exceptions to the general rule: (i) **in cases of equivocation or latent ambiguity** such as where the name or description or the property mentioned in the will would fit two or more persons or things and applied unambiguously to all of them; and (ii) **under the armchair rule as contemporaneous evidence** that was explanatory of the meaning which the testator attributed to a word or a name.

[4] In Re Atta (Dec'd); Kwako v Tawiah

The principles for the construction of non-statutory documents, which includes Wills, were stated in the case of **Biney v. Biney** namely:

i. the construction must be as near to the mind and intention of the author as the law would permit.
ii. the construction must be gathered from the written expression of the author's intention,
iii. technical words of limitation in a document must be given their strict legal effect, and
iv. the document must be read as a whole.

Section 38 of the Matrimonial Causes Act 1971 (Act 367) also provides that any gift to or appointment in favour of one spouse in the will of the other shall be invalidated if the marriage has been terminated under this Act by divorce or annulment, unless the will contains an express provision to the contrary.

MARKING SCHEME [JUNE 2015 Q1]

This question is to test students understanding and appreciation of the rules and approaches to the **construction of deeds and instruments, specifically the construction of a will.**

1. **Marks may be awarded for general introduction of the essence of construction; example**
   i. correction of errors;
   ii. settling ambiguities;
   iii. effectuating the intentions of a marker of an instrument etc.

2. **Marks may be awarded for references to the procedure for making a will as in the Wills Act;**

- **Capacity – Section 1** – 18 years and above and of ***sound mind*** and ***disposition***. However, in **Cartwright v Cartwright,** it was held that a person of unsound mind or who suffers from infirmity of mind can still make a Will provided the Will is made during a lucid interval and he or she understands the nature and effect of a will.

  It was held in the case of **In Re Sackitey** that, the law was that there should be a sound mind both at the time when instructions were given and when the will was executed.[5]

[5] In Re Sackitey

The case of **Hall v Hall [1868]** posited as follows *"to make a good will a man must be a free agent. In other words, a testator may be led but not driven and his will must be the off-spring of his own volition and not the record of someone else'."*

Banks v Goodfellow (1870) L.R. 5 QB 549

In establishing **animus testandi** [*animus testandi" = which is the presence of an intention to make a will at the time of making the will.*] three (3) elements of **testamentary capacity** must be satisfied:

1. Soundness of Mind,
2. Knowledge & Approval and
3. Free Will

The issue of soundness of mind is decided on case-by-case basis but in the case of ***Banks v Goodfellow [1870] 5 QB 549*** Cockburn gave certain factors as a general guide:

a. The testator must be aware he is making a will

b. He must have the property & the beneficiary in mind

c. He must himself determine the manner of distribution; &

d. There must not be any insane delusions or abnormal behaviour

- **Execution – Section 2 of Act 360 –** A will shall be in writing and signed by the testator or by some other person at his direction. The signature of the testator shall be made or acknowledged by him in the presence of **two or more** witnesses present at the same time. The witnesses shall attest and sign the will in the presence of the testator, but no form of attestation shall be necessary.

  where a testator is blind or illiterate a jurat is necessary…

  Section 2(6) – Jurat – A Will for a blind or illiterate shall have a jurat to the effect that the contents of the Will has been explained to the Testator and he appears to understand the contents before making his mark to the document.

  Where the Will for an illiterate or blind person was without jurat, the Will shall not be admitted to probate unless there is evidence to show that the Will was read over to the Testator who suffers from disability and he understood the contents before he made his mark. And therefore, the absence of a jurat alone is not enough reason for the rejection of the Will unless there is no corresponding evidence that it was the

deed of the Testator who understood its content. And the burden is on the proponent of the Will to lead evidence to establish the due execution of the Will.
This was the point the Supreme Court was at pains to state in the case of **Duodu and Others v Adomako and Adomako [2012] 1 SCGLR 198**, by Wood CJ as follows:

"…the courts must not make a fetish of the presence or otherwise of a jurat on executed documents. To hold otherwise, without a single exception, is to open the floodgates to stark injustice. *Admittedly, the presence of a jurat may be presumptive of the facts alleged in the document, including the jurat*. But that presumption is rebuttable, it is not conclusive. The clear object of the Illiterates Protection Ordinance, Cap 262 (1951 Rev.) is to protect illiterates for whom a document was made against unscrupulous opponents and their fraudulent claims; those who may want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests. At the same time, the Ordinance cannot and must not be permitted to be used as a subterfuge or cloak by illiterates against innocent persons. Conversely, notwithstanding the absence of a jurat, the illiterate person who fully appreciates the full contents of the freely executed document, but feigns ignorance about the contents of the disputed document, so as to escape legal responsibilities flowing therefrom, will not obtain relief. … Thus, any evidence which will demonstrate that the illiterate knew and understood the contents of the disputed document, that is the thumb printed or marked document, as the case may be, should settle the issue in favour of the opponent. In other words, in any action, it should be possible for the one seeking to enforce the contents of the disputed document to show that despite the absence of a formal jurat, the illiterate clearly understood and appreciated fully the contents of the document he or she marked or thumb printed."

A contrary decision was arrived at in the case of **Otoo (No 1) v Otoo (No2) [2013-2014] 2 SCGLR 810**; the court relied on the Illiterate Protection Ordinance, CAP 262 to conclude that where a jurat does not appear on the face of the Will prepared for an illiterate, it was void. The Cap 262 is a statute of general application. However, under **Order 66 Rule 19 of the High Court (Civil Procedure) Rules, C. I 47** which deals with procedure for the grant of probate it states as follows:

"Where the testator was blind or illiterate, the Court shall not grant probate of the will or administration with will annexed unless the Court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution or that the deceased had at that time knowledge of its contents".

You will note that section 2(6) of the Wills Act that requires a jurat for Wills for illiterates and blind persons does not provide sanctions for its non-compliance. However, the Otoo decision from the Supreme Court calls for a jurat to be on the face of the Will if it is not to be declared as invalid. The court in the Otoo decision did not avert its mind to decisions of the court in the case of Duodu v Adomako and Order 66 rule 19 and perhaps the Otoo decision may have been rendered per incuriam. This view is also shared by Sir Dennis.

Duodu v Adomako & Adomako decision has received further endorsement in the case of **Sedzedo Akuteye V Ajoa Nyakoa J4/58/2017 dated 23rd May, 2018**. For in that case Akuffo CJ was blunt when she held that:

"… there is indeed no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person. All it does is specify certain formalities that the physical author of the document must undertake. The jurat clause simply developed as a practice to evidence that the writer of the document has indeed fulfilled his/her formal statutory obligation under the Act, towards the protection afforded by the Act. That is why the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person. Conversely, that is also why **the mere absence** of a jurat clause **cannot per se vitiate the deed of an illiterate person** without any tangible proof that he/she did not understand the contents … In law, therefore, the issue as to whether or not an illiterate person fully understood and appreciated the contents of a document before executing same is a question of fact to be determined by the evidence on record".

In Re OKINE (DECD); DODOO AND ANOTHER v OKINE AND OTHERS [2003-2005] the Supreme Court held that Act 360 did not require that a will be written in the hand of the testator. **Section 2(1) of Act 360** only required that a will be "in writing." Thus, a will could be written for a testator or could be typewritten by the testator or some other person for the testator. *The only requirement was that the will, by whomever it was written or typed, had to be duly signed by the testator or some other person at his direction.*

- **Executors – Section 3-** any person of or above the age of 21 years and having capacity to enter into a contract may be appointed an executor of a will. A beneficiary shall not be a witness unless the signature is superfluous, otherwise the disposition to him or her shall be void.

- **Rules of construction – section 7** – a will shall take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.

- **A will is ambulatory.** This means that a will takes effect only on death of the testator. Therefore, until the death of the testator, the beneficiaries and executors have no interests whatsoever in the property of the testator covered by the Will. The ambulatory nature of a will also means that a Will is capable of dealing with property acquired after the date it was made, provided that the property is owned by the testator at his death. Under **section 7(1) of Act 360**, a Will is also ambulatory in the sense that in case of donee by description it applies to the person who satisfies the description at the time of the testator's death.

3. **Marks shall be awarded for brief discussion of the approach to construction of deeds or wills: the internationalist approach.**

   The three (3) basic rules of construction of deeds and non-statutory documents adopted by the intentionalist were set out in the case of **Biney v Biney [1974]** as follows:

   1. The construction must be near as possible to the mind and intentions of the author.
   2. The intentions of the author must be gathered from the words expressed in the document
   3. Technical words of limitation must be given their strict legal meaning and effect.

Furthermore, the case **of Najat Enterprises Ltd v Hanson [1982-83]** and **Boateng v VALCO** are to the effect that in construing documents and deeds, the document must read as a whole.

Amarteyifio v Amarteifio – a will must be construed as a whole.

It is not within the province of the court to question how the Testator distributed his self-acquired assets but only to give meaning to his intentions. The court in the case of **In Re Mensah (Decd); Barnie v Mensah & Others [1978] 1 GLR 225** CA underscored this when it noted that:

> *"The policy of the courts is to give effect to the last wishes of the deceased and to uphold them unless there are overriding legal obstacles in the way. Thus, in the area of execution, a liberal approach is taken to the form of signature and initials of a description or a mark will pass".*

4. **Marks shall be awarded for brief discussion of use of extrinsic evidence in the interpretation of wills.** –

   In Re Atta (Dec'd); Kwako v Tawiah
   Thus, generally, extrinsic evidence of a testator's declarations of intention as to the meaning to be put on the language used in his will ***was inadmissible as direct evidence of his testamentary intention.*** Hence evidence of instructions given by the testator for his will and any declarations made by him as to what he intended to do by his will was not admissible as direct evidence of his testamentary intention. However, such instructions were admissible in two situations accepted as exceptions to the general rule: (i) **in cases of equivocation or latent ambiguity** such as where the name or description or the property mentioned in the will would fit two or more persons or things and applied unambiguously to all of them; and (ii) **under the armchair rule as contemporaneous evidence** that was explanatory of the meaning which the testator attributed to a word or a name

5. **Further marks shall be awarded for the discussion of the linguistic canons of interpretation.**

1. **Falsa Demonstratio Nocet Cum De Corpore**

It literally means that where an item or property is wrongly or falsely described but it can be ascertained or identified, effect should be given to it in spite of the false description. Black's law dictionary explains falsa demonstration as: *"false description does not injure or vitiate, provided the thing or person intended has once been sufficiently described. Mere false description does not make an instrument inoperative."*

The wrong description of an object or a subject should not defeat the purpose of the document or transaction.

Cases-

- **Wilberforce v Wilberforce** – a testator falsely described his Nephews as sons but his description was certain as to the identity of the beneficiaries and the will was admitted to probate as valid. the HC invoked the maxim *falsa demonstration non cest cum de corpore* to save the gift. **It was held as follows**; Inaccurate references to beneficiaries under a will per se did not invalidate bequests. ……..*besides, it was a rule of construction applicable to all written documents, including wills, that if a term used to describe a subject matter was sufficient to ascertain that subject matter with certainty but other terms add a description which was not true, these other terms would not be allowed to vitiate the gift. And if such false description could not vitiate a gift, then it certainty could not nullify a whole will. IIn the instant case however, the court would also take judicial notice of the fact that it was not uncommon by Ghanaian custom and traditions that nephews and nieces should be affectionately referred to as sons*

and daughters by their respective uncles and aunts. In the circumstances the use of the word "sons" to describe the two nephews of the testator did not in any way detract from the validity of the will. ***In re Posner (Decd); Posner v Miller*** *[1953] All E R 1123 and Kennell v Abott [1931] ER 416 applied*

- **In Re Ofner; Samuel v Ofner, -** the testator bequeathed an amount of GBP200 to his nephew "**Robert Ofner**" where he had no grandnephew by that name. in spite of the false description, the amount of GBP200 was given to **Richard**, his grandnephew who the testator intended to bequeath the money to.

2. **Ut res magis** - Simply means apply wisdom to save the document or enactment. The literal meaning is that where an enactment or document is vague or ambiguous or susceptible to two or more meanings, the enactment or document should be construed with the meaning that would save it by making it intelligible or reasonable rather than the meaning which would make it absurd, unintelligible, incongruous, void or illegal. It is also expressed as a requirement to give a meaning so that the matter will have an effect rather than fail or to interpret prudently so that the transaction is upheld rather than lost.

6. Further marks shall be awarded for the discussion of grammatical construction and secondary meaning of words.

7. Further marks shall be awarded for the explanation of what constitute terms of art.

8. More marks shall be awarded for discussion of **Biney v Biney**; **In Re Amertefio (Decd)**; **In Re Dadzie (Decd);** Monta v Patterson Simons.

- In the case of **In Re Dadzie (Decd)** a testator in his will gave parts of the proceeds from a hotel to the beneficiaries in 'shares'. At the time of his death, the Hotel had been converted into a rental accommodation. The court construed 'shares' in the proceeds as income accruing from the rental accommodation to save the testators devise.

In **re Amarteifio (Decd); Amarteifio v Amarteifio (1981) ,** the deceased by clause (6) of his will which was executed in 1947 , directed that 20 pounds of the rents accruing from his house should be given to his wife and the balance shared equally among his children. The rent at the time of the execution of the will was 100 pounds, however 26 years after the death of the testator the rent had appreciated substantially to 1,440. The issue for determination was whether the will be strictly and literally construed as meaning that the testator intended his wife to receive only 20 pounds of the rents at all times or should it be

construed as meaning that the wife was to be paid twenty per cent of the accrued rents at all times.

It was held that as the accrued rents had increased substantially since the death of the testator in 1954, it would be absurd to construe **clause 6** of the will as meaning that the testator intended his wife to receive only 20 pounds or its present-day equivalent at all times. The court held that since the rents at the time of the execution of the will was 100 pounds per annum, it would be consistent with the testator's intention to construe the clause as meaning that the wife was to be paid **twenty per cent** of the total rents at all times; such an interpretation would give effect and not defeat the intention of the testator.

PAST QUESTION – SEPT. 2020 Q3

Question 3

Lawyer Ametefe, a lawyer and television panellist married his fairy tale lover Ruby in December 1995. The marriage ceremony which was described by the National Celebrity Magazine as marriage fit for the gods, was attended not only by family members of the couple but also learned friends, including Kukua, Esq. a junior at lawyer Ametefe's Chambers. Indeed Kukua, Esq. was requested to pray prior to the cutting of the wedding cake and sang a solo in praise of the couple. After 15 years of conjugal bliss and within which Lawyer Ametefe acquired a lot of properties, Lawyer Ametefe made a will in March 2010 in which he provided in clause 6 as follows:

"I give and devise to my very sweet and loving wife, the apple of my eye, and the strings of my heart my two-storey building more particularly described as "Kukua Cottage".

After the execution of the Will, the marriage broke down beyond reconciliation on grounds of infidelity on the part of Ruby. In 2015, the marriage was dissolved by order of the High Court. After the dissolution of the marriage, Lawyer Ametefe married Kukua, Esq. his junior counsel, as he puts it to cement their professional bond. Lawyer Ametefe died in October 2018 after a short illness, unable to effect any changes in his Will dated March 2010. Upon the grant of probate to the executors of Lawyer Ametefe, Ruby submitted a claim for the two storey building ("Kukua Cottage") on the ground that she was and remained the lawful wife of the testator at the time the last Will and testament of the deceased was executed and without a doubt the reference to 'my loving wife' was referable to her. Counsel for Kukua, Esq. vehemently resisted the claim of Ruby, in a writ filed at the Hohoe High Court. Referring to the neutrality of the word 'loving wife' as found in Clause 6 of the Will, Counsel contended that Kukua, Esq. was entitled to "Kukua Cottage" as she was the 'wife' intended by the testator.

As a judicial intern, you have been asked to write a reasoned opinion on the issue for his consideration.

(25 marks)

LEGAL OPINION ON THE INTERPRETATION OF THE WILL OF LAWYER AMETEFE

This legal opinion is being offered in respect of the issues emanating from the interpretation of the Will of Lawyer Ametefe. Before I proceed to proffer my opinion, it may be relevant to set out the brief facts of the case as follows;

Lawyer Ametefe, after 15 year of marriage to his fairy tale lover, Ruby, made a will in which it was provided under clause 6 as follows*; "I give and devise* ***to my very sweet and loving wife, the apple of my eye, and the strings of my heart*** *my two-storey building more particularly described as "Kukua Cottage".*

Soon after the execution of the will, the marriage broke down beyond reconciliation and consequently dissolved by order of the High Court. Thereafter, Lawyer Ametefe married Kukua, his junior Counsel. Lawyer Ametefe died after a short illness in October, 2018 without any alterations to the Will.

Now, upon the grant of probate to the executors of Lawyer Ametefe, Ruby submitted a claim for the two-storey building ("Kukua Cottage") on the ground that she was and remained the lawful wife of the testator at the time the last Will and testament of the deceased was executed and without a doubt the reference to 'my loving wife' was referable to her. Counsel for Kukua, Esq. vehemently resisted the claim of Ruby and contended that Kukua, Esq. was entitled to "Kukua Cottage" as she was the 'wife' intended by the testator.

Based on the facts stated supra, the area of law is construction of non-statutory documents, specifically Wills and the issue(s) or question relevant for consideration is,

1. Whether or not the phrase 'my loving wife' as used in clause six (6) is referable or applies to Ruby or Kukua.

Applicable laws

Wills in Ghana are governed by the Wills Act 1971 (Act 360). A will is a document in writing and signed by the person making it, i.e the testator, or by someone at his direction which declares the intention of the maker on how his properties and other matters should be distributed or take effect upon his death.

The essential characteristics of a will are;

i. A will is not limited to the disposition of property but may also deal with other matters
ii. It operates only as a declaration of the intention of the maker
iii. It must be in the prescribed form as provided by the Wills Act, 1971 (Act 360)
iv. It is always revocable
v. It takes effect only on death, and
vi. It is ambulatory.

In Ghana only a person of eighteen (18) years and above and of sound mind and disposition is capable of making a valid will. However, in **Cartwright v Cartwright,** it was held that a person of unsound mind or who suffers from infirmity of mind can still make a Will provided the Will is made during a lucid interval and he or she understands the nature and effect of a will. It was held in the case of **In Re Sackitey** that, the law was that there should be a sound mind both at the time when instructions were given and when the will was executed.[6]

The case of **Hall v Hall [1868]** posited as follows "to make a good will a man must be a free agent. In other words, a testator may be led but not driven and his will must be the off-spring of his own volition and not the record of someone else'."

A will **shall be in writing** and signed by the testator or someone at his direction [7] and it must be witnessed by at least two witnesses. The only exception is that, members of the armed forces "while on active service" may make wills without compliance with the prescribed form. Theye are known as privileged wills and they are provided for under section of the Wills Act, 1971(Act 360)[8]. In Supreme Court held in the case of **In Re Okine (Dec'd)** that, "*a will could be written for a testator or could be typewritten by the testator or some other person for the testator. The only requirement was that the will, by whomever it was written or typed, had to be duly signed by the testator or some other person at his direction provided there had been a proper execution animo testandi*."

A will is **ambulatory** in nature. This means that a will takes effect only on the death of the testator. Therefore, until the death of the testator and the subsequent grant of probate with or without will annexed, the beneficiaries and executors have no interests whatsoever in the property of the testator covered by the Will. The ambulatory nature of a will also means that a Will is capable of dealing with property acquired after the date it was made, provided that the property is owned by the testator at his death. Under section 7(1) of Act 360, a Will is also ambulatory in the sense that in case of donee by description it applies to the person who satisfies the description at the time of the testator's death.

Generally, where a Will is made in accordance with the wishes of the testator, effect should be given to it. However, under **article 22 of the Constitution, 1992 and section 13 of the Wills Act, 1971(Act 360),** a court can interfere with a will made by the testator where the testator did not make reasonable provision whether in his lifetime or by his Will for the maintenance of the testator's mother, father, spouse or child under 18 years, and that hardship will thereby be caused. An application may be made to the High Court to make reasonable provisions to the above-named persons within three (3) years from the date on which probate of the will is granted.

[6] In Re Sackitey
[7] In Re Okine [2010]
[8] Section 6 of Wills Act, 1971 (Act 360)

A will is an intentional document and in construing it, therefore, the courts must give effect to the intention of the testator as expressed by that testator in the actual words used by the testator[9]. ***Thus, generally, extrinsic evidence is inadmissible as direct evidence of his testamentary intention.*** However, such extrinsic evidence were admissible in two situations accepted as exceptions to the general rule: (i) **in cases of equivocation or latent ambiguity** such as where the name or description or the property mentioned in the will would fit two or more persons or things and applied unambiguously to all of them; and (ii) **under the armchair rule as contemporaneous evidence** that was explanatory of the meaning which the testator attributed to a word or a name.[10]

Section 38 of the Matrimonial Causes Act 1971 (Act 367) also provides that any gift to or appointment in favour of one spouse in the will of the other shall be invalidated if the marriage has been terminated under this Act by divorce or annulment, unless the will contains an express provision to the contrary.

ANALYSIS

In the instant case the only issue which calls for interpretation as resulting from the construction of Lawyer Ametefe's Will is, which of the two women, Ruby and Kukua, is entitled to the disposition made under clause 6 of the Will. In other words, which of the two women befits the description "my loving wife" as used in clause six (6) of the Will.

The time-honored principle is that, a will is an intentional document and rules for construction of wills are primarily the same as those applicable to non-statutory documents as enunciated in the case of **Biney v Biney**. Thus, the construction of Wills must be as near to the mind and intentions of the testator as expressed in the written document. Furthermore, the ambulatory nature of a will, as provided under section 7(1) of Act 360 implies that, in case of done by description it applies to the person who satisfies the description at the time of the testator's death.

The facts of this case undeniably show that Ruby was Ametefe's wife at the time he made his Will. However, Kukua was the lawful wife upon the death of Lawyer Ametefe. Consequently, the rules of construction of Wills as illustrated supra provides that the person who was the wife at the time of Ametefe's death is the person referred to under clause six (6) of his will. It follows therefore that Kukua shall be deemed the person referred to by the testator as "my loving wife" under the impugned clause.

It is also provided under **section 38 of the Matrimonial Causes Act, 1971 (Act 367)** that a gift made to a spouse under the will of the spouse shall be invalid upon dissolution or annulment of the marriage.

[9] In Re Atta (Dec'd); Kwako v Tawiah
[10] In Re Atta (Dec'd); Kwako v Tawiah

CONCLUSION

Considering that Kukua was the wife of Lawyer Ametefe upon his death, then the rules of construction when applied leads to the conclusion that Kukua is the wife intended by the Testator under clause six (6) and to whom the disposition was made.

Again, section 38 of Act 367 will not permit Ruby to benefit from any disposition made to her in Ametefe's Will since the marriage between the two was dissolved prior to his death.

2.0. STATUTORY INTERPRETATION

1. What is interpretation

According to Justice Dennis Adjei, in his book; Modern Approach to the Law of Interpretation in Ghana, Third Edition, *interpretation by judges and lawyers is a rational process by which a text is to be understood. In other words, the interpreter seeks to unearth the meaning of the text.* He further posits that, ***the essence of interpretation is to look for a meaning that will not render the text absurd or obscure***. He further noted that court users access courts either to settle disputes or resolve legalities and the resolution of legalities involves interpretation of Constitutions, Statutes, Deeds and documents, decisions and the common law. Therefore, interpretation is a major function of the judiciary.

Date-Bah (JSC) in Agyei-Twum v AG and Bright Akwetey [2005] held that Judicial interpretation is about determining the legal meaning of a set of words. A set of words will often raise a range of possible semantic meanings and the task of judicial interpretation is to select which of these semantic meanings should be accepted as the legal meaning of the text. All legal texts which are placed before a court have to be subjected to this process of judicial interpretation, even if their meaning appears to be plain. This is because the plainness of the meaning is itself a conclusion reached by the relevant judge after a process of interpretation.

2. Why do we interpret Statutes.

When it comes to the need to interpret Statutes and documents generally, there are two schools of thought, namely; ***the broad view*** and ***narrow view of interpretation***. The

proponents of a broad view of interpretation, such as Date-Bah JSC (as he then was), argue that no word is clear unless it is first interpreted, whereas those who share the narrow view of interpretation, the likes of Prof. Kludje JSC (as he then was) argue that no interpretative issue arises where the words are clear and unambiguous**.**

Generally, the necessity for interpretation arises where the Court seeks to;

a. To prevent absurdity or incongruity. i.e to resolve ambiguities or incongruities in the meaning of words used in the text
b. To give meaning to a text or document.
c. where the literal meaning would lead to absurdity.
d. The meaning of words are eroded over time due to technological advancement.
e. to determine the scope and effect of a provision of a statute,
f. to ascertain the intention or purpose of the legislature,
g. to ascertain the meaning of special and technical words,
h. where there is a dispute as to the true meaning of a provision of a statute or where the parties have placed rival meanings on the provisions of a statute.
i. To fill in gaps in the text. i.e sasu v Amua-Sekyi.

3. What are the approaches

Before the coming into force of the **Interpretation Act, 2009 (Act 792),** the courts adopted several approaches to interpretation of Statutes including; ***the literal/ strict constructionist approach, originalism, textualism, intentionalism*** and now, the dominant rule of ***purposive approach*** to interpretation of the Constitution, Statues and non-statutory documents.

- **the literal/ strict constructionist approach** – the literal approach to interpretation of statutes is that words should be given their ordinary meaning irrespective of the harshness of the outcome or consequences. Technical words should be given their technical meanings. Where words are clear and unambiguous the interpreter should not look for any other meaning. Literalists do not make a distinction between the letter and the spirit of the text. They interpret the text as it appears.

  In the case of **R v Judges of City of London Court, Lord Esher** held that ," *the rule is that courts will give words their ordinary or literal meaning even if the results is not very sensible". Where by the use of clear an unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced even though it is absurd or mischievous."*

See Also **Humphrey Bonsu v Quaynor**, where the Court of Appeal interpreted Section 13 of the Wills Act, 1971 (Act 360) strictly to deprive the disabled child a reasonable provision out of the estate of the deceased father.

- **Originalism -** Originalism looks for the meaning words or sentences had on the day the text was written; that is, the original meaning of the word. They are of the view that language and development are not static.

  They hold the view that **culture and language** are inseparable and therefore call on their followers to understand the culture of the people for whom the text was created in order to know its original meaning. Words by themselves are inadequate without the culture and the historical context within which they were created. Translation affects the original meaning of the text where conscious efforts were not made to consider the language, the culture of the people who created the text and the historical context of the text.

  According to the originalists, any interpretation must aim at preserving the originality of the text. Where the original meaning would be irrelevant as a result of the changing world, they will look for the contemporary meaning of the text to make it more relevant.

- **Textualism** - They believe that when it comes to interpretation of deeds and documents **context is everything.** To them words have a limited range of meaning and any interpretation that goes beyond that range is not permissible.

  Textualism is largely based on the ordinary meaning of the word and does not consider extraneous materials not specifically mentioned in the text. It does not also consider non-textual sources such as the mischief to be cured, the authorial intent, legislative history and materials such as parliamentary debates and reports of committees and commissions.

  Textualism give effect to the expressed text and not the intention of the law maker which cannot be found within the four corners of the law. Textualists apply linguistic canons and presumptions judiciously not to distort the ordinary meaning of the text. For the textualists, it is the law that governs and not the intention of the legislature; therefore, statutory interpretation should be devoid of the authorial intent which cannot be ascertained from the text.

Textualists are not oblivious of scrivener's error (slip of tongue) and are of the opinion that patent errors committed by scrivener's error should be addressed to give the normal meaning to avoid a literal interpretation which will render the text absurd.

- **Intentionalism** - Internationalists interpret to ascertain the intention of the legislature in respect of an enactment or the intention of the contracting parties with respect to the contract document at the time the text was created. Intentionalism looks into the past to ascertain the meaning of the text of the enactment or the deed or document as the case may be. They take into consideration factors such as the legislative history, preamble, long title, marginal notes and the mischief the law seeks to cure. **Intentionalism movement or approach's main task is to look for the intention of the author who created the text and not what was actually written.**

  The intentionalists adopt **a three-tier approach** in construing laws or documents, namely;

  1. **Construe the text as a whole to ascertain the intention of parliament** and to effectively achieve that purpose. It ensures that **the interpretation is made as near as possible to the mind of the legislature** or the parties to the contract under consideration.

  AG v Prince Ernest Augustus of Hanover the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it.

  2. **The intention of the legislature** or the contracting parties to the document to be interpreted **must be gathered from the written text** and not from any document or source which does not form part of the text.

  3. **Words are given their ordinary meaning** and technical or special words are given their technical or special meaning. Where the ordinary meaning will render the text absurd, you resort to a secondary meaning to make the meaning reasonable. Also, where words expressed in the technical sense and its strict interpretation will lead to absurdity, the court must look for the secondary meaning of the word.

Rules adopted by the intentionalists

The traditional common law view is that there are three (3) approaches to interpretation of statutes, namely;

- the mischief rule
- the literal rule or plain meaning, and
- the golden rule

the mischief rule

this rule was developed in the **Heydon's case in 1584**. The Supreme Court in the case of **Republic v High Court, Koforidua, Ex parte EREDEC [2003/2004]** quoted with approval the intentionalists approach in the Heydon's where the court held thus; for the sure and true interpretation of all statues, four things are to be discerned and considered;

1. what was the Common Law before the making of the Act?
2. what was the mischief and defect for which the Common Law did not provide?
3. what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?
4. the true reason for the remedy;
   and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy

The literal rule.

This was developed in the **Sussex Peerage case in 1844**. The rule requires interpreters to;

1. Read the text as a whole
2. give the words their ordinary meaning within the context in which they were used. Where words are used in the technical or special context, it should be construed within that context to convey its technical or special meaning.

The ordinary meaning is the meaning known to every member of the community.

The Golden Rule

This rule was developed in **Grey v Pearson [1857]** It is the modification of the literal rule of interpretation. This rule tries to avoid anomalous and absurd consequences from arising from literal interpretation.

The rule requires the interpreter to read the statute of the document as a whole and to give its ordinary meaning within the context. Where the ordinary meaning will not make sense

within the context and will render the meaning unreasonable or absurd, the interpreter is required to look for a **secondary meaning** within the context that will make the meaning reasonable. Where the words in the text were used in the technical or special sense, the interpreter is required to give the words their technical or special meaning within the context. Where the technical or special meaning will render the text absurd, the interpreter is required to look for a secondary meaning within the context that will make it reasonable. What constitutes secondary meaning is not defined, but any meaning that will make the text reasonable within the context. **Intentionalism movement or approach's main task is to look for the intention of the author who created the text and not what was actually written.**

The judges were to modify the text whenever they found that the ordinary meaning will render the text absurd or incongruous[11].

In the case of **Sasu v Amua-Sekyi,** the Court of Appeal corrected an error in the text by supplying into the text the missing words to make it intelligible to reflect intention of parliament.

Intentionalism is the opposite of literalism as the former does not restrict itself to the written or spoken words but seeks to look for what the author intended to say or write. Intentionalism makes use of aids to interpretation to enable the interpreter ascertain the intention of the author at the time the text was created.

- **The purposive approach**

Proponents of this school argue that, the task of an interpreter is to look out for the purpose for which the text was created. They do not limit themselves to the words as used in the text but go further to unravel the purpose behind those words.

Purposivists;

1. Read the text as a whole
2. They give words their ordinary meaning as well as the context in which they were used.
3. They do not place emphasis on linguistics context or the words, but rather they take into account the ***purpose of the enactment or agreement***, ***the scope***, ***the subject matter and to some extent the background of the law***.

[11] Sasu v Amua-Sekyi[1987/88] 1GLR 506

The purposive approach usually recommends the use of plain or ordinary meaning to the text but where the purpose of the law cannot be easily ascertained, a rational decision would be used to ascertain the purpose of the law.

In Agyei Twum v AG and Bright Akwetey, the Supreme Court considered the importance of the purposive approach to interpretation. However, the adoption of the purposive approach to interpretation does not mean discounting the text. Date-Bah held that;

> **"**In interpreting constitutional language, one should ordinarily start with a consideration of what appears to be the plain or literal meaning of the provision. But that should not be the end of the process. That literal meaning needs to be subjected to further scrutiny and analysis to determine whether it is a meaning which makes sense within its context and in relation to the purpose of the provision in question. In other words, the initial superficial literal meaning may have to yield to a deeper meaning elicited through a purposive interpretation"

Thus, it is only when the court determines that slavish application of the literal meaning will lead to absurd results that it may adopt the purposive approach. When adopted, the purposive approach allows implicit words to be read into the Constitution to avert manifest absurdity.

4. The dominant approach to interpretation of statutes

The interpretation Act 2009 (ACT 792), particularly **section 10** thereof enjoins Judges to use Purposive Approach to Judicial Interpretation. **Section 10(4**) enjoins the Court to construe or interpret a provision of the **Constitution** or **any other law** in a manner:

(a) that promotes the rule of law and the values of good governance.
(b) that advances human rights and fundamental freedoms.
(c) that permits the creative development of the provisions of the Constitution and the laws of Ghana and
(d) that avoids technicalities and niceties of form and language which defeats the purpose and spirit of the Constitution and the laws of Ghana.

As recognized in the memorandum to the interpretation Act, 2009 (Act 792), the literalist approach is not helpful and the now dominant approach is the purposive approach. The memorandum further states that the Courts in the Commonwealth have now moved to the Purposive Approach to the Interpretation of legislation and indeed of all written instruments. The Judges have abandoned the strict constructionist view of interpretation in favour of the true purpose of legislation.

The Purposive Approach to interpretation takes account of the ***words of the Act*** according to their ordinary meaning ***as well as the context in which the words are used***. Reliance is not placed solely on the linguistic context, but consideration is given to the subject-matter, the scope, the purpose and , to some extent, the background. Thus, with the Purposive Approach to the interpretation of legislation there is no concentration on language to the exclusion of the context. The aim, ultimately, is one of synthesis.

The Purposive Approach has been encapsulated in **Pepper (Inspector of Taxes) v Hart [[1993] 1 All ER 42],** the United Kingdom now following Australia and New Zealand. That decision now makes it possible for the Courts in other Commonwealth countries to seek assistance from;

(a) the legislative antecedents of the statutory provisions under consideration;
(b) pre-parliamentary materials relating to the provisions in the Act in which it is contained, such as reports of committees and of commissions reviewing the existing law and recommending changes;
(c) parliamentary materials such as the text of a Bill and reports on its progress in Parliament taking note also of explanatory memoranda, proceedings in committee and parliamentary debates.

The records of the debates in Parliament are a rich source of information regarding the intention of Parliament which the Courts when faced with problems of construction and interpretation seek to divine.

5. The aids to interpretation

The aids to interpretation of statutes are either internal or external.

1. **Internal aids** – the ***enacting or operative*** parts and the ***non-enacting*** or descriptive parts.

    - **Enacting part** – section, schedules, provisos, saving provision, interpretation., preamble and long-title.
    - **Non-enacting part** – short title, marginal notes, headings, footnotes,

2. **External aids** – Presumptions, legislative history, parliamentary debate, committee reports, memorandum to the Bill, re-parliamentary materials relating to the enactment, the parliamentary debates prior to the passing of the Bill in Parliament.

6. Canons

- Expression unus est exclusion alterius rule
- Ejusdem generis rule

- Noscitur a socii rule
- Ut res magis valeat quam ….

NB: ANSWER APRIL 219. Q4 and JUNE 2015 Q3.

JUNE 2015

QUESTION 2

Otafregya, an accomplished banker died on March 21, 2007 survived by seven children, including Aleko and Abaidoo. Aleko, who was a student at the time of Otafregya's death, and Abaidoo who was crippled and mentally retarded from birth, were only two of four surviving children of the deceased by his first wife Mariama. Aleko and Abaidoo were both aged over 18 years at the time of Otafregya's death. By his will, probate of which was taken in May 2008, the deceased did not make any provisions whatsoever for Aleko and Abaidoo. Whereupon Aleko and Abaidoo jointly filed an application under section 13(1) of the Wills Act, 1971 (Act 360) against the respondents for an order to make provisions under Otafregya's will for them. The said section 13(1) provides as follows:

> 13(1) If, upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will, for the maintenance of any father, mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased.

The Defendants opposed the application on the grounds, *inter alia,* that both Aleko and Abaidoo were over 18 years and upon strict interpretation of section 13(1) did not qualify as "child". Agreeing with respondents counsel, Debrah J said among other things that:

> "The language of section 13(1) of Act 360 admitted of no ambiguity whatsoever and in effect clearly prescribed that only a child of the testator under 18 years of age was entitled to the provision under the section.

Hence the law maker clearly intended the natural age of a child to prevail. Consequently the provision was to be enforced however harsh the result might be".

Do you agree with Debrah J? Give reasons for your answer.

MARKING SCHEME – 2015 – Q2

This question seeks to test students' appreciation for rules on statutory interpretation. Marks may not be awarded for detailed discussion of the facts or discussion of interpretation of wills.

AREA OF LAW – Statutory interpretation, specifically Section 13 of the Wills Act, 1971 (Act 360)

ISSUE

1. Whether or not under Section 13 of the Wills Act, only a Child of the testator under 18 years of age was entitled to the provision under the section.

- **Answer shall focus on the basic approaches to statutory interpretation.**

    1. **What is interpretation** - Interpretation of statutes is the rational process of ascertaining the legal meaning, scope and effect of the language or text in a statute. It is also involves the ascertainment of the meaning of a set of words that accords with the intention or purpose of the legislature or lawmaker.

    2. **The essence of interpretation** are as follows;
        2.1. To resolve ambiguities in the text
        2.2. To ascertain the legal meaning of words.
        2.3. To fill in gaps in the law to avoid incongruity or absurdity
        2.4. To ascertain the intention or purpose of the law.
        2.5. To correct errors.
        2.6. To ascertain the meaning of technical or special words.

    3. **Approaches to interpretation of statutes** – before the promulgation of the Interpretations Act, 2009 (Act 792) which enjoins the Courts to adopt the purposive approach to interpretation of statutes, the courts had adopted

several approaches to statutory interpretation such as; ***originalism, textualism, literalism/strict constructionist, intentionalism*** and now the ***purposive approach***.

- **Marks shall be awarded for discussing the literal rule, the golden rule and the modern purposive rule of interpretation**.

Intentionalism became the leading approach in England and consequently in Ghana. Intentionalists interpret to ascertain the intention of the legislature in respect of an enactment or the intention of the contracting parties with respect to the contract document at the time the text was created. Intentionalism looks into the past to ascertain the meaning of the text of the enactment or the deed or document as the case may be. Intentionalism forbade the use of legislative history or antecedents of the law to be construed; pre-parliamentary materials, explanatory memoranda, parliamentary proceedings and debates, The intentionalists adopt a three-tier approach to interpretation of Statutes as follows;

1. **construe the text as a whole to ascertain the intention of parliament**. To effectively achieve that purpose, it ensures that the interpretation is made as near as possible to the mind and intention of the legislature of the parties to the contract under consideration.
2. **The intention of the legislature must be gathered from the written text** and not from any document or source which does not form part of the text.
3. **Ensure that words are given their ordinary meaning** and technical or special words are given their technical or special meaning. Where the ordinary meaning will render the text absurd you must look for a secondary meaning.

The intentionalists adopted **three rules** the to interpretation of statutes, namely;

1. **the mischief rule** – heydon's case case quoted with approval in Republic v HC, Koforidua, Ex Parte EREDEC

2. **the literal rule** or plain meaning, and

3. **the golden rule –** read as a whole, give ordinary meaning, look for secondary meaning where ordinary meaning will lead to absurdity.

- **Further marks may be given for reference to the Hedon's and its import in statutory interpretation.**

- **Students shall be rewarded for reference to *the interpretation Act* on the preferred approach to statutory interpretation.** – the memorandum to the interpretation Act, 2009 enjoins the courts to adopt **the purposive approach**.

  Section 10(2) of the Act 792 permits the court where it considers the language of an enactment to be ambiguous or obscure, take cognisance of; the legislative antecedents of the enactment, pre-parliamentary material relating to the enactment, memorandum that accompanied the Bill, parliamentary debates, Parliamentary Committee reports, a report of a Commission, committee or any other body appointed by the Government or authorised by Parliament, a relevant treaty or convention,

the *travaux preparatoires* or preparatory work relating to the treaty or the agreement, to assist in ascertaining the meaning of an enactment and in resolving ambiguities in the law.

Section 10 (4) further enjoins the courts to construe or interpret the Constitution and statutes in a manner that;

1. Promotes the rule of law and values of good governance
2. advances the fundamental human rights.
3. Permits creative development of the Constitution and the laws of Ghana, and
4. avoids technicalities and niceties of form and language which defeats the purpose and the spirit of the constitution and the laws of Ghana.

- **Marks will be awarded for discussing the relationship between the *golden rule* and *the purposive approach* to interpretation. –**

1. **the golden rule** is one of the rules of statutory interpretation adopted by the intentionalists. It requires the interpreter to read the text as a whole, give the words their ordinary or technical meaning within the context, but where the ordinary meaning will render the text incongruous or absurd, look for a secondary meaning that will make it sensible and reasonable. Being an intentionalist tool/rule, the aim ultimately is o ascertain the intention of the law maker.

2. **The purposive approach** also requires the interpreter to read the text as a whole, give words their ordinary meaning. However, emphasis is not placed on the linguistic context or the words but takes into account the purpose of the law, the scope, the subject-matter and to some extent the background of the law . The purposive approach is to ascertain the purpose of the law and not the intention. **NB:** the background is what the intentionalists refer to as the mischief.

   The purposive approach requires the interpreter to go beyond the text to unravel the purpose of the law by resorting parliamentary debates and committee reports, the background of the law. The intentionalist do consider the background of the law which they term as the "mischief" but remain bound by the text in determining the intention of the legislature. Intentionalism forbade the use of legislative history or antecedents of the law to be construed; pre-parliamentary materials, explanatory memoranda, parliamentary proceedings and debates,

- Further marks shall be awarded for the discussion of the threshold for ordinary meaning; repugnancy; absurdly; incongruity etc.

- Marks shall be awarded for references and application of cases such as ***In Re Amartefio;***
- Students shall further be reference to **Humphrey-Bonsu v Quaynor.**

In the case of **Humphrey- Bonsu and Another v Quaynor and Others (1999- 2000) 2 GLR 781**, an application under **section 13(1) of the Wills Act** was brought by the widow of the testator and her two children who were dispossessed by the testator's will. The Court of Appeal through **Benin J.A** decided that the widow was a pensioner with no monthly pension and no significant source of income and was dependent

on the husband before the separation, therefore she was entitled to a reasonable provision under Section 13. The Court of Appeal however, interpreted Section 13 of the Wills Act, 1971 (Act 360) strictly to deprive the disabled children a reasonable provision out of the estate of the deceased father on grounds that they were 18 years old at the time of the testator's death and consequently did not qualify as dependents under section 13 of Act 360.

The majority of the COA held that; *" The language of section 13(1) of Act 360 admitted of no ambiguity whatsoever and in effect clearly prescribed that only a child of the testator under eighteen years of age was entitled to the provision under the section. Hence the law maker clearly intended the natural age of a child to prevail. Consequently, the provision was to be enforced however harsh the result might be. In the instant case since both the second and third plaintiffs were eighteen years old at the time the testator died, they did not qualify as dependents under section 13(1), however much pain or grief one had for them, especially the third plaintiff."*

DISCUSSION ON SECTION 13 OF ACT 360.

- **Constitution – article 22(1)** – a spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made will.

- **Constitution** – article 28(1)(b) – every child whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents.

- Section 13 of Act 360. -

- **General rule on making of Wills** – in the case of **Bird v Luckie**, it was held that ….."the general or common law rule is that a testator of a will is free to make his will and distribute his estate as he pleases. He is not bound to leave fixed portion of his estate to any particular person and he is permitted to be capricious and improvident.

- In **Thomas Kofigah v Kofigah Atanley (2020) 159 GM J1**. SC **Amegatcher JSC** cautioned that 'children ought to know that after the age of 18 years, a parent or guardian is under no obligation to make provision in his or her Will for them. Any such provision is based on the whims of the testator arising from natural love and affection, respect for, care for and cordial relationship a child shows or strikes with the parents or guardians when they were alive.'

- **In Re Mensah (Dec'd): Barnieh v Mensah & Ors [1978]** – it was held that ……" the policy of the court is to give effect to the last wishes of the deceased and to uphold them unless there are overriding legal obstacles in the way.

- Notwithstanding the right of the testator to distribute his estate as he pleases, **section 13 of the Wills Act, 1971 (Act 360)** permits the Courts to vary or alter the Will in order to provide for certain class of persons whom the Testator ought to have provided for but failed so to do.

- In **Akua Marfoa v Margaret Akosua Agyeiwaa,** it was held that, in an application under section 13 of Act 360, the court must be satisfied that:

  a) that the applicant is a dependent on the testator
  b) that the application has been brought within three years after the granting of the probate of the will.
  c) that the testator failed, either during his lifetime, or by his will, to make reasonable provision for the applicant
  d) that the Appellant is suffering, or likely to suffer hardship, and
  e) that having regard to all the relevant circumstances the applicant is entitled to support out of the estate of the testator.

Then notwithstanding the provisions of the Will, the Court will make reasonable provisions for the needs of such father, mother, spouse or child out of the estate of the deceased. Such reasonable provision may include;

1. a lump sum payment or grant of annuity or a series of payment.

2. Grant of an estate or an interest in immovable property for life or any lesser period.

In the case of **Humphrey Bonsu and another v Quaynor**, the court declined to consider a disabled child on grounds that he was above 18 years.

SAMPLE QUESTIONS

1. Three (3) persons were charged with the offence of loitering after 6pm without authority. The persons were Cpl. Ernestina, Sgt. Agatha and Lt. Louis. They were charged under **section 5 of the Armed Forces Act** which provides that …." ***It is an offence for a soldier who is found loitering after 6 pm"***. The three of them were found loitering after 7 pm.

   Lt. Louis has put up a defence that he is not a soldier. Discuss.

ATTEMPTED ANSWER

AREA OF LAW

Approaches to interpretation

ISSUE

Whether or not Lt. Louis is a Solder within the meaning of the Armed Forces Act and therefore culpable/guilty of the offence charged.

RULES

In this question, I will apply the intentionalist approach to interpretation of statute to resolve the issue.

The intentionalists apply three rules of construction, namely;

- The mischief rule
- The literal rule
- Golden rule

The intentionalists adopt a three-tier approach in construing laws and documents, namely;

1. Construe the text as a whole to ascertain the intention of parliament.
2. Ascertain the intentions of the law maker from the written text and not from any document or source which does not form part of the text.
3. Words are to be given their ordinary meaning and technical or special words are to be given their technical or special meaning.
4. Where the ordinary meaning would render the text absurd, you must look for a secondary meaning.

ANALYSIS

In the case before us, Lt. Louis is charged with the offence of loitering after 7pm contrary to section 5 of the Armed Forces Act which prohibits loitering by Soldiers after 6pm without authority. Lt. Louis in his defence asserts that, he is not a Soldier and therefore not guilty of the offence charged.

The question or issue presented us in this case, is to interpret the Armed Forces Act to ascertain whether, first of all, Lt. Louis is a Soldier in order to resolve the issue whether or not he is guilty of the offence.

In doing this, the intentionalist approach to interpretation of Statutes will be useful here. The rule or principle requires the interpreter to;

i. Construe the text as a whole to ascertain the intention of the draftsman or parliament.
ii. Ascertain the intention of the law maker from the written expression of the law
iii. Give words their ordinary meaning and where words are technical or special, they must be given their technical and special meaning, and lastly
iv. Look for a secondary meaning where the ordinary meaning of the text will render the whole statute absurd.

In construing the meaning of the word "**Soldier",** the rule requires that it must be interpreted in the light of its plain and ordinary sense. The word Soldier as understood by laymen in the ordinary sense refers to an officer or a member of the Armed Forces. Now, to construe the word Soldier in this sense will imply that Lt. Louis, being a member of the armed forces is a soldier and consequently guilty of the offence charged. This conclusion is absurd. It is absurd in the sense that, it renders the scope of the law so wide that it draws within its ambit every member of the armed forces including the most senior officers. Such interpretation subjects every member or officer to the law; thus, everyone is likely to be found guilty of the law.

Now it is apparent that the ordinary meaning of the word "Soldier" has rendered the interpretation absurd, thus the need to give the word "Soldier" its technical meaning within the context of the Armed Forces Act. The Armed Forces classifies its members into two categories, namely; "Soldiers" and "Officers". A careful reading of the Armed Forces Act discloses that a Lieutenant, is an Officer and not a Soldier within the meaning of the armed forces law.

Consequently, the technical meaning of the word Soldier does not include a Lieutenant, thus Louis being a Lieutenant, is not a Soldier and therefore not subject to the provisions of Section 5 of the Armed Forces Act.

CONSLUSION

Under the Armed Forces Act, a Lieutenant is an "Officer" and not a "Soldier". Louis being a Lieutenant is an Officer and not a Soldier. Lt. Louis is therefore not guilty of the offence charged.

2. Section 5 of the criminal offences Act of Jamaica provides that …" ***he who draws blood shall suffer death"***. A taxi driver was found in a pool of blood and a doctor invited two (2) persons to assist him to draw the blood of the person who was found

in the pool of blood ***to ascertain the cause of death***. The 3 persons have been charged with the offence of drawing blood from a human being. **As an intern of Justice Justice, offer an opinion for consideration by the judge.**

AREA OF LAW

Approaches to interpretation of statutes.

ISSUES

Whether or not upon a true and proper interpretation of section 5 of the criminal offences Act, the doctor and the two (2) other persons who assisted him in drawing the blood are guilty of the offence charged.

RULES.

In resolving the issue posed supra, the purposive approach to interpretation will be adopted. The purposive rule or approach to interpretation requires that the interpreter or person construing a statute shall interpret it in a manner that gives effect to the true purpose for which the enactment was made. They do not limit themselves to the words as used in the text but go further to unravel the purpose behind those words.

In so doing, the interpreter shall not only construe the ordinary meaning of the words but must also take into consideration, the subject matter, the scope, the purpose and sometimes the background of the law. Accordingly, purposivists interpret laws to advance the legislative purpose and to do justice and equity.

Purposivists;

1. Read the text as a whole.
2. They give words their ordinary meaning within the context in which they were used.
3. They do not place emphasis on linguistics context or the words, but rather they take into account the ***purpose of the enactment or agreement***, ***the scope***, ***the subject matter and to some extent the background of the law***.

In the case of **Appiah v Biani**, the issue for the determination was whether or not an uncompleted building is a house for purposes of inheritance under the interstate succession Law, 1985 (PNDCL 111). In resolving the issue, Lutterodt J (as she then was) held that a house in ordinary normal speech must have a roof, walls, widows etc. Consequently, by this strict construction, a spouse or children or both may not be entitled to any house which was being built by their deceased spouse or parent, but which has not been completed.

She further stated that by adopting the strict grammatical or constructionist approach, she would have ended up concluding that a house per its dictionary meaning, is "a building for dwelling in, a dwelling place" and therefore an uncompleted building would not be a house.

However, in adopting the purposive approach, it becomes obvious…that an uncompleted house is a house within the meaning and intendment of the law. She concluded by stating that the provisions of the law was not intended to merely provide a surviving spouse and children with a shelter or place of habitation but rather to ensure that they received a larger portion of the deceased's estate to enable the surviving spouse look after the children well and provide them with all the necessaries of life.

In **Church of Holy Trinity v United States**, the issue was whether or not a Pastor was a labourer thus forbidden from employment under the Laws of the United States which prohibited the importation and migration of foreign labourers into the USA. the Supreme Court and the Court held that a rector of a church would provide service and not labour and that the statute should apply to manual labourers only. The Court took into consideration ***the text***, ***the long title, context*** *and* ***subjective purpose*** to arrive at its decision.

ANALYSIS

In the case before us, we are faced with the task of unravelling the purpose or the true intendment of the legislator as provided under Section 5 of the criminal offences Act of Jamaica. The impugned section provides that …" ***he who draws blood shall suffer death"***.

A taxi driver was found in a pool of blood and a doctor invited two (2) persons to assist him draw the blood of the person who was found in the pool of blood ***to ascertain the cause of death***. These three (3) persons have been charged with the offence of drawing blood from a human being. The question that is worth asking and resolving is whether or not upon a true and proper construction of section 5 of the criminal offences Act of Jamaica, the legislature intended to make it an offence for anyone who drew blood, including the doctor, irrespective of the purpose for which the blood was taken.

A literal interpretation of the said provision will imply that anyone who drew blood from another person for whatever reason, will be acting in contravention of the law and therefore commits an offence under section 5 of the Act. Such a conclusion is patently absurd and repugnant to common sense, thus one could not anticipate such to be the outcome the draftsman intended.

The ordinary interpretation having resulted in absurdity, it is thus incumbent upon the interpreter to look beyond the text and consider the subject matter, the scope, the purpose

and the background of the law in order to offer a meaning that advances the legislative purpose.

In adopting the purposive approach, it has become obvious that the legislator did not intend such an outcome. Although, the plain and ordinary interpretation will mean that the three (3) persons charged did draw blood and therefore culpable, Purposive interpretation does not concur in such an absurd conclusion. Purposivism enjoins the interpreter to construe the text in a manner that excludes some people, such as the doctor and his accomplices even though, ordinarily, they should have fallen within the generic term.

In deed it was held in the case of **Church of Holy Trinity v United States 143 US 457 [1892]** as follows;

> "We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

CONCLUSION

The rationale for purposive interpretation is to give an interpretation the achieves the objects and purpose of the law. As a result, a purposive interpretation of section 5 of the Act will result in an outcome that excludes the doctor and the two other persons from coming within the ambit of the law. We may conclude that the law was not passed to achieve such an undesirable outcome, as to commit a medical doctor, who drew blood to ascertain the cause of death, for an offence. The purpose certainly was not one which had persons such as the doctor in contemplation.

3.0. INTERPRETATION OF CONSTITUTION

JANUARY 2020 QUESTION 5

QUESTION 5

There is a debate as to how the Constitution is to be interpreted. In the case of *Asare v Attorney - General [2003-2004] 1SCGLR 823* at pages 865 - 857 the Supreme Court speaking through Professor Kludze JSC stated thus:

"The provision in Article 60 may not be the most prudent, or even the most practical, for handling situations when the President is absent from Ghana. It may at times occasion inconvenient and theoretically incongruous choices. All the same, that is what the Constitution clearly ordains, and it must be observed until there is an amendment. If, as he is entitled, the plaintiff disagrees with the stipulations in the Constitution, he has avenues open to him. He can appeal to the political process to initiate the procedure to amend the part of the Constitution that he approves. Our Constitution has established procedures for securing amendments. This is because the framers anticipate that a Constitution as a basis for democratic government may need amendments in response to changing or changed circumstances or in the light of difficulties and flaws in application. The Supreme Court is ill-suited as a forum for advocating constitutional amendments. The plaintiff is urging us to become entangled in political issues which are properly reserved for Parliament and the people of Ghana in a referendum under articles 298-292 (chapter 25) of the Constitution."

The Memorandum to the Interpretation Act, Act 792 requires the Constitution to be interpreted as a living organism capable of growth to avoid amendments provided the spirit of the Constitution is given its due prominence. It provides thus:

"By that process the construction and interpretation of the Constitution 1992, will not be tied down to the Interpretation Act but will take account of the cultural, economic, political and social developments of the country without recourse to amendments which can be avoided if the spirit of the Constitution is given its due prominence. A Constitution is a sacred document. It must of necessity deal with fact of the situation, abnormal or usual. It will grow with the development of the nation and face challenging changes and new circumstances."

Discuss why you prefer the position taken in the Memorandum to the Interpretation Act to the position opined by Prof Kludze JSC in *Asare v Attorney- General supra*.

(25 Marks)

1. The present case/introduction

In this question, we are faced with a debate as to which of the two approaches to the interpretation of the Constitution 1992 is preferrable over the other.

It is the case of Prof. Kludze in **Asare v AG [2003/04]** that the Supreme Court should not be used as a forum to amend the Constitution nor lend itself to an interpretation that seeks to amend the Constitution. He supports his argument by stating that, the Framers of the Constitution contemplated the necessity to amend the Constitution and for that matter

provided a procedure for such amendment. In his view, the provision of article 60 must be interpreted according to what the legislature has in fact expressed in the text and in no other way. Thus, the Court could not admit or import any interpretation than what the text provides. I am thus inclined to conclude that the learned Justice adopted the **literal approach** to interpretation of the Constitution.

On the other hand, the Memorandum to the Interpretation Act, 2009 (Act 792) provides that the Constitution should be interpreted as a living organism capable of growth to avoid amendments provided the spirit of the Constitution is given its due prominence. This approach, in my view, is what is termed as the **purposive approach** to interpretation of Constitution.

Clearly the two approaches are in sharp contrast to each other. Whereas Prof. Kludze advocates for a literal approach, the Interpretation Act on the other hand adopts a purposive approach. Before I proceed to resolve the debate, I shall first discuss, briefly, the nature of the Ghanaian Constitution, its attributes and the various approaches the Courts or the Justices have adopted over the years.

2. The nature of the 1992 Constitution -Tuffuor v AG [1980]

In describing the nature of Constitution as a living organism capable of growth, this is what **Sowah JSC** had to say in **Tuffuor v AG** thus;

"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. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution."

Furthermore, Sowah described the approach to the interpretation of the Constitution in the following words;

*"Its language, therefore, 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. And so we must take cognisance of the age-old fundamental principle of constitutional construction which **gives effect to the intent of the framers** of this organic law. Every word has an effect. Every part must be given*

effect. And so a construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say "inconsistent" results, the spirit of the Constitution would demand that the more reasonable of the two should be adhered to. We must have recourse to the Constitution as a whole."

3. Attributes of the 1992 Constitution

On the authorities of the cases aforementioned the following can be said to be the attributes of the Constitution of Ghana;

1. The constitution is the supreme law of the land
2. It has its letter and spirit. i.e. the political, economic, social circumstances et al.
3. It is the fountainhead of the authorities of the three (3) arms of government. i.e the arms of government draw their existence, power and strength from the constitution.
4. It is ***sui generis.*** i.e. it is unique and crafted for a particular country, taking into account their historical antecedents.
5. It is a legal document and a political testament. i.e. it is the law and a political instrument. It performs what an ordinary law cannot do.
6. It embodies the soul of the people of a country
7. It provides its mode of amendment.

4. Various approaches by justices of the Supreme Court

The Justices of the Supreme Court have over the years adopted various approaches to the interpretation of the Constitution based on their idiosyncrasies and the school of thought they belong to. Until recently, there has not been a single or consistent approach when it came to interpretation of the national Constitution. The most notable approaches have been the literalist, intentionalist and purposive.

Whereas the likes of **Prof Kludze and Archer JSC** have been champions of the literalist/positivist school, **Prof. Date-Bah, Sowah and Aquah** JSC are staunch advocates of the purposive approach to the interpretation of national Constitution.

In the case **of Republic v Fast Track High Court, Ex Parte Daniel [2003/04] 1 SCGLR 364** Prof. Kludze held that judges do not have a right to substitute their own opinion for a word in the constitution as the Constitution has provided for how it should be amended. He further cautioned judges not to introduce their beliefs and opinions into constitutional interpretation. He held thus;

…" we cannot, under the cloak of constitutional interpretation, rewrite the constitution of Ghana. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise".

Conversely, **Prof. Date-Bah in Danso-Acheampon v AG and Abodakpi** held thus;

"This reading of the constitutional provision is very literal. These days, a literal approach to Statutory and Constitutional interpretation is not recommended. ***Whilst a literal interpretation of a particular provision may in its context, be the right one, a literal approach is always a flawed one, since even common sense suggests that a plain meaning interpretation of an enactment needs to be checked against the purpose of the enactment, if such can be ascertained.*** A literal approach is one that ignore the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question."

Archer JSC held in the 31st December case [1993] as follows;

"I have found it unnecessary to dive and delve further into what is meant by the spirit of the Constitution because I am convinced that it is a cliche 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, 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."

Also, **Georgina Wood CJ in Republic v High Court, Accra; Ex Parte CHRAJ (Anane Interested Party) [2007-08]** held thus;

"In construing '**complaints**' as used in article 218, I choose what I may describe as **a hybrid approach**, a combination of two or more guides, namely, the ordinary or plain meaning and the subjective-purposive approach. In this exercise, I will give primary consideration and weight to the actual text and structure of not only article 218(a), but the whole of article 218 and apply the literalist-ordinary dictionary meaning of complaints in the context of the entire article 218."

From the foregoing, it is manifestly clear that, indeed, the learned justices have not been at *consensus ad idem* in their approaches to interpretation of the Constitution.

5. **What then is the preferred approach to interpretation of the Constitution. In other words, which of the two approaches, literalist or purposive, should be preferred when construing the 1992 Constitution of Ghana.**

This is how Date-Bah puts it in **Agyei Twum v AG and Bright Akwetey;**

> "To answer the highlighted question posed above, let us revisit first principles. Judicial interpretation is about determining the legal meaning of a set of words. A set of words will often raise a range of possible semantic meanings and the task of judicial interpretation is to select which of these semantic meanings should be accepted as the legal meaning of the text. All legal texts which are placed before a court have to be subjected to this process of judicial interpretation, even if their meaning appears to be plain. This is because the plainness of the meaning is itself a conclusion reached by the relevant judge after a process of interpretation."

5.1. The Literalist approaches

The literalist approach to interpretation is pretty simple, which is that; words should be given their ordinary meaning irrespective of its consequence. Technical words should be given their technical meanings. Where words are clear and unambiguous the interpreter should not look for any other meaning. Literalists do not make a distinction between the letter and the spirit of the text. They interpret the text as it appears. They are of the view that what is written should be given effect to whether it is rational or not is not relevant. In the UK for instance, parliament is supreme and therefore whatever is enacted must be applied.

In the case of **Dr. Richard Anani, Aninakwah JSC** held, inter alia, that he would use the ordinary dictionary meaning of the word 'complaint' and give the word its literal interpretation. He then came to the conclusion that, complaint means to make a formal accusation against a person and that there should be an identifiable person or entity as a complainant before CHRAJ, else CHRAJ could not investigate the complaint.

5.2. The purposive approach

Proponents of this school argue that, the task of an interpreter is to look out for the purpose for which the text was created. They do not limit themselves to the words as used in the text but go further to unravel the purpose behind those words.

Purposivists;

1. Read the text as a whole.

2. They give words their ordinary meaning as well as the context in which they were used.
3. They do not place emphasis on linguistics context or the words, but rather they take into account the ***purpose of the enactment or agreement***, ***the scope***, ***the subject matter and to some extent the background of the law***.

The purposive approach usually recommends the use of plain or ordinary meaning to the text but where the purpose of the law cannot be easily ascertained, a rational decision would be used to ascertain the purpose of the law.

In Agyei Twum v AG and Bright Akwetey, the Supreme Court considered the importance of the purposive approach to interpretation. However, the adoption of the purposive approach to interpretation does not mean discounting the text. Date-Bah held that;

> **"**In interpreting constitutional language, one should ordinarily start with a consideration of what appears to be the plain or literal meaning of the provision. But that should not be the end of the process. That literal meaning needs to be subjected to further scrutiny and analysis to determine whether it is a meaning which makes sense within its context and in relation to the purpose of the provision in question. In other words, the initial superficial literal meaning may have to yield to a deeper meaning elicited through a purposive interpretation"

Thus, it is only when the court determines that slavish application of the literal meaning will lead to absurd results that it may adopt the purposive approach. When adopted, the purposive approach allows implicit words to be read into the Constitution to avert manifest absurdity.

6.0. The case for purposive approach to interpretation of the Constitution

One of the leading proponents or advocates of the purposive interpretation, **Date-Bah,** maintains that whilst a literal interpretation of a particular provision may in its context, be the right one, a literal approach is always a flawed one. This is how he puts it in the case of **Danso-Acheampong v AG and Dan Abodakpi;**

> "This reading of the constitutional provision is very literal. These days, a literal approach to Statutory and Constitutional interpretation is not recommended. ***Whilst a literal interpretation of a particular provision may in its context, be the right one, a literal approach is always a flawed one, since even common sense suggests that a plain meaning interpretation of an enactment needs to be checked against the purpose of the enactment, if such can be***

ascertained. A literal approach is one that ignore the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question."

In **Agyei-Twum v AG and Akwetey**, Date-Bah cited Prof. Zander, another Critic of literal interpretation as follows;

Thus, **Prof. Zander, the English academic, in his The Law-Making Process (1999, 5th Ed.)** p. 125 makes the following criticism of the literal approach:

> "A final criticism of the literal approach to interpretation is that it is defeatist and lazy. The judge gives up the attempt to understand the document at the first attempt. Instead of struggling to discover what it means, he simply adopts the most straightforward interpretation of the words in question — without regard to whether this interpretation makes sense in the particular context. It is not that the literal approach necessarily gives the wrong result but rather that the result is purely accidental. It is the intellectual equivalent of deciding the case by tossing a coin. The literal interpretation in a particular case may in fact be the best and wisest of the various alternatives, but the literal approach is always wrong because it amounts to an abdication of responsibility by the judge. Instead of decisions being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred."

On the basis of the aforementioned criticisms levelled against the literal approach to interpretation, the purposive approach is the most preferred and now the dominant rule of interpretation of all written documents, statutes and in particular, the Constitution.

Interpretation of Constitution as proposed by the Interpretation Act, 2009 (Act 792)

In Ghana, the Constitution is not an ordinary Act of Parliament. It is the supreme law of the land which expresses our will and embodies our soul. The interpretation of the Constitution cannot be subjected to the Interpretation Act. ***Always note that the Interpretation Act is one of the external aids and should be treated as a servant and not a master.*** **It is only an aid to the interpretation of the Constitution**. Therefore, the constitution is unique and different from all other laws and must be interpreted as a living organism which is capable of growth.

In interpreting the constitution as a living organism, this is what **Sowah JSC** said in **Tuffuor v AG**. He described the approach to the interpretation of the Constitution in the following words;

"*Its language, therefore, 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. And so we must take cognisance of the age-old fundamental principle of constitutional construction which* ***gives effect to the intent of the framers*** *of this organic law. Every word has an effect. Every part must be given effect. And so a construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say "inconsistent" results, the spirit of the Constitution would demand that the more reasonable of the two should be adhered to. We must have recourse to the Constitution as a whole."*

In a nutshell, the Constitution should be given a liberal or benevolent interpretation to meet the challenges of the nation at any point in time. The courts do not recommend a literal or direct approach to constitutional interpretation. It must be broad or benevolent to meet the aspirations of the people.

The position in Ghana now by virtue of **section 10(4) of the Interpretation Act** which has been quoted with approval by the SC in constitutional interpretation is that constitutional and statutory interpretation shall avoid technicalities and insistence on recourse to niceties of form and language.

Interpretation of the constitution should not be pedantic. Rather, it must be interpreted to promote the purpose and spirit of the Constitution as well as the laws of Ghana. The Constitution must be interpreted benevolently and liberally to *promote rule of law and values of good governance and also promote the advancement of fundamental human rights and freedoms.* Any interpretation which is literal and cannot advance the creative development of the provisions of the Constitution and laws of Ghana is not the mode of interpretation envisaged by the Interpretation Act, 2009 (Act 792) and should be avoided.

It must be construed as the Supreme law of the land and sui generis for that matter, taking cognisance of the directive principles of state policy as a guide.

Therefore, any proper interpretation should involve the whole text so as to promote the purpose for which the law was made. The interpreter should avoid technicalities, recourse to niceties of form and language and emphasis on specific words such as "may", "shall", "will" and "must" as they defeat the purpose of the law.

In **Dennis Torgbenu and Others v Torgbe Nakakpo Dugbaza VI (Suit. No.113/47/2017, COA)** The Court of Appeal held thus;

> "with purposive interpretation, laws are given benevolent interpretations to ensure that the interpretation takes account of the words of the enactment according to their ordinary meaning as well as the context in which they are used, and that judges do not only rely on the linguistic context but take into consideration the subject-matter, the scope, the purpose and the background of the enactment. Natural law

school requires judges to interpret words liberally to be able to address abnormal and usual circumstances to which the law-maker did not avert its mind, without recourse o amendment where it can be avoided."

The memorandum to the Interpretation Act which requires judges to adopt the purposive approach to the construction of legislation and all written instruments including deeds and documents provided that;

> " the courts in the Commonwealth have now embraced the purposive approach to the interpretation of Constitutions, legislation and indeed all written instruments. The judges have abandoned the strict constructionist view of interpretation in favour of the true purpose of legislation."

The interpretation Act, particularly **section 10** thereof enjoins Judges to use Purposive Approach to Judicial Interpretation. **Section 10(4**) sums up the theory of purposive interpretation as follows:

> Without prejudice to any other provision in this Section, a Court shall construe or interpret a provision of the Constitution or any other law in a manner:
>
> (e) that promotes the rule of law and the values of good governance.
> (f) that advances human rights and fundamental freedoms
> (g) that permits the creative development of the provisions of the Constitution and the laws of Ghana and
> (h) that avoids technicalities and niceties of form and language which defeats the purpose and spirit of the Constitution and the laws of Ghana.

The courts have given effect to the position that Ghana too has moved from strict constructionist view of interpretation to the purposive approach and all laws and documents are to be construed purposively.

The Constitution is a living organism capable of growth and has its letter and spirit and must be construed differently from other laws which are inferior to the Constitution, to be able to solve all situations without reference to amendments. It is apolitical document and must regulate all the political characters in the Country. The Courts should ensure that the Executive and the Legislature do not act in excess of their power conferred on them by the Constitution. The Constitution is made up of written and unwritten text and the combination of the two helps judges to use the Constitution to solve abnormal situations without reference to Parliament for amendment.

Notwithstanding the need to unearth the purpose of the Constitution, it must be borne in mind that the purpose should be aimed at fulfilling rather than destroying the law. As was stated by Kludze JSC;

"we cannot and must not under the cloak of interpretation rewrite the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution"

Similar sentiments were expressed by **Georgina Wood CJ in Republic v Fast Track High Court, ex-parte CHRAJ (Dr. Richard Anane, Interested Party) [2008];**

" the purposive rule is not carte blanche for rewriting legislation, let alone our Constitution, and should never be used as a ruse, a cloak or guise to do so. The function of the Court is to interpret legislation and give effect to it; even if where the terms appear unpalatable. Care must therefore be taken to avoid legislation under the guise of interpretation".

MAKING SCHEME [JUNE 2015, Q.7]

- This question requires detailed discussion of the basic rules and approaches to constitutional interpretation, especially the modern purposive rule to interpretation.

- Marks shall be awarded for introduction to the ***nature of a constitution*** as a fundamental law and the provision in ***article 1(2) of the Constitution***.

- Marks shall be awarded for discussing the ***enforcement provision*** and issue of ***capacity constitutional cases*** in ***article 2 of the constitution***.

- Marks may be awarded for ***brief explanation of jurisdiction*** and its importance.

- Marks shall be awarded for discussing ***the original jurisdiction of the Supreme Court.***

- Further marks shall be awarded for specifically ***discussing Article 130(1) (a) and (b)*** distinguishing of the Supreme Court.

- Marks may be awarded ***for distinguishing original jurisdiction from refer jurisdiction*** of the Supreme Court.

- Marks may be awarded for distinguishing ordinary matters distinguishing as constitutional interpretation cases and the response of the Supreme Court.

- More marks shall be awarded for the approach to constitutional interpretation. Marks shall be awarded for brief explanation terms such as ***textualism, originalism,***

pragmatist interpretation as specie of living construction document that is the ***constitution as a living organism***; ***strict constructionism*** etc.

- Further marks shall be awarded for the explanation and applicability of these terms. More marks shall be awarded for discussing the languages 70 and 193.

- Further marks shall be awarded for discussing issues relating construing constitutional language; ***construing the document as a whole***; ***ensuring internal cohere consistency***; ***avoiding absurdity***.

- More marks shall be awarded for brief explanation of the **modern purposive approach to interpretation;** the power of judges to fill in the gaps when identified.

- Marks be awarded for the application of these rules in resolving the question.

- Marks shall be awarded for evaluation of the approaches and their applicability.

- Further marks shall be awarded for reference to cases such as: Tuffuor v AG; Sallah v AG; Yeboah v JH Mensah; Edusei v AG (No.2); Bimpong Buta v GLC and Ors; NPP v AG (CIBA Case); Aduamoah II v Twum II; Osei Boateng v NMC, Adjei Ampofo v AMA (No.1); Asare v AG; Agyei Twum v AG & Or etc.

JUNE 2015 Q.7

QUESTION 7

This is an application by the Public Interest Law Group of Ghana invoking the original jurisdiction of the Supreme Court under Article 130(1) of the Constitution 1992. The said Article provides:
"Article 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; and
   (b) All matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution".

The background to this case is that the office of the Chairman of the Electoral Commission of Ghana became vacant on May 20, 2015. On June 22, 2015, the Presidency, through the Chief of Staff, issued an official statement as follows:

> The President acting in accordance with Article 70(2) of the 1992 Constitution has duly nominated Professor Harry Azoka for consideration by the Council of State. The President is awaiting the advice of the Council of State to make the formal appointment. The purpose of this announcement is to calm the political tension associated with the appointment of the Electoral Commissioner".

The Public Interest Law Group of Ghana is aggrieved with the contents of the announcement and is of the firm belief that the actions of the President is contrary to the letter and spirit of the said Article 70(2) which provides:

> "Article 70(2) The President shall, acting on the advice of the Council of State, appoint the Chairman...of the Electoral Commission".

In the view of the applicants, upon the true and proper interpretation of the above Article, it is the constitutional duty of the Council of State to advice the President by way of a nominee for the position of Chairman of the Electoral Commission and not the reverse. They further argued that the President shall then act in accordance with the advice of the Council.

The Attorney-General on her part, among other things, contends that where the Constitution requires a body or person to act in accordance with an advice the same is expressly provided by the Constitution. She supported her argument by referring to Article 193(1) which provides:

> "193(1) The President shall, acting in accordance with the advice of the Public Services Commission, appoint a public officer as the Head of the Civil Service".

In the view of the Attorney-General adopting the view of the applicants will defeat the purpose of Article 70(2) by subordinating the appointing authority of the President to that of the Council of State.

With reference to relevant authorities on the approach to constitutional interpretation, critically analyse the positions of the parties in this case.

ATTEMPTED ANSWER

1. Introduction

This question presents us with a case of approaches to interpretation of the Constitution. It requires detailed discussion of the basic rules and approaches to constitutional interpretation, specifically the literal and the purposive approaches. Before I delve into a critical analysis of the positions of the parties, I shall, first discuss the nature and attributes of the Constitution, the enforcement and interpretation jurisdiction of the Supreme Court, grounds for invoking the enforcement or interpretation jurisdiction, a highlight of some other approaches to interpretation, the recommended approach to interpretation of the Constitution under the interpretations Act, 2009 (ACT 792), the literal versus the purposive approaches and then analyse the positions of the parties and thereafter conclude.

Discussion of the law

2. Interpretation and the duty of the interpreter

Judicial interpretation is the rational process of determining the meaning and legal effect of the provisions of the Constitution, enactment and other non-statutory documents.

According to **Sir Dennis Adjei in his book, "Modern approach to the law of interpretation in Ghana, 3rd edition",** the essence of interpretation is to look for a meaning that will not render the text absurd or obscure.

In the case of **Agyei Twum v AG and Akwetey, Date-Bah** held thus; judicial interpretation is about determining the legal meaning of a set of words. A set of words may give rise to a range of possible semantic meanings and the duty of the interpreter is to determine which of the semantic meanings should be accepted as the legal meaning of the text.

3. The nature and attributes of the 1992 constitution as a fundamental law and the provision in article 1(2) of the Constitution.

Per **article 1(2) of the Constitution 1992, the Constitution of Ghana** is the supreme law of the land and any other law found to be inconsistent with the provisions of the Constitution shall to the extent of the inconsistency be void.

In describing the nature of the 1992 Constitution of Ghana as a living organism capable of growth, this is what **Sowah JSC** had to say in **Tuffuor v AG** thus;

"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. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution."

Again, **Acquah JSC** in **National Media Commission v AG [2000]** opined as follows; " *it is important to remind ourselves that we are dealing with a national Constitution and 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 gives certain rights to persons as well as bodies of persons and imposes obligation as much as it confers*

privileges and powers. Accordingly, in interpretating the Constitution, care must be taken to ensure that all the provisions work together as a functioning whole. The parts must fit together logically to form a rational, internally consistent framework"

On the authorities of the cases aforementioned the following can be said to be **the attributes of the Constitution of Ghana;**

1) The constitution is the supreme law of the land.
2) It has its letter and spirit. i.e. the political, economic, social circumstances et al.
3) It is the fountainhead of the arms of government. i.e the arms of government draw their existence, power and strength from the constitution.
4) It is ***sui generis.*** i.e. it is unique and crafted for a particular country, taking into account their historical antecedents.
5) It is a legal document and a political testament. i.e. it is the law and a political instrument. It performs what an ordinary law cannot do.
6) It embodies the soul of the people of a country
7) It provides its mode of amendment.

4. **Enforcement provision** and issue of **capacity in constitutional cases** under **article 2 of the constitution**.
   - **i.** Discuss jurisdiction generally
   - **ii.** The exclusive original jurisdiction of the SC – article 2 and 130
   - **iii.** Reference v original jurisdiction
   - **iv.** Capacity

Jurisdiction of a court is the power of the Court to adjudicate matters brought before it. Jurisdiction of the Superior Courts in Ghana are conferred by the 1992 Constitution whereas jurisdiction of the lower courts and lower adjudicating bodies are conferred by statute as held in the case of Chief **Timitimi v Amabebe [WACA].**

Article 2 of the 1992 Constitution provides that a person who alleges that an enactment or anything contained in or done under the enactment or any act or omission is inconsistent with or in contravention of a provision of this Constitution may bring an action in the Supreme Court for a declaration to that effect.

Article 130(1) of the 1992 Constitution also provides that, subject to the jurisdiction of the High Court under article 33 of the Constitution, the SC shall have exclusive original jurisdiction in all matters relating to the enforcement or interpretation of this constitution;

and all matters alleging that an enactment was made in excess of the powers conferred on Parliament or any other authority.

Article 130(2) provides that where an issue that relates to the enforcement or interpretation of the constitution or to clause (1) of article 130 arises in any proceedings, the court shall stay proceedings and refer the matter to the supreme court for determination and the court in which the case arose shall dispose of the case in accordance with the decision of the Supreme Court. This is called the "reference jurisdiction" of the supreme Court.

The Supreme Court has **exclusive original jurisdiction** in all matters concerning the enforcement or interpretation of the 1992 constitution. This means that the Supreme Court is the only court which has jurisdiction to adjudicate upon any matter or action concerning enforcement or interpretation of the constitution or an action under article 2.

The said person shall invoke the exclusive original jurisdiction of the Supreme Court under article 130 on enforcement or interpretation of the Constitution.

The person bringing the action under **article 2 and 130 of the 1992 Constitution** must be a Citizen of Ghana in order to be clothed with capacity before the Supreme Court. Bamford-Addo JSC (as she then was) held I the case of ***Sam (No 2.) V. Attorney-General*** **[2000]** *that* article 2(1) gives standing to any person who is a citizen to seek an enforcement or interpretation of the constitution in furtherance of the duty imposed on all citizens to defend the Constitution under articles 3(4) (a) and 41(b)…It is clear then that article 2(1) (a) is a special jurisdiction available to citizens of Ghana only, irrespective of personal interest."

5. **Grounds for invoking the enforcement or interpretation jurisdiction of the SC**-

The Supreme Court has held in a plethora of cases that it is not every matter that is dressed up in the garb of interpretation and enforcement of the Constitution is indeed a matter that requires the invocation of the enforcement or interpretation jurisdiction of the SC.

Anin JA held in the case of **Republic v Special Tribunal; ex parte Akosah [1980]** that an issue of enforcement or interpretation of a provision of the Constitution arises in any of the following eventualities;

i. Where the words of the provisions are imprecise, obscure or ambiguous or where a party has invited the court to declare that the words have a double meaning or are ambiguous.

ii. Where the parties have placed rival meanings on the provisions of the Constitution.

iii. Where there is a conflict in the meaning and effect or two or more articles of the Constitution and the question is raised as to which provision should prevail.

iv. Where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the constitution.

NB: This case was decided under the previous equivalent of the current articles 2(1) and 130 of the 1992 Constitution.

The Supreme Court in **Osei Boateng v National Media Commission and Appenteng** quoted with approval the holding of Anin JS in Ex parte Akosah and held thus;…..*aaccordingly, for this Court to accept to exercise its exclusive enforcement jurisdiction in this case, the plaintiff has to comply with the threshold requirement of identifying at least one of the four eventualities listed by Anin JA as existing in relation to the constitutional provisions in issue.*

However, the SC in the case of **Republic v High Court Accra, Ex parte Zanetor Rawlings** held that the guidelines stated in **Ex parte Akosah** are not cast in iron.

6. **The approaches to constitutional interpretation**. Marks shall be awarded for brief explanation terms such as ***textualism, originalism, pragmatist*** interpretation as specie of living construction document that is the ***constitution as a living organism***; ***strict constructionism*** etc.

The Justices of the Supreme Court have over the years adopted various approaches to the interpretation of the Constitution based on their idiosyncrasies and the school of thought to which they belong. Thus, there has not been a single or consistent approach when it came to interpretation of the national Constitution.

Some of the know approaches the Supreme Court has adopted when interpreting the national Constitution are; ***originalism, textualism, pragmatism, strict constructionist, living constitutionalism, intentionalism, purposive and the modern purposive approach.*** The most notable approaches have been the literalist, intentionalist and purposive approach.

Whereas the likes of **Prof Kludze and Archer JSC** have been champions of the literalist school, **Prof. Date-Bah, Sowah and Aquah JSC** are staunch advocates of the purposive approach to the interpretation of national Constitution.

The **literal approach** requires the interpreter to give the words their ordinary meaning and apply same irrespective of how onerous or repugnant the outcome may be. The **intentionalist approach** on the other hand enjoins the interpreter to ascertain the intention of the legislature from the written expression of the law and not what the law ought to be, whilst the purposive approach requires the interpreter to look for the purpose for which the law was passed taking into account, the subject matter, the scope, the object and to some extent the background.

In interpreting the constitution as a living organism, this is what **Sowah JSC** said in **Tuffuor v AG**. He described the approach to the interpretation of the Constitution in the following words;

*"Its language, therefore, 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. And so we must take cognisance of the age-old fundamental principle of constitutional construction which **gives effect to the intent of the framers** of this organic law. Every word has an effect. Every part must be given effect. And so a construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say "inconsistent" results, the spirit of the Constitution would demand that the more reasonable of the two should be adhered to. We must have recourse to the Constitution as a whole."*

In a nutshell, the Constitution should be given a liberal or benevolent interpretation to meet the challenges of the nation at any point in time. The courts do not recommend a literal or direct approach to constitutional interpretation. It must be broad or benevolent to meet the aspirations of the people.

7. Interpretation of the Constitution as recommended by the Interpretations Act, 2009 (Act 792)

The memorandum to the Interpretation Act enjoins judges to adopt the purposive approach to the construction of Constitution, legislation and all written instruments including deeds and documents. It further provides that.."*the courts in the Commonwealth have now embraced the purposive approach to the interpretation of Constitutions, legislation and indeed all written instruments. The judges have abandoned the strict constructionist view of interpretation in favour of the true purpose of legislation*."

The interpretation Act, particularly **section 10** thereof enjoins Judges to use purposive approach to Judicial Interpretation. **Section 10(4**) states that a Court shall construe or interpret a provision of the Constitution or any other law in a manner:

(i) that promotes the rule of law and the values of good governance.
(j) that advances human rights and fundamental freedoms.
(k) that permits the creative development of the provisions of the Constitution and the laws of Ghana and
(l) that avoids technicalities and niceties of form and language which defeats the purpose and spirit of the Constitution and the laws of Ghana.

In Ghana, the Constitution is not an ordinary Act of Parliament. It is the supreme law of the land which expresses our will and embodies our soul. The interpretation of the Constitution cannot be subjected to the Interpretation Act. This is because the I***nterpretation Act is one of the external aids and should be treated as a servant and not a master.*** **It is only an aid to the interpretation of the Constitution**. Therefore, the constitution is unique and different from all other laws and must be interpreted as a living organism which is capable of growth.

The position in Ghana now by virtue of **section 10(4) of the Interpretation Act** which has been quoted with approval by the SC in constitutional interpretation is that constitutional and statutory interpretation **shall avoid technicalities and insistence on recourse to niceties of form and language.**

Interpretation of the constitution should not be pedantic. Rather, it must be interpreted to promote the purpose and spirit of the Constitution as well as the laws of Ghana. The Constitution must be interpreted benevolently and liberally to *promote rule of law and values of good governance and also promote the advancement of fundamental human rights and freedoms.* Any interpretation which is literal and cannot advance the creative development of the provisions of the Constitution and laws of Ghana is not the mode of interpretation envisaged by the Interpretation Act, 2009 (Act 792) and should be avoided.

It must be construed as the Supreme law of the land and sui generis for that matter, taking cognisance of the directive principles of state policy as a guide. The constitution must be read as ***a whole***; ***ensuring internal coherence or consistency*** and ***avoid absurdity***

8. The **purposive approach to interpretation;** the power of judges to fill in the gaps when identified.

The purposive approach requires the interpreter to ascertain the purpose of the law by doing the following;

1. Reading the text as a whole

2. Give words their ordinary meaning as well as the context in which they were used.
3. Do not place emphasis on linguistics context or the words, but rather take into account the ***purpose of the enactment or agreement***, ***the scope***, ***the subject matter and to some extent the background of the law***.

The purposive approach usually recommends the use of plain or ordinary meaning to the text but where the purpose of the law cannot be easily ascertained, a rational decision would be used to ascertain the purpose of the law.

In Agyei Twum v AG and Bright Akwetey, the Supreme Court considered the importance of the purposive approach to interpretation. However, it held that the adoption of the purposive approach to interpretation does not mean discounting the text. Date-Bah held that;

> **"**In interpreting constitutional language, one should ordinarily start with a consideration of what appears to be the plain or literal meaning of the provision. But that should not be the end of the process. That literal meaning needs to be subjected to further scrutiny and analysis to determine whether it is a meaning which makes sense within its context and in relation to the purpose of the provision in question. In other words, the initial superficial literal meaning may have to yield to a deeper meaning elicited through a purposive interpretation"

Thus, it is only when the court determines that slavish application of the literal meaning will lead to absurd results that it may adopt the purposive approach. When adopted, the purposive approach allows implicit words to be read into the Constitution to avert manifest absurdity.

The SC in this case interpreted article 146(6) to mean that where the President receives a petition for the removal of the Chief Justice, a ***prima facie*** case must first be established before appointing a committee to investigate the complaint. In effect, the SC imported the words "prima facie" into the text of article 146(6).

9. Further marks shall be awarded for reference to cases such as: Tuffuor v AG; Sallah v AG; Yeboah v JH Mensah; Edusei v AG (No.2); Bimpong Buta v GLC and Ors; NPP v AG (CIBA Case); Aduamoah II v Twum II; Osei Boateng v NMC, Adjei Ampofo v AMA (No.1); Asare v AG; Agyei Twum v AG & Or etc.

ANALYSIS/APPLICATION

CONCLUSION

JUNE 2015

QUESTION 4

In December 27, 2014 the President gave assent to the National Lotto Act, 2014 (Act 9000). This legislation established the National Lotto. The National Gaming Authority was thus established to conduct the National Lotto. Section 4 of the Act prohibits any person other than the National Gaming Authority from operating any form of lottery. Pursuant to Act 9000, the National Gaming Authority caused notices to be issued as follows:

'In view of the establishment of the Authority, all persons who before the commencement of this Act, possess or own a machine or equipment used for the operation of lottery of any kind, shall within fourteen days after the announcement of this Act surrender the machine or equipment to the Authority..."

The National Gamers Association, a company established under the laws of Ghana whose objects include nurturing and promoting private lotto business and who were licensed under the Ghana Lottories Decree, 1991 to operate private lotto were aggrieved by the provisions of the Act as well as the contents of the announcements. Consequently, the Association issued a writ of summons in the High Court claiming among others:

(1) A declaration that the said provisions of Act 9000 could not be interpreted retrospectively as to affect the accrued rights of the members of the Association;
(2) A declaration that the creation of the National Gaming Authority to take over and monopolise the operation of lotto business in Ghana infringes the "economic objectives" of the Directive Principles of State Policy of the Constitution 1992 and therefore null and void.
(3) A declaration that the provisions of Act 9000 are inconsistent with the Constitution 1992's injunction to the State for the protection of individual freedom and right to property.

At the hearing, counsel for the Authority argued that since the matters raised border on the interpretation of the Constitution, the same must be referred to the Supreme Court as provided under Article 130(2). This was ferociously opposed by counsel for the applicants who was of the view that the matters were all within the competence of the learned High Court Judge to determine.

Identify and discuss the relevant interpretation issues paying particular attention to the issue of justiciability of the Directive Principles of State Policy as provided in Chapter Six of the Constitution 1992.

AREA OF LAW

Enforcement and interpretation of the Constitution, especially justiciability of the Directive Principles of State Policy.

ISSUES

1. Whether or not the economic objectives of the DPSP are justiciable.

2. Whether or not the matters raised border on enforcement or interpretation of the constitution.

3. Whether or not the High Court should stay proceedings and refer the matters raised to the Supreme Court.

APPLICABLE LAWS.

This question allows candidates to identify various issues from the facts with emphasis on the issue of justiciability of the provisions in chapter 6 of the 1992 constitution. Candidates shall raise among other issues relating to: enforcement of the constitution incapacity; supremacy of constitution and effects of inconsistent enactment of Acts; fundamental human rights to privacy and accrued rights; the original and reference jurisdiction of the Supreme Court as provided in article 130 and more importantly the justiciability of the Directive principles of State Policy.

- **Marks shall be awarded for brief introduction as to the approach to constitutional interpretation.**

The Constitution of Ghana, per article 1(2) of the Constitution is the supreme law of the land and any law found to be inconsistent with the Constitution shall to the extent of the inconsistency be void.

In the case of **Tuffuor v Attorney General, Sowah JSC** described the nature and the approach to interpretation of the Constitution in the following words:.." *the Constitution is the supreme law of the land. it embodies the will and the soul of the people. The constitution ha sits letter and its spirit. It is the fountain head from which the various arms of*

Government derive their power. The Executive, legislature and the judiciary al derive their power and authority for the Constitution. Its language must be considered as 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 of the Constitution will not do. We must take account of its principles and bring tah consideration to bear. Every word has an effect and every part must be given effect. And so a construction should be avoided which leads absurdity. The constitution must be construed as a whole to ensure inter consistency and coherence."

Again, **Acquah JSC** in **National Media Commission v AG [2000]** opined as follows; " *the Constitution is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It gives certain rights to persons as well as bodies of persons and imposes obligation as much as it confers privileges and powers. Accordingly, in interpretating the Constitution,* ***care must be taken to ensure that all the provisions work together as a functioning whole****. The parts must fit together logically to form a rational, internally consistent framework*"

- Marks may be awarded for briefly distinguishing the approach to constitutional interpretation vis-a-vis interpretation of statuses and deeds and the reason for the difference.

- Marks shall be awarded for brief discussion of fundamental human rights, namely right to property; accrued rights and retrospective legislation.

- **Marks shall be awarded for discussing capacity of persons to enforce the constitution.**

In the case of **Sam (No.2) v AG Bamford Addo JSC** (as she then was) held that article 2(1) of eth Constitution 1992 grants locus to every citizen of Ghana in furtherance of the duty imposed on every citizen under article 3(4) and 41(b) of the Constitution. Thus, the Plaintiff must be a Ghanaian Citizen in order to be clothed with capacity under article 2 and 130 of the 1992 Constitution.

- **Further marks maybe awarded for a brief course on issue of capacity in constitutional cases as opposed to personal matters.**

The Supreme Court has held in a plethora of cases such as **Bimpong-Buta v GLC and Edusei (No.2) v AG** that where the enforcement of the fundamental human right is in relation to the Plaintiff the High Court shall be the appropriate forum. However, where the

case of the Plaintiff is one brought in the public interest such as **Adjei Ampofo (No.1) v AG and AMA, Osei Boateng v NMC and Appenteng**, **FEDYAG v Public Universities of Ghana**, the Supreme court shall be well suited even though the matter may relate to enforcement of fundamental human rights.

In the *Edusei* and *Bimpong Buta* cases, the Supreme Court declined jurisdiction as the plaintiffs were pursuing matters of personal interests. In the *Adjei- Ampofo (No.1) and FEDYAG* cases the Supreme Court assumed jurisdiction because the plaintiffs were pursuing matters where the outcome invariably and primarily was to benefit the citizenry in general. Also in the FEDYAG case the substance and nature of the plaintiff's claim involved the interpretation of the constitutional provisions relating to the fundamental human rights to education.

- **Marks shall be awarded for distinguishing the original jurisdiction and the reference jurisdiction of the Supreme Court.**

The original and reference jurisdictions of the Supreme Court are provided under article 130(10 and 130(2) respectively.

The **exclusive original jurisdiction of the Supreme Court under article 130(1)** refers to the power of the Court to adjudicate on all matters which involve the enforcement or interpretation of the Constitution and also any mater alleging that an enactment was made in excess of the powers conferred on parliament or any other authority or person by law or under this Constitution.

On the other hand, the **reference jurisdiction of the Supreme Court under article 130(2)** requires that where in any proceedings an issue or question of enforcement or interpretation of the Constitution arises, the trial Court shall stay the proceedings and refer the question of law involved to the Supreme Court and the trial court shall dispose of the matter in accordance wit the decision of the Supreme Court.

- **Students shall be rewarded for reference to the Maikankan principles.**

The case of **The Republic v Maikankan [1971]**, popularly known as the "Maikankan principle" laid down the threshold for determining at what point the High Court can refer an issue of enforcement or interpretation of the Constitution to the Supreme Court.

Edmund Bannerman CJ stated: " a lower court **is not bound to refer to the SC** every matter or submission alleging that an issue involves a question of interpretation of the Constitution. If in the opinion of the lower court the answer to a submission is clear and

unambiguous on the face of the provisions of the Constitution or laws of Ghana, no reference need to be made since no question of interpretation arises and a person who disagrees with or is aggrieved by the ruling of the lower court has his remedy by the normal way of appeal, if he chooses."

However, in the Maikankan principle has been compromised by the case of **Republic v High Cout, General Jurisdiction, Accra; Ex parte Zanetor Rawlings.** The Court held that the Supreme Court has now moved to the era of constitutional interpretation based on the now dominant principle of purposive construction of statutes, particularly the constitution and therefore ***the tide against ready referral for interpretation began to change.*** The Court made reference to its earlier decision in the case of *Republic v High Court (Fast Track Division) Accra; Ex parte Commission on Human and Administrative Justice (Richard Anane Interested Party)* 2007-2008) SCGLR 213 where it held that the word "**complaint"** in article 218(a) of the Constitution was ambiguous and was referred to the Supreme court for interpretation. ***Indeed, in that case the court held that a lower court ought not readily to assume that a constitutional provision is plain and unambiguous***.

From the above quotation, lower courts should be circumspect when assuming jurisdiction over a matter which the parties have put a rival meaning on the words in the constitution. ***The basis for assumption of jurisdiction over a constitutional provision should not be based on whether the provision is plain and unambiguous but rather whether an interpretative issue has arisen and should be referred to SC for interpretation.***

- More marks shall be awarded for discussing the directive principles of state policy.
- Marks shall be awarded for distinguishing the provisions in Chapter 5 and Chapter 6 with particular reference to words such as 'shall guide' as in Article 34(1) of the Constitution 1992.
- **Marks shall be awarded for briefly discussing directive principles as aid to interpretation or spirit of the constitution and the meaning of justiciability of a provision.**

The **Directive Principles of State policy (DPSP)** under chapter six (6) are aids to interpretation of the Constitution. Indeed **article 34(1)** provides that the principles ***shall guide*** all citizens, parliament, the President, the judiciary, the Council of State and other bodies and persons applying or interpreting the Constitution or any other law.

An issue is justiciable if it is capable of being settled by a court. The justiciability of Chapter six (6) has been pronounced upon by the Supreme Court in the the following cases; **NPP v AG [31st December case] , NPP v AG [CIBA case] and Ghana Private Lotto Operators v AG and NLA.**

- In **the 31st December case,** a political party complained that the use of public funds by the Government every year to commemorate the anniversary of a coup d'état on every 31st day of December was a violation of articles 3(3), (4), (5), (6), (7), 35(1) and 41(b) of the Constitution. The Attorney-General objected to the jurisdiction of the Supreme Court on the ground, inter alia, that the whole of Chapter VI was not justiciable and therefore articles 35 and 41 could not ground a cause of action.

  Adade JSC (Majority decision) took the position that the entire Constitution, including Chapter VI, was a legal document and thus was as justiciable as any other provision of the Constitution. . He stated:

  " I do not subscribe to the view that chapter 6 of the Constitution, 1992 is not justiciable: **it is**. First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable.

  Another **Justice, Bamford-Addo JSC**, took a contrary view. To her, the principles were to serve merely as a barometer to public authorities.

- In the **CIBA case**, this time, Bamford-Addo JSC, having a second bite at the cherry, took the opportunity to explain her earlier general position in 31st December, that no provision under Chapter VI is justiciable or enforceable. The learned Justice explained that:

  "there are exceptions to this general principle. Since the courts are mandated to apply them [the DPSP] in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, 1992, they then in that sense, become enforceable.

  Justice Akuffo held that they are a mixed-bag of justiciable and non-justiciable provisions. They are not justiciable in chapter 6 but are justiciable when they are found in other parts of the Constitution.

- In **Ghana Lotto Operators Association and others v National Lottery Authority** [2008], the Court recounted **Adade JSC's position in 31st December** that the entire Constitution as a legal document is justiciable. The unanimous decision of all the 9 justices was that the DPSP were ***presumptively justiciable***. The Court held thus; applying this presumption of justiciability, our view is that the economic objectives laid out in Article 36 of the Constitution are legally binding and are not merely a matter of conscience for successive governments of our land. The objectives have, though, to be liberally construed in order not to interfere with the democratic mandates of successive governments. Where, however, a government introduces legislation which is flagrantly at odds with any of the objectives set out in the Article, we believe that this Court has jurisdiction to strike down the provisions in the legislation which are incompatible with the objectives concerned. In short, article 36(2)(b) is justiciable.

- Marks shall be awarded for reference to and application of cases such as: NPP v AG (31st December Case) [1993-94] 2 GLR 35; Asare v AG [2003-2004] 2 SCGLR 823; **NPP v AG (CIBA Case) (1997-98) 1 GLR 378**; FHC (Fast Track) Accra, ex parte CHRAJ (Dr Anane IP) [2007-2008] SCGLR 213.

ANALYSIS

1.0. REPEAL AND RETROACTIVE LEGISLATION

- **Meaning of Repeal**

To repeal an enactment or a provision of an enactment is to cause it to cease to be a part of corpus juris or body of laws. Section 32 of the Interpretations Act,2009 (Act 792) defines repeal as follows;

Section 32. - Cessation of operation of enactments

Where in an enactment it is declared that the whole or a part of any other enactment is to cease to have effect, that other enactment shall be deemed to have been repealed to the extent to which it is so declared to cease to have effect.

Repeal has been described as the terminal event in the operation of legislation; so that once a repeal takes effect, legislation ceases to be binding or to produce legal effect.

- **Types of repeal**

Legislations are either repealed **expressly or impliedly** by another legislation.

Express repeal of legislation occurs where there are clear words indicating that an enactment was made to repeal the enactment which was hitherto in existence.

Implied repeal – where a later enactment does not expressly repeal an earlier enactment but the provisions of the later enactment are contrary to, inconsistent with or repugnant to those of the earlier enactment so that the two enactments cannot reasonably be expected to stand together. There would be a conflict in the two enactments which cannot be reconciled.

How do we reconcile/resolve conflicts in statutes?

It is regulated by two (2) principles;

1. Based on the hierarchy of laws, and
2. The latin maxims;

- ***Leges posteriors prones contrarios abrogant*** - where laws of the same kind are in conflict, you resolve it in favour of the latter.
- ***Generalia specialibus non derogant*** – where a special law is in conflict with a general law or enactment, the conflict is resolved in favour of the special law.

Legal effect of repeals at common law and in Ghana

- **At Common Law**

The general principle at common law is that, except as to transactions past and closed, an enactment which is repealed is to be treated as if it never existed. That is the rule in **Surtees v Ellison.**

The common law position has several startling implications. It implies for example:

1. That everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce any legal effects. Hence proceedings pending under an enactment at the time of its repeal could not be continued after the repeal.

2. That any existing law that was in existence before the repeal automatically revived since the displacement is deemed never to have occurred. In other words, the repeal of a repealing enactment brought about the revival of the enactment which it has itself repealed.

3. That regulations, subordinate legislation, lose the force of law with the repeal of the provision under which they were made.

4. That the repeal operated retrospectively so that except for transactions past and closed when the repeal took effect, the repealed law ceases to be applicable to pre-repeal facts.

The operation of the common-law position on the effect of repeal legislation is subject to any **savings** which may be made expressly or by implication by the repealing enactment.

- **In Ghana**

In Ghana, the effect of repeals or statutory general savings are provided for under sections 34 and 35 of Act 792. By virtue of these provisions, it is no longer necessary for the consequences or the implication of the common law position to be expressly excluded in each case by the particular repealing enactment where the repeal is effected by statute.

Finally it is to be noted that the provisions of section 34 and 35 of Act 792 must always be construed and applied in the light of a number of the provisions of the 1992 Constitution including particularly, Articles 19(5),(6), (11) and 107.

General savings under Act 792, Section 34(1)

- **(a) – Non revival of anything not in force or existing at the time of the repeal:** the legal effect is that any statute or common law position or any Act repealed by the statute would not be revived after the said statute has been repealed.

- **(b) – previous operation of enactment not affected:** the legal effect is that anything validly done under the repealed Act would not be affected as the right would be deemed to have been acquired or accrued under it.

- **(c) – Acquired, accrued or incurred rights, privileges, obligations or liability:** where any person ***has acquired*** any rights or privileges or incurred any obligations or liability under an enactment, ***the subsequent repeal*** of that enactment ***shall not*** affect the continued enjoyment of that right or privilege or the satisfaction of the obligation or liability under the repealed enactment. Note that the rights, privileges, obligations or liabilities ***must have become vested*** at the date of the repeal. Where the act was incomplete or partially done under the repealed statute, no right would be said to have accrued under the repealed legislation. See Essilfie v GHAPOHA [1980], CFAO v ZECCA, Issoufou v GHAPOHA

  Exception : In criminal cases however, it appears that the effect of ***S.34 (1)(c) in relation to incurred liabilities has been altered by the provisions of article 19(11).*** See **British Airways v AG [1996-97] SCGLR 547** – the SC held that a person could not be investigated, tried or convicted under a repealed legislation unless the amending enactment saves the provision. The court construed article 19(11) and held that the PNDCL 150 under which the plaintiffs were being tried, had been repealed and was not saved by the amending enactment. The Court per Bamford- Addo JSC held thus:

  " *…but in view of article 19(11) of the 1992 Constitution, section 8 of CA 4 is inapplicable to the criminal cases pending against the plaintiffs. It is unconstitutional today to convict or punish any person unless a written law defines the offence or provides sanctions for same are required under article 19(11), and the criminal case against the plaintiff falls within the prohibition of article 19(11). For this reason, the provisions of section 8(e) of CA 4 is inapplicable to the criminal matters against the plaintiffs at the circuit court."*

NB: Section 8(1)(e) of the repealed CA 4 is the same as section 34(e) of Act 792. **The position in Ghana now is the same as the common law position.**

- **(d) – offence against repealed enactment, as well as penalty, punishment, forfeiture not affected:**

  The operation of section 34(1)(d) will in practice turn on a number of useful distinctions, namely:

  (i) whether or not the repeal occurs ***before or after*** the offender had been **convicted**; and

  (ii) whether or not one is dealing with a **criminal** or **civil offence**.

Repeal before conviction

In criminal cases, the operation of section 34(1)(d) will clearly be subject to the provisions of article 19(11), particularly if the offender ***has not been convicted*** when the enactment

was repealed. If the offender has not been convicted, liability is not incurred, hence, article 19(11) shall be invoked and proceedings shall cease/abate consequently. In consequence of the invocation of article 19(11), there can be no conviction, let alone punishment of eth offender, in those circumstances where the offence is not defined in written law.

Repeal after conviction

Where the repeal occurs after conviction, then section 34(1)(d) ought to be given effect. The law is settled that the sentence should be based on the law at the time the offence was committed except in cases where the substituted enactment reduces or mitigates the sentence or penalty or forfeiture. See **Section 35 (e) of Act 792**. In the case of **Francis Kojo Fiebor v The Republic**, *the COA held that the appellant's right accrued under the repealed law and not the Criminal Code (Amendment) 2003, (Act 646) and cannot therefore take benefit under it. He could not benefit from the less sever sentence under Act 646. If he had not been sentenced but convicted, he could have benefitted from the lesser sentence by virtue of section 35 (e) of Act 792*.

In effect, where the offender has already been convicted before the repeal of the offence and/or penalty creating sections, article 19(11) is inapplicable and that section 34(1)(d) is then to be given effect to.

Where only the punishment section is repealed after conviction and new penalties are substituted, their operation will be subject to the provision of **article 19(6) and 107 (b).**

- **(e) – Effect on investigations, legal proceedings and remedies.**

The law is that when an enactment is repealed, it would not affect an investigation, legal proceeding or a remedy in respect of a right, liability, punishment et cetera acquired under the repealed Act. Any investigation, legal proceedings or remedy in respect of the Act should be in accordance with the repealed law.

The effect of section 34(1)(e) is to modify the common law position under which proceedings cease and there could not be a conviction for an offence against a repealed enactment once the repeal has taken effect. Section 34(1)(e) in effect enables a prosecution or legal proceeding began before the repeal took effect to be completed and the penalty under the old law awarded. The application of section 34(1)(e) to criminal proceedings is however clearly subject to article 19(11) of the 1992 Constitution. Hence, section 34(1)(e) will probably stand only in respect of civil proceedings. See ***Republic v Police Council; Ex Parte Kwagyiri [1979] and British Airways v AG.***

IMPLIED REPEALS

Implied repeals exist in two forms; conflicts which are reconcilable and conflicts which are irreconcilable. Where the conflicts cannot be reconciled, we repeal, revoke or amend the law.

How do we reconcile

It is regulated by two (2) principles;

1. Based on the hierarchy of laws, and
2. The latin maxims;
   a. *Leges posteriors prones contrarios abrogant*
   b. *Generalia specialibus non derogant*

How to resolve conflicts with or in the Constitution

Per article 1(2) of the 1992 the Construction is the Supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void. This based on the hierarchy of laws.

Cases

1. Mensima v AG
2. Martin Kpebu (No. 1) and (No.2)
3. Agyei Ampofo v AG

Where there is a conflict between any enactment and the Constitution, the two laws will co-exist but the statute will be void to the extent of the inconsistency.

Examples of constitutional provisions in conflict are **Article 99 and 131**. Article 48 provides that an appeal from a decision of a tribunal to the COA shall be final. The provisions does not admit of any ambiguity. However, **article 99(2)** of the Constitution provides that a person a grieved by a decision of the HC in respect of determination of membership may appeal to the COA, but the provision does not state whether the decision of the COA is final. This creates an apparent ambiguity or incongruity.

Again **article 131** provides the appellate jurisdiction of the SC in all matter. Clearly there is a conflict between article 131 and 99 because, 131 states that the SC has appellate jurisdiction in all matters whether civil or criminal. Therefore, one may reasonably deduce that the decision of the COA under article 99 should not be final and the aggrieved person should be entitled to further appeal to the SC.

How do we reconcile article 99 and 131? Note that article 99 is a **specific provision** whereas article 131 is **a general provision**. Therefore, we resolve by using ***the generalia spacialibus non derogant*** and reconcile it in favour of the special or specific law.

Article 99 and 131 are reconcilable therefore there is no need for amendment or repeals.

Case;

In re Parliamentary Elections for Wulensi Constituency: Zakaria v Nyimakan [2003/04] SCGLR.

How to resolve conflicts in Acts of Parliament

Conflicts between Acts of parliament are resolved by using ither ***Leges posteriors prones contrarios abrogant*** *or* ***generalia specialibus non derogant****.*

Let's consider Limitations Act (NRCD 54) and the Ghana Ports and Harbours Authority Law (sic), 1986 (P.N.D.C.L. 160)". NRCD 54 provides that simple contracts shall become statute barred after six (6) years whereas the GHAPOHA law provides that actions founded on simple contracts shall become statute barred after one (1) year. In this case, the former is a general law whereas the latter is a special law. Any conflict shall be resolved in favour of the special law.

Case -Bonney &Ors (No.1) v GHAPOHA (No.1) [2013/14] SCGLR the court applied the generalia specialibus non derogant.

"The Act provides for the limitation of actions over the whole field of the civil law. (See the memorandum to the Act) Ordinarily therefore, the stance of counsel for the Appellants in this court would have been tenable under section 4 of the Limitation Act of 1972 but for section 92 (i) of PNDCL 160 which set up the Ghana Ports and Harbours Authority.

PNDCL 160 of 1986 is a later legislation and would ordinarily repeal the limitation Act, NRCD 54 except that in this case, whereas PNDCL 160 was specifically made in respect of Ports and Harbours and related matters, the Limitation Act is of general application. Relying on the maxim, "Generalia Specialibus non derogant" the Court of Appeal had concluded that:

"The two acts, the Limitation Decree (Act) NRCD 54 and the Ports and Harbours Authority Law were made for different situations. The Limitation Decree was made for general application as its long title states "to provide for limitation of periods for actions and for related matters" and Ports and Harbours Authority Law for specific act in respect of Ports and Harbours and to provide for 16 related matters. The time limited in the Ports and

Harbours Authority Law is thus to be preferred in this case to the time limited in the Limitation Act NRCD 54 of 1972." In this case therefore, the Limitation period of 12 months under the Ports and Harbours Authority Law overrides the limitation period of 6 years under the Limitation Act in actions founded on contract. Back home, this court in the case of RE PARLIAMENTARY ELECTION FOR WULENSI CONSTITUENCY: ZAKARIA VRS NYIMAKAN [2003-4] SCGLR 1 affirmed this principle.

Now let's compare ordinance marriage under the **Matrimonial Causes Act 1971(Act 367)** and the **Courts Act, 1993 (Act 459).** The MCA defines a Court as the HC and CC. This suggests that the jurisdiction of the DC is ousted in matrimonial causes. However, Section 47 of Act 459 confers jurisdiction on the DC. The law was amended by Act 620 and Act 620 took away the word "customary" leaving only the word "marriages". Is there a conflict between the Courts Act and the MCA as regards the jurisdiction of the DC??

Now, the MCA is a special Act whereas the Courts Act is also a special Act because it was made by parliament to create lower courts and confer jurisdiction on it. Read article 126(1)(b) and section 43 of the Courts Act. Where two specific provisions are in conflict you reconcile it by using ***Leges posteriors prones contrarios abrogant*** . **where laws of the same kind are in conflict, you resolve it in favour of the latter.**

The MCA was passed in 1971 whilst the Courts Act was passed in 1993, so you resolve the conflict in favour of the Courts Act. The latter in time overrides the former.

Cases;

Kowus Motors v Check Point Ghana Limited and Ors, the SC per Atuguba JSC held that, " apart from the opening words 'notwithstanding anything to the contrary…' in section 4 of AFRCD 60,*the trite known rule construction of statutes is that where two Acts conflict irreconcilably, the later one is deemed to have repealed or amended the earlier'*.

In this instance, the special provision is deemed to have amended or repealed the general statute. This principle is expressed in the latin maxim as ***generalia specialibus non derogant*** which is translated as special provisions override general ones.

In the case of **Republic v High Court, Accra; Ex Parte PPE and Juric (UT Financial Services Ltd, interested party)**, the SC held that special provisions override general ones.

PAST QUESTION

JANUARY 2020 – QUESTION 3

QUESTION 3

The Parliament of the Republic of Ghana recently enacted the Vigilantism Act, 2019 (Act 1000) to regulate vigilantism in the country.

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Section 10 of the Act was to address vigilantism conduct committed by political activists before the Act came into force on 20th December 2019. Section 14 of the Vigilantism Act is to regulate offences committed by political activists from 20th December 2019. Kofi Invincible and Kwame Without Weapon have been charged under section 10 of the Act in respect of offences allegedly committed by them between 2010 and 2018. Both accused persons were charged in 2018 with Dadekuukuu for rioting under the section 259 of Act 29. Section 10 of the Vigilantism Act repealed section 259 of Act 29 under which the accused persons were being tried and there was no saving provision in the Vigilantism Act. Dadekuukuu pleaded guilty to the offence of rioting under section 259 of Act 29 and was convicted by the High Court on his own plea. However, his sentence was deferred to await the outcome of the trial of the other accused persons.

Discuss the legal issues raised in the facts affecting the three persons with the aid of appropriate constitutional and statutory provisions including decided case.

(25 Marks)

AREA OF LAW

Repeal and retroactive legislation, specifically the effect of repeal

ISSUES

1. Whether or not Parliament has the power to enact a law which has retrospective effect.

2. Whether or not Dadekuuku can be sentenced under the repealed section 259 of Act 29 or section 10 of the Vigilantism Act.

3. Whether or not the trial of Kofi Invincible and Kwame Without Weapon can continue after the repeal of Section 259 of Act 29.

APPLICABLE LAWS/RULES

- **Retroactive legislation**

In Ghana all substantive laws are prospective unless otherwise stated by the legislature and matters which are purely ***procedural***, both civil and criminal, ***declaratory, evidence and consolidation and revision*** are retrospective unless the statute specifically or by necessary implication states otherwise. The Ghanaian position was reiterated by the SC in the case of **Fenuku v John Teye [2001-2002]** and **Saaka v Dahali [1984-86].**

Saaka v Dahali [1984-86] it was held thus……."the common law position is that ***prima facie***, all laws are prospective unless it is stated expressly or by necessary implication that they have retroactive operation and will not affect vested or accrued rights or privileges.

The law is that no one has a vested right in procedure. This legal position was stated in the case of **Yew Bon Tew v Kenderaan Bas Mara** as follows; *"There is however said to be an exception in the case of 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 time being prescribed."*

Article 107 (Retroactive legislation) of the 1992 Constitution provides that, Parliament shall have no power to pass any substantive law which operates retroactively ***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.

The basic rule of interpretation is that all substantive laws are prospective unless the legislature expressly or by necessary implication states otherwise. That notwithstanding, any statute which is likely to impose any limitations on or adversely affect the personal rights and liberties of any person or impose a burden, obligation or liability on any person

apart from statutes made under article 178 to 192 would be unconstitutional even in cases where the legislature expressly or by necessary implication states so.

- **Legal effect of repeals at common law and in Ghana**

The general principle at common law is that, except as to transactions past and closed, an enactment which is repealed is to be treated as if it never existed. That is the rule in **Surtees v Ellison.**

The common law position has several startling implications. It implies for example:

1. ***1.*** That everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce any legal effects. ***Hence proceedings pending under an enactment at the time of its repeal could not be continued after the repeal.***

2. That any existing law that was in existence before the repeal automatically revived since the displacement is deemed never to have occurred. In other words, the repeal of a repealing enactment brought about the revival of the enactment which it has itself repealed.

3. That regulations, subordinate legislation, lose the force of law with the repeal of the provision under which they were made.

4. That the repeal operated retrospectively so that except for transactions past and closed when the repeal took effect, the repealed law ceases to be applicable to pre-repeal facts.

In Ghana, the effect of repeals or statutory general savings are provided for under **sections 34 and 35 of Act 792**. By virtue of these provisions, it is no longer necessary for the consequences or the implication of the common law position to be expressly excluded in each case by the particular repealing enactment where the repeal is effected by statute.

Finally, it is to be noted that the provisions of **section 34 and 35 of Act 792** must always be construed and applied in the light of a number of the provisions of the 1992 Constitution including particularly, **Articles 19(5), (6), (11) and 107**.

Section 34(1)(d) of the Interpretations Act, 2009 (Act 792) provides that the repeal of an enactment ***shall not affect*** an offence ***committed*** against the enactment that is

repealed or revoked or a penalty or forfeiture or punishment ***incurred*** in respect of that offence.

The operation of section 34(1)(d) will in practice turn on a number of useful distinctions, namely:

(iii) whether or not the repeal occurs before or after the offender had been convicted; and
(iv) whether or not one is dealing with a criminal or civil offence.

Repeal before conviction

In criminal cases, the operation of section 34(1)(d) will clearly be subject to the provisions of article 19(11), particularly if the offender ***has not been convicted*** when the enactment was repealed. If the offender has not been convicted, liability is not incurred/established, hence, article 19(11) shall be invoked and proceedings shall cease/abate consequently. In consequence of the invocation of article 19(11), there can be no conviction, let alone punishment of the offender, in those circumstances where the offence is not defined in written law.

Repeal after conviction

Where the repeal occurs after conviction, then **section 34(1)(d) of Act 792** ought to be given effect. The law is settled that the sentence should be based on the law at the time the offence was committed except in cases where the substituted enactment reduces or mitigates the sentence or penalty or forfeiture. See Section 35(2)(e) of Act 792. In the case of **Francis Kojo Fiebor v The Republic**, *the COA held that the appellant's right accrued under the repealed law and not the Criminal Code (Amendment) 2003, (Act 646) and cannot therefore take benefit under it. He could not benefit from the less sever sentence under Act 646. If he had not been sentenced but convicted, he could have benefitted from the lesser sentence by virtue of section 35 (2)(e) of Act 792*.

In effect, where the offender has already been convicted before the repeal of the offence and/or penalty creating sections, article 19(11) is inapplicable and that section 34(1)(d) is then to be given effect to.

Where only the punishment section is repealed after conviction and new penalties are substituted, their operation will be subject to the provision of **article 19(6) and 107 (b).** in that case, if the newly substituted penalties are less severe, then the offender may take advantage of it, otherwise the sentence should be based on the law that existed at the time the offence was committed.

Section 34(1)(e) of the Interpretations Act, 2009 (Act 792) provides that when an enactment is repealed, it would not affect ***an investigation, legal proceeding*** or a

remedy in respect of a right, liability, punishment et cetera **acquired** under the repealed Act. Any investigation, legal proceedings or remedy in respect of the Act should be in accordance with the repealed law.

The effect of section 34(1)(e) is to modify the common law position under which proceedings cease and there could not be a conviction for an offence against a repealed enactment once the repeal has taken effect. Section 34(1)(e) in effect enables a prosecution or legal proceeding began before the repeal took effect to be completed and the penalty under the old law awarded.

The application of section 34(1)(e) to criminal proceedings is however clearly subject to article 19(11) of the 1992 Constitution. Hence, section 34(1)(e) will probably stand only in respect of civil proceedings. See ***Republic v Police Council; Ex Parte Kwagyiri [1979] and British Airways v AG.***

In **British Airways v AG[1996-97] SCGLR 547** – the SC held that a person could not be investigated, tried or convicted under a repealed legislation unless the amending enactment saves the provision. The court construed article 19(11) of the 192 Constitution and held that the PNDCL 150 under which the plaintiffs were being tried, had been repealed and was not saved by the amending enactment. The Court per Bamford- Addo JSC held thus:

> " *…but in view of article 19(11) of the 1992 Constitution, section 8 of CA 4 is inapplicable to the criminal cases pending against the plaintiffs. It is unconstitutional today to convict or punish any person unless a written law defines the offence or provides sanctions for same are required under article 19(11), and the criminal case against the plaintiff falls within the prohibition of article 19(11). For this reason, the provisions of section 8(e) of CA 4 is inapplicable to the criminal matters against the plaintiffs at the circuit court."*

NB: Section 8(1)(e) of the repealed CA 4 is the same as section 34(e) of Act 792. **The position in Ghana now is the same as the common law position.**

ANALYSIS

In the instant case, Parliament has, by Section 10 of the Vigilantism Act, 2019 (Act 1000) passed a law criminalizing the political activities conducted between 2010 and 2018. Meanwhile under section 14 of Act 1000, the law was expected to regulate the political activities of persons with effect from 20th December, 2019.

It is trite learning that that the provision under section 10 of Act 1000 is retrospective in character to the extent that it seeks to criminalize political activities antecedent to the coming into force of the Vigilantism Act. Consequently, the said section 10 of Act 1000 is

repugnant to or inconsistent with Article 107 of the 1992 Constitution and therefore unconstitutional.

Dadekuuku has been charged for rioting together with Kofi Invincible and Kwame Without Weapon under section 259 of Act 29. However, section 10 of Act 1000 has repealed section 259 of Act 29 under which the accused persons were being tried without any savings provisions in the Vigilantism Act. Dadekuuku pleaded guilty to the offence and was convicted by the High Court on his own plea. However, his sentence was differed to await the outcome of the trial of Kofi and Kwame.

The Vigilantism Act which repealed section 259 of Act 29 did not make provisions saving any accrued right, incurred liability or punishment or legal proceedings and investigations. That being the case, the rights, liabilities or punishment of the accused persons who were standing trial at the time of the repeal shall be resolved by recourse to section 34 and 35 of the interpretation Act, 2009 (Act 792).

Dadekuuku pleaded guilty and was convicted by the High Court on his own plea. His liability was incurred or vested at the time of his conviction under the repealed section 259 of Act 29. Consequently, by section 34(1)(d) of the interpretation Act, 2009 (Act 792), sentence shall be imposed under the repealed law since the new vigilantism Act did not make any savings or provide for a punishment which is less severe than that prescribed under the repealed law. Article 19(11) will not be applicable here because the repeal occurred after his conviction by which time his liability had vested.

Kofi and Kwame were standing trial and had not yet been convicted at the time of the repeal. Ideally, Section 34 (1) (e) of act 792 should be invoked to continue with the trial. However, by virtue of article 19(11), which provides that no person shall be convicted of a criminal offence unless the offence is defined and penalty for it is prescribed in a written law, the trial cannot be proceeded with and neither can they be convicted under the repealed section 259 of Act 29. This is because they had not incurred any liability and therefore, to try and convict them will be contrary to the constitutional provision stated supra.

CONCLUSION

It hereby concluded that;

1. Section 10 of the vigilantism Act is inconsistent with article 107 of the 1992 constitution and therefore void since it offends the law on non-retroactive legislation. By virtue of article 1(2) of the 1992 Constitution, the impugned provision, section 10 of Act 1000, is automatically repealed. Parliament has no power to pass a law which operates retroactively to impose any liability or adversely affect the personal rights and liberties of a person except the law was made under article 178 to 182.

2. Dadekuuku shall be sentenced under the repealed law. This is because he was convicted under the repealed law and his liability was vested or incurred at the time of his conviction. Consequently Section 34(1)(d) shall be invoked to impose sentence or punishment on him.

3. Kofi and Kwame cannot be triad after the repeal of the law under which they were being tried by virtue of article 19(11) of the 1992 Constitution. They had not incurred any liability at the time of the repeal.

5. OUSTER CLAUSE AND SUPERVISORY JURISDICTION

1. What is an ouster clause.

An ouster clause is a provision embodied in a document, statute or constitution which purports to oust, take away or restrain the normal jurisdiction of the courts either partially or totally.

Ouster clauses are classified under three (3) main heads, namely;

- non-statutory ouster clauses,
- statutory ouster clauses and
- constitutional ouster clauses.

An ouster clause may oust the jurisdiction of the courts in relation to;

- matters of fact
- matters of law, and
- matters of both fact and law

an ouster clause in document, statute or constitution may oust the jurisdiction of the courts in different ways;

i. totally or completely
ii. partially, or
iii. postpone the jurisdiction of the ordinary courts for a certain period.

Courts are set up to settle disputes and resolve legalities. Therefore, ouster clauses offend against public policy by attempting to take away the jurisdiction of the Courts. It was held in **Essilfie and Others v Tetteh and Others[1995/96]** that *public policy would not permit complete ouster of the jurisdiction of the courts. However, where the exclusionary clause provided for an initial recourse to the domestic tribunal, especially in disputes involving issues of fact before recourse to the ordinary courts, the court would generally recognize and give effect to it.*

Lee v Showman's Guild of Great Britain [1952] 1 AER 1175– "although the jurisdiction of the domestic tribunal is founded on contract, express or implied, nevertheless, the parties are not free to make any contract they like. There are important limitations imposed by public policy. ***The tribunal must, for instance, observe the principles of natural justice…another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts of their jurisdiction***… they can indeed make the tribunal the final arbiter of question of fact but they cannot make it the final arbiter on question of law.

2. Constitutional provision on ouster

In view of **article 125 of the 1992** constitution, all ouster clauses are unconstitutional save those warranted by the constitution itself. Article 125(3) of the 1992 constitution provides as follows;

> 125(1) Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.
>
> (2) Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems.
>
> (3) 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 effect of article 125 is that final judicial power is vested in the judiciary and shall be administered by same.

3. Discuss the jurisdiction of the High Court

Article 140 of the Constitution 1992 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 and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law.

Article 141 of the 1992 Constitution confers supervisory jurisdiction on the High Court over all ***lower courts and lower adjudicating authorities in the Country***. Parliament may by law oust the original and appellate jurisdictions of the High Court but cannot oust its supervisory jurisdiction. Any act by parliament that seeks to oust the supervisory jurisdiction of the High Court shall be in conflict with article 141 of the Constitution and shall render that act of Parliament void.

The Constitution itself may oust the appellate jurisdiction of the SC in a matter but this would not affect its supervisory jurisdiction. Article 99 has made the COA the final appellate court in parliamentary election petition but that does not prevent the SC from exercising its supervisory jurisdiction over parliamentary election petition before or determined by the COA.

4. **Discuss jurisdiction in cause or matter affecting chieftaincy.**

- **Section 57 of the Courts Act, 1993 (Act 459)—**Limitation of Jurisdiction in Chieftaincy Matters.

  Subject to the provisions of the Constitution, the Court of Appeal, the High Court, Regional Tribunal, a Circuit and Community Tribunal **shall not have jurisdiction** to entertain either at first instance or on appeal any cause or matter affecting chieftaincy.

- **Article 273 of the Constitution 1992** vests the National House of chiefs with original jurisdiction in a cause or matter affecting chieftaincy and also appellate jurisdiction over a matter which has been determined by the Regional house of chiefs in a region. Also, **Article 274** vests the Regional House of chiefs with both original jurisdiction and appellate jurisdiction to hear and determine appeals from the traditional councils within the region.

- **The chieftaincy Act, 2008 (Act 759) under Section 22, 26 and 29** also confers jurisdiction in a cause or matter affecting chieftaincy on; the National House of Chiefs, Regional House of Chiefs and the Traditional Councils respectively. The jurisdiction shall be exercised by the judicial committees of those houses of Chiefs and the Traditional Council.

Attoh-Quarshie v Okpote [1973] 1 GLR Citing Mosi v Bagyina [1963] held thus;

> If a court, in making a decision, overlooks certain mandatory provisions of the law, it has the Inherent power to vacate its own invalid orders. ***Inherent power is an authority not derived from any external source, possessed by a court***. Whereas jurisdiction is conferred on courts by constitutions and statutes, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the court and its due functioning. They spring not from legislation but from the constitution of the court itself. They are inherent in the court by virtue of its duty to do justice between the parties before it.

Under **section 76 of the chieftaincy Act, 2008 (Act 759),** a cause of matter affecting chieftaincy means a cause, matter, question or dispute relating to any of the following;

1. The nomination, election, selection or installation of a person a chief or the claim of a person to be nominated, elected or selected.
2. The deposition or abdication of a chief. Deposition means destoolment or deskinment.
3. The right of a person to take part in the nomination, election, selection or installation of a person as a chief or in the deposition of a chief.
4. The recovery or delivery of a tool property in connection with the nomination, election, selection, installation, deposition or abdication of a chief, and
5. The constitutional relations under customary law between chiefs.

Based on the said Constitutional and statutory provision, the High Court is ousted from hearing or determining a cause of matter affecting chieftaincy but the law ***does not oust the supervisory jurisdiction of the High Court*** over the judicial Committees of the Traditional Council, Regional and National Houses of Chiefs.

Apart from "causes or matters affection chieftaincy", the Court's jurisdiction is not ousted in other chieftaincy related issues…..**In Re Osu Stool" Ako Nortei II (Mankralo of Osu).**

5. Discuss whether the jurisdiction of the High Court is ousted

There appears to be two (2) main schools of thought on the subject whether or not the High Court has or should have concurrent original jurisdiction with the chieftaincy tribunals (i.e. the judicial committees of the National House of Chiefs, Regional House of Chiefs and Traditional Councils, respectively).

The proponents of the **first school of thought** strongly argue that the provisions of section 29 of Act 759 and Section 57 of Act 459 are in clear conflict with article 140 as well as 137(1) of the Constitution.

Reason – they contend that by its clear provisions, article 140(1) of the Constitution 1992, confers jurisdiction on the High Court in all matters and subject only to the provisions of the Constitution, so that in the absence of a provision to the contrary in the Constitution, the High Court can have jurisdiction in any justiciable matter under our legal system and that any enactment which purports to take away the jurisdiction of the High Court , particularly its original jurisdiction in a cause or matter affecting chieftaincy, is to that extent unconstitutional and therefore null and void. They further contend that there is nothing in the provisions of chapter 22 of the constitution, 1992 which confers exclusive jurisdiction in a cause or matter affecting chieftaincy on the chieftaincy tribunals. That exclusive

jurisdiction is not given by inference but expressly or by necessary implication as is the case under articles 130(1) and 135(1).

The proponents of the **second school of thought** contend, on the other hand, that the constitution, 1992 gives exclusive jurisdiction in chieftaincy maters to the chieftaincy tribunals so that the High Court does not have concurrent jurisdiction with the chieftaincy tribunals and further that, there is no conflict between section 29 of Act 759 and Section 57 of Act 459 on the other hand, and the provisions of articles 140 and 137(1) of the Constitution.

Reason – that a true and proper construction of the constitution as a whole will reveal not only that the framers of the constitution intended to vest exclusive original jurisdiction in causes or matters affecting chieftaincy in the chieftaincy tribunals, but also that the jurisdiction of both the High Court and the Court of Appeal should be "subject" to or not extend to causes or matters whose adjudication has been specifically assigned other adjudication bodies or tribunals that have been established under the same constitution, because the framers of the constitution could not have intended the High Court to have jurisdiction in every justiciable matter.[12]

6. Ouster of the supervisory jurisdiction of the ordinary Courts, specifically the High Court and Supreme Court.

In Ghana, only two courts have supervisory powers; the High Court and The Supreme Court. The Constitution, 1992 gives the Supreme Court and the High Court supervisory jurisdiction over other lower courts and adjudicating bodies under articles 132 and 141, respectively. Therefore, with the coming into force of the Constitution, 1992 any ouster clause that purports to oust the supervisory jurisdiction of the Supreme Court and the High Court under articles 132 and 141, respectively will be clearly unconstitutional.

The High Court supervises all lower courts and lower adjudicating bodies/authorities such as the Circuit Court, District Court, Judicial Committees of the Traditional Councils, the JCs of the Regional House of Chiefs and National House of Chiefs and all bodies with quasi-judicial functions, administrative bodies and administrative officials.

The Supreme Court supervises all Courts and lower adjudicating authority.

The Courts in exercising their supervisory powers may issue orders and directions, including orders in the nature of ***certiorari, madamus, prhbition, quo warranto, declaratory orders*** *and* ***injunctions.***

[12] Republic v High Court, Koforidua; Ex parte Bonsu Nyame. Ghana Bar Association v Attorney-General

NB: orders and directions to be issued by the Courts

For HC; see Order 55 and 56 of CI 47

For SC; see Section 5 of the Courts Act, 1993 (Act 459)

NB; the prerogative writs are discretionary and the court may refuse to grant it even where the applicant has satisfied all the conditions for the grant……Ashaley v GLC

- **Concurrent jurisdiction of the SC and the HC**

The Supervisory jurisdiction of the HC and SC overlaps when it comes to the lower courts and adjudicating authorities. The Traditional policy is that, no court should fight over jurisdiction with the apex court. So, where any court shares jurisdiction with the apex court, the jurisdiction of the apex court is postponed.

Ghana by its practice direction, the 1981 GLR 1, provides that where a court shares concurrent jurisdiction with the apex court, that jurisdiction of the SC must be postponed. Failure to comply shall cause the action to be dismissed with cost by the SC.

Exceptions to the practice direction.

Where the matter to be supervised is exclusively vested in the SC, irrespective of the court involved, the SC shall have supervisory powers over that body, such as *interpretation or enforcement of the Constitution* and *production of official documents in Court*. Articles 2, 130 and 135.

Article 2 and 130 vests exclusive original jurisdiction in the SC when it comes to the interpretation or enforcement of the Constitution.

Grounds for invoking the Supreme Court's Supervisory Jurisdiction.

The following are the grounds for invoking the supervisory jurisdiction of the High Court and Supreme Court.

1. Want or excess of jurisdiction
2. Fundamental error on the face of the record, whether jurisdictional or non-jurisdictional
3. Breach of the rules of natural justice
4. Intervening to ensure justice…***For Supreme Court only***.

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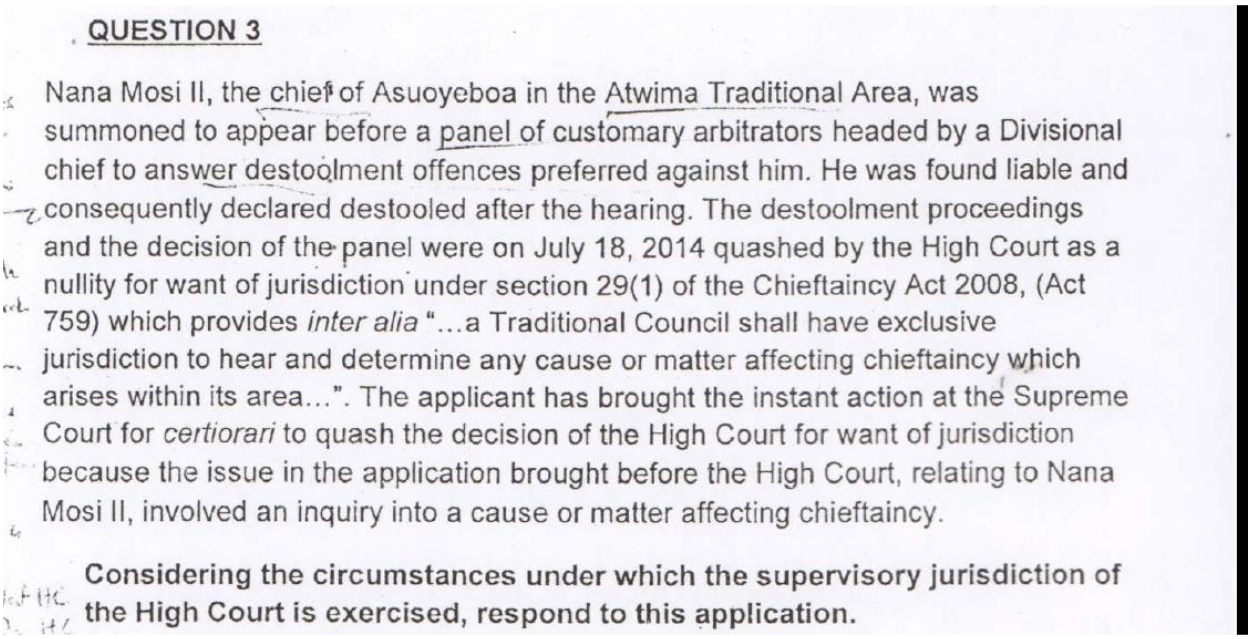

QUESTION 3

Nana Mosi II, the chief of Asuoyeboa in the Atwima Traditional Area, was summoned to appear before a panel of customary arbitrators headed by a Divisional chief to answer destoolment offences preferred against him. He was found liable and consequently declared destooled after the hearing. The destoolment proceedings and the decision of the panel were on July 18, 2014 quashed by the High Court as a nullity for want of jurisdiction under section 29(1) of the Chieftaincy Act 2008, (Act 759) which provides *inter alia* "...a Traditional Council shall have exclusive jurisdiction to hear and determine any cause or matter affecting chieftaincy which arises within its area...". The applicant has brought the instant action at the Supreme Court for *certiorari* to quash the decision of the High Court for want of jurisdiction because the issue in the application brought before the High Court, relating to Nana Mosi II, involved an inquiry into a cause or matter affecting chieftaincy.

Considering the circumstances under which the supervisory jurisdiction of the High Court is exercised, respond to this application.

AREA OF LAW

Ouster clauses and supervisory jurisdiction of the High Court.

ISSUES

- Whether or not the High Court has supervisory jurisdiction over a matter involving the destoolment of a chief.

- Whether or not the High Court properly exercised supervisory jurisdiction by quashing the destoolment proceedings and decisions of the panel of customary arbitrators.

- Whether or not certiorari will lie to quash the order of the High Court at the Supreme Court.

APPLICABLE LAWS

- **Ouster Clause**

An ouster clause is a provision embodied in a document, statute or constitution which purports to oust or take away the jurisdiction of the courts either partially or totally. Ouster clauses are classified under three (3) main heads, namely; ***non-statutory ouster clauses, statutory ouster clauses and constitutional ouster clauses***. An ouster clause may oust the jurisdiction of the courts in relation to matters of fact, matters of law, and matters of both fact and law.

Courts are set up to settle disputes and resolve legalities. Indeed **article 125 of the Constitution 1992** provides that justice emanates from the people and shall be exercised by the judiciary in the name of the Republic. **Clause 3 of article 125** of the Constitution further provide that, final judicial power of Ghana shall be vested in the judiciary. Therefore, ouster clauses offend against public policy and the Constitution by attempting to take away the jurisdiction of the Courts.

It was held in **Essilfie and Others v Tetteh and Others [1995/96]** that ***public policy*** *would not permit complete ouster of the jurisdiction of the courts. However, where the exclusionary clause provided for an initial recourse to the* ***domestic tribunal****, especially in disputes involving issues of fact before recourse to the ordinary courts, the court would generally recognize and give effect to it.*

- **Jurisdiction of the High Court.**

Article 140 of the Constitution 1992 vests the High Court with jurisdiction in all matters both civil and criminal, subject to Constitution. Furthermore, **article 141** vests the High Court with supervisory jurisdiction over all lower courts and any lower adjudicating authority and may in the exercise of that jurisdiction issue orders and directions for the purpose of enforcing its supervisory powers. Under **order 55 and 56 of the High Civil (Procedure) Rules, 2003 (CI 47)** the High Court may issue the orders in the nature of ***certiorari, quo warranto, prohibition, injunction and mandamus*** for purposes of enforcing or securing the enforcement of its orders and directions.

The lower courts and lower (Section 39 of the Courts Act, 1993) adjudicating bodies over which the High Court exercises supervisory powers include all the lower courts, the judicial committees of the chieftaincy tribunals, and all bodies which exercise quasi-judicial functions, administrative bodies and administrative/public officials.

The circumstances that may warrant the exercise of the supervisory powers of the High Court include; want or excess jurisdiction, fundamental error patent on the face of the record whether jurisdictional or non-jurisdictional and breach of the rules of natural justice.

- **Cause or matter affecting chieftaincy**

A cause or matter affecting chieftaincy under **section 76 of the Chieftaincy Act, 2008 (Act 759)** means a cause, matter, dispute, question relating to; the nomination, selection, election or installation of a person as a chief, deposition or abdication of a person as a chief, recovery of stool property, the right of a person to take part in the nomination, selection or appointment of a person as a chief et al.

The **Constitution 1992 has under chapter 22** conferred jurisdiction in cause or matter affecting chieftaincy on the judicial committees of the National house of chiefs, regional house of chiefs and the traditional councils. Furthermore, **the Chieftaincy Act, 2008 (Act 759)** has, pursuant to the provisions of Chapter 22 of the Constitution, conferred jurisdiction in cause or matter affecting chieftaincy, particularly in **sections 22, 26 and 29**, on the National house of chiefs, regional house of chiefs and the traditional councils respectively.

Section 57 of the Courts Act, 1993 (Act 459) provides that, subject to the provisions of the Constitution, the Court of Appeal, the High Court, Regional Tribunal, a Circuit and Community Tribunal ***shall not have jurisdiction*** to entertain either at first instance or on appeal any cause or matter affecting chieftaincy.

Judicial Committees of the Traditional Councils, the Regional Houses of Chiefs and the National House of Chiefs are given judicial functions in relation to causes or matters affecting chieftaincy by Chapter 22 of the Constitution and **sections 22, 26 and 29 of the Chieftaincy Act, 2008 (Act 759).**

The effect of these constitutional and statutory provisions is that, the original and appellate jurisdiction of all Courts including the High Courts in respect of a cause or matter affecting chieftaincy is ousted, save the appellate jurisdiction of the Supreme Court.

Even though the original and appellate jurisdictions of the High Court is ousted by the constitutional and statutory provisions aforementioned, ***parliament cannot, by an Act of Parliament, oust the supervisory jurisdiction of the High Court since that will be in conflict with article 141 of the Constitution and shall render that act of Parliament void.***

In **Nana Adjei Ampofo V Attorney General and National House of Chiefs** it was held that individual chiefs do not have, and have not had, a judicial function in independent Ghana. By article 125(3) of the 1992 Constitution,"[T]he 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." Nowhere in the Courts Act, 1993 (Act 459) are individual chiefs given a judicial function. Thus, individual chiefs are not vested with judicial power by the Constitution nor by statute.

However, though individual chiefs are not vested with judicial power, individual chiefs continue to exercise an **adjudicatory role only as customary arbitrators**, which role is to be sharply distinguished from a judicial one. **Section 30 of Act 759** states that:

> "The power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties' consent to the arbitration is guaranteed."

- **Certiorari**

Certiorari is one of the prerogative writs available to the High Court or the Supreme Court when exercising it supervisory powers. Looks into the past to correct errors. It is a discretionary remedy, therefore the Court may refuse to grant it, even though the party or applicant may have satisfied all the pre-conditions……Ashaley v GLC

At common law, certiorari and prohibition were available to only those who were directly affected by the order to be quashed or being complained of or impugned. Busybodies are not entitled to certiorari in matters they do not have any interest in and therefore do not come under the few exceptions to the rule.

The common law position was quoted in the case of **Republic v High Court, Denu, Ex parte Agbesi Awusu** – certiorari and prohibition are not available to busybodies.

But the position of the law has changed in Ghana. The Court has held repeatedly that applications for prerogative writs (Certiorari, prohibition, etc) have a special public aspect to them and therefore not restricted by notions of locus-standi. That is, one does not need to show that some legal right of his is at stake. They may be granted to a stranger"

They are public law remedies. They are not available to a person exercising a private function unless they are authorized by law to perform public functions.

Grounds for certiorari

1. On grounds of jurisdiction – excess of jurisdiction (ultra vires) or lack of jurisdiction
2. Breach of natural justice
3. Error patent on the face of the record
4. Wednesbury principles/unreasonableness
    - Illegality
    - Irrationality
    - Procedural impropriety
5. Intervene to ensure that justice is done – This is limited to the SC only.

Republic v Court of Appeal, Accra Ex-parte Ghana Cable Co. Ltd. (Barclays Bank Ghana Ltd. – Interested Party) [2005-2006] SCGLR 107 at 118 Where Dr. Twum JSC speaking for the court stated thus: "Certiorari is not concerned with the merits of the decision. It is a complaint about jurisdiction or some procedural irregularity like the breach of natural justice."

ANALYSIS

In the instant case, a chief was summoned before a panel of customary arbitrators to answer destoolment charges preferred against him. The panel found him liable and consequently declared him destooled after the hearing.

The destoolment proceedings were subsequently quashed by the High Court for want of jurisdiction under section 29 of the Chieftaincy Act, 2008 (Act 759) which vests exclusive jurisdiction in traditional Council, a cause or matter affecting chieftaincy within its area.

It is instructive to note that the supervisory jurisdiction of the High Court is exercisable over all lower Courts and adjudicating authorities including administrative bodies, quasi-judicial bodies and all person or authorities exercising a public function. Thus, any person or group of persons who do not exercise a judicial, quasi-judicial, administrative or public function are not amenable to the supervisory jurisdiction of the High Court.

A panel of customary arbitrators headed by a divisional chief do not exercise a public nor judicial function. Destoolment of a chief is a cause or mater affecting chieftaincy pursuant to section 76 of the Chieftaincy Act, 2008 (Act 759). Thus, in view of section 29 of the Chieftaincy Act, the panel was not seised of jurisdiction to prefer destoolment charges against the chief. accordingly, the panel does not have jurisdiction to determine a cause or matter affecting chieftaincy.

That notwithstanding, the High Court was still not clothed with jurisdiction to exercise supervisory powers over the panel of arbitrators simply because it is not one of the bodies amenable to the supervisory jurisdiction of the High Court. It follows therefore that, the High Court acted ultra vires its jurisdiction.

CONCLUSION

Even though the original jurisdiction of the High Court is ousted by the provisions under Chapter 22 of the Constitution, the Courts Act and the Chieftaincy Act, the supervisory jurisdiction of the High Court has not been ousted. Thus, the High Court' supervisory jurisdiction over the bodies vested with jurisdiction in a cause or matter affecting chieftaincy remains unfettered.

The High Court, in my respectful view, wrongfully exercised jurisdiction by quashing the proceedings of the panel of customary arbitrators, a body that is not amenable to its supervisory jurisdiction. The High Court cannot behave like the octopus, laying claims of jurisdiction where it has none.

The Supreme Court should grant the application for certiorari to quash the order of the High Court for want of jurisdiction.

MARKING SCHEME

This question is on the supervisory jurisdiction of the High Court on challenging matters. Marks shall be awarded for brief explanation of jurisdiction. Marks may be awarded for reference to and explanation of issues of ultra vires and intra vires in the exercise of jurisdiction. Marks may also be awarded for brief discussion of ouster clauses and the essence of ouster clauses. Marks shall be awarded for brief discussion of the superior courts and the hierarchy of courts. Marks shall be awarded for brief discussion of matters affecting chieftaincy and the adjudicating bodies. Marks shall be awarded for the discussion of the relationship between the Supreme Court and decisions of the Judicial Committee of the National house of Chiefs. More marks shall be awarded for discussion of matters affecting chieftaincy. Further marks shall be awarded for the discussion of the general jurisdiction of the High Court. Further marks awarded for the explanation of supervisory jurisdiction of the High Court. Students shall be rewarded for distinguishing matters affecting chieftaincy and issues requiring the supervisory jurisdiction of the High Court, further marks shall be

awarded for discussing cases that attempts to circumvent the exclusionary clause relating to chieftaincy through the use of the high court supervisory jurisdiction. Marks shall be awarded for the discussion of the circumstances under which the supervisory jurisdiction of the High Court could be invoked Marks may also be awarded for references to and brief explanation of some of the remedies available upon invoking the supervisory jurisdiction of the High Court, such mandamus; prohibition; quo warranto; injunction etc. This question requires references to cases such as: Tobah v Kwekumah [1981] GLR 648; R v High Court; ex parte Odonkorteye [1985-85] GLRD 37; R v National House of Chiefs; ex parte Faibil III [1984-86] GLRD 143; Yiadom v Amaniapong [1981] GLR 3; R v Boateng; ex parte Adu Gyamfi [1972] GLR 317; Republic v High Court, Koforidua ex parte Bediako II [1998- 99] SCGLR 91; Republic (No.2) v NHC, ex parte Akrofa Krukoko II [Enimil VI Interested Party] (No. 2) (2010) SCGLR 134; Republic v High Court, Koforidua; ex parte Bediako IV [1998-99] SCGLR 91. Marks shall also be awarded for references to appropriate constitutional provisions such as articles 111; 277 of the Constitution; section 16 of Act 459 etc

6. AIDS TO INTERPRETATION OF STATUTES

- **Internal aids**
    i. **Enacting/operative parts** –Section, schedule, interpretation, long-title and preamble
    ii. **Non-enacting/descriptive parts** – short title, marginal notes, footnotes, heading

- **External aids –**
    i. Legislative and parliamentary history
    ii. Directive principles of state policy
    iii. Dictionary
    iv. Textbooks and other literary or academic publication
    v. Practice
    vi. Common sense

- **Linguistic canons (of general application)**
    i. Ejusdem generis rule
    ii. Ut res magis valeat…..
    iii. Noscitur a socii
    iv. Expressio unius exclusion alterius

- **Linguistic canons (Non-Statutory)**

i. Contra proferentum rule- non-statutory only
ii. Falsa demonstration rule - non-statutory only
iii. Expression eorum quae tacite insunt nihil operator maxim – applicable to statues
iv. Expressum facit cessare tacitum – applicable to statues

AIDS TO INTERPRETATION

		STATUTS	
		CASES/AUTHORITY	**LEGAL EFFECT**
ENACTING/OPERATIVE PARTS	Sections		They are part of the enactment and serve as aids to interpretation.
	Schedules		Schedules are part of the law. Where schedules are in conflict with the provisions in the statute, the provisions of the statute take precedence over the refence made to the schedule.
		Kuenyehia and Ors v Archer	*– the Sc held that the schedule was as much a part of a statute and as much as enactment as any other part, including the section which introduced it.*
	Provisos		
	Savings		They are part of the enactment and serve as aids to interpretation.
	interpretation		the definition and interpretation sections form part of the law. They are internal aids. All laws are numbered as sections. Interpretation is also numbered as section and therefore forms part of the law. They are also used as aids to interpretation. **Read Section 10 of Act 792.**
		Okwan v Amankwah (II) [1991] GLR 123	– Wiredu JA…" *the general rule of interpretation is that where an enactment has clearly defined particular words in its interpretation section, it is uncalled for and most unnecessary, to look elsewhere for the meaning of those words."*
			The ratio in ***Okwan's*** case , supra, seems to contradict the ratio in the English case of ***Thompson v Goold & Co.*** (1910) where the Court held that *even where an enactment contains a definition section; it would not necessarily apply in all the contexts in which a defined word may be used.*
		Thompson v Goold & Co. (1910)	where the Court held that *even where an enactment contains a definition section; it would not necessarily apply in all the contexts in which a defined word may be used.*
			This Common Law position was quoted with approval by the Supreme Court in the cases of ***Kumnipah II v Ayirebi*** **[1987-88] 1 GLR 265**.and ***BCM Ghana Ltd v Ashanti Goldfields Ltd*** [2005-2006] SCGLR 602.
		***BCM Ghana Ltd v Ashanti Goldfields Ltd* [2005-2006] SCGLR 602.**	It is trite law that the rules of construction of statutes are largely the same as those for the construction of other documents. It is also a settled rule of construction that, generally speaking , *there is a presumption that the same words in a statute bear the same meaning. However, it is a rebuttable presumption. This is so even when the words are defined in a definition section.*
		Section 38 of Act 792	The Act has restated the common law position that where an enactment contains a definition section, it would not necessarily apply in all the contexts in which a defined word may be used.

NON-ENACTING/DESCRIPTIVE PARTS	Long Title/Preamble	**DEN v URISON[1807]**	Both have the same legal effect.**At common law they were not part of the law.** They were considered as the gateway to the law and whenever the enacting part of the law was ambiguous, the court resorted to either the preamble or the long-title, as the case may be, to ascertain the intendment of the law maker.
		CEPS v National Labour Commission [2009] SCGLR 530	a preamble to an Act of Parliament is only a narrative of the facts that gave rise to the passage of the Act and can be described as the gate way to understanding the reasons why the Act was enacted and the problems which it is meant to solve
		SECTION 13 of ACT 792	The legal effect of **preamble and long title** has changed on the coming into force of the Interpretation Act, 2009(Act 792) which came into force on 31st December, 2009. The position of the law, per **section 13 of Act 792**, is that, long title and preamble; **Form part of an Act of parliament,** and **They are used as aids to explain the intent and object of the Statute**
	Memorandum		is considered **as part of the Law and is also used as an aid to interpret the law**. It provides for the object of the Bill that gave birth to the Act and the mischief the law intended to cure. It gives the historical antecedents.
		CEPS v NLC and AG (Public Service Workers Union of TUC, interested party) [2009] SCGLR 530	**–** the SC speaking through Atuguba JSC (as he then was) held that ..*"it is trite law that in Ghana under section 19(1) of the Interpretation Act 1960 (CA 4), t**he memorandum accompanying a Bill is an aid to the interpretation of a statute** but not the debates of parliament"*
	Punctuations	**Section 14 of Act 792**	Punctuations **are part of the law and are used as aids to construction.** Where they are not properly used it will distort eth meaning of the document.
	Headings	**Section 15 of Act 792**	**Headings do not form part of the law**. However, they have 2 legal effect; 1. F**or convenience of reference** and 2. **may be used as aids to construction of enactments**
		ANTIE & Adjuwua v OGBO [2005/06] SCGLR 414	– The SC in construing Section 4 of the repealed interpretations Act (C.A 4) held that, headings do not form part of the statute. They are intended for convenience of reference only.
	Maginal Notes		marginal notes **do not form part of the statute**. They are intended for convenience of reference only.
		Chandler v DPP	Lord Reid held that; **side notes cannot be used as an aid to interpretation/construction**. They are mere catchwords. NB: Histotically, marginal notes like headings were considered unamendable descriptive parts and therefore rejected as aids.

		Bilson v Apaloo	I concede that **marginal note** is not part of the enactment but in appropriate cases it can be an aid to interpretation.
		Republic (No.2) v National House of Chiefs [2010] SCGLR 134, Ex parte Akrofa Krukoko II (Enimil VI Interested party) (No.2)	The SC discussed the COA case **of Republic v National House of Chiefs and Others, EX Parte Faibil III and Other**s, which referred to the marginal notes and held that an application for mandamus was time barred under rule 3 of order 59 of LN 140A. The SC, however, held that the COA was wrong because the body of Order 59(3) dealt only with certiorari and not mandamus; therefore, the marginal note was misleading and the COA should not have relied on it as an aid to interpretation.
			the position of the SC is consistent with Lord Reids in the case of **Maunsel v Olins** where he stated that the aids are non-binding rules and where they would not assist the judge to ascertain the purpose of the document, they should not be invoked. The aids are servants to teh judges and not Lords or Masters
	Footnotes/Endnotes		footnotes are not part of the law. They are for referencing and as aids to interpretation.
		Kuenyehia and Ors v Archer and Ors,[1993/94]	Hayfron Benjamin JSC held that the interpretation Act, 1960 (CA 4) was silent on footnotes and that footnotes do not form part of the Statutes in Ghana. He held that; " *it will be observed from section 4 that there is no mention of footnotes. Footnotes do not therefore exist in our statutes and that submission is therefore wrong".*
			The law is settled that footnotes/endnotes are aids to interpretation even though the Interpretation Act, 2009 (Act 792) is silent on it
		Boateng v AG & 2 OTHERS (writ no. J1/28/2015) decided in [2017] SC	A footnote is part of an enactment and constitutes an integral part of the enactment. It is not merely an aid to the construction of the enactment.

LINGUISTIC CANONS (General application)			
CANON	**MEANING**	**CASES/AUTHORITY**	**PRINCIPLE**
1. Ejusdem Generis rule	the principle is that general words which follow specific words should be construed in the light of the specific words,in other words, the general words derive their meaning from the specific		
	It must be noted that the ejusdem generis rule is not absolute. General words are not to be limited by preceding words where the preceding words already cover the entire class of things the preceding words could refer to. In such cases it makes no sense to limit the preceding words. Therefore, the general words should be deemed to refer to another class of things.	**GRINI v GRINI [1969] 5 Dominican LR 3rd Ed. 640**	The court declined the invitation to interpret the words "other cause" ejusdem generis teh preceding particular words; illness and disability. The Court held that the words illness and disability exhaust the genus to which they relate; therefore, the general words other *cause relates* to other matters outside the said genus. Consequently, the court considered the education of the child as a valid cause for which, though she was of age to work, the father was required to maintain her.
		Asare v AG [2003/04]	The principle has been applied in the case of **Asare v. AG, where Kludze JSC** held that the phrase "***unable to perform the functions of his office***" is a genus of which "***absent from Ghana"*** is one of the species or subsets. Therefore "absent from Ghana" must be construed ejusdem generis with "for any other reasons unable to perform his functions".
Ut res Magis valeat Quam Pereat	Simply means apply wisdom to save the document or enactment. The principle is invoked where the text is susceptible to more than one meaning and one of them would save the document while the other would render it void. in such a case the court is to choose the meaning that would save the document or law by making it intelligible or reasonable rather than the meaning which would make it absurd, unintelligible, incongruous, void or illegal	**Davies v AG [2012]**	
Expressio Unius Est Exclusio Alterius	The rule states that the mentioning of one excludes the one not mentioned. It is literally explained as an expression of one thing is the exclusion of the other. This particular rule has been said to be a valuable servant but a bad master because an interpreter who follows this rule rigidly is likely to defeat the intention of the maker of the law or the statute and its object	**GHAPOHA v Isoufou [1993/94],** (A warning was sent to members of the legal fraternity to apply the maxim with caution in this case)	The maxim ***expressio unius est exclussio alteris*** and ***expressum facit cessare tacitum*** apply to the interpretation of documents. But it is important to appreciate that their interpretation must be with caution b***ecause the omission to mention a thing [sic] which appear to be excluded may be due to inadvertence or accident or because it never occurred to the draftsman that they needed specific mentio***n
Noscitur A sociis	It is literally translated that the meaning of a word is known from its associates or context or the environment it finds itself or words are known by their friends. Example, what is the meaning of a house? A dwelling place. If is say.. The house passed the Bill, what does the word "house" here mean? Parliament. Therefore, words by themselves do not give meanings, rather derive their meanings from the context or environment in which they are used.	**Republic v Minister for Interior; ex Parte Bombelli [1984-86]**	the HC applied the noscitur a sociis rule to state that the word "ORDER" as used in article 4(7)(a)of the 1979 Constitution, which is in parimateria with article 11(1)© of the 1992 Constitution, refers to rules or regulations and commands.Consequently, the deportation ORDER was not an ORDER within teh contemplation of the refernced constittuional provision.

EXTERNAL AIDS (NON-STATUTORY)			
1. Falsa demonstratio non nocet cum de corpore	It literally means that where an item or property is wrongly or falsely described but it can be ascertained or identified, effect should be given to it in spite of the false description. The wrong description of an object or a subject should not defeat the purpose of the document or transaction	**Wilberforce v Wilberforce.**	a testator falsely described his Nephews as sons but his description was certain as to the identity of the beneficiaries and the will was admitted to probate as valid. the HC invoked the maxim *falsa demonstration non cest cum de corpore* to save the gift.
		In Re Ofner; Samuel v Ofner.	the testator bequeathed an amount of GBP200 to his nephew "Robert Ofner" where he had no grandnephew by that name. in spite of the false description, the amount of GBP200 was given o Richard, his grandnephew who the testator intended to bequeath the money to.
2. Contra proferentum rule	Where there is an ambiguity in a deed or document, the rule is that it should be construed against the maker or grantor. It is a tool used as a last resort. This means where you can use any other tool, don't use it. This rule is applied in cases of ambiguities only and it should be applied after all the known rules for interpretation have been applied but have failed to resolve the ambiguity.	It is used under three (3) circumstances; **1.** Where there is an ambiguity in a **covenant,** it is resolved against the covenantor. **2.** Where there is ambiguity ina **conveyance** it is construed against the grantor**.3**. ambiguity in a contract of **indemnity** is construed against the indemnified or guarantor.	**John Lee and Son Ltd v Railway Executive [1949] -** We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, amongst other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended... that it has a remarkably, if not extravagantly, wide scope and I think that the rule contra proferentem should be applied"'
3. Expressio eorum quae tacite insunt nihil operator, and	Means the "expression of those things that are tacitly implied are of no consequence." Words which are necessarily implied in a text could be further stated in express terms but this would not have any legal effect on the implied meaning. Put differently, the implicit meaning could also be expressed in definite words and would not have any legal consequence on the meaning of the text.		In a conveyance of an interest in land, **section 12(1) of the Conveyancing Act, 1973 (NRCD 175)** provides that words used to denote parties in a conveyance shall be deemed to include their heirs, successors, etc. unless a contrary intention is expressed. Therefore, it is of no consequence where parties to a conveyance mention their names only without assigns and representatives unless a contrary intention is expressed in the conveyance or appears by necessary implication
4. Expressum facit cessare tacitum	What is written is written. Where words are expressly stated on an issue it puts an end to all other issues which are unwritten or unspoken. This maxim applies to the interpretation of statutes as well as other documents. However, it is another maxim which may be described as valuable servant but a bad and dangerous master. It should be applied cautiously in order not to defeat the intention or the purpose of the law.		

7. PRESUMPRIONS

Introduction:

Section 18 of the Evidence Act, NRCD 323 defines presumption as:

> *"an assumption of facts that the law requires to be made from another fact or group of facts found or otherwise established in the action".*

Presumptions may be in the nature of rebuttable or irrebuttable presumptions. Rebuttable presumptions can be said to be inferences or assumptions of facts made from established facts by operation of law but a contrary evidence when available, may be used to displace the facts established. There are numerous rebuttable presumptions known. For there is the presumption of the innocence of the accused until proven guilty under article 19(2)(c) of the Constitution.

The law of evidence under the Evidence Act and includes, among others, presumption of the validity of a marriage under section 31, presumption of children born as children of the marriage during the subsistence of the marriage under section 32, presumption of the death of a person after seven years of diligent search for him, presumption of the commorientes rule for the purposes of succession where the younger is presumed to survive the older in circumstances where we are unable to know who died first, the owner of legal title presumed to be the owner of beneficial title under section 35, omnia presumnitur ecta rule under section 37, that official function is presumed to have been regularly performed, presumption of a person intending the ordinary consequences of his voluntary act under section 38, presumption of the regularity of the exercise of the jurisdiction of a court under section 39, the presumption that a foreign law is the same as that of Ghana under section 40, a person

presumed to be of full age and sound mind under section 42 are among some of the rebuttable presumptions in the Evidence Act.

The irrebuttable presumption on the other hand are those presumptions that cannot be contradicted or no evidence in rebuttal can be admitted against it when the basic facts that give rise to it are established. For section 24(1) says:

> *"Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of facts".*

The preconditions to trigger the presumption is that it must relate to existing fact, it must be unambiguous, it must be legal and it must be just and equitable to invoke it. See **Social Security Bank v Agyarkwa [1991] 2 GLR 192**.

Conclusive presumptions are found in sections 25 to 29 of the Evidence Act. They include the presumption that facts in a written instrument are conclusively presumed to be true as between the parties under section 25. The presumption in section 26 that if a person by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest. There is estoppel of licensee or tenant denying the title of licensor losing the license under sections 27 and 28. And section 29 is on estoppel of bailee, agent or licensee.

PRESUMPTIONS IN INTERPRETATION

The focus of presumptions in interpretation is not from the angle of evidence but as understood in the law of interpretation. And in this area of law, presumptions are seen as aids to interpretation and are taken for granted. For Cross put it this way that:

"These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction and they may be described as presumptions of general application at the level of interpretation. Their function is the promotion of brevity on the part of the draftsman"

The function of presumptions in interpretation is to aid in the construction of statutes by giving a ***prima facie*** pointer as to legislative meaning. Some of these presumptions in interpretation are:

a. Presumption against unclear changes in the common law
b. Presumption against the retroactive operation of statutes
c. Presumption against ousting the established supervisory jurisdiction of the superior courts over lower courts and administrative bodies
d. Presumption against interference with vested rights, etc.

General Purpose of Presumptions

1. Presumptions usually reflect protection of human rights.
2. presumption in favour of upholding ethical values and behaviour and
3. presumption in favour of rule of law.

JUNE 2015

QUESTION 6

The Ministry of Interior and the Ghana Police Service are concerned about the level of noise making in the City of Accra, especially by drivers who are fond of blowing their horns unnecessarily. To curb this nuisance, the Motor and Traffic Act of Ghana, 2019, (Act 999) was amended with the insertion of a new section which reads as follows:

> "Any person driving any vehicle for whatever purpose and at whatever period of the day shall not blow or hoot a horn of the vehicle unless such a vehicle is exempted by the relevant authorities commits an offence".

Gyato, a taxi driver was arrested by the police for indiscriminately and unnecessarily blowing and hooting his vehicle horn on June 9, 2020 on the High Street in Accra towards the Korle Bu Hospital. In his defence, Gyato explained that he was hired on that fateful day to convey a lady who was in labour to the Korle Bu Polyclinic. The accused further stated that he resorted to the continuous hooting and blowing of the horn of the vehicle to secure a smooth passage to the hospital in order to save the life of the passenger. At the trial when asked whether his vehicle was exempted by any relevant authority, Gyato answered in the negative and went further to say that he was not aware of such a law.

The chief prosecutor has invited the court to strictly construe the provisions of the statute to serve as a deterrent to all other drivers. In his response, counsel for Gyato asked the court to be mindful of presumptions as interpretative criteria of statutory construction. Specifically, counsel reminded the court of the presumption against absurdity and the presumption "*sensus communis*". Replying to counsel, Obuoba J declined the invitation to consider the presumption as an aid to interpretation in these words:

> "Counsel is inviting this court to wander into presumptions and depart from the known canons of statutory interpretation. This is a court of law and not a court of common sense. Our duty is to strictly apply the provisions of a

> statute which embodies the intention of the law-maker and nothing more. Presumptions are unruly horses and their destinations may not be certain".

Considering your understanding of presumptions as aid to interpretation, critically analyse the statement of Obuoba J vis-à-vis the contentions of both counsel.

MARKING SCHEME

- This question is testing students appreciation of presumption as aid to statutory interpretation,

- student is expected to discuss in broad terms ***the various approaches to statutory interpretation*** and the literal or plain meaning rule; the golden rule and the mischief rule and the purposive rule as provided in the Memorandum to the interpretation Act and provision section 4(d).

- Marks shall be awarded for reference and application of the Heydon's case.

- Further marks shall be awarded for discussing terms like ***absurd; repugnance and the duty of the court to avoid same***.

- Further marks shall be awarded for the discussion of ***what constitute presumptions and the importance*** or otherwise of presumptions as interpretative criteria.

- Further marks shall be awarded for giving examples of presumptions such as: presumption that common sense applies; presumption against absurdity; presumption that the law must be for the common good and serve public interest; presumption then shall be just; presumption of purposive construction.

- Marks shall be awarded ***for adopting and justifying an approach*** for the construction of the provision as proved in the facts. Students shall be rewarded for reference and application of cases such as: Heydon's Case 75 ER 637; Republic v High Court, Koforidua; ex parte Eastern Regional Development Corporation [2003-2004] SCGLR 4; Sam v Comptroller of Customs and Excise [1971] 1 GLR 289; Bernard v German [1941] AC 378