LAW OF INTERPRETATION

What is interpretation.

For Edzie, ***interpretation is a rational process of ascertaining the meaning of language used in a legal text and the determination subject to any rule of law of the scope and legal effects of language used in a DSC (Non statutory document, statute ands and national constitutions) in a specific context and for the purpose of applying it to a specific set of facts or situations before the courts***. In effect Edzie posits that interpretation of a DSC is subject to any rule of law for applying to a specific set of facts or situation.

Twinning & Miers : How To Do Things With rules 3rd Edn Chapter 4 @ 181 where it is noted that strictly speaking, interpretation in law ***refers to "the clarification of the general scope and meaning of a rule".***

In sum, **interpretation provides the mechanism needed to arrive at the legal meaning of a legal document, enactment or a constitution.**

Date-Bah (JSC) in Agyei-Twum v AG and Bright Akwetey [2005]

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. That process need not be laboured or elaborate in every context. In some contexts, the legal meaning of words concerned can be determined simply and quickly. The words whose meaning become contentious tend to be those in exceptional cases where the legal meaning cannot be simply and quickly determined.

According to Justice Dennis Adjei, in his book modern approach to the law of interpretation in Ghana, Third edition, the essence of interpretation is to look for a meaning that will not render the text absurd or obscure. He further posits that interpretation 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.

None of the approaches to interpretation gives the true interpretation of words, phrases and sentences. Purposive interpretation which has been embraced by courts in the commonwealth helps interpreters arrive at an interpretation which may be considered to be **proper** but **not necessarily true**. **Therefore, Interpreters seek to ascertain the proper legal meaning of words, phrases, and sentences within the context they are used.**

Why interpretation

We interpret because:

- To give meaning to documents, text or statute.
- Some words are unclear, vague, imprecise, incongruous, ambiguous or general and must be interpreted within the context in which they are used before the legal meaning can be extracted.
- To prevent absurdity or incongruity.
- To ascertain the intention or purpose.
- The meaning of words are eroded over the course of time. Words are not static. Words 'grow' as a result of development and technological advancement. About a century ago, the word "mouse" was a reference to a rodent but same can now mean a computer device.
- To remove ambiguity. The meaning of some words will depend on their environment.
- Some words have technical meaning. A 'colonel' in the Salvation Army Church has a different meaning from a colonel in the Ghana Army.
- Some words also have special meanings.
- Sometimes there may be gaps in the text, document or statute. – in Sasu v Amua-Sakyi
- Due to technological advancement, new words are coined and their meanings could be ascertained from their environment.

There are those interpreters who subscribe to the school of thought that, words that are clear, precise and unambiguous need not be construed. Other interpreters, however, hold the view that no word has such characteristics. Consequently, it is only after the construction of a word has been carried out that an interpreter may conclude that a word is clear and unambiguous. Therefore, the relevance of interpretation cannot be dispensed with in law and every word requires interpretation. For example, Aharon Barak is of the opinion that it is fallacious to hold that some words do not require interpretation.

Unconsciously, interpreters construe words before they come to the conclusion that a word is clear, precise or unambiguous. ***In the domain of purposive interpretation, no word is clear, precise or unambiguous unless it is construed within cultural, economic, political and social contexts***.[1]

R V HC, General Jurisdiction; ex parte Zanetor Rawlings[2015/16]……it has to be realized that the initial stance of the SC exemplified by cases such as **Republic v Maikankan [1971**], **R v Special Tribunal; ex parte Akosah [1980]**, **Aduamoa II v Adu Twum II [2000] SCGLR** 165 which laid emphasis on the plain meaning of a statute preceded the new era of constitutional interpretation based on the now dominant principle of purposive construction of statutes, particularly the constitution.

However, ***some judges are of the opinion that some words are clear, precise and unambiguous and do not require interpretation***. Such views are apparent in cases where courts below the SC decline to refer to the SC matters of constitutional interpretation and cases where the SC declines to exercise its jurisdiction to interpret the constitution. For example, the SC in discussing **Article 22(1) of the 1992 Constitution**, which provides that a spouse shall not be deprived of a reasonable provision out of the estate of the other spouse regardless of whether or not he died testate, stated thus:

> In our opinion, the provision in Article 22(1) does not call for any interpretation for which the jurisdiction of the Supreme Court under Article 130(2) should be invoked. There is a plethora of decided cases to the effect that where the words used in a provision in the constitution are clear and unambiguous there is no need to refer same to the Supreme Court for interpretation. The court merely goes ahead to implement the provision as it is. Article 22(1) which is the basis of the Appellant's claim provides 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 a will. ***This provision is so clear and unambiguous that we do not see why the High Court judge was required to call on the Supreme Court for interpretation. We hold that the High Court was perfectly within jurisdiction when he applied Article 22(1) without reference."***[2]

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 also made. It was an application 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 in deciding that the widow was entitled to reasonable provision said:

> "The first plaintiff (wife) who was a pensioner with no monthly pension and no significant source of income was dependent on the husband before the separation and I hold that he continued to be responsible for her…

[1] Republic v High Court, General Jurisdiction; Ex parte Zanetor Rawlings (Ashittey & NDC(NO.1) [2015-2016] 1SCGLR 53

[2] Akua Marfoa v Margaret Akosua Agyeiwaa (unreported) Civil appeal No. J4/42/2012 judgment of the SC delivered on 19th November, 2016.

The rule is that if the Language of the statute is clear, it must be enforced however harsh the result may appear to be"

Grounds for invoking the interpretation jurisdiction of the Supreme Court

The case of **Republic v Special Tribunal; Ex Parte Akosah** [1980] GLR 592 provides the four grounds upon which the jurisdiction of the SC to interpret the Constitution may be invoked.

The CA (sitting as SC) held that the referencing will be accepted:

a. **Where the words of the statue are imprecise, unclear, or ambiguous**. Put in another way, it arises if one party invites the court to declare that the words of the article have a double meaning or are obscure or else mean something different from or more than what they say;
b. where rival meanings have been placed by the litigants on the words of any provision of the Constitution;
c. **where there is a conflict in the meaning and effect of two or more articles of the Constitution**, and the question is raised as to which provision shall prevail;
d. where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

The court further stated that apart from those situations the words of the constitution must be applied by Courts below the SC because they are clear and unambiguous and need not be interpreted. Consequently, Courts below the SC are not required to make reference to the SC regarding those unambiguous words. **Therefore, a judge who is confronted with the interpretation of a constitutional provision, must first look at the text and satisfy himself as to whether the text requires interpretation by the SC or not.**

The main duty of an interpreter is to look for the legal meaning or intent of the law and it's the legal meaning that would convey the purpose of the law. The main task of an interpreter is to give effect to what already exists in the system by making it meaningful. The task of making what exists meaningful does not amount to the insertion or creation of new words into the text.

LEGAL BASIS FOR INTERPRETATION

The power of courts to interpret or give true meaning of statutes or documents is found in the Courts Act, 1993 (Act 459) any other enactment or the 1992 Constitution. By virtue

of Article 130 of the Constitution, the Supreme Court has original jurisdiction when it comes to the interpretation of the constitution.

Article 130(2) is what is called the referencing. Specifically, as provided in article 130(1) of the 1992 Constitution, the SC is vested with the exclusive original jurisdiction to determine:

Article 130 of the Constitution, 1992:

(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.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, ***that court shall stay the proceedings and refer the question, of law involved to the Supreme Court for determination;*** and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

At what point can the High Court refer to the Supreme Court? The Supreme Court has laid down the threshold in the case of ***The Republic v Maikankan*** [1971] 2GLR 473

Edmund Bannerman CJ stated: **(MAIKANKAN PRINCIPLE)**

> " a lower court is not bound to refer to the SC very submission alleging as an issue the determination of 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. To interpret the provisions of article 106(2) of the Constitution in any other way may entail and encourage references to the Supreme court of frivolous submissions, some of which may be intended to stultify proceedings or the due process of law and may lead to delays such as may in fact amount to denial of justice."

Commenting on the dictum of Edmund Bannerman CJ in the Maikankan case, Taylor J (as he then was) in ***Republic v Special Tribunal; Ex parte Forson*** [1980] GLR 529 @ 542 said :

> "In my view, it is plausible in every court to raise a constitutional issue of a sort and if the utilitarian principle so ably enunciated by Edmund Bannerman CJ is not constantly kept in mind, the Supreme Court will be inundated with problems which it can never conveniently handle."

Yiadom I v Amaniampong [1981] GLR 3, SC : The plaintiff sought to invoke the original jurisdiction of the Supreme Court for a declaration that the defendant had disqualified himself from continuing in office as a paramount chief because of some adverse findings made against him by the Archer Committee of Inquiry into the affairs of the Ghana Cocoa Marketing Board. The plaintiff also applied for an interpretation and enforcement of articles 161, 177, 181 and section 7(1) of the transitional provisions to the 1979 Constitution. The action was dismissed by the Supreme Court. It held that even though the plaintiff, a queen mother, had pleaded her case in such a way to make it appear that she was seeking an interpretation of the provision of the Constitution, in reality the only issue to be resolved was whether the defendant had been guilty of conduct calling for his deposition as a paramount chief; it was therefore unnecessary to construe the provisions of the Constitution.
In the words of Apaloo CJ, delivering the judgment of the Supreme Court @ page 8,

> "Perhaps we should point out, at least for the benefit of the profession, that where the issue sought to be decided is clear and is not resolvable by interpretation, we will firmly resist any invitation to pronounce on the meaning of constitutional provisions. It would …be a waste of mental effort and a thoroughly pointless exercise."

The earlier decisions of the Supreme in both the Maikankan case and Yiadom failed to give any specific guidelines as an aid in determining when it could be said that a constitutional/statutory provision was clear and unambiguous. This was subsequently given by Anin JA at page 604 in the case of ***Ex parte Akosah*** **(**in relation to the 1979 Constitution).

The Legal Philosophical Schools

Interpretation of laws was largely influenced by the various legal philosophical theories including the ***natural law, positivist, realist and sociological theories***. Whether the interpreter will interpret the text as it is or take into account other considerations to make the meaning fair, just or reasonable is largely influenced by the particular legal philosophical school in law which the person either belongs or associates with.

1. The Natural law school

They view laws as rules made to govern which derives their source from God. Laws are to be fair, just and reasonable. A valid law must be embedded with morality and therefore,

any law which lacks moral principles should not be considered as law. St. Thomas Aquinas was of the opinion that law is everything about God and that universal law was handed over to man by God. To him, law was about seeking good and avoiding evil.

The natural law school has influenced the interpretation of law as interpreters as interpreters who belong to that school are of the opinion that interpreters should introduce morality into their work when interpreting to ensure that laws do not become repugnant to conscience and natural justice. They believe that human being do not write laws and other documents with angelic hands, therefore, any interpretation which renders a meaning absurd or unjust should be avoided.

Proponents of the ***purposive, living constitutionalism, and intentionalism approaches*** are normally influenced by the natural law school in their interpretative analysis as their cardinal aim is to ensure that justice is meted out through interpretation.

The underlying objective behind purposive interpretation ***is to achieve fairness and justice*** in contemporary times. ***Purposive interpreters associate themselves with the natural law school to ensure that laws are interpreted to advance legislative purpose and to do justice and equity***.

The intentionalism school also aims at doing justice through the interpretation of statutes and constitution. The intentionalism school normally supplements the written words with unwritten words to achieve the legislative intent. ***The school is of the opinion that parliamentarians are mortals and do not make laws with angelic minds and whenever there is a gap in the law, an interpreter is required to look for the mischief the law sought to cure, the social conditions which gave rise to the law*** and ***the intention of the legislature at the time the law was made***.

As stated by Lord Denning in the case of ***Seaford Court Estates Ltd v Asher*****.....** "It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. ***In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman.*** He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and to the mischief which it was passed to remedy, and then he must supplement the written word as to give '***force and life'*** to the intention of the legislature."

Th above case has been quoted with approval in some Ghanaian cases, including **Appiah v Biani.[1991]**

Facts : The plaintiff's husband died intestate leaving an uncompleted house (a storey building) which had reached lintel level. His wife, the plaintiff sought to have the building vested in her and their children. This was however opposed by the deceased's mother, the defendant. By an originating summons, the plaintiff sought the determination of inter alia whether upon the true construction of section 4 of PNDCL111, an

uncompleted house was a house and whether same should devolve on the plaintiff and the children of the deceased.

Held: That PNDCL 111 did not define a "house" however on a literal interpretation, a house meant a building for dwelling in, a dwelling place and must therefore have a roof, walls and windows. On a literal interpretation therefore, an uncompleted house would not be a house. However, the clear provisions of PNDCL 111 was that on the death of a spouse, his self-acquired properties should devolve on the surviving spouse and children. To fulfil the legislative intendment therefore, the court defined a house to include any building or part thereof which was occupied or intended to be occupied and would include both a residential and a commercial house. Hence an uncompleted house was a house within the meaning of section 4 of PNDCL 111 and same ought to devolve to the plaintiff and their children.

Per Lutterodt J @p. 157 :

> "Unfortunately, the law does not define what is meant by house or what it includes. I do not think they can be faulted. They never thought that there would be any difficulty about this. Actually, the problem raised here is simply not what is meant by a house but whether an uncompleted house is a house. This leads us to the vexed question of interpretation of statutes. I have no decided case to help me on this issue of whether or not an uncompleted house is a house but by using the general principle of interpretation of statutes, I hope to resolve the issue. The general principle which I would bow to is that we give the words their ordinary meaning. And where they are plain and obvious the interpretation of the law raises no problem. I would think in such obvious cases, both old and young lawyers and laymen alike would not haggle over words.
>
> But the real problem is where an absurdity or ambiguity arises. In such cases, I would think that it is a wrong principle to limit one's self to the bare reading of the words, giving each word the mechanical or grammatical meaning. The solution would lie rather in going into the mischief which gave birth to the statute or what right it did try to confer. If we do not adopt this approach but the strict constructionist approach we shall find the letter of the law not giving life though it exists for the living but find that it kills. When we look at the spirit of the law, however, we find that it gives life."
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> **@ page 159 "** *Now if I adopt the strict grammatical , literal and lifeless interpretation I would find myself saying that because a house has been interpreted in the Chambers' Short Dictionary as "a building for dwelling in , a dwelling place" an uncompleted building would not be a house. In ordinary normal speech when I point to a house or when I say "I live in this house," it may be poorly finished and furnished both in the inside and outside but one basic factor is, it must have a roof, walls , windows. One can never point to an obviously uncompleted house without any of these basics and say confidently it is a house.*
>
> *At worst one would describe it as an uncompleted house or building under construction. 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.* ***However, in adopting the purposive approach, it becomes obvious…that an uncompleted house is a house within the meaning and intendment of the law. ..****54 The provisions of this Law are therefore intended not merely to provide a shelter or a place of habitation for a surviving spouse and of the deceased's children but starting them off financially well by giving them a larger portion of the deceased's estate to enable the surviving spouse to look after the children well and provide them with all necessaries of life…The clear provision of PNDCL 111 is that on his death intestate that house would devolve on the surviving spouse or children or both as the case may be. No one can be permitted to say that because that house was never a matrimonial home or even that the owner intended it to be such, the surviving spouse and children are not beneficially entitled to it.*

In my view, therefore if the purpose of PNDCL 111 was to provide for these persons in this way, then it would be wrong for counsel to argue that an uncompleted house, because it is not habitable on the death of the deceased, is not a house. It would, in my view also , be equally wrong for counsel to argue that because the deceased had no house in which he was living or could have occupied with the widow, then he never died possessed of a house."

Seaford Court Estates Limited v Asher **[1949] 2 KB 481 –Denning LJ @ 498-499, CA:**

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. ***The English language is not an instrument of mathematical precision...***A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word as to give 'force and life' to the intention of the legislature: …Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v STudd [(1574) 2 Plowden 465]. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. ***A judge must not alter the material of which it is woven, but he can and should iron out the creases."***

The intentionalism school does not endorse an interpretation which will render the meaning absurd. Its aim is to ensure that justice is meted out to parties through proper judicial interpretation. Where the written words in a text do not make sense, the interpreter is required to supplement the written words with other considerations to promote equity and justice.

The purposivists, living constitutionalists, and intentionalists consider the natural law school principles when interpreting, but each of them uses different tools with different objectives. **The living constitutionalists** look for the purpose of the law from the point of view of a hypothetical reasonable man at the time of the interpretation, while **the intentionalists** look for the intention of the law maker at the time the law was made. **The purposivists** rather look for the purpose which the law was made in order to give effect to legislative purpose. However, each of them introduces justice and equity into law through interpretation of law.

2. Positivist School

Traditional positivism view law as an expression of the will of a sovereign. Therefore, law is what has been actually written or given by the law maker and not what the law maker ought to have given. The positivists dissociate morality from law and state that law and morality are two different things and judges should not introduce morality into law where the law maker did not introduce it. Law is a command issued by a sovereign who is a commander who cannot be commanded. The command issued by the sovereign are enforceable by sanctions.

The positivists gave birth to **the strict constructionist and literal approach** to interpretation. The position of the law is that the courts are the servants of the sovereign and, therefore, they are forbidden from substituting their own opinions for that of the sovereign by reading into law what is not in the law.

The duty of the court is to give meaning to what is written in the law whether or not its application would render the meaning absurd or unreasonable. There is a clear distinction between law making and adjudication. A judge shall not substitute his belief and other considerations for that of the sovereign, else it will amount to naked usurpation of the sovereign's power. An example of strict constructionist approach is the ratio in **R v Judge of City of London court** where Lord Esher held thus; " *the rule is that courts will give words their ordinary or literal meaning even if the result is not very sensible".*

In the case **of Republic v Fast Track High Court, Ex Parte Daniel [2003/04] 1 SCGLR 364 Prof. Kludze @** page 370 of the record 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".*

Textualists are also influenced by the positivists. Textualist also give effect to the ordinary meaning of the words without giving consideration to non-textual factors.

3. Legal Realism or American Legal Realism

This movement was founded by Oliver Wendel Holmes. The movement emphatically states that, judges, in adjudication are influenced by both legal and non-legal considerations such as precedents, equity, fairness, boldness, values and their personal

beliefs. That, judges' decisions are influenced by other factors and not the laws and the facts of the cases which are presented before them to persuade the court. adjudication entails more than knowing the law and applying them to the facts than the mechanical application of the law.

4. Sociological School

Law is used as an effective tool for social control. The theory sees law and justice as basic tools for the promotion of stability in every human institution and, therefore, law should be used for social control.

According to Benjamin N. Cardozzo, judges should not make laws except where there are gaps in the law which must be filled. Cardozzo also expected judges to look for the historical antecedents of the law when interpreting it to ensure that the judgment is in accordance with what the framers of the law intended to achieve for the benefit of the society. Therefore, an interpretation made without due regard of the customs and traditions of the parties cannot promote the welfare of the people.

Cardozzo once said… the final cause of law is the welfare of society. The main aim of the sociological school is to ensure that the final cause of law is for the promotion of the welfare of society. Adjudication based on legalities or technicalities does not promote the welfare of society but enslaves the adjudicator and the society and should be discouraged.

Though it may be doubtful, the sociological school can boast of approaches to interpretation such as the **living constitutionalism, purposive and modern purposive approaches.** The position of the sociological school is that the constitution has its content but its meaning is fluid as it varies from age to age. The sociological school therefore shares the same features with the living constitutionalism. The purposive and modern purposive approaches to interpretation take into account the ordinary meaning of the words as well as the context in which the words are used. Consideration is further given to the subject matter, the scope, the purpose and background without relying solely on the linguistic context.

APPROACHES TO INTERPRETATION

1. Originalism

Originalism theory hinges on changes in language. The five factors that change language are; history, linguistics, social factors, psychological factors and the influence of foreign language. 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.

Language and culture are two important factors considered by the originalists movement. 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 eth 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 eth changing world, they will look for the contemporary meaning of the text to make it more relevant.

Section 10(1) of eth interpretation Act, 2009 (Act 792) provides for the materials to consult and consider where a court is concerned with ascertaining the meaning of an enactment.

They admit that words grow and are not static and because they grow, one is bound to experience adulteration of words. They are interested in the original meaning because words are not static. It is because words are not static that we have different editions of dictionaries so if a constitution is written in the 1910, to understand the meaning of a word and over there you have to look at the meaning of the word at the time the constitution was written and probably refer to the dictionary and edition used at the time. Nothing should be done to deprive the text of the meaning it had at the time it was made. It is their position that the original meaning should be applied so long as it will not yield an absurd result.
Those who believe in originalism are of the opinion that amendment is not always material. (American Constitution of 1776 has seen only 14 amendments).

2. 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. They use rules of interpretation, known as canons of interpretation and presumptions to interpret the text of statutes and non-statutory documents. Some of the linguistic canons are; expression *unius est exclusion* (expression of the one is the exclusion of the other), *noscitur a sociis* (words are known by their companions); *ejusdem generis* (words of the same sort).

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 discourages intentionalism, strict constructionist and purposive approach to interpretation.

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.

3. Intentionalism

Refer to Archer CJ Supra in the 31st December case.

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.

Intentionalists include those who use Purposive Approach, creative approach and Modern Purposive Approch to look for the legislative intent and the mischief the law seeks to cure. They take into consideration factors such as the legislative history, preamble, long title, marginal notes and the mischief the law seeks to cure

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*** 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.
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.

Case; Biney v Biney [1974] …..this case has outlined how deeds and documents **[non-statutory]** should be interpreted.

'The deed of settlement, exhibit A, had to be interpreted in the light of **three basic rules** of construction, namely:

(i) the construction must be as near to the mind and intention of the author as the law would permit;

(ii) the intention must be gathered from the written expression of the author's intention; and

(iii) local authorities had firmly established that in pre-1974 conveyancing, technical words of limitation in a document relied on as constituting a transaction known and recognised by English law *must have their strict legal effect according to the English pre-1881 conveyancing law.*

NB: Always add the 4th point, which is that *the document must be read as a whole.*

Case

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.

Rules adopted by the intentionalists

- the mischief rule
- the literal rule, and
- the golden rule

the mischief rule

this rule was developed in the **Heydon's case in 1584**. The Heydon's rule require interpreters;

1. to know the common law position at the time an Act was passed.
2. The mischief the common law failed to address as a result of which it became necessary to enact an Act to replace it. Ie, the mischief to be cured.
3. The judge shall construe the Act to cure or suppress the mischief in the common law and advance the remedy for which the Act was passed to advance or promote.

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[3].

Intentionalism introduced the emendation or modification of words into interpretation of law. Lord Denning in his dissenting opinion in the case of **Magor and St. Mellons Rural District Council v Newport Corporation** at the Court of Appeal held thus:

" *we sit here to find out the intention of parliament.. and carry it out and we do this by filling the gaps and making sense of the enactment than by opening it up to destruction analysis"*

Judges fill in the gaps largely by the emendation of the text. Where there is the need to strike out, add, interpolate or modify some words, the judge would do so after his or her voyage to find the intention of the legislature comes to an end. However, the dissenting

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

opinion of Lord Denning was described by Lord Simonds as the naked usurpation of legislative power by the judiciary under the guise of interpretation.

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.

The extent to which the courts can fill the gaps in the law still remains unresolved.

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.

Intentionalists take into consideration factors such as the legislative history, preamble, long title, marginal notes and the mischief the law seeks to cure.

Case;

The Supreme Court in the case of **Republic v High Court, Koforidua; EREDEC [2003/04]** quoted with approval the intentionalists approach in the ancient Heydon's case, where the court held, thus;

For sure and true interpretation of all statutes in general, 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, and
4. The true reason for the remedy;

And the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo[for private benefit or convenience]*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.[for the public good].*

In the case of **Osei v Ghanaian Australian Goldfield Ltd [2003-2004] 1 SCGLR 69**, the Supreme Court explained the basic interpretative rule of construction of deeds and documents as follows :

"The basic rule of construction of documents are that the interpretation or construction must be nearly as close to the mind and intention of the maker as is possible; and the intention must be ascertained from the documents as a whole, with the words used being given their plain and natural meaning and within the context in which they are used".

The decision in **Biney v Biney [1974]** reflects the true intentionalists approach to interpretation. It sets up three considerations which the interpreter must always look for. The corut in ***Biney v Biney*** said :

The deed of settlement, exhibit A, had to be interpret in the light of the basic rules of construction, namely :

(i) the construction must be as near to the mind and intention of the author as the law would permit;
(ii) the intention must be gathered from the written expression of the author's intention; and
(iii) local authorities had firmly established that in pre-1974 conveyancing, technical words of limitation in a document relied on as constituting a transaction known and recognized by the English law must have their strict legal effect according to the English pre-1881 conveyancing law.

Statutory interpretation by Intentionalists

1. read the law as a whole
2. ascertain the intention of the law maker from the written expression of the law.
3. Words be given their ordinary meaning. i.e. give technical words their technical or special meaning.
4. 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.
5. Intentionalists support interpretation of documents with presumptions and canons.

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. The purposive approach is an approach on its own and does not rely on any of the approaches.

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***.

NB: The background is what the internationalists refer to as the mischief.

CASES

1. **Appiah v Biani [1991] …. Lutterodt J** (as she then was) criticized the literalists and invited them to embrace a more benevolent approach where literal or grammatical approach to interpretation would defeat the purpose of the legislature. She adopted the purposive interpretation to define a house to include uncompleted building, otherwise the literal approach would have rendered the law an absurdity. The HC read the statute as a whole including its memorandum to ascertain the purpose of the law.

Purposive approach and its effect on constitutional interpretation.

2. **Republic v High Court; General jurisdiction, Accra, ex parte Zanetor Rawlings [2015/16] SCGLR …..**the disputants placed rival meanings on article 94(1) of the Constitution but the HC judge rejected the invitation to make reference to the Supreme Court and held that the provision was clear and there was no ambiguity in it to make reference mandatory**.** ***The SC in a majority of 4-1 held thus;***

   "it has to be realized that the initial stance of the SC exemplified by cases such as **Republic v Maikankan [1971**], **R v Special Tribunal; ex parte Akosah [1980]**, **Aduamoa II v Adu Twum II [2000] SCGLR** 165 which laid emphasis on the plain meaning of a statute preceded the new era of constitutional interpretation based on the now dominant principle of purposive construction of statutes, particularly the constitution. Indeed, beginning with *Republic v High Court (Fast Track Division) Accra; Ex parte Electoral Commission (Mettle-Nunoo & Others Interested Parties)* [2005-2006] SCGLR 514 ***the tide against ready referral for interpretation began to change.*** In that case apparently very clear and unambiguous constitutional provisions were held to be referable ambiguities. Thus, in *Republic v High Court (Fast Track Division) Accra; Ex parte Commission on Human and Administrative Justice (Richard Anane Interested Party)* 2007-2008) SCGLR 213 this Court held that the word "complaint" in article 218(a) of the Constitution was ambiguous and was referred to this 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***. This trend of thought has been followed in *Republic v. High Court*

(Commercial Division, Accra, Ex parte Attorney-General Balkan Energy Ghana Ltd & Others Interested Parties) [2011]2 SCGLR 1183.

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.***

In fact, it now appears that the principle enunciated in **Maikankan's case is not iron cast**, else it will defeat the principle that the Constitution is a living organism capable of growth.

The purposive approach takes context into consideration to ascertain the purpose or the intention of the law maker***. The purposive approach to interpretation may be equated to Aharon Barak's subjective purpose***. 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.

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:
>
> (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 provides :

> The general rules for the construction or interpretation used by the Courts were formulated by the Judges and not enacted by Parliament. From the Mischief Rule enunciated in *Heydon's Case* [(1584) 3 Co. Rep. 7a; 76 E.R. 637] to the Literal Rules enunciated in the *Sussex Peerage Case* [(1844) II. Co. & F 85; 8 E.R. 1034], to the Golden Rule enunciated in *Grey v Pearson* [(1857) 6 H.L.e. 61; 10 ER. 1216]

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. But the Courts will resort to the debates only where;

(a) the legislation is ambiguous or obscure or the literal meaning would lead to absurdity;
(b) the material relied on consists of a statement or statements made by the Minister in charge of the Bill or other promoter of the Bill which led to the enactment of the legislation, together if necessary, with such other parliamentary material as is necessary to understand the statements and their effect;
(c) the statements of the Minister or other promoter of the Bill are clear."

Literalism

The literalists position of interpretation 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. Their guide is simple – words are to be given their ordinary meaning and technical words should be given their technical meaning.

This refers to what is obvious on its face. In other words, what is written should be given effect to. Whether it is rational or not is not relevant. Lord Reid was a straight jacket and a mechanistic judge. Lord Denning on the other hand was more of a judge who always sought to look out for the intention of parliament. The foundation of textualism is that parliament does not make mistake. Therefore, whatever parliament has enacted must be applied. In the UK for instance, parliament is supreme and therefore whatever is enacted must be applied.

Cases;

1. **Republic v High Court Accra, ex parte CHRAJ (Interested party Richard Anane),** 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.

The courts in Ghana have settled that when construing a provision in the Constitution where the subject matter is about power, it should be given narrow or strict interpretation. The law is that any provision which purports to confer power must be interpreted as strictly as possible, consistent with the words, and with the presumption not being construed in favour of the power in the case of a doubt. See Richard Anane's case.

It is not always the case that constitutional provisions should be interpreted or construed benevolently or liberally. The ratio in the case of **Yebbi v Avalifo[1999/2000] SCGLR**, is that in compelling cases, words in national constitutions should be construed strictly and the general rule that national constitutions should be benevolently construed should not apply.

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."*

The position was followed by Taylor J (as he then was) in the case of **Tinieye v The Republic.** He held that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from the notions which might be entertained by the Court as to what was just and convenient.

In the case of **Whitely v Chapell**, the court held that *where the words of an Act are not clear they must be followed even though they lead to a manifest absurdity*."

The defects in literal interpretation were expressed in the case of **Pepper v Hart by Lord Reid** as follows: *"to apply the words literally is to defeat the obvious intent of the legislature. To achieve the intent and produce a reasonable result, we must do some violence to the words."*

Pragmatism

Practical adjudication.

Pragmatic judges interpret constitutions without being bound by the text or precedent. According to Wilkinson III, pragmatic judges focus on the future. They base their judicial decisions on the effects the decisions are likely to have, rather than on the language of a statute or of a case, or more generally on a pre-existing rule. They rather consider overall consequences, not only those fallen on the litigants in a particular case. They do not feel duty bound to follow text, precedent or tradition. Pragmatism provides for flexible adjudication, reminds judges of their limitations, and encourages judicial candor.

According to Wilkinson II, Judge Posner acknowledges that it is difficult to decide on how to balance privacy rights and the state's interest in protecting life and his approach to pragmatic balancing is reflected in his discussion in **Roe v Wade 410 US 113** (1973) where he said :

There may be no objective method of valuing the competing interests. But analysis can be made more manageable by pragmatically recasting the question as not which of the competing interests is more valuable but what are the consequences for each interest of deciding the case one way rather than the other. If one outcome involves a much smaller sacrifice of one of the competing interests, then unless the two are of very different value that outcome will probably have the better overall consequences.

That was the approach the Supreme Court took in Roe v Wade , in balancing the individual's privacy rights against the state's interest in protecting foetal life and women's health, though the approach was executed ineptly.

In the case of **Roe v Wade,** the US Supreme Court's decision on abortion was determined based on the competing interests in the matter. The Court considered the right to privacy under the 14th Amendment which covered a woman's decision to abort or terminate

pregnancy against the protection of pre-natal life and the protection of women's health. The Court considered the competing interests in the case and held that the State's interest became stronger over the course of a pregnancy than the right to have an abortion. The balancing test by the court tied the state to regulate abortion to the trimester of pregnancy.

Where there are two conflicting interests, the court will resolve the issue in favour of the one with a higher interest. Where the competing interest are of different values, the one whose outcome would have better consequences should influence the decision of the court.

Political process theory

They hold the view that the court must be the mouthpiece of the marginalized and the vulnerable. They believe that equality is equity.

The theory is mainly practiced in South Africa, Norway and Philippines and now it is creeping into Ghana. What they are saying is that judges should decide or influence political decisions through interpretations. They have the opinion that the world is unfair or imbalanced. Others will benefit and others will not benefit and therefore it is the duty of the court to stand up and fight for those who are not protected. In Ghana for instance, we have 275 parliamentarians and less than 20 are women. And so, if a law on women is going to be passed the number of women available to fight for the interests of women will be few and therefore the fight may not succeed. Same applies to children. There are no children in parliament and therefore if a law on children is being passed same may not adequately represent their interests. The courts then will have to intervene and fight for the vulnerable and marginalized. They believe that equality is equity. Thus, the theory is grounded on the jurisprudence of equality. Under this approach, courts are supposed to intervene when legislators inflict inequality on the target groups.

MENSAH VRS MENSAH [2012] SCGLR 391: The Court used a common-sense approach, the jurisprudence of equity and a reliance on fundamental human rights to ignore the text in the Matrimonial Causes, act, Act. 367 to protect the interest of married women in property acquisition during subsistence of marriage.

The Court in holdings 2 and 4 held thus:

> 2. Common sense and principles of general fundamental human rights would require that a person who has been married to another, and had performed and keeping dirty laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner had a free hand to engage in economic activities must not be discriminated against in

the distribution of properties acquired during the marriage when the marriage was dissolved. The reason was that the acquisition of the properties had been facilitated by the massive assistance that the one spouse had derived from the other. In the instant case the wife's contribution even as a housewife in performing the household chores, maintain the house and creating a congenial atmosphere for the husband to create the economic empire he had built, were enough to earn the wife a portion of the property as if she had made substantial contribution to the acquisition of the matrimonial properties and was therefore entitled to the equal share.

4. The court would integrate the principle of "Jurisprudence of Equality" which had been defined as the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women into our rules of interpretation, such meaning would be given to the contents of the 1992 Constitution, especially on the devolution of property to spouses after divorce. Consequently, it was unconstitutional for the courts in Ghana to discriminate against women in particular, whenever issues pertaining to distribution of property acquired during marriage came up during divorce. There should in all appropriate cases be sharing of property on equality basis.

See memorandum 4 of interpretation Act: the general rules for construction are formulated by judges and not enacted by parliament.

The Political Process Theory approach was summed up by the Supreme Court in the case of ***Quartson v Quartson*** **[2012] 2 SCGLR 1077.** The Court held, *inter alia,* that when it comes to the distribution of properties acquired during subsistence of marriage, it would apply the principle, "equality is equity". The Court at page 1089 stated that the inaction of Parliament to enact laws to regulate the distribution of properties jointly acquired during marriage in accordance with article 22(2) of the 1992 Constitution of Ghana should not prevent the Court from doing justice. The Court held that:

> *"In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint properties. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament. We do not think that this court is usurping the role of Parliament, especially in cases where the inaction of Parliament results in the denial of justice and delays in the realization of constitutional rights. AS the appellant (petitioner) put it in ground (v) of her grounds of appeal, the appellant should not be made to bear the brunt of Parliament's failure to pass a law regulate distribution of joint matrimonial property."*

MODERN PURPOSIVE APPROACH

The modern purposive approach to interpretation is an offshoot of the purposive approach to interpretation. The purposive approach requires that interpreters should take into account time and circumstances when interpreting. They are of the view that meanings change over time and circumstance. The MOPA embraces the purposive approach but suggests a formula unlike the purposive approach to ascertain the purpose of the enactment. There are several proponents but two will be the subject of this discussion: Aharon Barak and Bennion. The fundamental principle underlying the purposive approach is to look for the goal the text seeks to achieve.

The factors to be considered in purposive interpretation are:

1. The text should be able to communicate and should have a meaning. Language is not static and its distinct meaning on the day it was created and the day of interpretation must be known. Meanings change with context and any interpretation which fails to take context into consideration will fail to convey the authorial intent.
2. Interpretation shall take into consideration the ordinary meaning of the words as well as the context in which the words are used. The other factors to be considered are the subject matter, the scope, the purpose, the circumstances in which the text was created, and to some extent, the background. The interpreter is cautioned not to concentrate on language to the exclusion of the context. The combination of the language, context, subject matter, scope, purpose and to some extent the background help to produce the true purpose of legislation and of al written instruments.
3. The judge must consider the explicit and implicit meaning; the implied meaning and the dictionary meaning together to ascertain the authorial intent

AHARON BARAK's APPROACH TO MOPA

Aharon Barak's approach is known as Aharon Barak's **'three tier approach /three-pronged approach.** It's a tier or prong and not a step because it cannot be separated unlike the intentionalists who resort to steps-thus, first apply the ordinary meaning and if it makes sense, you leave it there, however if not you proceed to the secondary meaning. For Barak's three trier approach however, all three must be satisfied.

The three tier/pronged approach is a constituent of:

- Subjective purpose;
- Objective purpose and
- Ultimate purpose (this is constant)

The subjective and objective are variables and hence an interpreter may decide to commence with any of them whether subjective or objective. However, the 'ultimate' is always the last or constant and can only be turned to after the subjective and objective have been fulfilled.

DATE-BAH JSC in Agyei-Twum v AG and Bright Akwetey

subjective and objective. The **subjective purpose** is what the framers of the Constitution actually intended. The **objective purpose**, on the other hand, is what the provision should be seeking to achieve, given the general purposes of the Constitution and the core values of the legal system and of the Constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provision in question.

SUBJECTIVE PURPOSE

The subjective purpose is the actual intent of the author of the text at the time it was created and not its meaning at the time of interpretation. The question then becomes what was the **context** in which the **text** was created? Therefore, in interpreting, the interpreter must take into account the context in which the text was created. Eg. When a text was created during military regimes, it will be realized that most of them will not survive during democratic eras. However the task of the interpreter is to construe and give meaning to them. So as provided for in Article 11(6) of the 1992 Constitution: "*The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution."*

As has already been noted supra, we interpret because words grow, or change, hence in interpreting, the interpreter has to consider the meaning of the word as at the time the word was created. A strict interpretation of the text without reference to the context gives a misleading legal meaning. It is the context that determines the legal meaning to be given to the text at any point in time. As stated by Holmes J in the case of ***Towne and Eisner,*** 245, U.S. 418, 425; 38 S. Ct. 158, 159 (1918):

> *"A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."*

SOURCES OF SUBJECTIVE PURPOSE

There are two sources of the subjective purpose. They are :

1. The Internal or Textual and

2. External or Contextual sources.

The Internal purpose is the intention expressed in the text by the author. It is the most reliable source as the words were carefully chosen by the author to reflect his intention. The author who has an intention reduces it into writing while the judge looks at the text to look for the intention expressed by the author.

The work of the Judge is the reverse of the author. The presumption is that the words expressed by the author are a fair representation of the author's intent but the presumption is rebuttable. Where there is a clear mistake in the drafting and would render the meaning unworkable, impracticable or incongruous, the Judge has to look for the real intention of the author beyond the text.

The second source of subjective purpose is external to the text. The factors which the Judge take into consideration are the ***context and the circumstances*** under which the text was created or surrounding the creation of the text. Was it under the military regime? The text alone is inadequate to provide the intention of the author without looking at the context in which the text was created. An author may write '*get up'* but without the context, the authorial intent may not be ascertained. You consider the circumstances that influenced the law. The factors that influenced the law are the external factors.

The external source and internal source jointly provide the subjective intent of the author.

In private documents, the interpreter looks for the data that will provide information about the intent of the parties. The circumstances include the factors that culminated in the making of, for example, the will or the contract. The interpreter looks for the circumstances before, during and after the execution of the document.

In the case of statutes, the interpreter looks for the circumstances leading to the making of the law. These include the intention of the originator of the Bill, Parliamentary debates, Parliamentary Committee's report/discussions, newspaper publications on the law, articles written by respectable personalities before, during or after the enactment of the law and proposal for amendments or people's perception of the law. Other factors which are considered are foreign law which influenced the enactment as well as textbooks and articles on the subject matter. For example, the High Court (Civil Procedure) Rules C.I. 47 was largely influenced by the English Civil Procedure and the interpreter would not effectively understand C.I. 47 without making reference to the English provision. The Interpretation Act, Act 792 was largely influenced by decisions from USA, in particular, the U.S. state of Atlanta, New Zealand, and England and Wales.

In the case of a Constitution, the history about the founders of the Constitution, Constitutional Committee's debates and reports, and reports on referendum are referred to.

Judges rely on both the internal and external sources to arrive at the intention of the author. In some cases, the internal source may not reveal the intention of the author due to poor drafting or the use of inappropriate words. In other cases, the external source may not be credible or it may be impossible to ascertain. The proper mode to ascertain the authorial intent is to marry the internal and the external sources.

The text is read as a whole to assist the Judge to know the purpose of the law to properly ascertain the intention of the author. Aharon Barak quoted the admonition of Viscount Simmons in **AG v Prince Ernest Augustus of Hanover** that:

> *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*

The authorial subjective purpose cannot be ascertained where the document or the statute is not considered as a whole. Even though the word to be interpreted may be limited to only a phrase or a sentence, the interpreter is required to consider the document as a whole to get the true authorial intent.

A Judge should not make a reference to any word whether it is clear or ambiguous without considering the entire law or the document as a whole. Subjective meaning can only be discovered after the document has been read as a whole.

As Ahron Barak states in his book,

Judges must study every provision of the text; they must deal with the text in its entirety. A text is not a federation (or confederation) of provisions, but rather a unified text and must be interpreted as a whole. As the interpretative process progresses, Judges learn the internal; relationships among the various provisions the primary provisions and the secondary provisions; the valid provisions and the invalid provisions; the provisions that add to the meaning of the text and the superfluous provisions. They draw these conclusions at the end of the interpretative process. The starting point is an integrative text; the entirety of whose provisions provide information about its subjective purpose …Judges should begin the interpretative process by reference to the text as a whole, through an attempt to uncover its subjective purpose.

THE OBJECTIVE PURPOSE

The meaning at eth time the law is interpreted. We want to know the meaning as at now. The text has not changed but the meaning may have changed due to time and circumstance. Aharon Barak does not support constitutional amendments because he believes that a constitution should be interpreted in the light of the prevailing circumstances to meet the needs of the people. It is the test of the hypothetical reasonable man. The author is presumed to be a hypothetical reasonable man. The

objective purpose is the intent of a hypothetical reasonable man at the time of the interpretation. In construing or interpreting a constitution of a country, the interpreter is to take into consideration the social developments, economic, political and cultural values of that country.

This interpretation takes into consideration the intent of the system. **This is the intent of the system at the time of interpretation and not the time the text was created.** That is, the text must be construed with the spectacle of today. So while the subjective looks at the construction as at the time the text was created, the objective looks at the construction today. According to Aharon Barak, words grow and must therefore be seen as a **living tree.**

Sources of Objective Purpose

Objective purpose is ascertained from both internal and external sources.

Internal Source:

The internal source is the text and it is made up of written and unwritten words. The text is made up of implicit and explicit meaning. Aharon Barack explaining the internal source says :

> Judges learn objective purpose from the text itself; taking into account both explicit and implicit language…the text plays an important role in Objective Purpose not by setting the limits of interpretation but also by determining the content of the text's purpose. Judges use the text to learn about the values, objectives, interests, policy designs and functions that a text of that kind is designed to actualize in a democracy.

This quotation above sums up the importance of the text. The text limits the interpreter to the Objective Purpose (s) that may come from it. The intent of the system is also obtained from the text and does not exist in vacuum.

External Source

The external source includes similar texts or related texts. Where similar words or identical words were used in another statute or a will or a contract, it may help to understand the text well. Where words in a statute are repeated in a similar statute the text is said to be in *pari materia.* In the case of ***Afendza III v Tenga V*** [2005-2006] SCGLR 414, the Supreme Court held that it is trite law that when generally speaking, the same or similar words in the statute have received judicial construction by a superior court and repeated in a subsequent statute those words are in *pari materia.* Aharon Barak refers to the external source as **'nearby texts'** or **'natural environment'** and according to him it includes, '*the immediate normative layout in which the text in question*

operates'. Where it is about a will, another will of the deceased may be brought for comparison. In the case of statutes, a related statute or a foreign statute which largely influenced the passage of the law may be consulted. For example, where there is an issue as to a meaning to be given to a provision or a word in the Interpretation Act, reference may be made to US, New Zealand and Australian laws as they influenced the passage of the Act. The external source requires Judges to read every will, contract, statute or constitution as a whole as the words do not stand in isolation but are dependent on each of other for their meanings.

Professor Justice Kludze in the case of ***Asare v Attorney General*** [2003-2004] SCGLR 823 in discussing law as a good source for interpretation stated as follows:

> An enactment including a Constitution may itself be the best source for the interstation of otherwise obscure words and expressions. Where the enactment gives a meaning to a word or phrase in another section, we may refer to that section to construe the word or phrase when it occurs again in the same context elsewhere in the enactment.

The ultimate purpose

The Ultimate Purpose is formulated from the subjective and objective purposes. The Judges remind themselves of the presumption that the ultimate purpose of the text is to ascertain or realize the intent of the author. In most cases, the subjective and the objective purposes disclose the same or similar purpose. Where there is conflict between the two purposes, presumptions are used to resolve it or to arrive at the ultimate purpose. Aharon Barak requires that, in the event of conflict, you go back to the subjective purpose to ascertain the things you conspired which you ought not and those you should have considered but failed to consider to determine whether you were right or wrong. **The circuitous processes go on until the ultimate purpose is realized.** However, if after the circuitous process, there still remains a conflict between the subjective and objective purposes, According to Aharon Barak, the objective purpose must be taken to connote the ultimate purpose.

CASES:

Asare v Attorney General [2003-2004] SCGLR 823 , the Supreme Court per Dr. Date-Bah JSC distinguished between subjective purpose and objective purpose at page 834 and 844 as follows:

> The subjective purpose of a constitution or statute is the actual intent that the authors of it, namely the framers of the constitution or the legislature, respectively,

had at the time of the making of the constitution or the statute. On the other hand, the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values, etc of the society for which he is making law. This objective purpose will thus be interpreted to include the realization, through the given legal text, of the fundamental or core values of the legal system…

I should mention that although I have expressed the conflicting interpretations of the plaintiff and the defendant as representing a tension between the subjective and objective purposes of articles 60(11), this is not necessarily how the plaintiff himself sees it. Rather, this represents my interpretation of the plaintiff case. Indeed, the plaintiff himself, in one part of his argument, purports to frame his contention on the basis of a 'literalist' interpretation of the provision under construction…

My conclusion is that the purposive interpretation to be given to article 60(11) is that where both the President and the Vice –President are absent from Ghana, they are to be regarded as 'unable to perform the function of the President' and thus the Speaker is obliged to perform those functions.

In **Ex parte Yalley** [2007-08] 1 SCGLR 512**,** Georgina Wood CJ opined as follows:

> Similarly, I made reference to the two-tier approach to interpretation, commended by my brother Dr. Justice Date-Bah, in the Asare case. In bringing out the difference between two approaches, namely, the objective based and subjective based purpose, a theory espoused by the President of the Supreme Court of Israel, Justice Aharon Barak, which undoubtedly is a helpful guide to constitutional or statutory interpretation, my respected brother observed :
>
> "The subjective purpose of a constitution or statute is the actual intent that the authors of it, namely, the framers of the constitution, or the legislature had at the time of making the constitution or the statute. On the other hand, the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values of the legal system for which he is making the law."
>
> I fully endorse these views. It does appear to me that where the purposive and literalist approach, advocated by Bennion, which in my view is synonymous with the subjective purpose theory of Justice Barak, advances the legislative intent and does not lead to any ambiguities or injustice, then

it is not proper to apply the "purposive and strained" meaning or "objective purpose" rule.

By way of emphasis, in the construction of statutes, if the subjective purpose would bring out the legislative intent, leaving no ambiguities, absurdities or injustices that the purely literalist approach would result in; the objective purposive approach does not come into play. In other words, the objective purpose, which does not constitute the actual intent of the authors but rather the intents of a hypothetical reasonable man, should only be deployed if upon application of the subjective purposive rule, the statute is still clouded in absurdity, irrationality, mystery or will prove unworkable. The objective purpose is a useful guide, where with the best of efforts, namely reading the statute as a whole and conscientiously applying all the known guides to interpretation, the meaning of the statute still remains unclear, or has elements or even traces of the absurd, the irrational, the unjust or the like.

Ghana Lotto Operators Association & Ors. v National Lottery Authority [2008] SCGLR 1088 per date Bah JSC @ pp. 1103-4 :

> If one adopts an originalist approach (to borrow a term from United Stats constitutional law), that is, if one looks no further than the framers' intention, one could make a case for the non-justiciability of the principles. This case is however weakened by the fact that the language proposed by the framers (in this case, the Committee of Experts) to carry out their intent was not adopted by the Consultative Assembly. Accordingly, the inference may legitimately be drawn that the Consultative Assembly was of a different view. Moreover, reliance on original intent is a method which does not necessarily produce the right interpretative results, as the quotation from the *Theophenous* case (*supra)* demonstrates. While the 1992 Constitution has not yet endured even two decades, it is nonetheless not safe to rely on this mode of interpretation exclusively or even predominantly. A *more modern approach would be to see the document as a living organism. As the problems of the nation change, so too must the interpretations of the Constitution by the judiciary. Interpreting the Constitution as a living organism implies that sometimes there may be a departure from the* ***subjective intention*** *of the framers of it. The* ***objective purpose*** *of the Constitution may require an interpretation different from that of the original farmers of it.* I think that the issue of the enforceability of Chapter 6 of the Constitution probably illustrates the divergence between subjective and objective purpose, if one is inclined to the conclusion that the framers' intent was against justiciability."

This dictum was applied in **Ransford France v EC**

Church of Holy Trinity v United States 143 US 457 [1892]:

Facts : the Act of 26th February, 1885 was passed to "*prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labour in the United States, its territories and the District of Columbia."* The plaintiff, a church incorporated under the laws of the State of New York entered into a contract with one Pastor Warren, a foreigner as a rector and pastor. Warren was told that he could not perform his priestly functions in the United States of America because he was forbidden by the 26the February, 1885 Act which forbade the importation and migration of foreigners not resident in U.S.A. to provide labour. The Court of Appeal held that the contract was within the prohibition of the statute. The Church appealed to 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 interpreted "labour" to exclude pastors. It held among others that:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of its makers…This is not the substitution of the will of the Judge for that of the legislators, for frequently words of general meaning are used on a statute, words broad enough to include an act in question and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment or the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislator, intended to include a particular act.

The Court in its decision to ascertain the purpose of the law appealed to history, the evil it was intended to cure and the long title. The Court said:

> We find, therefore that the title of the Act, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house, all concur in affirming that the intent of congress was simply to stay the influx of this cheap, unskilled labour.

The Court took into consideration ***the text***, ***the long title, context and subjective purpose*** to arrive at its decision. In discussing the objective purpose, the Court used a general word to exclude some people even though, ordinarily, they should have fallen within the generic term. The court further went ahead to say that :

> The common sense of man approves that judgement mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of I Edw. II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is one fire…

The Court advised that interpreters should look for the object or purpose of the law and give an interpretation that would help to achieve its purpose. In line with this, the Court said that:

> 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.

Justice Stephen Breyer discussed the importance of values in constitutional interpretation. He impliedly made reference to subjective and objective purpose in constitutional interpretation. At page 162 he stated as follows :

> Values are the constitutional analogue of statutory purposes. When faced with a difficult question of constitutional law, Judges initially examine the constitutional provision as they would other texts using the tools of language, history, tradition, precedent, purposes and consequences. The last two tools; purposes and consequences, may be particularly important when the constitution is at issue but when referring to the constitution's protection of individual rights, I would substitute the 'term values' for it better describes the deep , enduring and value-laden nature of the constitution's protections. Courts must consider how those values, which themselves change little over time, apply to circumstances that today may differ dramatically from those two hundred years ago.

BENNION'S MODERN VERSION OF PURPOSIVE APPROACH

Aside the MOPA version of Purposive Approach as postulated by Aharon Barak; an expert in constitutional law, interpretation, and legislation, Francis Bennion also has his own version of the Purposive Approach. According to Bennion, the foundation of Purposive interpretation is the Mischief Rule enunciated in the Heydon's Case. The Mischief rule requires Judges to go to the common law to find the purpose for which the law was enacted in order to do away with the common law position. In cases where the existing statute repealed an earlier one, the interpreter shall inquire into the basis and the circumstances which gave birth to the repealed statute so that she would know the mischief the statute was enacted to cure.

The Bennion's approach to interpretation sets up two conditions of interpretation of statutory and non-statutory documents. They are;

1. **The purposive – literal construction**

2. **Purposive – strained construction**

The purposive – literal construction

This principle provides that you give words their ordinary meaning having in mind the purpose of the law or the purpose for which the law was made. The rationale underlying his approach is to look for the legislative purpose or the purpose of the deed, document or statute. The first principle is that words should be given their ordinary, plain or literal meaning where the literal meaning is in accordance with the legislative purpose. This approach is referred to as the **purposive-and-literal construction.** That is, the literal meaning of the words must be first resorted to but in a purposeful manner.

1. **Purposive – strained construction**

The second principle is that strained meaning should be given to an enactment or document where the literal meaning is not in accordance with legislative purpose. Therefore, where you consider the literal meaning purposively but it leads to an absurdity, then you apply a strained meaning that will bring out the legislative purpose.

Under this rule, the interpreter must strain himself to get the meaning that satisfies the purpose. This must be done within the context.

This two-step approach should not be confused with the **golden rule** which uses the ordinary meaning and secondary meaning. That is an intentionalists approach unlike the purposive approach for which the Bennion's two step approach focuses.

Dr. Date-Bah JSC in the case of ***Asare v Attorney-General supra,*** at page 836 sums up Bennion's Purposive Interpretation in the following words:

> The leading English textbook on statutory interpretation, Bennion, *Statutory Interpretation* (4th ed 2002) at page 810, regards purposive interpretation as a modern version of what used to be called the mischief rule. The author expresses the nature of purposive construction thus :
>
> "A purposive construction of an enactment is one which gives effect to the legislative purpose by ;
>
> a. Following the literal meaning if in accordance with the legislative purpose (in this Code called purposive-and-literal construction),
> b. Applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in this Code called a purposive-and-strained construction).

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.

LIVING CONSTITUTIONALISM

- Limited to interpretation of the Constitution.

Attributes of a Constitution

1. The constitution is the supreme law
2. It has its letter and spirit. The spirit is the political, economic, cultural, 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. 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.

AIDS TO INTERPRETATION

The "aids to interpretation" are basically discretionary guides to the determination of the subjective, objective and/or ultimate purpose(s) and consequently the legal meaning of the text of a document, statute or Constitution.

The aids to interpretation are made up of all the tools which are used by the interpreters in construing statutes and documents. The interpreter's tools kit contains ***internal and external aids***, ***linguistic canons of construction, presumptions***, and ***special binding rules*** which are used to interpret the text brought before the interpreter.

No text is clear, simple or complex until the interpreter attempts to interpret it with all the tools available to him or her.

- We use either parts of the document to interpret, or
- Linguistic canons and latin maxims.

The aids are often described as "mere guides" – servants not masters – which are in each case to be weighed and valued against other guides in order to arrive at a meaning most consistent with the purpose (s) at the core of the text.

Lord Reid remarked on the status of the aids in **Maunsell v Olins [1975]** as follows;

> "then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently, one rule points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any rule."

In practice, the aids to interpretation are often broadly divided into two(2) categories, namely:

1. **Internal aids**, and – i.e. the parts of the document, statute or constitution itself as well as numerous rules or principles derived therefrom or relating thereto.
2. **External aids.** i.e aids other than the internal aids, such as rules or principles that derive from or relate to the use of information or materials from outside the text of the document, statute or Constitution itself.

3. DEEDS AND DOCUMENTS – (NON-STATUTORY DOCUMENTS)

Parts of Normal Agreements

- Nature of agreement
- Names of parties and their addresses
- Dates
- Recitals (The WHEREAS Clauses) – the background to the agreement
- Covenants/Obligations – express covenants
- Consideration/receipt clause
- Parcel
- Schedule
- Attestation
- Jurat

Parts of a traditional deed of conveyance.

1. **Non-operative part of deed of conveyance –**
    - Commencement
    - Date
    - Parties
    - Recitals

2. **Operative parts of deed of conveyance –**
    - Consideration and receipt clause
    - Vendors covenants and undertakings
    - Purchaser's covenant
    - Words of conveyance
    - Parcel
    - Habendum
    - Testimonium
    - Schedules and attachments
    - attestation

The essence of the various parts of an Agreement.

- **Commencement –** this is the very beginning of the conveyance and often indicates the nature of the transaction covered by the document by an expression such as "THIS LEASE…. THIS ASSIGNMENT…"
- **Parties** – to know the persons involved in the transaction and their respective capacities. For example, when interpreting a document that has a church as a party, you have to refer to either the Trustees incorporated Act or the Companies Act, 2019 (Act 992). Who has capacity to enter into an agreement on behalf of a church? It is the Board of trustees, under the Trustees Incorporated Act, but if registered under the companies Act, then you may use the church's corporate name to enter into the agreement.

  NB. Churches are not required to be registered but the Board of Trustees must be registered to hold all landed properties of eth church in trust.

- **Address** – for service
- **Date** – to ascertain the commencement of rights and obligations.
- **Recitals** – tells you the background, the available interests in the land

- **Consideration** – the agreed price. Shall be in figures and words. When in conflict we rely on the words. You cannot take advantage of the implied covenants under S.22 and 23 of eth Conveyancing Act when you do not provide consideration.
- **Parcel** – provides vivid description of the land. Helps you to identity the land.
- **Schedule** – example is the site plan. Provides detail information on the items or referenced in the main agreement. Schedules are part of the agreement.
- **Attestation** – provides how a document should be executed. An agreement shall have at least one witness otherwise it shall be void.
- **Jurat –** where a party is an illiterate or blind. A competent person, who understands the language spoken by the illiterate and also can read and write the language in which the document is made, must read and explain the contents of the agreement to the illiterate or blind person. Above all, he must understand English. the competent person is supposed to provide a certificate i.e. name, address and certify that he read the content to the illiterate and that he understood the content before signing.

NB: there is nothing like partially blind or semi-illiterate when it comes to interpretation.

What is the effect of a failure to provide for a jurat.

- The illiterate protection Act, 1912
- Kwamin v Kuffuor [1914]
- Fori v Ayirebi [1966]

These old cases held that failure to provide a jurat rendered the document void.

- **Zebrama v Segbedzi [1991] 2 GLR 221**

The court of appeal departed from the old principles. Failure to provide a jurat should not render the document void but should be treated at the level of presumption. The maker will be required to adduce evidence to show that the illiterate understood the documents he signed.

- **In Re Kodie Stool: Adowaa v Osei [1998/99] SCGLR 23**

The Supreme Court held that failure to provide jurat should render the agreement void and no evidence will be admitted. The Court held thus;

> " the provisions of section 4 of the Illiterate Protection Ordinance cap 262 were mandatory and the matters required to be complied with must have appeared on the

face of the letter or document, without strict fulfillment of the section, any document such a exhibits A, B, C and D tendered by the plaintiff, allegedly executed by an illiterate person, had no probative value and was, to all intents and purposes, invalid."

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.

- **Antie & Adwuwaa v Ogbo [2005/2006] SCGLR 494 and Duodu & Ors v Adomako & Adomako [2012] SCGLR 198**

The current position is that failure to provide jurat shall not automatically render the agreement void. However, it is treated at the level of presumption.

NB: whenever you get a question on this topic, discuss the previous position of the law, the illiterate protection Act and then the current position.

Culled from Evidence Notes.

A more elaborate statement of the law was given in **Zabrama v Segbedzi [1191] 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."

Illiterate protection Ordinance, Cap 262

Where a document is executed by an illiterate, another major requirement is that the document should comply with the provisions of the Illiterate Protection Ordinance, Cap 262, Section 4 which provides that:

A person writing a letter or any other document for or at the request of an illiterate person, whether gratuitously or for a reward, shall

(a) clearly and correctly read over and explain the letter or document or cause it to be read over and explained to the illiterate person,

(b) cause the illiterate person to sign or make a mark at the foot of the letter or the other document or to touch the pen with which the mark is made at the foot of the letter or the other document,

(c) clearly write the full name and address of the writer on the letter or the other document as writer of it, and

(d) state on the letter or the other document the nature and amount of the reward charged or taken by the writer for writing the letter or the other document, and shall give a receipt for the reward and keep a counterfoil of the receipt to be produced at the request of any of the officers named in section 5.

In Re Bremansu; Akonu-Baffoe v Buaku & Vandyke

We find this reasoning also faulty. *While it is correct to state that the absence of a jurat does not in itself negate the validity of an otherwise valid Will, it must be pointed out that the law requires the proponents of such a will to lead evidence to show that even in the absence of a jurat, the testator fully understood the content of the Will*. Again, the case of **Zabrama v. Segbedzi**, supra is instructive. At page 234-235 Kpegah J.A. (as he then was) held:

"What then is the standard of proof on a party relying on a document to which an illiterate is a party? Does the presence of a declaration on the document that it had been read and interpreted to him and that he appeared to have understood before signing same satisfy this requirement of proof or there is need for some corroborative evidence outside the document? … As had been pointed out, in **Kwamin v. Kufuor (supra),** the issue whether an illiterate fully understood the contents of a document before making his mark or not "raises a question of fact, to be decided like other such questions upon

evidence." Being a question of fact, I think the presence or otherwise of an interpretation clause on a document is one of the factors a court should take into account in determining whether the document in question was fully understood by the illiterate. In my view, an interpretation clause is only an aid to the court in satisfying itself that the illiterate against whom the document is being used appreciated the contents before its execution. *The presence of an interpretation clause in a document is not, in my humble view, conclusive of that fact, neither* ***is it a sine qua non****. It should still be possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause he was not made fully aware of the contents of the document to which he made his mark. While its presence may lighten the burden of proof on its proponent, its absence on the other hand should not be fatal to his case either. It is still open to him to lead other credible evidence in proof that, actually, the document was clearly read and correctly interpreted to the illiterate who appreciated the contents before executing same*.

I hold this view because the standard of proof required in law to affect an illiterate person with the knowledge of complete appreciation of the contents and import of a document, written in a language he can neither read nor write, and to which he is a signatory, cannot be achieved by merely saying:

"Look at the document. There is an interpretation clause on it to the effect that it had been clearly read and interpreted to him and he understood it fully before executing it so he is bound by it." I will recommend that type of proof which settles for preponderance of evidence in a civil case. If a court after assessing all the available evidence is satisfied, upon the preponderance of evidence, that the document was read and interpreted to the illiterate person, and that he fully understood the contents before making his mark, then the burden of proof would have been discharged by the person relying on the document. This is because just as it is bad to hold an illiterate to a bargain he would otherwise not have entered into if fully appreciated, so also is it equally bad to permit a person to avoid a bargain properly and voluntarily 14 entered into by him under the guise of illiteracy.

In the case of **State v. Boahene** [1963] 2 G.L.R. 554 at 568, Sowah J. (as he then was) put it nicely:

"I agree 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; this is sound principle for the protection of an illiterate person against an unprincipled opponent, but this principle is not to be stretched to make illiteracy a cloak for fraud or criminal activities." I adopt these words as my own and **will only add that illiteracy is not a privilege but rather a misfortune**. **Cap. 262 is therefore a shield and not a sword**. Although there is no interpretation clause on exhibit A in this case, there is sufficient evidence on record to justify a finding of fact that

the document was read over and dutifully interpreted to the plaintiff before he made his mark. …" (e.s.).

4. AIDS TO INTERPRETATION – STATUTORY

Every statute has the **enacting or operative part** and the **non-enacting or the descriptive part**. The non-enacting parts include the ***long title, short title, preamble, heading, marginal notes and footnotes***.

The **enacting parts** include sections, schedules, provisos, saving provisions and interpretation sections.

- **Non-Enacting or Descriptive Part**

Long title/preamble -both have the same legal effect. At common law, long title and preamble 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.

Cases

1. **Deen v URISON [1807] 2NJL 212**
2. **CEPS v National Labour Commission [2009] SCGLR 530** – "*The SC per Jones Dotse JSC described the preamble as follows; in making use of the preamble to Act 526, I am aware of the fact that a preamble to an Act of Parliament is only a narrative of the facts that gave rise to the passage of the Act and will give a semblance of the main objectives of the Act. It thus gives a historical basis for 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".*

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;

i. Form part of an Act of parliament, and
ii. They are used as aids to explain the intent and object of the Statute

NB: Read Section 13 and the preamble to the Constitution, 1992.

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. the mischief or the old position. Normally a law comes with a memorandum where the change is very radical.

Punctuations (Statutory and non-statutory) – 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 – Headings including short-titles and *marginal notes* do not form part of the law. However, they have 2 legal effect;

1. For convenience of reference.
2. They may be used as aids to construction of enactments.

However, the Courts must be cautious when using **marginal notes** as an aid to interpretation. This point is clear from the SC case of **Republic (No.2) v National House of Chiefs [2010] SCGLR 134, Ex parte Akrofa Krukoko II (Enimil VI Interested party) (No.2)** where the Court discussed the marginal notes to Rule 3 of order 59 of the repealed HC (Civil procedure) Rules, LN 140 A. the marginal notes to Rule 3 of order 59 read as follows; "*time for applying for mandamus and certiorari in certain cases*". the body of the law mentioned only certiorari and provided that an application for certiorari before the HC was to be brought within six months after the delivery of the offending judgment, order or the Decree. 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.

NB: this a past question. Read section 15 of Act 792

Section 15 of Act 792 - Headings

15. Titles placed at the head or beginning of a subdivision' of an enactment and notes and references placed before the beginning of a provision are intended for convenience of reference only but may be as an aid to construction of the enactment.

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.

Footnotes/Endnotes – footnotes are not part of the law. It is extra information that is printed at the bottom of the page about the provision. They are for referencing and as aids to interpretation. The Statute revision Commission has used footnotes in the statutes of Ghana to disclose repealed and amended legislation or statutes.

Case- Kuenyehia and Ors v Archer and Ors, 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.

Enacting or operating part

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. There are several statutes which have schedules and these include the **Courts Act, 1993 (Act 459). Section 119 of Act 459** provides that the statutes of general application as specified in eth Second Schedule to the law form part of the Laws in Ghana.

Case – 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.*

Interpretation/definition sections (Applies to both statutory and non-statutory)– 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.**

At common law, definitions section forms part of the law, but where a strict application of the interpretation will render the text absurd, it is rejected.

Cases-

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.*

This legal position was quoted with approval by the Supreme Court in the case of ***Kumnipah II v Ayirebi*** **[1987-88] 1 GLR 265**. The decision in *Thompson's* case supra, seems to be in accordance with the principle that the presumption which is to the effect that same words in an enactment bear the same meaning is rebuttable. This common law position was restated by the Supreme Court in the case of ***BCM Ghana Ltd v Ashanti Goldfields Ltd*** [2005-2006] SCGLR 602. The Court per Atugua JSC held that;

> *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.*

In conclusion, where the same words appear in different parts of a document or a statute which has an interpretation section for that particular words; one of the words may have the meaning assigned to it in the Interpretation Section while the other word may have a different meaning. This occurs where the meaning in the Interpretation Section would render the purpose of the law absurd. In some cases, the same words appearing in different parts of the statute may have the same meaning as provided in the Interpretation Section.

Section 38 of Act 792 provides thus :

(1) Definitions or rules of interpretation contained in an enactment apply to the construction of the provisions of the enactment which contains those definitions or rules of interpretation.
(2) An interpretation section or provision contained in an enactment shall be read and construed as being applicable:
  (a) only if the contrary intention does not appear in the enactment, and
  (b) to the enactments relating to the same subject matter, unless a contrary intention appears in the enactment.

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.

Saving Clause –.

A saving clause is a provision in an enactment used to preserve rights, privileges and claims which could have been lost as a result of the repeal of or amendment of a statute. where a law is made to repeal or revoke an enactment, a saving clause is also provided to save some of the subsidiary legislations and acts done under the old enactment, such as ongoing trials or prosecutions, orders, regulations, rules etc.

Case- **British Airways v AG [1196/97] SCGLR 547** – held that unless a criminal provision is saved by the amending or the substitution legislation, neither an investigation nor a prosecution could be made under the repealed law as it will be in conflict with Article 19(11) of the Constitution.

BA was being prosecuted, in the course of the trial, the law was repealed without any saving clause. The SC held that the prosecution could not continue because there was now law under which the prosecution could proceed. The offence creating provision was repealed.

Sections – it is a distinct part or a division of a statute.it is part of the law and separates the divisions or distinct parts from one another. Even though statutes are read as a whole to ascertain their purpose, the sections enable the court to know the distinct part of the law which it is called upon to construe.

OTHER AIDS:

DESCRIPTIVE WORDS

They are not part of the law but are aids to interpretation. **Section 16 of Act 792** provides as follows :

> Words in an act descriptive of another enactment are intended for convenience of reference only and shall not be used as an aid to the construction of the enactment to which they refer.

The use of the conjunctive and Disjunctive –And/Or
See section 42 of Act 759. See also the case of *ASare v AG-Kludze*

"And" is conjunctive. If used in relation to a list, it means that all the listed requirements must be satisfied. "Or" however, is to separate. When "Or" is used, in law it implies that it creates a mutually exclusive condition that can rule out mixing and matching.

It should be noted however that sometimes, the courts do not apply these so strictly. So at times, "Or" may be applied conjunctively and "and" disjunctively. This approach is normally adopted by the courts if strictly construing them may lead to an absurdity.

The use of Definite and Indefinite Articles

When "the" is used, it is particular in its effect. So in dealing with a contact situation, "the law" thus becomes The Contracts Act, Act 25 and not any other law. "The" is thus a word of limitation.

"A" on the other hand is general and indefinite.

Shall/May

Section 42 of Act 792 , in an enactment, the expression "may" shall be construed as permissive and empowering and the expression "shall" shall be mandatory.

He/She: Both are gender neural and thus used interchangeably.

Singular/Plural: Under Law 111, "spouse" includes "spouses". "child" includes children. Simply put, singular includes plural.

LINGUISTIC CANONS OF INTERPRETATION

They started as linguistic canons but have been recognized by interpreters as some of the ***internal aids to construction***. They are servants to the judges and may be used where appropriate. In cases where the canons would not depict the purpose of the law or the document, the judges may decide not to use them.

1. Ejusdem Generis rule

The word "Genus" means similar or identical. Where specific words are followed by general words, the court must construe the generic word *ejusdem generis* to give effect to the purpose of the law except where it would defeat its purpose or intention. the general words should be construed in the light of the specific words or within the context of the specific words, in other words, the general words derive their meaning from the specific words. Example, **"A" informs "B" that "C" has in his house; a dog, cat, monkey and others.** The word "others" should be construed *ejusdem generis* to include domesticated and captive animals of **the same kind** or **class** as those specifically mentioned above. The general word used above shall be construed to exclude domesticated animals such as donkeys and horses. It will also exclude captive animals

such as lions and tigers as they are of a different class of animals even though they may fall within the definition of domesticated or captive animals.

NB: Always look whether the word "and" or "or" has been used.

"And" suggests similar genus – i.e. within the same class or Genus.

"Or" suggests you have exhausted the genus and introducing different genus. In this case you are veering from the genus, but they must relate.

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.

Case – GRINI v GRINI [1969] 5 Dominican LR 3rd Ed. 640 – in this case, a statute empowered the courts to make maintenance orders for persons who would have but for "**illness", disability, or other cause"** been capable of working. The father disputed that he could not be ordered under the law to maintain his daughter whose reason for not working was because she was attending school. He urged the court to interpret the words "*other cause"* ejusdem generis the preceding particular words *"illness" and "disability"*. The court declined the invitation and 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.

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".

2. Ut res Magis valeat Quam Pereat

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.

The principle is invoked in cases where the text is susceptible to more than one meaning and one of the would save the document while the other meaning would render it void. In such a case, the court is to choose the meaning that would save the document or law.

Case – Davies v AG and EC [2012] 2 SCGLR 1155 – the provisions of Article 47(6) of the 1992 Constitution was somewhat ambiguous. It was, however, well settled that where the language of a statute was ambiguous so as to admit of two constructions, the consequences of the alternative construction must be considered and that construction must not be adopted which would lead to manifest public mischief, or, great inconvenience, inconsistency, unreasonableness or absurdity, or to great harshness or injustice.

3. Expressio Unius Est Exclusio Alterius

The rule states that the mentioning of one excludes the one not mentioned. The maxim applies to the interpretation of statutes and other documents. 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.

A warning was sent to members of the legal fraternity to apply the maxim with caution in the case of **GHAPOHA v Isoufou [1993/94],** the SC per Aikins held about the unreliability of the maxim thus;

> "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 because 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 mention. In this case, Issoufou acquired (Purchased) one of the subsidiary companies of GHAPOHA. The advert specifically mentioned the sale of the assets without any mention of liabilities whatsoever. Issoufou urged on the court to construe the advert by applying the expression unius exclusion rule to exclude liabilities since the advert did not make any mention of it. The SC declined the invitation and held that under the Companies Act Assets and liabilities move together. Consequently, the word "assets" was construed to include "liabilities. The court refused to be bound by the maxim.

4. Noscitur A sociis

Birds of the same feather. 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.

Case – Republic v Minister for Interior; ex Parte Bombelli [1984-86] – the HC applied the noscitur a sociis rule in giving meaning to article 4(7)(a) of the 1979 Constitution, now article 11(1)(C) of the 1992 Constitution. Bombelli argued that the deportation order was not laid before parliament contrary to article 4(7)(a) of the 1979 Constitution therefore he should not be deported. The Court, applying the noscitur a sociis principle, however, held that the word "order" referred to orders in the form of rules or regulations and not commands. Consequently, the deportation order was not an order within the contemplation of article 4(7) of the 1979 Constitution.

EXTERNAL AIDS TO INTERPRETATION OF STATUTES

They are materials brought from outside the text to construe the statute, document, deed or national constitution. Some of the external aids are;

- Legislative or parliamentary history
- Directive principles of state policy
- Textbooks, and
- Other literally or academic publications
- Dictionaries
- Practice, and
- Common sense

The external aids are used in the interpretation of constitutions, statutes and non-statutory documents.

There are two kinds;

1. The latin maxis/canons, and
2. The others

Latin Maxims

The following aids to interpretation are limited to **non-statutory documents** such as leases, assignments, subleases, contracts and mortgages. They are;

1. Falsa demonstratio non nocet cum de corpore
2. Contra proferentum rule
3. Expressio eorum quae tacite insunt nihil operator, and
4. Expressum facit cessare tacitum

1. **Contra proferentum rule – (Non-statutory ONLY)**

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.

Case – John Lee & Son (grantharm) ltd v Railway Excutive [1949] 2 AER 581 it was found that

> "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'"

If a party has incorporated its own standard terms and conditions of trade into an agreement then in the event of ambiguity those terms and conditions will be construed ***contra proferentem*** that party. Where however the parties execute standard form contracts, the contra proferentem rule will only operate in respect of amendments or additions to the contract.

2. **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. For example, Kofi writes in his will…." I give my house in Accra to Ms. Adjei"…meanwhile the house is in Nsawam.

This maxim is normally used in relation to the description of persons such as beneficiaries and executors and properties devised in a will or properties disposed of *inter vivos.*

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.

- **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.

3. Expressio Eorum Quae Tacite Insunt Nihil Operatur

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.

In effect, the expression of those things which are implied is of no consequence.

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.

OTHER EXTERNAL AIDS TO INTERPRETATION OF STATUTES.

These are materials brought from outside the text to construe the statute, document, deed or national constitution. Some of the external aids are legislative or parliamentary history, directive principles of state policy, textbooks and other literally or academic publications, dictionaries, common sense and practice.

The external aids are used in the interpretation of constitutions, statutes and non-statutory documents. Parliamentary history and DPSP are usually referred to as external aids to interpretation of statutes in limited cases. Textbooks and other literary or academic publications, dictionaries, practice and common sense are usually referred to as *external aids of general application*.

Legislative or Parliamentary History.

Read Section 10 of Act 792. At common law, because of the literalist and internationalist approach, one was forbidden from using parliamentary history or debate.

Under section 19 the repealed interpretation Act 1960 (CA 4), debates of parliament were not admissible as aids to interpretation. The position was restated by the SC in the case of **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), the memorandum accompanying a Bill is an aid to the interpretation of a statute but not the debates of parliament"*

But now we use parliamentary history as aids to interpretation. **Section 10 of the Interpretation Act, 2009 (Act 792)** permits the Courts to refer to certain documents where a court is concerned with ascertaining the meaning of an enactment. **By section 10(2) of Act 792**, parliamentary debates prior to the passing of the Bill in parliament, pre-parliamentary materials relating to the enactment and legislative antecedents of the enactment are admissible to resolve the ambiguity or obscurity of language.

Directive principles of State Policy (DPSP)

- **Article 34 of the 1992 Constutiton** provides that:

The directive principles of State Policy under Chapter 6 of the Constitution, 1992 are ***intended to guide*** all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, Political parties and other bodies and persons ***in applying or interpreting the Constitution*** or ***any other law*** and in taking and implementing any policy decisions, for the establishment of a just and free society. These principles

supplement Chapter 5 of the Constitution on Human rights and consist of economic, social, educational, cultural, and political objectives as well as duties and obligations of citizens.

The DPSP has three (3) basic legal effects;

1. They are not justiciable – it means no action can be founded on it. You cannot go to court to enforce it.
2. They are justiciable – you may bring an action to enforce it
3. DPSP by themselves are not justiciable but they are presumptively justiciable.

the justiciability or otherwise of the DPSP depends on the Country, its identity and political considerations. Whereas in some Countries, it is expressly provided in their national Constitutions whether or not they are justiciable, the Constitution of Ghana does not state either.

In South Africa it justiciable but in India and Nigeria, it is expressly provided that is not justiciable.

The Committee of experts proposed that the DPSP should not be justiciable by the Consultative Assemble rejected the proposal. The rejection did not mean that it is justiciable or presumptively justiciable.

The DPSP, per the proposals of the drafter of the two Constitutions (1979 and 1992), were meant to follow the India approach. That the DPSP were not intended to be justiciable was very clear from the *travaux preparatoires* to the two Constitutions.64 However, unlike the Indian situation, this intention of non-justiciability was not written into either Constitutions.

In Ghana, we now depend on the Supreme Court decisions on the justiciability of the DPSP.

Justiciability of DPSP in Ghana

The first time that the justiciability of Chapter VI came into question before the Supreme Court was in **New Patriotic Party v the Attorney-General (31st December case),** in that 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. On this issue, the 9 judges on the panel were divided into all the three different positions possible – for, against and neutral.

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. She explained:

> "Now I come to the spirit of the Constitution, 1992. The plaintiff, apart from article 3, relied also on articles 35(1) and 34(b) of the Constitution, 1992, provisions under the 'Directive Principles of State Policy' to ground its claim. *But the said principles are not justiciable and the plaintiff has no cause of action based on these articles*. Those principles were included in the Constitution, 1992 for the guidance of all citizens, Parliament, the President, judiciary, the Council of State, the cabinet, political parties or other bodies and persons in applying or interpreting the Constitution, 1992 or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

It took four years, after 31st December, for the Supreme Court to have another opportunity to consider the issue whether or not Chapter VI of the 1992 Constitution was justiciable. This was in **New Patriotic Party v AttorneyGeneral (CIBA case).**

Npp v Ag (CIBA's Case)[1997/98]

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.

Ghana Lotto Operators Association and others v National Lottery Authority [2008]

In 2008, Chapter VI came up again for the Supreme Court's consideration, in Ghana Lotto Operators v National Lottery Authority75 (Lotto case). A group of private lotto operators challenged the constitutionality of the National Lottery Act, 2006 (Act 722). The Act establishes the National Lottery Authority (NLA) to regulate, supervise, conduct and manage National Lotto. It also prohibits the operation of lottery by persons other than the NLA. The Plaintiffs' plaint was that the regulation and prohibition offend article 36(2)(b), which falls under Chapter VI of the Constitution.

This time all the 9 Justices on the panel were unanimous on the issue of justiciability. The Court recounted Adade JSC's position in 31st December that the entire Constitution as a legal document is justiciable.

The Court held that;

> As far as this present Court is concerned, we are of the view that, because there is a conflict between two previous Supreme Court decisions, were are free either to choose between the two decisions or to formulate a different rule that is right in our view, since there is currently no binding precedent. ***We would humbly submit that the right rule is a presumption of justiciability in relation to the provisions of Chapter 6 of the Constitution, 1992 as outlined above***. 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.

CASES;

The critical issue is whether or not the directive principles of state policy are enforceable? The Supreme Court in the case of **NPP v AG (31st December case**) by the majority ruled *that the Directive Principles of Stat policy were justiciable.*

A contrary opinion was expressed by the SC in **Npp v Ag (CIBA's Case)** , the SC per the majority held that the Directive Principles of State Policy *were not of and by themselves legally* enforceable by the courts but they provide goals for legislative programmes and further serve as a guide for judicial interpretation.

In the recent case of **Ghana Lotto Operators Association and others v National Lottery Authority the SC followed the decision in the 31st December case** The Supreme Court held thus :

> The next point we wish to stress is that Bamford Addo JSC ***fails*** (as do the other members of the court who agreed with her) **to consider the implication of the fact that the Committee of Experts' proposal of explicit language proclaiming that the principles should not be in and of themselves enforceable by the courts was not accepted by the Consultative Assembly**. We think the omission of that language is a strong pointer in favour of Adade viewpoint.
>
> As far as this present Court is concerned, we are of the view that, because there is a conflict between two previous Supreme Court decisions, were are free either to choose between the two decisions or to formulate a different rule that is right in our view, since there is currently no binding precedent. ***We would humbly submit that the right rule is a presumption of justiciability in relation to the provisions of Chapter 6 of the Constitution, 1992 as outlined above***. 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.

The position in Ghana is that the DPSP are presumptively justiceable. They are presumptively justiciable in that whenever a condition precedent under any of them is fulfilled and a suit is brought, the Court may decide whether that provision has become justiciable or not.

Textbooks and Other Literary or Academic Publications

Textbooks and Other literary or academic publications are rich sources of information. They have persuasive effect and may only become binding after a court has quoted them with approval. For example, in the case of **In Re Wenchi Stool Affairs; Nketia & Ors v Sramangyedua III and Others [2011] 2SCGLR 1024** the SC in discussing what constitutes a valid nomination to be a chief, made refence to R.S.Rattray's, *Ashanti Laws and Constitution*.

The law in Ghana is that the issue as to the existence or content of a rule of customary law is a question of law. **Section 55(2)(b) of the Courts Act, 1993 (Act 459)** provides that Customary law could be ascertained by the courts from reported cases, textbooks, and other sources that may be appropriate to the proceedings.

Reference books, newspapers and periodicals are of relevance and are admissible under **section 155 and 156 respectively of the Evidence Act, 1975 (NRCD 323).** The courts have settled that some textbooks and other academic publications may be unreliable and the court should prefer credible oral evidence to such publications, particularly where the issues border on traditional evidence or historical accounts. In the case of **Hilodjie and Another v George [2005/06],** the SC in discrediting the Jackson

Commission report, held that the oral evidence on record which proved acts of possession must take precedence over unreliable textbook accounts. The court held…." *In cases of this nature, historical accounts from other sources, textbook accounts included, which are nothing more than a repeat of the disputed or inconclusive traditional evidence already adduced at the trial, ought to attract very minimal weight."*

In essence, the courts must evaluate textbooks and other literary or academic publications before relying on them or quoting them with approval or using them as an aid to interpretation.

Dictionaries

Dictionaries are quite often resorted to as an aid to interpretation. In some cases, judges must resort to the dictionary meaning to enable them construe a text. The ordinary meaning of a word may not always be the same as the dictionary meaning. In the case of **Republic v High Court, Accra, Ex parte CHRAJ (Interested party, Anane),** the Court per Aninakwah JSC resorted to the dictionary to ascertain the meaning of the word "complaint". In the case of **Opremreh v EC and AG,** the SC referred to Barons Law dictionary and held that the word "annul" means to *make void, to dissolve that which once existed.*

Dictionaries are often used by textualists and eth literalists. Interpreters who use purposive or MOPA occasionally use dictionaries to look for the ordinary meaning of words as they always take into consideration the context in which the words are used. They do not concentrate on language to the exclusion of context. Under MOPA, purpose is considered whether there is ambiguity or not but the use of dictionary has not been thrown out altogether. In some cases, the courts cannot construe without making refence to dictionary.

Common sense.

Words are interpreted in their ordinary or popular sense to enable the courts to arrive at a fair or reasonable interpretation. Any interpretation which takes context and the normal use of language into consideration in order to arrive at a reasonable interpretation is referred to as a common-sense approach to interpretation.

In the case of **Osei v Ghanaian Australian Goldfields Ltd**. The SC discussed the common-sense approach to interpretation in the headnote thus:

The basic rules of construction of documents are that the interpretation or construction must be nearly as close to the word and intention of the maker as is possible and the intention must be ascertained from the document as a whole with the meaning and within the context in which they are used."

Practice

Practice in court has been accepted as one of the three yardsticks by which justice is dispensed. Holmes J, an eminent former SC judge of the USA, wrote in his book titled the common Law, his famous maxim, "the *life of the law has not been logic. It has been experience."*

In effect, the long-standing practice of the courts has been accepted as one of the three modes by which justice is administered.

It is used under three yardsticks;

1. Statute law
2. Case law, and
3. Well known practice of our courts.

Case – Harley v Ejura Frams Ghana Ltd [1977] 2 GLR 179 – Tyalor J (as he then was) described the practice of the courts as part of the adjudication system in the following words: …"*the law, however, does not always and at all times deal with logic and common sense….in these courts we dispense justice in accordance with three and only three yardsticks.* ***Statute law, case law and well-known practice of our courts****."*

Practice and experience in the Courts is an aid to interpretation and it supplements case law and statutes.

CONSTRUCTION OF WILLS

In Ghana Wills are governed by the Wills Act, 1971 (Act 360). The Wills Act, 1971 (Act 360) came to force on 3rd July, 1971.

- **Capacity/Power to make a will**

Section 1 of Act 360

A person of 18 years and above, of sound mind and disposition, and who understands the nature and effect of a Will is competent to make a will**.** No person suffering from insanity or infirmity of mind, so as to be incapable of understanding the nature or effect of a will shall have capacity to make a will during the continuance of that insanity or infirmity of mind.

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. As a general rule, as long as eth testator is of sound mind, memory and understanding at eth time of giving instructions for the making of a will, then the Will is valid even if the Testator is of unsound mind at the time of execution, provided the testator understands that he or she is signing a Will drafted in accordance with their instructions….**Parker v Felgate**.

A Will is a voluntary disposition of a property by a testator and therefore a Will or a provision of a will obtained by fraud, duress or undue influence shall be void upon proof of any one of them.

NB:

1. **Section 34 of NRCD 323** – Commorientes rule (This does not apply to Wills)- the older is presumed to have predeceased the younger.
2. **Section 15 of PNDCL 111** – presumption against survivorship. The older shall be presumed to have predeceased the younger (*Applies to a couple ONLY*).
3. **Section 7(7) of Act 360** -the testator shall be presumed to have predeceased the beneficiary.

Wills are considered as intentional document. When interpreting, we give effect to the intention of the testator.

Grounds upon which a will or a provision of a will may be invalidated (vitiating factors)

- Section 1(3) of Act 360

1. Fraud – **Derry v Peek** – Fraud vitiates everything because it is a scarlet sin.
2. Duress
3. Undue influence – where there exists a special relationship which is likely to be compromised. Such as;
   i. Pastor & Congregant
   ii. Lawyer & Client
   iii. Doctor & Patient
   iv. Husband & Wife
   v. Parent & Children

NB: For any question on Wills, take particular notice of the date of execution. If the Will was made before 3rd July, 1971, then the common law principle of joint tenancy/***jus ascrescendi*** will apply……**Fenuku v John Teye.**

EXECUTION OF A WILL

Section 2 of the Wills Act, 1971 (Act 360)

A will shall be in writing. **Exception is the Armed forces** Will under section 6. Shall be signed by the Testator or some other person at his direction. Testator shall execute his will in the presence of at least 2 attesting witnesses. They attest only to the signature and not the content of the will.

NB: Where a beneficiary attests to a will, any devise to him shall be declared void unless the signature of the beneficiary is superfluous.

Where the testator is himself signing the will, it is attested in two forms;

1. **By acknowledgment** – here the witnesses did not see him sign the will.
2. The signature shall **be made** in the presence of the two witnesses present at the same time.

OR, He may direct that the Will be signed at his direction. Here the issue of acknowledgment does not arise. The person so appointed must sign in the presence of two or more witnesses.

Any erasures, interlineations or insertions which is not re-executed shall be invalid.

Case -Okyere v Republic [1998/99] SCGLR – Lawyer made a will for a client. It was subsequently discovered that he had made insertions. He was prosecuted and disbarred.

In Re Okine (Deceased) ; Dodoo v Okine [2003/04]

Section 2(6) – where the testator is blind or illiterate, jurat becomes very important. Ordinarily, if there is no jurat, it should be declared void. Here, there are two schools of thought;

1. If no jurat is provided for but there is sufficient evidence before the court that the testator knew the content, it may be admitted to probate.

Read order 66 rule 19 of CI 47 – 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.

NB: Note that **C.I 47 & S. 2(6)** are not in conflict. Order 66 rule 19 of CI 47 admits that the jurat must be provided. But further add that where the court is satisfied that the will was read over to the deceased before its execution or that the deceased had at that time knowledge of its contents.

2. Where there is no jurat, it shall be void.

Case: Otoo (No.2) & Ors v Otoo (No.2) & Ors [2013/14] 2 SCGLR 810 – This case was decided by a single justice of the SC. He held that once there is no jurat, the Will should be declared void.

NB: In examination, discuss the two positions and take a position.

In Re Mensah (Deceased): Barnieh v Mensah & Ors [1978] GLR 225 – This case supports order 225.

How do we ascertain the intention of the testator?

How do you resolve latent ambiguities?? Understand latent ambiguity and arm-chair rule.

In Re Atta (deceased): Kwako v Tawiah [2001/02]…MUST READ

EXECUTORS AND WITNESSES

Section 3 – Executor must be at least 21 years old having capacity to enter into a contract. An executor who is not himself a beneficiary may attest to a will. An executor who is a beneficiary may attest a will where there are at least 2 witnesses.

Section 4 – incorporation of other documents

Any document referred to in the will must be in existence at eth time of eth making of the will.

Section 5 - Alteration of a will.

ARMED FORCES WILL – PRIVILEGED WILL

Section 6 of Act 30

Read the Armed Forces Act, 1962 (Act 105) – who are members **on active service**.??

NB: Quite often there is a question on armed forces will.

Section 114 of the armed forces Act, 1962 (Act 105) provides as follows;

In this Act, unless the context otherwise requires "***active service***" means

(a) service in operations against an enemy or in a foreign country in operations for the protection of life or property or relating to the military occupation of a foreign country,
(b) service in operations for the preservation of public order,

(c) service for purpose of relief in cases of emergency, and

(d) service for any other purpose appearing to the President to be expedient;

NB: A soldier not on active service cannot take advantage of a privilege will.

Members on active service may make wills in 3 different forms;

1. Where it is in that person's own handwriting and unattested
2. Where it is in the person's own handwriting or anther and there is a witness – attested
3. Oraly made before 2 witnesses (nuncupative wills)

NB: A will is unitary in nature. i.e it is made up of the aggregate of all unrevoked testamentary writings.

The general position was that, a person who was not named as a beneficiary under a will shall not benefit from it unless there is a contrary intention by the country concerned.

Case – Turker v Harrison [1832] 5 SIM 538

RULES OF CONSTRUCTION

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…..In **Re Atta (Dec'd) ; Kwako v Tawiah**

In Re Atta (deceased): Kwako v Tawiah [2001/02]…

Wills—Construction—**Intention of testator—Extrinsic evidence**—**Evidence of solicitor who prepared will**—Testator providing in will appellant "is to inherit me on my death" and all residuary estate "must go to him"—No ambiguity in provision—Appellant subsequently appointed customary successor of testator by family—Dispute whether appellant taking residuary estate for himself or as customary successor on behalf of family—**Trial court taking evidence from solicitor who prepared will of intention of testator—Whether evidence admissible in construing will**

Facts

The testator, O By clause (7) of his will evised six rooms in his house to the appellant and by clause (13) he declared that the appellant "is to inherit me on my death and all the properties which I have not devised must go to him." After the death of O, the appellant was appointed the customary successor of O by the family. Subsequently, the respondent brought an originating summons before the High Court for the determination of the question whether having regard to the devise in clause (7), the devise by clause (13)

of the residuary estate to the appellant was to him personally forever, or in his capacity as customary successor who was to hold the properties in trust for the immediate family. he trial judge after taking evidence from the solicitor who had prepared the will on his instructions in respect of clause (13) held that O had intended that the residuary estate should go to the appellant in his personal capacity. He therefore dismissed the respondent's action. However, on appeal by the respondent from that decision, the Court of Appeal by a majority decision accepted the respondent's claim that the appellant had been appointed customary successor at the request of O, and therefore held that the appellant was bound in law and custom to hold and administer the residuary estate in trust for the family. Dissatisfied with that judgment, the appellant appealed against it to the Supreme Court. The court found, inter alia, that the evidence given by the family on the appointment of the appellant as the customary successor of O supported the case of the appellant rather than that of the respondent.

ISSUE

Trial court taking evidence from solicitor who prepared will of intention of testator—Whether evidence admissible in construing will.

Held, allowing the appeal:

(1) in construing a will the courts looked for the intention of the testator as expressed in the actual words used by him, having regard to all the other provisions in the will. 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. But in both cases the instructions were admitted not for the purpose of gathering what the testator intended to do, but strictly for identifying the person or object he was reasonably deemed to have had in mind. Since in the instant case the language of clause (13) of the will was fairly straightforward and portrayed no hidden intentions, it did not fall under any of the exceptions. Accordingly, it did not require any extrinsic evidence to assist the court in construing it. Accordingly, the trial judge erred in relying on the evidence of the lawyer who prepared the will in construing clause (13) of the will. Doe d Hiscocks v Hiscocks (1839) 5 M & W 363 and Ofner, In re; Samuel v Ofner [1909] 1 Ch 60, CA cited.

The Armchair Rule

The armchair rule is that, in the construction of a will, the court may place itself in the position of the testator at the time he made his will, so as to ascertain all the factors known to the testator at that time**.**

In Boyes v Cooke – it was stated that in order to construe the will, "you may place yourself, so as to speak in the testator's armchair and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention"

Section 7(1) of Act 360 -A will takes effect as if it had been executed immediately before the death of the testator unless a contrary intention appears from the will.

The provisions of Act 360 apply to Wills made in Ghana after 3rd July 1979.

Commorientes Rule (Wills ONLY)

Section 7(7) – Where a testator and a beneficiary die under circumstances rendering it incapable to determine who predeceased the other, the testator shall be deemed to have predeceased the beneficiary. In other words, the beneficiary shall be deemed to have survived the testator**.**

Lapsed disposition

Section 8 of Act 360

The general position of the law is that a disposition made by a testator to a beneficiary under a will shall lapse where the beneficiary predeceases the testator. The only exception is, where the beneficiary was a descendant of the testator (unless a contrary intention appears from the will). A descendant of the testator means a child or grandchild of the testator who predeceases the testator and leaving behind an issue.

Instances where a disposition by a testator shall be deemed to have lapsed are;

1. Where the beneficiary predeceases the testator, except where the beneficiary is a descendant who left behind an issue or was survived by an issue.
2. Where the disposition was made contrary to law
3. Where disposition is incapable of taking effect, unless a contrary intention appears from the will.

NB; Read Section 38 of Matrimonial Causes Act, 1971 (ACT 367)—

Bequest to Divorced Spouse to be Invalid.

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.

Section 38 of Act 367 provides that, a disposition of a property made by a spouse in the Spouse's Will to the other spouse shall lapse upon termination of the marriage under the Act. However, where a contrary intention has been expressed by eth testator in the testator's will, that intention shall override the general position of law contained in the Act.

NB: PQ – 2016/17 – Q2.- POST CALL

PROVISION FOR DEPENDENTS

Only a person named as a beneficiary in the will who is entitled to benefit from the will. This is the general rule. However, section 13 of the Wills Act 1973 (Act 360) departs partially from the common law position.

It is only the High Court which is ceased with jurisdiction to invoke and apply Section 13 of the Wills Act. The High Court is ceased with jurisdiction within 3 years from the date of the grant of probate. Meaning, if probate has not been granted, it will be incompetent to bring an application.

Circumstances under which Section 13 will be invoked.

- By an application within 3 years of the grant of probate to the HC.
- The following persons may apply;
  1. Father
  2. Mother
  3. Spouse, or
  4. **Child** under 18 years of age,
- And that hardship will thereby be caused.
- You must demonstrate that;
  1. In the lifetime of the testator, he did not make a reasonable provision for your maintenance, and
  2. In his will, he did not make a reasonable provision
  3. Prove that hardship will be caused.

NB: The testator may have made provisions for you during his lifetime or in the will but you may be of the opinion that, that is not reasonable provision for you.

Section 18 defines **a child** to include;

1. Adopted children
2. A person he stands in loco parentis
3. Any person recognized under customary law to be the child of such person
4. Any person recognized by the testator to be his child.

The reasonable provision may include;

1. Payment of lumpsum or grant of an annuity or series of payments
2. Grant of an estate or an interest in immovable property for life or any lesser period.

NB: Read Humphrey Bonsu & Ano. v Quaynor [1999-2000] – 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. Quaye v Quarcoo [1991] 2 GLR 437 and dictum of Tindal CJ in Warburton v Loveland (1832) 2D & CL 480 at 489, HL applied.

STATUTORY INTERPRETATION

Article 11 provides the primary sources of law. Note that, Article 11 does not arrange the hierarchy of laws.

Article 11……..the laws of Ghana shall comprise;

- **This Constitution**
- **Enactment** made by or under the authority of Parliament established by this Constitution.
- **Any Orders, rules and Regulations** made by any person or authority under a power conferred by this Constitution.

NB: Read Article 11(7). The Order, Rules and Regulations shall;

1. Be laid before parliament
2. Be published in the Gazette on the day it is laid before Parliament;
3. Come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the order, rule or regulation by votes of not less than two-thirds of all the members of parliament…….**Case - Mensah v EC**

NB: It excludes Executive Instruments (EIs). EIs haven't got legislative power so it is not a delegated legislation. Delegated Legislation are CIs and LIs. Constitutional Instruments derive its authority from the Constitution. Legislative Instruments derive its authority from an Act or Parliament.

NB: Read Article 157 – Rules of Court Committee.

Read Article 51 – Regulations for elections and Referenda. The EC makes CIs in the form of Regulations.

Note that CIs may exist in the form of Orders, Rules and Regulations.

- **The existing law;**

1. Statutes of general application – these are laws handed over to us by the British. We have only 10 of them and they are provided in the Courts Act, 1993 (Act 459) – Section 119 & the second schedule.
2. Ordinances – these are laws made for Ghanaians specifically by the British. Eg. The Illiterate Protection Act,1960 (CAP 262)
3. CA (Constituent Assembly) these are laws made by the Constituent Assembly (Parliament) between 6th March 1957 – 30th June, 1960. Eg. Is the repealed Interpretation Act (CA 4)
4. Acts
5. Decrees
6. Laws

- **The common law,** shall comprise;
    1. The rules of law generally known as the common law,
    2. The rules generally known as the doctrines of equity, and
    3. The rules of customary law including those determine by the Superior Court of judicature.

NB: When a superior court pronounces on a custom then it becomes customary law. Now customary law is question of law. See Section 55 of Act 459.

REPEALED AND RETROACTIVE LEGISLATION.

Express v implied repeals

Legislations are either repealed expressly or impliedly by another legislation.

Express repeal – this is where a new law clearly states that it has repealed previous or existing laws. The 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 - the implied repeal of legislation could either be seen in various forms. The existing enactment does not expressly say that an enactment has been repealed but a careful consideration of the two enactments would reveal that one has repealed the other. Acts of parliament may be in conflict with one another and would be deemed that one of them has amended or repealed the other. This type of repeal or amendment is

known as repeal or amendment by necessary implication as none of the laws specifically says that it has repealed the other until it is determined by the Courts.

Where laws are in conflict and the conflict is reconcilable, the question of repeal, amendment, revocation do not arise.

Where there is a conflict between two Acts of parliament and one **is special** and the other one **is general**, the special legislation is deemed to have amended the general one. Where two Acts or subsidiary legislations are of the same character, that is both are general or special, the latter one is deemed to have repealed the earlier one. Furthermore, a conflict between an Act of Parliament and Subsidiary legislation is resolved in favour of the Act of Parliament.

Case – Kowus Motors v Check Point Ghana ltd and Ors. The SC was called upon to resolve the conflict in AFRCD 60 and Statute Law Revision Act,1997 (Act 543). In resolving this conflict, 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 of construction of statutes is that where two Acts conflict irreconcilably, the later one is deemed to have repealed or amended the earlier one"*

In this case, the special legislation is deemed to have amended or repealed the general statute. This principle is expressed in the Latin maxim as ***generalia specialbus 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 the special provisions override the general provisions on the same subject-matter and the special legislation is deemed to have amended the general one. The SC quoted Bennion:

"*Generalibus specialia derogant*, where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation is intended to be dealt with by the specific provision. This is expressed in the maxim *generalibus specialia derogant* (special provision overrides general ones)

The Common law position was restated by the SC in the case of **Bonney &Others (No.1) v Ghana Ports & Harbour Authority (No.1) [2013-2014] 1 SCGLR 436….**whenever there is a general enactment in a statute which if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative and the general enactment must be taken to affect only the parts of the statute to which it may properly apply.

The court held that the limitation period of 12 months under the GHAPOHA Law overrides the limitation period of 6 years under the limitation Act in actions founded on contract.

NB: Read Article 99, 131 and 48

Article 99 – Determination of membership

(1) The High Court shall have jurisdiction to hear and determine any question whether - (a) a person has been validly elected as a member of Parliament or the seat of a member has become vacant; or
(b) a person has been validly elected as a Speaker of Parliament or, having been so elected, has vacated the office of Speaker.

(2) A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal.

NB: Article 99(2) does not state whether the COA is the final appellate Court.

Article 131 – is the appelate jurisdiction of the Supreme Court. Which states that an appeal shall lie from a judgment of the Court of Appeal to the SC as of right or with leave of the court in certain cases.

Article 48 – Appeals from Decisions of Commission

(1) A person aggrieved by a decision of the Electoral Commission in respect of a demarcation of a boundary, may appeal to a tribunal consisting of three persons appointed by the Chief Justice and the Electoral Commission shall give effect to the decision of the tribunal.

(2) A person aggrieved by a decision of the tribunal referred to in clause (1) of this article may appeal to the Court of Appeal whose decision on the matter shall be final.

NB: Article 48 is very clear on the finality of the decision by the COA. So here there is no ambiguity.

NB: it is not every conflict that will render the text repealed or revoked. The text may be reconcilable or irreconcilable. Article 99 is ambiguous but reconcilable.

Case – In Re Parliamentary Election for Wulensi Constituency, Zakaria v Nyimakan – the Supreme Court held that the article 99 of the Constituion is in conflict with article 131(1)(a), when it come to the determination of which court should be the final appellate court for parliamentary election disputes.

All laws are meant to be prospective unless the law maker prescribed otherwise. At common law, laws which m ay affect a right, privilege, obligation or may impose obligation or liability shall have prospective effect unless parliament prescribes otherwise.

Read Article 107 – Retroactive legislation

Parliament shall have no power to pass any law –

(a) to alter the decision or judgement of any court as between the parties subject to that decision or judgement; or

(b) which operates retrospectively ***to impose any limitations on***, or ***to adversely affect the personal rights and liberties*** of any person or ***to impose a burden, obligation*** or ***liability*** on any person except in the case of a law enacted under articles 178 0r 182 of this Constitution.

NB: Article 107(a) was introduced because of the case of State v Okyere.

Parliament can pass laws which have retroactive effect. However, per article 107, parliament cannot pass laws that adversely affects that rights of any person or where the law imposes a burden, obligation or liability.

Case – **Kofi Fiabor v Republic**

The four (4) exceptions to retroactive legislation

The following laws have retroactive effect unless the law maker prescribes otherwise;

1. Procedural laws (both civil and criminal) – the law is that nobody has a vested right in procedure….**Yew Bon Tew v Kenderaan Bas Mara**
2. Law of evidence
3. Declaratory laws
4. Consolidation and reviews

Case – Fenuku v John Teye – this case talks about the three exceptions but not the 4th one. Held "(2) The general rule was that statutes, other than those which were ***merely declaratory***, or which related only to ***matters of procedure*** or **of evidence**, were prima facie prospective; and retrospective effect was not to be given to them unless by express words or necessary implication, it appeared that, that was the intention of the legislature. In general, the courts would regard as retrospective any statute which operated on cases or facts coming into existence before its commencement in the sense that it affected, even if for future only, the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute was not retrospective merely because it affected existing rights nor was it retrospective merely because part of the requisites for its action was drawn from a time antecedent to its passing.

The position in Ghana is that all substantive laws are prospective and matters which are purely ***procedural, declaratory and evidence*** are retrospective unless the statute specifically or by necessary implication states otherwise.

Saaka v Dahali [1984-86] – 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 position is that apart from purely procedural legislations, all other legislations are presumed to be prospective except where the statute provides otherwise. 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.** Lord Brightman stated: " there is however said to be an exception in the case of a statute which is purely procedural, ***because no person has a vested right in any particular course of procedure,*** but only to prosecute or defend a suit according to the rules for the conduct of an action for time being prescribed.

Hierarchy of laws

1. The Constitution
2. Act of Parliament – irrespective of the time it was made
3. Delegated legislation
4. Common law

How do you resolve conflicting provisions in a statute or legislation?

1. Leges posteriones priores contrarias abrogant
2. Generalia Specialibus non derogant

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 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."

The period of limitation under the Ports and Harbours Authority Law seeks to take the period of limitation outside the general law and by operation of law, the particular law i.e. section 92 (1) of the Ports and Harbours Authority law is applicable in an action instituted under the law. It is not a case of preferring section 92 (1) of the Ports and Harbours Authority Law to the Limitation Act of 1972.

Generalia Specialbus Non Derogant: "Whenever there is a general enactment in a statute which if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the parts of the statute to which it may properly apply."

See Halsbury's Laws of England 4th edition volume 44 paragraph 785. 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. 17 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 parliament to create lower courts and confer jurisdiction on it. Raed 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.

NB: This was a PQ.

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.

Legal effect of repealed laws.

Article 107- Parliament shall have no power to pass any law –

(a) to alter the decision or judgement of any court as between the parties subject to that decision or judgement; or

(b) which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 0r 182 of this Constitution.

Section 32 of Act 792 - Cessation of operation of enactments

32. *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.*

This simply means that where an enactment or part of it is repealed, the enactment or the part of it which has been repealed shall cease to have effect and shall cease to form part of the laws of Ghana.

Read Section 33

Effect of repeal

34. (1) Where an enactment repeals or revokes an enactment, the repeal or revocation ***shall not***, except as in this section otherwise provided,

(a) **revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect**. -*this means that the old law has ceased to exist. See Section 270 of Act 30 on dying declarations. Section 270 changed the commo law position on dying declarations, then SMCD Decree repealed Section 270 without restating any provision because the Evidence act 1973 (NRCD 323) has taken care of dying declaration.*

(b) **affect the previous operation of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment;** - i.e. the legal effect is that anything done or suffered under a law would not be affected after the repeal of the law. All acts validly done under the repealed Act would not be affected as the right would be deemed to have been acquired or accrued under it. *if the repealed law had an LI and the LI was not revoked, the LI shall continue to be operative*.

(c) **affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked**; - **Case** – Ellis and Another v AG [2000] SCGLR – in this case, the plaintiff invited the SC to declare **HEMANG LANDS (ACQUISITION AND COMPENSATION) ACT, 1962 P.N.D.C.L. 294** *void for being inconsistent with or in contravention of the Constitution. The SC did not declare the Act void because at the time the law was made it was not in conflict with any law but held that the Government validly acquired lands under it and paid the required compensation and the Constitution which was subsequently made and came into force on 7th January, 1993 did not have retrospective effect. His rights accrued under Act 123 and not the Constitution.*

(d) affect ***an offence committed*** against the enactment that is repealed or revoked, or a ***penalty*** or a ***forfeiture or a punishment*** incurred in respect of that offence; or –

any penalty or punishment for a future obligation and/or liability should also be in accordance with the repealed legislation.

***(e)* affect an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation, a liability, a penalty, a forfeiture or a punishment.** – here article 19(11) creates an exception in criminal actions. This provision applies to ONLY civil and quasi-criminal actions. At common law, if the enactment under which you are being tried is repealed without any savings, the prosecution will be discontinued.

Article 19 (11) provides that - No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.

Case – British Airways v AG [1996/97] SCGLR 547 – BA was being prosecuted under a repealed law, PNDCL 150. The repealing law did not provide for any savings. BA could not be prosecuted. The trial was abated. 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 constitution which provides that "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law" and held that PNDCL 150 under which the plaintiffs were being tried, had been repealed and was not saved by the amending enactment. The SC per Bamford-Addo JSC held thus;

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

Section 8(e) of CA is in pari materia to section 34 (1)(e) of Act 792. **The position now in Ghana is the same as the common law position.**

(f) and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.

(2) Subsection (l) does not authorise the continuance in force after the repeal or revocation of an enactment or of an instrument made under that enactment.

(3) Where an enactment expires, lapses or otherwise ceases to have effect, this section shall apply as if that enactment had then been repealed or revoked.

(4) The inclusion in the repealing provisions of an enactment of an express saving with respect to the repeals affected by the inclusion does not prejudice the operation of this section with respect to the effect of those repeals.

NB: A liability is incurred when there is a conviction, so where there is no conviction, there is no liability (in criminal law)

Read section 35 of Act 792 - Effect of substituting enactment – very examinable

(2) Where an enactment repeals or revokes an enactment, in this subsection and in subsection (3) referred to as the "old enactment", and substitutes, by way of amendment, revision or consolidation with any other enactment,

(e) **where a penalty, a forfeiture or a punishment is reduced or mitigated by a provision of the enactment so substituted, the penalty, forfeiture or punishment, if imposed or awarded after the repeal or revocation, shall be reduced or mitigated accordingly.** – section 35(2) (e) has altered the common law position on punishment. The common law position was that, once a personal liability is uncured under a repealed enactment that person shall be punished under the repealed enactment. However, section 35(2)(e) provides that you should be sentenced under the old law but where the repealing law introduces lesser punishment or sentence then you can take advantage of the mitigated sentence. But if the law is harsh, you shall be sentenced under the old law.

Case - Francis Kojo Fiebor v The Republic – The appellant was convicted and sentenced to life imprisonment under section 149 of Act 29. At the time of his appeal, the Act under which the appellant was convicted had been amended and authorized the court to pass a lesser term of imprisonment. 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 severe sentence under Act 646. If he had not been sentenced but was convicted, he could have benefited from the lesser sentence by virtue of section 35 subsection (2) (e) of Act 792.

OUSTER CLAUSES

What is the essence for the creation of Courts? They are two;

1. To settle disputes
2. To settle legalities

To oust means to take away somebody's right from doing something. 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 recognise and give effect to it.

By deeds and documents persons are at liberty to prescribe modes of settling their own disputes, however, they cannot completely oust the jurisdiction of the Court.

Read Article 125 of the 1992 Constitution. By the said article, the Constitution has given final judicial power to the judiciary. That notwithstanding, article 125 does not take away the people's right in resolving their own disputes but they cannot completely oust the jurisdiction of the courts. Parties may choose to resolve their disputes through negotiation, mediation, arbitration, customary arbitration, reconciliation etc.

NB: The judiciary refers only to magistrates and judges who have taken the oath to exercise judicial power. Non-members of the judiciary, such as jurors, assessors etc may exercise judicial function or responsibility and not judicial power.

The Chief justice is the head of the judiciary but not all the courts. The Court Marshal is an inferior court and not under the purview of the CJ.

All lower courts are created by Statute. The Courts Act is a special enactment because it was passed to create lower courts and confer jurisdiction on them. Read S.39 of Act 459.

Section 39—Establishment of Lower Courts. The following are by this Act established as the lower courts of the country— (a) Circuit Courts; (b) District Courts; (c) Juvenile Courts; (d) the National House of Chiefs, Regional Houses of Chiefs and every Traditional Council, in respect of the jurisdiction of any such House or Council to adjudicate over any cause or matter affecting chieftaincy; and (e) such other lower courts as Parliament may by law establish.

The chieftaincy Courts are not under the ambit of the CJ because the composition is not by members of the Judiciary.

OUSTER CLAUSES IN DEEDS AND DOCUMENTS (NON-STATUTORY)

Parties by themselves may decide to postpone or sidestep the jurisdiction of the Courts, but cannot completely oust the jurisdiction of the Courts. Any clause in an agreement which seeks to make a domestic tribunal the final arbiter on a question of law is a nullity. It would be in conflict with article 125(3) of the constitution, 1992 which has vested judicial power of Ghana in the judiciary. It is the judiciary which has the final judicial power in all matters.

Where parties have provided domestic mechanisms for settling their disputes, that mechanism should be exhausted before they can go to court. By this, parties are deemed

to have postponed the jurisdiction of the courts. Most employees' collective bargaining agreements (CBAs) provide mechanisms for resolving disputes.

Despite the right of parties to adopt a domestic mechanism to resolve their disputes, not all matters can be settled under any of the ADR mechanisms. See section of the ADR ACT, 2010 (ACT 798).

Application 1.

This Act applies to matters other than those that relate to

(a) the national or public interest;

(b) the environment;

(c) the enforcement **and** interpretation of the Constitution; or

(d) any other matter that by law cannot be settled by an alternative dispute resolution method.

NB: In the case of **KOR v AG** – The SC held that the phrase… the enforcement **and** interpretation of the Constitution as provided in Section 1 of Act 798 should be read as…. the enforcement **or** interpretation of the Constitution.

By Section 73 of the Courts Act,2003 (Act 459) - not all offences are amenable to settlement. It must not be a felony or aggravated in nature.

At common law, the rule was that the courts were more suited to settle matters involving legalities. Once the matter involved interpretation, then the courts were well suited.

Case: 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.

Case: Baker v Jones [1954] 2AER 553

It has been expressed by the Ghanaian courts that the courts are the final arbiters on questions of fact and law and any exclusionary clause which purports to take the final decision on questions of fact or law from the courts is a nullity. The courts have also held that an exclusionary clause cannot be used to oust the jurisdiction of the court where there is a breach of the rules of natural justice or whether the matter to be determined

by the parties is on interpretation. In such cases, the parties cannot make the domestic tribunal the first avenue to seek redress.

The Court of Appeal followed the English position in the case of **Essilfie and Ano. v Tetteh and Ors.[2001/02] 1GLR 440** and held that the HC was right in assuming jurisdiction because the matter which involved legalities.

NB: In Ghana because of **Section 24 of the ADR ACT, 2009 (ACT 798**), we are not bound to rely on the English position. By the principle of kompetenz-kompetenz, the tribunal has the power to determine its jurisdiction, scope and validity of the arbitration agreement or the agreement itself. Where a matter is within the scope of the tribunal, it has jurisdiction to determine it.

In **Essilfie and Ano. v Tetteh and Ors.[2001/02] 1GLR 440,** the SC held that, once patties have agreed by themselves to confer jurisdiction on the tribunal on factual matters, the court should observe that provision….**Held** – " ….*however, where 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. However, even in disputes involving issues of fact whenever there was a breach or threatened breach of the principles of natural justice by the domestic tribunal the court would assume jurisdiction over the matter. Furthermore, the court was the final arbiter on questions of law and any clause to the contrary was therefore invalid. However, even though the courts were not bound by any express provision in a contract that a plaintiff had to exhaust his domestic remedies before resorting to the Court, the Plaintiff would have to* ***show cause*** *why the court should interfere with the contractual provision."*

The position of the law however is not that domestic tribunals or arbitral tribunals may not decide on questions of law and it is important that the Court of Appeal's decision in **Essilfie and Ano. v Tetteh and Ors, supra,** is qualified in this light as the SC on appeal in that case did not take that position. The SC did not lay an inflexible rule to the effect that such tribunals may not decide on questions of law even though the courts should be the appropriate forum to interpret such questions.

It is clear from **Section 40(1) of the ADR Act, 2010** that arbitral tribunals are competent to resolve questions of law unless a party applies to the HC to determine same. It is therefore not a correct statement of the law in Ghana that only the courts may determine questions of law. The provision demonstrates that arbitral proceedings do not oust the jurisdiction of the courts where a question of law arises in the course of proceedings.

Grounds upon which a party may sidestep the jurisdiction of the domestic tribunal and go to Court.

1. Where the dispute involves a question of law and the issue does not fall within the arbitration clause.
2. Where there is a threatened or actual breach of natural justice……**Essilfie v Tetteh**
3. Where the constitution of the domestic tribunal did not make provisions for the initiation of a particular dispute. i.e. by agreement, parties set up a domestic tribunal but fails to provide for ***forum or composition*** of the members of the tribunal, a party may decide to go to court. i.e you may side-step the domestic tribunal and go to court….**Essilfie and Another v Tettey and Others[1995/96].**
4. Where the issue to be resolved is about the interpretation or construction of the constitution or the regulation or the contractual document between the parties and falls outside the scope of the arbitration clause….**In Re GPRTU; Tetteh & Ors v Essilfie & Ors[2001/02]**

5. Where there is an arbitration clause but the parties have by themselves evinced an intention not to make use of the domestic tribunal or where they openly repudiate it, the innocent party may treat the contract as at an end and seek such remedies as are open to him." Case**: In Re Timber and Transport-Krusevac; Zastava v Bonsu[1981].**

6. Where a statute provides that a matter cannot be resolved by a domestic tribunal. Eg. Section 1 of the ADR ACT, 2010 (Act 798).

7. Where the issue involves criminal matters, which is a felony or aggravated in nature. See Section 73 of the Courts Act, 1993 (Act 459).

NB: In **Essilfie and Another v Tetteh and Others**, the COA held that whenever parties agreed in an exclusionary clause to refer their disputes initially to a domestic tribunal before recourse to the courts, that agreement was a submission to arbitration constituted by domestic tribunal. Where a party refuses to make use of the domestic tribunal before instituting an action, the court cannot proceed unless the plaintiff satisfies the court that the exclusionary clause was either a nullity, offends public policy, or that the reason for refusing to use the domestic tribunal is supported by any of the grounds discussed above.

Culled from **Essilfie and Another v Tetteh and Others**

Indeed, in Hayford v Gbedemah (supra) this court had occasion to examine this article 24 and held that the article does not oust the jurisdiction of the courts, and further, an aggrieved member may ignore the domestic procedure set out therein if the nature of his dispute makes the domestic procedure inappropriate. From what I have said so far, some

of the factors which would justify recourse to the courts by an aggrieved GPRTU member, notwithstanding article 24 are:

(i) If there is no competent domestic forum.

(ii) If the principles of natural justice would be breached.

(iii) If the issues involved are purely those of law.

(iv) If it can be established that the members have by their previous conduct evinced a clear intention not to resort to the domestic procedure.

STATUTORY OUSTER CLAUSES.

Some enactments prescribe a special procedure by which something is to be done, and the courts give effect to it provided it does not completely oust the jurisdiction of the Courts. Parliament cannot by an Act of Parliament completely oust the jurisdiction of the High Court. Any such enactment will be inconsistent with article 125(3) of the Constitution of Ghana and would be rendered null and void.

In modern practice, some enactments set up internal tribunals in institutions to have the first bite at disputes arising within those institutions before recourse is made to the courts if the matter could not be amicably resolved by the internal tribunal. Some of these internal tribunals include Labour Commission, Disciplinary Committee of the General Legal Council and Disciplinary Committee of the Medical and Dental Board.

The jurisdiction of the court may be ousted by;

1. The courts that have been ousted
2. The mode of initiating the action. i.e. by writ, petition etc
3. The composition.

Cases: Tularley v Abaidoo [1962]1GLR the SC held that, the law is settled that where an enactment has prescribed a special procedure by which something is to be done, it is that procedure alone that is to be followed. The position was further stated in **Boyefio v NTHC Properties Lts [1996/97]**

Some of the substantial reasons for sidestepping the internal tribunal include the breach or threatened breach of the rules of natural justice or where the tribunal purports to oust the jurisdiction of the courts, particularly, the High Court and where the matter to be determined is a felony.

Read Section 39 of the Courts Act, 1993 (Act 459).

OUSTER CLAUSES AND SUPERVISORY POWERS.

Courts or adjudicating bodies established by Parliament are deemed to be lower Courts or tribunals and come under the supervisory jurisdiction of the High Court. Article 126(1)(b) of eth Constitution of Ghana, 1992 confers powers on Parliament to establish such lower courts or tribunals. Parliament, therefore, cannot establish a Superior Court or a higher adjudicating authority.

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. Such attempt 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.

OUSTER CLAUSES AND JUDICIAL REVIEW

Judicial review in some jurisdictions means the power of the court to strike out enactments made by parliament in excess of jurisdiction or to declare an enactment as incompatible as pertains in England and Wales.

In Ghana, the power to strike out legislation is exclusively vested in the SC. Article 130 confers on the SC the power to strike out legislation. It states that; the Sc shall have exclusive original jurisdiction in all matters relating to the enforcement or interpretation of this Constitution; and all matters 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.

Adjei-Ampofo v AG and President of the National House of Chiefs [2011]

Section 63 of the Chieftaincy Act, 2008 (Act 759) provides as follows;

Certain offences in connection with chiefs.

63. A person who;

a) Acts or performs the functions of a chief when that person is not qualified to act,
b) Being a chief assumes a position that the person is not entitled to by custom
c) …
d) Deliberately refuses to honour a call from a chief to attend to an issue

Commits an offence and is liable on summary conviction to a fine not more than two hundred penalty units or to a term of imprisonment of not more than three months of bot.

The plaintiff filed a sit at the SC for, inter alia, a declaration that section 63 (d) of ACT 759 was contrary to fundamental human rights, particularly freedom of movement and was inconsistent with the letter and spirit of article 14 and 21 of the Constitution of Ghana 1992. The SC held that judicial power is given to the judiciary and a limited judicial responsibility is given to the various judicial committees of the traditional Councils, Regional and National House of Chiefs. Individual chiefs did not have and have not had a judicial function in Ghana.

The SC struck out section 63 (d) of the ACT 759 because it was unconstitutional and contrary to article 2(2) of the 1992 Constitution.

COURTS WITH SUPERVISORY JURISDICTION

In Ghana, only two courts have supervisory powers; the High Court and The Supreme Court. See article 132 and 141 of the 1992 Constitution.

The High Court supervises all lower courts and lower adjudicating bodies/authorities such as the CC, DC, 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.

Article 132 – supervisory jurisdiction of the SC

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.***

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)

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.

NB: Any adjudicating authority created by parliament is a lower or inferior adjudicating Tribunal. Examples of lower adjudicating authorities are the Court Marshall and the disciplinary committee of the General Legal Council.

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.

SUPERVISORY OREDERS

the supervisory orders are;

1. Certorari
2. Prohibition
3. Mandamus
4. Quo warranto, and
5. Habeas corpus

NB: 1 to 4 are judicial review remedies. Habeas corpus is not a judicial review remedy.

NB: Read order 55 of CI 47. Habeas corpus is not a judicial review remedy.

Judicial review + habeas corpus = **supervisory powers.**

Grounds for invoking the Supreme Court's Supervisory Jurisdiction.

The following are the grounds for invoking the supervisory jurisdiction of the SC;

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.

Want or excess of jurisdiction

Jurisdiction is conferred on a Court by either the Constitution, Statute or common law. A court shall be a court of competent jurisdiction where jurisdiction has been conferred on it by Constitution, Statute or common. Common law jurisdiction is inherent in the Superior Courts and not the lower Courts. Therefore, no lower court has an inherent jurisdiction with the exception of setting aside its void judgments….See **Mosi v Bagyina [1963].**

Jurisdictional issue may arise where a court does an act without jurisdiction. That is where no jurisdiction has been conferred on it by the Constitution, statute or common law as the case may be. In **Chief Timitimi v Amabebe,** it was held that a court cannot exercise jurisdiction not conferred on it; and particularly, lower courts do not have jurisdiction unless statute expressly confers jurisdiction.

Where the law provides that a party be afforded a certain number of days and that umber of days are not up yet the court proceed, the proceedings will be irregular but within the jurisdiction of the court and cannot be quashed. This applies to short-service of court process. On the other hand, where the process is not served at all and the court proceeds it will be quashed as held in the case of **Republic v High Court, Accra, Ex parte Allgate Co Ltd.**

Fundamental error on the face of the record.

Where an error is patent on the face of the record the supervisory jurisdiction of the Sc may be invoked. **In Republic v High Court, Accra, ex parte CHRAJ (Addo interested party)** the SC held that the mere fact that a HC judge makes a mistake or commits an error does not take him outside his jurisdiction. such error may not result in the invocation of the supervisory jurisdiction of the SC ***unless the error is patent on eth face of the record.***

In the case of **Republic v COA, ex parte Tsatsu Tsikata [2005/06]** the SC further held that a mere error of law on the face of the record is not enough to invoke the its supervisory jurisdiction; the error has to be fundamental or one that renders the impugned decision a complete nullity.

The record refers to the document which initiated the proceedings, the pleadings, if any, and the judgment bout not the evidence or the reason for the judgment.

Breach of the rules of natural justice

The supervisory jurisdiction of the SC may be invoked where the rules of natural justice are breached.

1. ***Nemo judex in causa sua*** – the rule requires that a person does not act as a judge in his own cause. It is the rule against bias or the likelihood of bias. The SC in the case of the **Republic v High Court, Denu, ex parte Agbesi Awusu II (No.1)** thus quashed the decision of the HC on the basis of the bias of the judge.
2. Audi alteram partem – the rule requires that the decision maker hears all parties affected by his decision. Cases – Republic v HC, Bolgatanga, ex parte Hawa Yakubu

Intervening to ensure justice.

The supervisory jurisdiction of the SC is not only limited to the issuing of the traditional conventional prerogative writs of certiorari, mandamus, prohibition, quo warranto, and habeas corpus which are available to the HC under article 141 of the Constitution. The SC has wider powers in exercising its supervisory jurisdiction. The SC would in appropriate circumstances, give directions in cases to ensure the prevalence of justice, equity and fairness. This is clear from the decision of the SC in the ff cases; **British Airways v AG, Republic v HC, (Fast Track Division) Accra, ex parte EC [2005/2006].**

Order 55 of CI 47 provides the reliefs which could be granted by the High Court in an application for judicial review. They are orders in the nature of ***mandamus, prohibition, certiorari, or quo warranto***, ***an injunction*** restraining a person from acting in any public office in which the person is not entitled to act, any other injunction, ***a declaration*** and ***payment of damages.***

NB:Judicial review used in order 55 or CI 47 is used in a limited sense and **does not include the power to strike out enactment or legislations.**

Persons amenable to judicial review.

A part from the SC, all other courts including ***the other superior courts***, ***lower courts***, and ***inferior tribunals***, including **administrative tribunals**; administrative bodies, and administrative officials; ***fact-finding tribunals*** which have a duty to act judicially, and any other fact-finding tribunal or ***commission of enquiry*** whether statutory or not (provided it makes decisions affecting the rights of subjects or people) are expected to act judicially and are amenable to judicial review.

By article 23, administrative bodies and administrative officials who fail to act fairly would be amenable to the prerogative writs.

Can a statute conferring jurisdiction on administrative bodies oust or postpone the jurisdiction of the High Court.

- **The deference theory v Ouster clauses**

The difference between an ouster clause and deference is that, **an ouster takes** away or postpones the jurisdiction of the court. **The deference theory** on the other hand gives jurisdiction to administrative bodies to decide a matter which requires expertise or where there is lack of reciprocity.

Laws conferring jurisdiction on administrative bodies to exercise investigative, inquisitorial, or enquiry powers are prevalent in Countries such as the USA, Canada and South Africa.

The position in Ghana on whether the High Court has jurisdiction to hear all maters is not settled as the Supreme Court has rendered conflicting decisions on whether a statute, being inferior to the Constitution, may defer or oust the jurisdiction of the High Court and confer jurisdiction on administrative bodies. In this sense, the use of the ouster clauses as well as an application of the deference theory are discussed as two distinct phenomena.

- **The deference theory**

The deference theory requires that where administrative bodies which have expertise in a matter have jurisdiction which is concurrent with the jurisdiction of the High Court, the administrative bodies ought to exercise jurisdiction. The deference theory addresses situations where the courts defer matters of a specialized nature to an administrative body which has expertise in that area after which a person dissatisfied with it may appeal to the Court.

Article 140(1) of the 1992 Constitution

Article 140 of the 1992 Constitution provides that the High Court shall have jurisdiction in all matters and in particular, civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law.

A critical look at article 140 reveals that it does not necessarily confer original or appellate jurisdiction in all matters on the High Court. Therefore, other courts or other administrative bodies may have original jurisdiction in some matters.

Analysis of cases;

1. In the case of **Republic v High Court, Denu; ex parte Avadali IV [1993/94]** the Supreme Court held that the jurisdiction of the High Court had been ousted by Section 57 of the Courts Act, 1993 (Act 459).

The Courts Act provides as follows;

Section 57—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.

2. The jurisdiction of the disciplinary committee of the General Legal Council. Section 18 of the Legal Professions Act, 1960 (Act 32) entitles a person to lodge a complaint against a lawyer for misconduct or unethical professional conduct with the Disciplinary Committee of the General Legal Council. Section 21 provides a right of appeal to the Court of Appeal by the Lawyer or the Complainant if dissatisfied with the decision. In either case the High Court was not conferred with original or appellate jurisdiction **but** article 140 of the Constitution is not violated. It is therefore incongruous to argue that the High Court has original jurisdiction in all matters.

3. in cases of unfair termination under the **Labour Act, 2003 (Act 651).** In the case of **Bani v Maersk Ghana Ltd[2011]** the SC applied the deference theory to confer jurisdiction on the Labour commission to determine matters of unfair termination under section 64 of the Labour Act which provided remedies for unfair termination. However, in **Republic v High Court, Accra, ex parte Peter Sangber-Derry (2017),** the SC held that the HC has ***concurrent original jurisdiction*** with the Labour Commission in unfair termination of employment matters. The SC held as follows;

   "but an even more fundamental ground on which, in our humble opinion, the Bani v Maersk decision was per incuriam is that it did not consider article 140(1) of the Constitution which provides that; *the High Court shall have jurisdiction in all matters and in particular, civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law."*

   The authority granted the Commission to hear certain cases arising from section 63 of Act 651 cannot and is not exclusive of the High Court's jurisdiction in all matters, civil and criminal, under the Constitution. Section 63 and 64 of the Labour Act did not oust the High Court's jurisdiction. It rather defers to the jurisdiction of the Labour Commission who are experts in Labour issues.

4. In **Ghana Bar Association v AG (unreported, writ No. 14/95)** the SC in a unanimous judgment dated 7th Feb.1995 upheld the ouster of the High Court in

chieftaincy matters only because it interpreted articles 274 (3)(d) of the Constitution as conferring that jurisdiction on the Traditional Councils and Houses of Chiefs to the exclusion of the High Court.

That provision is peculiar and special in the sense that only a provision of the Constitution may limit the jurisdiction of the High Court, and not by an Act of Parliament. The Legislature may enhance but not diminish the High Court's jurisdiction by an Act of Parliament. Thus, the Legislature cannot by Act 651 take away the jurisdiction of the High Court in the light of article 140 of the Constitution which grants jurisdiction in all matters.

GROUNDS FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI and PROHIBITION

Certiorari Looks into the past to correct errors. Certiorari and prohibition go together. Prohibition is forward looking. Certiorari and prohibition are discretionary remedies. The court may refuse to grant it, even though you may have satisfied all the pre-conditions.

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 certiorari in matters they do not have nay 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.

See;

1. Republic v High Court, Ho, Ex parte Diawuo Bediako [2011] SCGLR
2. Republic v High Court, Accra, ex parte Ghana Medical Association (Arcman-Ackomey, interested party) [2012] 2 SCGLR 768
3. Republic v High Court, UTAG-Winneba chapter (Univ. of Education), 20/02/2017, Justice Pwamang.

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.

At what instance will certiorari and prohibition lie?

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. This is one of the grounds for the relief of certiorari available to the SC of Ghana 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."

Appeal and Certiorari mutually exclusive

Previously, the SC had held that appeal and certiorari were mutually exclusive in the following cases;

1. R v High Court Accra, ex parte Pupulampo (No.10 [1991] 2 GLR 472
2. R c HC, Fast track div. Accra, ex parte EC [2005/06] SCGLR 514
3. R v HC Cape Coast, ex parte Ghana Cocoa Board [2001] SCGLR 603

The current position

Republic v Circit Court Accra, Ex parte Konley Adams & Others [2012] 1 SCGLR 111 – the position now is that in one matter you may appeal and apply for certiorari.

Where in one action the grounds of appeal and certiorari are available, you may appeal and seek certiorari at the same time.

Grounds of Jurisdiction

Jurisdiction is the power of the court to adjudicate. A court must operate within the law. It does not affect geographical jurisdiction.

Her we mean excess or lack of jurisdiction. Note that judicial review is not about the merits of the case, rather infractions.

NB: if the body was not established by statute, you commence an action by a writ to set it aside for want of jurisdiction and not judicial review.

Natural justice.

GCB v Aboagye

WEDNESBURY PRINCIPLE

Developed from administrative law. Where a decision is illegal or irrational, it will be quashed.

Example is the Ghana Private Lotto case – the Sc quashed the injunction granted by the High Court because the activities of the lotto operators was illegal.

Procedural impropriety – example is where you commence an action by a writ instead of a petition. These are improprieties which go to the root of the matter and cannot be cured by order 81.

Case: Ashaley v GLC – this is the case of the judge who did not have a degree. Certiorari was refused because to do so would have occasioned injustice. This is to support the position that certiorari is a discretionary remedy.

MANDAMUS

An order issued by a competent court to compel a body or officer to perform a public function which has been imposed on that person or body by law.

It does not lie against a private person unless that private person performs a public function under an Act or enactment. Where the function is not a core function imposed by statute you cannot compel.

Grounds.

1. There must a demand and refusal. The refusal may be express or implied.
2. The function must be public in nature or exercised by a private person.

Cases;

- **Republic (No.2) v National House of Chiefs, ex parte Akrofa krukoko II [2010] SCGLR 134**….. *as a general rule, the order will not be granted unless the party complained of, has been made known of what it was required to do, so that he has the means of considering whether or not he should comply…..the requirement, however, that before the Court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it* ***cannot be applicable in all cases****, and does not apply where a person has by inadvertence omitted to do some act which he was under a duty to do, and where the time within which he can do has passed."*

Exception to the demand and refusal

1. Where it is a constitutional right
2. Where injustice will be occasioned

- Republic v National House of Chiefs, ex parte Akyeamfour II
- In Re Oguaa Paramount Stool; Garbrah and others v Central Regional House of Chiefs and Haizel [2005/06] SCGLR 193
- Republic (No.1) v National House of Chiefs, ex parte Akrofa Krukoko.

Where there is an alternative remedy mandamus will not lie unless you demonstrate that there is a danger or threat that an interest may be interfered with.

- **Larbieh Mensah IV alias Aryee Addoquaye v National House of Chiefs & Ano. [2011] 2SCGLR 883.** – This case is an exception to the requirement of demand and refusal.i.e. where it is a constitutional right you are not under obligation to make a demand.

Republic v Chieftaincy Secretariat, ex parte Adansi Traditional Council [1968] GLR 736 – Provides the four (4) essential requirements for Mandamus;

1. There must be a duty imposed by statute
2. The duty must be public in nature
3. The applicant **must have locus**
4. There must be a demand and refusal to perform that public duty.

NB: Point 4 is subject to the exception

The relief of damages in an action for certiorari, prohibition or mandamus

At common law, you could not seek for the relief of damages if you brought an action for certiorari, Prohibition and mandamus.

But in Ghana, the position changed in the case of **Awuni v WAEC** – Awuni was compensated and that decision influenced order 55 of CI 47 when it was enacted. You must make a case for the relief of damages.

QUO WARRANTO

Literally translated as "by what authority" or "produce your warrant".

Conditions

1. A person is holding a public office
2. That office was created by statute. The office must be of a public nature

3. The office must be permanent and not adhoc or temporary
4. The office must be substantive and not ministerial to another's will.
5. The person must have taken possession of the office.

Case : Republic v Sagoe II, ex parte Baffoe V [1979] GLR 378.

NB: injunction automatically flow from the grant of quo warranto to restrain the person from holding that office.

Habeas Corpus

The person detaining must be performing a pubic function. It is an ex-parte application. It does not lie against a person performing a judicial function.

CAUSE OR MATTER AFFECTING CHIEFTAINCY

- **CHIEFTANCY ACT 2008 (ACT 759)**

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. See **Section 57 of Act 459.**

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).

The High Court's supervisory jurisdiction over the lower adjudicating bodies was pronounced upon by the Supreme Court in the case of **Republic v High Court, Koforidua; Ex parte Bediako II;**

> "to my mind, the mere fact that the question of whether or not a person is a chief raises its head during an application for certiorari before the High Court does not necessarily constitute the matter as the one affecting chieftaincy for purposes of Section 57 of the Courts Act, 1993 (Act 459). In order to constitute a matter as one affecting chieftaincy, it must, in my view, be the determination of which, unless overturned on appeal, would settle once and for all, a chieftaincy matter or dispute."

Article 277 of the 1992 constitution and Section 57 of Act 759 provides that a chief is a person hailing from the appropriate family and lineage who has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law.

NB: Nomination varies according to tribes, however, among the Akans, the nomination is usually done by the queen mother for consideration by the kingmakers of the main stool.

It was held in the case of **Sremangyedua v Nketia [2010] SCGLR** that the nomination was invalid because the queen mother could not be compelled to nominate a candidate for a chief within 12 hours.

A chief exercise only customary function. He can exercise statutory functions only where his name is registered in the National register of Chiefs and published in the Gazette or the chieftaincy bulletin.

Read Section 57 of Act 759. – Definition of a chief.

Section 58 – Categories of Chiefs

1. The Asantehene and paramount chiefs
2. Divisional Chiefs
3. Sub-Divisional Chiefs
4. Adikro
5. Other chiefs recognized by the National House of Chiefs.

Cause or matter affecting chieftaincy - Section 76

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.

NB: point 4 applies in situations where the necessary customary rights have not been performed to cause his deposition or give effect to the voluntary abdication.

The Chieftaincy Courts

1. The judicial committee of the Traditional Council
2. Judicial committee of the Regional House of Chiefs
3. Judicial Committee of the National House of Chiefs.

NB: if your name is not entered in the National Register of Chiefs, you cannot perform a statutory function.

Section 29 – Jurisdiction of the Traditional Council

Subject to this Act, a traditional Council has exclusive jurisdiction to hear and determine a cause or matter affecting chieftaincy which arises within its area not being one which the Asantehene or a Paramount Chief is a party.

The jurisdiction shall be exercised by a Judicial Committee comprising three or five members appointed by the Council from their members.

The jurisdiction is ousted where;

1. The Asantehene is a party
2. A paramount chief is a party
3. A paramount queen mother is a party
4. The paramount stool or skin is a party

NB: Read Section 39 of Act 459.

Section 29(3) of Act 759 – a person aggrieved by a judgment or order may appeal to the relevant Regional House of Chiefs as of right against the judgment or order. The appeal must be filed within 30 days and once filed operates as a stay of execution.

Section 26 – original jurisdiction of the Regional House of Chiefs

Has jurisdiction in matters relating to the Paramount stool or skin or the occupant of the stool or skin including queen mothers to paramount stool or skin.

NB: The stool is a corporate Sole with capacity to sue and be sued. It is a legal entity, its occupants may come and go but the stool remains forever……**Amankwah v Kyir.**

Essouman Stool v Appiah Nkyi …..Alienation of a stool land by the Chief and majority of the elders is valid.

Section 27 – Appellate jurisdiction of the regional House of Chiefs

Has jurisdiction to hear and determine;

a) Appeals from the traditional Councils within the region in respect of the nomination, selection, election, installation and deposition of a person as a chief
b) Appeals against a judgment or an order given or made by a traditional council within its region on a cause or matter affecting chieftaincy.

Section 28. Judicial Committee of a Regional Houses of Chiefs

(1) There shall be a Judicial Committee of each Regional House which shall exercise the original and appellate jurisdiction conferred on the Regional House under sections 26 and 27.

(2) The original and appellate jurisdiction of a Regional House shall be exercised by the Judicial Committee of the Regional House comprising three chiefs appointed by the Regional House from among its members.

(3) A member of a Judicial Committee of a Regional House may be removed from office on the ground of proven misbehaviour or infirmity of mind or body by the votes of not less than two-thirds of all the members of the Regional House.

(4) A Judicial Committee appointed under this section shall be assisted by a lawyer of not less than five years standing appointed by the Regional House on the recommendation of the Attorney-General.

NB: the advice of the lawyer does not bind the chiefs.

NATIONAL HOUSE OF CHIEFS

Section 22 - Original jurisdiction of the National House of Chiefs.

The National House of Chiefs has original jurisdiction in a cause or matter affecting chieftaincy,

(a) which lies within the competence of two or more Regional Houses,

(b) which is not properly within the jurisdiction of a Regional House, or

(c) which cannot be dealt with by a Regional House.

Section 23 - Appellate jurisdiction of the National House of Chiefs

(1) The National House has appellate jurisdiction in a cause or matter affecting chieftaincy which has been determined by a Regional House.

(2) Upon an appeal, the National House may confirm, reverse or vary the decision appealed against or remit the matter or a part of that matter for reconsideration by the Regional House from whose decision the appeal is brought, subject to the conditions or directions that the National House may consider necessary.

Section 24 - Appeals to the Supreme Court

An appeal against a decision of the National House in the exercise of its

(a) original jurisdiction lies to the Supreme Court, and

(b) appellate jurisdiction, lies to the Supreme Court **with leave** of the National House or of the Supreme Court.

Case: Mansah & Ors v Adutwumwaa & Ors [2013/14] SCGLR…"We will like to reiterate the views of this court when it spoke with one voice restating the principles of judicial review through Dr. Date-Bah JSC, in the locus classicus case of **Republic v High Court, Accra, Ex-parte Commission on Human Rights and Administrative Justice (Addo – Interested Party) [2003-2004] 1 SCGLR 312** "The court would re-state the law governing exercise of judicial review as follows: Where the High Court (or for that matter the Court of Appeal) has made a *non-jurisdictional error of law*, *which was not patent on the face of the record* (and by the "record" was meant the document which initiated the proceedings, the pleadings, if any, and the adjudication but not the evidence nor the reasons unless the tribunal chose to incorporate them), the avenue for redress open to an aggrieved party was an appeal, not judicial review.

Therefore, **certiorari** would not lie to quash errors of law which were not patent on the face of the record and which had been made by a superior court judge who was properly seised of the matter before him or her. In that regard, an error of law made by the High Court or the Court of Appeal, would not to be regarded as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it."

NB: The Asanteman Traditional Council is not a creature of Statute but the Kumasi Traditional Council is.

CONSTITUTIONAL INTERPRETATION

Tyes of Constitutions.

1. Written and unwritten
2. Unitary and federal
3. Rigid and flexible
4. Entrenched, enshrined, unamended.

A written Constitution must be interpreted as a living organism capable of growth. The Constitution has the letter and the spirit. the letter is the text. The spirit could be; economic, political, cultural, social and other factors.

Attributes of a Constitution.

1. The Constitution is the supreme law of the land – article 1 of the Constitution.
2. It is both a legal document and political testament.
3. It is organic in nature and must be allowed to develop its own conventions. It must be interpreted to address all normal and abnormal situations.

4. It is the fountainhead of the arms of government. Meaning the Executive, legislature and the judiciary derive their strengths, source of power and sustenance from the Constitution.
5. It is the fundamental law and therefore not an ordinary law of the land and its interpretation cannot be tied down to an Act of Parliament.

Case – Tuffuor v AG

6. It should be construed liberally to keep pace with development and advancement of the Country.
7. The interpretation of the constitution should not be based on technicalities to defeat the purpose for which it was enacted or made.
8. The constitution being a sacred document must grow with the development of the Country.

The interpretation Act should not be used to interpret the Constitution.

NB: Read the memorandum to the interpretation Act,2009 (Act 792)

Time and circumstances must be taken into consideration when interpreting the Constitution. The constitution must be interpreted to achieve the rule of law.

Read Article 1 and 2.

A person, as provided in article refers to only citizens of Ghana. The Constitution was made for Ghanaians. The preamble to the Constitution provides; "we the people of Ghana…" therefore the person in article 2 is referrable to Ghanaians. For one to initiate an action under article 2, you must be a Ghanaian.

NB: failure to disobey orders or declarations of the SC made in respect of article 2 of the Constitution amounts to a High Crime. However, in any other case the offence shall be contempt of court.

GROUNDS FOR CONSTITUTIONAL INTERPRETATION

Article 2 and 130 are inseparable and move together.

Article 130 provides that, subject to article 33, the SC shall have exclusive original jurisdiction

a. In all matters relating to the enforcement or interpretation of the Constitution, and
b. All matters arising as to whether or not an enactment was made in excess of the powers conferred Parliament or any other any other authority or person by law or under this Constituion.

The Grounds

Republic v Special Tribunal, ex parte Akosa [1980] GLR 592 – outlines the grounds upon which one may go for constitutional interpretation. There are four (4) grounds as follows;

1. Where the words of the constitution are imprecise, unambiguous or unclear.
2. Where rival meanings have been placed by the litigants on the words of any provision of the Constitution.
3. Where there is a conflict between one or more provisions of the Constitution. Eg. Article 99 and 131.
4. Where on the face of the provision, there was a conflict between the operation of particular institutions set up under the Constitution. Eg. Article 216 (CHRAJ)

Reference jurisdiction of the Supreme Court

Reference is a jurisdiction conferred on the Supreme Court to entertain all matters involving the construction and interpretation of the Constitution which arises in any proceedings at any court other than the Supreme Court. The Court shall stay proceedings and make reference to the SC…**Article 130 (2)**

The Maikankan principle

REPUBLIC v. MAIKANKAN AND OTHERS [1971] 2 GLR 473-478

Constitutional law—Constitutional issue—Interpretation of Constitution—Reference to Supreme Court by High Court—**When issue referable**—Answer to question referred clear and unambiguous on the face of the provisions of Constitution—**Whether High Court bound to refer issue to the Supreme Court**—Constitution, 1969, art. 106 (1) (a) and (b).

The ten accused persons were committed to the High Court for trial on various charges, inter alia, of conspiracy to defraud contrary to sections 23 (1) and 131 of the Criminal Code, 1960 (Act 29); defrauding by false pretences contrary to section 131 of Act 29 and making illegal payments outside Ghana contrary to the Exchange Control Act, 1961 (Act 71), s. 6 and of Sched. IV, para. 5 (1). None of the charges carried the death penalty. At the trial counsel for the Republic applied that owing to the complicated nature of the case, the trial judge should try the case without a jury and that the court could under articles 20 (2) and 112 (2) of the Constitution, 1969, try the case without a jury. One of the defence counsel objected to the application on the ground that the interpretation being placed on article 20 (2) of the Constitution was wrong and that by virtue of section 204 of the Criminal Procedure Code, 1960 (Act 30), the trial could not be conducted

without a jury. The trial judge therefore referred the matter to the Supreme Court under the provisions of article 106 (2) of the Constitution for a ruling "whether a justice of the High Court can try the charges against the accused persons herein without a jury."

Held:

(1) article 20 (2) (a) of the Constitution, 1969, does not provide that a trial by a judge with a jury is compulsory for all offences other than treason, but rather makes it mandatory in trials of persons charged with offences punishable with death or imprisonment for life, other than those persons charged with treason, which is also punishable with death, but for which special provision is made in article 20 (2) (h) of the Constitution for trial by the "High Court duly constituted by three Justices thereof."

(2) An examination of the provisions of Act 30 does not support any argument that the offences with which the accused persons in the instant case were charged must be tried by a judge with a jury.

(3) Under section 243 of Act 30, the trial of offences other than those punishable with death or life imprisonment is by a court with the aid of assessors, unless the court, for stated reasons, directs that the accused be tried by a jury. The provisions relating to trials with the aid of assessors have not been abolished by the Constitution, 1969; they are still part of the law of the land.

Per curiam. A lower court **is not bound to refer** to the Supreme Court every submission alleging as an issue the determination of a question of interpretation of the Constitution or of any other matter contained in article 106 (1) (a) or (b). ***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 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***. To interpret the provisions of article 106 (2) of the Constitution in any other way may entail and encourage references to the Supreme Court of frivolous submissions, some of which may be intended to stultify proceedings or the due process of law and may lead to delays such as may in fact amount to denial of justice.

NB: The Maikankan principle has been compromised by the case of **Republic v High Court, Accra Ex parte Zanetor Rawlings (No.1).** there is now a shift from the position that a lower court should not make reference to the SC for interpretation of a constitutional provision where the provision is clear and unambiguous or that where the provision had already received interpretation from the SC, the lower court should apply the said interpretation, to the present position requiring the lower court to determine whether an issue of interpretation would arise if the provision is interpreted purposively or as a living constitution. If the answer is affirmative, the lower court should not assume

jurisdiction and make reference to the SC. The SC articulated the position that the Maikankan case is not a cast in iron case and neither are the guidelines set out in **Republic v Special Tribunal Ex Parte Akosah.**

The SC in the case of **Republic v High Court Accra, Ex Parte Zanetor Rawlings, per the majority** held that the Court has departed from its earlier stance exemplified in the case of **R v Maikankan[1971], Ex Parte Akosa and Aduamoah II V Adu Twum II[2000]** in favour of the now dominant principle of purposive construction of statutes, particularly the Constitution. The Court held thus;

> ….."indeed beginning with **Republic v High Court Accra, Ex Parte EC (Mettle-Nunoo & Others Interested parties)** [2005-2006] the tide against ready referral for interpretation began to change. In that case apparently very clear and unambiguous constitutional provisions were held to be referrable ambiguities. Thus in **Republic v High Court Accra; Ex Parte CHRAJ (Richard Anane Interested Party)** this court held the word "complaint" in article 218(a) of the Constitution was ambiguous and was referred to the SC for interpretation. Indeed, in that case the court held that a lower court ought not readily to assume that a constitutional provision is plain or unambiguous. ". This trend of thought has been followed in **Republic v High Court Accra, Ex Parte Balkan Energy."**

NB: the position of the law now is that a lower court should not assume jurisdiction over a matter of constitutional interpretation unless the court is satisfied that the provision is so clear that no interpretative issue will arise where the constitution is interpreted either purposively or as a living constitutionalism.

ENFORCEMENT OR INTERPRETATION

Article 2 and 130 provide the exclusive original jurisdiction of the SC. The same provision was provided in the 1969 and 1979 Constitutions.

In **Republic v Special Tribunal; Ex parte Akosah,** Anin JA (as he then was) held as follows;

From the foregoing dicta, we would conclude that an issue of ***enforcement or interpretation*** of a provision of the Constitution under article 118 (1) (a) arises in any of the following eventualities:

a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;

(b) where rival meanings have been placed by the litigants on the words of any provision of the Constitution;

(c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail;

(d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's original jurisdiction under article 118. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises.

NB: Anin JA was of the view that the statement in Article 118 of the 1979 Constitution which provided that ; "enforcement **OR** interpretation" should be read in a conjunctive sense, that is " enforcement **AND** interpretation". This is because, according to him, all Courts can enforce a provision of the Constitution and not interpretation of same. Hence in that sense the SC hasn't got exclusive jurisdiction in terms of enforcement of a provision of the Constitution. But if it is read conjunctive as "enforcement AND interpretation" then in that sense the SC is seized of jurisdiction when a matter involves both enforcement and interpretation of the Constitution. In the nutshell, article 118 which is in pari materia with article 130 of the 1992 Constitution should be read conjunctive and not disjunctive.

In Okudjeto Ablakwa v AG and Obetsebi Lamptey [2011] SCGLR, Counsel for the 1st Defendant raised a preliminary objection that the provisions (20(5), 20(6), 23, 257, 258, 265, 284 and 296) relied on by the Plaintiffs are clear and unambiguous and does not call for interpretation and also that the matter is a simple land case which can be ventilated before the HC in the first instance. The SC assumed jurisdiction in the case for the

enforcement of a constitutional right which did not involve an issue of Constitutional interpretation. Therefore, the word OR as used in article 130 should remain disjunctive.

The CASE

Adinyira JSC

1. The provisions relied on by the plaintiffs are clear and unambiguous and does not call for interpretation.

2. The matter is a simple land case which can be ventilated before the High Court (Lands Division) in the first instance.

Objections by 2nd defendant to the jurisdiction of the Court

1. The provisions relied on by the plaintiffs are clear and unambiguous and does not call for interpretation. The 2nd defendant referred to the guidelines provided in the *Republic v. Special Tribunal, Ex parte Akosah* [1980] GLR 592 CA

2. Article 20 (5) and (6), articles 23, 265 and 296 relate to the management of public lands by the Lands Commission on behalf of the Government and this action is thus a matter for the High Court.

3. The Constitution has under Article 287 vested the Commission on Human Rights and Administrative Justice (CHRAJ) the power to determine a claim of breach of article 284 and consequently the plaintiffs cannot come to the Supreme Court at first instance to ventilate their grievance relating to the alleged breach of article 284

Plaintiffs' response

The plaintiffs claim that the allocation of a parcel of government land to the 2nd defendant was illegal and unconstitutional and their case "hinges on the interpretation of the said constitutional provisions in relation to the acts and/ or policies of the previous government in alienating land compulsorily acquired by the state in the public interest and for public use, i.e. for the accommodation of public officers"

Is this a case for administrative review?

It seems to me that this writ is in essence questioning an administrative action or decision taken by the past government and the Lands Commission in respect of public land on the grounds inter alia that it contravenes the Constitution. Meanwhile the Constitution provides under article 23 that:

> "23. Administrative bodies and administrative officials shall act fairly and reasonably comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."

Admittedly article 23 falls under the chapter of fundamental human rights and its enforcement is within the exclusive jurisdiction of the High Court. I therefore agree with the 2nd defendant to the extent that the plaintiffs could have lodged a complaint at CHRAJ under article 218 on grounds of abuse of administrative discretion.

But does this prevent the plaintiffs from mounting an action in the Supreme Court to challenge the acts of public officials as being in contravention of the provisions of the Constitution? I do not think that paragraph 6 of the *Practice Direction* by the Supreme Court reported in [1981] 1GLR 1 SC which requires that:

> "where a cause or matter can be determined by a superior court other than the Supreme Court, the jurisdiction of the lower court shall first be invoked,"

are meant to curtail or exclude the original jurisdiction of the Supreme Court when the matter in issue is primarily in relation to the enforcement of the Constitution.

Is this a case primarily for the enforcement of the provisions of the Constitution?

The question then is whether the plaintiffs' writ properly raises any real issue of enforcement of the Constitution that can only be resolved by this Court in exercising its original jurisdiction, given the explicit language of articles 2(1) and 130 (1) (a)?

It is well settled by decisions of this Supreme Court that any citizen of Ghana has the capacity as a matter of public interest to uphold and defend the Constitution by challenging in the Supreme Court any perceptible inconsistency or contravention in any enactment, or act or omission of any person, with the Constitution, irrespective of personal interest. It would suffice to mention the case of ***Sam (No 2.) V. Attorney-General*** **[2000]** SCGLR 305 at 315, where the eminent and learned Mrs. Joyce Bamford-Addo JSC (as she then was) held that:

> "[A]rticle 2(1) gives standing to any person, who is a citizen to seek an interpretation and enforcement 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."

At pages 340 to 341 of the same law report my sister **Sophia Akuffo JSC** also held that:

> "In my view article 2(1) is one of the most important provisions of the Constitution since it deals with enforcement. To limit its scope below the levels intended by the framers of the Constitution, would be to enfetter one of the most crucial built-in mechanisms for assuring the people of Ghana that their Constitution, would always remain a living and vibrant instrument of social and political management and good governance. Every citizen of Ghana, by virtue of such citizenship, has an innate interest in the integrity of the supreme law of the land, the National Constitution. As such, (therefore,) any perceptible inconsistency or contravention in any enactment or act or omission of any person, with the Constitution constitutes a sufficient occasion for the invocation of article 2. The perceived existence of any unconstitutional enactment, act or omission is ipso facto, a matter of public standing, personal interest and public duty to bring an action in this court to challenge its constitutionality… In the context of article 2 (1), therefore, there can never be an officious bystander or nosy busybody. Every Ghanaian is and must be an interested party. This has always been the position of this court since the 1992 Constitution came into existence"

It seems to me that the plaintiffs' contention is based mainly on an infringement of articles 20 and 23 which fall under the Fundamental Human Rights and Freedoms as set out in Chapter Five of the 1992 Constitution. Even where the High Court is vested with the exclusive jurisdiction of enforcement in the area of fundamental human rights and freedoms by the combined effect of articles 33 (1), 130 (1) (a) and 140 (2), and the Supreme Court not having concurrent jurisdiction; yet the jurisdiction of the Supreme Court in this domain is determined by whether or not the plaintiff is pursuing **a personal interest** as in ***Edusei (No.2) v. Attorney-General*** **[1998-99] SCGLR 753** and ***Bimpong-Buta v. General Legal Council*** **supra**, or **a public interest** or a matter in the interest of public good as in *Adjei- Ampofo (No.1) v. Accra Metropolitan Assembly & Attorney-General(No.1)*[2007-2008] 1SCGLR 611 and *Federation of Youth Association of Ghana (FEDYAG) v. Public Universities of Ghana & Ors* **supra**. 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.

In any event, "[But] even those matters, made subject to the enforcement jurisdiction of the High Court, may themselves require interpretation by the Supreme Court, since they form part of the Constitution" Per Prof. Modibo Ocran in The Republic V. High Court (Fast Track Division); Ex parte Electoral Commission(Mettle-Nunoo & Others Interested Parties, **supra,** at page 547.

The subject matter of the constitutional challenge before us is in relation to part of public lands which is held in trust by the President for the people of Ghana and administered by the Lands Commission on his behalf. The plaintiffs' challenge to the constitutionality of the alienation of public property is premised on an alleged violation by the previous government of article 20(5) of the 1992 Constitution that provides that:

> "20 (5) Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired."

The plaintiffs are alleging that the grant to the 2nd defendant of a parcel of government land was in utter contravention of article 20(5) and "smacks of cronyism, and the same is arbitrary, capricious, discriminatory and a gross abuse of discretionary power vested in a public officer under the 1992 Constitution." At this point I need not enquire whether or not the plaintiffs' action is likely to succeed or fail.

My concern is that where there is any perception of inconsistency or contravention in the acts or omission of any office holder or any person in contravention with the provisions of the constitution in respect of his public duties, and for our purpose, the management or administration of public lands; the Constitution confers the right or duty on any citizen to bring an action for enforcement of the Constitution. In this respect the interpretation of the provisions of the Constitution is only ancillary to the enforcement of those provisions. Accordingly the submissions by the 1st and 2nd defendants that our jurisdiction is ousted because the constitutional provisions relied on by the plaintiffs are plain and unambiguous and do not need interpretation are of no moment and are rejected. In effect the plaintiffs are rather urging us to invoke our enforcement jurisdiction to correct, or prevent a constitutional breach by public office holders and to enforce compliance of the Constitution.

Article 2 (1) imposes on the Supreme Court the duty to measure the actions of both the legislature and the executive against the provisions of the Constitution. This includes the duty to ensure that no public officer conducts himself in such a manner as to be in clear breach of the provisions of the Constitution. It is by actions of this nature that give reality to enforcing the constitution by compelling its observance and ensuring probity, accountability and good governance.

In this respect, I share the views expressed by my brother Gbadegbe JSC in Suit No. J1/2/2010 entitled *Sumaila Bielbiel v. Adamu Daramani & Attorney-General,* unreported, dated 4th July, 2011, to the effect that:

> "In my view it is important that we do nothing to undermine the confidence that the ordinary person (thus) has in our ability to compel observance of the Constitution by invalidating in appropriate cases not only enactments that are in breach of it but also acts of among others constitutional office holders that do not

derive their legitimacy from the Constitution in terms of article 2(1). [Emphasis mine]

This is an exclusive jurisdiction conferred on us by the Constitution under article 130 (1) of the Constitution and we must not shirk it.

For these reasons I dismiss the preliminary objection to our jurisdiction to determine the matter on its merits.

Preliminary objection overruled.

ATUGUBA, J.S.C:

By their amended writ dated 30/7/2010 the plaintiffs claim before this court as follows:

"1. A declaration that, by virtue of Articles 20(5) & (6), 23, 257, 258, 265, 284 and 296 of the Constitution of the Republic of Ghana, 1992, the Minister for Water Resources, Works and Housing in the previous Government of His Excellency, President J.A. Kufuor, did not have the power to direct the sale, disposal or transfer of any Government or public land to the 2nd Defendant or any other person or body under any circumstances whatsoever, and that any such direction for the disposal, sale or outright transfer of the said property in dispute or any public land to the 2nd Defendant was unconstitutional and illegal.

2. A declaration, by virtue of Articles 20(5), 23, 257, 258, 265, 284 and 296 of the Constitution of the Republic of Ghana, 1992, the Government of Ghana is obliged to retain and continue to use in the public interest the property compulsorily acquired for public purpose the parcel of land designated as Parcel No. 29, Block 12, Section 019, in extent 1.04 acres more or less, as delineated on Registry Map No. 0033/019/1988, on which is situated by the Republic of Ghana Bungalow No. 2 located at St Mungo Street, Ridge, Accra.

3. A declaration that the purported sale of the said Government Bungalow by the outgoing Government to one of its high ranking public officials, the 2nd Defendant, was in utter contravention of Articles 20(5), 23, 257, 258, 265, 284 and 296 of the Constitution of the Republic of Ghana, 1992, and the purported direction by the Minister for Water Resources, Works and Housing in the previous Government of

His Excellency, President J.A. Kufuor, for the disposal, sale or outright transfer of the said property in dispute to the 2nd Defendant smacks of cronyism, and the same is arbitrary, capricious, discriminatory and a gross abuse of discretionary power vested in a public officer under the 1992 Constitution.

The 2nd defendant has raised a preliminary objection to the jurisdiction of this court to entertain this action. In summary form the 2nd defendant's objections are that the provisions of the constitution relied on by the plaintiff are clear and unambiguous and therefore on the authority of particularly *Republic v. Special Tribunal, Ex parte Akosah* [1980] GLR 592 C.A.,in such a case the submissions of a party may relate "to no more than a proper application of the provisions of the constitution to the facts in issue, a matter for the trial court." He further contends that the plaintiff's reliance on article 284 is misconceived since the Constitution has under article 287 vested the Commission on Human Rights and Administrative Justice (CHRAJ) jurisdiction to determine a claim of breach of article 284. He further contends that articles 20(5) and (6), 23, 265 and 296 relate to the scope of the power of management of public lands by Government, acting by the Lands Commission under the Land Commission Act 1994, Act 483 and that this is a matter for the High Court. In short the 2nd defendant contends that the plaintiffs' case is a non-constitutional one camouflaged in constitutional robes. Counsel for the 1st defendant raised objections to this court's jurisdiction that are very similar to those raised by the 2nd defendant's counsel. He concludes thus: "Consequently we invite this honourable court to dismiss Plaintiffs' case as being a simple land matter which can be ventilated before the High Court (Lands Division) in the first instance."

First, the contention that this case is essentially a land case which is within the jurisdiction of the High Court in the first instance. Though this action involves land it is difficult to see how it is a land case for the High Court. The Plaintiffs are not seeking any relief *inter partes*in a land suit. The typical features of a land suit have been settled by this court in *Odonkor v Amartei* (1992)I GLR 577 S.C. It was therein held as per the headnotes (1) and (2) as follows:

"(1) an action was for a declaration of title if (i) the action was between adjoining land owners and one committed a trespass over the other's land, ie a boundary dispute; or (ii) where the party had been dispossessed of land by reason of adverse claims or possession made thereto or an actual right of occupation and enjoyment thereof; or (iii) where there had been a sale or alienation of the same land to rival

purchasers. *Since the appellants had not set out any of those grounds as entitling them to call on the respondent to demonstrate his title, the action was not one for declaration of title.*

(2) The appellants' claim that the land in dispute was their ancestral property over which they had granted the respondent's family farming rights postulated that the appellants had known that the respondent's family were in possession. And *trespass to land was committed by injury to or interference with one's possession*. Accordingly, *the cardinal principles in an action for trespass to land were that the plaintiff had to establish that he was in exclusive possession of the land at the time of the trespassand that the trespass was without justification*. " (e.s)

Conclusion

The problem of ascertaining the presence of jurisdiction of this court in constitutional matters can largely be arrested by focusing more on the nature of the law that will be relevant to the resolution of the issues raised in an action before this court rather than the nature of the subject-matter. It is quite clear that it is the upholding of the supremacy of the constitution that is the fulcrum of this court's jurisdiction in actions commenced before it. Accordingly, some such test (in addition to what has been hereinbefore stated) as, with which law the issues to be determined in the action have the closest connection or which law, the application of which to the action before the court wholly or substantially will dispose of it, could be of great pertinence

In this case the plaintiffs' case stands or falls only upon the grounds upon which he relies and they are all based on articles of the constitution. It is clear that these provisions are stated in such generalised terms that they are inherently ambiguous and require interpretation by this court. In any event it is clear that the plaintiffs are out to enforce those provisions of the constitution with regard to the acquisition of the land in issue by the 2nd defendant and the observance of those provisions by the government, the Minister for Works and Housing and the Lands Commission.

Clearly the law applicable is constitutional law within the jurisdiction of this court. I hasten to add that with regard to articles 20(5) and (6) and 23 they pass for public interest matters and they are within the jurisdiction of this court as laid down in *Adjei-Ampofo v Accra Metropolitan Assembly and Attorney-General (No. 1)* [2007-2008]1

SCGLR 610 and *Federation of Youth Association of Ghana (Fedyag) v Public Universities of Ghana* [2010] SCGLR 265. As regards the contention that because CHRAJ can investigate allegations of conflict of interest such matter is outside the jurisdiction of this court assuming the same is well founded, that alone cannot divest this court of entire jurisdiction over this action. Even if this case were a land case I do not see how the special and exclusive jurisdiction of this court regarding the issues upon which its resolution depends could be dominated by the general jurisdiction of the High Court under article 140, as if *verba generalia specialibus derogant*.

Nothing stated herein should be construed as departing from those decisions that hold that where the constitutional issue is only incidental this court has no jurisdiction but such issue must be truly incidental in the light of the foregoing.

For all the foregoing reasons the preliminary objection to our jurisdiction is overruled.

On the issue of whether or not the SC has the power to assume jurisdiction under articles 2(1) and 130 of eth 1992 Constitution in matters of enforcement where no question of interpretation arises; the majority of the SC (6-3) in the case of **Osei Boateng v National Media Commission and Appenteng [2012]** SCGLR took the firm opinion that matter relating to the enforcement of **fundamental human rights** which does not involve constitutional interpretation should be filed in the HC instead of the SC. The decision was that the word OR should be read as AND.

The minority, made up of Atuguba, AG CJ, Akuffo and Owusu JJSC speaking through Atuguba, AG CJ was of the opinion that the Supreme Court's jurisdiction to enforce fundamental human rights should not be tied down to only cases involving constitutional interpretation.

He stated his dissenting opinion as follows:

I have had the advantage of reading the characteristic masterly opinion of my brother Dr. Date-Bah J.S.C. I agree with much of it and its conclusion.

However, I perpetually disagree, with global respect to him, in so far as he holds that this court's enforcement jurisdiction does not arise unless an issue of interpretation arises. The original jurisdiction of this court stems from articles 2 and 130 of the Constitution. One of its most essential components is the enforcement of the Constitution as an item of jurisdiction in its own right and though it may arise jointly with

an issue of interpretation its existence and invocation cannot be inextricably linked to the incidence of an interpretative issue, as a sine qua non prerequisite.

It is common knowledge that the original jurisdiction of this court has been conferred in almost identical language in the 1969 and 1979 past Constitutions of Ghana and has been consistently interpreted in the same manner by the Supreme Court.

The locus classicus of Anin J.A. (as he then was), in **Republic *v. Special Tribunal, Ex parte Akorsah* (1980) GLR 592 at 605** summed up in his statement that *"there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous"* needs restatement. It certainly cannot, with tremulous respect to him, be right to the extent that this court's enforcement jurisdiction only arises where the article that falls to be enforced is not devoid of ambiguity. No court other than the Supreme Court has jurisdiction to entertain **an ACTION to enforce any article of the Constitution even if its clarity is brighter than the strongest light. However, when an enforcement ISSUE coincidentally arises in any court and the article involved is crystal clear such court may apply the Constitution to it.**

NB: the majority in the cases of **Osei Boateng v NMC and AG and Aduamoah II v Twum,** took the position that the SC cannot assume jurisdiction in matters involving enforcement of the constitution except where the enforcement involves constitutional interpretation.

The position that any enforcement of a right by the SC under articles 2(1) and 130(1) of eth Constitution need not involve an interpretative issue was restated by the SC in the case of **Sumaila Bielbiel (no.1) v Adamu Dramani and AG** - the SC held that the enforcement jurisdiction is independent of the interpretative jurisdiction. Therefore, the SC has exclusive jurisdiction in enforcement and interpretation of the Constitution. The SC in holding 5 held thus;

"……a careful reading of article 130 (1) would reveal that the word "and" appearing in its clause (a) and (b) had been used in respect of the two special or exclusive jurisdictions of the SC that were not available to the HC; and that it was not intended to mean that for the SC to have jurisdiction in cases of enforcement, the question for decision must also involve the interpretation of the Constitution. A contrary interpretation of article 130(1) would render article 2(1) of the constitution superfluous.

The recent decisions delivered by the SC after **Osei Boateng's case** seem to be *ad idem* that the SC has jurisdiction to enforce the provisions or the spirit of the constitution and also has exclusive jurisdiction to interpret the Constitution. In the case of **Prof. Kwaku**

Asare v AG and General Legal Counsel, the SC held that it has jurisdiction to enforce the Constitution where there is no interpretative issue involved in the matter before it.

The SC authoritatively held that it has jurisdiction to enforce the Constitution which is distinct from its jurisdiction to interpret the Constitution in the case of **KOR v AG & Justice Douse [2015-2016] SCGLR.** The SC unanimously held that the word OR should be read as such and further declared that the previous decisions on the subject-matter or article 130 were bad laws including Osei Boateng.

The SC went to state that it had departed from its previous decision in Osei Boateng v NMC and AG.

NB: See Q7 of Sept. 2020 PQ.

NB: See Section 1 of the ADR ACT 2010, (ACT 798)……..at the time the ADR Act was passed the SC had interpreted the OR in "enforcement or interpretation" as "AND". Based on the current position in the KOR case it should now be read as OR.

NB: Every Court has jurisdiction to enforce fundamental human rights in the course of proceedings but where you go to court specifically to enforce HR, then you must go to the HC. Similarly, when an enforcement issue arises in any court and the article is unambiguous, that Court may apply it but where you go to court specifically to enforce a provision of the Constitution, then you must go to the SC.

Osei Boateng v National Media Commission and Appenteng [2012]

The plaintiff, by a writ filed on 26th October 2011, sought to invoke the original jurisdiction of this Court for:

"Enforcement of the constitution by:

1. A declaration that on a true and proper interpretation of articles 168, 23 and 296 of the Constitution, the National Media Commission cannot appoint one of its members to the position of Director General of Ghana Broadcasting Corporation without affording other qualified Ghanaians the opportunity to apply for the position.

2. A declaration that the appointment of the 2nd defendant, a member of the National Broadcasting Corporation, without offering other qualified Ghanaians the opportunity to apply for the job contravenes the letter and spirit of articles 23 and 296 of the 1992 constitution.

the defendants filed notice of their intention to rely on a preliminary legal objection. The notice listed the grounds of the objection as follows:

1. "The Supreme Court does not have original jurisdiction to hear this action as the action is premised on Article 23 of the Constitution, 1992, a human rights provision. Thus, while dressed up as a constitutional issue, the action in fact involves the enforcement of a human right provision which by virtue of the combined effects of Article 33(1), 130(1) and 140(2) is a matter that the High Court and not the Supreme Court has original and exclusive jurisdiction over. *Abel Edusei v Attorney General* [1996-97] SCGLR 1; *Abel Edusei (No. 2) v Attorney General* [1998-99] SCGLR 753. The instant action is no more than one to enforce a human rights provision of the Constitution dressed up in the garb of interpretation and enforcement of the Constitution. See *Yiadom I v Amaniampong* [1981] GLR 3, SC; *Ghana Bar Association v Attorney General* [1995-96] 1 GLR 589 SC; [2003-2004] 1 SCGLR 250; *Yeboah v Mensah* [1998-99] SCGLR 492. What is more, in order successfully to bring an action to enforce a human rights provision, the Plaintiff/Respondent (hereinafter referred to as "the Plaintiff") ought to have a "personal interest" in the outcome of the litigation. Plaintiff however has no such right in this case and accordingly lacks *locus standi* to bring an action to enforce Article 23.

   Article 168 of the Constitution the interpretation of which Plaintiff seeks does not raise any question of interpretation as same is clear, precise and unambiguous, admitting of no controversy as to its meaning.

   This ruling is thus a determination of whether the preliminary objection raised by the defendants is justified. It will, of course, consider the defendants' arguments and the plaintiff's counterarguments, before coming to a decision.

   In response to these arguments, the plaintiff asserts that he does not seek to enforce a fundamental human right in relation to himself. Rather, his suit is based on the "public interest" leg of article 2(1), in contradistinction from the personal interest leg provided for in article 33(1). He contends that the substance of his case is that the plaintiff is complaining as citizen of Ghana that the National Media Commission, a creature of the Constitution, has exercised its constitutional mandate in a manner that sins against the Constitution. He draws attention to the clear distinction made in *Sam (No. 2) v Attorney-General* [2000] SCGLR 305 between this Court's jurisdiction in respect of article 2(1) and 33(1). This Court there held that its jurisdiction under article 2(1) is a special one available to only citizens of Ghana irrespective of personal interest, which entitles them to seek an interpretation and enforcement of the Constitution, in furtherance of the duty

imposed on all citizens "to defend the Constitution" under articles 3(4)(a) and 41(b). He further cites *FEDYAG v Public Universities of Ghana* [2010] SCGLR 265 which also makes the distinction between public interest actions (under article 2(1)) and personal interest actions under article 33(1). The only *locus standi* needed under article 2(1) is citizenship of Ghana.

In response to the defendants' point that the plaintiff's action is a human rights action dressed up in the garb of an action for interpretation or enforcement of the Constitution, the plaintiff counters by indicating that in the *Yiadom* case *(supra)* the Court was of the view that the House of Chiefs was the appropriate forum, while in the *Yeboah v Mensah* case (*supra)* the Court decided that the High Court was the appropriate forum since the suit was in substance an election petition. He then poses the question: what other forum will be available to the plaintiff on the facts of this case, where the plaintiff has no personal interest in the suit? Clearly that forum will not be the High Court because of the lack of personal interest. He therefore argues that this Court has jurisdiction since in any case he is not relying exclusively on article 23, but also alleging breach of article 296, in both reliefs 1 and 2 of his writ. He also invokes the "spirit" of the Constitution to buttress his claim.

I think that the plaintiff's response to the defendants' objection on this ground is sound and must be upheld. His point is made eloquently for him by the Supreme Court in *Adjei-Ampofo v Accra Metropolitan Assembly* [2007-2008] SCGLR 611 where the Court said (at pp. 621-622):

"Although the High Court's jurisdiction in Article 140(2) appears to be very broad, the provision is nothing more than a practical restatement of the exception to the Supreme Court's jurisdiction, as defined by article 130(1) in cases brought under article 2(1). The High Court's enforcement power is therefore to be exercised within the scope of article 33(1), the language of which is clear. Hence the emphasis we must not loose sight of in article 33(1) is the phrase ***"in relation to him".*** In other words, in the High Court, the actual, ongoing or threatened contravention of the fundamental human right or freedom must be in relation to the plaintiff and no one else. However where the human right or freedom sought to be enforced is not in relation to the plaintiff's personal rights and freedoms, but for the purpose of enforcing a provision of the Constitution under article 2 (1), the proper court is the Supreme Court. In the latter case, such a plaintiff would not have access to the High Court for lack of locus standi. Likewise, the former would not have access to the Supreme Court because he or she would be seeking to invoke the original jurisdiction of the High Court to enforce his or her personal fundamental right or freedom. Thus, the two jurisdictions are not concurrent. The jurisdiction of the Supreme Court is not ousted simply because of the provision sought to be enforced. The court's jurisdiction in such a case is determined by whether or not the plaintiff is pursuing a

personal interest (as in the ***Edusei and Bimpong –Buta cases*** as well as the case of ***Oppon v. Attorney-General [2003-2004] 1 SCGLR 376***, for example), or the enforcement of a provision of the Constitution in interest of the public good (as in the ***CIBA case*** and ***Sam (No. 2) v. Attorney –General.***"

The view of the law expressed above is now settled law, having been re-affirmed by the majority decision in *FEDYAG v Public Universities of Ghana* [2010] SCGLR 265. Thus, even if the plaintiff were relying on article 23 alone, this Court would still have jurisdiction because he would be relying on article 23, not in his own personal interest, but in order to test the constitutionality of the defendants' action in the public interest. The plaintiff's case is even stronger because he is claiming to enforce a further provision other than one in Chapter 5, namely, article 296.

Ground 2

Under ground 2, the defendants argue that article 168, pursuant to which the first defendant made the second defendant's appointment, is clear and unambiguous and therefore does not raise any question of interpretation. They further argue that no question of enforcement arises, since an examination of the plaintiff's Statement of Case shows that he does not aver that the first defendant breached the provisions of article 168 in appointing the second defendant. The defendants contend that no question of offering other qualified Ghanaians the opportunity to apply for the position arises from the text of article 168 and that if this Court were to so hold it would be substituting for, or adding to, the express and clear words of article 168. They buttress this point by quoting the words of Apaloo JA, as then was, in *Awoonor Williams v Gbedemah*, G & G, 2nd Edition, Vol. 2, Part 2, 1184 at 1190 that:

> "We think therefore the words 'adjudge or declare' have no technical connotation and in the context of Article 72(2)(b) mean the Commission of inquiry 'found or pronounced' that a person acquired assets unlawfully, etc. To accede to the interpretation put on behalf of the defendant, it would be necessary to substitute for the words 'report of a Commission of Inquiry' the words by a Court as a result of the finding of a Commission of Inquiry'. In our judgment, this would be an amendment, not an interpretation of the article. To do so, would be anything but our duty."

Responding to this argument, the plaintiff concedes that article 168 is clear and unambiguous, but contends that the crux of his case is that in the exercise of its duty under article 168 the first defendant owed a duty to be open, transparent, unbiased and

fair. The plaintiff states that this duty is imposed by articles 23, 296 and the spirit of the Constitution. The plaintiff further makes the point that the jurisdictions of this Court with respect to interpretation and enforcement, respectively, are separate. While it may be necessary to show some ambiguity in relation to a provision before the interpretation jurisdiction is invoked, they contend that in relation to the jurisdiction to enforce, there is no need to identify any ambiguity before the court's jurisdiction is invoked. In support of this proposition, it cites *Adjei-Ampofo v Accra Metropolitan Assembly* [2007-2008] SCGLR 611, quoting Holding 1, which is as follows:

> "the objective of article 2(1) of the 1992 Constitution was to foster the enforcement of all provisions of the Constitution by encouraging all Ghanaians (whether natural persons or corporate) to access the original jurisdiction of the Supreme Court in the interest of the general polity. Whilst the outcome of an action under article 2(1) was invariably, primarily of benefit to the citizenry in general, it might not necessarily inure to the direct or personal benefit of the plaintiff therein. The objective of article 2(1) was to encourage all Ghanaians to help ensure the effectiveness of the Constitution as a whole, through legal action in the Supreme Court. Therefore, every Ghanaian, natural or artificial, had *locus standi* to initiate an action in the Supreme Court to enforce any provision of the Constitution."

A moment's reflection on the last sentence in the above quotation should lead to the conclusion that it cannot be entirely correct. If it were right, it would mean, for instance, that any person who is falsely detained in Ghana, instead of suing in the tort of false imprisonment, could bring an action to enforce article 21(1)(g), which guarantees the right to freedom of movement. It is to prevent such an outcome that Anin JA, in ***Republic v Special Tribunal; Ex parte Akosah*** **[1980] GLR 592 at 605,** said of a previous provision *in pari materia* with the current provisions that:

"From the foregoing dicta, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118(1)(a) arises in any of the following eventualities:

> (a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are 0obscure or else mean something different from or more than what they say;

(b) where the rival meanings have been placed by the litigants on the words of any provision of the Constitution;

(c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail;

(d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's *original* jurisdiction under article 118. Again, where the submission made relates to no more that a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises."

Thus, Anin JA, in this *locus classicus* on the exclusive original jurisdiction of the Supreme Court under the previous equivalent of the current articles 2(1) and 130 of the 1992 Constitution, asserted that the requirement of an ambiguity or imprecision or lack of clarity applied as much to this Court's enforcement jurisdiction as it did to its interpretation jurisdiction. This is clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to overwhelm this Court. **Accordingly, in my view, where a constitutional provision is clear and unambiguous any court in the hierarchy of courts may enforce it and this Court's exclusive original jurisdiction does not apply to it**.

Accordingly, 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.

I think that at least one of those eventualities exists in this case. Clearly the interpretation put on article 296 by the defendants, relying on Akufo-Addo CJ's interpretation of a provision *in pari materia (*article 175 of the 1969 Constitution) in *Captan v Minister for Home Affairs(Minister of Interior) (supra)* is different from that put forward by the plaintiff. We thus have a situation in this case where "rival meanings have been placed by the litigants on the words of [a] provision of the Constitution," in the words of Anin

JA. To conclude on ground 2, it should be stressed that ambiguity or imprecision or lack of clarity in a constitutional provision is as much a precondition for the exercise of the exclusive original enforcement jurisdiction of this Court as it is for its exclusive original interpretation jurisdiction.

in sum, I find the three grounds of the preliminary objection unmeritorious and they are thus dismissed.

MENSIMA and Others v **ATTORNEY-GENERAL and Others [1997-98] 1 GLR 159 –**

*Constitutional law-Fundamental rights and freedoms-**Freedom of association**-Imposition of restrictions by law-Manufacture of akpeteshie local gin-Grant of distiller's license-L I* 239, *reg 3(1) mandatorily requiring membership of co-operative as condition precedent for grant of licence-No provision in parent Act* 331 *of reg* 239 *on mandatory requirement-L I* 239, *reg* 3(1) *discriminatory in terms of **article I7(2)-** L I 239. reg* 3(1) *unnecessary for safety, security and health of consumers of akpeteshie-**Whether L I 239. reg 3(1) justifiable under article 2(14)(c).** Whether L I* 239, *reg* 21 *violative of freedom of association under **article 21(e)***

Plaintiffs brought an action against the defendants before the Supreme Court for, inter alia, a declaration that regulations 3(1) and 21 of Ll 239 were null and void. the plaintiffs contended regulations 3(1) and 21 of LI 239 which restricted their right to manufacture akpeteshie unless they became members of a co-operative society, and regulation 21 of LI 239 which compelled them to sell their products only to specified persons or bodies, were inconsistent with the exercise of their freedom of association guaranteed under article 21 (1)(*e) and discriminatory under article 17(2)* of the Constitution, 1992 and were therefore null and void.

Held (1) *(Bamford-Addo and Kpegah dissenting)* regulation 3(1) of the Manufacture and Sale of Spirits Regulations, 1962 (LI 239) was inconsistent with the letter and spirit of the Constitution, 1992 and therefore null and void because:

(a) *Per Ampiah ISC.* The Manufacture and Sale of Spirits Act, 1962 (Act 154), subsequently repealed by the Liquor Licensing Act, 1970 (Act 331), under which LI 239 was made did not specifically provide for the making of regulations for the issuing of distiller's licence conditioned on one being a member of a cooperative society. LI 239 had thus clearly amended its enabling or parent Act. And since Act 331 did not provide that the regulations made under it should have the same effect as if enacted in the Act, regulation 3(1) of LI 239 was in conflict with Act 331. Moreover, since akpeteshie was

> no longer an illicit gin, the attempt to control its manufacture by the requirement of membership of a co-operative society when that condition had not been imposed on other associations that manufacture consumables such as palm-wine sellers, chop bars, kenkey sellers etc, it was discriminatory and contrary to article 17(2) of the Constitution, 1992. Furthermore, the curtailment or restriction of the individual's or an association's right to distill akpeteshie by refusing them licence until they become members of a co-operative society was contrary to article 37(2)(a) of the Constitution, 1992.

(b) *Per Acquah and Atuguba llSC.* Articles *21(1)(e)* and 24(3) of the Constitution, 1992 entitled every worker to form or join a trade union of his choice for the promotion and protection of his economic and social interest. However, article 24(4) of the Constitution, 1992 legitimised, inter alia, laws which were reasonably necessary to maintain the equilibrium between the competing interest and rights of the individual and that of the State. Thus since regulation 3(1) of LI 239 in making it mandatory for an applicant for a distiller's licence to belong to a registered distillers co-operative infringed the applicant's right to join an association of his choice, the onus of proving by a preponderance of probabilities that that regulation was reasonably necessary was on the defendants. However, it was clear from section 2 of the Co-operative Societies Decree, 1968 (NRCD 252) that the objective of the registered co-operative was the promotion of the economic interests of its members and not the promotion of the health and security of the consuming public. Indeed, elaborate provisions had been made in Act 33 I and LI 239 to ensure the health safety and security of the public. And in all those provisions a registered distillers co-operative played no part. Thus, the defence that the membership requirement of a registered distillers co-operative was necessary for the safety, security and health of the public was patently unfounded and unsupported by NLCD 252, Act 331 and LI 239. Since the compulsory requirement of membership could not be justified in terms of article 21 *(4)(c)* of the Constitution, 1992, regulation 3(I) of LI 239 was inconsistent with the letter and spirit of the Constitution, 1992, particularly article 21(1)(e) thereof.

NANA ADJEI AMPOFO V AG and NATIONAL HOUSE OF CHIEFS [2011]

Indeed, as Coussey JA percipiently observed in ***Republic v Techiman Traditional Council, Ex parte Tutu*** **[1982-83] GLR** 996 at 999:

> "Chieftaincy, since the British colonial administration, has been governed by statute and this has continued since the independence of Ghana in 1957."

The plaintiff, who is a lawyer and former Paramount Chief and member of the National House of Chiefs, brings this action in his capacity as a citizen of Ghana. The plaintiff

issued his Writ of Summons to invoke the original jurisdiction of this Court on 26th August 2008. As mentioned above, this Writ was amended on 11th May 2010, after leave had been granted by this Court to do so.

The provisions of the Chieftaincy Act, 2008 challenged by the plaintiff are all contained in section 63, which reads as follows:

> "**Certain offences in connection with chiefs**
>
> **63.** A person who
>
> a) acts or performs the functions of a chief when that person is not qualified to act,
>
> b) being a chief assumes a position that the person is not entitled to by custom,
>
> c) knowingly uses disrespectful or insulting language or insults a chief by word or conduct,
>
> d**) deliberately refuses to honour a call from a chief to attend to an issue,**
>
> e) refuses to undertake communal labour announced by a chief without reasonable cause, or
>
> f) deliberately fails to follow the right procedures to destool a chief,
>
> commits an offence and is liable on summary conviction to a fine of not more than two hundred penalty units or to a term of imprisonment of not more than three months or to both and in the case of a continuing offence to a further fine of not more than twenty-five penalty units for each day on which the offence continues."

The plaintiff argues in his Statement of Case that because s. 63(d) of Act 759 compels a citizen to honour a call by a chief to attend to an issue, whether he likes it or not, it is unconstitutional as an undue restriction on, and interference with, his freedom of movement. He also points out that the person summoned by the chief may not even be

his subject. He contends that the power could be used by chiefs as a tool for oppression and suppression. He further submits that the provision is vague as it does not explain the word "issue". It is also overbroad in that it creates no limits as to time or place etc. He poses the question: if the President of the Republic of Ghana cannot compel a citizen to honour his invitation to attend to an "issue", why should a chief, qua chief, have that power?

The plaintiff also raises an issue in relation to s. 63(a), namely, that it is also vague and does not clearly define when a person qualifies to act as a chief. Furthermore, he expresses the view that the provision is defective in not providing a definition or description of the functions of a chief.

In relation to s. 63(b), he complains that it is unclear and overbroad and does not give notice of what specific conduct is being made criminal.

He concludes that:

> "A penal statute has to be clear in its meaning, application and scope to enable the citizenry know what specific conduct [it] prohibits so that they can steer away from what it prohibits. That is a due process requirement and an attribute of the doctrine of the rule of law and due process: U.S. v Brewer 139 U.S. 278, 288."

In short, he contends that most of the crimes created by s. 63 of Act 759 are unconstitutional for the reasons outlined above.

The constitutionality of section 63(d) of Act 759

We begin by affirming that this Court has jurisdiction to determine this suit. Though ***Edusei v Attorney-General*** **[1996-97] SCGLR 1** held that the cumulative effect of articles **33(1), 130(1) and 140(2)** was to vest the High Court, as a court of first instance, with an exclusive jurisdiction in the enforcement of the fundamental human rights and freedoms of the individual contained in Chapter 5 of the 1992 Constitution, in effect Ghana's Bill of Rights, **nevertheless when an action raises a genuine issue for interpretation of any provision of the Constitution or requires a decision as to whether an enactment is inconsistent with any**

provision of the Constitution, the Supreme Court has jurisdiction over it, pursuant to article 130 of the 1992 Constitution. (See *Adjei-Ampofo v Attorney-General* [2003-2004] SCGLR 411 at 417.) This case raises a legitimate justiciable constitutional issue as to the consistency of the provisions of s. 63 of Act 759 with articles **14 and 21** of the 1992 Constitution.

Proceeding next, then, to the merits of the issue of the constitutionality of section 63(d) of Act 759, it should be pointed out that in the amended Statement of Case filed on behalf of the first defendant, namely the Attorney-General, the response put forward against the plaintiff's argument on s. 63(d) of Act 759 was that chiefs have an adjudicating function alongside their administrative one. Accordingly, s. 63(d) can be equated to **a subpoena** to attend the chief's summons. A telling passage from the Statement of Case is as follows:

> "As stated earlier in our submission, the chief has traditional authority in the adjudication of cases brought before him.
>
> In the process of adjudicating such traditional cases, there may be need to summon or make an order for a person to be brought before him for the proper adjudication of the matter in the interest of justice and fairness.
>
> Respectfully my Lords, considering that the Chief's Palace can pass for a traditional court, any order made by a chief for a person to appear before it to resolve an issue, cannot be an encroachment on the liberty generally and freedom of movement of a particular citizen called before that court and accordingly such an act cannot be in contravention of nor inconsistent with the spirit and letter of Articles 14 & 21 of the 1992 Constitution of the Republic of Ghana."

With respect, this is a flawed and troubling argument. Its fundamental flaw is to accord a judicial role to chiefs as individual chiefs. 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, the Constitution gives judicial committees of

chiefs limited judicial responsibility. 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 section 39 of the Courts Act, 1993. In contrast to this collective exercise of judicial responsibility by committees of chiefs, 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."

The distinction between a judicial and an arbitration process lies in the consensual nature of an arbitration. Nobody can be compelled to submit himself or herself to arbitration. Accordingly, if all that individual chiefs can carry out are customary arbitrations, the first defendant's argument, which endeavours to equate a chief's call to a subpoena, collapses. If what the chief is undertaking is based on the consent on the parties, why must he have a power to compel the parties to appear before him?

A second dimension to the flaw in the first defendant's argument is the fact that a subpoena is for a very specific purpose, to compel a witness to attend judicial proceedings and to testify in them. A chief's call under Act 759 is, in contrast, not at all targeted. It is not limited to judicial proceedings. On an initial plain language reading of it, it appears to authorise a person to be summoned by a chief to attend to any issue. The first defendant is thus not comparing like with like.

"Whether or not the offence creating Section of the Chieftaincy Act 2008 (Act 759) Section 63, particularly sub paragraph (d) constitutes an undue restriction, encroachment and interference with the liberty and freedom of movement.

On a literal interpretation of the text of s. 63(d), any deliberate refusal of any person to honour a Chief's call from any part of Ghana may result in criminal liability. This prospect of criminal liability is likely to constrain the freedom of movement of any person who

receives a call from a Chief. As the plaintiff puts it in his Statement of Case, a "citizen's Freedom of Movement includes his freedom to stay away from where he does not want to be." It is true that this court has held that a purposive interpretation is usually to be preferrred. (See, for example, the recent case of *CHRAJ v Attorney-General & Baba Camara* (Writ No. J1/3/2010, unreported judgment of the Supreme Court dated 6th April, 2011)). However, in the circumstances of this case, since more than one purposive interpretation could be extrapolated from the text of the provision in question, it is difficult to establish authoritatively which of them is correct. Thus, although a purposive interpretation could be attempted by this court to cut down the scope of the restriction on the freedom of movement consequent from the text of s. 63(d), our inclination is rather to invite Parliament to try again to formulate a clearer and narrower penal provision, by striking down the existing provision. Indeed, it may well be that the purpose of Parliament was to confer the wide power of summons that the plaintiff is complaining about, in order to strengthen the authority of chiefs beyond the borders of their traditional areas. In other words, one of the purposive interpretations available is equivalent to the literal interpretation. Another purposive interpretation would be to limit the scope of the chief's power to call a person to that which he or she has under customary law.

As we have already indicated, striking down s. 63(d) as unconstitutional would, to our mind, be preferable to maintaining it with a fudged meaning. The extent of the fudge that may result from a purposive interpretation to narrow the scope of the impugned provision is evidenced by the fact that the first and second defendants are not even agreed on what the scope of s. 63(d) should be.

Of course, this court cannot strike down the impugned provision if the defendants can show that the interference with the freedom of movement of individuals is justified in terms of the Constitution. The next question, therefore, which needs to be addressed is **whether the restriction on the freedom of movement of persons called by chiefs to attend to an issue, that is imposed by the offence created by s 63(d), is justifiable under Chapter 5 of the 1992 Constitution.**

Article 12(2) of the 1992 Constitution provides that:

> "Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and

freedoms of the individual contained in this Chapter *but subject to respect for the rights and freedoms of others and for the public interest."* (Emphasis supplied).

In the light of this Article 12(2), can the freedom of movement conferred on residents of Ghana by article 21(1)(g) of the 1992 Constitution be justifiably restricted by s. 63(d) of Act 759 out of respect for the rights and freedoms of chiefs or for the public interest? In our considered view, the wide power of chiefs to summon, on the pain of a criminal sanction, anybody at all in Ghana to attend to an issue of any kind represents an unwarranted interference in the freedom of movement of residents of Ghana and the width of the power does not make it justifiable in the public interest. Even though criminalising a deliberate refusal to honour a chief's call may strengthen the authority of chiefs and the respect accorded them, this consideration is not a sufficient justification for the restriction that s. 63(d) imposes on the freedom of movement of individuals, even in a society which reveres its chiefs.

The first defendant endeavours in its Statement of Case to find a justification for the restriction on freedom of movement entailed by s. 63(d) by invoking clause 4 of article 21 of the Constitution. Article 21(1) proclaims the right of all persons to certain general fundamental freedoms which it lists. Among them, as clause 21(1)(g) is: "freedom of movement which means the right to move freely in Ghana, the right to leave and to enter Ghana and immunity from expulsion from Ghana." Clause 4 then provides certain derogations from these freedoms in the following words:

"Nothing in, or done under the authority of a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision –

a) for the imposition of restrictions by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

b) for the imposition of restrictions, by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana; or

c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or

d) for the imposition of restrictions on the freedom of entry into Ghana, or of movements in Ghana, of a person who is not a citizen of Ghana; or

e) that is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community."

With respect, none of these derogations justifies the restriction on freedom of movement entailed by s. 63(d).

In our view, therefore, the declaration sought by the plaintiff in paragraph (a) of the reliefs endorsed on his Writ of Summons should be granted. The inconsistency of s. 63(d) of Act 759 is primarily with article 21 (g) of the 1992 Constitution. An invocation of article 14 is less relevant in this context, since, prior to conviction, a person "called" by a chief does not lose his personal liberty, by which is meant his freedom from confinement.

However, our upholding of the plaintiff's argument relating to article 21(g) implies that s. 63(d) of Act 759, being void for unconstitutionality, cannot serve as a viable legal basis for a criminal prosecution that could deprive an accused of his or her personal liberty. The fundamental freedom infringed by s. 63(d) is thus freedom of movement as prescribed in article 21(g), rather than the personal liberty protected by article 14(1) of the 1992 Constitution.

Our conclusion on whether s. 63(d) is constitutional is thus that the first remedy endorsed on the plaintiff's writ should be granted, since the plain meaning of s. 63(d) authorises conduct by chiefs which is likely to interfere with the freedom of movement of persons, including those not subject to them, and in relation to issues whose nature is unspecified and therefore wide. As the plaintiff points out, not even the President of the Republic, who is vested with the Executive authority of the State, has a direct power similar to that conferred on chiefs to compel persons to honour their invitation. Whilst this potential

unjustified interference by chiefs with the freedom of movement of persons within the Ghanaian jurisdiction could be averted to a degree with a purposive interpretation which narrows the scope of s. 63(d), such an interpretation would result in an unclear criminal statute which would pose a challenge for due process. It would be unwise for this court to rewrite a criminal statute which appears, on its plain meaning, to be unconstitutional. It is a much better outcome for this court to strike down the offending legislation and for Parliament itself then to rewrite the statute in the light of the Supreme Court's view. In our view, a statutory provision which limits itself to a chief's call within his or her Traditional Area and provides a defence for a person who is called but has a reasonable excuse not to heed the call would have a better chance of passing the constitutionality test.

However, we would not grant relief (b) since we do not consider s. 63(d) as legally vague. As to whether the impugned provision is overbroad or not, we do not find that the plaintiff has done enough to challenge the constitutionality of the provision on this score and therefore we do not find it justifiable to give judgment in his favour on that issue.

ERNEST ADOFO V GHANA COCOBOARD [2012]

Asuman-Adu J. has, pursuant to Article 130 of the 1992 Constitution, referred the following issue to the Supreme Court for determination:

> "Whether in view of Articles 1(2), 12(1) and 24(3) and (4) of the 1992 Constitution of the Republic of Ghana, the application of PNDC Law 125 of 1985 to the retrenchment exercise in 1993 to 1994 by the defendant was unconstitutional and for that matter void".

The Plaintiffs challenged the constitutionality of their retrenchment by the defendant Company on grounds that in view of article 1(2) and 24 (3) and (4) of the 1992 Constitution, the application of PNDCL 125 to the retrenchment exercise conducted in 1994 to 1995 is unconstitutional.

The plaintiffs state the basis of their contest of the constitutionality of the retrenchment exercise in the following terms: By article 1(2) of the Constitution, the Constitution is the supreme law of Ghana and any other law found to be inconsistent with any of its provisions is to be held void to the extent of its inconsistency. In accordance with this fundamental constitutional principle, the plaintiffs rely on article 24(3) and 24(4) to sustain their argument of unconstitutionality.

These suits are the consequence of action taken by the defendant in the suits, that is the Ghana Cocoa Board, under the authority of the Ghana Cocoa Board (Reorganisation and Indemnity) Law, 1985 (PNDCL 125). It is the plaintiffs' contention that the application of this Law to them after the entry into force of the 1992 Constitution was unconstitutional since it infringed their fundamental human rights under article 24 of the 1992 Constitution.

Sections 1 to 4 of PNDCL 125 provide that:

1. (1) "Notwithstanding the provisions of any enactment and subject to the provisions of this Law, the Ghana Cocoa Board (referred to in this Law as "the Board") shall re-organise its establishment structure in such manner as it deems necessary to secure optimum efficiency of the Board.

   (2) The Board shall, in the discharge of its function under sub-section (1) of this section, have the power to terminate the employment of any employee of the Board on ground of redundancy.

2. Notwithstanding anything to the contrary in his contract of employment or any collective agreement applicable to him an employee of the Board whose employment is terminated under section 1 of this Law *may be paid such severance award* as the Board may determine subject to such terms and conditions as the Provisional National Defence Council may direct.

3. Notwithstanding anything to the contrary in his contract of employment or any collective agreement to him no redundancy award shall be granted to an employee of the Board whose employment is terminated under section 1 of this Law.

4. (1) Subject to the provisions of this Law, an employee of the Board whose employment is terminated under section 1 shall be paid such other terminal benefits as the Board may determine are due to him under the terms of his contract of employment or any collective agreement applicable to him, and the payment of such benefits shall be subject to such terms and conditions as the Provisional National Defence Council may direct.

   (2) Any debt owed by any such employee to the Board shall be set off against any terminal benefits payable to him under subsection (1) of this section."

A necessary implication of the right embodied in clause 3 of article 24 is that the benefits of trade union membership should not be rendered nugatory by legislation. There is no point to a citizen of Ghana or a resident in Ghana being given a constitutional right to form or join a trade union of his choice if the results of his or her union's collective bargaining can be unilaterally set aside by the State or a state agency, under the authority

of a statute, without available relief. A purposive interpretation of the clause should thus inevitably lead to the striking down of legislation that permits a State agency to set aside unilaterally provisions in a collective bargaining agreement and in an individual trade union member's contract. Sections 2 and 3 of the Ghana Cocoa Board (Re-Organisation and Indemnity) Law, 1985 (PNDCL 125) *supra* should thus be interpreted as being infringements of article 24(3) of the 1992 Constitution. We do not interpret them as coming within the scope of the derogations permitted by article 24(4) of the 1992 Constitution. The retrenchment exercise carried out by the defendant in these consolidated suits, under the authority of these provisions of PNDCL 125, was thus unconstitutional. This is why on 5th March, 2013, this Court unanimously answered the question referred to it by Asuman-Adu J. in the affirmative.

OPREMREH V EC and AG [2011]

My Lords, by the writ of summons herein, the plaintiffs seek from us in the exercise of our original jurisdiction the following reliefs.

1. A declaration that the Local Government (Creation of New Districts Electoral Areas and Designation of Units) Instrument, 2010, LI 1983, which purportedly came into force on 24th November 2010 is unconstitutional and therefore null and void.

2. An order restraining the 3rd defendant, its agents and assigns from in any way, using the new electoral areas created under the schedule to LI 1983 for the District Assembly Elections, scheduled for 28th December 2010.

3. A declaration that on the expiration of 21 parliamentary sitting days, the original copy of LI 1983, which was laid before Parliament on 19thOctober, 2010 automatically came into force in accordance with article 11(7) of the Constitution, 1992.

4. An order directed at the 3rd defendant to use only the original copy of LI 1983 as laid before Parliament on 19thOctober, 2010 to conduct the District Assembly Elections, scheduled for 28th December, 2010.

What is in contention for our determination turning on those facts is a simple question of law. The said question is whether Parliament in the exercise of its functions under article 11.7 of the 1992 Constitution may effect changes to any instrument laid before it? This requires a careful reading not only of Article 11.7 of the 1992 Constitution but also other provisions of the constitution that deal with the law making power of Parliament.

Reference is made to the speech of Acquah JSC (as he then was) in the case of **NMC v Attorney-General** [2000] SCGLR 1 at 11 as follows:

> **"But to begin with, it is important to remind ourselves that we are dealing with our national constitution, not an ordinary Act of Parliament. It is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It gives certain rights to persons as well as bodies of persons and imposes obligations as much as it confers privileges and powers. All these duties, obligations, powers, privileges and rights must be exercised and enforced not only in accordance with the letter, but the spirit, of the Constitution. Accordingly, in interpreting the Constitution, care must be taken to ensure that all provisions work together as part of a functioning whole. The parts must fit together logically to form a rational, internally consistent framework. And because the framework has a purpose, the parts are also to work together dynamically, each contributing something towards accomplishing the intended goal. Each provision must therefore be capable of operating without coming into conflict with any other."**

In my view, the above provision, that deals with the power of Parliament in relation to subordinate or subsidiary legislation under the 1992 Constitution is expressed in language that is free from any ambiguity and if I may say so by the use of words that do not suffer from imprecision. It appears that since Parliament is ordinarily engaged in the making and or passing of substantive legislation as opposed to subordinate or subsidiary legislation that are variously described as constitutional instruments, executive instruments or legislative instruments; its role in the bringing into being of the latter category of legislations is quite different from its role that involved in the making of substantive legislation as provided for in articles 106 – 108 of the 1992 Constitution. The rationale for the difference is not too difficult to comprehend. While in the case of its exercise of legislative power under Articles 106-108, Parliament is engaged in an activity that is reserved for it by the Constitution as the legislative authority, in matters that come before it pursuant to Article 11.7 of the 1992 Constitution, Parliament as an institution of state is only being used as the medium to enable the power conferred on persons or authorities other than Parliament to make "any Orders, Rules and Regulations" as provided for in Article 11.1(c) to conform to the requirements of the law.

A careful reading of the entire provisions contained in Article 11of the 1992 Constitution enhances its understanding than merely reading clause 7 of the said article in isolation. When so read in conjunction with the exercise of legislative power by Parliament that is contained in articles 106-108 of the 1992 constitution, the purpose of the restrictive power conferred on Parliament in respect of subordinate or subsidiary legislation becomes tolerably clearer and renders the meaning of the words by which the article is expressed that is pressed on us by the 2nd defendant fallacious and or perhaps strained. So approached, our task of ascertaining the true meaning of the words and giving effect to them by way of their enforcement also becomes lighter. When the true meaning of the words are measured against the circumstances in which LI 1983 came into being, we are enabled after considering whether those circumstances are in conformity or conflict with the constitutional provisions either to validate or nullify it. This plainly is the essence of our original jurisdiction under Article130 of the 1992 Constitution. This, we must approach guided by the pronouncement of this court in the case of **NMC v Attorney-General**(supra) by not reading article 11.7 as if it existed on its own but as part of a functional working document. As a matter of fact while in the exercise of its legislative power under the 1992 Constitution, Parliament is authorised in appropriate cases to make amendments in article 106.6, in the case of subsidiary and or subordinate legislation, the Constitution only authorises Parliament to **"annul"** any instrument laid before it before the expiry of twenty-one days. When Parliament does not exercise its power of annulment within the specified period then the instrument automatically becomes law. That the framers of the constitution made specific provision in the case of the exercise by Parliament of its legislative power in article 106.6in the course of considering any bill to amend it but withheld this power from it regarding subordinate or subsidiary legislation is in our opinion supportive of the position that in the case of subsidiary and or subordinate legislation, no such authority was intended to be conferred on Parliament. Article 11.7 does not confer on Parliament any power of making changes to the instrument so laid before it and I am unable to acquiesce in the invitation urged on us by the 2nd defendant to hold that any such power could be inferred from article 297(c) of the Constitution as to **"annul"** means "**to make void, to dissolve that which once existed**" See: *Baron's Law Dictionary Fifth Edition page 26.*

AGYEI TWUM V AG and BRIGHT AKWETEY [2005-2006] – in this case the SC implied the words "*prima fascie*" into article 146(6) of the Constitution 1992 to make it intelligible or reasonable. The Court, Speaking through Dr. Date- Bah JSC adopted a purposive approach in construing article 146(6). The Court held that the entire article 146

should be read as a whole to make explicit what is implicit withing the penumbra of the language employed in article 146(6). The Court discussed in detail the objective and subjective purpose of the Constitution. The Court stated that a literal construction of article 146(6) will lead to a manifest absurdity which could not have been the intendment of the framers of the Constitution. That the pendulum has swung in favour of purposive approach to interpretation.

NB: Article 146(6) must be interpreted in the broader sense to mean that the President must first establish a prim facie case just as in the case of all other Superior Court justices under article 146(3) and (4). Therefore, even though it was not expressly stated that the President must first establish a prims facie case, the court in its wisdom read into it in order to make the provision intelligible or reasonable. The Constitution must be read benevolently. In respect of article 146(8), the SC held in Agyei Twum that, Bright Akwetey violated the said provision by the publication of the petition however, the said publication did not nullify the proceedings. Same principle was applied in the Dery v Tiger Eye P.I case.

The facts

The facts of the case are briefly as follows. The second defendant, who is a lawyer and a citizen of Ghana, on 16th January 2006 sent a petition, dated 13th January 2006, to the President, with a copy to the Chief Justice. Further copies were also sent to the Secretary of the Ghana Bar Association, the Attorney-General and the Judicial Secretary. The petition sought the removal of the Chief Justice on the grounds of judicial misconduct and abuse of power. On March 9th 2006, the President's Press Secretary issued a public statement that in compliance with article 146 of the Constitution, the President was setting up a committee to inquire into the petition. The Plaintiff complains that the appointment of a committee by the President to inquire into the petition is unwarranted and unconstitutional. He has therefore invoked the original jurisdiction of this Court, in his capacity as a citizen of Ghana, citing Articles 2(1); 146(1) and 146(6); 127(1), (2) and (3); and 17, and is seeking the following declarations:

(i) "A Declaration that the petition dated 13 January 2006, presented by Mr. Bright Akwetey to the President which relates to the removal of the Chief Justice is in respect of the performance of administrative functions of the Chief Justice within

the meaning of Article 125(4) of the Constitution and is, therefore, inconsistent with the said Article 125(4).

(ii) A Declaration that Article 146(6) of the Constitution shall be construed concurrently with Article 146(3) and (4) which requires the establishment of a ***prima facie case*** prior to the setting up of a Committee to investigate complaints in a petition against a Justice of the Superior Court because the Chief Justice is first and foremost a Judge of the Superior Court.

(iii) A Declaration that by virtue of such construction, the consultation by the President with the Council of State in respect of the appointment of a Committee to inquire into a petition for the removal of the Chief Justice shall first determine whether the said petition discloses a prima facie case before the Committee is appointed."

(iv) A Declaration that the publication in the media of the 2nd defendant's petition to the President contravenes Article 146(8) of the Constitution which provides that all proceedings relating to the removal of a Justice of the Superior Court shall be held in camera."

DATE-BAH JSC

If I may be permitted to be graphic, I would say that in this case, in the green corner, as it were, to borrow a boxing term, is the literal approach to constitutional interpretation and in the red corner the purposive approach. The two approaches are about to be unleashed in combat to determine the outcome on one of the issues in this case. The contest is between a literalist interpretation of article 146(6), which leads to absurd consequences, and a purposive interpretation of that provision intended to avert the said absurd consequences. Put another way, the Court is confronted with whether to accept certain constitutionally unpalatable policy consequences flowing from a literal reading of article 146(6) or whether to interpret this constitutional provision purposively in a way that avoids these undesirable consequences. These undesirable consequences include the likelihood of undermining two interrelated structural pillars of the Constitution, namely, the independence of the judiciary and the separation of powers.

Establishment of a Prima Facie Case against a Chief Justice as a Precondition to the President setting up a Committee to inquire into a Petition for the Removal of the Chief Justice

When one compares Article 146(3) with Article 146(6), it becomes evident that there is a gap in the logical sequencing of action under Article 146(6). According to the literal language of Article 146(6), no PDF Editor Judgments of the Superior Courts 9 one is required to examine a petition brought against the Chief Justice to ascertain whether it establishes a prima facie case, before the President refers it to a Committee established by him. Once any petition, no matter how frivolous its contents are, is presented to the President, then he has a duty to establish a committee to consider it. A literal reading of the provision, therefore, could lead to the floodgates being opened for frivolous and vexatious petitions being continuously filed against a serving Chief Justice, with two Supreme Court judges being perpetually tied down to hearing such petitions, alongside the other members of the committee that the President has to appoint. This is a scenario that would weaken the efficacy of the top echelon of the Judiciary.

Moreover, there is even more mischief in the literal interpretation. This is because Article 146(10)(a) authorises the President, albeit on the advice of the Council of State, to suspend the Chief Justice whilst a petition for his removal is being considered by a Committee appointed by him under article 146(6). There is thus scope for the Executive or others to initiate frivolous and vexatious petitions against the Chief Justice resulting, according the literal reading, to an automatic establishment of a committee to consider the petitions and the empowerment of the President to suspend the Chief Justice from his functions. This is a scenario that is deeply subversive of the balance of power underlying the 1992 Constitution and the separation of powers that it entrenches. It is, of course, also inimical to the independence of the judiciary. As the plaintiff points out in his Statement of Case (paragraph 28.9): "…There is an implied obligation of the President to maintain the basic tenets of the Constitution among which is the doctrine of separation of powers and, its corollary, the independence of the Judiciary."

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.** That process need not be laboured or elaborate in every context. In some contexts, the legal meaning of words concerned can be determined simply and quickly. The words whose meaning become contentious tend to be those in exceptional

cases where the legal meaning cannot be simply and quickly determined. ***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, **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."

Thus, where an interpreter comes to the conclusion that the literal meaning does not make sense within its context and in relation to the purpose of the relevant provision, it becomes necessary for the interpreter to explore other semantic possibilities flowing from the language of the provision. In exploring these possibilities, the interpreter has to bear in mind the purpose of the provision.

Analysis of the concept of the purpose of a constitutional provision reveals that there are two kinds of purpose: **subjective and objective**. The **subjective purpose** is what the framers of the Constitution actually intended. The **objective purpose**, on the other hand, is what the provision should be seeking to achieve, given the general purposes of the Constitution and the core values of the legal system and of the Constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provision in question. In **Asare v Attorney-General [2003-2004] SCGLR 823**, this Court held that, in determining the purpose of a provision, the interpreter should balance the two kinds of purpose.

The spirit of a constitutional provision includes its objective purpose. I explained this in my judgment in Asare v Attorney-General [2003-2004] SCGLR 823, where, I said (at p. 835):

> "In this connection, I would like to refer to the dictum of Sowah JSC (as he then was) in Tuffuor v Attorney-General [1980] G.L.R 637 at p. 647, which is frequently referred to and is in this case relied on by both the Plaintiff and the Defendant. He said: "The Constitution has its letter of the law. Equally, the Constitution has its spirit….Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development. 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."

The "spirit" to which Sowah JSC refers is another way of describing the unspoken core underlying values and principles of the Constitution. Justice Sowah enjoins us to have recourse to this "spirit" or underlying values in sustaining the Constitution as a living organism." I describe **objective purpose** in the Asare case in the following terms (at p. 834): "The objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values etc. of the society for which he is making law. This objective purpose will thus usually be interpreted to include the realisation, through the given legal text, of the fundamental or core values of the legal system."

Accordingly, the core values of the Constitution can be drawn upon to help fashion a construction of its language. Thus, though an initial superficial reading of a provision may convey a particular meaning, further reflection on the provision, taking into account the context and core values of the Constitution, may lead to a different construction of the provision. This further reflection may identify a gap in a provision, whereas at first sight it might have been thought to be complete and to bear a particular plain meaning. Having identified such gap, the issue then arises as to whether the gap is to be filled and whether it is legitimate for judges to fill the gap. **Does filling the gap come within the concept of interpretation?** Taylor JSC had some insightful observations on this issue of gaps in a statutory or constitutional provision and how they might be filled, in **Sasu v Amua Sakyi [1987-88] 1 GLR 506.**

Taylor JSC thus expresses himself in favour of gap filling in a limited range of circumstances. He regards this as part of the process of judicial interpretation in the common law tradition. The principle that I derive from Sasu v Amua Sakyi is that, in exceptional cases, ***additional text may be imported into an enactment in order to give effect to its purpose. It is not unprecedented for a common law court***

to imply a provision into a Constitution to give it efficacy in relation to its purpose.

In my view, the objective purpose and spirit of the 1992 Constitution require that a Chief Justice be given the benefit of a prior determination as to whether there is a prima facie case established against him or her, before the President may establish a Committee to consider a petition for his or her removal. A comparative examination of the relevant provisions dealing with petitions for the removal of other Superior Court Justices (in articles 146(3) and 146(4)) reveals an omission in the plain language of article 146(6) relating to the impeachment process of the Chief Justice which, in my view, could not have been intended by the framers of the Constitution. The omission to provide for a prior determination of a prima facie case leads to a manifest absurdity which this court has power to avert. In effect, one is saying that there is a logical gap or inadvertent mistake in Article 146(6) which this Court should correct, by interpretation. The purpose of article 146(6) is to enable credible allegations as to the Chief Justice's stated misbehaviour, incompetence or infirmity of body or mind (see article 146(1)) to be investigated. No reasonable interpreter could reach the conclusion that its purpose also includes providing a forum for the ventilation of frivolous or vexatious petitions. These observations regarding the purpose of article 146(6) are obviously to be taken into account in determining the meaning of the provision.

In this connection, the plaintiff is right when he points out in his Statement of Case (paragraph 29.17) that: "The literal interpretation would also be incompatible with the established tradition of this PDF Editor Judgments of the Superior Courts 13 honourable court which has embraced the purposive approach to constitutional interpretation. In a long line of cases, most notably: Tuffour v the Attorney-General [1980] GLR 637 C.A. sitting as S.C.; Republic v High Court, Accra; Ex Parte Adjei [1984-86] 2 GLR 511 – 561; Republic v Tommy Thompson Books Ltd. (No. 2) [1996-97] SCGLR 484; Kuenyehia v Archer [1993-94] 2 GLR 525; and Sam (No. 2) v Attorney-General [2000] SCGLR 305, among others, this Court has sought to approach its interpretive task from a purposive stance." I, of course, fully endorse this purposive stance. Such a purposive approach is in consonance with the modern trend in other mature jurisdictions, such as the English, as I point out in my judgment in Asare v Attorney-General (supra)

With respect, what I am seeking to do is not to import my intention into article 146(6), but to determine its meaning in the light of its context and purpose. To do that, I believe that it is necessary to read article 146 as a whole and to make explicit what is implicit within the penumbra of the language employed in article 146(6). I do not believe that the framers of our Constitution would have intended a procedure which lends itself to manipulation and to interference with the independence of the judiciary. This conceptual route of an implied provision requiring a prima facie determination, which I have

articulated above, is in substance the same as the argument made by the plaintiff in its Statement of Case

The various approaches to interpretation of the Constitution by Justices of the Supreme Court.

Juxtapose Prof. Kludze's approach in **Republic v Fast Track High Court, Ex Parte DANIEL [2003/04]** with Prof. Date-Bah in **Danso Acheampong v AG & Abodakpi [2009]**

In the case **of Republic v Fast Track High Court, Ex Parte Daniel [2003/04] 1 SCGLR 364** Prof. Kludze @ page 370 of the record 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".*

Date-Bah held in Danso-Acheampong as follows;

"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."

NB: Read Archer's ruling in 31st December case.

> "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."

It is not always the case that constitutional provisions should be interpreted or construed benevolently or liberally. The ratio in the case of **Republic v Yebbi and Avalifo [2000]**, is that in compelling cases, words in national constitutions should be interpreted strictly and the general rule that national constitutions should be benevolently construed should not apply.

FUNDAMENTAL HUMAN RIGHTSM- CHAPTER 5

Human rights are rights given by nature, therefore, they are jealously protected. The natural law theorists place emphasis on nature.

Th UN Charter is the first docuent that discussed fundamental human rights (i.e the UDHR)

Cases.

FEDYAG (NO.2) V Public Universities of Ghana & Ors [2011]

Re Akoto & Ors

Chapter five (5) is an entrenched provision.

The Courts with Jurisdiction under Chapter five. (Article 33 vs 130)

Article 12 – 33

Article 14(3) – Martin Kpebu (No.4)

Article 23 – ENEKWA v KNUST [2009] SCGLR

Principles;

1. Every court has jurisdiction to enforce fundamental human rights when it comes up in the course of proceedings.
2. An action specifically instituted to enforce human rights shall be filed at the HC, unless the person hasn't got locus standi.
3. Where the person hasn't got locus standi, the SC is the appropriate forum.

Case.. . in **Osei Boateng v NMC and Appenteng**, the SC held that where the Plaintiff has no personal interest in the suit, the SC will be the appropriate forum……" He then posed the question: what other forum will be available to the plaintiff on the facts of this case, where the plaintiff has no personal interest in the suit? Clearly that forum will not be the High Court because of the lack of personal interest. He therefore argues that this Court has jurisdiction since in any case he is not relying exclusively on article 23, but also

alleging breach of article 296, in both reliefs 1 and 2 of his writ. He also invokes the "spirit" of the Constitution to buttress his claim."

In **Bimpong Buta v GLC**, the SC held that the plaintiff had locus and therefore had to initiate proceedings at the High Court. The suit was dismissed at the SC because the alleged violation was in relation to him.

Locus standi

Article 33 requires that the alleged violation ***must be in relation to the applicant.*** Where the fundamental human rights ***has been***, or is ***being*** or **is likely** to be contravened in relation to him.

It was held in **Okudzeto Ablakwa v AG and Kake Obetsebi** Lamptey that;

Even where the High Court is vested with the exclusive jurisdiction of enforcement in the area of fundamental human rights and freedoms by the combined effect of articles 33 (1), 130 (1) (a) and 140 (2), and the Supreme Court not having concurrent jurisdiction; yet the jurisdiction of the Supreme Court in this domain is determined by whether or not the plaintiff is pursuing a **personal interest** as in ***Edusei (No.2) v. Attorney-General*** **[1998-99] SCGLR 753 and** ***Bimpong-Buta v. General Legal Council*** **supra**, or a **public interest or a matter** in the interest of public good as in ***Adjei- Ampofo (No.1) v. Accra Metropolitan Assembly & Attorney-General(No.1*****)[2007-2008] 1SCGLR 611 and*** ***Federation of Youth Association of Ghana (FEDYAG) v. Public Universities of Ghana & Ors*** **supra**. 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.

Article 33 orders (Perogative writs)

1. Habeas Corpus
2. Certiorari
3. Mandamus
4. Prohibition, and quo warranto

NB: Read article 141 on supervisory jurisdiction of the HC with Order 55 and 56 of CI 47 (same orders as article 33(2)). Read article 33(4) and order 67 of CI 47 on enforcement

of fundamental human rights. Rule 3 provides that the application shall be made within six (6) months of the occurrence of the alleged contravention or three months of the applicant becoming aware that the contravention is occurring or is likely to occur.

ARTICLE 130

Provides that subject to the jurisdiction of the HC in the enforcement of the fundamental human rights and freedoms provided in article 33, the SC shall have exclusive jurisdiction in all matters of enforcement OR interpretation of the constitution.

The cases are replete on this subject.

Agyei Ampofo v AMA – the "night soil case". This case was founded on article 15 on inviolability of the dignity of mankind. The SC held that it was seised of jurisdiction because the alleged violation was not in relation to him.

Mensima

Adofo v Ghana Cocoa Board

Agyei Ampofo v AG and National House of Chiefs.

NB: Note that, under article 33(5) the fundamental human rights and freedoms are not exhaustive. Any right considered to be inherent in democracy and intended to secure the freedom and dignity of man.

On this point, note that right to vote is not a fundamental human right as held in the case of Ohumah Ocansey v AG and EC. It is s constitutional right.

Dualism v Monism

Ghana is a dualist Country. Treaties do not bind the Country unless domesticated per article 75(2). But where it is a human right treaty or provision, the dualism principle does not apply. It requires no domestication. It automatically becomes part of our juris corpus. See articles 74 and 75.

The Children's Act and the Juvenile justice Act were enacted to domesticate international treaties.

NB: Article 75(2)(a) – becomes part of our laws

75(2)(b) – does not become part of our laws.

See Margaret Banful v AG [2017] – The GITMO Case.

Background By a writ filed on 21st of January, 2016, the Plaintiffs, in their capacities as citizens of Ghana, invoked the original jurisdiction of the Supreme Court pursuant to Articles 2(1)(b) and 130(1) of the 1992 Constitution and Rule 45 of the Supreme Court Rules, 1996 (CI 16), seeking against the Defendants the following reliefs:

i. "A declaration that on a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana, by agreeing to the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby (both profiled terrorist and former detainees of Guantanamo Bay) to the Republic of Ghana, required the ratification by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.
ii. ii. A declaration that on a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana acted unconstitutionally in his failure to obtain the requisite ratification by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament when he agreed with the Government of the United States of America to transfer Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana.
iii. iii. A declaration that the reception of the said detainees into the Republic of Ghana by the President of Ghana is in excess of his powers under the constitution and hence unconstitutional.

Held

The language of Article 75 is perfectly clear. The Article forms part of the set of provisions governing the role of the Executive arm of government in Ghana's international relations. The scope of the Article deals with treaties in general (c.f. the side notes) and the body of the text makes reference to 'treaties, agreements and conventions'. It is also clear that the instruments referred to relate to Ghana's international relations with other countries or groups of countries and the Article requires that such instruments must be ratified by Parliament. The Constitution makes no mention of any formal distinctions that are dependent on the formality with which such an instrument is formatted or brought into being. From the aforementioned principles of constitutional interpretation in Ghana, there is no doubt that where, by various forms of documentation, the Government of Ghana binds the Republic of Ghana to certain obligations in relation to another country or group of countries, an international agreement comes into existence. Taking into account the substance of Exhibit A, we are in no doubt that, despite the form in which it has been drafted and the text couched, it is intended to create an obligation on the part of Ghana to the USA whereby, inter alia, Ghana binds herself to 'receive' and 'resettle' the said two persons, 14 and assure that, 'for at least two years, or longer if warranted by circumstances,' these persons are kept under such conditions (i.e. monitored and

surveilled) as would accord with 'the security assurances in this agreement to be implemented'

We must, furthermore, bear in mind Section 10(4) of the Interpretation Act, 2009 (Act 792) which provides that:

> "(4) Without prejudice to any other provision of this section, a Court shall 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 recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana.

Consequently, we hold that, upon a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana, in agreeing to the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana, required the ratification by an Act of Parliament, or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament, and by virtue of the failure to obtain such ratification the agreement is unconstitutional.

NB: 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 should be made to promote the purpose and spirit of the Constitution as well as the laws of Ghana. An interpretation of the Constitution and statutes shall be made in a manner that ***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.

DIRECTIVE PRINCIPLES OF STATE POLICY

The Directive Principles of State are *"core principles around which national, political, social and economic life will revolve."* They constitute a very comprehensive social, economic and political programme for a modern and welfare state.These principles emphasize that the State shall try to promote welfare of people by providing them basic facilities like shelter, food and clothing.

The Directive Principles of State Policy (DPSP) under chapter six (6) of the Constitution 1992 were meant to serve as guides to the interpretation of the Constitution or any other law. It I provided under **Article 34** as follows:

"The Directive Principles of State Policy contained in this Chapter shall guide ***all citizens***, ***Parliament***, ***the President***, ***the Judiciary***, ***the Council of State***, ***the Cabinet, political parties*** and ***other bodies and persons*** in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society."

The eight (8) articles under Chapter six (6) are as follows;

1. Article 34 – implementation of directive principles
2. Article 35 – political objectives [p]
3. Article 36 – economic objectives[E]
4. Article 37 – social objectives[S]
5. Article 38 – educational objectives[E]
6. Article 39 – cultural objectives[C]
7. Article 40 – international relations
8. Article 41 – duties of a citizen

- **Justiciability of DPSP**

It was not the intention of the framers of the Constitution, being the Committee of Experts to make the directive principles of State policy justiciable provisions of the Constitution.

The DPSP has three (3) legal effects, namely;

1. Non-justiciable
2. Justiciable, and

3. Presumptively justiciable.

The justiciability of the DPSP depends on the Country, its ideology and political considerations. Whereas in some Countries (South Africa-justiciable, India and Nigeria – non-justiciable), it is expressly provided in their written constitution that they are either justiciable or not, in Ghana, there is no mention of its legal effect in our Constitution of 1992.

The DPSP, per the proposals of the drafter of the two Constitutions (1979 and 1992), were meant to follow the India approach. That the DPSP were not intended to be justiciable was very clear from the ***travaux preparatoires*** to the two Constitutions. However, unlike the Indian situation, this intention of non-justiciability was not written into either Constitutions.

The Committee of Experts proposed that the DPSP shall not be justiciable. This was rejected by the Consultative Assembly, but the rejection did not mean that it is justiciable or presumptively justiciable.

In Ghana, the justiciability or otherwise of the DPSP has been pronounced upon in the following cases by the Supreme Court since 1996.

CASES

1. **New Patriotic Party v the Attorney-General66 (31st December case),**

The first time that the justiciability of Chapter VI came into question before the Supreme Court was in New Patriotic Party v the Attorney-General66 (31st December case).

In 31st December, the Plaintiff, 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. Both article 35 and 41 are found in Chapter VI 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. On this issue, the 9 judges on the panel were divided into all the three different positions possible – for, against and neutral.

Adade JSC 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."…..***Majority decision***

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

> "Now I come to the spirit of the Constitution, 1992. The plaintiff, apart from article 3, relied also on articles 35(1) and 34(b) of the Constitution, 1992, provisions under the 'Directive Principles of State Policy' to ground its claim. But the said principles are not justiciable and the plaintiff has no cause of action based on these articles. Those principles were included in the Constitution, 1992 for the guidance of all citizens, Parliament, the President, judiciary, the Council of State, the cabinet, political parties or other bodies and persons in applying or interpreting the Constitution, 1992 or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

2. New Patriotic Party v Attorney General (CIBA case).

It took four years, after 31st December, for the Supreme Court to have another opportunity to consider the issue whether or not Chapter VI of the 1992 Constitution was justiciable. This was in New Patriotic Party v Attorney General (CIBA case). In CIBA, too, the same political party sued the Attorney-General, challenging the constitutionality of the Council of Indigenous Business Associations (CIBA) Law, 1993 (PNDCL 312 or the CIBA Law). The CIBA Law compels indigenous businesses of a kind to belong to an association which is basically controlled by the Government. The Plaintiff contends that the law was inconsistent with articles 21(1)(e), 35(1) and 37(2)(a) and (3) of the Constitution and consequently void. Article 21(1)(e) protects the right to freedom of association and is found under Chapter V of the Constitution. However, articles 35(1) and 37(2)(a) & (3) fall under Chapter VI.

The Attorney-General, again, objected on the ground that articles 35 and 37, being part of Chapter VI, were not justiciable and therefore could not be enforced by a court action. 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."

With the exception of one Justice, Kpegah JSC, who did not think the Plaintiff had locus standi, 3 of the 5 Justices who sat on the case concurred with Bamford-Addo JSC's position. In fact, one of the **Justices, Atuguba JSC**, put the position more clearly. He explained that the DPSP are 'rules of construction to be applied when interpreting other provisions of the Constitution, 1992, just as at common law there is a great body of rules for the construction of statutes' … and that it is irrelevant that 'some of the provisions of the Directive Principles of State Policy may after all pass for supplementary 'rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned'. The overall implication of this formula is that no one may know beforehand that a provision under Chapter VI is enforceable.

3. Ghana Lotto Operators v National Lottery Authority75 (Lotto case)

In 2008, Chapter VI came up again for the Supreme Court's consideration, in Ghana Lotto Operators v National Lottery Authority75 (Lotto case). A group of private lotto operators challenged the constitutionality of the National Lottery Act, 2006 (Act 722). The Act establishes the National Lottery Authority (NLA) to regulate, supervise, conduct and manage National Lotto. It also prohibits the operation of lottery by persons other than the NLA. The Plaintiffs' plaint was that the regulation and prohibition offend article 36(2)(b), which falls under Chapter VI of the Constitution. Article 36(2)(b) requires the state to follow an economic objective by 'affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy'. The Plaintiffs therefore argued that, to the extent that it excludes private persons from engaging in lottery business, the law violates the economic objective spelt out in article 36(2)(b). Again, the Defendant challenged the justiciability of article 36(2)(b) in particular and Chapter VI as a whole.

This time all the 9 Justices on the panel were unanimous on the issue of justiciability. The Court recounted Adade JSC's position in 31st December that the entire Constitution as a legal document is justiciable. However, unlike Adade JSC, the Court did not think that all the clauses under Chapter VI were as justiciable as all the other clauses of the Constitution. The Court, speaking through Date-Baah JSC, stated:

> The Constitution is a legal document containing the most important rules on political governance. The courts have the responsibility of ensuring that these rules are complied with. To my mind, therefore, the starting point of analysis should be that all the provisions in the Constitution are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution.

The Court went on to state that some particular provisions under Chapter VI may, by their very nature, not lend themselves to judicial enforcement and that '[t]he very nature of such a particular provision would rebut the ***presumption of justiciability*** in relation to it.

TRANSITIONAL PROVISIONS

There are two (2) components of the Constitution. First, article 1 to 299 and Second, the transitional provisions.

Article 299 - The transitional provisions specified in the First Schedule to this Constitution shall have effect notwithstanding anything to the contrary in this Constitution.

NB:The transitional provisions override any provision or article whenever there is a conflict.

Section 3 – Functions of Superior Courts of judicature

(1) The Supreme Court, the Court of Appeal and the High Court in existence immediately before the coming into force of this Constitution ***shall be deemed to have been established under this Constitution*** and shall perform the functions of the Supreme Court, the Court of Appeal and the High Court specified respectively in Chapter 11 of this Constitution.

(2) All proceedings pending before any court referred to in subsection (1) of this section immediately before the coming into force of this Constitution may be proceeded with and completed in that Court notwithstanding anything in this Constitution.

MUST READ CASES

1. Ex parte Akrofa Krukoko
2. Osei-Boateng v National Media Commission (No.2)

OSEI BOATENG V NATIONAL MEDIA COMMISSION [2012]

DR. DATE-BAH JSC:

Ground 3

As already adumbrated above, the interpretation of article 296 on which the third ground of the preliminary objection is based is contested by the plaintiff. The defendants' submission is that the function of the first defendant that is challenged by the plaintiff is not in the nature of an adjudication of a quasi-judicial matter, nor is it the exercise of the

type of discretionary power contemplated by article 296. Accordingly, they contend that the institution of the plaintiff's action in the Supreme Court based on article 296 is misconceived and without merit. The plaintiff retorts, in its written submission in response to the preliminary legal objection that:

> "Indeed, whether the function of the NMC in appointing the Director General of the Ghana Broadcasting Corporation is one that should be governed by Article 296 is one of the issues that this court must consider in the substantive matter. It is not an issue that goes to the jurisdiction of the court or the capacity of the Plaintiff to bring this action. It therefore cannot be a reason for the court to refuse the Plaintiff a hearing."
>
> As already argued above, the fact that the parties to this suit have competing interpretations of what "**discretionary power"** means in the context of article 296 and whether it applies to the exercise of the first defendant's power under article 168 is a reason for this Court to exercise its exclusive original jurisdiction, rather than the contrary. There is clearly a dispute as to the meaning of a constitutional phrase that justifies this court's exercise of its enforcement or interpretation jurisdiction.

One other issue arises from the defendants' submission on this ground. It relates to the doctrine of ***stare decisis*** and whether this Court is absolutely bound by the *Captan* case *(supra)* or not. **In *Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party* [2010]** SCGLR 134, the majority of this Court held that decisions of the Superior Courts established before those under the Fourth Republic were binding on the Fourth Republic courts, depending of course on the position of a particular court in the hierarchy of courts. This is how Dotse JSC, speaking for the majority of the Court, expressed it:

> "The above provisions give the clearest indications that the framers of the Constitution did not intend to be any vacuum between the Superior Courts of judicature in existence before the coming into force of the Constitution 1992 on 7th January, 1993 and those in existence after the constitution 1992.

If my analysis is correct, then there should be continuity in the jurisdiction, composition, functions and scope of the Superior Courts from the pre-January 7th 1993 to post 7th January 1993. In other words, the constitution 1992 does not admit of any difference in the Courts structure, jurisdictional powers and composition.

That being the case, the provisions of *Article 136 (5) of the Constitution 1992* would apply equally to all decisions of the Court of Appeal prior to January 7th 1993 and the principle of Judicial precedent established therein would apply equally. This means that all the decisions of the court of Appeal pre-January 1993 would also be binding not only on the Court of appeal itself, but also on all Courts below the Court of Appeal."

However, this view, with respect, was expressed *per incuriam* of a decision which, by Dotse JSC's own formulation, he was bound by. In ***In Re Agyepong; Donkor v Agyepong*** **[1973] 1 GLR 326, Apaloo JA**, as he then was, said (at p. 331):

> "We are then squarely faced with the question whether a pre-1960 decision of the then Court of Appeal binds any court after the Republican Constitution in 1960. We think not. Since 1960, there has been a completely new constitutional set-up with a fresh hierarchy of courts. Before the Republican Constitution of 1960, the highest court in the land was the Privy Council. Its decisions were binding on the then Court of Appeal whose decision in turn was binding on all other courts on points of law. With the promulgation of the 1960 Constitution, the Supreme Court, a completely new institution became the final Court of Appeal. Appeals to the Privy Council were stopped and Court of Appeal which fathered *Nimoh v Acheampong (supra)* was abolished. The Supreme Court was not made a successor of any of the previous courts. In so far as the 1960 took any cognisance of the cherished principle of *stare decisis*, article 42(4) provides that:
>
> "The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law." "
>
> The logical implication of the *Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party*

Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party is that the Court of Appeal is absolutely bound by the previous decision of itself and all its predecessor courts. Yet Apaloo JA, as he then was, sitting in one of these predecessor courts expressed the contrary view that the decision of the Court of Appeal before 1960 was not binding on a post 1960 Court of Appeal. With respect, this contrary view was one that, by Dotse JSC's own showing in his judgment, was binding on the Court of Appeal under the Fourth Republic whose decision he was considering. Accordingly, the majority's decision was ***per incuriam*** for not having taken Apaloo JA's view into account before reaching its decision. In other words, if Justice Apaloo's binding view had been adverted to by Justice Dotse and the majority of the Court, they may well have reached a different decision. ***The authority of the majority view is thus diminished and should not necessarily be followed by this Court.*** In my view, *the preferable position for this Court to adopt is that whilst the decisions of courts established under previous Republics are of a highly persuasive nature, none of them is of an absolutely binding nature on Superior Courts established under the Fourth Republic, since those courts are new courts.* This is the view that I expressed in a dissent to Dotse JSC's view in the *Ex parte Krukoko* case and I would like to re-iterate it here. I said then that:

"To rephrase the issue, the question for consideration is this: is the Court of Appeal under the 1992 Constitution bound by its previous decisions without exception or are the exceptions formulated by the ***Bristol Aeroplane*** **case** applicable to its decisions? **Secondly**, is the Court bound by its decisions given since the coming into force of the Constitution in January 1993 only or is it bound by all appellate courts that have exercised jurisdiction in relation to the territory of Ghana? When I refer to "bound", I mean a binding precedent, as opposed to a persuasive precedent. It is reasonable to contend that the only binding precedents are those handed down subsequent to 1993 and that the previous decisions are merely persuasive, although they carry a high degree of persuasiveness. Such a view of the operation of the doctrine of precedent in our jurisdiction would make for greater flexibility in adapting the law to social change and make the need to resort to the principles of the *Bristol Aeroplane* case less frequent, assuming that they have any applicability to the existing courts of Ghana.

Addressing the second issue first, I think that the doctrine of precedent established by article 136(5) applies only to the Court of Appeal and the lower courts established by the 1992 Constitution. I consider that the pre-1993 cases are persuasively binding, but they do not fall into the strict doctrine of precedent underlying article 136(5)."

In conclusion, the point that I wish to make on this *stare decisis* issue is that this court is not absolutely bound by the decision in the ***Captan* case** and therefore the correct interpretation of "discretionary power" remains open, so far as this Court is concerned. Accordingly, that is a further reason why the preliminary objection cannot succeed. It cannot be legitimately asserted that the meaning of "discretionary power" has already been authoritatively and conclusively determined and therefore there is no issue left for interpretation.

In sum, I find the three grounds of the preliminary objection unmeritorious and they are thus dismissed.

"Clearly the interpretation put on article 296 by the defendants, relying on Akufo-Addo CJ's interpretation of a provision *in pari materia (*article 175 of the 1969 Constitution) in ***Captan v Minister for Home Affairs(Minister of Interior)*** *(supra)* is different from that put forward by the plaintiff. While the Akufo-Addo view is that the discretionary power referred to in article 296 is only that exercised by an administrative agency or some other authority with power to adjudicate quasi-judicially on administrative matters or with power of legislation delegated to it, the plaintiff contends that the express language of article 296 does not restrict the discretionary power as used there to only quasi-judicial matters. We thus have a situation in this case where "rival meanings have been placed by the litigants on the words of [a] provision of the Constitution," in the words of Anin JA. To conclude on ground 2, it should be stressed that ambiguity or imprecision or lack of clarity in a constitutional provision is as much a precondition for the exercise of the exclusive original enforcement jurisdiction of this Court as it is for its exclusive original interpretation jurisdiction."

INDEMNITY CLAUSE

The effect of the indemnity clause is to oust the jurisdiction of the Courts.

Cases

1. Republic v Special Tribunal, ex-parte Akosah
2. R v Special Tribunal, Ex-Parte Forson [1980]
3. R v Director of Prisons and Another, Ex parte Shackleford [1981] – "trial or purported trial". There was neither trial nor purported trial. Cecilia Koranteng Addow granted habeas corpus on grounds that the ouster did not include his case.

NB: Section 34 – the indemnity covers those who were specifically named in the Section.

Section 35 – No court has jurisdiction to de-confiscate except CHRAJ.

Section 34 –

(1) No member of the Provisional National Defense Council, Provisional National defence Council Secretary, or other appointees of the Provisional National Defense Council shall be held liable either jointly or severally, for any act or omission during the administration of the Provisional National Defense Council.

(2) **It is not lawful for any court or tribunal to entertain any action** or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of Ghana or any person acting under the authority of the Government of Ghana whether before or after the coming into force of this Constitution or against any person or persons acting in concert or individually to assist or bring about the change in Government which took place on the twenty-fourth day of February 1966 on the thirteenth day of January, 1972, on the fourth day of June 1979 and on the thirty-first day of December 1981 in respect of any act or omission relating to, or consequent upon –

(a) the overthrow of the government in power before the formation of the National Liberation council, the National Redemption Council, the Supreme Military Council, the Armed Forces Revolutionary Council and the Provisional National Defense Council; or

(b) the suspension or a abrogation of the Constitutions of 1960, 1969 and 1979; or

(c) the establishment of the National Liberation Council, the National Redemption Council, the Supreme Military Council which took office on the ninth day of October 1975, the Supreme Military Council established on the fifth day of July 1978, the Armed Forces Revolutionary Council, or the Provisional National Defense Council; or

(d) the establishment of this Constitution.

(3) For the avoidance of doubt, it is declared that **no executive, legislative or judicial action** taken or purported to have been taken by the Provisional National Defense Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defense Council or the Armed Forces Revolutionary Council or by any person appointed ……shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act.

Section 35 – Preservation of Confiscation and Penalties imposed by AFRC and PNDC

(1) Subject to subsection (2) of this section, any confiscation of any property and any other penalties imposed by or under the authority of the Armed Forces Revolutionary Council and the provisional national Defense Council under any Decree or Law made by that Council, shall not be reversed by any authority under this Constitution.

(2) Where any property or part of any property of a person was confiscated on the basis of his holding a public or political office or on any other basis, and it is established to the satisfaction of the Commissioner for Human Rights and Administrative Justice that the property or that part was acquired before he assumed the public or political office, or that it was otherwise lawfully acquired, the property or that part shall be returned to that person.

REPUBLIC v. DIRECTOR OF PRISONS AND ANOTHER; EX PARTE SHACKLEFORD [1981] GLR 55

Constitutional law—Constitutional issue—Interpretation of Constitution—Reference to Supreme Court by High Court—Applicant detained under warrant of commitment allegedly issued by special court set up under A. F. R. C. D. 3—Habeas corpus proceedings filed by applicant—Preliminary objection raised to application under Constitution, 1979, art. 118 (2)—The only issue before court whether or not applicant convicted by special court—Whether application to be stayed and matter referred to Supreme Court—Armed Forces Revolutionary Council (Special Courts) Decree, 1979 (A. F. R. C. D. 3)—Constitution, 1979, arts. 35 and 118 (2).

FACTS

The Applicant, a businessman, was requested by a Ghana Broadcasting Corporation radio announcement to report at the Air Force Station, Burma Camp, Accra. He reported

accordingly, and he was detained by the military authorities. Having not been released, he brought the instant proceedings for a writ of habeas corpus under the Habeas Corpus Act, 1964 (Act 244), for the purpose of inquiring into the reasons for his detention and an order for his release. The respondents, by their return to the writ, sought to justify the detention on the grounds that the applicant had been received in prison custody on 28 August 1979 by virtue of a warrant of commitment, numbered as A.F.R.C. 83 and dated 8 June 1979, allegedly issued by the dissolved special court set up under the Armed Forces Revolutionary Council (Special Courts) Decree, 1979 (A.F.R.C.D. 3), and that the applicant had been ***tried, convicted and sentenced*** to a three-year term of imprisonment for the offence of selling goods above the controlled price. However, the warrant of commitment attached to the return, bore the signature of a person whose real name could not be identified. By an affidavit deposed to on his behalf, the applicant alleged that he was never brought before the special court for any trial and that the warrant of commitment dated 8 June 1979, was a forgery because the special court was not physically in existence before that date.

The respondents raised a preliminary objection to the jurisdiction of the court to entertain the application on the grounds that: (a) the issue involved an interpretation and enforcement of the Constitution, 1979, and therefore on the authority of the Court of Appeal decision in Ex parte Nti given on 21 November 1979: (see [1980] G.L.R. 527, C.A.) the application should be stayed and the issue referred to the Supreme Court under article 118 (2) of the Constitution; (b) the Habeas Corpus Act, 1964 (Act 244), had been abrogated by the Constitution, 1979, as being in conflict with it; ***(c) in view of the provisions of section 2 (5) of A.F.R.C.D. 3 and section 15 (2) of the transitional provisions of the Constitution, 1979 and on the facts, the jurisdiction of the court had been ousted***, and (d) the court could not go beyond the warrant of commitment issued by the A.F.R.C. Special Court. The court having dismissed the preliminary objection, reserving its reasons,

Held, granting the application

1. the application did not involve the enforcement and interpretation of the provisions of the Constitution, 1979……the only issue at the beginning of the proceedings was whether or not the applicant had been convicted by the special court set up by the Armed Forces Revolutionary Council (Special Courts) Decree, 1979 (A.F.R.C.D. 3).

2. if the respondents had produced a warrant of commitment with a return showing that the applicant had been tried, sentenced and committed, then the writ of habeas corpus would not issue for whether the conviction was wrong or not, the court would, be stripped of jurisdiction by section 15 (2) of the transitional provisions of the Constitution, 1979. But where there was a dispute about the authenticity of the warrant and the applicant gave circumstances which showed it was practically impossible for him to have been tried, then the justification for the

detention was controverted and the court had to study it meticulously. The court had power to inquire into the bona fides of the person who made the detention order, where this was impugned, the genuineness of the detention order itself and the identity of the applicant with the person referred to in the order. There must be a factual basis for the application of the transitional provisions. The court was not satisfied that the warrant of commitment was an act of the A.F.R.C. or any person authorised in the name of the council or was issued as a result of any trial.

3. Apart from section 15 (2) of the transitional provisions of the Constitution, 1979, and A.F.R.C.D. 3, s. 2 (5), a writ of habeas corpus would not be granted to a person lawfully committed or where the effect of the grant would be to review or question the decision of an inferior court on a matter within its jurisdiction. Also, where the return showed that the applicant was in execution under the judgment of a competent court, an affidavit would not be allowed to traverse those facts. However, where the applicant, as in the instant case, alleged that ***he was never tried or there was no conviction or sentence***, the court would be duty bound to go beyond the warrant. The authenticity of the warrant of commitment where it had been challenged, must be proved. It must be shown that it was a legal one and it could only be so if it was issued by a person who had the legal authority to do so. The warrant of commitment produced bore the signature of an unknown person and was undecipherable. It could not therefore be a signature for the purpose of validity of a committal warrant and thus it had not been established that the warrant was issued by an A.F.R.C. Special Court.

LECTURE WITH DIRECTOR **23/04/2021**

- **Three parts**

    1. Dealing with Non-statutory documents
    2. Statutory interpretation
    3. Interpretation of Constitution

Non-Statutory

1. **Biney v Biney** – general rules on construction of documents. The 3 main basic rules + read as a whole.

2. You must also know the rules applicable specifically to Wills.

- Extrinsic evidence - Equivocation and armchair rule
- The basic presumption is that it is not the intention of the Testator to render the Will ineffective. The Court may not want t render nugatory the intention of the testator.
- The Court is liberal when it comes to form but strict on content.
- Understand latent and patent ambiguities.
- If description is wrong you resolve it by extraneous evidence.
- You cannot substitute your wisdom for the intention of the testator.
- **Amartefio v Amartefio –** "GBP20 " to my wife. Applying strict literal meaning would have been absurd.
- Always remember that the rules of interpretation are our servants and do no bind us.

Statutory interpretation

- Statutes are of general application
- Seeking to ascertain the intention of the legislature.
- Also the basic rules apply. Eg. *Read the statue as a whole.*

- The aids to statutory interpretation
    1. **Internal aids** – what is in the text and linguistic canons.
    2. **External aids** – Presumptions, legislative history, latin maxims/canons; ut res magis, noscitur a socii,

Other external aids

Common sense, Dictionary

APPROACHES

- State reasons for your departure.

- Intentionalist - Literal, golden and mischief.

PRESUMPSTIONS

Assist in ascertain the intentions of the maker.

CONSTITUTIONAL

- Not bound by the strict rules of presumptions and maxims
- Look at the guide, the preamble; (the core values are the aids)
  i. Rule of law.
  ii. Separation of powers
  iii. Supremacy
  iv. Both legal, political, economic etc document.
  v. Living organism – must be given life, must continue to grow.

- It is broadly interpreted
- In addition to the core values is the DPSP. The DPSP are the spirit of the Constitution.