RULES OF CONSTRUCTION OF STATUTES AND APPROACHES/SYSTEMS TO STATUTORY INTERPRETATION

Approaches to interpretation feeds much into the schools of jurisprudence as it is the school of thought that informs the approach that a Judge may employ in his duty of meaning to the document or a statute. The approach taken may result in a different conclusion but that may not necessarily be so always. **Approach or system of interpretation is the mode of thought that explains the line of thought in a court coming to one conclusion or the other more especially when it has to do with a statute or a constitution. Criteria is established for determining the meaning of the word or phrase at stake and being the subject of interpretation.** What is relevant distinguishing factor from one approach from the other is the goal or the objective that each approach set for itself. And this may also involve the principles, rules and the basic aims of each approach to interpretation. There is not one approach but many. The approach may further differ from one another in the sense of the answers it provides to why do we interpret? When does it become necessary to interpret? How do we interpret? And whose understanding is relevant for the interpretation? Among some of the approaches/theories/systems are literalism, textualism, originalism, intentionalism, living constitutionalism, purposivism etc. now may begin by taking a critical examination of the nature of these individual approaches, their drawbacks and how they have been applied or rejected in our courts when the need for their invocation arose.

Strict Constructionist/Literalism

Strict constructionism or the literal interpretation is an approach to interpretation that places restrictions or set boundaries on judicial interpretation of a text. The approach restricts the Judge to the text as it is written and once the text appears to be clear no other approach to interpretation is admitted. It does not require Judges to draw inferences but confines them to the text. Scalia has referred to it as a degraded form of textualism. That "*no one ought to be a strict constructionist*", although to him to be a strict constructionist was better than to be a non-textualist. The approach may

fall under originalism but originalist denounces it as unhelpful approach to interpretation. It was first stated in the case of **Prince Augustus Frederick, Duke of Sussex** as follows:

> *"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver"*

In the case of **Republic vs. High Court, Accra; Ex-Parte Yalley (Gyana & Attor Interested Parties) [2007-2008] GLR 512** Wood C.J observed as follows:

> *"… I examined the case law on statutory interpretation and observed that on the construction of statutes, the literalist, the ordinary, plain, or grammatical meaning, should be adhered to if it clearly advances the legislative purpose or intent and does not lead to any outrageous consequences. This rule of construction may fitly be described as the subjective- purpose rule, with this rule being invoked only where the objective – purpose rule leads to mischief or injustice . . ."*

The literalists place much premium on the ordinary meaning of the words used to give effect to it. That where a text is clear, plain and unambiguous, effect should be given to it without looking for any extraneous matters. But where there are technical words employed, then the technical meaning assigned to them must be given effect to. Literalist will not entertain the notion that there is a mistake in an Act and the Judge must interpret so as to avoid the absurdity that the mistaken or the omission produces. In the case of **Whitely v Chappel (1868) LR 4 QB 147** a statute made it an offence for *"any person entitled to vote*" to use the identity of another to cast his vote. The defendant used the name of a dead person to cast a vote and the statute required a person to be alive for his vote to be used by another. The literalist approach was used and the defendant was acquitted that by using the vote of a dead person he had not violated the law as the one whose vote is to be used must be alive. Also in the case of **R v Harris (1836) 7 C & P 446** where the law made it an offence to *"stab, cut or wound"* and the Defendant had used his teeth to bite off the nose of the victim,

the court held that the plain or literalist meaning of the words does not admit of an offence being caused by the use of one's teeth.

In the case of **R v City of London Court Judge [1892] 1QB 273** at p. 290, Lord Esher MR in applying the literalist approach noted that: *"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity*." Lord Goddard CJ adopted a similar literalist approach in the case of **R v Wimbledon Justices, Ex Parte Derwent [[1953] 1 QB 380 at 384** when it was noted that: *"A court cannot add words to a statute or read words into it which are not there."* Lord Parker CJ followed in **R v Oakes [1959] 2 QB 350 at 354** when he stated that: "*It seems to this court that where the literal reading of a statute…produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament."*

By literal meaning is meant "*linguistic meaning taken in isolation from legal considerations, that is the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted linguistic canons of construction*." See Bennion on Statutory Interpretation, 4th Ed. At page 384.

Literalism suffers from one major deficiency. It reads the text without linking it to the context and completely misses the point. For as it was noted in the case of **Guisipi v Walling**[1] that "*there is no surer way to misread any document than to read it literally*". The so called simple meaning of words or phrases that one may be misread to be the meaning of the text may actually be a delusion.[2] One great criticism is that it is defeatist and lazy. This was made by Zender in his work The Law Making Process when he noted as follows:

> *"A final criticism of the literal approach to interpretation is that it is defeatist and lazy. The judges gives up the attempt to understand the document at the first attempt. Instead of struggling to discover what it means, he simply adopts*

[1] Guisepi v Walling, 144 F2nd 608 (2nd Cir.1944)
[2] Cohen page 257

the most straightforward interpretation of the words in question – without regard to whether the 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 a 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 decision being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred."[3]

The appropriate role of literalism as an approach to interpretation has been considered in a number of cases in Ghana. One such case is **Agyei Twum v Attorney-General & Akwetey [2005-2006] SCGLR 732.** In this case the 2nd defendant, a lawyer sent a petition to the President seeking the removal of the Chief Justice, CJ George Kingsley Acquah on the grounds of judicial misconduct and abuse of office. The President issued a statement that he intended to comply with Article 146 of the Constitution, 1992 by setting up an impeachment committee. The plaintiff aggrieved by the announcement of the setting up of the committee invoke the exclusive original jurisdiction of the Supreme Court for a number of reliefs including a declaration to the effect that the President was not entitled to present a petition to the President in his capacity as a lawyer relating to the performance of the administrative functions of the chief Justice for the transfer of Judges named in the petition presented. And that the establishment of a committee to probe the Chief Justice required the establishment of a prima facie case. And above all the publication of the petition in the media constituted a breach of Articles 146(8) of the Constitution which required that proceedings relating to removal of office of a Superior Court Judge was to he be held in camera.

Justice Date-Bah JSC at page 754 of the report saw the issues in controversy as on between a literalist approach and purposive approach to interpretation of Article 146 of the Constitution. And noted at page 756 that:

[3] Zender supra page 125, 5th Ed. 1999

> *"When one compares Article 146(3) with article 146(6), it becomes evident that there is a gap in the logical sequence of action under article 146. According to the literal language of article 146(6), on one is required to examine a petition brought against a Chief Justice to ascertain whether it establishes a prima facie case before the President refers it to a committee established by him. Once a 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 therefor 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, along side the other members of the committee that the President has to appoint. This is the 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 to 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."*

The court accordingly rejected the literal view of the article 146 of the Constitution and relied on the purposive approach by reading the need to establish a prima facie case as an implicit or implied requirement before the President upon receipt of a petition, could proceed to set up an impeachment committee to probe the Chief Justice.

Again, an attempt to force the Supreme Court to adopt the literal approach to interpretation by the 2nd defendant in the case of **Commission for Human Rights & Administrative Justice CHRAG v Attorney-General & Baba Kamara**

J1/3/2010 dated the 6th of April, 2011 was rejected by the Supreme Court. CHRAG wanted the court to adopt the literal approach and decline the invitation by Plaintiff to interpret the provision of Article 218(e) of the Constitution by adding private person to the category of persons who are to be investigated. It is stated under article 218(1)(a) of the Constitution, 1992, that the Commission as part of its functions was "(a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties; and under 218(1)(e) to "(e) to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations.

The facts were that CHRAG purporting to exercise its mandate under article 218 of the Constitution to investigate alleged or suspected corruption, it commenced investigations into alleged or suspected acts of bribery and corruption involving the second defendant and others. All the others were public officers at the time of the alleged or suspected acts of corruption.

The allegations of corruption referred to above were made during investigations by the United Kingdom's Serious Fraud Office into the overseas business operations of Mabey and Johnson, simply as "M & J", a privately-owned British engineering company, in various countries, including Ghana. A series of disclosures, admissions of facts and pleas of guilty by this British company resulted in conviction on 25th September 2009 before the Southwark Crown Court in London. The SFO alleged that a notional fund of 750,000 pounds was created by M & J from which it paid bribes amounting to 470,792.60 pounds to some Ghanaian public officials in order to secure contracts in Ghana.

Consequently, the Ghanaian media gained access to them. Considerable discussion of them was generated. The plaintiff then commenced investigations into the conduct of the second defendant and six other persons. The President of the Republic also invited the plaintiff, by a letter of 13th October, 2009, written on his behalf by the Secretary to the President, to undertake a thorough investigation of the M & J matter. The second defendant who at the time of the suit was the High Commissioner of

Ghana to Nigeria contested that prior to his appointment to that public office he had never held public office and had never been a public official. Until the said appointment, he was the Managing Director of Kamara Limited, a construction company. And to him not being a public officer he could not be investigated by CHRAG and was unaware of any position called "political overseer". On that basis the Commission sought for a declaration that upon a true and proper construction and/or interpretation of article 218 of the Constitution 1992 of the Republic of Ghana, the Commission has the mandate to investigate a private individual, entity and/or person who is alleged to be involved or implicated in an act of bribery or corruption allegedly committed by a public official or officials and who is being investigated by the Commission. 2nd defendant contended that the words of article 218 of the Constitution were very clear and private persons were not within the purview of the investigations of the Commission and therefore called for a literal application of the relevant articles of the Constitution. The apex court rejected this approach as unhelpful by noting that:

> *"To insist that the plaintiff's mandate relates exclusively to an investigation of public officials, even where a public official has participated in a corrupt transaction with a private individual in a situation where a comprehensive investigation of the transaction is needed in order to expose the corruption, would be similar, in a sense, to asking of Shylock in Shakespeare's Merchant of Venice to take his pound of flesh, but not to spill any blood. It is singularly unrealistic!"*

One may also consider the case of **Danso-Acheampong v Attorney-General [2009] SCGLR 353**. What was at stake was the correct interpretation of article 97(1)(e) and 94(2)(e) of the 1992 Constitution and whether a member of Parliament on being convicted and sentenced to a prison term mandatorily would be deemed to have vacated his seat. And that any law that appears to suspend vacation of the seat of a member of Parliament who has been imprisoned but appealed was unconstitutional and violation of the articles 97 and 94 of the Constitution. The plaintiff therefore called for a literal interpretation of section 10 of the Representation of the People Act, 1992 PNDCL 284 and Rule 41(1)(e) and (3) of the Supreme Court Rules, 1996, C.I 16 which suspended the seat of a member of Parliament who had been

convicted and had filed an appeal. The section 10 of the PNDCL 284 is to the effect that:

> *"When a member of Parliament is adjudged or declared bankrupt or of unsound mind or sentenced to death or imprisonment, the decision shall not have the effect of causing him to vacate his seat in Parliament until —*
>
> *(a) where no appeal is lodged, the time within which an appeal may be lodged has expired; or*
>
> *(b) where an appeal is lodged, the appeal has been finally disposed of"*

In the view of the plaintiff the seat ought to be declared vacant. The court rejected the view of the plaintiff as al literalistic one that had no place in modern approach to interpretation in the following words at page 358 that:

> *"This reading of the constitutional provisions 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 ignores the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question."*

On the absence of signatures on some of the pink sheets in the 2012 election petition case in the case of **In Re Presidential Election Petition: Akufo-Addo, Bawumia & Obetsebi-Lamptey v Electoral Commission & NDC [2013] SCGLR Special Edition 73**; Vida Akoto Bamfo JSC disavowed the strict constructionist approach to the interpretation of the word "shall" as it appears in article 49(3) of the Constitution as follows:

"(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating -

(a) the polling station; and

(b) the number of votes cast in favour of each candidate or question: and the presiding officer shall, there and then, announce the result of the voting at the polling station before communicating them to the returning officer.

She noted that:

"it has been held in a long line of decisions that a strict, narrow, technical and linguistic approach to interpretation of the Constitution, the embodiment of our hopes and aspirations must be avoided"

She then proceeded to interpret the word *"shall"* purposively by concluding that no injustice had been occasioned by the refusal of some presiding officers to sign the pink sheets as that was not capable of denying the right of voters who voted to have had their votes counted. The minority on the other hand gave a strict constructionist and literal interpretation to the word "*shall*" as it appears in the article and the Interpretations Act as mandatory which had to be obeyed for the votes cast to be valid. For this is what Julius Ansah JSC stated:

"By the use of the word "shall" the legislature intended that the duty to do the act specified and cast on the presiding officer must be honoured in obedience to the letter. I am fortified in this view because of the interpretation given to the word in our Interpretation Act, 2009, Act 792, which provided that: 27 "shall and "may" in an enactment made after the passing of this Act "shall" shall mean be construed as imperative and "may" as permissive and empowering". Shall connotes an obligation or mandatory duty conveying a command bereft of discretion. I hold in my concluding comments on this ground, that the failure to sign the pink sheets was a monumental irregularity unmitigated by any circumstances".

The same literalist approach was adopted by Rose Owusu JSC in her opinion that the failure to sign the pink sheets by the presiding officer was an irremediable error when she held that:

> *"Article 49 is an entrenched provision and Parliament itself cannot even amend it. How can a court under the guise of an interpretation give any other meaning to article 49(3) other than what is stated in the clause. The golden rule of interpretation is that words must be given their ordinary meaning unless same shall lead to an absurdity. The clause is clear and unambiguous and does not call for the interpretation of this court".*

Anin-Yeboah JSC (as he then was) also gave force to the letter of the article when he also stated that:

> *"As a country with a desire to entrench democracy based on a universal adult suffrage and transparency and accountability, the framers of the 1992 Constitution had cause to debate and insert this very important provision in the Constitution. Care must be taken to avoid any attempt to nullify words through linguistic manipulations to deny its effect as a constitutional provision entrenched for a purpose… if in an ordinary statute "shall" should be construed as imperative and mandatory what interpretation should we place on the same word "shall" if it appears in our Constitution and calls for construction. I am of the firm view that the framers of the Constitution inserted the word "shall' there for a purpose and should be construed as imposing mandatory duty on the presiding officer to perform their statutory duty which appears clearly as a condition for the declaration of the results at the polling station when there is clear breach of mandatory provisions of the Constitution"*

The literalist approach had earlier been endorsed by the Supreme Court by Aninkwa JSC in the case of **Republic v High Court, Accra; Ex Parte CHRAJ (Richard Anane Interested Party) [2007-2008] SCGLR 213** when he held that the word "*complaint*" must be referenced to its dictionary meaning and gave it that literalist interpretation as such. That it meant to make a formal accusation against a person

and therefore there must be an identifiable person to lodge the complaint with CHRAJ against Richard Anane. The strict constructionist approach was approved even for constitutional interpretation in the case of **Republic v Yebbi & Avalifo (1999-2000) 2 GLR 50** The facts of this case are that On 15 July 1997 Constable Yebbi and Corporal Avalifo, both police officers, were arraigned before the Regional Tribunal, Greater Accra on charges of conspiracy to steal and stealing the sum of ¢100 million belonging to the National Democratic Congress (NDC), a political party registered under the Political Parties Registration Law, 1992 (PNDCL 281). In the course of the trial, the accused persons challenged the jurisdiction of the tribunal on the ground, inter alia, that under article 143(1) of the Constitution, 1992 a Regional Tribunal only had jurisdiction to try "*such offences against the State and public interest*" as Parliament may by law prescribe. The accused further contended that the offences within which they were charged could not be said **to be against the State and public interest** since the money involved was admitted to belong to a political party which was not a state institution; neither was the theft of a political party's money, an offence against public interest.

The court held that it was evident from the clear language of articles 140(1) and 143(1) of the Constitution, 1992 that the High Court and Regional Tribunal were not meant and were not intended to have the same original jurisdiction in criminal matters. Article 140(1) of the Constitution, 1992 gave the High Court original jurisdiction in all criminal matters, whereas the original jurisdiction of the Regional Tribunal was, under article 143(1) of the Constitution, 1992, confined to such offences against **"the State and public interest**" as Parliament may by law prescribe. Parliament had consequently, no jurisdiction under article 143(1) of the Constitution, 1992 to provide that Regional Tribunals had original jurisdiction in all criminal matters. Accordingly, section 24(1) of Act 459, to the extent that it vested in the Regional Tribunal concurrent original jurisdiction in all criminal matters with the High Court, was clearly inconsistent with the letter and spirit of the Constitution, 1992.

However on the issue of stealing it noted that even though the stealing of money belonging to a political party could not be said to be a theft of State money because a political party was not a state institution in the sense that it was not set up or owned

by the State, the stealing of such money belonging to a political party was undoubtedly an offence against the public interest as defined in article 295(1) of the Constitution, 1992.

This school is not now very much subscribed to by many Judges. And in **Ransford France v Electoral Commission (No 3) & Attorney-General [2012] SCGLR 705** the apex court shut down a literalist interpretation by noting that an interpretation that favours application of a literalist view of a text even when its consequences will be absurd should not be embraced. This was a case in which the plaintiff had sought a number of declarations including, among others, the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 before Parliament purporting to create new constituencies for Parliamentary Elections in the Republic of Ghana and its subsequent entry into force on the 3rd day of October, 2012, is inconsistent with Articles 23, 51 and 296(c) of the Constitution 1992 and demanded the laying of Regulations spelling out how the EC intended to exercise the discretion conferred on it by the Constitution before it could proceed with the C. I 78. The view of the plaintiff was informed by the Proposal of the Committee of Experts in 1968 in the drafting of the 1969 in relation to the exercise of discretion. The article 296 of the 1992 Constitution is derived from an identical provision in article 173 of the 1969 Constitution and it was the claim of the Plaintiff that there ought to be Regulations in the exercise of the discretion as it was mooted by the drafters of the Constitution. This view was however, rejected by Prof Date-Bah JSC as a literalist approach to interpretation:

> *"Thus, article 173(c) of the 1969 Constitution, if literally interpreted, would seem to require that before any discretion is exercised by a public official or agency, the official or agency must first publish regulations governing the exercise of that discretion. It is also possible to interpret the quotation (supra) from the 1968 Constitutional Commission's Proposals as supporting such an expansive literal interpretation … However, such an expansive literal interpretation would lead to grave mischief. It would lead to a nuclear melt-down, so to speak, of government, as we have known it since 1969. It would*

be thoroughly impractical for public officials and agencies in general to publish regulations governing their discretions before they could exercise them, on pain of the invalidity of those discretionary decisions. Literally thousands of decisions already taken by public officials and agencies since 1969 would be rendered invalid and would have to be declared so by this Court".

Any statutory or constitutional interpretation that insist on placing premium on a literalist approach in the face of injustice or absurdity such as the minority in the 2012 election petition case sought to do is not in consonance with the new approach to interpretation as view from the Interpretations Act, whose Memorandum clearly states that *"Judges have abandoned the strict constructionist view of interpretation in favour of the true purpose of legislation".* For section 10(4) of Act 792 states as follows as guide to interpretation by urging a shift from a literalist interpretation:

"(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".

Did the minority in the 2012 Election Petition case heed to section 10(4) of the Interpretation Act? See also **Danso-Acheampong v Attorney-General & Abodakpi [2009] SCGLR 353.**

Textualism

Textualists believe that the ordinary but not necessarily the plain meaning of a language of a text should control its interpretation. It is a word that was first used by Mark Pattison to criticize Puritan theology in 1863. Justice Robert Jackson employed it in his opinion in the case of **Youngstown Sheet & Tube Co v Sawyer 343 US.** It rejects non-textualists and extra sources to interpret a document or a statute. It therefore does not subscribe to the approach to interpretation that seeks for meaning by searching for the intention of the makers of the text nor the cure that a statute was enacted to cure. Textualists examine the text and how it appears to mean to the objective reasonable person. It gives little consideration to the legislative intention that informed the provision. In other words, the textualist are not concerned with what the author wanted but more with what he wrote. For them a text has meaning of its own independent of the legislative intent. That the author cannot change the meaning that the objective reader will as Oliver Wendell Holmes best captured the views of the textualist when he said:

> *"We ask, not what this man meant, but what those words mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used … we do not inquire what the legislature meant; we ask only what the statute mean"* **[Holmes: The Theory of Legal Interpretation, 1899, Harvard Law Review 12 (6): 417]**

Textualists think that there is nothing genuinely like legislative intent as the legislators may have different thoughts in the promulgation of the law. Textualism bears close resemblance to the strict constructionist approach but the two are not the same. Former Associate Justice of the US Federal Supreme Court, Antonin Scalia set out the distinction in the following:

> *"[T]extualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist and no one ought to be. A text should not be construed strictly and it should not be construed leniently, it should be*

construed reasonably, to contain all that it fairly means" **[Antonin Scalia: A Matter of Interpretation, 1997]**

Textualists are of two kinds. They are the old and the new textualists. The Old Textualists interpret the document as expressed and as a reasonable reader will appreciate it. It abandons authorial intent altogether. To this group that is the only approach that is certain and one may be permitted to go beyond this to look for the authorial intent only when the reasonable reader cannot find certainty. The textualist adopt a two-stage approach in its work. First the interpreter determines if the meaning is plain and if it leads to non-absurd result. If the answer is yes, then the first stage also becomes the final stage. (This is synonymous with Bennion's literalist-purposive approach to interpretation). But if the answer is no that is the text of the provision is not plain and the result on application would be absurd, then the interpreter moves to the second stage which is they attempt to clarify the vagueness and the ambiguity. Barak at page 271 of his Purposive Approach to Interpretation has raised six main criticisms of old textualism.

First that old textualist do not take authorial intent seriously. This is because old textualism exhibit schizophrenic tendencies as in one breath it claim that the goal of interpretation is to confer on the text a meaning that actualizes the authorial intent and in one breath it restricts the sources from which the interpreter may learn about the authorial intent. That means it pays lip service to the authorial intent and does not take it seriously. Second, old textualists ignore credible information about intent from sources external to the text. For this assumption is out of sink with our life experience. For in some instances the meaning of the text originates in sources outside the text itself. Legislative history may provide credible information as to the meaning of a text, letters written by a testator or words used may provide valuable information as to what the testator meant by a clause or provision in his will. Though external information may be unreliable and its credibility may be problematic, but s general rule to rule them out creates its own problems for interpretation.

Third, they are based on false distinction between a plain and an unclear text. In Barak's view the understanding that a clear text needs no interpretation but application and when it is unclear that is when one apply interpretative principles, is akin to this claim by old textualist that one has to glean the meaning of the text from the text itself and it was only when there is lack of clarity that one looks for meaning outside the text. **To Barak a text is only clear at the conclusion stage of interpretation process but not at the beginning stage. And as long as the intent of the author has not been realized the text cannot be said to be clear. The semantic clarity may be deceptive as a text cannot be clear unless checked against the contextual environmental of historical, social and textual.**

Fourth, they fail to achieve the rationale at their core – that is security and certainty in law. Relying on the plain meaning approach is deceptive as giving a false sense of security and certainty that persons and institutions can plan with the plainness of the law in mind. But this is not so. A text can be plain only after it has been examined in the context of its environment but not only paying heed to the semantic meaning of the word. And in the end the security or certainty that one claim to have achieved due to the plainness of the text becomes an illusion. Fifth, old textualism fosters judicial superficiality and encourage judges to avoid dealing with the policy that the author of the text tried to actualize. This is because little attempt is made to subject the text to a more rigorous and intellectual analysis by accepting on the face value the semantic meaning that the words convey. Sixth, old textualist lack hermeneutic and social support and has no support from constitutional legitimacy as it fails to allow the text to connect to the system as a whole. This is because it proceeds on the breath of understanding of the authorial intent and yet abandons it for what it terms as the reasonable man's criteria. This narrows the interpreter's array of sources and horizon by limiting him to the text. Such becomes a handicap that prevents the interpreter from fully grasping the meaning of the text.

The new textualist focus on interpretative principles applicable to statutory and constitutional law but not to private documents. They believe that the author of the text only created the text but not the intent. They see this approach as objective

textualist system by seeing it as a reasonable person or author would have understood it at the time the text was created.[4] To new textualist the goal of interpretation is not to realize the intent of the legislature but what it said. For this is what Scalia states in his work, A Matter of Interpretation that:

> *"It is the law that governs, not the intent of the lawgiver … The objective indication of the words, rather than the intent of the legislature, is what constitutes the law … I object to the use of legislative history on principle, since I reject of the legislature as the proper criterion of the law."*[5]

In constitutional interpretation, again they look for the meaning they term the "**original meaning**" but not what the draftsman intended. This is the approach of some of the American Realists. The new textualist rely on the language of the text and if the language of the text is plain they apply it. They also rely on sources such as dictionaries and linguistic aids to appreciate how the text was understood at the time of the making of the enactment by Parliament. New Textualist also rely or consult interpretative maxims and presumptions in interpreting the law. Finally, they also allow the interpreter to consult laws where there had been the use of similar language to the one being interpreted.

Originalism

Originalism as an approach to interpretation emerged in the US as a theory of constitutional interpretation. This view of interpretation holds that a constitution must be interpreted in a way that brings out the understanding that the original framers had in mind when the constitution was drafted. By stretching it to statutory interpretation, one can say that a statute must be interpreted as the makers of the statute understood it or had in mind when they first made it. For the Originalists they seek either the **original meaning or the original intent**. The original meaning approach is not far from textualism the approach of the new textualists. **That an interpretation should be seen from what reasonable persons living at the**

[4] K. E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review (1999)
[5] A. Scalia: A Matter of Interpretation: Federal Courts and the Law 17, 29, 31 (1997)

time the provision came into force understood it to mean. However, the original intent adherents believe that interpretation should be on what those who drafted and ratified the constitution meant at the time of its adoption.

The term became popular in the 1980's and became associated with the strict constructionists. So the originalist sees a constitution just like a statute and begins to give it meaning as it was understood when it was crafted. Scalia notes about originalism as:

> *"The theory of originalism treats a constitution like a statute and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all textualist, you don't care about the intent, but I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words as they were promulgated to the people … and what is the fairly understood meaning of those words"* **[Scalia: A Theory of Constitution Interpretation. A Speech at the Catholic University of America on 18th October, 1996.**

It is only when the language has more than one meaning that the interpreter must look for the purpose, structure and history for the purpose of clarifying any ambiguity in the text. Barak equates originalism with the subjective meaning of a text. As the interpreter attempts *"to give the legal text the same meaning it had at the time it was drafted. There is no consideration of reality in existence at the time of interpretation. The passage of time cannot change the intent of the author it is fixed in time*". He therefore equates originalism with intentionalism. In Ghana originalism may be described as **the subjective purpose of the framers of the Constitution as contradistinction to the objective purpose**, which is one of giving the constitution a living constitutional interpretation. In the case of **Asare v Attorney-General [2003-2004] SCGLR 823 (at p. 834-835**) where the plaintiff had sought for an interpretation of article 60(11) of the constitution that whenever the President and the

Vice President were outside the jurisdiction, there was no need to swear the Speaker as acting President as the absence of the President could not be deemed as "*unable to perform his functions*". The apex court described the subjective and objective purposes in the following:

> "*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…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 realization through the given legal text, of the fundamental or core values of the legal system*.

In the Asare case, when the Plaintiff insisted on the application of the objective purpose of the Article 60(11) of the Constitution rather than the subjective purpose, Justice Date-Bah called for a balancing act between the two when it relied on the view of Aharon Barak in his work, "**The Judge on Judging: The Role of the Supreme Court in a Democracy**", (2002) 116 Harvard Law Review, 19 when the Israeli Judge stated as follows:

> "*…one should take both the subjective and objective elements into account when determining the purpose of the constitution. The original intent of the framers at the time of drafting is important. One cannot understand the present without understanding the past. The framers' intent lends historical depth to understanding the text in a way that honours the past. The intent of the constitutional authors, however, exists alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person, to protect his or her freedom. It must contend with his or her needs. Therefore, in determining the constitution's purpose through interpretation, one must also*

take into account the values and principles that prevail at the time of interpretation, seeking synthesis and harmony between past intention and present principle."

The originalist approach is not a favoured approach in Ghanaian constitutional interpretation as exemplified in the case **of Ghana Lotto Operators Association v National Lottery Authority [2007-2008] 2 SCGLR 1088** when Date-Bah JSC was examining the justiciability or otherwise of the directive principles when the National Private Lotto Operators had complained that Act 722, the National Lotto Act violated Article 33(5) of the constitution in so far as it excluded them from operating in the lotto space. It was the view of the Plaintiffs that their right to work as guaranteed under the constitution has been breached. In referring to the work of the Committee of Experts who had intended that the directive principles of State Policy should not be justiciable, but same was not accepted into the constitution, this is what the court noted on originalism:

"If one adopts an originalist approach (to borrow a term from United States 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 … While the 1992 Constitution has not yet endured for 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 learned Judge further noted by explaining the doctrine of living Constitution as implying, that there is no slavish adherence to the original subjective intent of the framers, but rather that the interpreter takes the constitutional text as it is and interprets it in the light of the changing needs of the time. The actions by government officials in the early years of the promulgation of the Act as compliance to the provisions may become a source that reliance may be placed in an attempt to understand the text.

For that may provide evidence of the original meaning of the text as early interpreters within the time of the promulgation would be deemed to have understood it better as to the meaning and scope of the law. Under section 10(2) of the Interpretations Act, Act 792 it provides that in circumstances of ambiguity, that recourse to sources for resolution may include the following: *(a)* the legislative antecedents of the enactment; *(b)* the explanatory memorandum as required by Article 106 of the Constitution and the arrangement of sections which accompanied the Bill; *(c)* pre-parliamentary materials relating to the enactment; *(d)* a text-book, or any other work of reference, a report or a memorandum published by authority in reference to the enactment, and the papers laid before Parliament in reference to the enactment; *(e)* the parliamentary debates prior to the passing of the Bill in Parliament.

All these is to situate the interpreter to have a better understanding of the original intent of the makers of the Act and give meaning to it. And in that sense language and culture are worth considering by the originalist. Such was the view of CJ Burger of the US federal Supreme Court in the case of **Marsh v Chambers 463 US 783 (1983).** The case concerned the State of Nebraska's practice of opening State legislature with prayers by a Chaplain paid by the State which the Plaintiff contended violated the Establishment Clause of the US Constitution. The establishment clause is embodied in the first amendment to the US Constitution. It states that:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of*

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"

The District court held that the prayers did not violate the Establishment Clause but was violated in terms of the payment of the chaplain from public funds. The State legislature was prohibited from using public funds to pay the chaplain. The 8th Circuit of the Court of Appeal reversed the trial Judge by holding that the prayers itself violated the Establishment Clause being one that favours one particular religious expression above others. At the Supreme Court it reversed both lower courts by looking at the original intent and conduct of the drafters of the Establishment Clause in the following:

"the opening of sessions of legislative and other deliberative public bodies with prayers is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since the practice of legislative prayers has coexisted with the principles of de-establishment and religious freedom… The tradition in many of the colonies was of course linked to an established church, but the continental congress beginning in 1774 adopted the traditional procedure of opening its sessions with prayers offered by paid chaplains… Clearly then the men who wrote the First Amendment Religious Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening legislative sessions with prayers has continued without interruption. Standing alone historical patterns cannot justify contemporary violations of constitutional guarantees. But there is far more here than simply historical patterns. In this context historical patterns shed light not only on what the draftsmen intended the Establishment Clause to mean but also on how they thought that the Clause applied to the practice authorized by the First Congress – their actions reveal their intent …"

This though is a recourse to patterns of historical behaviour and actions but it is also a reference to the original intent of the framers of the First Amendment to the US Constitution that situate it within the approach of the originalist view of interpretation

of the Constitution. Non-originalist such as living constitutionalists believe that the meaning of a text in a constitution must assume a dynamic approach as the meaning of a text of a document or constitution is not fixed until it is applied to practical and concrete circumstances over time.

Living Constitutionalism

This favoured approach to constitutional interpretation is conceived in the fact that the constitution is a dynamic document and must be seen as capable of adapting to change and modern circumstances. That an approach that construe the constitution as if the dead hands of those who framed it reached from their graves to negate or constrict the meaning thereby depriving what was intended to be a living instrument of its vitality and adaptability to serve succeeding generations ought to be rejected. That the constitution should be seen as a living law and capable of change to meet the needs of generations long after the death of its framers. This system is rooted in liberal political theory founded on legal normative process, natural law and how the law ought to be in a given condition and circumstance. Barak and Ronald Dworkin are strong adherents to this system of interpretation. For the living constitutionalist are of two kinds. First the pragmatist holds the notion that interpreting a constitution framed many generations ago when the original farmers never conceived or thought of the exigencies that had occurred will not help in the interpretation. Whiles the second approach look for the intent that the framers had in mind for generations yet unborn and crafted the constitution in broad and liberal terms and ought to be interpreted and seen as such. Opponents of living constitutionalism such as the originalist believe that the constitution should rather be changed through amendments and not through judicial activism as such a process is undemocratic.

In the case of **Tuffour v Attorney-General [1980] GLR 637** this approach to constitutional interpretation was widely acknowledged. And giving the constitution a malleable interpretation that accords with the modern times has been seen as not only interpreting the words or letters alone but the spirit as well. Sowah CJ noted this fact at page 647 as follows:

"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."

Francois JSC underscored the same point on living constitutionalism in his reference to the spirit in the case of **NPP v Attorney-General [1993-94] GLR 35 @79-80** as follows:

"a constitution is the outpouring of the soul of the nation and its precious life blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and the spirit of the constitution are essential fulcra which provide the leverage in the task of interpretation. In every case a true cognition of the constitution can only proceed from the breath of understanding of its spirit… the necessary conclusion is that the written word and its underlying spirit are inseparable bedfellows in the true interpretation of the constitution"

In the thinking of the Judges that invokes the spirit is that the word of the constitution may no longer with time convey the meaning it ought to convey but the spirit survives and is capable of giving a meaning from the word or letter that meets the needs and exigencies of the times. Date-Bah JSC endorsed this approach in the **National Private Lotto Operators Association v National Lottery Authority** case supra when he held that:

"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 framers of it".

See also **National Media Commission v Attorney-General [2000] SCGLR 1**. It should be noted that there are some interpreters like Archer CJ who reject this approach to interpretation. And this was manifest in the **NPP v Attorney-General (31st December case)** supra at page 49 of the report as follows:

"… a cliché used in certain foreign countries when interpreting their own constitutions which were drafted to suit their own circumstances and political thought. Whether the word "spirit" is a metaphysical or transcendental concept, 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"

Bimpong-Buta sees the views of the minority in its failure to recognize the spirit of the constitution as a retrograde step in constitutional interpretation.

The Golden Triangle Principles of Interpretation: Literal, Golden and Mischief Rules

The Golden triangle of interpretation has been stated by Cross to be this: That first point of call is that the ordinary meaning of the words and in proper circumstances the technical meaning of the words used or employed must be given effect. General words used must be given effect having regard to the context in which they appear.

Two if giving effect to the ordinary words may produce absurd results that the Judge thinks Parliament never intended to produce such an absurdity, then a resort may be had to the secondary meaning of the words which they are capable of bearing. These first and second approach in the golden triangle is what is popularly referred to as the golden rule. And this rule was first stated in the case of **Grey v Pearson (1857) HLC 61 @106** that:

"in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that

would lead to some absurdity, or some repugnancy with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency but no further".

The third principle in the golden triangle is for the Judge to read in words which may necessarily be implied by adding to, altering or failing to give effect to some of the words so as to make the provisions not unreasonable. By this approach the Judge will have regard to the situation that existed before the passage of the law, the very reason that the law was promulgated to address, the mechanisms that Parliament put in place to address the defect detected. This is what is referred to as the mischief rule established in the **Heydon's case (1584) 76 ER 637 @ 638** which was stated to be that:

"That for the sure and true interpretation of all statutes in general … four things are to be discerned: what was the common law before the making of the act? what was the mischief and defect for which the common law did not provide? What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And the true reason of the remedy, and the office of the Judge is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief: and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, probono publico"

I must be quick to add that this golden triangle principles has given way in modern times, where the statute or a document is examined or looked at a whole in an attempt to find its ultimate purpose. Therefore, the modern purpose which is discussed infra has become the dominate approach to interpretation eclipsing the golden triangle principles which held sway for so long a time.

Intentionalism

An interpretation that search for the intention of the legislature or the maker of the document has so long been hailed as the best approach to interpretation. The courts

attempt to look for the intention of the maker of the document and interpret in a way that gives meaning and effect to the law or the document. The starting point in discovering the intention is the very words used in the text. If the words are capable of themselves expressing the intention of the maker, then effect will be given. However, if giving effect to the words will result in absurdity, repugnancy or inconsistency with the rest of the document or the Act as a whole, the court will move beyond the words used or its literal appreciation of the words and first construe the Act or document as a whole. Therefore, the mischief rule in Heydon's case is resorted to by the intentionalist to interpret the document. That is to the effect that:

> "*"That for the sure and true interpretation of all statutes in general … four things are to be discerned: what was the common law before the making of the act? what was the mischief and defect for which the common law did not provide? What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And the true reason of the remedy, and the office of the Judge is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief: and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, probono publico"*

The above was quoted with approval in the case of **Republic v High Court, Koforidua; Ex Parte Eastern Regional Development Corporation [2003-2004] SCGLR 4.** The intentionalism approach requires the Judge to read the document as a whole to discover its meaning. Chitty on Contract at note 18 of page 611 states as follows:

> *"it is true of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex ante cedentibus et consequentibus: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done".*

It is out of this holistic appreciation that the necessary connections and inferences could be drawn from the various parts, provisions, clauses, words, phrases etc in an attempt to discover the intent and purpose of the makers of the documents. This has been echoed time and again and in the words of Viscount Simmonds that:

> *"the elementary rule must be observed that no one should profess to understand any part of ... any document before he had read it as a whole".*

See ATTORNEY GENERAL v AUGUSTUS OF HANOVER [1957] AC 436; See also **OSEI v GHANAIAN AUSTRALIAN GOLDFILEDS LTD [2003-2004] SCGLR 69** where the court underscored the need for an approach that seeks the intention of the makers od the document in the following:

> *"The basic rules 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"*

In the case of **Biney v Biney** [1974] 1 GLR 318 the Court of Appeal had to interpret the deed of settlement of a settlor and the court laid down three main stages in dealing with the meaning in the following:

> *"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".

And in embarking on this exercise any construction that makes the meaning of the document unreasonable, absurd, unintelligible, incongruous or that may tend to create undue hardship for the parties and third parties may be said not to be closer to the intention and purpose of the makers of the document. By this approach the court in the Biney case gave technical words their technical meaning.

Intentionalist did not originally seek to take into consideration factors such as the legislative history, preamble, long title and marginal notes by the use of the mischief to discover the intention of the maker and eventually gave way to purposivism. However, the intentionalist of today admit and take into consideration in the cases of ambiguity and lack of clarity legislative history, government papers, debates in Parliament etc in order to effectuate the legislative intent. The intentionalist approach may involve some modifications to the words of the statute or document when the words used fails to bring out the true intention of the maker or the legislature. And this is what Lord Denning in the case of **Magor & St. Mellons Rural District Council v Newsport Corporation (1961) AC 189 @ 191** stated as follows:

"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 destructive analysis".

This approach historically did not reckon the legislative history of the law, pre-parliamentary materials as well as *contemponeo exposito*, explanatory memoranda, Hansard and has now given way to the modern purposive approach to interpretation as the dominant and preferred approach. Intentionalism may involve a three tier approach towards the construction of a statute. The first is the need to interpret as whole with a view to ascertaining the intention of Parliament or the maker of the

document by making the interpretation as near to the mind of Parliament or the makers of the document as possible. Two, that the intention of the maker of the document or of Parliament must be gathered from the written text. And it is from this context that intentionalism rejects the need to have recourse to sources other than the text such as Hansard, parliamentary debates, debates etc. The third is that the words must be accorded their ordinary meaning with technical words and scientific words given the meaning assigned them. Intentionalism abides by the golden triangle of interpretation.

There has been a number of criticisms levelled against the intentionalist view of interpretation. The first is from Ronald Dworkin who points out in his work "**Laws Empire**" that the search for the intention of the author assumes a canonical moment at which a statute is born for which it has only one meaning all the time that never changes. And in that sense the interpreter fails to view it as a creature of a changing environment. And when the need arises for the statute to be applied to changed circumstances, the statute or the constitution may be found wanting. For he writes that:

> *"The speakers meaning theory begins in the idea which I said was the root of its troubles: that legislation is an act of communication to be understood on a simple model of speaker and audience, so that the commanding question in legislative interpretation is what a particular speaker or group meant in some canonical act of utterance. And hence the catalogue of mysteries … who is the speaker? When did he speak? What mental state supplied his meaning? The mysteries are spawned by a single domineering assumption: that their solutions must converge on a particular moment of history, the moment at which the statute's meaning is fixed once and for all, the moment at which the true statute is born. That assumption has a sequel that as time passes and the statute must be applied to changing circumstances, judges are faced with a choice between enforcing the original statute with a meaning it has always had or amending it convertly to bring it up to date. That is the dilemma old statutes are often supposed to present: judges must choose between the dead but legitimate*

hand of the past and the distinctly illicit charm of progress"

Barak supports this criticism of intentionalism in his own words when he also notes that:

> *"The flaw in intentionalism is that it fails to view the text being interpreted as a creature of a changing environment. It is insensitive to the existence of a legal system and democratic regime in whose framework the text operates. It views the text being interpreted as a fossilized creature, standing alone. If a legal system began and ended with a single statute, we could justify intentionalism. But a legal system contains panoply of legal norms that influence each other. Interpreting statute X according to the intent of its author at the different time of enactment … would create disharmony. It would freeze the meaning of each statute to the four corners of its text, without reflecting the system as a whole. Intentionalism cannot integrate the individual text into the legal system as a whole".*

It can be concluded that intentionlism is replete with its own peculiar challenges and the courts have given meanings to statutes that accord with the changing times that was never the authorial intent or the subjective meaning of the statute.

Purposive Approach and MOPA

This widely accepted approach calls for interpretation that fulfils the purpose of the law or the constitution under consideration. For the generally accepted goal of interpretation is to seek for the meaning that effectuates the purpose of the document or the statute or the constitution. That can be realised when the court seeks for meaning from sources even beyond the Act such as parliamentary proceedings, memoranda that accompanied the bill, early papers, reports of commissions or committees whose work might have informed the passage of the law, textbooks, opinions of experts, etc. Cross and others view the purposive approach as born out of the Heydon's rule.

This calls for a statute to be read as a whole and when the meaning is not clear both internal and external aids to interpretation may be explored. The internal aids include the context, the title being the short and long title, preamble, headings, provisos, interpretation section, punctuations etc. The external aids that the court may fall upon may include the antecedents of the law, the object and purpose of the making of the law, the remedy it was meant to cure, textbooks, international conventions, government papers etc, judicial interpretations, contemporary expositions, legislative history etc. Such an approach has received the blessings of the Interpretations Act under section 10 (1) and (2) as follows:

> *"(1) Where a Court is concerned with ascertaining the meaning of an enactment, the Court may consider*
>
> > *(a) the indications provided by the enactment as printed, published and distributed by the Government Printer;*
> >
> > *(b) a report of a Commission, committee or any other body appointed by the Government or authorised by Parliament, which has been presented to the Government or laid before Parliament as well as Government White Paper;*
> >
> > *(c) a relevant treaty, agreement, convention or any other international instrument which has been ratified by Parliament or is referred to in the enactment of which copies have been presented to Parliament or where the Government is a signatory to the treaty or the other international agreement; and the travaux preparatoires or preparatory work relating to the treaty or the agreement, and*
> >
> > *(d) an agreement which is declared by the enactment to be a relevant document for the purposes of that enactment.*
>
> *(2) A Court may, where it considers the language of an enactment to be ambiguous or obscure, take cognisance of*

(a) the legislative antecedents of the enactment;

(b) the explanatory memorandum as required by article 106 of the Constitution and the arrangement of sections which accompanied the Bill;

(c) pre-parliamentary materials relating to the enactment;

(d) a text-book, or any other work of reference, a report or a memorandum published by authority in reference to the enactment, and the papers laid before Parliament in reference to the enactment;

(e) the parliamentary debates prior to the passing of the Bill in Parliament".

This green light provided in section of Act 792 places the purposive approach above the intentionalism that could not look at some of the sources that the purposive interpreter has the liberty to examine. Such a healthy approach was adopted by the Supreme Court in the case of **Republic v High Court, Ex Parte Expendable Polystyrene Products Ltd [2001-2002] 1 GLR 98.** In this case the High Court (Civil Procedure) Rules, LN 140A, repealed and as amended by L. I. 1107 had provided by Rule 2 that upon conclusion of a case, a Judge shall deliver his judgment within six weeks. The case was concluded with addresses filed and judgment was supposed to be delivered on the 28th of January, 2000 but it was not delivered until 21st January, 2002. The defendant who lost the case upon delivery of the judgment invoked the supervisory jurisdiction of the High Court that without the court not having complied with L.I 1107 by failing to deliver its judgment within six weeks the judgment delivered was a nullity. The court refused to quash the judgment even though the rules were couched in mandatory terms as the court employed the purposive approach in the following words:

"[I]t was an established rule of interpretation that the provisions of a statute had to be read as a whole and should be considered in both its internal and external context. If the whole of Order 63, r 2A of the High Court (Civil

Procedure) Rules, 1954 (LN 140A) as inserted by the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107) were read together, it was clear that it contained consequential measures that might be taken if a court failed to deliver judgment within six weeks after the close of the case. Accordingly, it had to be assumed that that was all the legislature intended should be if there was such a failure: as provided in sub rules (4)-(7) either the judge or a party might notify the Chief Justice who might then fix the date … Since those requirements were for the benefit of parties to causes and matters in the superior courts, i.e to ensure that judges delivered judgments expeditiously, any interpretation of those provisions which might deprive them of those benefits could not have been intended by the legislature".

Similar conclusion was reached in the case of **Abadwum Stool v Akokerri Stool**, J4/28/2016 31st May, 2017 when the word "shall" came upon for interpretation as to whether the Commissioner for Stool Lands Boundary Dispute had power to deliver judgment more than eight months after what the law had stated that he should complete the cases pending before him and deliver his judgment. This was a matter commenced at the Circuit Court but was transferred to the Commission set up under the Stool Lands Boundaries Act. While the Commissioner was still hearing the case the Commission was dissolved with the passage of the **Stool Lands Boundaries Settlement (Repeal) Act, 2000 (Act 587)** which came into force on 20th October, 2000. **Act 587** transferred all pending cases and proceedings to the High Court but it nevertheless provided that matters in which the taking of evidence had commenced before the Commissioner shall be continued with by him and completed not later eight months. The Commissioner, Justice John Augustus Osei, continued with the hearing of the instant case and closed the taking of evidence on 18th June, 2001, two days to the end of the eight months grace period. On that day the Commissioner ordered the lawyers of the parties to file their addresses as soon as practicable and adjourned the case sine die.

Thereafter, nothing was done in the claim until 18th June, 2002 when Justice J. A. Osei, then former Commissioner, was given appointment in the Judicial Service as a Court of Appeal judge. On 19th June, 2002 the Chief Justice in exercise of his powers

under article 139(1)(c) of the 1992 Constitution, requested Justice J. A. Osei "as an Additional High Court judge to sit and complete all cases and proceedings pending eight months after the coming into force" of Act 587. On 13th December, 2002 Justice J. A. Osei, sitting in his capacity as a High Court judge, delivered judgment in this case in favour of the 1st Claimant. The contention of the appellants at that the Supreme Court was whether the use of the word "*shall"* in Act 587 be employed to nullify the judgment that had been delivered more than the stated statutory eight months period. The court relied on purposive interpretation and rejected the arguments of the appellants in the following words:

> *"This line of reasoning by appellants that the use of the mandatory word "shall" without more automatically results in nullification of the judgment does not impress us. We shall, with humility, borrow the words of Lord Steyn in the case of* ***R v Sonje and another [2005] 4 All ER 321,*** *to explain the need for the interpretation of statutes such as Act 587 by the courts. In that case Lord Steyn said as follows at page 329 of the Report;*
>
> *"A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows."*
>
> *Thus, where, as in this case, parliament sets out in a statute conditions for the exercise of legal authority but does not spell out the legal consequences of non-compliance on the rights of persons affected by the exercise of the authority, it is for the courts to decide in a particular case taking into consideration the concrete facts what the legal consequences of non-compliance shall be. The courts do this by construing the provision in question in the context of the purpose of the enactment as a whole so as to give effect to the intention of the legislature or the rule maker as the case may be."*

The court further relied on the case of **Abu Ramadan & Nimako v EC & A-G [2013-2014] 2 SCGLR 1654,** Wood C.J, in support of this approach stated as follows at page 1674;

> *"To arrive at a proper construction of regulation 1(3)(d) and (e) of the Public Elections (Registration of Voters) Regulations, 2012 (CI 72), firmly established principles of statutory interpretation require that C. I 72 be read as a whole, not piecemeal, and purposely construed and the impugned legislation interpreted in the context of the other parts of CI 72."*

So also in the case of **London & Clydeside Estate Ltd v Aberdeen DC [1979] 3 All ER 836** where the court shot down rigid adherence to the difference between mandatory and directory of the use of the words "shall" and "may in an enactment when it noted that:

> *"…though language like "mandatory", "directory", "void", "voidable", "nullity", and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and the developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purpose of convenient exposition."*

It was implicit in the decision of the court that a rigid mandatory and directory distinction, and its many artificial refinements, had outlived their usefulness and that the emphasis ought to be on the consequences of non-compliance, whether Parliament can fairly be taken to have intended total invalidity for non-compliance with the timelines for a duty to be accomplished. By this approach the court in the Abadwum Stool case took a holistic view of the law by examining the context and purpose of the law rather than a formalistic examination of the words. It is the view of many such as Bennion that purposivism is a derivative of the rule in Heydon's case that is the mischief rule. This view has become the approach to both constitutional and statutory interpretation in Ghana. Having referred to Bennion it is necessary to

set out and explain the various strands in Purposive Interpretation as it ought not to be seen as one size fit all but a concept that comprises different angles of appreciation.

THE TWO-TIER APPROACH OF BENNION'S PURPOSIVE INTERPRETATION: LITERALIST PURPOSIVE AND PURPOSIVE STRAINED MEANING

This approach or strand of purposivism is espoused by Bennion in his work on Statutory Interpretation. They consist of literalist -purposive approach and purposive strained meaning approach. This strand of purposivism believes that the correct approach to statutory interpretation is for the court to move away from a literalist, dictionary, mechanical or grammatical meaning of the text to one that focus on its purpose. But that in some instances the grammatical, ordinary or the dictionary meaning may evince the very purpose of the statute or the purpose-oriented solution of the text. This is how Bennion notes it and as quoted with approval by Date-Bah JSC in the **Asare v Attorney-General** [2003-2004] 2 SCGLR 823 that:

> *"A purposive construction of an enactment is one which gives effect to the legislative purpose by*
> *(a) following the literal meaning of the enactment where the meaning is in accordance with the legislative purpose (in this Code called purposive – and literal construction) or*
> *(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 meaning)".*

This has come to be known as the two-tier approach of Bennion's purposive interpretation. Therefore, in Bennion's view where the literalist or ordinary meaning of the text advances the legislative purpose and is free from ambiguity it was needless to proceed to the second tier of the purposive strained meaning approach. The first stage the becomes the final stage. And it was only when the first stage of the literalist purposive tier fails to yield the true purpose of the enactment that the interpreter is permitted to move to the second and final stage. This is how Wood CJ put it in the case of **Republic v High Court, Accra; Ex Parte Yalley (Gyane & Attorney-General Interested Parties)** [2007-2008] SCGLR 512 @ 520 that:

"It does appear to us that where the purposive and literalist approach, advocated by Bennion, which, in our view is synonymous with the subjective-purposive 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. Thus, in the construction of statutes, if the subjective purpose rule would bring out the legislative intent leaving no ambiguities, absurdities or injustices that the purely literalist would result in, the objective purpose 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 intentions of a hypothetical reasonable man should only be deployed if upon application of the subjective-purpose approach, the statute is still clouded in absurdity, irrationality, mystery or will prove unworkable."

The above demonstrates that Bennion's approach also subscribed to by Cross is a staggered one but not integrative as the one propounded by Barak. The principles applicable to this traditional approach which is not the path adopted by Barak in his MOPA, Bennion's approach to purpose interpretation can accordingly can be summed up as follows:

1. The document or the statute must be read as a whole to get the true purpose and the statute must be read in its entirety as the words, phrases, sentences, paragraphs are not to be seen as independent of each other but interconnected and interwoven together by one common strand of thread.
2. The interpretation must be gathered from the text and its context except where it is apparent that the purpose cannot be ascertained. And where the subjective purpose cannot be ascertained there must be a search for the objective purpose.
3. Words must be given their ordinary and natural meaning except where the ordinary meaning would lead to absurdity or make it unreasonable, incongruous or unworkable. And in the event of ambiguity or vagueness, a meaning that

would accord with the text to produce a reasonable meaning should be followed.

4. Technical and scientific words and terms of art must be given their technical and scientific meaning. In the event that the technical or scientific meaning was not intended to have that meaning, then the secondary meaning must be assigned. That technical and scientific meaning must be presumed to have been used in their ordinary and primary sense unless such a presumption would result in absurdity or vagueness.
5. Words that are necessarily implied may be read into the text and this is done when the words themselves or the text is incapable of addressing the purpose.
6. When there is the need to modify, alter, add, restrict, reject any part of the text for the purpose of avoiding absurdity, the starting point is the text and the interpreter must be guided by the text. But where due to inelegant drafting style the text could not convey the intention, then any of the acts modification, alteration, restriction, addition etc may be engaged in.
7. In the case of non statutory documents, the power to add to, modify, restrict, reject is done with extreme caution. The words are given their ordinary and it is only when the ordinary meaning does not produce the intention of the makers that a limited form of modification may be engaged in.
8. The search for the subjective-objective purpose may be non-integrative as espoused by Bennion on Statutory Interpretation.
9. Judges are not precluded from resorting to the known and linguistic canons of interpretation and aids to interpretation in an attempt to bring out the meaning.

BARAK'S APPROACH TO PUPOSIVISM

Barak views purposive interpretation as a legal construction that combines elements of the subjective and objective purposes of the enactment or the Constitution. Barak states that the subjective elements include the intention of the author of the text, whereas the objective elements include the intent of the reasonable author and the legal system's fundamental values.

He first explains what to him is meant by purposivism in his work, "**The Judge on Judging: The Role of the Supreme Court in a Democracy"**, 2002 16 Harvard Law Review 19 @page that:

> *"In my world view the aim of interpretation is to realize the purpose of the law; the aim in interpreting a legal text such as a constitution or statute is to realize the purpose for which the text was designed. Law is thus a tool designed to realize a social goal. It is intended to ensure the normal social life of the community on the one hand, and human rights, equality, justice on the other hand. The history of law is a search for the proper balance between these goals and the interpretation of the legal text must express this balance. Indeed if a statute is a tool for realizing a social objective, then interpretation of the statute must be done in a way that realizes the social objective. Moreover, the individual statute does not stand alone. It exist in the context of society, as part of general social activity. The purpose of the individual must therefore also be evaluated against the backdrop of the legal system. This approach underlies the system of interpretation that I think is proper: purposive inter-pretation".*

In his work Purposive Interpretation in Law @page 87 he expresses his disagreement with Bennion in the following words:

> *"Bennion … devotes a lengthy chapter to purposive interpretation notes that the historical source of purposive interpretation is the mischief rule established in the Heydon's case. Eskridge analyzes purposivism in the context of 'archaeological' system of interpretation that are based on the will of the legislature. Driedger, Cross and Twining and Miers take a similar approach. Hart and Sachs also appear to treat purpose as a subjective concept. I say appear because although Hart and Sachs claim the interpreter should imagine himself in the legislature's shoes, they introduce two elements of objectivity. First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that*

members of the legislative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather intent the author would have had, had he or she acted reasonably".

Barak sees purposive interpretation as a normative concept. That is a legal construct that helps the interpreter understand a legal text. The author of the text created the text but the purpose the text is not part of the text. It is the interpreter that assigns the purpose of the text. That purposivism is about analysis of the text but not a psychoanalysis of the author who created the text. The Judge analysis the text using interpretative criteria formulated based on subjective and objective sources as well as the ultimate purpose. **That there is an assumption of an underlying presumption for interpretation**. That the laws passed contains within themselves values and goals and the interpreter must strive to effectuate those values. Barak is not just in favour of the authorial intent but rather the one imputed by a reasonable by stander as in interpretation, the interpreter may encounter a number of potential purposes from the enactment and he will not be able to formulate the ultimate purpose of the norm grounded in the text. It is necessary to take one after the other what Barak means by subjective purpose, objective purpose and ultimate purpose.

SUBJECTIVE PURPOSE (AUTHORIAL INTENT)

The subjective purpose of a legal text is the subjective intent of the author and if the author is an individual it is the intent of the author. If the text is the product of two individuals, then it is the subjective joint intent of the two such as bilateral contracts. If it is a collective body then it is the shared intent of the whole body. And the intent of the author includes the values, objectives, interests, policy, aims and functions that that the author sought to actualize.[6] Therefore, the subjective purpose reflects the true intent of the author of the document at the time the document was created. For Barak the subjective purpose is "*a physical, biological-psychological-historical fact. It is an archeological fact."* And to him it is also "*a genetic fact and does not change with*

[6] Purpose Interpretation in Law, chapter 6

time".[7] The subject purpose is the real intent of the author established at the time of creation of the text. It is an *ex tunc* (from the outset) interpretation, a meaning ascribed to the text from the outset. It is the real but not hypothetical intent.[8] Subjective intent appears before the Judge as a presumption that the purpose of the text is to realize the intent of the author.[9] To Barak, purposive interpretation tells the truth about itself to the extent that it considers authorial intent and how it varies with the type of text being interpreted. And that the subjective purpose is one of a search for the actual intent of the author but not a hypothetical person trying to place himself in the shoes of the author.[10] Purposive interpretation takes into account subjective intent though it does not make it the prevailing factor.

In the case of **Asare v Attorney-General [2003-2004] SCGLR 823 (at p. 834-835**) where the plaintiff had sought for an interpretation of article 60(11) of the constitution that whenever the President and the Vice President were outside the jurisdiction, there was no need to swear the Speaker as acting President as the absence of the President could not be deemed as "*unable to perform his functions*". Supreme Court speaking through Date-Bah JSC described the subjective and objective purposes in the following:

> *"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…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 realization through the given legal text, of the fundamental or core values of the legal system*.

[7] ibid
[8] ibid
[9] Ibid
[10] Ibid

The subjective purpose being the historical intent was fixed by the author at a point in time and does not change or shift position. But we must recognize that there could be multiplicity of subjective intent. The multiplicity may be intentional whiles other times it may be the result of carelessness or accident on the part of the author.[11] There could in the sense of multiplicity of purposes be the horizontal purposes and vertical purposes. Being horizontal means the author intended to achieve a number of purposes at the same level of abstraction whiles in the vertical the author intended to achieve a number of purposes, one being general and more abstract than others.[12] That the different purposes leads to a different interpretative results.

One can identify through the subjective purpose a particular or specific intent of the author of the text. Dworkin calls this "*concrete intention*"[13] whiles Barak deems it "*consequentialist intention*". Some also call it interpretative intention.[14] For instance, a testator in a will bequeathing his properties to all his children. With all the children of the testator being certain and identifiable, the real subjective intention becomes clear as to the persons he sought to inherit him. Or a statute that imposes strict liability offence for damage caused to vehicles would be deemed not to include damage to trains. And in all these we have concrete intention. And knowing the concrete or consequentialist intention would help the Judge to discern the author's (abstract) subjective intention. That is where the Judge follows the path of the author but in a reverse direction. This is what he says:

> *"The author formulated the abstract purpose which he or she clothed in semantic garb, while drawing conclusions about the results of its interpretation. The Judge begins with the results that the author hoped to achieve and infers from it the abstract purpose that guided the author. Purposive interpretation recognizes the retracing of steps as proper judicial activity."*

[11] Ibid
[12] Supra page 126
[13] Ronald Dworkin, The Moral Reading of the American Constitution (1996)
[14] Purposive Interpretation in Law, page 126

For Barak when it comes to statutory and constitutional interpretation concrete intention of the legislators and founders of the constitution becomes less influential. Again, one must note that there are two sources of the subjective purpose. The first source is internal. That is the text itself. There is no better source to derive the authorial intent than the text which is the object of the interpretandum. For an author begins with his thought with which he sought to realize through the final work of his text. Therefore, the language of the text supply the information to understand the authors intent.

Then there is the external source which is outside the text itself. And it consists of the context in which the text was created. The circumstances leading to the crafting of the text and the totality of the circumstances leading to the fashioning of the *interpretandum*. If it is a statute then it will be one of legislative history, Hansard, government papers etc. A combination of the internal and external sources provides the gravitas for recognizing the subjective purpose of a text. And even with knowing the subjective purpose the interpreter is permitted to move freely from text to context, internal to external sources to discover the subjective authorial intent. There is no restriction or boundary. In the case of the **State of Israel v Apropim Housing & Development**, 49(2) P. D 265, 311, @ 314[15] this is how Barak explains himself:

> *"A contract is interpreted according to the intent of the parties. This intent is the objectives, aims, interests and plan that the parties sought to achieve together. The interpreter learns this intent from the contract and the circumstances external to it. Both sources are acceptable. They help the interpreter formulate the joint intent of the parties. The transition from the internal source (the language of the contract) and the external source (circumstances surrounding its formation) does not depend on fulfilling any initial conditions. There is no need for a preliminary evaluation of whether or not the contractual language is clear. That question is answered only at the*

[15] State of Israel v Apropim Housing & Development, 49(2) P. D. 265, 311

end of the interpretative process … external circumstances are always considered, not just when the contract itself fails to indicate the parties intent."

OBJECTIVE PURPOSE (INTENT OF THE REASONABLE AUTHOR; INTENT OF THE SYSTEM)

The second leg of MOPA is the objective purpose. The objective purpose of a text is the intent of a reasonable author at the low level of abstraction. However, at the highest level of abstraction, it is the intent of the legal system. And the intent of the system constitutes the values, objectives, interests, policy, goals and functions that the system is designed to actualize in a democracy. The objective purpose is determined by an objective criteria. This is unlike subjective purpose, not based on physical, biological and psychological facts. And it is not a reflection of any historical event. A legal construct that reflects the needs of the society. The Judge should use language and **discretion,** to formulate as objectively as possible the purpose at the core of the legal text. The basis for purposive interpretation is two-fold, first the interpreter should be able to extract the legal meaning from the range of semantic meanings of the text, in other words beyond the semantics and language, what does the text legally mean and the understanding it conveys, and second, he must attempt to provide the text the meaning that best achieves the aim of interpretation. And this will involve a consideration of a gamut of factors with a resort to both internal and external aids to interpretation.

Purposivism is more concerned and animated by the values underpinning the legal system. And the interpreter must ask if the **values are one of democracy, human rights, free press, justice, equity** etc. And the interpretation must strive to reach the goals of those values. Any interpretation that undermines those values would have to be rejected. Purposivism postulates (i) that all documents, statutes and text are presumed to have a purpose. That it is possible for the courts to construct or reconstruct the purpose of the document or statute. That the purpose ought to guide the interpreter in the performance of the work of interpretation. And that an interpretation that accords with the purpose of the document or the statute has to be

resorted to or preferred. This is summed up by Lord Hand in the case of **Cabell v Markham (1945) 148 f 2d 737 @ 739** that:

> *"Of course it is true that words used even in their literal sense are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing: be it statute, contract or anything. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or objective to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning".*

In the view of Barak the objective purpose operates at various levels of abstraction determined by the level of particularity or generality of the author of the text. And also the degree to which the text is value laden. And it is these that will determine the level of abstraction if it is a contract, or a statute or a constitution. Let us discuss some of the levels of abstractions:

Low Level of Abstraction: The lower level of abstraction focusses on the author(s) of the text being a contract, a statute or constitution that the authors had intended to actualize if they had been asked to resolve the legal question before the Judge. The judge tries to discover the social object that the law was designed to achieve. This low level is not really a subjective one as it does not seek to discover what the author or maker actually sought to achieve. **But what the authors might have sought to actualize but even failed to do with the text.** The judge would try to enter the shoes of the author in the sense of the historical reality that existed at the time the text was created. This is what is termed as the *"imaginative reconstruction."* He seeks not for the subjective intent but rather what there was no information about. The judge employs his imagination as best as he can to discover what was not on the face of the text.

Intermediate Level of Abstraction: The Purpose of the Reasonable Author

This second level of abstraction in MOPA disentangles itself from the individuality of the author and focus on the imaginary figure of the reasonable man. It turns on the purpose that a reasonable author would be deemed to have contemplated if he behaved as a reasonable person**. The intent of the author is replaced with that of the intent of the reasonable author**. **The reasonable author transforms us from the shoes of the real author to an imaginative hypothetical reasonable author of the text who reflects a proper balance between the values and principles of the system.**

High Level of Abstraction: The Purpose derived from the type and nature of the Text.

This is the third level of abstraction under the objective purposive interpretation. There is disengagement from the author as well as the individual text under consideration. **There is focus on the type and nature of the text.** The Judge does not ask what meaning a reasonable author would attribute to the text but ***"rather typical purpose characterizes a certain kind of text."*** For instance, that in a sales contract the Judge would look for purpose characteristic of a sales contract but not the intent of a reasonable author. And if that is done that would be the high level of abstraction. Such that the interpreter would look for a purpose that is typical of parties to such a contract, so says Barak.

Supreme Level of Abstraction: Purpose Derived from the System's Fundamental Principles.

This is deemed to be the highest and the fourth level of abstraction. This is where the Judge ask for the purpose derived from the fundamental values of the system. The interpreter taps into the values of the legal system's and situate his interpretation into those values. So to Barak, when it is an interpretation of the Will of a deceased, the Judge must focus on the values and the goals that the system seeks to actualize through the Will. And he answers that the values and goals to be actualized through an interpretation of the Will is to guarantee equality, justice and fairness in the sharing of the properties of a deceased person. And if it is a contract the goals and values of the system is to ensure equity, conscionability, just results. In this sense an

interpretation that would not lend itself to such principles and values would have to be rejected. And for a statute, it does not stand alone but it is a creature of its environment. And beyond the internal context that may be reckoned with, there is an environment of external context and encompass wider circles of accepted principles, fundamental objectives and basic standards. And a piece of legislation is enacted against the background of these principles. That these fundamental principles fill our legal universe serving as the objective purpose of every piece of legislation.
For Barak notes in the case of **Efrat v Director of Population Registration at the Interior Ministry H.C 693/91** that:

> *"A piece of legislation does not stand alone. It constitutes part of the legislative alignment. It integrates into it, aspiring to legislative harmony. No statute stands alone ... all statutes constitute a single project, integrating into each other in legislative harmony… he who interprets one statute interprets all statutes. The lone statute integrates a tool into the legislative alignment. The legislative alignment as a whole influence the legislative purpose of a single statute. A prior statute influences the purpose of a latter statute. A latter statute influences the purpose of a prior statute".*

And the above is the essence of the supreme or highest level of abstraction in objective purposive interpretation. This highest level of abstraction is again evinced in how Barak quotes with approval the minority opinion in **Yediot Ahronot Ltd v Kraus 52(3) P.D.I, 72, 73, 74** authored by Justice M. Cheshin as follows:

> *"In approaching the interpretative work, we are equipped with more than a just a dictionary. We carry with us the Bible and heritage, love of humanity and our inner quest for freedom … all these tenets, values and principles appear to be extra legal, but they are the foundation of the statute – of every statute and no statute can be conceived without them. A statute without that platform is like a house without foundation… we do not come [to the interpretative work] empty handed. As we read the statute, our robes upon us, we carry on our backs "an interpretative kit". Inside this quiver are the values, principles and*

doctrines without which we would not be who we are: fundamental values of the system, morality, fairness, justice … we do our best to interpret but we are not tabulae rasae. Before approaching the statute we must ask: who are we? The answer is "we" are the proper values, principles and the ethics and word order. We begin the interpretative journey unwittingly, perhaps with the same values, principles and doctrines that are the foundation on which the statute is based. We continue from there. We will not understand a statute unless we analyze it with cognitive tools from the quiver we carry, and whose cognitive tools guide us".

Purposive construction was applied by the Court of Appeal in the unreported case of **Olivia Asobayireh v Inspector General of Police H1/35/2021** dated the 20th of January, 2022 where the appellant who was an Inspector of Police had been dismissed based on a recommendation of a Central Disciplinary Board which had rejected the recommendations of a Regional Disciplinary Board that the appellant be reduced in rank. She led a patrol team on the Accra Tema motorway and found a scene of a dead motorist. A bag containing the belonging of the dead driver was handed over to the appellant as leader of the team by onlookers that had thronged to the scene. When the money was later handed over to the sister of the deceased she complained that the money was short as she was in Tema expecting the deceased brother to come with the money. Investigations revealed that the Appellant and her men took part of the money and shared among themselves. Appellant complained that by Police Service Act, Act 350 and the Police Regulations, L.I 993 now repealed the penalty recommended by the Regional Disciplinary Board could not be increased by the Central Disciplinary Board. The court *coram* Barbara Ackah-Yensu, Amma Gaisie and Kyei Baffour JA rejected this argument. Baffour J.A writing for the court and relying on purposivism noted as follows at Page 16 of the judgment that:

"A holistic appreciation of the entire Police Service Disciplinary Proceedings Regulations and its purposive construction shows that the Central Disciplinary Board has power to impose the punishment of dismissal that it did based on the nature and gravity of the offence for which the Appellant was found liable

and acting under Regulation 16. The imaginative discovery of the purpose of a statute is surely the guide to its meaning but not to make fortress out of only one or two provisions in the name of construction. And the argument that the punishment of the Adjudicator or the Regional Disciplinary Board against personnel who are not Senior Officers is not subject to review by Central Disciplinary Board cannot be correct more especially when the Central Disciplinary Board was acting under Regulation 16 … Holistic understanding of the L. I. 993 shows that the Central Disciplinary Board is not only imbued with appellate jurisdiction but depending on the circumstances such as Regulation 16, it has power to impose its punishment on an erring or lawless Policewoman.

One may see this exemplified in the interpretation given in the unconstitutionality of the celebration of the 31st December as a public holiday by the majority decision in the case of **NPP v Attorney-General**. That the values of the Constitution is one of democracy and rule of law and the courts could not hold its arms where the nation celebrates a day that glorifies the day democracy was destroyed. Therefore, in purposivism, there is emphasis on **language, purpose and discretion of the Judge**. The interpretation cannot lose sight of the language of the text which is the starting point. Meaning of a construction must be derived from the text as the meaning must be confined to the words of the text. **And when there are more than one meaning then the exercise of discretion sets in for the option that best accords with the spirit, values, policies, aims and principles of the constitution or the enactment to be employed.** For the **objective purpose if it is to be used is not for the author of the text but that of the interpreter but may have regard to the subjective text.**

Asare v Attorney supra, the Supreme Court deemed it fit to employ the subjective purpose in interpreting whether the President whiles outside Ghana was capable of performing his duties as President. However, in the National Lottery Authority case supra, the court deemed it fit to apply the objective purpose in coming to the conclusion that the directive principles of State policy were justiciable. You may examine a case like **Ransford France (No 3) v Electoral Commission &**

Attorney-General J1/19/2012 dated 19thth October, 2012; Adofo & Others v Attorney General. In the Ransford France case, on the creation of new constituencies and the laying of C. I 78 before Parliament and the application of article 47 and 296 of the Constitution, when one of the issues for determination was whether the discretion exercised was one to which article 296(c) applied, Date-Bah JSC applying the purposive approach to interpretation noted as follows:

> *"Restricting the scope of article 296(c) by purposive interpretation is not equivalent to removing due process from the exercise of discretionary power. Article 296(a) and (b) contain the standards for the application of such due process. Those two clauses of Article 296, in conjunction with article 23, assure residents in Ghana of fairness and impartiality in administrative processes. Limiting the scope of the obligation to publish regulations before the exercise of discretionary power does not significantly impair due process in administrative matters in Ghana; rather it avoids the unravelling of the system of government as we have known it since 1969. The standard embodied in article 296(c) may well offer a desirable benchmark for good practice and I commend it to those who exercise discretion to adhere to it whenever practicable, but non-compliance with it should not be treated as resulting in invalidity, for the reasons already explained above".*

Atuguba JSC in his concurring opinion also relied on the purposive approach to interpretation, had this to say:

> *"The wording of this provision is very wide indeed. However, it is a trite principle of the construction of statutes now fully backed by section 10(4) of the Interpretation Act 2009 (Act 792) that the widest words of a statute can be cut down by the context, scope, surrounding circumstances and true purpose thereof. Numerous decisions abound in Ghana to that effect.*

Subjective purpose is static and fixed in a period of time but as as practicable the objective purpose is not fixed and frozen in time. As the interpreter detaches himself

from the hypothetical intent of the author and places himself or assumes the intent of the reasonable man or even that of the legal system. And these may be changing depending on the system at the period in time. As even the environmental of the social life changes the interpretation would also change. **And that is what is meant that *"a statute always speaks".* That the law is wiser than the legislator. The interpreter may understand the law better than its creator. And the law may be wiser than the author of the law**. In the opinion penned in the case of **Lindorn v Compensation Fund for Traffic Accident Victims**[16] Barak explains as follows:

> *"The statute integrates into the new reality. An old statute speaks to the contemporary person. Hence the interpretative approach that "the statute always speaks" … interpretation is a process that renews itself. It puts modern content into old language, narrowing the gap between law and life … the statute is a living organism. Its interpretation must be dynamic. It should be understood in context so that it advances modern reality".*

On this note Eskridge[17] concurs with Barak and notes as follows:

> *"Interpretation is not static but dynamic. Interpretation is not archeological discovery but a dialectical creation. Interpretation is not a mere exegesis to pinpoint historical meaning but hermeneutics to apply that meaning to current problems and circumstances*."[18]

Sources of the Objective Purpose: Internal and External

That objective purpose originates in the text and the context. And the Judge may employ both internal and external sources to understand the meaning of the text. By learning the objective purpose from the text itself is the internal source. The role of the text in defining the objective purpose is crucial as it sets the boundaries and also determines the content of the purpose of the text. It is the text that the Judge would

[16] 55/(1) P.D 12, 32
[17] Prof W. Eskridge: " Dynamic Statutory Interpretation" 135 U. Pa Rev 1479, 1482 (1987)
[18] Supra

use to determine the content of the purpose of the law. It is the text that the Judge must use to learn about the values, interests, designs, policy and functions that the law was designed to achieve. That one would glean from the substance of the text and its normative arrangements as well as the type of issues it addresses a window in discerning its objective purpose. We may also derive help even from the internal structure of the text being divisions into sections as well as the various parts. It is not the intent lodged in the heart of the author of the text but the normative goal the text was designed to achieve. The internal text is not only made up of the black letter text but its implicit meaning and spirit as well. And it may consist of the implicit and explicit meaning. The starting point just like the search for the subjective purpose begins with the text itself. The text sets the limits and content of the purpose of the text. And through the text the values, interests, policy, designs and functions that a text is designed to actualize in a democracy is realized.

For the External sources on the other hand may include the circumstances and the context. For this is what Aharon Barak puts it:

> *"The second source is external to the text. It is the context in which the text was created. It includes the circumstances up to the creation of the text and the totality of circumstances related to its creation. It may also include circumstances in existence after the text was created to the extent that they reflect the intent on the basis of the text's creation.*

Judges may learn the objective purpose from sources external to the text itself which may include related texts such as another will of the testator or an additional contract between the parties or statute on the same issue. Besides, the natural environment of the text may also be explored and understood, that is the immediate normative layout in which the text operates. External source may be information not within the body of the text itself but outside it or foreign to it but relevant to give context and background information that will assist in the interpretation. For instance, if it is a statute, the Judge would look for the state of affairs as it existed before the promulgation of law, publications that came up before the draft bill was prepared, the

debates that went on in Parliament before the passage of the law, the memorandum that accompanied the bill in Parliament which spells out the necessity for the law and the deficiencies in the old law, the inspiration that the law drew from foreign laws that it wanted to be abreast with etc.

This involves a consideration of texts in *pari materia* with the one under consideration and draw inspiration as to how they have been interpreted. This is what is seen as nearby text. For instance, in the case of **Afendza III v Tenga [2005-2006] SCGLR 414**, the Supreme Court relied on this rule that when the same or similar words in a statute have received judicial consideration by a superior court those words are to be given similar interpretation or meaning as they are of words of in *pari materia*. That involves comparing of documents of similar nature. We have the High Court Civil Procedure (Amendment) Rule, C. I 87 that introduced case management as part of trial process. How this procedure has been practiced in jurisdictions that first introduced them becomes crucial in one's understanding of the new rules introduced in Ghana. As far as the objective purpose is concerned it set its eyes on the goals, interest and values that the text and the document was designed to achieve.

Some of external sources includes, among others, the history of the creation of the text, general historical and social background, case law, jurisprudence and legal culture of the system, basic values of the system. That these basic values are sprinkled throughout the constitution of the state, its statutes as well as judicial opinions, etc. at the core are three basic principles. First are ethical principles like justice, morality, fairness, good faith, human rights, then we have social objectives such as preservation of the state and its democratic character, public peace and security, separation of powers, separation of powers, rule of law, judicial independence, certainty and security, human rights etc. the third is patterns of behavior such as reasonableness, fairness, good faith. These values would still exist even if a particular rule in the system contradicts them.

That to Barak:

"Judges must reflect these values which are products of the modern present. They grow in the soil of the past and remain connected to it. But the horizons are not limited to the horizons of the past. Each generation creates its own horizon. The approach to basic values – emphasizing deep perspective, not passing trends, history and not hysteria is appropriate response to the claim that interpretation according to original understanding is necessary to protect the constitution, particularly the constitutional protection for human rights from the power of the majority".

And the ingredients to enable the Judge to do that would include the text, and the sources external to the text. The factors stated under section 10(2) of Act 792, the constitutional arrangements governing the various branches of government, human rights, rule of law, necessity to avoid impunity etc. **A text must reflect a number of presumptions of its purpose.** And they are termed as presumptions of general applicability being for example, presumption about the objective purpose of a will, which operates like rebuttable presumption in the law of evidence. **In contract the objective purpose of the parties proceed on the presumption that the parties seek to achieve a purpose that is just, efficient, reasonable and fair**. And we can replicate it for a statute. There is always presumption of purpose to every law. And these presumptions of purpose include, purposive presumption based on the need to guarantee security, certainty, consistency and normative harmony, purposive presumption that reflect ethical values like the presumption that the purpose of a text is to achieve justice, morality and fairness, purposive presumption that reflects social objectives, purposive presumption that reflects proper forms of behavior, purposive pre sumption that reflect human rights, rule of law. We may explore these deeper when we come to study of Presumptions in Interpretation.

ULTIMATE PURPOSE:

This is where the interpreter must assign relevant weight to the subjective and objective purposes. And to him this is the stage that distinguishes between purposive interpretation from other forms. It is the Judge that must formulate the Ultimate Purpose and this is the stage that is unique to modern purposive interpretation. This

is the stage or level of integration and synthetization between the subjective and objective purposes. The questions posed are how do judges achieve the integration and on what basis? The second question is what justifies the integration and what are its benefits?

The judge must examine the various data in his kits. First, they lay the information of the subjective purpose on the table by studying what the author sought to achieve, authorial intent by recalling that the intent of the author was very relevant. On the other hand, they study the intent of the hypothetical reasonable author would ascribe to the text by taking objective purpose into consideration at various levels of abstraction. Then the judge is led to the stage where he must formulate the ultimate purpose of the text. The task is easier when both the subjective and objective purposes coincide but where there is a conflict between the subjective and objective purposes, then there must be a response from the Judge. Where there is a disconnect then the judge seeks synthesis and integration but not opposition. The ultimate purpose must be sought that accord with both the subjective and objective purposes by taking the fulness of the complexities of the text into account. In resolving the dispute there is not one criterion for doing that there are a number of them.

First criteria is the nature or type of legal text being the subject of interpretation. Is the text under consideration a will, a contract, a statute or constitution. For a court would be careful not to read the provisions of a constitution like that of an ordinary contract or a will of a testator. Every text has its character or role and creates its own expectations. **Though purposive interpretation applies to all types of text but recognizes the uniqueness of each kind of text**. The nature of the text under consideration is taken into account and to ensure the individuality of the text. The intent of the author and intent of the legal system both comes to play and apply holistically and there must be a decision between them when there is a conflict. **For instance, a will is interpreted according to its purpose, that is the interest, objectives, values and social functions that the will is designed to achieve.** And the platform for the will is the division of the estate of the testator. With the intent of the testator being the central and primary purpose of the

will expressing the autonomy of the individual, **in formulating the ultimate purpose therefore for a will the intent of the testator becomes the ultimate purpose of a will**. This to Barak is "*the North Star that guides the interpreter. The presumption that the ultimate purpose of a will is its subjective purpose is decisive*".[19]

For a contract is also interpreted according to its purpose and that is the interest, values and policy that the contract is designed to achieve. A contract in arriving at the ultimate purpose one must note that it also expresses the autonomy of the parties to the contract. And the ultimate purpose must be determined by having an eye on the joint intent of the parties to the contract at the time of its formation which is its subjective purpose. The judge would assume that the parties are reasonable persons that seeks to achieve reasonable results of fairness.

For a statute it must be interpreted according to the purpose for which it was designed for. And its purpose is the interests, objectives, values, policy and social functions that the state is designed to achieve. Social change must be visited on existing law. And its purpose is one of a legal construct. **The legal construct then would not be the actual intent of the makers of the law but one existing at the various levels of abstraction. And the ultimate purpose would be the special goals and objectives that the statute is designed to achieve in a democracy**. The fundamental values of the system, democracy, rule of law, justice, due process etc. And for a constitution its ultimate purpose is its objective purpose existing at the high and supreme levels of abstraction. As constitution is at the high level of the normative order it must be interpreted to guide human behaviour. The interpretation must take account of the historical depth that honours the past but should not be a prisoner of the past to one that recognizes contemporary matters for which the Constitution must address.

Second factor in deciding the Ultimate Purpose of a Text is the effect of the Age of a text. That the age of a text affects the way it is interpreted. **That a newly**

[19] Barak, "Purposive Interpretation in Law" page 186.

created text may have its subjective purpose being the intent of the makers of the law being more decisive than the intent of the hypothetical reader of the text. But with the passage of time this approach would give way to one for which the intent of the legal system would carry more weight than that of the intent of the makers of the statute. For as a text ages it becomes more harder for the interpreter to enter the shoes of the makers of the law and must choose a much more relevant factor of the values of the system to interpret the law. And even if the intent of the author is still known with the passage of time, it may still not be appropriate to make authorial intent the determining factor in arriving at the ultimate purpose. Obsolete social perspective here should not hold contemporary society hostage. This is true in the way society views women, children, aged, the disable etc and their role with the passage of time. And the changing notions must reflect in the law and its interpretation. And significant weight would be given to the objective purpose. For this Bennion agrees and states that:

> *"Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. Whiles their language may endure as a law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act's legislative history, necessarily becomes less relevant as time rolls on."*[20]

The third factor in choosing the Ultimate Purpose is to Distinguish a Text by the Scope of issues regulated by the text. Statutes or legal text vary in the range of matters they regulate. Some are just narrow slice of human activity to more labyrinth matters of life. A contract may deal with a single issue to multi-faceted matters of human activities. Statutes may regulate specific matters to a broad range of many matters such as a Criminal Code. As it regulates broad swathes of human activities and its interpretation must rely on open ended concepts such as good faith, fairness, reasonableness etc. The interpreter may assign weight to the intent of the

[20] Bennion: "Statutory Interpretation" note 13 at 687

authors must more weight to the objective purpose of the law while having an eye on the general purpose of the legal system.

The fourth determining factor in choosing the Ultimate Purpose is the Change in Regime Character and Society's Fundamental Assumptions. That every text is a creature of its environment. And this may consist of accepted principles, basic standards, fundamental objectives. The author does not fashion a text in vacuum but against the background of social, legal, political and cultural reality. Changes in these factors of social, political, cultural and legal settings tends to affect the way the law may have to be interpreted. As the changes occur over time and time itself impacts on the interpretation of the text, the concomitant effect of change over time in the social, cultural, legal regimes then would have effect on the law and its meaning and this become a factor guiding the interpreter. In this the judge ascribe less weight to the intent of the author and more weight to the intent of the legal system.

The Fifth is the type of text and content of the provision of the text. That legal texts make provisions that differ in content. The content of a will, contract, statute and a constitution are not the same and remarkably differ. In contract the law may distinguish between ordinary situations and special ones such as where there is unequal bargaining power between the parties, adhesive contracts or boiler plate contracts to contracts that affect third parties or one where a party represent the government. And in statute our understanding of criminal statute may differ from a statute that regulates government business. And these distinctions affect the need for invocation of the subjective purpose or the objective purpose helping one arrive at the ultimate purpose. In standard contracts or boiler plate there is no parity of bargaining power and the rule would be not the subjective intent of the drafter of contract in the event of dispute with the rule but one of *contra preferen*tum. And the objective purpose or even the intent of the author become crucial determinant of the ultimate purpose.

The final one is the type of text in determining the Ultimate Purpose. The weight to assign depends on the type of text. For contracts or wills the subjective

purpose may carry more weight but for statute or constitution the objective purpose being the high and supreme levels of abstraction becomes very decisive. And these help in determining the ultimate purpose of an enactment.

With these and the Judge guide by **language, purpose and discretion** may be able to settle on the ultimate purpose of an enactment but it is language that sets the limits of interpretation. Purpose will determine the choice of legal meaning to assign within the boundaries of language. Discretion comes to play when the purpose of the text does not point to a single unique meaning. And that it is a myth for one to think that we can build any system of interpretation without it. And without discretion interpretation could not fulfill its aim in law as it is a necessary condition for each system of interpretation. To Barak judicial discretion is a normative concept but not a psychological one. It does not only reflect consideration, thought and deliberation but also a state of affairs in which a judge must choose a number of options none of which the legal system has determined to be the right choice. That the law so to say, stopped walking in an intersection and the judge must decide in the absence of a clear standard. Where there are no single legal solution judicial discretion will always exist.

Barak's purposivism smashes technical restrictions on the structured approach of the traditional purposive interpreters. **There is no separate layered approach and integrates both in interpretation in the quest for the ultimate purpose of the text.** He notes that purposivism does not take place in stages but rather integrative. **That the interpretative conception is holistic**. And all apply immediately with the commencement of the interpretative process and accompany it to conclusion. It is circular process and the point of departure is irrelevant as long as all the data is assessed and circle back to the starting point. The Judge moves freely from text to context and back and there is no formal obstacle to consulting circumstantial evidence. There is no need for an initial determination that the text is clear or unclear. That there is no sharp difference between internal and external context. No stages in the process. There is only one continuous process and the

process ends when the interpretative process ends. All these would be possible when the Judge is guided by discretion.

The **interpretative machinery may move from text to context and verse versa to first identify the subjective intent before proceedings with the objective or the hypothetical meaning that must be assigned to the test.** The Interpretation Act endorses MOPA in its Memorandum as it states as follows:

> *"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.*

Critique of Purposivism

There have been a number of criticisms levelled by critics against the purposive approach to interpretation. Some are not really founded upon a well appreciated understanding of purposivism. **The first of these is that purposive approach to interpretation assumes that every enactment or document has a purpose that must be searched and looked for and applied. And that it is possible to have a document in which the underlying purpose may not be discernible.** This criticism may not be well sound. For the notion that a document has a purpose is a realistic assumption as every document just like a designed work of humans has an underlying purpose for its creation. It is different from the mark made by a child of two years with a crayon on a wall or a mark drawn by a gorilla in a cage I a zoo

which may not have any purpose assigned to it at all. Therefore the search for purpose is not an illusory journey embarked upon by the interpreter.

And in many cases in interpreting statutes or documents the subjective purpose is not difficult to find. For instance in a densely populated area of town, if the bye laws states that the speed limit for driving is 40 miles or 30 miles per hour, it needs no rocket science for one to discern the purpose of such a law to avert speeding vehicles knocking down persons who may be crossing the road. The internal and external context together with the language of the document usually and in most cases enough to lead the interpreter to find the purpose of the document.

Again, the argument or criticism that purpose may not be discernable may even if legitimate apply only to the search for the subjective purpose but not the objective purpose of the document. For the objective purpose does not seek the subjective intentions of the makers of the document but how a reasonable interpreter skilled in the performance of his task would approach it armed with the values of the society that may be steeped in respect for human rights, rule of law and democracy. And that is always ascertainable with the exercise of discretion by the Judge. With these defences, the criticism may not be all that strong.

Second, is the claim that for every document, its purpose if found within the text and context of the text of the document and the search for a meaning by the employment of an objective standard not ever contemplated by the maker would be embarking on a wild goose chase. And that a search for a purpose outside the text is futile. However, this criticism is valid when one is of the strict constructionist/literalist school that does not look for a meaning outside the text provided. And if one does not subscribe to that school, there is a search for meaning beyond what the text provides. As we know that the two stage non-integrative approach even allow the interpreter to look for a secondary meaning where the ordinary meaning would lead to absurdity or inconsistency that the maker did not have a mind to enact an absurd or inconsistent document.

Third, criticism is that where some purpose may be seen such as in a preamble to a constitution, it might have been stated in broad and hortatory terms and language that may not specifically lead or gives specific clues to interpretation of specific texts. And in furtherance of this criticism it has been suggested that in an enactment they may be multiplicity of purposes with some conflicting. And to discern a specific purpose in a given context may not be that easy. And where a Judge is invited to rank and balance the purposes may be like one looking for a needle in a haystack. This to some may arm the Judge or interpreter with too much discretion. And what weight to assign to a specific purpose may be within the discretion of the Judge.

Again, there is always the danger of inventions of fanciful and fictitious purposes and assigned to documents in the name of objective meaning which a judicial activist Judge may be pushing a hidden agenda in the name of objective purpose. Such warning was sounded by Archer CJ in the 31st December case when he said that:

> "*"… a cliché used in certain foreign countries when interpreting their own constitutions which were drafted to suit their own circumstances and political thought. Whether the word "spirit" is a metaphysical or transcendental concept, I wish to refrain from relying on it as it may lead me to Kantian obfuscation. I would rather rely on the letter and intendment of the constitution, 1992"*

In as much as some of these criticisms may be justified in some context, the purposivism has been acclaimed to be by far superior to the other systems and approaches to interpretation. And it would continue to be the dominant and preferred approach to interpretation of statutory documents and constitution for a long time to come. It is the light for present and the future.