IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

MARFUL-SAU, JSC

DORDZIE (MRS.), JSC

AMEGATCHER, JSC

KOTEY, JSC

WRIT NO.

J1/05/2018

13TH MAY, 2020

DR. DOMINIC AKURITINGA AYINE …….. PLAINTIFF

VRS

ATTORNEY-GENERAL …….. DEFENDANT

JUDGMENT

AMEGATCHER, JSC:-

This writ is invoking our original jurisdiction under articles 2(1) and 130(1)(a) of the 1992 Constitution. The writ was originally issued against the Attorney-General and Martin Alamisi Burns Kaiser Amidu (hereafter referred to as Martin Amidu), the incumbent Special Prosecutor. By a ruling dated 5th February, 2019, this court struck out Martin Amidu as 2nd defendant relying on article 88(5) of the 1992 Constitution. The writ now is against the Attorney-General as the sole defendant.

FACTS:

Following the passage by Parliament of the Office of the Special Prosecutor Act, 2017, (Act 959), the Attorney-General acting in accordance with the provisions of Section 13(3) of the Act nominated for appointment by the President, Martin Amidu as the Special Prosecutor subject to the approval of Parliament. The President accepted the nomination and forwarded the name to Parliament for approval. Parliament vetted and approved the nominee, and he was sworn into office as the first substantive Special Prosecutor in February 2018. The curriculum vitae submitted by Martin Amidu to Parliament for the vetting stated his date of birth as 6th September, 1951. This implies that at the time of his nomination, vetting, approval by Parliament and swearing in by the President, Martin Amidu had attained the age of 66 years.

The plaintiff, a former Deputy Attorney-General & Minister of Justice and Member of Parliament for Bolgatanga East describing himself as a citizen of Ghana seeking the

interpretation and enforcement of the Constitution issued this writ against the Attorney-General for the following reliefs:

(a) A declaration that by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow and not beyond sixty-five (65) years;

(b) A declaration that by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment in any public office created under Article 190(1)(d);

(c) A declaration that by reason of his age, (66 years), Mr Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be nominated by Parliament as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2017 (Act 959);

(d) A declaration that by reason of his age, (66 years), Mr Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be approved by Parliament as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2017 (Act 959);

(e) A declaration that by reason of his age, (66 years), Mr Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be appointed by His Excellency the President of the Republic as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2017 (Act 959);

(f) A declaration that any purported nomination by the Attorney-General or approval by Parliament or appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3),

of the Office of the Special Prosecutor Act, 2017 (Act 959), is unconstitutional , and, therefore, null and void;

(g) A declaration that by a true and proper interpretation of Articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor Act, 2017 (Act 959) are inconsistent with and /or contravene Article 195(1) of the 1992 Constitution and are, therefore, unconstitutional, null and void;

(h) An order striking out the said Sections 13(1) and 16(2) of the Office of the Special Prosecutor Act, 2017 (Act 959) as unconstitutional, null and void;

(i) An order annulling the nomination by the Attorney-General, approval by Parliament and appointment by His Excellency the President of the Republic of Martin Alamisi Kaiser Burns Amidu as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act 2017 (959).

After the exchange of Statements of Case between the plaintiff and defendant, the parties agreed on the following Memorandum of Issues:

a) Whether or not the Constitution prescribes one compulsory retirement age of sixty (60) years for all classes of public officers;

b) Whether or not by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years;

c) Whether or not parliament has residual legislative powers to prescribe for the appointment of a specific public office under a specific Act of Parliament;

d) Whether or not by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for

employment, including post-retirement employment, in any public office created under the Article 190(1)(d);

e) Whether or not by reason of his age, (66 years), Mr Martin Alamisi Burns Kaiser Amidu is qualified or eligible to be nominated, appointed and approved as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2017 (Act 959) and to assume and act in an office created under Article 190(1);

f) Whether or not by a true and proper interpretation of Articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and/or contravene Article 195(1) of the 1992 Constitution.

It is the case of the plaintiff that Act 959 makes the position of the Special Prosecutor a public officer within the definition of Articles 295 and 199(1) who is expected to retire compulsorily from the public service at the age of 60 or at most 65 years. Therefore, by reason of his age, Martin Amidu is not qualified under the Constitution to be nominated by the Attorney-General, appointed by the President of the Republic, approved by Parliament and sworn in as the Special Prosecutor. By nominating, appointing and approving Martin Amidu as the Special Prosecutor, the Attorney General, the President and Parliament have all violated Article 199(1) of the 1992 Constitution and, therefore, his nomination, appointment and approval as the Special Prosecutor be declared null and void and of no effect.

Having enumerated above the basis upon which the plaintiff brought this writ our role now is to examine the issues agreed to by the parties with a view to making a determination on the constitutionality of the appointment of the first Special Prosecutor.

ISSUES (a), (b) & (d)

ISSUE (a) deals with whether or not the Constitution prescribes one compulsory retirement age of sixty (60) years for all classes of public officers

ISSUE (b) calls upon the court to determine whether or not by a true and proper interpretation of articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years; and

ISSUE (d) invites our opinion on whether or not by a true and proper interpretation of articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment, including post-retirement employment, in any public office created under article 190(1)(d);

Issues (a), (b) and (d) appear to us to be inviting us to deal with the interpretation of the same articles in the Constitution. We have, therefore, decided to deal with the three together.

We shall commence our assignment by summarising the basis forming the reliefs sought by the plaintiff. The thrust of the plaintiff's case is that article 199(1) prescribes one retirement age i.e., sixty (60) years for all classes of public officers in the public service created by Parliament pursuant to article 190(1)(d). Further, the plaintiff argues that subject to constitutional provisions relating to certain specific public officers, the compulsory retirement age for public officers serving in the public services provided for in article 190(1)(d) of the Constitution is sixty (60) years. It is also the case of the plaintiff that in view of article 190(1)(d), 199(1) and 199(4), for a public servant to be eligible for an extension of his retirement age under article 199(4), he must have already been in employment in the public service at the time he attained the age of 60 years.

The search for the original intent of the framers on the articles in contention will take us into our constitutional history. This will assist us comprehend the rationale behind the

retirement age of all public office holders and the scope of its applicability. We would at this stage analyse some of the reports which informed the promulgation of our Constitutions starting from 1968.

In the memorandum on the proposals for a constitution for Ghana published in 1968 which gave birth to the 1969 Constitution, the Constitutional Commission recommended at paragraph 616 the establishment of an independent Public Services Commission to make appointments to all levels of the public services. The Commission also recommended that the President must have power to make appointments as well as regulations governing the appointments to certain critical public offices on the advice of the Council of State. This is what paragraph 335-336 of the report stated:

"**335. In appointing the following public officers the President acts not on the advice of the Prime Minister or the Cabinet but in consultation with the Council of State: the Auditor-General; the Chairman and other members of the Council on Higher Education; the Governor and other members of the Bank of Ghana; a sole Commissioner or the Chairman and other members of any Commission established by the proposed Constitution; the Ombudsman; and the Chairman and other members of the governing body of any corporation established by an Act of Parliament, a Statutory Instrument, or out of public funds for wireless broadcasting, television, the press or other media for mass communication and information.**

336. Similarly he must consult with the Council of State in making regulations governing the appointment of public officials he has power to appoint;"

The views expressed above on the need for the President to appoint certain key public office holders into the public offices was re-echoed in the Proposals of the Constitutional Commission for a Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978. Paragraph 219 of the report recommended that to

guarantee the independence and integrity of the Public Services and remove the Public Services from direct or indirect control of the Executive, a Public Services Commission should be retained as the principal controlling authority of the Public Services with the responsibility and power to advise on the appointment of persons to hold offices in the Public Services except those cases where the power to advise is entrusted by the Constitution to another authority. The public offices whose appointment had been entrusted to some other authority outside the Public Services Commission were captured in paragraphs 123-124 of the report in the following words:

"123. One major limitation on the President's power is in the area of appointments to public offices. We concede and accept that the President should have some freedom in appointing the team with which to formulate and implement his programmes and policies. We feel, however, that this discretion should not be untrammelled, particularly in the appointment of persons to perform, certain sensitive functions in which a degree of impartiality and independence from the executive is considered essential. We, therefore, propose that in the case of a number of important offices the President shall only make appointments in accordance with the advice of a Council of State which, as we shall explain later, is to be an independent body of eminent citizens of proven merit and achievement. In the case of ministerial appointments, the President's nominations are subject to approval by Parliament.

124. The system we propose does not oblige the President to work with persons he does not approve of or to entrust important State functions to persons who he may not consider to be fit or capable for such functions. What our system does is to require that suitability of persons to be appointed to important State offices shall be passed upon by another authority other than the President. It is hoped that the President, aware of this extra test, will nominate and designate persons whose suitability and probity are such that they can expect to pass the additional scrutiny."

The views expressed by the 1968 and 1978 constitutional proposals contemplated two main appointing bodies or authorities making appointments into public office. One is an independent body called the Public Services Commission which the President will either consult or delegate his appointing functions of public officers into the public service. The other authority is by the President acting in consultation with or on the advice of a body like the Council of State. Parliament is another authority the President may forward certain category of his appointees to for their approval.

These views were accepted for promulgation in articles 48, 49, 52, 140 and 141 of the 1969 Constitution, and articles 57, 58, 157 and 158 of the 1979 Constitution. The views and provisions referred to above were again adopted by the Committee of Experts appointed in 1991 to propose a constitution for Ghana. The adoption resulted in the promulgation of articles 70, 71, 190 and 195 of the 1992 Constitution.

Chapter fourteen (14) of the 1992 Constitution headed "The Public Services" captured article 190(1) which listed the Public Services of Ghana to include:

(a) the Civil Service,

the Judicial Service,

the Audit Service,

the Education Service,

the Prisons Service,

the Parliamentary Service,

the Health Service,

the Statistical Service,

the National Fire Service,

the Customs, Excise and Preventive Service,

the Internal Revenue Service,

the Police Service,

the Immigration Service; and

the Legal Service;

(b) public corporations other than those set up as commercial ventures;

(c) public services established by this Constitution; and

(d) such other public services as Parliament may by law prescribe.

Article 195 makes provision for the appointment of persons into the public services. It provides:

195 (1) Subject to the provisions of this Constitution, the power to appoint persons to hold or to act in an office in the public services shall vest in the President, acting in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission.

(2) The President may, subject to such conditions as he may think fit, delegate some of his functions under this article by directions in writing to the governing council concerned or to a committee of the council or to any member of that governing council or to any public officer.

(3) The power to appoint persons to hold or act in an office in a body of higher education, research or professional training, shall vest in the council or other governing body of that institution or body.

Public officers who succeed in gaining appointments into the public services are then required by article 199(1) to compulsorily retire from the public services at the age of sixty (60) years after which a person so retired where the exigencies of the service require, may be eligible for contract at two (2) yearly intervals up to a maximum of five (5) years. This is what article 199(1) & (4) states:

199 (1) A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years.

(4) Notwithstanding clause (1) of this article, a public officer who has retired from the public service after attaining the age of sixty years may, where the exigencies of the service require, be engaged for a limited period of not more than two years at a time but not exceeding five years in all and upon such other terms and conditions as the appointing authority shall determine."

We believe the compulsory retirement age stated in article 199(1) must have prompted the claim by the plaintiff and his argument that all public officers have one retiring age i.e., 60 years.

What, then, is the scope of the retirement age stated in article 199(1)? The starting point would be the right approach to interpretation of constitutional documents such as ours. Over the years, this court has in several decisions adeptly dealt with the proper approach to interpreting national Constitutions. These decisions have now properly become trite law in interpretation of written constitutions. We will, however, draw from the rich storehouse of a few of these decisions to guide us in our deliberations.

There is no doubt that the locus classicus in constitutional interpretation in Ghana is the case of **Tuffuor v Attorney-General [1980] GLR 637.** This case appears to have been flogged by our courts in almost all constitutional cases since 1980. This may be so but the principle behind the case and the relevance to our constitutional evolution cannot be whittled away by the passage of time. In reality, the case could also be described as Ghana's version of **Marbury v Madison [5 US] 137 (1803) 1 Cranch 137** which, for over 200 years, is still quoted as the foundation of modern judicial review in the United States of America. We classify the **Tuffuor** case as a watershed in delimiting checks and balances and setting the pace for the three arms of state to co-exist within the principles

of separation of powers entrenched in our constitutions. As such, it is an indispensable authority on any matter involving the interpretation of our written constitution. On that score, our starting point towards a purposive approach to this Constitution will lead us to that locus classicus.

Explaining how a written constitution should be construed, Sowah JSC (as he then was) **at 647** laid the foundation as follows:

"A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power……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, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time. And so, we must take cognisance of the age-old fundamental principle of constitutional construction which gives effect to the intent of the framers of this organic law. Every word has an effect. Every part must be given effect."

Later, in **New Patriotic Party v Attorney-General [1997-98] 1 GLR 378 at 386-387,** Bamford Addo JSC laid her own emphasis for interpreting written constitutions as follows**:**

"Interpreting a Constitution is not the same as interpreting an ordinary statute. The Constitution is a political and meaningful document which requires a broad and liberal interpretation; its voice carries higher than that of an ordinary legislation and its pronouncements must be given as full and as wide effect as possible. Some constitutional rules of interpretation have been laid down and applied in this country, which requires that the provisions of the Constitution be given a liberal and broad meaning, rather than a narrow or doctrinaire one, to suit the changing social and political development of the nation."

She went on:

'This rule of interpretation has been applied to many constitutional cases by the Supreme Court: see Republic v High Court, Accra, Ex parte Adjei in [1984-86] 2 GLR 511 at 518-519, SC where Sowah CJ stated again that:

"the narrow rules of construction applicable in cases of contracts, wills, statutes and ordinary legislation may or may not be adequate when it comes to the interpretation of a Constitution or law intended to govern the body politic ... Our interpretation should therefore match the hopes and aspirations of our society and our predominant consideration is to make the administration of justice work."

Another dimension of the broad and liberal interpretation was expounded by Francois JSC in **New Patriotic Party Vrs Attorney-General [1993-1994] 2 GLR 35, (31st December case)** where he opined:

"**A constitutional document must be interpreted sui generis, to allow the written word and the spirit that animates it, to exist in perfect harmony. It is to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation."**

Again, in **Kuenyahia & Ors v Archer [1993-1994] 2 GLR 525**, Adade JSC stated that:

"**We are expounding a constitution, not a penal code, a lot of flexibility is called for."**

These cases have established and laid bare the jurisprudence which the court has subscribed to in the past. Constitutional documents are not ordinary regulations or Acts of Parliament. Therefore, when interpreting written constitutions, the letter, spirit, history, hopes and aspirations of the people must all come to play in the mind of the court in extracting the intention behind the document. Equally, a literal or narrow view of the document will not work. Rather, a broad and liberal approach will help to marshal all the forces at the disposal of the court to arrive at a just and most convenient route to drive the document as a living framework.

In interpreting the articles listed in the three issues above, we have identified the phrases **"public officer'** retiring from the "**public service**" very critical to a determination of the class of people contemplated in article 199(1). We will define and explain these terminologies in the course of this judgment. Let us emphasise again that in interpreting a written constitution such as ours, the document containing the various articles must be read as a whole to sieve the intention of the framers. It will be myopic on our part to just concentrate on the solitary article focused on by the plaintiff to make a determination in this matter. A step like this will create retrogression in our forward march towards progress. Thus, Acquah JSC in **National Media Commission v Attorney-General [2000] SCGLR 1** echoed the significance of the holistic approach to constitutions **at page 11** as follows:

"But to begin with, it is important to remind ourselves that we are dealing with our national Constitution, 1992 not an ordinary Act of Parliament. It is a document that expresses our sovereign will and embodies our soul. It creates authorities and vests certain powers in them. It gives certain rights to persons as well as bodies of persons,

and imposes obligations as much as it confers privileges and powers. All these duties, obligations, powers, privileges and rights must be exercised and enforced not only in accordance with the letter, but also with the spirit of the Constitution, 1992. Accordingly, in interpreting the Constitution, 1992 care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form a rational, internally consistent framework. And because the framework has a purpose, the parts are also to work together dynamically, each contributing something towards accomplishing the intended goal. Each provision must therefore be capable of operating without coming into conflict with any other".

Applying the principles enunciated above to the current case, we see our role to guard against limiting ourselves to the articles referred to in the issues raised by the parties but to delve into the entire 1992 Constitution, and identify whether the letter, spirit, core values and purpose of the Constitution can justify the case put forward by the plaintiff. In doing so, we do not intend to read the provisions piecemeal. For where a constitutional document is read piecemeal, it is taken out of context and its meaning lost, resulting in a conclusion unintended by the framers.

Reading the Constitution as a whole, we are convinced that the framers contemplated a situation where all persons appointed to serve the nation in one capacity or the other and paid out of public funds charged on the consolidated fund are deemed to be public officers holding public office. Some of these public office holders are engaged in various work within the public services while others function as administrative, political or legal office holders.

Thus, the term "**public office**" is defined in article 295(1) of the Constitution as follows:

"includes an office the emoluments attached to which are paid directly from the consolidated Fund or directly out of moneys provided by Parliament and an office in

a public corporation established entirely out of public funds or moneys provided by Parliament;"

Then "**Public officer**" is not defined in the Constitution but in section 46 of the Interpretation Act, 2009 (Act 792) as:

"**includes the holder of a public office and a person appointed to act in that office**;"

In our view, the term "**public office**" or "**public officer**" is very broad and includes the President, Vice-President, Speaker of Parliament, Chief Justice and Superior Court Judges, Ministers of State and Deputies, Regional Ministers and Deputies, Members of Parliament, Ambassadors, Members of the Council of State, Commissioners such as the Chairperson of the Electoral Commission and Deputies, Chairman of the Commission for Human Rights and Administrative Justice and Deputies, Chairman of the National Commission for Civic Education and Deputy, Chief Executive Officers of State Owned Corporations other than those set up for commercial purposes, persons who serve in the public services of Ghana, persons who are agents of the President and serve at his will and pleasure, persons who occupy elective positions among others specified as such by an Act of Parliament.

As we shall demonstrate in the course of this judgment, all these categories of public office holders have different retirement ages attached to the offices they occupy. For example, the retiring ages for persons elected as President, Vice-President, Speaker of Parliament, Ministers of State and Deputies, Ambassadors, Members of Parliament though public office holders are not provided for in the Constitution. They fall under the category of political public office holders. As such persons elected or appointed into these offices do not have any fixed age at which they retire but serve at the pleasure of the appointing authority or at the expiration of their tenure of office.

Superior court judges are public office holders whose retirement ages are stated in the Constitution, i.e., 65 years for High Court judges and 70 years for Chief Justices, Supreme and Court of Appeal judges. Additionally, heads of constitutional bodies such as the Chairperson of the Electoral Commission and Deputies, Chairman of the Commission for Human Rights and Administrative Justice and Deputies and the Chairman of the National Commission for Civic Education and Deputy all have retirement ages very different from the core administrative staff of the institutions. While the Chairmen and Deputies have their retirement ages tied up to that of the Court of Appeal and High Court judges respectively, the core administrative staff who are also public officers in the same commissions are governed by article 199(1) and retire at the age of sixty (60) years.

On the contrary, "**public service**" is defined in article 295(1) as follows:

"**includes service in any civil office of Government, the emoluments attached to which are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament and service with a public corporation**."

Thus, the term "**public service**" for the purposes of our constitution is limited to a sector composed mainly of career bureaucrats hired by the government on merit rather than appointed or elected to work for the public sector or government departments commonly referred to as Ministries, Departments and Agencies (MDAs). The institutional tenure of public service workers is fixed in terms of retirement age which survives changes of political leadership. Article 199(1) of the Constitution prescribes a retirement age of sixty (60) years, and depending on the exigencies of the office a worker is entitled to a maximum of five (5) years post-retirement contract.

The scope of office holders covered by this provision are those specifically mentioned by the Constitution, those provided for by an Act of Parliament as in the case of the Auditor General and the core administrative staff who work up to pensionable age and who were

described in the 1968 and 1978 reports as persons whose appointments were to go through the Public Services Commission to protect them from direct or indirect control of the Executive. It is constitutional for a person to be appointed into public office on contract basis or with specific tenure of office reckoned in terms of years and assigned, posted or appointed to head a public service, department, agency, or authority created either by the Constitution or an Act of Parliament.

An example is the tenure of the Chairman and Vice-chairman of the Public Services Commission, who though created under chapter 14 of the Constitution which deals with the public services, have their retirement ages aligned to that of the Court of Appeal and High Court judges respectively i.e., seventy (70) years and sixty-five (65) years and not the sixty (60) years as provided in article 199 for the core staff of the public services. The Chairman and Vice-chairman are public officers charged with the responsibility of "**supervision and regulation of, entrance and promotion examinations, recruitment and appointment into or promotions within, the public services, and the establishment of standards and guidelines on the terms and conditions of employment in the public services and generally exercising supervisory, regulatory and consultative functions as Parliament shall, by law, prescribe.**"

Thus, while the "**public service**" is essentially the bureaucratic and administrative organ of the government, "**public office**" is a combination of the political, professional, technical, bureaucratic, administrative and legal organs of the government.

A previous decision of this court which is on all fours with the issue under consideration is the case of **Yovuyibor v Attorney General [1993-1994] 2 GLR 343.** That case is one of the early constitutional cases decided by the court after the promulgation of the Constitution, 1992. The case dealt with different categories of employees with different tenure of office within the public services of Ghana. Unfortunately, neither the plaintiff nor defendant found this case relevant to the determination of the issues at hand and

therefore failed to refer to or address us on its relevance to the issue at hand and the binding nature of the case on us. Being an authority of this court, we will proceed to cite and apply it to this case.

In the **Yevuyibor** case, the plaintiffs, both superintendents of police, were compulsorily retired from the Police Service at the age of fifty-five (55) years a few weeks after the coming into force of the Constitution, 1992. They filed a suit in the Supreme Court for, inter alia, declarations that as the compulsory retirement age for public officers under article 199(1) of the Constitution, 1992 was sixty (60) years, the compulsory retirement age for members of the Police Service who were part of the Public Service was sixty (60) years and not fifty-five (55) years as was the case before the Constitution came into force. They further argued that their premature retirement at the age of fifty-five (55) years was wrongful and a breach of the provisions of article 199(1) of the Constitution, 1992. In opposing the action by the plaintiffs, the Attorney-General contended that by virtue of section 8 of the transitional provisions of the Constitution, 1992, particularly section 8(2) thereof, the Police Force continued to be governed by the Police Service Act, 1970 (Act 350), the Police Service (Amendment) Decree, 1974 (NRCD 303) and the Police Service Regulations, 1974 (LI 880) which required all police officers to retire at the age of fifty-five (55) years.

After noting that the Police Service was under article 190(1) of the 1992 Constitution clearly listed as part of the public services and that the plaintiffs both held pensionable appointments in the Police Service, **Amua-Sekyi JSC** delivering the unanimous judgment of the court held at page 347 that:

"**It is to be observed that there are two types of employees in the public services: those holding appointments for fixed periods, usually computed in years; and those holding permanent appointments, i.e. appointments for periods not limited in terms of years. To the former category belong persons holding contract appointments. These contracts**

are usually of two years' duration, but they may be for as long as five years. To the latter category belong the mass of employees who by the terms of their employment can look forward to a lifetime engagement in one public office or the other. These are the career officers in the various public services who, subject to the needs of the public services, and their own competence and good behaviour can expect to be kept in employment until they reach the prescribed retiring age."

The Yevuyibor case was decided three years before the Constitution of the Republic of Ghana (Amendment) Act, 1996, (Act 527) was passed by Parliament. This constitutional amendment introduced a new article 199(4) granting contracts of two-year duration up to a maximum of five years for public servants who had attained the age of 60 years under article 199(1). The contract duration reckoned in years referred to in that judgment cover all public office holders whose tenure of appointments are reckoned in number of years or who are granted extension in their service under article 199(4) of the Constitution. The Yevuyibor judgment, therefore, answers the question posed in this issue that apart from the retirement age of 60 years, there are other public office holders whose tenure of employment within the public services is reckoned in terms of years.

Recently in this court's case of **Donkor vs. The Attorney-General, Writ No. J1/08/2017 dated 12th June, 2019 (unreported)**, Kotey JSC, delivering the unanimous decision of the court also identified the category of staff which form the public services in the following words:

"The overwhelming majority of staff of public corporations and authorities would be members of the public service as described by Article 190 of the Constitution. Such staff must, in accordance with Article 195 of the Constitution, be appointed by the President acting in accordance with the advice of the governing board of the corporation given in consultation with the Public Services Commission. Such persons are public officers and therefore governed by Article 191(b)".

It is clear from the two cases cited above that within the public services, there are workers who are engaged on fixed terms measured in terms of years of service and then the career officers who have lifetime engagement until they reach a prescribed retirement age. The argument submitted by the plaintiff that the Constitution contemplates only one retirement age and secondly that the public services created by Parliament pursuant to article 190(1)(d) are all required to retire at the age prescribed in article 199(1) in our opinion will give a narrow construction to the constitutional provisions. Such a narrow construction will do damage to the constitutional document which has been interpreted to be a living organism full of life with the tendency to grow with the people in their search for progress in the future. We agree with the interpretation of the Constitution in the two cases cited above. Since we do not intend to invoke article 129 of the Constitution to depart from those decisions, they remain binding on this court and the parties in this case.

It is also worthy of mention that apart from the appointments the President is required to make under article 195 into the public services acting on the advice of the governing council of the service concerned and in consultation with the Public Services Commission, the framers of the constitution in their wisdom vested the President with power to appoint certain key public office holders in consultation with or on the advice of some other authority. Parliament could also prescribe in a law not inconsistent with the Constitution for the President to appoint any other person to the public offices in consultation with or on the advice of the Council of State. This provision is made in Chapter 8 under the Executive. Article 70 provides as follows:

70 (1) The President shall, acting in consultation with the Council of State, appoint-

(a) the Commissioner for Human Rights and Administrative Justice and his Deputies;

(b) the Auditor-General;

(c) the District Assemblies Common Fund Administrator;

(d) the Chairmen and other members of -

(i) the Public Services Commission;

(ii) the Lands Commission;

(iii) the governing bodies of public corporations;

(iv) a National Council for Higher Education howsoever described; and

(e) the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.

(2) The President shall, acting on the advice of the Council of State, appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission.

Reading the Constitution carefully, these article 70 appointees are special classes of public officers who play critical or sensitive roles in the governance structure of the country. This is how Dotse JSC described that class in the case of **Appiah Ofori vs. Attorney-General [2010] 2 GLR 294 at 355:**

"**if one looks at the category of office holders mentioned in Article 70 of the Constitution it is clear that they are special breed of public office holders whom I may refer to as crème de la crème of either the Public Services of Ghana and or of core constitutional bodies performing very critical, and sometimes delicate constitutional functions**".

These classes of public office holders usually head constitutional bodies, statutory bodies or other state institutions referred to in the Constitution or created by an Act of Parliament. As such lumping the mode of appointments and tenure of these heads with the bulk of the core administrative staff engaged under different provisions of the Constitution to work in the same institutions is a recipe for confusion and hasty conclusions when interpreting a constitution.

Interpreting the phrase preceding article 195(1) "**Subject to the provisions of this Constitution**" reference would be made to the case of **Edusei v Attorney-General [1997-1998] 2 GLR 1 at 42** where Acquah JSC (as he then was) explaining the phrase "subject to" used in a constitution or enactment stated as follows:

"**The net result of the above analysis is that where a statutory provision is expressed to be "subject to" another statutory provision or statute, this generally makes the "subject to" provision prevail over the main provisions, whenever there appears to be conflict or incongruity in reading the two provisions together**."

This phrase implies that where other provisions of the Constitution have prescribed specific modes for appointments into public office or retirement from the office, the specific mode takes precedence over the general. This is in consonance with the **generalia specialibus non derogant** doctrine which translates to mean general words in a later statute do not repeal an earlier statutory provision dealing with a special subject. The general words must yield to those of a special one.

It is clear that the appointments, tenure and conditions of service of majority of these public office holders by the President in article 70 is separate and takes precedence over the general provisions made in article 195(1) for the appointments of core administrative staff to the public services.

We have observed that all the office holders mentioned in Article 70 perform such delicate governance functions that regulate, control and give meaning to the democratic dispensation that Ghana has been enjoying since 7th January, 1993. It is in pursuit of the above that the said office holders need to be protected first from early retirement as other public office holders do under Article 199(1). The rationale for this in our opinion, is to ensure that the state benefits from the rich experience that they will gather on the job by their long stay in office up to seventy (70) or sixty-five (65) as the case may be.

Drawing another analogy, the Auditor-General who is also a key public office holder appointed by the President in consultation with the Council of State and enjoys the status of article 71 office holder has his retirement age interpreted by the Supreme Court in **Appiah Ofori v Attorney-General** (supra) to be (sixty) 60 years as legislated by Parliament in section 10(4) of the Audit Service Act, 2000 (Act 584).

What conclusion do we draw from the interpretation of articles 190(1)(d), 195(1), 199(1) & (4), 295(1) read together with article 70? We find from perusing the totality of the various articles that the framers of the Constitution in their wisdom prescribed different retirement ages for different classes and category of key public office holders. Reading, therefore, the Constitution as a whole, the conclusion that the framers did not prescribe one retirement age of sixty (60) years for all classes of public officers is without question. In our opinion, if the framers had intended one retirement age for all classes of public office holders, the Constitution would have stated so explicitly and unequivocally.

Interpreting, further, the language of Article 199, it is our opinion that when read carefully and purposively, it will leave no one in doubt that a fixed retirement age of sixty (60) years was never contemplated for all classes of public officers. The opening sentence of the article gave a proviso "**except as otherwise provided in this Constitution**". This implies that the framers contemplated a situation where other retirement ages would be provided for other public officers. These other officers have been excepted from retirement at sixty (60) years in article 199(1). Again, the emphasis on "**public officer**" retiring from the "**public service**" clearly limits the sixty (60) years retirement to public officers who work in the public services and who are not excepted by other retirement ages in other provisions of the Constitution such as article 70.

If these categorisations in retirement ages have been put in place by the framers of the Constitution, is Parliament in making laws for the appointment of such critical staff to head the public services disabled from placing this staff under article 70 and making

provision for their tenure? We decline to accede to an interpretative approach which will tie the hands of the representatives of the people and create confusion and disaffection among the larger society.

In our opinion, in the absence of any such clear prohibition, inference or language in the Constitution pointing to one conclusion, i.e., the intention of the framers to bar Parliament from crossing the sixty (60) year retirement age when fixing the tenure of office for certain critical office holders, we find no basis to accede to the arguments put forward by the plaintiff that Parliament, in exercising its residuary powers under article 190(1)(d), is disabled from prescribing a retirement age outside the one provided for the core administrative staff of the public services.

An interpretation of the Constitution which locks down the whole country in a strait jacket, unable to extricate itself from the shackles of man-made blockades is dangerous and will do damage to the progress and development of the country. In the peculiar situation under discussion, it will make it impossible to tap certain category of human resource expertise when the need arises.

A clear example is the recent covid-19 pandemic which some countries, overwhelmed by the numbers, recalled health staff who were on retirement into active service to help manage the crisis. Did the framers of the Constitution anticipate a crisis situation in which experts with diverse experiences in the health sector would be needed by the state to lead the fight against the pandemic? Will it be unconstitutional to contract such health service workers who have passed the age of 60 years and have the profile to assist in the fight against an unseen virus which we never anticipated will bring the world to its knees?

Future unexpected crisis or similar situation may occur where the expertise needed to assist the country to manage that crisis may be found in a person with expertise and experience but one who has passed 60 years. Surely an interpretation contemplated by

the plaintiff will not find favour with the purposive approach so touted in the jurisprudence of this court. It will be counter-productive and will end up opening the Constitution to frequent amendments just to take care of the exigencies of the time.

In our opinion, the Constitution has set the tone by permitting certain critical staff to have different retirement ages from that of the core staff. Parliament, therefore, in creating other public services, has the implied authority to also prescribe retirement ages above sixty (60) years for the critical public office holders provided for in the enactments passed by it. Any other interpretation to the constitutional provisions will stultify the growth of our democracy and paralyse the ability of Parliament to be dynamic and lead the way for our Constitution to grow as a living organism.

The plaintiff has also submitted that the provisions in article 199(4) should be interpreted to mean that the entitlement to a post retirement contract must be limited to those public service workers at post at the time of the attainment of sixty (60) years. Hence, a worker who passes the age of sixty-five (65) years would not be entitled to a post-retirement contract. We have looked at the provisions of article 199(4) and note that the framers carefully chose the language used in that provision for a reason. They provided for "**a public officer who has retired… after attaining the age of sixty years"** without qualifying the effective date of the retirement. Further, the manner of engagement stated that "**be engaged for a limited period of not more than two years at a time but not exceeding five years in all**." A narrow construction of this provision will lead to undesirable results not contemplated by the framers. An expansive, broad and liberal interpretation will bring the provision in conformity with the needs of the time. It will also give meaning to the growth expected of our constitution as a living organism. In the case of article 199(1), the retirement age was stated clearly as sixty (60) years. In article 145, the ages of sixty-five (65) years and seventy (70) years was expressly provided for the retirement ages of High Court judges, and Court of Appeal and Supreme Court

judges respectively. Further, for the Commissioner for Human Rights and Deputies, article 232 expressly provided for their retirement ages at seventy (70) and sixty-five (65) years respectively. Nowhere in article 199(4) is sixty-five (65) mentioned as the age for the exit of persons serving post retirement contracts. It is possible for a technical person to retire from the public services and be replaced by another who is then incapacitated by illness or dies within a few months. In situations such as this, is it the case of the plaintiff that if a replacement for that technical position cannot be found immediately from that public service department, the retired officer or some other qualified person above the age of 60 years cannot be brought back and given a contract for up to a maximum of 5 years duration? An interpretation of this kind will make the Constitution inflexible and lead to undesirable public policy consequences.

To sum up, the plaintiff fails in issue (a) and we declare that by a true and proper interpretation, the Constitution does not prescribe one compulsory retirement age of sixty (60) years for all classes of public officers.

Issue (b) is also determined against the plaintiff. We declare that by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the Constitution 1992, the retirement age of all holders of public offices in the public services created pursuant to Article 190(1)(d) is sixty (60) years for majority of the core administrative staff who are pensionable officers. In the case of other public office holders who are classified as critical staff appointed under articles 70 or 195, their tenure is fixed in terms of years of service specified in the law appointing them or in their letters of appointment as the case may be.

We determine issue (d) that by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the Constitution 1992, a public officer whose expertise is critical to the function of a public service and is above the age of 65 years is eligible to serve a tenure calculated in number of years and where the exigencies of the service require any other public

officer in the public services is eligible for post-retirement employment of up to 5 years in any public office created under Article 190(1)(d).

Issue (c):

This is an issue which deals with whether or not Parliament has residual legislative powers to prescribe for the appointment of a specific public office under a specific Act of Parliament.

Though the parties agreed on this issue and framed it in their memorandum of agreed issues, the plaintiff in his statement of case failed to advance any argument to assist the court to determine this issue. This notwithstanding, being a constitutional case which affects the body polity, the court will proceed to deal with it.

The doctrine of separation of powers is firmly enshrined in the Constitution, 1992. The doctrine ensures that all organs of state operate harmoniously within the framework of the Constitution. Based on this, the legislative power of the State is vested in Parliament. This is provided for in chapter 10 of the Constitution. Thus, article 93(2) provides as follows:

"**93(2) Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution."**

Article 106 expressed the power of Parliament to make laws in the form of bills passed and assented to by the President. Article 190(1) listed the public services existing at the time of the promulgation of the Constitution. Because the Constitution has been identified as "**a living organism capable of growth**", the framers anticipated situations where in future other public services not conceived of before 1992 would be needed for the effective governance of the country. This is not surprising because hardly will any

constitutional document conceive of all situations which will arise in the future and provide for them. It is precisely because of the dynamic nature of society that provision was made in article 190(1)(d) for Parliament to create by an Act, such other public services, their governing councils, functions and membership.

Additionally, article 70(1)(e) recognises the right of Parliament to make laws not inconsistent with the Constitution by vesting in the President power to make appointments of key public office holders in consultation with or on the advice of the Council of State. The implication of this provision is that Parliament in exercising its law-making powers under article 190(1)(d) can in one Act create a public service and in the same act make provision for the appointment of certain public office holders by the President in consultation with or on the advice of the Council of State.

The framers also anticipated a situation in article 298 where no provision is made on a matter that has arisen for the first time. In such a situation, Parliament shall by an Act, not inconsistent with the Constitution, provide for that matter to be dealt with. Parliament, under the Constitution, therefore has residual powers to enact laws to cover all matters not anticipated by the framers and which arise in the future, subject, of course, to the same Constitution.

We are left in no doubt after reading the Constitution as a whole that since the Constitution foresaw that not all public officers in the Public Services will have a uniform retirement age of sixty (60) years, Parliament in exercising its powers under article 190(1)(d) has flexibility and authority in appropriate cases to prescribe a retirement age different from the article 199 age as the exigencies of the job will require. To say that Parliament should have no power in providing the retirement age of certain classes of public officers identified subsequent to the promulgation of the Constitution will create a rigid and inflexible approach towards a document which is aimed at moving along with

the changing scenes of the times for the development of the country. In our view, Parliament in Act 959 did discharge creditably its responsibilities assigned to it in article 190(1)(d) by providing the tenure for the Special Prosecutor and Deputy.

A few examples of such powers exercised by Parliament to create public services with tenure for specified office holders since the promulgation of the Constitution, 1992 will support the interpretation, being put forward by us, of the Constitution.

DISTRICT ASSEMBLIES COMMON FUND ACT

Article 252(4) & (5) of the Constitution established the Office of a District Assemblies Common Fund Administrator to be appointed by the President with the approval of Parliament. The Constitution did not specify the tenure. It did not also assume that the office being part of the public services, the Administrator shall retire at the age of sixty (60) years in accordance with article 199(1). However, in the wisdom of the framers, clause (5) left the determination of the tenure of the office of the Administrator to Parliament to fix by an Act. This is the language used in the Constitution:

"Article 252

(4) There shall be appointed by the President with the approval of Parliament, a District Assemblies Common Fund Administrator.

(5) Parliament shall by law prescribe the functions and tenure of office of the Administrator in such a manner as will ensure the effective and equitable administration of the District Assemblies Common Fund."

Acting in accordance with article 252, Parliament in 1993 enacted the District Assemblies Common Fund Act (Act 455), vesting in the President power to appoint the Administrator in consultation with the Council of State and with the approval of Parliament. We note that the Constitution did not require the President to consult the Council of State in appointing the Administrator. However, Parliament, in the enabling Act added the Council of State as an additional authority to be consulted by the President before submitting the name to Parliament for approval. Is this addition in the consultation process beyond the powers of Parliament and, therefore, unconstitutional? Will it enhance the consultation process and ensure that broad sectors of the governance process were brought on board for their input to enable the right person to be appointed? The Council of State plays an important role in the governance structure of this country by counselling the President on important matters including key appointments of public officers. In our opinion, Parliament as the representative of the people acted constitutionally when it sought guidance from article 70 and broadened the consultative process by the addition of the Council of State.

Reviewing this Act further, we observed that in the same Act 455, Parliament in section 5 fixed the tenure of the Administrator for a period of four (4) years and eligible for re-appointment. If we were to buy into the plaintiff's arguments, it will imply that whoever is appointed into this position as Administrator must serve the article 199(1) tenure and retire at the age of sixty (60) years irrespective of the age at which the person was appointed. But will a tenure like that be in the interest of the country ruled by different political parties? Will a provision anticipated by the plaintiff strengthen our governance process? We must guard against tying ourselves into a knot which will fly in the face of the very constitution conceived to liberate us as a people. In our opinion, Parliament acted constitutionally in fixing the tenure of the Administrator for a fixed term of years as

against the pensionable age. The power exercised by Parliament in this Act is not different from the Office of Special Prosecutor Act, 2017 (Act 959).

BANK OF GHANA ACT

Another Act relevant to the determination of this case is the Bank of Ghana Act, 2002 (Act 612). Section 17 deals with the appointment and tenure of a Governor and Deputy Governors. It provides that the Governor and two Deputy Governors shall be appointed by the President acting in consultation with the Council of State for a term of four years each and each one is eligible for re-appointment. Article 183(4) of the Constitution, however, did not provide for the two Deputy Governors. The article only provided for a Governor. Going by the argument of the plaintiff, it would seem that Parliament in enacting the Bank of Ghana Act will have no power to provide for the appointment of the two Deputy Governors and fix their tenure for four years because the Constitution did not provide for those positions even if the expertise of the two Deputies will be needed by the State. An argument like that will hold when the Constitution is being construed literally. But for a written constitution, the legislative intent will be the flexible and purposive approach. The role of the framers of the Constitution is to set forth the broad framework leaving the details like mode of operations, membership, functions, governance and policy formulations to the law-maker to legislate. The American Constitution is a classic example of a document which gave a broad indication of the vision, mission and core values the founding fathers had for the country and left the detailed workings within the framework to Congress, the representative of the people.

LABOUR ACT, 2003 (ACT 651)

Another Act of Parliament relevant to these discussions is the Labour Act, 2003 (Act 651). The Act deals with all matters relating to labour in the country. The Act makes provision for the appointment of Commissioners by the President in consultation with the Council of State. The Commissioners hold office for a term of four (4) years and are eligible for re-appointment after the expiration of their tenure of office. There is no age limit specified for the Commissioners except their tenure of four (4) years. Will it be unconstitutional for Parliament following similar appointments in the Constitution such as the headships of the Bank of Ghana to vest the President in consultation with the Council of State with power to give a tenure of four (4) years to labour experts to serve as Commissioners even if their ages are above sixty (60) or sixty-five (65) years? We think not.

NATIONAL COMMUNICATIONS AUTHORITY ACT, 2008 (ACT 769)

The National Communications Authority Act (Act 769) was also passed in 2008 by Parliament to license and regulate communications activities and services in the country. The Authority has a Director-General who is appointed in accordance with article 195 of the Constitution and holds office for a period of not more than five (5) years and eligible for re-appointment. Again, in the wisdom of Parliament, no age limit is prescribed for the appointment despite the fact that it is made in accordance with article 195. Is it the case of the plaintiff that this Act is unconstitutional? We find it perfectly constitutional.

NATIONAL DEVELOPMENT PLANNING COMMISSION ACT, 1994 (ACT 479)

The National Development Planning Commission is provided for in article 86 of the Constitution to advise the President on development planning policy and strategy. The chairman and other persons are appointed by the President in consultation with the Council of State having regard to their knowledge and experience of the relevant areas

and roles pertaining to development, economic, social, environmental and spatial planning. The Constitution did not specify the tenure of office and retirement age of the Commissioners. However, by reason of the power vested in it as the legislative organ of the State, Parliament in 1994, passed the National Development Planning Commission Act, (Act 479). The Act gave the Commissioners a tenure of four (4) years, and at the expiration, eligibility for reappointment for a further term. Is this Act also unconstitutional per the plaintiff's arguments about what powers Parliament has? In our opinion, Parliament was within its powers when it passed this Act.

PUBLIC SERVICES WITH TENURE OF CHIEF EXECUTIVES RESERVED FOR THE BOARD TO DECIDE IN LETTERS OF APPOINTMENTS:

In the course of this opinion we identified a number of public services whose chief executive officers were appointed by the President or Board but their tenure of office was either left to the Board or stated to be provided for in their letters of appointments. A few of these are:

THE BUI POWER AUTHORITY ACT, 2007 (ACT 740):

The Bui Power Authority was set up in 2007 by an Act of Parliament, Act 740, to develop hydroelectric power project on the Black Volta River at Bui and any other potential hydroelectric power sites on the Black Volta River. Section 9 makes provision for a chief executive officer to be appointed by the Board. All his terms and conditions are to be determined by the Board.

COMMUNITY WATER AND SANITATION AGENCY ACT, 1998 (ACT 564):

The Community Water and Sanitation Agency was enacted by Act 564 of 1998 to facilitate the provision of safe water and related sanitation services to rural communities in Ghana. The Act also made provision for a chief executive officer who is appointed under article 195 of the Constitution, i.e., by the President in accordance with the advice of the Board given in consultation with the Public Services Commission. The Act provides that the terms and conditions of the chief executive officer shall be stated in his letter of appointment.

COPYRIGHT ACT, 2005 (ACT 690):

The Copyright Office of Ghana is another body enacted by an Act of Parliament, the Copyright Act, 2005 (Act 690). Section 68 of the Act makes provision for a chief executive officer to be called the Copyright Administrator. His appointment is made by the President in accordance with the advice of the Legal Services Board given in consultation with the Public Services Commission. The terms and conditions of office shall be specified in his letter of appointment.

ECONOMIC AND ORGANISED CRIME ACT, 2010 (ACT 804)

By the Economic and Organised Crime Act, 2010 (Act 804), Parliament set up the Economic and Organised Crime Office to monitor and investigate economic and organised crime and on the authority of the Attorney-General prosecute the offences to recover the proceeds of crime. It has an Executive Director and Deputies who by sections

11 and 13 are appointed by the President in accordance with article 195 of the Constitution. They hold office on terms and conditions specified in their letters of appointment.

GHANA EDUCATION SERVICE ACT, 1995 (ACT 506) & GHANA HEALTH SERVICE AND TEACHING HOSPITALS ACT, 1996 (ACT 525):

Sections 12 and 13 of the Ghana Education Service Act, 1995, (Act 506), makes provision for the appointment of a Director-General and two Deputy Directors-General by the President in consultation with the Public Services Commission but no retirement ages are specified in the Act. Their terms and conditions of office shall be specified in their letters of appointment. A similar provision is made for the Director-General and Deputy Director-General in sections 11 and 12 of the Ghana Health Service and Teaching Hospitals Act, 1996 (Act 525).

NATIONAL PENSIONS ACT, 2008 (ACT 766):

Section 16 of the National Pensions Act, 2008 (Act 766) provides for the appointment and tenure of the Chief Executive of the National Pensions Regulatory Authority. The Chief Executive who shall be a person with expertise in pensions, actuarial science, insurance or related field is appointed by the President in accordance with article 195 of the Constitution. His tenure, terms and conditions of office is provided for in his letter of appointment.

We could go on and on citing many more Acts of Parliament reserved by the Constitution for Parliament to enact. If we were to accede to the prayer of the plaintiff, we will end up

nullifying and declaring virtually all of these Acts of Parliament unconstitutional and wiping them out of our statute books. And the result will be chaos, anarchy and confusion in our society.

The case of **Yovuyibor v Attorney General (supra)** will again be appropriate in explaining the status of the tenure of public officers in the public services. At page **348** the Supreme Court stated:

"Section 8(2) of the transitional provisions of the Constitution, 1992 caters for the first category only by requiring those holding appointment for fixed periods to vacate their offices in accordance with the terms of their engagement."

Further in **Donkor v Attorney General (supra)** the mode of exit of these executive heads of some of the statutory boards and corporations established by Acts of Parliament was explained by the court in the following words:

"This brings us to a consideration of the position of the executive heads (howsoever described) of statutory boards and corporations. Executive heads of statutory boards and corporations are usually members of the governing body of their institution but they are members of the governing body by virtue of their position as executive head. Are they affected by section 14 of Act 845 or not? In our considered opinion the answer to the above question lies in the mode of appointment of the executive head concerned and the terms and conditions of his appointment. It can be deduced from article 195(1) and the sample legislation we have examined that the Executive heads of Statutory Boards and Corporations are appointed by the President acting in accordance with the advice of the governing board concerned given in consultation with the Public Services Commission. Their tenure and terms and conditions are specified in their letters of appointment. Are executive heads of Statutory Boards and Corporations affected by section 14 of Act 845? Upon a careful consideration and a purposive

interpretation of relevant constitutional and legislative provisions, it is our considered view that executive heads of statutory boards and corporations are not affected by section 14 of Act 845. They are public officers under article 190 of the Constitution. They hold office under terms and conditions stated in their letters of appointment and may only be removed in accordance with those terms."

The constitutionality of appointments and the tenure of these chief executive officers having been confirmed by this court in the **Donkor case**, we do not think we should revisit the legality of an Act of Parliament providing for their tenure being determined in their letters of appointments by the Boards of the respective institutions.

PRESIDENTIAL (TRANSITION) ACT, 2012 (Act 843)

It is relevant at this juncture to examine the Presidential (Transition) Act, 2012 (Act 843) which was enacted by Parliament to cater for arrangements for the political transfer of administration from one democratically elected President, to another democratically elected President, and for the regulation of the political transfer of power. Section 14 of the Act provides that on the assumption of office of a newly elected President, various public office holders shall cease to hold their office, and be paid the relevant retirement benefits and the enjoyment of facilities provided by law. The public office holders who cease to hold their offices include:

1. The persons holding office under the Presidential Office Act, 1993 Act 463).

2. Ministers and Deputy Ministers of State.

3. Regional and Deputy Regional Ministers of State.

4. Special Assistants, Special Aides to the President, to the Vice-President and to the Ministers of State, Deputy Ministers, Regional Ministers and Deputy Regional Ministers.

5. Non-career Ambassadors and High Commissioners.

6. Persons appointed by the President or a Minister of State as members of Statutory Boards and Corporations.

It is interesting to note that majority of public office holders specified above are required by this law to cease holding their offices whether they have attained the compulsory retirement age of sixty (60) years or not. If the plaintiff's argument is to be accepted, all public office holders shall retire at the age of sixty (60) years. Therefore, Parliament will have no discretion and flexibility to make provision in an Act as Act 843 for the exit or retirement of political public office holders before attaining the age of sixty (60) years.

However, the exigencies of the country experienced in the chaotic transfer of political power from one political regime to another warranted the country's need for Act 843 passed by Parliament. The Act has averted a situation where a newly elected President would be compelled to work with certain public office holders he did not appoint and could not guarantee will be faithful to the implementation of his policies. Until the Act came into force in 2012, the chaos surrounding our transition process was still fresh in the minds of many Ghanaians. Act 843 justifies why a constitution must be interpreted having in mind the aspirations of the people in their search for progress, growth and development. Interpreting a constitutional document to tie the hands of Parliament acting within the framework of the Constitution is, again, counter-productive.

Section 14(3) has an interesting provision. It states as follows:

"**14(3) A public officer, whose office is not specified in the Schedule, continues to hold office on the assumption of office by the person elected as President, subject to the provisions of the Constitution and of the relevant law applicable to that public officer**."

Our understanding of this provision is any other public officer who is not listed to cease holding office on the assumption of a new President will continue to hold office until his constitutionally mandated retirement age prescribed by law. This category falls within the core public service staff earlier described in this judgment. Interestingly, we find a similar provision for the appointment of the administrative staff of the Office of Special Prosecutor in section 21 of Act 959 which provides as follows:

21. (1) The President shall in accordance with article 195 of the Constitution, appoint other staff of the Office that are necessary for the proper and effective performance of the functions of the Office.

PRESIDENTIAL OFFICE ACT, 1993 (ACT 463)

Another Act of Parliament worth discussing is the Presidential Office Act, 1993 (Act 463) which was passed by the first Parliament to provide for appointed and seconded staff and their functions for the President and Vice-President. The salaries, allowances and pensions payable to the staff serving at the Office are charged on the Consolidated Fund. In addition, the code of conduct specified in chapter twenty-four of the Constitution for public office holders shall apply to all staff of the Presidential Office. Irrespective of the age, the staff are appointed by the President in consultation with the Council of State and shall hold office at the pleasure of the President. The staff shall cease to hold office on the removal, resignation or on cessation of the tenure of office of the President. Their tenure

is linked to that of the President irrespective of whether or not they have attained the age of 60 years.

THE AUDIT SERVICE ACT, 2000 (ACT 584)

The Audit Service is part of the public services listed under Article 190 of the Constitution. The Constitution makes provision for an Auditor-General to be appointed by the President in consultation with the Council of State in accordance with Article 70 of the Constitution. However, the retirement age of the Auditor-General was not stated in articles 70 or 187 as was the case of other appointees of the President under Article 70 of the Constitution. When Parliament enacted the Audit Service Act, 2000 (Act 584), section 10(4) provided for the retirement age of the Auditor-General to be sixty (60) years.

The plaintiff referred to the case of **Appiah-Ofori v Attorney-General (supra)** as being on all fours with his claim and invites this court to invoke the holdings in that case and rule in his favour. In that case, section 10(4) of the Audit Service Act, 2000 (Act 584) stated the retirement age of the Auditor-General to be sixty (60) years. Appiah-Ofori brought a writ to this court for the interpretation of the Constitution. According to him since the Auditor-General is appointed under article 70 and since his conditions of service are tied up to that of a justice of the Court of Appeal, the Auditor-General is also to retire at the age of 70 years as applicable to justices of the Court of Appeal and not sixty (60) years as enacted in Act 584. The Supreme Court held that the Auditor-General is not entitled to the benefit of the retirement age provided for justices of the Court of Appeal and that the sixty (60) years provided in Act 584 is what should apply to his retirement age.

We think the ratio of the Appiah-Ofori's case is very different from the facts presented in this case. Nowhere in Appiah-Ofori was it held that all public office holders appointed

pursuant to Article 70 or whose offices are part of the public services of Ghana should retire at the age of sixty (60) years. We, therefore, decline the invitation by the plaintiff to apply Appiah-Ofori to this case.

It appears to us that the plaintiff is satisfied with the tenure of sixty (60) years provided by Parliament in Act 584. If that is the case, we find it difficult to appreciate why the plaintiff should have a problem with other tenure provided by the same Parliament in other Acts passed pursuant to power vested in it by the Constitution. Is it a case of one size fits all? Or the plaintiff is satisfied with Act 584 because it coincided with his interpretation of what a compulsory retirement age for all officers in the public service should be.

The authority of Parliament to enact laws to supplement the provisions in the Constitution was explained by this court in the case of **Janet Naakarley Amegatcher v Attorney-General [2012] 2 SCGLR 933**. The plaintiff in this case challenged the authority of Parliament to make certain laws and to delegate its responsibility under the Constitution to the Executive and other bodies. Date-Bah JSC after reviewing the arguments of the plaintiff postulated the role of Parliament in law-making under our current dispensation in the following words at 953-954:

"It is dangerous, from a public policy standpoint, to construe the legislative authority of Parliament too restrictively, since this is likely to incapacitate it from dealing with exigencies and contingencies in relation to which the public interest may require it to take legislative action, of necessarily different kinds within a wide range. Undesirable legislation needs to be distinguished from unconstitutional legislation….. To proscribe the option adopted in the Act would be tantamount to limiting the plenitude of the legislative authority of Parliament too narrowly……The legislative power thus vested in Parliament should be expansively interpreted in the interest of the effective

representative democratic governance of this country. Parliament should be regarded as authorised to pass any legislation on any matter so long as in doing so it does not breach any express or implied provision of the Constitution. This is axiomatic! Were the legislative power of Parliament to be restricted beyond what the provisions of the Constitution require, this would be an assault on the sovereignty of the people, whose representatives constitute Parliament. To me therefore, it is clear that Parliament has the fullest of legislative power, subject only to what the Constitution prohibits, expressly or impliedly. Democratic principles demand this conclusion."

We could not have a better summary of the right of Parliament to enact laws setting up public services and the tenure of their chief executive officers than the dictum enunciated above by Date-Bah JSC. We wholly agree with the law expounded by him and adopt it as our own in concluding our arguments on this issue.

We, therefore determine issue (c) that on a true and proper interpretation of articles 93(2), 106 and 298 of the Constitution, Parliament has residual legislative powers to prescribe for the appointment of a specific public office under a specific Act of Parliament.

Issue (e):

This issue is calling for an analysis whether or not by reason of his age, sixty-six (66) years, Mr Martin Amidu is qualified or eligible to be nominated, appointed and approved as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959) and to assume and act in an office created under Article 190(1);

In his submissions on this issue, the plaintiff argues that on a true and proper interpretation of articles 190(1)(d), 199(1), 199(4) and 295 of the Constitution, Martin Amidu having already attained the age of sixty-six (66) years as at September, 2017, is not

qualified or eligible to be nominated by the Attorney General, appointed by the President and approved by Parliament to serve in the public services generally, and, specifically, as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959).

As pointed out above, there are different categories of public office holders who serve in the public services under different tenure specified by the Constitution or the enabling Act of Parliament. At age sixty-six (66) years, Martin Amidu was nominated, vetted by Parliament and sworn in to be the Special Prosecutor. The office is a specialized agency created by Parliament to investigate specific cases of alleged or suspected corruption and corruption-related offences involving public officers and politically exposed persons in the performance of their functions. It is also to investigate persons in the private sector involved in the commission of alleged or suspected corruption and corruption-related offences and prosecute these offences on the authority of the Attorney-General.

After his nomination, he appeared before Parliament to be vetted and approved. Section 13(9) of Act 959 provides that before assuming office, the Special Prosecutor shall take and subscribe to the Official Oath and Oath of Secrecy specified in the Schedule. A review of the Constitution and laws passed by Parliament will reveal that public office holders who go through the Parliamentary approval process and thereafter subscribe to an oath of office before assuming office are a peculiar class of public officers with different tenure and conditions attached to their offices outside the provisions made for the core staff of the public services. Some have their tenure fixed at seventy (70) years. Others are computed in fixed term of years while the rest are tied up to the tenure or discretion of the appointing authority.

Articles 78(1) and 79(1) of the Constitution require Ministers of State and Deputy Ministers of State to go through Parliamentary approval. Article 256(1) & (2) also provides for Regional Ministers and their Deputies to go through Parliamentary

approval. These political public office holders have their tenure tied up to the tenure or discretion of the appointing authority. No age is prescribed to qualify to serve in these offices. In the case of Chief Justices and Supreme Court judges who also go through Parliamentary approval under articles 144(1) & (2) respectively, their tenure is fixed at seventy (70) years.

The last office which goes through Parliamentary approval is the District Assemblies Common Fund Administrator. As already discussed above, article 252 (4) & (5) of the Constitution did not fix the tenure of office but assigned that responsibility to Parliament to determine. Act 455 fixed the tenure for four (4) years renewable for another term of four (4) years. No age limit is prescribed to qualify a person to hold that office. Therefore, one common feature running through these Parliamentary approval class of public office holders is that their retirement ages are different from the sixty (60) years prescribed in article 199(1) for public officers retiring from the public service. The question is, if in the wisdom of the framers of the Constitution all such public office holders have had their retirement ages fixed outside the article 199(1) age, why will Parliament be faulted for prescribing a fixed tenure retirement age for the Special Prosecutor whose office also goes through Parliamentary approval? The reasons provided by the plaintiff do not find favour with us because they are not in consonance with the letter, spirit, purpose and core values of our sacred document and same is rejected.

In our opinion, the intention of Parliament is to give whoever is appointed into the office security of tenure and peace to perform the assignment. That is why a non-renewable tenure of seven (7) years is provided for the Special Prosecutor and two terms of four years for the Deputy Special Prosecutor. The difficulty in plaintiff's arguments, if stretched, would mean that if the Special Prosecutor is appointed at the age of forty (40) years, he will not retire at age forty-seven (47) but by operation of article 199(1) will continue in office for another thirteen (13) years until he attains sixty (60) years. In our

opinion, the intention is not to make the office a career position up to the pensionable age of 60 years. See the dictum of Amua-Sekyi JSC in **Yovuyibor v Attorney General (supra).**

Consequently, the age of retirement for Martin Amidu as the Special Prosecutor becomes immaterial, as long as at age sixty-six (66) years, he was competent, met the requirements provided for appointment into the office and had validly been approved by Parliament and sworn in by the President to serve the non-renewable term as indicated in section 13 of Act 959. We, therefore, answer this issue whether or not by reason of his age, sixty-six (66) years, Mr Martin Amidu is qualified or eligible to be nominated, appointed and approved as the Special Prosecutor under section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959) and to assume and act in an office created under Article 190(1) in the affirmative.

ISSUE (f):

The last issue addresses whether or not by a true and proper interpretation of articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, sections 13(1) and 16(2) of the Office of the Special Prosecutor Act, 2017 (Act 959) are inconsistent with and/or contravene article 195(1) of the 1992 Constitution.

Act 959 establishes the Office of Special Prosecutor as a body corporate with perpetual succession and the power to acquire and hold movable and immovable property and enter into contract. Its main object is to investigate specific cases of alleged or suspected corruption and corruption-related offences involving public officers and politically exposed persons in the performance of their functions. Additionally, it investigates persons in the private sector involved in the commission of alleged or suspected corruption and corruption-related offences, prosecute these offences on the authority of

the Attorney-General, recover the proceeds of the corruption-related offences and take steps to prevent corruption.

It is the submission of the plaintiff that because the Office of Special Prosecutor was enacted by an Act of Parliament under article 190(1)(d) of the Constitution, it is part of the public services of Ghana and hence its officers including the Special Prosecutor and Deputy must be appointed in accordance with article 195(1) of the Constitution, i.e., by the President, acting in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission. It is further the case of the plaintiff that if indeed Parliament enacted Act 959 as part of the public services under chapter 14, then Parliament could not provide for an office holder or Deputy in a manner contrary to article 195(1). In effect, apart from the age of the Special Prosecutor, the plaintiff is also questioning the mode of appointment of the Special Prosecutor and Deputy.

The Plaintiff also avers that the Office of the Special Prosecutor was established by an Act of Parliament pursuant under Article 190(1)(d) of the 1992 Constitution, which confers on Parliament the power to create such other public services as it may prescribe, in addition to the Public Services spelt out in chapter 14 of the 1992 Constitution. According to the plaintiff, the Office of the Special Prosecutor is thus a creature of the Constitution to the extent that it is a direct offshoot of a power drawn from Article 190. **"Once Parliament passed Act 959 and the President assented to it on 2nd January, 2018, the Office of the Special Prosecutor became part of the Public Service and governed by the constitutional provisions relating to the Public Service and Public office holders. Plaintiff argues in the alternative, that Article 959 created a public corporation within the meaning of definitions provided under Article 295 and 190(4). Plaintiff concludes his submissions that the Special Prosecutor envisaged under Section 12 of the Act, if appointed, would be a public officer."**

Section 13(1) of Act 959 provides that

"A person is not qualified for appointment as the Special Prosecutor if that person *(a)* owes allegiance to a country other than Ghana; *(b)* has been adjudged or otherwise declared (i) bankrupt under any law in force in Ghana and has not been discharged; or (ii) to be of unsound mind under any law in force in Ghana; *(c)* has been convicted (i) for high crime under the Constitution or high treason or treason or for an offence involving the security of the State, fraud, dishonesty, or moral turpitude or (ii) for any other offence punishable by death or by a sentence of not less than ten years; or *(d)* has been found by the report of a commission or committee of inquiry to be incompetent to hold public office or is a person in respect of whom a commission or committee of inquiry has found that while being a public officer that person acquired assets unlawfully or defrauded the State or misused or abused the office of that person, or willfully acted in a manner prejudicial to the interest of the State, and the findings have not been set aside on appeal or judicial review."

The Special Prosecutor is nominated by the Attorney-General for appointment by the President, subject to the approval of the majority of all the members of Parliament. The tenure of office is provided for in Section 13(5) as follows:

"13(5) The Special Prosecutor shall hold office on the same terms and conditions of service as a Justice of the Court of Appeal except that the tenure of office shall be a non-renewable tenure of seven years."

In the case of the Deputy Special Prosecutor, apart from the minimum qualification of being a lawyer of not less than ten years standing at the Bar and is of high moral character and proven integrity and also possesses the relevant expertise in corruption and corruption related matters, he is also nominated by the Attorney-General for

appointment by the President, subject to the approval of the majority of all the members of Parliament. The tenure of office of the Deputy is provided for in section 16(4) as follows:

"16(4) The Deputy Special Prosecutor shall hold office on the same terms and conditions of service as a Justice of the High Court except that the tenure of office shall be for a term of five years and may be appointed for another term only."

It is the qualification set for a person to hold the office and the mode of appointment which the plaintiff argues is unconstitutional because article 195(1) made no provision for the qualification and mode of appointment.

The plaintiff buttresses his arguments by referring to sections 10(2) & (3) of the Interpretation Act, 2009 (Act 792) which allows resort to documentary history such as the Official Report on the Parliamentary Debates captured in the Hansard to outline the real intentions of Parliament in enacting specific legislation. According to the plaintiff, these Parliamentary debates are an aid to the interpretation of the Constitution.

We intend to address first the role of the Interpretation Act in interpreting a Constitution and the use of Parliamentary debates as an aid to the Constitution. In answer to the arguments of the plaintiff on these preliminary matters, the Attorney-General submitted that the Interpretation Act, 2009 (Act 792) cannot be an aid to the interpretation of the Constitution because it is a mere Act of Parliament. Further section 2(1) of Act 792 limited the scope of application of the provisions of the Act to only enactments which do not include interpretation of the Constitution. In that regard, the Attorney-General invited this court to reject the invitation of the plaintiff to apply the provisions of the Act which permits the reliance on Parliamentary debates as an aid to interpretation of the Constitution. The Attorney-General did not cite any authority to justify his submissions.

We have reviewed the submissions. As a general rule, in interpreting a constitutional document, one must first resort to the language of the Constitution itself. If that fails, other aids may be resorted to for guidance but not as a substitute to the time-tested approaches developed as part of the jurisprudence of this court in interpreting written constitutions. Thus in the case of **New Patriotic Party v Attorney-General [1997-1998] 1 GLR 378** an invitation was made to the Supreme Court to disregard the use of the then Interpretation Act, 1960 (CA 4) from interpreting the meaning of the word "person" used in article 2 (1) of the Constitution because it has no relevance and would not permit a broad definition. Bamford-Addo JSC delivering the lead judgment of the court held as follows at page 385:

"This argument seems to ignore the proper role of CA 4 in this country, which is that unless the contrary intention appears in any enactment, the interpretation of words provided in CA 4 ought to be applied, except where the context in which the word was used would not permit such an interpretation or where the enactment itself provides an interpretation of any particular words used therein. Therefore, if the definition of the word "person" in CA 4, s 32 fits the context in which that word was used in article 2(1) of the Constitution, 1992, that meaning ought to be applied."

On the strength of this authority we will now consider if Parliamentary debates provided for in sections 10(2) & (3) of Act 792 and referred to in the submissions of the plaintiff is apposite for this case. The pre-requisite for seeking an aid from Parliamentary debates is where the court "**considers the language of an enactment [Constitutional provision] to be ambiguous or obscure."** In this case we have found none of the constitutional provisions referred to us ambiguous to resort to Parliamentary debates which led to the enactment of Act 959 before deciding this matter. We, therefore decline the invitation by the plaintiff to apply the Parliamentary debates in this case.

We preface our analysis of this issue by sourcing inspiration from the great works of Roscoe Pound, the American legal scholar and former Dean of the Harvard Law School. In his writings on Social Engineering, he postulates that laws are created to shape society and regulate the people's behaviour. According to Pound, a lawmaker acts as a social engineer by attempting to solve problems in society using law as a tool. In this regard, both the Judiciary and Legislators play an important role in enacting the statutes which fulfil the various desires of human beings.

The passage of Act 959 could be attributed to Parliament's desire to shape the society and regulate a menace the country has been confronted with as advocated by Roscoe Pound. Corruption has plagued this nation from independence. The yearly corruption perception indexes by Transparency International testify to this fact. To deal with this, laws were passed in the past criminalising corruption. Commissions of Enquiry were set up at the end on the tenure of one government after another all with the goal of fighting this menace. Bodies such as the Commission for Human Rights and Administrative Justice, Economic and Organised Crime Office were also set up to fight corruption. Civil Society coalitions such as the Ghana Anti-Corruption Coalition have joined the fight. The menace still persists.

The passage of Act 959 was a bold step taken by Parliament in the fight targeting this time an independent body with expertise, integrity and history in fighting corruption and hoping, possibly, this time to succeed. It will surprise us if Parliament's intention in setting up this office was to make it another ordinary public service institution. We believe taking our history and aspiration to curb this menace, the importance attached to the Office cannot be in dispute. Parliament consciously and deliberately set up the Office of the Special Prosecutor under article 190(1)(d) as part of the public services. However, like other critical public service bodies named already in this judgment, Parliament formulated stringent minimum qualifications for the heads different from the general

qualifications provided for in article 195(1). The mode of appointment of the Special Prosecutor and Deputy were also taken out of article 195(1) to ensure that the occupants of the offices met the approval of key institutions of State such as the Executive and Parliament. In our opinion, this approach is in consonance with our history and our search as a people for progress.

We have already made reference to article 252 of the Constitution which established the office of the District Assemblies Common Fund Administrator to administer and distribute monies paid into the Common Fund among District Assemblies, propose a distribution formula for approval of Parliament and to report to the sector Minister on how allocations made from the Fund have been utilised by the District Assemblies. There is a similarity between this Act and Act 959 which necessitates our reference to it once again. Section 4 of Act 455 set out the minimum qualifications of the Administrator as follows:

"Section 4—Qualification of the Administrator.
No person is qualified to be appointed the Administrator who
(a) is not a citizen of Ghana;
(b) has been adjudged or otherwise declared
(i) bankrupt under any law in force in Ghana and has not been discharged; or
(ii) to be of unsound mind or is detained as a criminal lunatic under any law in force in Ghana; or
(c) has been convicted
(i) for high crime under the Constitution or high treason or treason or for an offence involving the security of the State, fraud, dishonesty or moral turpitude; or
(ii) for any other offence punishable by death or by a sentence of not less than ten years; or

(d) has been found by the report of a commission or a committee of inquiry to be incompetent to hold public office or is a person in respect of whom a commission or committee of inquiry has found that while being a public officer he acquired assets unlawfully or defrauded the State or misused or abused his office, or willfully acted in a manner prejudicial to the interest of the State, and the findings have not been set aside on appeal or judicial review; or

(e) has not paid all his taxes or made arrangements satisfactory to the appropriate authority for the payment of his taxes; or

(f) is under sentence of death or other sentence of imprisonment imposed on him by any court; or

(g) is otherwise disqualified by a law for the time being in force.

We note that almost all the qualifications set up above for the Administrator of the District Assemblies Common Fund were repeated verbatim in Act 959. In addition, because the position of Special Prosecutor can only be occupied by a lawyer, an additional qualification of expertise in corruption related matters, high moral character and proven integrity and a lawyer of not less than twelve years standing were added. The significance of the comparison we are making is Act 959 is not the first time our Parliament has enacted a law for the public service and made provision for stringent qualifications for the office holder. If the plaintiff did not find anything wrong with Act 455 when it was enacted in 1993, we find it difficult to appreciate the attack on Parliament for making a similar provision for the qualifications of the Special Prosecutor and Deputy in Act 959.

In our opinion, sections 13 and 16 of Act 959 are not inconsistent with other provisions of the Constitution. We decline the invitation by the plaintiff to strike them down as unconstitutional.

CONCLUSION

We conclude emphatically by stating that the category of public officers to which the Special Prosecutor has the closest affinity is the article 70 office holders whose conditions, including retirement age is pegged to that of Justices of the Court of Appeal. Thus, Parliament in prescribing the mode of appointment of the Special Prosecutor and Deputy different from article 195(1) did not flout the Constitution.

When the various constitutional provisions referred to above are read together and construed purposively, it can be deduced that, the Special Prosecutor is a public officer whose office is analogous to that of the Commissioner for Human Rights and Administrative Justice, the Chairman of the Public Services Commission, Chairperson of the Electoral Commission, Chairman for National Commission for Civic Education, Administrator of District Assemblies Common Fund, etc., and not a public officer under articles 190, 195 and 199 of the Constitution.

We consider the Special Prosecutor an important one; i.e. to curb corruption and ensure probity, accountability and transparency by all. Ensuring independence in his functions and protection against victimisation for work done under the constitution warrants security of tenure for the Special Prosecutor. The need, therefore, to put measures in place to curb the menace of corruption does not only satisfy the mandates of the Directive Principles but supports the liberal interpretation in consonance with Sowah JSC's dictum (supra) that "***We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time***".

Accordingly, the plaintiff's writ fails in its entirety and all the reliefs are dismissed.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

YEBOAH, CJ:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

ANIN YEBOAH

(CHIEF JUSTICE)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

PROF. KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

DORDZIE (MRS.), JSC:-

This action invokes the original jurisdiction of the Supreme Court under Articles 2 (1) and 130 (1) of the constitution. These provisions of the constitution read as follows ***Article 2 (1) "A person who alleges that***

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

Article 130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

> ***(a) all matters relating to the enforcement or interpretation of this Constitution; and***
>
> ***(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.***

The action is instituted by Dr. Dominic Akuritinga Ayine in his capacity as a citizen of Ghana against The State, represented by the Attorney-General who is the principal legal adviser to the government.

The facts leading to this whole action are as follows

On 2 January 2018, the Office of the Special Prosecutor Act, 2018 (Act 959) was passed by Parliament. Section 13(3) of Act 959 provides that the Attorney General nominates a qualified person as the Special Prosecutor to be appointed by the President subject to the approval of Parliament. Mr. Martin Alamisi Burns Kaiser Amidu was nominated. Accordingly, with the approval of parliament the President appointed him as the Special Prosecutor. It is the contention of the Plaintiff herein that per the curriculum vitae of Mr. Martin Amidu presented to the Appointment Committee of Parliament for his vetting and approval, which is exhibited with the writ as Exhibit A; Mr. Amidu was born on 6 September 1951. This means as at 6 September 2017, Mr. Amidu had attained the age of 66 years. It is the position of the Plaintiff that by reason of his age, Mr. Amidu does not qualify under Act 959 to be nominated by the Attorney-General, appointed by the President of the Republic with the approval of parliament. According to plaintiff, Mr. Amidu does not qualify because, **upon his appointment he would become a public officer within the definition of Article 295 of the constitution**; and under Article 199(1) of the 1992 Constitution, he is older than the constitutionally prescribed compulsory retirement age of all public officers which is 60 years. He does not also qualify for the extension of tenure of public service up to 65 years provided for under Article 199(4) of the Constitution. Therefore, by his appointment, the Attorney-General, Parliament and the President have violated Article 199(1) of the 1992 Constitution.

The plaintiff by his writ is praying this court for the following reliefs:

a) A declaration that by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years;)

b) A declaration that by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment in any public office created under Article 190(1)(d);

c) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be nominated as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

d) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be approved by Parliament as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

e) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be appointed by His Excellency the president of the Republic as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

f) A declaration that any purported nomination by the Attorney General or approval by Parliament or appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3), of the Office of the Special Prosecutor Act, 2018 (Act 959), is unconstitutional, and therefore, null and void;

g) A declaration that by a true and proper interpretation of Articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and/or contravene Article 195(1) of the 1992 Constitution and are, therefore, unconstitutional, null and void;

h) An order striking out the said Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) as unconstitutional, null and void;

i) An order annulling the nomination by the Attorney General, approval by Parliament and appointment by His Excellency the President of the Republic of

Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3) of the Office of the Special prosecutor Act 2018(Act 959).

The defendant, that is the Attorney-General opposed the grant of these reliefs and maintained that the plaintiff's case is based on his narrow and literal approach to the interpretation of Article 199 of the Constitution. The fundamental position the defendant took in resisting the grant of the reliefs prayed for by the plaintiff is that, not all public officers are public servants, therefore, a person may hold public office but not hold an office in the public service or be a public servant bound by the retiring age prescribed by article 199 in chapter 14 of the Constitution.

This court made orders on 5 February 2019 for the parties to file a joint memorandum of issues. In compliance, the following issues were filed by the parties for determination:

1) Whether or not the Constitution prescribes one compulsory retirement age of sixty (60) years for all classes of public officers;
2) Whether or not by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4) and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years;
3) Whether or not Parliament has residual legislative power to prescribe for the appointment of a specific public officer under a specific Act of Parliament;
4) Whether or not by a true and proper interpretation of Article 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment, including post-retirement employment, in any public office created under Article 190(1)(d);
5) Whether or not by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is qualified or eligible to be nominated, appointed and approved

as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959) and to assume and act in an office created under article 190(1);

6) Whether or not by a true and proper interpretation of Articles 190(1) (d), (195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and or contravene Article 195 (1) of the 1992 constitution.

Upon the court, accepting the issues in the joint memorandum of issues the court on 14 May 2019 ordered the parties to file their respective legal arguments on the issues as stated above. We will proceed by giving a summary of the submissions made by the parties on the above stated issues.

Legal submissions by plaintiff

Plaintiff considers the first issue to be a non-issue because he agrees with the defendant that the constitution does not prescribe one compulsory retirement age of sixty years for all classes of public officers. Counsel submitted that his case is not based on the preposition that the constitution prescribes one retirement age of sixty years for all classes of public officers. He is ad idem with the defendant that 'Public Office' is a much broader definition than 'Public Service' as the latter is a subset of the former. Counsel referred to the definition of a public officer as provided in Article 295 of the constitution and submitted, that definition is broad and it covers just about any holder of public office including the President, Vice President and members of Parliament, the Civil Service and certain statutory corporations in which there are no constitutionally prescribed age limits for retirement. To further illustrate the point that the constitution does not prescribe one retirement age of sixty years for all classes of public officers, counsel referred to Article

145 (2) (a) & (b) which pegs the retirement age of Justices of the Superior Courts beyond 60 years. Article 223 (2) which puts the retirement ages of the Commissioner and Deputy Commissioners of the Commission on Human Rights and Administrative Justice at 70 and 65 years respectively. Article 194(5) also equates the retirement age of the Chairman and Deputy Chairman of the Public Service Commission to that of the justices of the superior courts.

Plaintiff emphasized that his case on compulsory retirement age is in reference to public officers in the Public Service under chapter 14 of the 1992 Constitution in respect of which the constitutional prescription of compulsory retirement age applies. The defendant's arguments on this issue is not any different from the above. It is clear therefore that the parties are ad idem on the position that the constitution does not prescribe one compulsory retirement age of sixty years for all public officers. Issue (1) therefore is a non-issue and we would treat it as such.

Counsel for the plaintiff next addressed issues (3) and (4) together and made the following submissions: Article 190(1) (d) gives Parliament power to create additional Public Service institutions apart from the existing ones numerated in 190(1)(a). In doing so Parliament must adhere to the provisions of Chapter 14 of the constitution, including those relating to compulsory retirement under Article 199. Counsel urges the court to purposively interpret Article 199(1) and 199(4) of the constitution. The intention of the framers of the constitution is to ensure that by a certain age, public officers working in the public service must cease to work, as such, for a public officer working in the public service to be eligible for extension of his retirement age under Article 199(4), he must have already been in employment in the public service at the time he attained the age of sixty

years. He would then be eligible to be employed under some arrangement (usually by a contract) for a further term, not exceeding 5 years. Counsel further argued that the intent and purpose of Article 199(4) is to provide for exigencies arising immediately and directly as a result of the retirement of a public servant upon attaining the mandatory retirement age of sixty years. Counsel further urged us to take into consideration the policy objectives that informed the setting of age limits to the holding of positions in the public service. Counsel referred us to Proposals of the Constitutional Commission for 1979, the Report of the Committee of experts (Constitution) on proposals for a draft Constitution of Ghana. In conclusion of his arguments on these two issues counsel submitted that any interpretation we may give to Article 199(1) and 199(4) should aim at affirming their twin objectives: a) That there must be an end to employment within Public Services created under Article 190. b) A very limited and restricted window should be available to enable the Public Service to benefit from exceptional experience of those who would otherwise have retired at the age of sixty years.

Counsel for plaintiff urged the court to consider official record of parliament in the debates preceding the passing of the Bill of the Office of the Special Prosecutor. Particularly Hansard i.e. the official record of Parliament dated 1 November 2017 exhibit SS1. Counsel argued that Parliament intended the Office of the Special Prosecutor to be a public office created under Article 190(1) (d) and 190(3) of the constitution. As such, the office is a public office created under chapter 14 of the constitution. The public prosecutor is therefore a public officer occupying an office in the public service; his tenure of office ought to be regulated by provisions under Article 14 of the constitution. To support further the submission that the office created by Act 959 is a public office in the public service, counsel made reference to the object and functions of the of the public prosecutor as stipulated in sections 2 & 3 of the Act. He argued that the office of the Public Prosecutor is integral to running central government machinery and therefore forms part of the 'civil

office of Government' within the definition of "public Service" under Article 295. That being the case Mr. Martin Amidu by reason of his age 66 years at the time of his appointment is not qualified to be nominated, approved and appointed to the office of the Public Prosecutor.

Counsel further submitted that; the nature of the institution created by Act 959 would have been that of a public corporation other than those set up as a commercial venture as stipulated in Article 190 (1) (b) but for sections 13 (3) and 16 (2) of the Act. Act 959 is an off-hoot of Article 190(1) (d) therefore; it must be interpreted strictly in line with the constitutional provision that created it. That Section 13(5) makes the office of the Special Prosecutor analogous to that of a justice of the Court of Appeal does not imply a variation of the constitutionally prescribed compulsory retirement age of a public service holder. An interpretation of S13 (5) taking the office of the Public Prosecutor out of the ambit of Article 199 of the constitution would render Section 13 (5) of the Act unconstitutional and ought to be struck out in the circumstance.

Plaintiff's submissions on issue (6) are that Parliament exceeded its powers when it created sections 13 (3) and 16 (2) of Act 959 thereby providing a mode of appointment to the Public Service which are materially different from what is constitutionally prescribed under Article 195 (1). Counsel therefore urged this court to exercise its powers under Article 2 (2) of the constitution to strike out the said sections and all acts done thereunder by the Attorney-General, the President of the Republic and Parliament as unconstitutional, null and void.

Counsel addressed issue (3) lastly and submitted that the Plaintiff does not dispute the fact that Parliament has residual legislative powers under article 298 of the constitution. However, Parliament's residual legislative power is not at large. Parliament cannot by legislation alter the architecture set up by the constitution for specific categories of

institutions without first amending the constitution. When Parliament set out to create a public office under chapter 14 of the constitution, it must adhere to the architecture provided by the constitution.

Submissions by the defendant

Defence counsel opened his submissions and elaborated extensively on the distinction between a public officer and a public servant. Public Servants according to the defendant retire at the age of 60 years with a possibility of extension of their years of service under article 199 (4) of the constitution. An office in any institution specifically created under article 190 (1) (a) of the constitution is a public office and is part of civil office of government. Persons appointed under article 195 of the constitution are career public servants and they retire in accordance with the provisions of article 199 of the constitution. The defendant argues a public officer on the other hand occupies an office the emoluments of which are paid out of public funds or an office set up by public funds. Therefore, there are different kinds of public officers that are not appointed under chapter 14 of the constitution. Counsel concludes on this point that when article 199 (1) talks about a 'public officer' retiring from the 'public service' at the age of 60, it is referring to only that public officer appointed under article 195 and not all public officers.

The defendant further submits that the Special prosecutor and his deputy were not appointed pursuant to article 199 of the constitution. They were appointed pursuant to sections 13 and 16 of Act 959. The said Act was enacted by parliament in the exercise of its residual legislative powers in accordance with article 298 of the constitution. Apart from the provision in article 190(1) of the Constitution for the Public Services of Ghana and other related provisions in chapter Fourteen there is no provision in the constitution regulating how a public office in general ought to be created. Article 298 vests in Parliament the power to deal with any matter where no provision express or by necessary

implication has been made by the constitution. There is no limitation placed on parliament in the exercise of its residual powers to make legislation to cater for situations deemed relevant to the national interest. It is the position of the defendant that it is the 'other staff' of the Office of the Special Prosecutor who are subject to article 195 of the Constitution and not the Special Prosecutor and his deputy. The appointment of Mr. Martin Amidu as the Special Prosecutor is thus constitutional.

It is a further submission of the defendant that the constitution does not provide any limitation on age for all public office holders. Age restriction is placed on only a public officer holding office in the public service referred to as a public servant. Article 199 does not place any restrictions on the President to engage a public officer above the age of 65 years who had previously retired from the public service to hold office in the public service. To emphasize the point that no age restrictions are placed on the office of the Special Prosecutor counsel submitted that a person who is appointed a Special Prosecutor is a delegate of some of the powers of the Attorney-General under article 88 (4) of the Constitution. The said article in permitting the delegation of the Attorney-General's powers of prosecution does not place any constraints on the age on the person to whom the power may be delegated.

The defendant strongly objected to references the plaintiff made to the provisions of the interpretation Act that permits the court to refer to reports of parliament as aid to interpretation and said the Interpretation Act cannot be an aid to the interpretation of the constitution of Ghana. It is a mere Act of Parliament whose provisions cannot be used as a guide to interpret the provisions of the Constitution which is the primary law of the land. The Act can only be referred to in interpreting statutes and not the Constitution.

Consideration of Issues

The action herein raises for our determination the core question whether the provisions of the Constitution in Chapter 14 specifically, 190, 195, 199(1) and (4) provide the mode of appointment and retiring age of public officers. If the question is answered in the affirmative then whether an act of Parliament, Act 959 can purport to alter the provisions of the said articles. An answer to these questions would substantially resolve most of the issues before us excepting that relating to section 13 (1) of Act 959.

The key that unravels these issues is to first determine the purpose for which the Office of the Public Prosecutor Act was enacted. Both parties have urged us to rely on the purposive approach to the interpretation of statutes to determine the issues before us. For that purpose the plaintiff exhibited with his statement of case, the Hansard i.e. the official report of Parliament dated 1 November 2017 exhibit SS1. In his submissions, he quoted extensively portions of the proposals of the Constitutional Commission for the 1979 constitution, particularly page 80 paragraphs 223 to 225. Counsel also referred us to page 170 of the Report of Committee of Experts (Constitution) on Proposals for a draft Constitution of Ghana dated July 31, 1991.

The duty of the judiciary is to interpret the law and it is common knowledge that the legislator is the lawmaker. The purposive approach to interpretation of statutes is widely embraced by most jurisdictions in modern times. It is no doubt, the method of statutory interpretation that effectively gives the judge the discretion to discover the intentions of parliament. The Indian Supreme Court emphasized this point in the case of ***Chief Justice of Andhara Pradesh V. L.V.A. Dikshitulu, AIR 1979 SC 193 and held that "the primary principle of interpretation is that a Constitutional or statutory provision should be construed according to the intent of they that made it".*** Our courts have embraced this principle from time immemorial. This is demonstrated in the celebrated case of Tuffour v Attorney-General when the Supreme Court held: ***"this court makes haste and turns to***

the Proposals of the Constitutional Commission first as an aide-memoire, and secondly, to extract the intentions of the framers of the Constitution therefrom"

Dr. Date-Bah JSC in his book Reflections on the Supreme Court of Ghana at page 117 made reference to the dictum of Atuguba JSC in the ***In Re Presidential Election Petition [2013] SCGLR (Special Edition]*** where the learned jurist said the purposive approach has been 'enthroned' in the Supreme Court as the dominant rule for the construction of the Constitution. The learned author went on to say ***"simply because a provision in the Constitution is clear does not exclude the obligation of a court to search for and find the purpose meant to be served by that provision in order that the provision may be interpreted so as to promote that purpose. In other words, the clarity of a provision is not a bar to the application of the purposive approach to it in order to avoid an unintended result which is in conflict with its purpose, distilled from its context."***

Section 10 of the Interpretation Act, 2009 Act 792 gives statutory support to the use of specific materials that aid interpretation or construction.

It reads ***10. (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.

(3) Subject to article 115 of the Constitution, a Court shall have recourse to parliamentary debates under subsection (2), where the legislative intention behind the ambiguous or obscure words is clearly disclosed in the parliamentary debate.

(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.

Section 10 (2) (4) clearly demonstrates that this section of the Interpretation Act is not limited to the interpretation of statutes only but the constitution as well. This court's decision in ***Osei-Akoto v Attorney-General [2012]2 SCGLR 12 95*** supports this position. The argument of the defendant that the Interpretation Act can only be a guide in interpretation of statutes and not the Constitution is untenable.

This takes us back to the key question: what was Parliament's intention and purpose of enacting the Office of the Special Prosecutor Act? The Hansard of Ghana's Parliament, dated Wednesday 1 November, exhibit SS1 in this proceeding is a useful source of discovering the purpose of enacting the subject Act, Act 959. Sections 2 and 3 of the Act that set out the objectives and functions of the Office of the Special Prosecutor give insight to the purpose of the Act.

It will be of interest to look at the view of jurists of other jurisdictions on the importance of reference to Hansard as aid to the purposive approach to interpretation. In the House of Lords decision in ***Pepper v Hart [1992] 3 WLR 1032***

Lord Brown Wilkonson has this to say on reference to Hansard: ***"In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words."***

Lord Griffiths on his part in the same case expressed his view on the purposive approach to legislative interpretation as follows:

"*The days have passed when the courts adopted a literal approach. The courts use a purposive approach, which seeks to give effect to the purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted"*

Exhibit SS1 contains the official report of Parliament on the Office of the Special Prosecutor Bill, 2017. These are the words of Mr. Banda who is described as the Chairman of the Committee: "Mr. Speaker we are creating a public office. The Office of the Special Prosecutor is a public office being created under article 190 (1) (d) of the constitution and under article 190(3) of the constitution. It is mandatory that any time a public office is created a governing council is also established. Mr. Speaker, with your permission, I beg to quote article 190(1) (d) and 190 (3)" he went ahead and quoted those articles.

Parliament has categorically made it clear that the Office of the Special Prosecutor Act was enacted to create a public office under Article 190 (1) (d) of the constitution. In conformity with article 190 (3) Parliament reached a consensus to maintain the provision of the bill that provides for the establishment of a governing council to oversee the functions of the office.

Parliament having clearly stated in the consideration stage of the Office of the Special Prosecutor Bill, that they were exercising the powers conferred on Parliament under Article 190 (1) (d) to

*enact the Act; it is very incorrect to argue as the defendant did, that the Office of the Special Prosecutor was established pursuant to the exercise of the residual powers of Parliament as provided under Article 298 of the constitution. Parliament in its own words had expressly stated the constitutional provision under which it exercised its powers to enact Act 959. There is no basis for this court to say otherwise. If Parliament intended to rely on its residual powers under article 298 it would have said so. Besides, to do so in accordance with the mandatory provisions of the Constitution contained in article 106, the memorandum to the Bill would have clearly indicated that Parliament sought to exercise the power conferred on it under article 298. In doing so, the law mandates the memorandum to specify the defects in the existing law and specify the remedies proposed in the new law to deal with them and the necessity for doing so. Article 106 (1) & (2) provide "**1) The power of Parliament to make laws shall be exercised by bills passed by parliament and assented to by the President.***

(2) No bill, other than such a bill as is referred to in paragraph (a) of article 108 of this Constitution, shall be introduced in parliament unless -

> ***(a) it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction; and***
>
> ***(b) it has been published in the Gazette at least fourteen days before the date of its introduction in Parliament.***

Though the defendant argued that The Office of the Special Prosecutor Act was passed because the constitution does not provide how a public office may be created; he failed to demonstrate in his written brief, filed before the court that, the memorandum to Act 959 contained any statement about matters related to how a public office in general ought to be created.

The memorandum to Act 959 is under the hand and signature of the Attorney-General and she is bound by the contents. The court cannot go behind the clear reason for enacting the Act and hold otherwise. The contention that Parliament exercised its residual powers is without any constitutional basis and must be dismissed.

If Parliament had said that "we are creating a public office under Article 190 (1) (d) of the constitution, the court has no basis to say parliament rather exercised its residual powers under Article 298 of the constitution.

Parliament definitely has residual powers as provided in Article 298 of the constitution. However, in enacting Act 959 it did not exercise those powers.

This resolves issue **(3) which is Whether or not Parliament has residual legislative power to prescribe for the appointment of a specific public officer under a specific Act of Parliament.**

Having established from the above analysis that The Office of the Special Prosecutor Act was enacted pursuant to Article 190(1) (d) of the constitution, it follows that the office of the Special Prosecutor is governed by provisions under chapter 14 of the 1992 Constitution. Issue (2) would therefore be considered within this context

Issue (2) is Whether or not by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4) and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years

Article 190(1) numerates institutions that constitute Public Services of Ghana as follows:

> ***"(1) The Public Services of Ghana shall include -***
>
> ***(a) the Civil Service,***
>
> ***the Judicial Service,***

the Audit Service,

the Education Service,

the Prisons Service,

the Parliamentary Service,

the Health Service,

the Statistical Service,

the National Fire Service,

the Customs, Excise and Preventive Service,

the Internal Revenue Service,

the Police Service,

the Immigration Service; and

the Legal Service;

(b) public corporations other than those set up as commercial ventures;

(c) public services established by this Constitution; and

(d) such other public services as Parliament may by law prescribe.

(2) The Civil Service shall, until provision is otherwise made by Parliament, comprise service in both central and local government.

(3) Subject to the provisions of this constitution, an Act of Parliament enacted by virtue of clause (1) of this article shall provide for -

(a) the governing council for the public service to which it relates;

(b) the functions of that service; and

(c) the membership of that service.

(4) For the purposes of this article "public corporation" means a public corporation established in accordance with article 192 of this Constitution other than one set up as a commercial venture.

Article 199 prescribes a compulsory retirement age for public officers in the public service and states as follows:

(1) A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years.

(2) A public officer may, except as otherwise provided in this Constitution, retire from the public service at any time after attaining the age of forty-five years.

(3) The pension payable to any person shall be exempt from tax.

Per the Constitution of the Republic of Ghana (Amendment) Act, 1996 Act 527, clause (4) was added to Article 199; clause 4 reads:

"Notwithstanding clause (1) of this article a public officer who has retired from the public service after attaining the age of sixty years may where the exigencies of the service require, be engaged for a limited period of not more than two years at a time and but not exceeding five years in all and upon such other terms and conditions as the appointing authority shall determine."

Article 295 defines "Public Office" and "Public Service" in the following words:

"public office" includes an office the emoluments attached to which are paid directly from the consolidated Fund or directly out of moneys provided by Parliament and an office in a public corporation established entirely out of public funds or moneys provided by Parliament;

"public service" includes service in any civil office of Government, the emoluments attached to which are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament and service with a public corporation;

There is no doubt or controversy as far as the above definitions are concerned that "public office" embraces a wide scope of public officers including public officers in the public service

Article 190 specifically provides in clear terms institutions that are classified as the public services of Ghana. Clause (4) of article 199 describes office holders in the public service created under chapter 14 of the constitution as public officers. This confirms our earlier statement that 'public office' as defined by article 295 embraces a wide scope of public officers.

The wordings of Articles 190 (1) (d) 199 (1) and 199 (4) are clear and unambiguous and do not need any interpretation. However taking a look at the history behind these provisions as contained in reports of constitutional expects gives a better understanding of the intent of the framers of the constitution so far as these provisions are concerned.

In the proposals of the Constitutional Commission for the 1979, the brains behind the framing of the 1979 Constitution made it clear that they recommend the provisions on retiring age of members of the public services to be enshrined in the Constitution and not to be left to regulations of Parliament (Emphasis added). This is found in paragraph 224 of the report. Article 162 of the 1979 Constitution therefore pegged the retiring age of

members of the public service at sixty years. In making proposals for the 1992, Constitution the Committee of Experts (Constitution) maintained the same position. (See page 170 paragraph 369 of the Report on Proposals for a Draft Constitution of Ghana dated July 31 1991) This led to the provisions of Article 199 of the 1992 Constitution as quoted above. Article 199 was amended by The Constitution of the Republic of Ghana (Amendment) Act 1996 Act 257; clause (4) was inserted thus: ***"Notwithstanding clause (1) of this article a public officer who has retired from the public service after attaining the age of sixty years may where the exigencies of the service require, be engaged for a limited period of not more than two years at a time and but not exceeding five years in all and upon such other terms and conditions as the appointing authority shall determine."***

That this clause was intended to be put to use in only exceptional cases, and the retirement age for a public officer could be 65 years at most is again demonstrated in the deliberations that preceded the enactment of the provision. Particularly part of the speech of the then Attorney-General to parliament found in the Official Report on the Parliamentary Debates of Tuesday October 29, 1996. Counsel for the plaintiff made reference to this in his submissions and I find it worth quoting: ***"This dispensation was allowed after exhaustive discussion of the fears expressed about low morale and the possible restriction of promotion prospects of junior staff if this was allowed. <u>It was felt that this privilege should be accorded in only exceptional circumstances not involving those risks"</u>*** (Emphasis supplied)

A purposive approach to the interpretation on the provisions of chapter 14 of the 1992 Constitution particularly Article 190 (1) (d) 199 (1) and 199 (4) must reflect the intent and objectives behind the enactment of these provisions. This is where reports of experts and materials that contribute to the history of the promulgation of the Constitution become

handy aids to us the interpreters of these provisions. We can safely say that the intent of the framers of the Constitution is that, holders of public office created pursuant to Article 190 (1) (d) of the Constitution would retire from office upon attainment of 60 years. In exceptional circumstances, the retiring officer may be engaged for a period not more than 5 years. The ceiling of the retiring age of any occupant of a public service office created pursuant to article 190 (1) (d) of the constitution is 65 years.

It follows therefore that no person above the age of 65 years, is eligible for employment, including post-retirement employment in any public office created under article 190 (1) (d) of the constitution. The logical conclusion is that any act of Parliament that takes the regulation of the retiring age of a public officer in the public service out of the ambit of the Constitutional provisions in Chapter 14 of the Constitution is contrary to the intents and purposes of the provisions in Chapter 14

The office of the Special Prosecutor is a creature pursuant to article 190 (1) (d) of the constitution and therefore subject to the provisions of chapter 14 of the constitution. It is an office within the public services of the Republic of Ghana. As defined by Article 295 of the constitution. The emoluments attached to the office are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament. This is supported by section 22 of the Act which provides ***"The funds of the office include (a) monies approved by Parliament; (b) internally generated funds and (c) grants approved by the minister responsible for Finance in consultation with the Attorney-General".***

The functions of the office of the Special Prosecutor involves service in any civil office of Government as provided in the definition of public service under article 295. The functions of the office as stated in section 3 of the Act is derived from ***Article 58(2) of the constitution which provides as follows: "The executive authority of Ghana shall extend***

to the execution and maintenance of this constitution and all laws made under or continued in force by this constitution"

The functions of the office of the Special Prosecutor as provided in section 3 of the Act include investigation and prosecution of corruption and corruption related crimes. These functions fall under the executive arm of government and forms part of the "civil office of government."

Essentially, therefore the Office of the Special Prosecutor is one of the public service institutions created by Parliament under Article 190(1) (d) of the Constitution. The occupant of the Office of the Special Prosecutor is subject to the retirement restrictions placed on all public service office holders under Article 199 of the constitution.

Mr. Martin Amidu at the time of his nomination and appointment to the office of the Special Prosecutor was 66 years. His age was beyond the prescribed age of 65 years for holders of public office created under article 190 (1) (d) of the Constitution. He was therefore not eligible to be nominated and appointed to that office. (This resolved issue (5) which is: ***Whether or not by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is qualified or eligible to be nominated, appointed and approved as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959) and to assume and act in an office created under article 190(1);***

Issue (6) Whether or not by a true and proper interpretation of Articles 190 (1) (d), (195 (1) and 295 of the 1992 Constitution, Sections 13(3) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and /or contravene Article 195 (1) of the 1992 constitution.

Article 195(1) vests in the President the power to make appointments to public service offices created under Article 190 of the Constitution.

Article 195(1) reads: "Subject to the provisions of this Constitution, the power to appoint persons to hold or to act in an office in the public services shall vest in the President, acting in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission."

The Office of the Special Prosecutor having been created under Article 190(1) (d) of Chapter 14 of the constitution, appointments to that office ought to be by the provisions of Article 195(1) of the constitution.

Sections 13(3) and 16(2) of Act 595 purport to prescribe a different mode of appointment to the office of the Special Prosecutor and his deputy. The said sections state ***"13(3) The Attorney-General shall nominate a person qualified for appointment as Special Prosecutor by the President, subject to the approval of the majority of all the members of Parliament"***

"16(2) The Attorney-General shall nominate a person qualified for the appointment as Deputy Special Prosecutor by the President, subject to the approval of the majority of all the members of Parliament".

Sections 13 (3) and 16(2) of Act 959 are inconsistent with section 195(1) of the constitution. We hold that they are unconstitutional, null and void and ought to be struck down.

A careful reading of the 1992 Constitution reveals that the word "public servant' was not used in describing persons who hold public offices. The description is "public officer". The attempt before us to differentiate between a public officer and a public servant is not derived from the Constitution. The Constitution does not define a public servant although the entirety of chapter 14 is devoted to the public service. The Constitution makers were in my view avoiding the derogatory meaning attached to the word 'servant' and therefore it is wrong for such a differentiation to be made in the arguments before

us. Any person who occupies an office that satisfies the definition in article 295 of "public officer' is entitled to the protections contained in chapter 14 of the constitution. Again, the Constitution creates certain constitutional offices such as the cabinet, ministers and the like who are public officers as well. However, they have no governing board and by the clear provisions of the Constitution contained in articles, 76 to 81 derive their appointment from the President without any fixed tenure. We know that the president has a tenure of 4 years and as such without a revocation of their appointments, ministers end their tenure with the President. As the cabinet and related offices were created by the Constitution which subjects articles 195 and 199 to other provisions of the Constitution, the contention that because minsters are public officers therefore they should also retire at 60 or 65 is quite unreasonable. We all know from the mode by which the President and members of his cabinet for example, get into office are quite different from other public office holders. As such to contend as the defendants pressed before us is to invite the court to reach a view of the matter that is not derived from a careful reading of the provisions of the Constitution in relation to public officers under Chapter 14 and other office holders. Similarly, the point made related to specified constitutional bodies like the Public Service Commission is that they are creatures of the Constitution and reading the constitution as one document enables one to engage in some form of accommodation such that the various parts complement each other.

The issue before the court arises out of an Act of Parliament, so the question before us must be in relation to the said Act only for the purpose of determining its constitutionality. One cannot call in aid provisions of the Constitution to support an Act when the Act in question is proved to be inconsistent with particular provisions of the Constitution.

Section 13 (1) of Act 595

In so far as Section 13(1) of the impugned Act sought to add to the disqualification list affecting citizens who owe allegiance to countries other than Ghana from holding specified offices in the country, on the authority of Asare v Attorney-General [2012] 1 SCGLR 460, it is unconstitutional

Section 13(1) of the impugned legislation reads as follows

A person is not qualified for appointment as the Special Prosecutor if that person

- ***a. owes allegiance to a country other than Ghana***
- ***b. has been adjudged or otherwise declared (i) bankrupt under any law in force in Ghana and has not been discharged; or (ii) to be of unsound mind under any law in force in Ghana.***
- ***c. Has been convicted (i) for high crime under the Constitution or high treason or for an offence involving the security of the State, fraud, dishonesty or moral turpitude; or (ii) for any other offence punishable by death or by a sentence of not less than ten years; or***
- ***d. Has been found by the report of a commission or committee of inquiry to be incompetent to hold public office or is a person in respect of whom a commission or committee of inquiry has found that while being a public officer that person acquired assets unlawfully or defrauded the State or misused or abused the office of that person, or wilfully acted in a manner prejudicial to the interest of the state, and the findings have not been set aside on appeal or judicial review."***

The action of the plaintiff succeeds. All the reliefs sought in the writ are hereby granted which reliefs are-

a) A declaration that by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public

offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years;)

b) A declaration that by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment in any public office created under Article 190(1)(d);

c) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be nominated as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

d) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be approved by Parliament as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

e) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be appointed by His Excellency the president of the Republic as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

f) A declaration that any purported nomination by the Attorney General or approval by Parliament or appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3), of the Office of the Special Prosecutor Act, 2018 (Act 959), is unconstitutional, and therefore, null and void;

g) A declaration that by a true and proper interpretation of Articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and/or contravene Article 195(1) of the 1992 Constitution and are, therefore, unconstitutional, null and void;

h) An order striking out the said Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) as unconstitutional, null and void;

i) An order annulling the nomination by the Attorney General, approval by Parliament and appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3) of the Office of the Special prosecutor Act 2018(Act 959).

j) A declaration that by a true and proper interpretation of Articles 190(1)(d), 199(1), 199(4), and 295 of the 1992 Constitution, the retirement age of all holders of public offices created pursuant to Article 190(1)(d) is sixty (60) years, anyhow not beyond sixty-five (65) years;)

k) A declaration that by a true and proper interpretation of Articles 190(1)(d) and 199(4) of the 1992 Constitution, no person above the age of 65 years is eligible for employment in any public office created under Article 190(1)(d);

l) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be nominated as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

m) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be approved by Parliament as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

n) A declaration that by reason of his age, (66 years), Mr. Martin Alamisi Burns Kaiser Amidu is not qualified or eligible to be appointed by His Excellency the president of the Republic as the Special Prosecutor under Section 13(3) of the Office of the Special Prosecutor Act, 2018 (Act 959);

o) A declaration that any purported nomination by the Attorney General or approval by Parliament or appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3), of the Office of the Special Prosecutor Act, 2018 (Act 959), is unconstitutional, and therefore, null and void;

p) A declaration that by a true and proper interpretation of Articles 190(1)(d), 195(1) and 295 of the 1992 Constitution, Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) are inconsistent with and/or contravene Article 195(1) of the 1992 Constitution and are, therefore, unconstitutional, null and void;

q) An order striking out the said Sections 13(1) and 16(2) of the Office of the Special Prosecutor, 2017 (Act 959) as unconstitutional, null and void;

r) An order annulling the nomination by the Attorney General, approval by Parliament and appointment by His Excellency the President of the Republic of Martin Alamisi Burns Kaiser Amidu as the Special Prosecutor under Section 13(3) of the Office of the Special prosecutor Act 2018(Act 959).

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my sister Dordzie, JSC.

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

COUNSEL

TONY LITHUR WITH HIM MARIETTA BREW APPIAH-OPONG FOR THE PLAINTIFF.

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