IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- GHANA

CORAM: ATUGUBA, J.S.C (PRESIDING)
ANSAH, J.S.C.
ADINYIRA, J.S.C.
DOTSE, J.S.C.
ANIN YEBOAH, J.S.C.

WRIT J1/5/2007
4TH FEBRUARY, 2009

CUSTOMS EXCISE & PREVENTIVE SERVICE - PLAINTIFF

-VRS-

NATIONAL LABOUR COMMISSION - DEFENDANTS

PUBLIC SERVICES WORKERS' UNION OF GTUC - INTERESTED PARTY

J U D G M E N T

ATUGUBA, J.S.C:

The facts of this case have been related by my brother Dotse, J.S.C. and I would not repeat them except where necessary.

The plaintiff claims before us per its writ of summons as follows:

"1. A declaration that on a true and proper interpretation of the Labour Act 2003 (Act 651), particularly s.1, the application or the purported application of the said Act to cover the Customs, Excise and Preventive Service (CEPS) as established by law is inconsistent with, or in contravention of Article 24 (4) of the Constitution and to that extent the court ought to declare that restrictions prescribed by law and reasonably necessary in the interest of national security or public order require that Customs, Excise & Preventive Service be excluded from the application of the Labour Act 2003 (Act 651).

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2. That by virtue of the combined effect of Article 1(2) and Article 11(6) of the Constitution the Court declares a Collective Bargaining Certificate dated 20th March 1987 issued to cover the Customs, Excise & Preventive Service void and of no effect."

It is obvious that these claims could have been better drafted. However their substance is that

(a) insofar as the Labour Act 2003 (Act 651) applies to the workers of the Customs, Excise and Preventive Service, the same is inconsistent with or in contravention of Article 24(4) of the Constitution and to that extent is null and void.

(b) The continued operation of a Collective Bargaining Certificate dated the 20th day of March 1987 in respect of the Customs Excise and Preventive Service is for the same reason also null and void.

Preliminary Points

The defendant objects that the plaintiff failed to appeal against the Ruling of the National Labour Commission dated the 7th day of June 2006 that it has jurisdiction over it and therefore is out of time in this court. But the plaintiff's case is not an appeal but an original action in this court. As this court is the only competent court to entertain and if appropriate, to grant the reliefs claimed by the plaintiff in this action, it is difficult to fathom how there could be an objection to the initiation of the same. See *Mensima v. Attorney-General* (1996-97) SC GLR 676. *New Patriotic Party v Attorney-General* (Ciba Case) (19996-97) SC GLR 729, *Sam (No. 2) v Attorney-General* (2000) SC GLR 305, *Adofo* v. *Attorney-General & Cocobod* (2005 – 2006) SC GLR 42.

Some other preliminary objections could, but were not raised as to the legal capacity of the plaintiff to institute this action. However they would not have defied resolution so as to allow this action to survive. See *Republic v. High*

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Court, Accra, Ex parte Attorney-General (Delta Foods Case) (1998-99) SC GLR 595.

The Position of CEPS under ordinary Legislation

The Customs, Excise and Preventive Service (Management) Act, 1993 (PNDCL 330) has no direct provision precluding CEPS from unionizing. S.235 however provides as follows:

> "For the administration of this Act all officers shall have the same powers authorities and privileges as are given by law to Police Officers"

There has been much argument as to the proper scope of this provision as it applies to CEPS because s.17 of the Police Service Act 1970 (Act 350) provides:

> "It is *a misconduct* for a police officer
>
> X X X X X X
>
> (f) *to become a member of a trade union* or of any other association, other than an association authorized by the Minister having similar objects."(e.s)

Misconduct is a liability. S.235 of PNDCL 330 does not say that the officers of CEPS should have the same liabilities as attach to police officers. Therefore s.17 of Act 350 does not apply to CEPS' officers.

Even assuming that by dint of s.235 of PNDCL 330 S.17 of Act 350 disentitles CEPS officers from unionizing, it is clear that the Labour Act, 2003 (Act 651) which is later in time has removed that disability against CEPS. This is the combined effect of ss.1 and 10(d) thereof. They are as follows:

> "S.1 This Act applies to *all workers* and to *all employers* except the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526)

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X X X X X

S.10 The rights of a worker
The rights of a worker include the right to

X X X X X

(d) *form or join a trade union*"

It is clear that s.1 of this Act does not include CEPS by name. Its residue refers to the "Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526)"

The preamble to the Security and Intelligence Agencies Act, 1996 (Act 526) is very revealing. It runs thus:

> "An Act to make provision in respect of the National Security Council, to provide for the establishment of regional and district security councils, *to specify the state agencies responsible for implementing government policies on the security of the Republic and issues relating to internal and external security* and to provide for related matters."

Section 42 defines "Intelligence agencies" and also "security services," as follows:

X X X X X X

"*intelligence agencies*" means the internal or external intelligence agencies *referred to in section 10*"

X X X X X X

"*security services*" means the services connected with national security *as determined by the Council"*

S.10 provides:

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"National security intelligence agencies

The departments existing immediately before the coming into force of this Act and known as *the Bureau of National Investigation and the Research Department respectively are hereby continued in existence* under this Act *as the internal and external intelligence agencies of the Republic*."(e.s)

As was said by Edward Wiredu J.A (as he then was) in *Okwan and others v. Amankwa II* (1991) IGLR 123 C.A at 131 "… the general rule of interpretation is that *where an enactment has clearly defined particular words in its interpretation section, it is uncalled for and most unnecessary to look elsewhere for the meaning of those words.*"(e.s) From the above extracts it is plain that Act 526 has not brought CEPS within the fold of the "Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526)" as envisaged by s.10 of the Labour Act, 2003 (Act 651).
It is therefore clear that the Labour Act, 2003 (Act 651) does apply to CEPS and its workers.

Furthermore, the defendant has in its statement of case dated 3/10/2007 raised the point that

"*Indeed Parliament* on 31st October, 1996 during the consideration stage of the bill on "Security and Intelligence Agencies Bill [COL-780] and as part of the Constitution of the Republic of Ghana (Amendment) Bill, clause 7 *voted against the inclusion of CEPS as part of the security and intelligence Agencies*. See copy of Parliamentary Debates: OFFICIAL REPORT Thursday, 31st October, 1996 attached."(e.s)

It is revealing that in the said attachment marked "B" headed

"PARLIAMENTARY DEBATES
OFFICIAL REPORT
CONTENTS

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THURSDAY, 31ST OCTOBER, 1996", it is stated as part of the "Constitution of the Republic of Ghana (Amendment) Bill as follows:

"*Clause* 7: Article 190 (1) (a) of the Constitution sets out quite extensively the area of employment that constitutes the public service of Ghana. The list is not exhaustive and Parliament has power to provide for other areas of employment that should be classified as part of the public services of Ghana. *One may note here that the Armed Forces is not classified in this list.*

It is also noteworthy that in the interpretation clause of the Constitution, i.e. article 295 the following definition is stated.—

' "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'.

Government is of the considered view that services such as the Police Service, Prisons Service, National Fire Service, *Customs, Excise and Preventive Service* and the Immigration Service *are of a para-military nature. Some of these services have a right to bear arms and could be given orders which they have to comply with in the interest of national security. These services are often called upon to perform quasi-military service. Looked at from this angle, these services cannot strictly be looked upon as a part of the public services serving in civil offices of government as* defined in article 295.

The government is of the view that the removal of these para-military services from the public service will enable government give these services treatment similar to those of the Armed Forces for better ensuring the security of the state.

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For these reasons, article 190 (1) (a) of the Constitution is being amended in clause 7 of this Bill to remove the said services from the list of Public Services stated in article 190 (1) (a) of the Constitution."

It is trite law that in Ghana under s.19(1) of the Interpretation Act, 1960 (C.A.4) the Memorandum accompanying a Bill is an aid to the interpretation of a statute but not the Debates of Parliament. However like the side notes of a statute, Adade J.S.C. said of Parliamentary Debates in *New Patriotic Party v. Attorney-General* (31st December Case) 1993-94) 2 GLR 35, S.C at 68-71 as follows:

" The question of the justiciability of the chapter on the Directive Principles of State Policy was *debated at length in the 1979 Constituent Assembly*. At its twentieth sitting on Friday, 2 February 1979 the assembly expressly resolved to make the chapter justiciable:

"*MR chairman* [Justice VCRAC Crabbe]: Now I am going to put the question. And the question is the amendment as proposed by Mr. Zwennes that we should make chapter four non-justiciable be accepted by the house."

The question was then put. The result of the exercise was: "Question put and negatived."

X X X X X X

The debates *confirm* the interpretation that in the absence of anything in the Constitution to the contrary, chapter 4 (The Directive Principle of State Policy of the Constitution, 1992 is also justiciable.

X X X X X X

The debates themselves are inadmissible *to contradict* the language of the Constitution. That is not permissible. As was stated by Coleridge CJ in *R V Hertford College*(1878) 3 QBD 693 at 707, CA:

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"We are not, however, concerned with what parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not [clear]."

The maxim is *parliamentum voluisse quod dicit lex* (what the law says is the wish of Parliament, ie the language of the statute expresses the intentions of Parliament)."

X X X X X X

Thus what *the debates* in the Consultative Assembly said *cannot be admitted to contradict what chapter 6 of the Constitution, 1992 itself says or does not say*." (e.s)

It is clear from the foregoing that the Executive through Parliament made an effort in October 1996 to pull CEPS away from ordinary governmental civilian circles but failed. Certainly they knew the facts that CEPS was represented on the National Security Council as well as on the Regional and District Security Councils. However some opportunity presented itself again with the passage of the Labour Act, 2003 (Act 651) to do so if they were still convinced that the security status of CEPS warranted it. It is clear that they did so in terms of the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies aforesaid but plainly excluded CEPS. We may in these circumstances safely apply the maxim of statutory construction that *expressio unius est exclusio alterius.*

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<u>The Position of CEPS as a unionizing body under the Constitution</u>

Article 24(3) of the Constitution provides:

"*Every worker* has *a right to form or join a trade union of his choice* for the promotion and protection of his economic and social interests."

This is reinforced by articles 36(11) and 37(2) (a) of the Directive Principles of State Policy. This right is however qualified by article 24(4) which provides as follows:

> "Restrictions shall not be placed on the exercise of the right conferred by clause (3) of this article *except restrictions prescribed by law and reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others.*"

(a) **The need for a balancing act:**

In construing these provisions it is necessary to bear in mind the powerful words of Akufo-Addo C.J delivering the judgment of the Court of Appeal in *State v. General Officer Commanding the Ghana Army, Ex parte Barimah (1967)* GLR 192 C.A. (full bench) at 200 – 201:

> "*The court in the execution of its duty to protect the citizen's liberty always proceeds on the well-known principle, at any rate as acknowledged in democratic countries, of the primary necessity in the administration of the law to establish a healthy balance between the need to protect the community against crime and the need to protect individual citizens against abuse of executive power. Subject to the limits imposed on this twofold protection by the establishment and maintenance of the requisite balance, the scales are to be held evenly, at any rate in normal times, between the community, that is the State and the individual and there can be no question of "leaning over backward" so to speak, to favour the State at the expense of the citizen or to favour the citizen at the expense of the community*. And the courts' vigilance in protecting the citizen against any encroachments on his liberty by the executive becomes meaningful and real only when pursued on the basis of this principle.
>
> Naturally *any extension of the powers of the executive that tends to impinge upon the liberty of the citizen is viewed with the gravest*

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suspicion, for such extended powers are in their operation fraught with serious dangers."(e.s)

All this means that the legitimacy of a restriction on human rights depends on a balancing act, see *Mensima v. Attorney-General*, supra. Kpegah JSC's opinion in support of the majority decision in *Republic v. Tommy Thompson Books Ltd, Quarcoo & Coomson* [1996-97] SCGLR 804 is instructive. **The court upheld section 185 of the Criminal Code as a law reasonably required as a limitation on freedom of speech.** In the words of Kpegah JSC at 846:

"The denial of the balancing doctrine will place the individual outside society and make an island of him… *there is the need for a meeting point between individual and societal rights for harmony*. For, *while an unbridled insistence on, and enforcement of, personal rights have the great potential of leading to anarchy, so also has a similar insistence and enforcement of societal rights the potential of undermining the democratic values of a society*"(e.s)

As was forcefully put by McLachlin J of the Canadian Supreme Court in the Canadian case of *R v. Zundel* IO CRR 2d 198 at 209: "*Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection*"(e.s)

Consequently, what the Executive and Parliament prescribe even in terms of economic and security matters, is not uncritically endorsed by the courts when convinced that such prescription is contrary to the constitution. Hence the question whether CEPS has a right to unionise ultimately depends upon the proper construction of article 24(3) and (4) of the Constitution and not ordinary legislation.

(b) **The discharge of the balancing act**

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No evidence was led in this case. But the central theme of the plaintiff's worry about unionizing CEPS is what could happen if CEPS were to back a strike or other industrial action with their weapons. Some restrictions on CEPS' rights to unionise are therefore called for. However is the plaintiff's claim for a total exclusion of CEPS from unionising justifiable? When a similar problem with regard to public order arose in the celebrated case of *New Patriotic Party v. Inspector-General of Police*, (1993-94)2 GLR 459 S.C, this court held, as recounted by Dr. Bimpong –Buta in his invaluable book "The Role of the Supreme Court In the Development of Constitutional Law In Ghana" at p. 409:

> "The Supreme Court unanimously *granted the plaintiffs a declaration that certain sections of the Public Order Decree, 1972 (NRCD 68) were inconsistent with and in contravention of article 21(1) (d) of the Constitution, 1992 and were to the extent of such inconsistency null and void*. The nullified sections included: section 7 which gave the Minister of Interior the power to prohibit the holding of public meetings or processions for a period in a specified area; section 8 which provided that the holding of all public processions and meetings and the public celebration of any traditional custom should be subject to the obtaining of a prior police permit; section 12(a) which gave a police officer an unfettered power to stop and cause to be dispersed any meeting or processions in any public place in contravention of sections 7 and 8; and section 13(a) which made it an offence to hold such procession, meetings and public celebration without permission." (e.s)

He continues at pp.411-412 thus:

> "In assessing this positive development in the law of demonstrations, *it must be borne in mind that Charles Hayfron-Benjamin JSC emphasized the exceptions to the right to process and demonstrate. It must therefore be stressed that (contrary to general belief) the decision did not render the police entirely powerless in the maintenance of law and order in the country*. Charles Hayfron-Benjamin JSC clearly indicated what he referred

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to as "inherent limitation" and restrictions on the enjoyment of the right as conferred by article 21(1) (*d*). First, *the operation of the right to demonstrate without permission did not affect the continued operation of section 12(c) of the Public Order Decree, 1972 which dealt with the powers of the police and other authorized public officers to stop and disperse unlawful assemblies*. In the words of the judge:

> "….we could not grant a declaration in favour of the plaintiff affecting section 12 (c) of NRCD 68. It would have been irresponsible for a court to order in the light of section 12 (c) ….., that the police should remain helpless on-lookers in a situation in which a "breach of the peace has taken or is taking place or is considered by the officer as likely to take place."

Second, *there were inherent limitations to the enjoyment of the right of assembly, procession or demonstration, namely, the obligation to observe the law – particularly the observation of the public peace under the Criminal Code… ….*

It should be observed that, *subsequent to the Supreme Court decision* in *New Patriotic Party v. Inspector-General of Police, the President signed into law, the Public Order Act, 1994 (Act 491)*, which repealed the Public Order Decree, 1972 (NRCD 68) and the Public Order (Amendment Law, 1983 (PNDCL 48). Sections 1- 3 of Act 491 govern the holding of what is referred to as "special events"…

Section 1 of Act 491 of 1994 requires any person who desires to hold a special event to notify in writing the police of his intention to do so not less than five days before the date of the special event. The notification should give details of the place, hour, nature, time, the proposed route and destination, if any, and the proposed and the proposed time of the special event. Under section 1(4) where a police officer, notified of a special event, has reasonable grounds to believe that the holding of a proposed special event might "*lead to violence or endanger public defence, public order, public safety, public health or the running of*

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> *essential services or violate the rights and freedoms of other persons*" he may request the organizers of the special event *to postpone the event to any other date or to relocate it*. Under section 1(6), *where the organizers* of the special event *refuse to comply with the request, the police officer may apply to any judge or a chairman of a tribunal for an order to prohibit the holding of the special event on the proposed date or at the proposed location*. The judge or tribunal may issue the judicial order – prohibiting the holding of the special event on the grounds specified in section 1(4).
>
> It is suggested that the provisions in section 1-3 of the Public Order Act, 1994 (Act 491) are constitutional as being in line with article 21(4)(a) as endorsed by the Supreme Court in *New Patriotic Party v. Inspector-General of Police." (e.s)*

As regards similar decisions with respect to economic activity, see *Mensima v Attorney-General* supra , and *New Patriotic Party v Attorney-General* (Ciba case) (1996-97) SC GLR 729.

From the position of CEPS under ordinary legislation as hereinbefore set out, it is clear that the Executive and the Legislature have so far found it safe to allow CEPS to unionise. I do not think that this court knows more about the security requirements of this country than the Executive and the Legislature, though as I have said supra, the courts do not follow them uncritically on such matters. For as was aptly put by the Sri Lankan Supreme Court in *Joseph Perera v. Attorney-General* [1992] 1 SRLR 199: "…..

> But even though the Government's purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

The security concerns in this case must not be blown out of proportions. They would seem to bother more on disruption of public order than touching on national upheavals. This difference should affect the character and extent of the restrictions called for under article 24(4) of the constitution. As was held by the

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Indian Supreme Court in the case of the *Superintendent Central Prisons Fatehgarh v. Ram Manchur Lohia* (1960) 2 CSR 821 at 839:

> "'Public Order' is synonymous with public safety and tranquility; it is *the absence of disorder involving breaches of local significance in contradiction to national upheavals, such as revolution, civil strife, war, affecting the security of the state.*" (e.s) See also *Ekwam v. Pianim* (No. 2) (1996-97) SC GLR 120.

In determining this case, it is necessary to bear in mind the powerful words of Lord Atkin quoted by one of his Ghanaian counterparts, Taylor J, in *Republic v. Greater Accra Regional Commissioner; Ex Parte Naawu III* (1976) 2 GLR 25 at 41 as follows:

> "I recall the oft-quoted warning of Lord Atkin in his powerful and highly respected dissenting speech in *Liversidge v. Anderson* (supra) at p. 244, H.L. where he said:
>
> *I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive*" (e.s)

I also bear in mind the words of Lord Simon in his dissenting speech in *D.P.P. v. Lynch* (1975) A.C 653 at 695 which were subsequently followed in the unanimous judgment of the House of Lords in *Regina v. Howe* (1987) A.C. 417 thus:

> "I am all for recognizing frankly that judges *do make law*. And I am all for *judges exercising this responsibility boldly at the proper time and place--that is, where they can feel confident of having in mind, and correctly weighed, all the implications of their decision, and where matters of social policy are not involved which the collective* wisdom of Parliament is better suited to resolve (see *Launchbury v. Morgans* [1973] A.C. 127, 136F-137A, 137G)."

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In the circumstances I would hold, as this court held in *New Patriotic Party v. Attorney-General*, supra, that the restrictions prescribed by the Criminal Offences Act, 1960 (Act 29) designed for the maintenance of public order and security – see Part Two, chapter 1 (Justifiable Force and Harm), Part Four (Offences against Public Order, Health and Morality, Offences against the Peace) and the Criminal and other Offences (Procedure) Act, 1960, Parts 1 and 2, etc, and the Public Order Act, 1994 (Act 491) do apply, under article 24(4) of the Constitution "as *restrictions prescribed by law and reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others.*" to CEPS' workers' right under article 24(3) and ss.1 and 10(d) of the Labour Act 2003 (Act 651) to unionise, with its incidentals.

Since these restrictions are adequate (I do not say that they are exhaustive), for the purposes and intendment of article 24(4) with regard to the security implications of unionizing CEPS, it will exceed the bounds of necessity to exclude CEPS from unionizing. Such excess would, in turn be a breach of the ambit of the restrictions required by article 24(4) and therefore rather unconstitutional. This accords with the ratio decidendi in *New Patriotic Party v. Inspector General of Police, Mensima v. Attorney-General* and *New Patriotic Party v. Attorney-General* (Ciba Case), supra. There is in this case no necessity so compelling as to warrant the virtual negation or recall of the very right conferred by the constitution as this court was constrained to do in *Republic v. Independent Media Corporation of Ghana* (Radio Eye Case) (1996-97) SC GLR 258.

If the Executive and Legislature deem it meet to prescribe further restrictions, e.g. prohibiting CEPS' workers from embarking on a strike or otherwise, it is left to them. After all, as was noted by Charles Hayfron-Benjamin JSC in New Patriotic Party v. Inspector-General of Police, supra, at p.79. "…some restrictions as are provided for by article 21(4) of the Constitution, 1992 *may be necessary from time to time and upon proper occasion.*" It is easier for judges to pronounce on the constitutional legality of the measures of the executive and legislature when taken than otherwise.

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CONCLUSION

For all the foregoing reasons, I would dismiss the plaintiff's action subject to the restrictions on CEPS' workers' right to unionise as I have hereinbefore set out.

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

SOPHIA ADINYIRA (MRS):

I have the privilege of reading beforehand the very comprehensive opinions of my learned brothers Atuguba and Dotse. I find myself agreeing with the reasoning and conclusion reached by my brother Atuguba that the action be dismissed. I however wish to add a few words of my own.

The *Labour Act, 2003, Act 651* by its preamble is an *"Act to amend and regulate the laws relating to labour, employers, trade unions and industrial relations; to establish a National Labour Commission and to provide for matters related to these".*
It is provided by section 1 of the said Act that:

> *"This Act applies to all workers and to all employees except the Armed Forces, the Police Service, the Prisons Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act) 526."*(Emphasis mine)

This Court is being invited to interpret "Security and intelligence agencies" specified under Act 526 to include the Customs, Excise and Preventive Service, (CEPS). To accede to this request would have the effect of depriving the senior and junior staff of the Customs, Excise and Preventive Service, (CEPS) of their fundamental freedom of association and economic right to join or form a trade union of their choice.

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I am not persuaded by the views urged on this Court that by virtue of the fact that the Commissioner of CEPS is a member of the National Security Council under Act 526 **supra** it follows automatically that CEPS is a security service under the said Act, and hereby its workers are prohibited from joining a trade union of their choice. Though the phrase "security services" has been defined under section 42 of Act 526 as: *"security services means the services connected with national security as determined by council,"* (emphasis mine) the only security and intelligence agencies specified in the said Act 526 are the Bureau of National Investigation and the Research Department respectively.

Under our existing laws CEPS is considered as a revenue agency under the *Revenue Agencies (Governing) Board Act, 1996, Act 558.* The other agencies under this board are the Internal Revenue Service (I.R.S.), and the Value Added Tax Service (VATS). The primary function of CEPS is to safeguard and protect the economic security of the nation by the collection of duties, taxes, revenue and penalties payable under the Customs, Excise and Preventive ((Management) Act, PNDCL 330 and also to carry out border patrols on our frontiers and coastlines for the purpose of preventing smuggling and any other custom and excise offences. This role is as important and sensitive as the role of political security undertaken by the armed forces and the police service.

I agree with my brother Atuguba JSC that it is not for this Court to assume the role of the legislature or the executive to convert CEPS into a security and intelligence agency in the absence of any express legislation. Such a role by the Court would be undemocratic as it may result in stifling CEPS workers from exercising their economic right of joining or forming an association of their own choice. This would not only be in contravention of articles 21 (1) (e) and 24 (3) of the Constitution but also of *article 2 of the International Labour Organisation (ILO) Convention C87 Freedom of Association and Protection of the Right to Organise Convention, 1948,* to which this country subscribe as a member of the ILO. *Article 2 of Convention C87* provides that:

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"Workers without distinction whatsoever shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisation of their own choosing without previous authorisation."

I believe that any restrictions on the fundamental freedoms and human rights of a citizen or any person ought to be by express legislation. In the absence of any express statutory restrictions, it is rather the duty of the Court to enforce these fundamental freedoms and rights and not to whittle them down. I accordingly endorse the views expressed by the learned Justice Bamford Addo JSC in the case of *New Patriotic Party vrs. Inspector General of Police [1993-94] 2 GLR 459 at 482 that:*

"This Court is therefore not permitted to give an interpretation which seeks to tamper in any way with the fundamental human rights but rather to see that they are respected and enforced."

International norms and conventions recognise the need to regulate members of the armed forces and the police in the expression of their economic rights and freedom of association, due to the sensitive nature of their work and the implications for national security. *Article 9(1) of ILO Convention C87* therefore provides:

Article 9 (1) "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."

In consonance with the above convention, members of the Police and Prison Services are specifically restricted from joining or forming trade unions under the statutes establishing them under our domestic laws. See *section 17 (f)* of the *Police Service Act, 1970, Act 350* and *section 16 (f) of the Prison Service Act, 1972, NRCD 46.* Even then the members of these two services are permitted to join associations authorised by the minister with similar objectives. *Section 17* (*f*) of the *Police Service Act, 1970, Act350* is reproduced for illustration. It states:

s.17 "It is misconduct for a police officer

(f) to become or be a member of a trade union or of any other association other than an association authorised by the Minister having similar objects."

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However, there is no such express restriction on the right of members of CEPS to join or form a trade union in the *Customs, Excise and Preventive Service (Management) Act, 1993 PNDCL 330.*

It is my considered opinion that section 1 of the Labour Act is clear and unambiguous and it is merely re-stating the existing laws by restricting the application of the Labour laws to the Armed Forces, Police and Prison Services respectively. The section does not call for any purposive and strained meaning. In the unreported case of *The Republic v. The High Court, Accra, Ex parte Paa Kwesi Yarlley and 2 Ors. S.C. Suit no. J7/2/2007,* dated.. her ladyship, Chief Justice Wood after reviewing the purposive rule of construction said:

> " *It does appear to me that where the purposive and literalist approach, advocated by Bennion, which in my view is synonymous with the subjective purpose theory of Justice Barrack, advances the legislative intent and does not lead to injustice, then it is not proper to apply the purposive strained meaning or objective purposive rule"*

This Court is under a duty to interpret the Constitution and statutes to conform to international legal norms and also to promote and encourage respect for human rights and freedom. It is therefore my considered view that section 1 of the Labour Act does not cover CEPS.

I accordingly dismiss the action.

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S. O. A. ADNIYIRA
(JUSTICE OF THE SUPREME COURT)

JONES DOTSE (J.S.C)

The Plaintiffs' claim against the Defendants' the following reliefs as per their writ filed on 27th of August, 2007;

"1. A declaration that on a true and proper interpretation of the Labour Act 2003 (Act 651) particularly S.I, the application or the purported

application of the said Act to cover the Customs, Excise and Preventive Service (CEPS) as established by law is in-consistent with, or in contravention of Article 24(4) of the Constitution and to that extent the court ought to declare that restrictions prescribed by law and reasonably necessary in the interest of national security or public order require that Customs, Excise and Preventive Service be excluded from the application of the Labour Act 2003 (Act 651)

2. That by virtue of the combined effect of Article 1(2) and Article 11(6) of the Constitution the Court declares a Collective Bargaining Certificate dated 20th March 1987 issued to cover the Customs, Excise and Preventive Service void and of no effect.

Originally, the plaintiffs' writ was against the National Labour Commission the Defendants herein, but as the rules of procedure in the Supreme Court require i.e. Supreme Court Rules, 1996 C.I. 16 rule 45 (3) the Attorney-General was made a party for its opinions in the matter to be made known. Thereafter, the Interested party, the Public Services Workers Union of TUC was also made an interested Party, pursuant to rule 45(4) of the Supreme Court Rules, 1996 C.I. 16 already referred to supra.

The plaintiffs' are the body that has been mandated under the Customs, Excise and Preventive Service (Management) Act, 1993 PNDC Law 330 to collect and account for the duties, taxes, revenue and penalties payable under this Act for and on behalf of the state.

The Head of the Plaintiffs' organization is the Commissioner who shall be appointed by the President in accordance with article 195 of the Constitution.
There shall also be Deputy Commissioners to head various departments of the Service as may be determined by the Sector Minister acting on the recommendations of the Board which shall include the following departments, Finance and Administration, Operations, Research, Monitoring, Planning and Preventive.

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Section 235 of PNCDL330 provides as follows:-

For the administration of this Act, all officers shall have the same powers, authorities and privileges as are given by law to Police officers".

The Law establishing the plaintiffs' also lists some of the powers granted them as follows:-

1. Power to stop ships, aircraft and vehicle – section 245 of PNDCL 330.
2. power to board ship or aircraft – section 256.
3. Power to search persons and premises.
4. Power to patrol freely any part of Ghana etc etc.

It can therefore be seen that the powers granted to the plaintiffs' under PNDCL 330 are really very extensive and penal in character.

On the other hand, the original defendants herein, the National Labour Commission had been established by the Labour Act, 2003 (Act 651) and Sections 135 – 152 thereof deal with the composition, functions and powers of the Commission. Of particular interest to this case are Section 139 (1) (a)-(d) and (2) of Act 651. Section 139 (1) (a) of (Act 651) provides as follows:-
"The commission shall exercise the following powers:

a. receive complaints from workers, trade unions, and employers, or employers organizations
   i. on industrial disagreement and
   ii. allegations of infringement of any requirements of this Act and the Regulations.

Section 139(2) provides thus

"without prejudice to section (1) the commission shall in settling an industrial dispute have the powers of the High Court in respect of

a. enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise

b.

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compelling the production of documents and

c.

the issue of a commission or request to examine witnesses abroad.

3. The commission shall in respect of its proceedings enjoy the same privileges and immunities pertaining to proceedings in the High Court".

It is also clear that the commission has very extensive powers and in some instances has powers equivalent to the High Court.

What then are the brief facts of this case?

BRIEF FACTS OF THE CASE

Due to protracted and inconclusive legal battles between the PSWU and CEPS over an earlier directive in or about 1988 or 1989 which declared that the local union of PSWU had been proscribed at CEPS, the senior staff association of CEPS formally applied to the Labour Department to be allowed to unionize under section 1 of the Labour Act, 2003 (Act 651).

The Attorney General's Department upon being requested to advise on whether CEPS staff association can form or join a trade union stated unequivocally as per a letter dated 25th August, 2005 as follows:-

"Customs, Excise and Preventive Service cannot form and or join trade union" citing section 234 of PNDCL 330 as authority and applying the "ejusdem generis" rule of legal interpretation.

After the receipt of the advice from the Attorney-General's Department, the Senior and Junior Staff Association of CEPS lodged a joint complaint with the National Labour Commission against the management of CEPS for unfair labour practices.

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The management of CEPS raised the preliminary issue that the Labour Commission had no jurisdiction over CEPS. However, after reception of arguments, the Labour Commission held on 23rd May, 2006 that it had jurisdiction in the matter and concluded the matter thus:-

> ***"....In the light of the foregoing, the commissions decision is that CEPS is not one of the security institutions listed under section 1 of the Labour Act 2003, Act 651 and therefore the commission has jurisdiction to determine the complaint of unfair labour practices against the management of CEPS from its staff groups".***

It is significant to note that the rationale for the Labour Commission's decision referred to supra had been prefaced on the fact that CEPS is not mentioned anywhere in the Security and Intelligence Agency Act (1996) Act 526. With this background, the Labour Commission concluded that it is only the Bureau of National Investigations and the Research Department which had been redesignated as Internal and External Intelligence Agencies together with the Armed Forces, the Police Service and the Prisons Service that qualify to be referred to as security agencies and therefore fall outside the jurisdiction of the Labour Act 2003 (Act 651) section 1, thereof.

After the decision of the National Labour Commission on 23rd May, 2006, even though the Management of CEPS did not accept the decision, they did not take any steps to set it aside or appeal.

Since the adjudicatory process of the National Labour Commission is equated to that of a High Court, reference section 139 9(2) (a) (b) (c) and (3) of Act 651. It follows that any decision to appeal against it to the Court of Appeal must be done within three months of the original decision and that is 23rd August, 2006. From the records available to me, it is clear the plaintiffs did not avail themselves of the appeal process. Finding themselves hopelessly out of time to file any appeal against the Labour Commission decision and faced with a further legal challenge by the Labour Commission seeking to compel the management of

CEPS to negotiate with the PSWU pursuant to a motion filed in the High Court, the plaintiffs filed the instant writ.

LEGAL SUBMISSIONS

PLAINTIFFS'

The plaintiffs contention is that the interpretation by the Labour Commission of Section 1 of the Labour Act, 2003, (Act 651) to exclude CEPS from the list of security agencies mentioned in that law is inconsistent with or in contravention of Article 24(4) of the Constitution 1992 and that the restrictions stipulated by law can reasonably be inferred in the interest of national security or public order to include CEPS such that they the plaintiffs be exempted from the application of the Labour Act 2003, (Act 651).

The plaintiffs further contend that grant of the Collective Bargaining Certificate is in breach of Section 3(6) of Act 299 the Industrial relations Act which was the operative law at the material time.

Accordingly, the plaintiffs' argue that the said Certificate is invalid and void for failure to have it published in the Gazette as is mandatorily required to be done in Act 299 just as it has been re-stated in Act 651.

It is provided in Article 1(2), 2(1) & (2) of the Constitution 1992 as follows:-
Article 1(2)

> ***"This Constitution shall be the Supreme Law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency, be void." Emphasis is mine***

Then article 2(1) (a) and (b) provides:

"A person who alleges that

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a. ***an enactment or anything contained in or done under the authority of that or any other enactment, or***
b. ***any act or omission of any person***

Is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect".

The plaintiffs therefore contend that the Constitution 1992 is Supreme i.e principle of the Supremacy of the Constitution.

The plaintiffs further contend that any law, or act or omission by anybody or institution which is inconsistent with or in contravention with the Constitution 1992 must be declared void.

There is no doubt in my mind that articles 1(2), 2 (1) (a) and (b) of the Constitution 1992 stipulates the Supreme Court as the defender of the Constitution 1992. To that extent, the instant writ by the plaintiffs should be considered as an exercise of their right in the Constitutional provisions in the articles of the Constitution 1992 referred to supra.

The CRUX of the plaintiffs' submission is that, the interpretation by the Defendants that section 1 of the Labour Act does not permit the plaintiff to claim the status of being a Security or an Intelligence Agency is inconsistent with the Constitution. They further contend that such an interpretation is in contravention of Article 24(4) of the Constitution 1992.

It is note worthy to refer to the provisions of section 1 of the Labour Act, (Act 651) which provides as follows:-
"This Act applies to all workers and to all employers except the Armed Forces, the Police Service, the Prison Service ***and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 651)".***

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From the above provision, it is clear that the intendment of the scope of application of the Labour Act was clearly meant to cover and deal wit the Security and Intelligence Agencies. Put in another way, the Labour Act 1996 is clearly not referable and applicable to all staff of the Armed Forces of Ghana, the entire Police Service in Ghana as well as the Prison Service in additional to all other Security and Intelligence Agencies covered in Act 526.

It is perhaps pertinent at this stage to refer to constitutional provisions that guarantee and restrict the right to join or form a trade union. It is only when these rights are determined that it will be possible to conclude whether the decision of the defendants that the plaintiffs' are a non security organization, and therefore cognizable under the Labour Act is right or wrong..

Articles 24(3) and (4) of the Constitution 1992 which deal with economic rights and restrictions placed therein state as follows:-

"24(3) "***Every worker has a right to form or join a trade union of his choice for the promotion and protection of his economic and social interests***".

This means that every worker in Ghana has an unfettered right of his choice to affiliate or join any trade union in pursuit of his or her economic or social rights.

However, article 24(4) imposes some restrictions on the exercise of those rights in the following words.
"Restrictions shall not be placed on the exercise of the right conferred by clause (3) of this article ***except restrictions prescribed by law and reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others."***

What this means is that, the provisions admit of the guarantee of the workers right to form and or join any trade union of his choice in pursuit of his or her economic or social rights. These are however subject to the restrictions imposed by law eg under section 1 of the Labour Act or under those conditions as are

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reasonably necessary in the interest of national security or public order to protect the rights and freedoms of others.

It therefore means that the list of those class of workers or of employers capable of being restricted in their quest to form or join trade union is flexible and capable of being expanded as and when the exigencies of national security or public order concerns demand.

This being the case, what then is the peculiar position of the plaintiff vis-à-vis the constitutional provisions referred to supra.

CASE FOR DEFENDANTS

The defendants have beautifully set out the facts which are not different from the facts that have already been narrated supra.

They however contend that since there is no ambiguity, conflict or doubt in the meaning of the provisions of the statute referred to, no issue of interpretation arises thereby.

After referring to the cases listed hereunder, the defendants invited this Court to dismiss the plaintiffs' case and refer same back to the High Court where it properly belongs.

The cases are:

a. **EDUSEI vs A.G [1996-97] SCGLR 1**

b. **YIADOM I vs AMANIANPONG [1981] GLR 3**

c. **TAIT vs GHANA AIRWAYS CORPORATION [1970] G&G 527**

d. **GBEDEMAH vs AWOONOR WILLIAMS [1970] 2GLR 438**

The defendants in a supplementary statement of case further argued that the Supreme Court has no jurisdiction in the matter since to attempt to do so would

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amount to this court legislating and not interpreting or enforcing as the Constitution 1992 requires of the Court.

POSITION OF THE ATTORNEY GENERAL

The Attorney General in his opinion stated clearly that the case before this court does not fall into any of the parameters set out by an earlier Supreme Court decision in the case of ADUMOAH **II vs ADU TWUM II [2000]SCGLR 165.**

The Attorney General therefore concluded that the instant suit is therefore not one in which the original jurisdiction vested in the Supreme Court under Articles 2(1) and 130(1) of the Constitution arises.

CASE FOR INTERESTED PARTY

After associating themselves with the submission of the Defendants, the Interested Party also concluded by inviting the Supreme Court to decline jurisdiction arguing that there is no real and genuine issue of interpretation to enable this courts exclusive original jurisdiction to be invoked.

JURISDICTION OF SUPREME COURT

Does this Court, have jurisdiction in the matter?

Looking at the memorandum of issues that has been filed, since the issue of jurisdiction is basic and goes to the root of the courts powers to determine the matter, it will be first be taken as a preliminary issue. Depending upon the outcome of that determination, all the other issues would be dealt with under only two headings to be formulated later.

In the case of ***GbedemahVs Awoonor Williams [1970]2 G&G 438 at 439*** the Court of Appeal, sitting as the Supreme Court stated the limits within which the original and exclusive jurisdiction of the Supreme Court can be invoked and exercised thus:

> ***"It seems to us that for a plaintiff to be able to invoke the original and exclusive jurisdiction of the Supreme Court his writ***

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of summons or statement of claim or both must prima facie raise an issue relating to

> ***(1) the enforcement of a provision of the Constitution, or***
>
> ***(2) the interpretation of a provision of the Constitution, or***
>
> ***(3) a question whether an enactment was made ultra vires Parliament, or any other authority or person by law or under the Constitution".***

The Supreme Court rejected a similar invitation made to it to intervene in the case of ***TAIT vrs Ghana Airways Corporation already referred to supra where it held that the plaintiffs case was essentially one of wrongful dismissal and rejected the contention that it was a case of Constitutional Interpretation***.

This is how the Supreme Court summed it up all in the TAIT case:

> ***"In our view, unless the words of an article of the Constitution are imprecise and ambiguous, an issue of interpretation does not arise. Where the language of the Constitution is not only plain but admits of but one meaning, the task of interpretation does not arise. In our opinion, the task of interpretation does not arise where.....it is manifestly clear that the dispute is not about the true meaning of ambiguous or vague words in the Constitution..."***

The constitutional provisions which needs to be looked at critically in this case before a determination can be made in respect of relief (one) 1 of the Plaintiffs writ are articles 24(3) and 24(4). The words in article 24(3) admit of no controversy and are clear, unambiguous and straight to the point. Not so, however with article 24(4).

There are two indicators that have been stated therein, these are

(i) Restrictions imposed by law, and

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(ii) Restrictions necessary in the interest of national security and public order.

Which body or institution is best suited under the circumstances to interprete the said provisions by making them applicable.

I am also aware of the Practice Direction as contained in ***Judicial Circular No. 146/12 dated 15 June 1981 and reported in [1981] GLR1 which admonishes the assumption of jurisdiction*** by the Supreme Court as a Court of first instance in such cases. This is what is contained therein:

> ***"It is also to be noted that where a cause or matter can be determined by a Superior Court, other than the Supreme Court, the jurisdiction of the lower Court shall first be invoked.***
> ***The Supreme Court may dismiss any such cause or matter, with punitive costs to be paid personally by Counsel or by the party responsible for bringing such cause or matter to the Supreme Court in the first instance".***

The above statement in the Practice Direction was cited with approval by Kpegah JSC as he then was in his dictum in the ***EDUSEI vs A.G*** case already referred to. As a matter of fact, the majority decision in the EDUSEI case held that

> ***"assuming the Supreme Court had concurrent jurisdiction with the High Court in enforcing the fundamental human rights and freedoms of the individual, the court was precluded from assuming jurisdiction in the matter as a court of first instance because of the 1981 Practice Direction" and by the said decision, declined jurisdiction in the matter.***

It is my considered opinion that the facts in the EDUSEI case are significantly different from the facts in the instant case.

FACTS OF EDUSEI CASE

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The Plaintiff (EDUSEI) a Ghanaian citizen was before the coming into force of the Constitution 1992 allowed to leave Ghana with other Ghanaian citizens to the United States on allegations that they engaged in espionage activities on behalf of the U.S. His Ghanaian Passport was seized from him shortly before he left Ghana. After the Constitution 1992 came into force, the plaintiff wrote a letter to the Minister of Foreign Affairs and requested that his old Passport be returned to him to enable him apply for a new one. There was stoic silence to this request. The plaintiff then brought an action in the Supreme Court for a declaration that:-

(i) "Sections 5(1) and 12(3) of the Passports and Travel Certificates Decree, 1967 (NLCD 155) which sought to give the Minister for Foreign Affairs wide discretionary powers in the grant, refusal, revocation, cancellation or impounding of passports and travel certificates, section 5(2) (a) and (b) (ii) and (iii) which provided that the Minister should not issue a Passport to specified categories of persons and also section 17(e) of the Decree were inconsistent with and in contravention of the letter and spirit of the Constitution, especially articles 17(1) –(3) and 21(1) (g) and thus void and unenforceable and

(ii) That as a citizen of Ghana by birth, he had the Constitutional right to enter and leave Ghana and a fortiori to a passport to enable him exercise and enjoy that right".

In their statement of case, the defendant the Attorney-General among other reasons argued that, since the plaintiff was seeking an enforcement of his right of freedom of movement a fundamental human right, the court had no jurisdiction to determine the claim because it was the High Court, and not the Supreme Court that had exclusive jurisdiction to entertain the suit.

The Supreme Court by a majority decision dismissed the plaintiffs action and held that

> ***"the effect of articles 33(1) and 130(1) and 140(2) of the Constitution 1992 was to vest in the High Court, as a court of first instance, an exclusive jurisdiction in the enforcement of the***

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fundamental human rights and freedoms of the individual. The Supreme Court had only appellate jurisdiction in such matters. It has no concurrent jurisdiction with the High Court in the enforcement of fundamental human rights contained in Chapter five of the Constitution".

In the Edusei case no matter how ingeniously the reliefs were couched, it is to be generally seen as a breach of the fundamental human rights of the plaintiff and therefore the right to seek enforcement of those rights.

In the instant case, the plaintiffs contend that an interpretation of a statutory provision in the Labour Act (Act 651), enacted after the Constitution 1992 came into force is inconsistent with or contravenes a Constitutional provision in article 24(4).

Is such a claim legitimate?
Taking a cue from the decision of the Supreme Court in the case of **ADUMOA II vs ADU TWUM II [2000]SCGLR 165** Where the court in answering the question, stated thus:

"When then does a real or genuine issue of interpretation or enforcement of a provision of the Constitution arise for determination by the Supreme Court, either in the exercise of its original jurisdiction under article 130(1)
(a) or in its reference jurisdiction under article 130(2) of the Constitution 1992". The Supreme Court itself answered the question bY referring to the decision of the TAIT case already referred to.

In my mind, the words in article 24(4) of the Constitution 1992 are ambiguous and capable of different meanings depending upon the circumstances of each case. This is because, whilst the article in question is dependent upon the general provisions of chapter five of the Constitution which deals with fundamental human rights, article 24 deals with economic and social rights.

Secondly, whilst article 24(4) re-emphasizes the grant and enjoyment of the rights enshrined in article 24(1) (2) and (3) in particular, it also in another breadth takes away some of these rights. The scenario is that, ***whilst Ghanaian workers have the right to work, to form and join trade unions of their choice, their rights to enjoy those freedoms can be curtailed by (1) operation of law, or***
(2) in the interest of national security and public order.

It does appear that by reference to operation of law would be easy to determine and might not admit of any ambiguity whatsoever.

However, if one considers the contents of section 1 of the Labour Act, already referred to, it is clear that the provisions therein contained admit of some controversy and ambiguity. To that extent therefore, there is the need for judicial intervention to help solve the confusion.

Secondly, who determines the issue of national security and public order?

In my mind, the Judiciary is best suited to determine such issues in an unbiased and impartial manner.

To what level then of the judiciary is such a delicate task to be entrusted?

The Edusei case just like the other cases ***TAIT, GBEDEMAH, YIADOM*** etc all referred to supra seem to suggest that the High Court is the commencement point or level. Thereafter, if there is the need for a referral of an interpretation or enforcement, then that would be made to the Supreme Court.

I am however of the opinion that, where the interpretation of a Constitutional provision or statute is capable of different meanings, or where the provisions therein contained are ambiguous and admit of more than one meaning, and there is no existing Supreme Court decision or interpretation on the issue, it is better for the Supreme Court to assert its role as the defender and protector of the Constitution by assuming jurisdiction.

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What should be noted is that, in construing the Supreme Courts role as envisaged in Articles 1(2) 2(1) and (ll) and 130(1) of the Constitution 1992 the magnificence of the supremacy of the Constitution should be allowed to work perfectly.

When the Supreme Court functions like it is supposed to do, taking into consideration the policy measures that lie behind the enormous role assigned the Court against the historical background that gave birth to the Constitution 1992, the need of a robust, but fair minded court that transcends policy prejudices and preferences that may exist at any point in time in order for the purpose and will of the constitution itself to be clearly manifested have to be clearly distinguished and made functional and applicable.

I am of the opinion that, it is better to leave this critical and crucial role to the Supreme court Justice who are at the apex of the judicial system and whose judicial oath among others is to preserve the core values of the Constitution 1992 and the Constitutional system.

In this respect therefore I will dismiss the contention that this Supreme Court has no jurisdiction in the matter. There is no matter for the High Court to decide in this case. The Supreme Court is therefore best suited to determine the remaining issues, which have been re-formulated as follows:-

REMAINING ISSUES

1. Whether or not upon a true and proper interpretation of the Labour Act, (Act 651) especially section 1 thereof vis-à-vis the Security and Intelligence Agencies Act, 1996 (ACT 526) and the application of the said laws in respect of the Customs, Excise and Preventive Services as established by law denoting CEPS as a non-security organization is inconsistent with or in contravention of article 24(4) of the Constitution 1992.

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2. Whether or not the Collective Bargaining Certificate issued to cover CEPS is valid.

ISSUE 1

The Labour Commission in their decision dated 23rd May, 2006 concluded the aspect of their decision touching and dealing with Security and Intelligence Agencies Act, (Act 526) as follows:-

"The law makers in the section 1 of the Labour Act, 2003, Act 651 unambiguously mentioned those institutions whose employees are not covered by the Act and it is trite learning that when a law expressly mentions a class as the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies which in the Security Agencies Act 1996, (Act 526) refers to the Bureau of National Investigations and the Research Department without mentioning CEPS, it is conclusive in the absence of anything to the contrary that CEPS is not part of that class. Until the law makers amend the law regulating CEPS to change it from para-military institution to a full fledge Security agency, the Commission finds CEPS not to be part of the Security and Intelligence Agencies whose employees fall outside the scope of the application of the Labour Act 2003, ***CEPS cannot be said to be part of the Security Service by necessary implication of statutes".***

Based on the above reasoning the Defendants concluded that the Plaintiffs are not a Security Institution mentioned in section 1 of the Labour Act to qualify them to be exempted from unionization.

What then is this security and Intelligence Agencies Act, (Act 526)?

The preamble to Act 526, states as follows:-

> ***"An ACT to make provision in respect of the National Security Council, to provide for the establishment of Regional and District Security Councils, to specify some of the state agencies responsible for implementing government policies on security of***

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the state and attendant issues on or relating to the internal and external security of Ghana and to provide for related matters".

In making use of the preamble to Act 526, I am aware of the fact that a Preamble to an Act of Parliament is only a narrative of the facts that gave rise to the passage of the Act and will give a semblance of the main objectives of the Act. It thus gives a historical basis for the passage of the Act and can be described as the gateway to understanding the reasons why the Act was enacted and the problems which it was meant to solve.

The authorities are quite certain that, even though a Preamble is not part of the Act of Parliament, the facts so stated in the preamble can be looked at by the courts although not without challenge.

In R v. Haughton (Inhabitants) {1853] 6 Cox. CC. 101, E & B, 501 at 506 Lord Campbell stated thus:

"A mere recital of an Act of Parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different to the Statement in the recital".

Under these circumstances, I will take the preamble to Act 526 into consideration in an attempt to fully comprehend the objects of the Act, and the mischief that the law was meant to cure. Such an approach will enable me to unravel any missing links if any that are needed to make the Act functional in practice. I am not to be understood to be attempting to legislate or insert new words into the Act when the legislature did not intend any such effect.

From this standpoint, Act 526 must be understood to be an Act designed to specify some of the state agencies responsible for implementing government polices on security of the state and related issues bordering on internal and external security of Ghana.

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In that respect therefore, sections 1, 6 and 8 of Act 526 establish and indicate the membership of the National, Regional and District Security Councils respectively.
It is significant to observe that Section 1(2)(j) names the head of the Plaintiffs institution as one of the members of the National Security Council. Sections 6(l)(h) and 8(i)(e) mention the plaintiffs as an Institution comprising membership of the Regional and District Security Councils.

A consideration of the functions of the National Security Council, as is stated in section 4 of Act 526 clearly shows that the functions of the plaintiffs as spelt out in PNDCL 330 the CEPS Management Law in theory and practice are in tandem with those of a Security apparatus as is spelt out in Act 526.

It is also to be noted that Act 526 is divided into six parts as follows:-

1. Part I - National Security Council.
2. Part II - Regional and District Security Councils.
3. Part III - The Internal and External Intelligence Agencies.
4. Part IV - National Security Coordinator.
5. Part V - Complaints Tribunal and Warrants.
6. Part VI - Financial And Miscellaneous provisions.

It is therefore certain that there are clear differences between a Security Service and an Intelligence Agency as is depicted in Section 42 of Act 526, the Interpretation Section.

Under this section, Intelligence Agency is defined as "***Intelligence Agency" means the Internal or External Intelligence Agency established under this Act".***

Whilst security services is defined as "Security Services" "means such services connected with national security as the Council may determine".

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The above definitions re-enforces the divisions of Act 526 referred to supra into different segments.

When therefore the Defendants state in their decision that

> ***"It is worthy of note that CEPS is not mentioned anywhere in the Security and Intelligence Agencies Act (1996) Act 526", it is clear that the said assertion is not only false but misleading. It appears, the Defendants were only referring to section 10 of Act 526 which dealt with the Intelligence Agencies and not the Security Services which had been dealt with in part I and II of Act 526.***

Section 1 of the Labour Act, exempts the Armed Forces, the Police Services, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act 1996 (Act 526) from the application of the Labour Act.

In other words, all workers and or employees in the institutions mentioned therein in section 1 of the Labour Act are not subject to the Labour Laws of this country. It also means that they cannot unionise under the provisions of the Labour Act in its entirety.

The Plaintiffs main complaint is that, even though article 24(3) of the Constitution 1992 guarantee's certain rights to workers as is contained therein, article 24(4) restricts those rights in cases of national security or public order or for the protection of the rights and freedoms of others.

I have perused the erudite submissions of all the parties in this case. I also appreciate the fine distinctions that have been drawn by all the parties in respect of the Constitutional and Statutory interpretations in their statements of case.

In attempting to determine whether there is any inconsistency or contravention of article 24(4) of the Constitution 1992 and section 1 of the Labour Act and how

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the interpretation of a Security and Intelligence Agency under Act 526 has been dealt with it behoves on a Constitutional Court such as the Supreme Court to adopt a holistic and purposive approach.

This therefore means that all the relevant provisions of the Constitution 1992 that touch and deal with matters of National Security would have to be considered alongside other statutory provisions on security and Intelligence.

For example, article 83(1) of the Constitution 1992 contained the membership of the National Security Council. It states as follows:-
"There shall be a National Security Council which shall consist of

(a) The President
(b) The Vice-President
(c) The Ministers for the time being holding the portfolios of foreign affairs, defence, interior, and finance and such other ministers as the President may determine.
(d) The Chief of Defence Staff and two other members of the Armed Forces.
(e) The Inspector General of Police and two other members of the Police Service, one of whom shall be the Commissioner of Police responsible for Criminal Investigations Department;
(f) The Director-General of the Prisons Service.
(g) The Director of External Intelligence.
(h) The Director of Internal Intelligence
(i) The Director of Military Intelligence
(j) ***The Commissioner of Customs, Excise and Preventive Service***, and
(k) Three persons appointed by the President.

Article 84 of the Constitution 1992 deals with the functions of the National Security Council. The key function therein contained is the "considering and the taking of appropriate measures to safeguard the internal and external security of Ghana", among others.

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If one considers the membership o f the National Security Council as listed in article 83(1) of the Constitution, it is clear that apart from the holders of political power e.g. the Presidency and Ministerial Portfolio's , membership is drawn from institutions of national security or quasi security.

Is the membership of such an august body like National Security Council by CEPS accidental or by design which took into consideration the practical realities of the functions being performed by CEPS under the law establishing it, irrespective of its historical underpinnings?

I have in the early parts of this judgment set out in some detail the functions and powers of the plaintiffs. Their powers are rather extensive and the provisions give them wide discretionary powers similar to those that are granted to the Police.
As a matter of fact, most of the sanctions that apply in the event of a breach of the rules and regulations of CEPS as is contained in the CEPS Management Law PNDCL 330 are penal in character.

This, coupled with their membership of the National Security Council established under both the Constitution 1992 and the Security and Intelligence Agency Act means that to a very large extent CEPS is a Security organization.

What should be noted is that, Constitutions are made by people to control, regulate and guide the Community to achieve certain goals and or objectives. The modern view to constitutional interpretation seems to dwell on <u>purposive approach.</u>

This view has been echoed in the following notable decisions by the Supreme Court in Ghana,

1 **TUFFOUR vs ATTORNEY-GENERAL [1980] GLR 637, at 650** and

2 **ASARE vs ATTORNEY –GENERAL [2003-2004] SCGLR 823 at 825**

where the court stated in holding 1 as follows:-

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"Modern judicial technique had tended away form simple liberalism towards a purposive approach to interpretation which was more likely to achieve the ends of justice. It was a flexible approach which would enable the judge to determine the meaning of a provision taking into account the actual text of the provision and the broader legislative underpinning and purpose of the text. In applying the purposive approach, a court might give an ordinary or artificial meaning of words in a statute or constitution, depending upon its perception of the legislative purpose of the provision……………..Consequently, the court would give purposive interpretation".

On the basis of the above quotation I would be minded to give a really pragmatic and purposive approach to the interpretation of article 24(4) of the Constitution 1992 to include plaintiffs set up, (CEPS) as an exception prescribed not only by law e.g. the Labour Act and Act 526, but also as an exception necessary in the interest of national security and public order.

This view to me is a better approach as it takes into consideration the realities on the ground as to the real practical functions of CEPS as stipulated under law.
The time is certainly ripe for courts faced with construing ambiguous provisions in a Constitution and or statute to consider not only the practical realities of the effect of their decisions on society in general, but also the total and complete meaning of the provisions on the effective and harmonious relationship and functioning of state machinery.

In coming to the decision that CEPS is a security institution capable of being considered as an analogous security organization in line with those institutions listed in Section 1 of the Labour Act, I have also been very mindful of the entire provisions of the Labour Act and the Security and Intelligence Agencies Act, 1996 (Act 526).

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Viewed from that angle, and looking at the provisions in the Laws applicable and taking a cue from the admonition of the Court of Appeal per Edward Wiredu J.A in the case of

OKWAN & OTHERS vs AMANKWA 11[1991]1 GLR 123 where it was held that

> ***"For the general rule of interpretation is that where an enactment has clearly defined particular words in its interpretation Section it is uncalled for and most unnecessary to look elsewhere for the meaning of those words".***

In this respect, I have already referred to the definition of State Security in Section 42 of Act 526 and other references in the Law which make it really imperative and necessary for the Plaintiffs institution to be regarded as a security organization.

I have apprized myself of the English authorities referred to in the statement of case of the Interested Party.
Cases such as

1. **ROYAL COLLEGE OF NURSING Vs D.H. S.S [1981] AC800**

2. **DUPORT STEELS LTD vs SIRS [1980] 1WLR 142 at 541**

3. **D. P. P. vs LYNCH [1975] AC 653 and**

4. **REGINA vs HOWE [1987] AC 417**

All the above cases reiterate and reinforce the principle that, whenever Parliament enacts a law, it is not the duty of the Courts or for that matter Judges to attempt to unravel the intentions of Parliament in the passage of the enactment. In other words, it is not the duty of judges and Courts to provide missing links whenever these appear in legislation.

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Of particular interest to me are the words of Lord Simon in the case of ***Regina vrs. Howe,*** referred to supra, where he stated thus:

> ***" I am all for recognizing frankly that judges do make law. And I am all for judges exercising this responsibility boldly at the proper time and place that is, where they can feel confident of having in mind, and correctly weighed, all the implications of their decision, and where matters of social policy are not involved which the collective wisdom of Parliament is better suited to resolve".***

The above is the correct statement of the Constitutional relationship between the Legislature, (Parliament) and the Courts, (the Judiciary).

The Constitution 1992 recognizes this relationship by granting to Parliament in article 106(1) the power to make laws, and also granted the Judiciary in article 125(3) judicial power and the Supreme Court has its jurisdictions specified in articles 129; 130, 131 and 132 of the Constitution.

There is thus a fine balance between these two institutions of state, the power to make laws and the power to exercise judicial power respectively. ***In the exercise of this judicial power, the Supreme Court is not expected to act as a robot or consider itself as being placed in a straight jacket. The Supreme Court and indeed any other Court should not have any undue limitations about the exercise of judicial power that has been entrusted to it save references to the Constitution and legislations.***

Indeed, the Supreme Court as the highest court and the Constitutional Court for that matter must consider itself in a unique position as shaping the constitutional and legal development of the country. This it can do, by ensuring that it asserts its authority by giving meaningful and progressive decisions that will affect the ship of state and lead to incongruous results.

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It is in this respect that I am of the view that the time is ripe and proper for this court to take a bold and progressive decision that will recognize the Plaintiffs institution as a Security organization. This is because if one considers the statutory functions that they perform and the powers that has been granted their officials, equating them to Police officers, reference section 234 of PNDCL 330, then the only logical, prudent and practical approach is to consider CEPS as a Security set up.

Much as I concede the fact that trade union activities by their nature can be turbulent and unpredictable, especially taking into account the sensitive nature of the Plaintiffs work and the tools with which they carry out their assignment, these factors alone cannot be used to determine the categorization of the Plaintiffs institution as a security organization.

In coming to the conclusion I have reached in this matter, I have been guided solely by the Constitution 1992 and the laws that are relevant for that purpose and the philosophical underpinnings of Constitutional and Statutory interpretation.

CONCLUSION

This means that, I will declare that upon a true and proper interpretation of the Labour Act 2003 Act 651, particularly Section 1 thereof, the application of the said law to include, the Customs, Exercise and Preventive Service (CEPS) is inconsistent and contravenes not only the provisions of the Security and Intelligence Agencies Act, 1996, (Act 526) but is also inconsistent and contravenes article 24(4) of the Constitution 1992.

The Plaintiffs are therefore by operation of the Constitution and law exempt and excluded from the operation and application of the Labour Act 2003 Act 651. This means that the Plaintiffs employees cannot unionise because of the sensitive and security nature of their work.

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Having come to this conclusion, it is not considered worth while to deal with the other issue which deals with the validity or otherwise of the Collective Bargaining Certificate.

Judgment is accordingly entered for the Plaintiffs on relief one of their writ of summons.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

I agree

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

I agree

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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