IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: ATUGUBA, AG .C.J (PRESIDING)
DR. DATE-BAH, J.S.C
ADINYIRA (MRS), J.S.C.
OWUSU (MS.),J.S.C
ANIN-YEBOAH, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS.) J.S.C

WRIT No. J1/19/ 2012
19TH OCTOBER, 2012

RANSFORD FRANCE . . . PLAINTIFF

VRS.

1. **THE ELECTORAL COMMISSION**
2. **THE ATTORNEY-GENERAL . . . DEFENDANTS**

J U D G M E N T

DR. DATE-BAH JSC:

On 6th July 2012, the plaintiff, a citizen of Ghana, issued a writ to invoke the original jurisdiction of this Court indorsed with the following reliefs:

(i) "A declaration that upon a true and proper interpretation of Articles 23, 51 and 296 (c), the 1st defendant in the exercise of its functions and discretionary power in creating new constituencies, is required to make by Constitutional Instrument, regulations not inconsistent with the Constitution or any other law to govern the exercise of its discretionary power;

(ii) An order directed at the 1st Defendant compelling the 1st Defendant to, as required by Articles 51 and 296 (c) of the 1992 Constitution, make by Constitutional Instrument not inconsistent with the Constitution or any other law, regulations to govern the exercise of its discretionary power to create new constituencies including in particular, the specification of the formula and mechanism to be used in the creation of new constituencies;

(iii) A declaration that failure by the 1st Respondent as required by Article 51 and 296 (c) of the 1992 Constitution to make the Constitutional

Instrument referred to in (i) above is a breach of the fundamental human right to vote of all citizens of Ghana qualified to vote;

(iv) An order of perpetual injunction restraining the 1st Defendant from laying before Parliament any Constitutional Instrument creating new constituencies and or revoking the Representation of the People (Parliamentary Constituencies) Instrument, 2004 [C.I. 46], until and unless the 1st Defendant has laid before Parliament a Constitutional Instrument which sets out clearly, regulates and governs the manner in which the 1st Defendant intends to exercise its discretionary powers in creating new constituencies including particularly, the specification of the formula and mechanism to be used in the creation of new constituencies, and that Constitutional Instrument has come into force;

(v) An order of perpetual injunction restraining the 1st Defendant from laying before Parliament any Constitutional Instrument creating new constituencies and or revoking the Representation of the People (Parliamentary Constituencies) Instrument, 2004 [C.I. 46] until the hearing and final determination of this matter.

(vi) Any other order or orders as this Honourable Court may seem meet."

On the 3rd October, 2012, the plaintiff filed a motion for leave to amend the writ of summons by adding the following further reliefs:

i. "a declaration that the laying by the 1st Defendant of the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 before Parliament purporting to create new constituencies for Parliamentary Elections in the Republic of Ghana and its subsequent entry into force on the 3rd day of October, 2012, is inconsistent with Articles 23, 51 and 296(c) of the Constitution 1992;
ii. an order declaring as null, void and of no effect the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 as having been made in contravention of Articles 23, 51 and 296 (c) of the Constitution, 1992."

Leave was duly granted the plaintiff on 10th October for these additional reliefs to be added to the endorsement on the Writ.

The first defendant has contended that article 48 of the Constitution provides for a dispute resolution forum for any person aggrieved by a decision of the Electoral Commission in respect of a demarcation of a constituency and that it is from this forum that the plaintiff must seek relief. This forum is the tribunal mentioned in article 48, which makes provision for a right of subsequent appeal to the Court of Appeal from the tribunal. It cites in support of this view the Supreme Court decision in *Richard Odum Bortier & Anor v Electoral Commission & Anor* (judgment delivered on February 23, 2012, Suit No. J1/9/2011). In short, it

contends that the plaintiff is in the wrong forum. The second defendant, in his Amended Statement of Case, also adopted the same defence.

Pursuant to leave granted by Ansah JSC, sitting as a single Justice of the Supreme Court on an interlocutory matter, an *Amicus Curiae* Statement of Case was filed on behalf of Mr. Chris Ackummey on 3rd October 2012. This Statement of Case also endorsed the position adopted by the first defendant based on the *Bortier* case.

In the *Richard Odum Bortier* case, the plaintiff's claims did relate to the demarcation of the boundaries of constituencies and Akuffo JSC, delivering the judgment of the Supreme Court said:

> "Even though the declarations sought appear, largely to be based on basic Constitutional principles, we have no doubt that, in this case, what the Plaintiff seeks to dispute is the manner in which the EC has demarcated, is demarcating and might demarcate boundaries in the exercise of its power under Article 47. Such a challenge cannot be mounted in this court through an invocation of our original jurisdiction."

However, in this present case, the first defendant's argument based on the *Richard Odum Bortier* case is not well founded, since the plaintiff's complaint in this case is not about "a decision of the Electoral Commission in respect of a demarcation of a boundary" (the language of article 48), but rather about the

validity of the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78. As is well-known, article 2(1) vests this Court with jurisdiction to entertain suits challenging the validity of enactments which are in conflict with the Constitution. Article 2(1) provides as follows:.

> "(1) 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."

Accordingly, in my view, this Court is vested with jurisdiction over the plaintiff's suit. Although a declaration by this Court that the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 is invalid would have an impact on the demarcation of constituency boundaries, there is also a different genuine issue in controversy regarding the impact of an alleged breach of article 296(c) on the validity of the Instrument. This issue in controversy cannot be ignored by this Court, simply because it has a side effect on the demarcation of constituency boundaries. To describe the impact of this case on the demarcation of constituency boundaries as a side effect is not to triavialise that impact, but to give pride of place to the enforcement of the supremacy of the Constitution. Where invalidity of an enactment is in issue, the exclusive original jurisdiction of

this Court under article 130(1) of the Constitution prevails over the jurisdiction of the tribunal established under article 48, even if the invalidity would have an impact on the demarcation of constituency boundaries. The *Bortier* case (*supra)* is clearly to be distinguished from the present case, since in the *Bortier* case an issue of invalidity of an enactment on account of its conflict with the provisions of the Constitution was not raised.

The crucial issue in this case is the interpretation to be given to article 296(c) of the 1992 Constitution. Article 296 of the 1992 Constitution reads as follows:

> "Where in this Constitution or in any other law discretionary power is vested in any person or authority -
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> (a) that discretionary power shall be deemed to imply a duty to be fair and candid;
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> (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased whether by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and
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> (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

This text of article 296 originates from an identical provision contained in article 173 of the 1969 Constitution. The plaintiff's argument based on paragraph (c) of this provision has implications way beyond elections and the constitutional authority of the Electoral Commission. Invalidating the Constitutional Instrument in question on the ground urged by the plaintiff would put at risk innumerable decisions reached in government pursuant to the exercise of discretion. In this connection, it is instructive to note what the Constitutional Commission which put forward the proposal on this issue for consideration by the Constituent Assembly in 1968 had to say on the rationale for it (in paragraphs 731 to 733 of its Proposals of the Constitutional Commission for a Constitution for Ghana at pp. 199-200):

> *"Exercise of Discretionary Power*
>
> 731. Experience has shown that it is practically impossible for any Parliament however well-intentioned to carry out all its legislative duties properly. It has thus become the fashion for discretionary power to be given to Ministers under Acts of Parliament for certain things to be done, usually of an administrative nature. This is often referred to as delegated legislation. This system of delegated legislation can easily lead to abuse. We fully appreciate that delegated legislation by and large are laid on the table of Parliament for the scrutiny of members of Parliament. Experience has shown that placing such legislation on the table has become a mere formality and no effective check is thereby placed on delegated legislation.

732. Much harm is done thereby to the individual and even though we have proposed in Chapter Fourteen of this Memorandum the establishment of an Ombudsman who will deal with administrative complaints we strongly feel that there must be some constitutional limitation on the exercise of discretionary power and **we therefore propose that when discretionary power is given to any person or authority that person should publish a statutory instrument which will set out the principles, the manner and the mode of the exercise of the discretionary power conferred.**

733. We go further and **propose that any discretionary power given to any authority should by itself imply a duty to be fair and candid so that its exercise is not arbitrary, capricious or biased either by resentment, prejudice or personal dislike. And that any such exercise shall be in accordance with due process of law.** This in our view will make it possible for the Courts to determine not only the limits of the exercise of the discretionary power, but also the reasonableness of it and whether the power so vested has been used in good faith."

It was on the basis of this rationale that article 173 of the 1969 Constitution was adopted. It was in the following terms:

"Where in this Constitution or in any other law discretionary power is vested in any person or authority,

(a) that discretionary power shall be deemed to imply a duty to be fair and candid;

(b) the exercise of any such discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and

(c) the person or authority, not being a Judge or other Judicial Officer in the exercise of his judicial functions, in whom the discretionary power is vested shall, by constitutional or statutory instrument, as the case may be, make and publish Regulations, not inconsistent with any provision of this Constitution or of that other law, which shall govern the exercise of that discretionary power."

Thus, article 173(c) of the 1969 Constitution, if literally interpreted, would seem to require that before any discretion is exercised by a public official or agency, the official or agency must first publish regulations governing the exercise of that discretion. It is also possible to interpret the quotation (*supra)* from the 1968 Constitutional Commission's Proposals as supporting such an expansive literal interpretation, when the Commission says: "**we therefore propose that when discretionary power is given to any person or authority that person should publish a statutory instrument which will set out the principles, the manner and the mode of the exercise of the discretionary power conferred".**

However, such an expansive literal interpretation would lead to grave mischief. It would lead to a nuclear melt-down, so to speak, of government, as we have known it since 1969. It would be thoroughly impractical for public officials and agencies in general to publish regulations governing their discretions before they could exercise them, on pain of the invalidity of those discretionary decisions. Literally thousands of decisions already taken by public officials and agencies since 1969 would be rendered invalid and would have to be declared so by this Court. These invalid decisions would include the last creation of additional constituencies in 2004, by the Representation of the People (Parliamentary Constituencies) Instrument, 2004 (CI 46). In an *Amicus Curiae* brief filed by Dr. Dominic Ayine in support of the defendant's case, he spells out what I have metaphorically referred to above as a nuclear melt-down as follows:

> "…accepting the argument of the Plaintiff in this case has deep-seated constitutional implications. For example, it would mandate a concomitant declaration of past actions taken by the Commission in breach of article 296(c) as unconstitutional. This is one of the most serious logical consequences of the argument of the Plaintiff; because these past actions cannot mature into constitutional acts through the effluxion of time, this Court cannot turn a blind eye to them."

(Dr. Dominic Ayine is a lecturer from the University of Ghana's Faculty of Law who filed the *Amicus Curiae* brief without leave of the Court. When he appeared before this Court, on 10th October 2012, and the Court pointed out to him that he was not entitled to file the brief without leave, he duly applied for leave, which the Court granted.) Dr. Ayine's analysis is, of course, correct in that there is authority to the effect that estoppel cannot operate in public law to bar the

invalidation of unconstitutional acts. This is the unequivocal effect of Sowah JSC's judgment in *Tuffour v Attorney-General* [1980] GLR 637, in which he clarified the law as follows (at p. 655):

> "Before the court enters upon the interpretation of the relevant provisions it would dispose of the arguments relating to the doctrines of estoppel urged upon it. The very first principle that is enshrined in the Constitution is in article 1 (2) which provides:
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> "(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 and of no effect."
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> This is the constitutional criterion by which all acts can be tested and their validity or otherwise established. A plaintiff under article 1 (2) of the Constitution reed not have any community of interest with any person or authority. His community of interest is with the Constitution.
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> Neither the Chief Justice nor any other person in authority can clothe himself with conduct which the Constitution has not mandated. To illustrate this point if the Judicial Council should write a letter of dismissal to a judge of the Superior Court of Judicature and that judge either through misinterpretation of the Constitution or indifference signifies acceptance of his dismissal, can it be said that [p.656] he cannot subsequently resile from his own acceptance or that having accepted his dismissal, he is estopped by conduct or election from challenging the validity of the dismissal? This court certainly thinks not. The question whether an act is repugnant to the

Constitution can only be determined by the Supreme Court. It is that court which can pronounce on the law.

The decision of Mr. Justice Apaloo to appear before Parliament cannot make any difference to the interpretation of the relevant article under consideration unless that decision is in accordance with the postulates of the Constitution. It is indeed the propriety of the decision which is under challenge. This court does not think that any act or conduct which is contrary to the express or implied provisions of the Constitution can be validated by equitable doctrines of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid."

The plaintiff's response to the ripple effect of invalidating CI 78 is to cite *Ahumah-Ocansey v Electoral Commission* [2010] SCGLR 575 in which the Supreme Court gave prisoners the right to be registered to vote. He says that this interpretation by the Supreme Court implied that prisoners had had the right to be registered to vote right from the inception of the 1992 Constitution and yet the Supreme Court had not held invalid all previous elections held under the Constitution in which prisoners had not been able to exercise their vote. However, with respect, this argument is flawed. Invalidity as a result of non-compliance with the literal meaning of article 296(c) would appear to occur automatically, since what is contemplated is unconstitutionality of an act which is in conflict with a provision of the Constitution. Invalidity of an enactment flows as an inevitable

consequence of its non-compliance with a provision of the Constitution. This is what article 1(2) of the 1992 Constitution demands. Article 1(2) states that:

> "(2) The 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."

The failure of prisoners to register and to vote does not have a similarly automatic effect on the validity of the elections in which they did not participate.

The literal interpretation advocated by the plaintiff in this case cries out for modification, in the context of the realities of actual government practice. This much was recognised by Akufo-Addo CJ in his judgment in *Captan v Minister for Home Affairs (Minister of Interior)* (1970) Gyandoh & Griffiths, A Sourcebook of the Constitutional Law of Ghana Vol.II (Part 2) 457 at 460, where, delivering the judgment of the Court of Appeal sitting as the Supreme Court, he had this to say:

> "There is a very loose sense in which it can be said that most decisions taken by ministers in the day to day performance of their ministerial duties involve the exercise of some discretion, and it is in this sense that the minister's act in revoking a residence permit may be said to involve the exercise of discretion. But can it be seriously argued that the exercise of discretion in this sense by ministers must comply with the requirements of article 173, and in particular, with article 173(c) which requires that the minister shall "make and publish Regulations … which shall govern the exercise of that discretionary power"? The government could hardly govern if this were so. In so far as the Memorandum contained in the

Proposals for a Constitution for Ghana is any guide at all, the three paragraphs, namely, 731, 732 and 733 at pages 199-200 of the Proposals cited by Mr. Quashie-Idun and paragraph 515 at page 141 show clearly that the sort of discretionary powers contemplated by article 173 are those that arise when the legislature or the executive constitutes an administrative agency or some other authority with power to adjudicate quasi-judicially on administrative matters or with power of legislation delegated to it. Apart from the aforementioned observations in the Proposals the Constitution itself contains no definition of "discretionary powers". It may, however, be of some significance to point out that the phrases used in article 173(a) and (b) to describe the requirements for the exercise of discretionary powers were lifted almost verbatim from a dictum of Lord Mansfield C.J. in the old case of R v Askew (1768) 4 Burr. 2186 at p. 2189 in an appeal that came before him from the determination by the College of Physicians as to competence to practise medicine. Lord Mansfield's dictum was that the exercise of discretion of a judicial nature imports a duty to be "fair, candid, unprejudiced; not arbitrary, capricious or biased; much less, warped by resentment or personal dislike."…

To determine whether a discretionary power is exercisable in a judicial manner or is one of an executive nature one has to examine the wording of the instrument creating the power, the subject-matter to which the power is related, the circumstances in which and the conditions under which the power is exercisable and the character of the authority to which it is entrusted."

From this passage, it would appear that Akufo-Addo CJ, who had earlier also been the Chairman of the 1968 Constitutional Commission that proposed the constraint on the exercise of discretion contained in the current article 296(c) of the 1992 Constitution, was not inclined towards an expansive literal interpretation. Even if he and his Commission were so inclined, there would still be a question as to what weight should be given to the original subjective intention of the framers of the provision, given the disruptive consequences of such an expansive interpretation. Constitutional interpretation should never be mechanical, oblivious of the destructive results or implications of a particular interpretation, when an alternative interpretation is available that could avert the identified mischief. In short, as this Court has held many times, a purposive approach needs to be applied.

In *Ghana Lotto Operators Association & Ors. V National Lottery Authority* [2008] SCGLR 1088, when delivering the unanimous judgment of the Supreme Court, I stated as follows, in connection with what weight is to be given to the original subjective intent of the framers of the Constitution (at pp. 1103-4):

> "If one adopts an originalist approach (to borrow a term from United States constitutional law), that is, if one looks no further than the framers' intention, one could make a case for the non-justiciability of the principles. This case is however weakened by the fact that the language proposed by the framers (in this case, the Committee of Experts) to carry out their intent was not adopted by the Consultative Assembly. Accordingly, the inference

may legitimately be drawn that the Consultative Assembly was of a different view. Moreover, reliance on original intent is a method which does not necessarily produce the right interpretative results, as the quotation from the *Theophenous* case (*supra*) demonstrates. While the 1992 Constitution has not yet endured for even two decades, it is nonetheless not safe to rely on this mode of interpretation exclusively or even predominantly. A more modern approach would be to see the document as a living organism. As the problems of the nation change, so too must the interpretations of the Constitution by the judiciary. Interpreting the Constitution as a living organism implies that sometimes there may be a departure from the subjective intention of the framers of it. The objective purpose of the Constitution may require an interpretation different from that of the original framers of it. I think that the issue of the enforceability of Chapter 6 of the Constitution probably illustrates the divergence between subjective and objective purpose, if one is inclined to the conclusion that the framers' intent was against justiciability."

I continue to be persuaded of the need for the Supreme Court to interpret the Constitution as a living document, so to speak. This remains the preferable route to distilling the right meaning from the Constitution. Accordingly, article 296(c) has to be interpreted as part of a living Constitution that provides a workable and functional framework for governance in Ghana. An interpretation that leads to nuclear melt-down, as it were, of government should be avoided. That is why the cue given by Akufo-Addo CJ in the *Captan* case needs to be taken up. This court should follow the highly persuasive authority of *Captan.* The obligation to make

regulations should be limited to discretions that are exercised in quasi-judicial situations. By that I mean where adjudication is involved. Although the learned Chief Justice Akufo-Addo suggests in his judgment that the obligation of the 1969 Constitution's equivalent of article 296(c) is also to apply to situations where a power of legislation is delegated to a public official or body, this is difficult to justify, in the light of the considerations already sketched out above. Accordingly, since the discretion that has been exercised by the Electoral Commission is not quasi-judicial, the obligation imposed by article 296(c) should not apply to it. As Akufo-Addo CJ said in *Captan*, regarding Ministers complying with the equivalent of article 296(c) of the 1992 Constitution, in relation to the exercise of their discretionary powers, "The government could hardly govern if this were so." This sagacious comment applies with equal force in relation to the first defendant in this case. The Electoral Commission could hardly perform its functions if prior to each time it exercises a discretion it has to promulgate regulations containing the principles governing the exercise of that discretion. The framers of article 296(c) of the 1992 Constitution could not have intended such an absurdity. As Sowah JSC said in *Tuffour v Attorney-General* [1980] GLR 637 at p. 648:

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

To take account of the unravelling of government that would be the consequence of upholding the plaintiff's argument is not to submit to political expediency, but

rather to give the relevant provision of the Constitution a purposive interpretation that preserves its objective of providing an effective framework for good governance, rather than serving as an instrument for the unleashing of chaos in government.

The plaintiff, however, is of a different view. He argues in his Supplementary Statement of Case filed on 12th October 2012 with leave of this Court that:

18. "We submit that article 47 of the 1992 Constitution is merely indicative of what must be included in a constitutional instrument made regarding the article and we submit further that the constitutional instrument should be in conformity with article 296 (c) of the 1992 Constitution in that, it must set out clearly the principles, the manner and mode of the exercise of the discretionary power by the Electoral Commission.

19. Article 47 is replete with discretionary power. It does not set out in full the principles, manner and mode of the exercise of the power of the Electoral Commission under the article. It therefore cannot be the answer to dispense with the requirement as contained in article 296 (c). For example, article 47 (1) provides as follows:

> *47 (1) Ghana shall be divided into as many constituencies for the purpose of election of members of Parliament as the Electoral Commission may prescribe, and each constituency shall be represented by one member of Parliament.*

No where in article 47 does it indicate further the maximum or minimum number of constituencies that Ghana may have. This discretion is an

example of a discretion that must be defined by way of a constitutional instrument.

Another example is the number of persons per constituency. The maximum and minimum number of persons per constituency must also be defined by constitutional instrument.

Yet another example of discretion that must be defined in more detail is when to undertake the review of constituencies envisaged under article 47 (5). The time frame for review is after seven years of the last review or within twelve months after the publication of a population census, whichever may come first. Thus if seven years have lapsed after the last review under article 47 (5) and a population census has not been published the Electoral Commission as the position is now is under no obligation to undertake a review.

Also with regards to after the publication of a population census the only fetter on the discretion of the Electoral Commission to act is the twelve month period. Within this twelve month period many questions arise. Is it reasonable for example, for the Electoral Commission to undertake a review two weeks before a general election.

20. It is for the reasons stated above, we respectfully submit, that the argument that article 47 itself contains the principles, manner and mode by which the Electoral Commission should exercise its discretionary power under the article is not tenable.

21. We submit further that the upon a true and proper interpretation of articles 47, 51 and 296 (c), the Electoral Commission is required to publish a constitutional instrument to set out the principles, mode and manner by

which it intends to exercise its power under article 47 of the Constitution. We further submit that this may be done before it exercises its power of reviewing constituencies or together with its power to review constituencies.

22. Thus C. I. 78 could contain the principles; mode and manner by which the EC intended to exercise its powers under article 47 as well as the results of the actual exercise of the discretionary power. It need not be two separate constitutional instruments but any constitutional instrument made in furtherance of the exercise of the power of the Electoral Commission under article 47 should include the principles, manner and mode by which the power will be exercised or has been exercised."

The plaintiff buttresses his case by citing an article entitled "Discretionary Powers in the Second Republic" in the University of Ghana Law Journal ([1971] 7 UGLJ 98) by Professor S. O. Gyandoh, formerly of the University of Ghana, which is very critical of the decision in *Captan. Inter alia,* he writes that:

> "The main thrust of my reaction to the ruling in the Captan case, so far as it relates to the constitutional requirements for the exercise of discretionary powers, is that though the framers of our Constitution, mindful of the excesses of executive authority during our recent history, have sought to carefully circumscribe the exercise of discretionary powers generally, the Supreme Court has by that ruling, reduced the broad scope of the constitutional guarantee of due process of law contained in Article 173 to a practical nullity. This the Court has done out of what appears like excessive

zeal, and perhaps an unexamined enchantment with an artificial distinction, which, in its place of birth, is on its way out, as we have seen.

The Captan case, like the English wartime decision of Liversidge v Anderson should, in my respectful submission, be limited to its special facts. We can validly say that the Captan case involved the exercise of a special kind of power which the Constitution allows to be exercised without reference to the requirements of Article 173, without being committed to the more questionable proposition that the exercise of the power granted could not be judicially reviewed because it was not of a "judicial" character. In other words, the Captan case could, and in my respectful submission should, have been decided on the simple ground that the relevant provisions of the Constitution permit the Minister of the Interior, acting under the Aliens Act, 1963, to expel an alien without assigning any reasons or granting him a hearing, and that such action, by virtue of these same Constitutional provisions, cannot be said to contravene the due process clause of the Constitution.

If the Court had been content to rest its ruling on the conclusion that neither the Constitution nor the Aliens Act confers reviewable discretionary power on the Minister in respect of the expulsion or exclusion of aliens, at least we could reap some comfort from the limited effect of such a ruling. But to go further, as did their Lordships, to make ex cathedra pronouncement that the provisions of Article 173, and in particular the concept of due process of law, can only be invoked when the action

> complained of involves an enquiry of a "judicial" nature is to lay an unfortunate foundation for the perpetration for an indefinite span of time of what the late Earl Bertrand Russell would have called "important error". Happily, our Supreme Court is not bound to follow its own previous decisions or those of any other Court or Tribunal anywhere and therefore the opportunity still exists for a wider and less confusing exposition of the locus operandi of Article 173 by our highest Court."

With the greatest respect, I do not share this opinion of Professor Gyandoh. Akufo-Addo CJ in his remarks in *Captan* was rowing back on the wide statements made in the Proposals for a Constitution for Ghana, presumably because of his subsequent realisation that the realities of government made the initial proposals impractical. Thus, far from this Court limiting the rule in *Captan* to the facts of the case, there is ample policy justification for this Court to follow it. Restricting the scope of article 296(c) by purposive interpretation is not equivalent to removing due process from the exercise of discretionary power. Article 296(a) and (b) contain the standards for the application of such due process. Those two clauses of Article 296, in conjunction with article 23, assure residents in Ghana of fairness and impartiality in administrative processes. Limiting the scope of the obligation to publish regulations before the exercise of discretionary power does not significantly impair due process in administrative matters in Ghana; rather it avoids the unravelling of the system of government as we have known it since 1969. The standard embodied in article 296(c) may well offer a desirable benchmark for good practice and I commend it to those who exercise discretion

to adhere to it whenever practicable, but non-compliance with it should not be treated as resulting in invalidity, for the reasons already explained above.

The second defendant in his Statement of Case rested his defence on an assertion that the first defendant had not exercised a discretion when it formulated the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78. This is palpably incorrect. The first defendant indubitably did exercise a choice or choices in formulating CI 78, although it was not an untrammeled choice or choices, since the criteria listed in article 47 of the 1992 Constitution provided it with guide posts. The issue is thus not whether a discretion was exercised, but rather whether the discretion exercised was one to which article 296(c) applied. As shown above, I do not think that the discretion exercised by the first defendant was one to which article 296(c) applied. However, it would be difficult, linguistically and in terms of plain meaning, to justify the assertion that no discretion was exercised by the first defendant.

I do not see any other constitutional provision that the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 infringes. The plaintiff has not set out to make, nor has he succeeded in making, a case that the first defendant has not measured up to the constitutional standards prescribed in article 296(a) and (b) for the exercise of discretion. There has thus been no proof that either the duty to be fair and candid or to refrain from arbitrariness, capriciousness or bias has been breached. There has therefore been no breach of article 296, read as a whole.

For the reasons set out above, I would dismiss the plaintiff's writ as not well-founded in law.

Before I conclude, let me place on record my appreciation of the industry and skill of all counsel who have been involved in this case, including those who provided the *amicus curiae* briefs. Their collective excellent contribution has enabled this court to clarify an important area of our constitutional and administrative law.

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

ATUGUBA AG. C.J

I agree with the conclusion and most of the reasons given by Dr. Justice Date-Bah in his masterly judgment. I however deem it necessary to express a few views on some of the issues in this case.

The proper interpretation of article 296(c)

Article 296(c) provides as follows:

> "296. Where in this Constitution or in any other law discretionary power is vested in any person or authority –
>
> x x x
>
> (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or

statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

The wording of this provision is very wide indeed. However it is a trite principle of the construction of statutes now fully backed by section 10(4) of the Interpretation Act 2009 (Act 792) that the widest words of a statute can be cut down by the context, scope, surrounding circumstances and true purpose thereof. Numerous decisions abound in Ghana to that effect. In *Kwakye v. Attorney-General* (1981) GLR 9 at 13 it was held that the jurisdiction of a court can be invoked as soon as an act is committed or even threatened. Nonetheless, this court held in *Boyefio v. NTHC Properties Ltd* (1996-97) SCGLR 531 that a restriction on the right of resort by a party to court until the Land Title Adjudication Committee has had the opportunity of determining a dispute which has arisen in a registration district in the course of a registration of title to land or interest in the Land Title Registry is not inconsistent with articles 125(3) and 140(1) of the 1992 Constitution.

In *Okwan v. Amankwa II* (1991) 1 GLR 123, CA, even though the definition of stool land by article 213 of the Constitution, 1979 clearly embraced family lands, the Court of Appeal held that a literal interpretation of that definition would lead to absurd results. Particularly, at 135 Apaloo CJ stated the matter emphatically:

"*I appreciate that this interpretation makes the special mention of family land in the definition of stool land otiose and from that point of view, unsatisfactory,but is a more satisfactory course than to impute to the Constitution makers an intention to convert*, by mere definition and without more, *all family lands into stool lands.*"(e.s.)

Again in *J.H. Mensah v. Attorney-General* (1996-97) SCCLR 329 this court held, despite the clear provisions of article 81 that a minister or deputy minster's term of office runs out with the President's term of office; in order to avoid absurdity.

In *Dolyphyne (No. 2) v. Stevedoring Co. Ltd* (1996-97) SCGLR 373 and *Afendza III v. Tenga* (2005-2006) SCGLR 414 this court had to construe the very wide words governing the grant of special leave to this court in article 131 of the Constitution as follows:

> "131. (1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court –
>
> (a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or
>
> (b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.
>
> (2) *Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant leave accordingly.*" (e.s.)

This court held that article 131(2) did not by its very wide wording purport to empower this court to grant special leave to appeal from any decision emanating from any court whatsoever but only those decisions emanating from the Court of Appeal where the case originated from a court below the High Court of Justice,

because of the context of the provision. See also *Brown v. Attorney-General (Audit Service Case)* 2010 SCGLR 183, Holding (2).

Applying these principles it would be noticed from a careful reading of paragraphs 731 to 732 at pages 199-200 of the Proposals of the Constitutional Commission for a Constitution of Ghana that they related to discretionary power in delegated legislation which could affect the individual. They are as follows:

> "*Exercise of Discretionary Power*
>
> 731. Experience has shown that it is practically impossible for any Parliament however well-intentioned to carry out all its legislative duties properly. It has thus become the fashion for discretionary power to be given to Ministers under Acts of Parliament for certain things to be done, usually of an administrative nature. This is often referred to as delegated legislation. This system of delegated legislation can easily lead to abuse. We fully appreciate that delegated legislation by and large are laid on the table of Parliament for the scrutiny of members of Parliament. *Experience has shown that placing such legislation on the table has become a mere formality and no effective check is* thereby placed on delegated legislation.
>
> 732. *Much harm is done thereby to the individual* and even *though we have proposed in Chapter Fourteen of this Memorandum the establishment of an Ombudsman who will deal with administrative complaints* we strongly feel that there must be some constitutional limitation on the exercise of discretionary power and we therefore propose **that when discretionary power is given to any person or authority that person or authority should publish a statutory instrument which will set out the principles, the manner and the mode of the exercise of the discretionary power conferred.**" (e.s.)

Article 296(c) therefore does not have the wide scope contended by the plaintiffs and therefore cannot affect the issuance of C.I. 78. In any case how could the State operate well under its literal and wide application?

The Constitution as a Living Document

It has always been emphasized that the Constitution is not an ordinary document but one that is not only special in character but that is not static but capable of growth and that its interpretation must move in accordance with its growth and development. As I said with the concurrence of my learned brethren (Akuffo, Date-Bah, Owusu, Anin-Yeboah, Gbadegbe and Akoto-Bamfo, JJ.S.C.) in *Janet Naakaarley Amegatcher v. The Attorney-General and Others* J1/1/2012, S.C. unreported, dated 9th May, 2012:

> "As laid down in the celebrated case of *Tuffour v. Attorney-General* (1980) GLR 634 C.A. (sitting as the Supreme Court) the Constitution is an organic document capable of growth to meet the aspirations and needs of the Ghanaian society. This principle has been stated in very moving terms by Le Dain J in the Canadian case of *R v. Therens* (1985) 1 SCLR 613 at 638-639 and 677 and quoted with approval by Maxwell C.J. of the Western Samoa Supreme Court in *Reference by the Head of State* (1989) LRC 671 S.C. at 676."

At 677 in that case Maxwell C.J. said:

> "*A document such as a Constitution or a Charter of Rights is not calcified into an era, but must be fluent and capable of change to meet current trends and social values. It must be capable of re-evaluation*

should the need arise and, as Wood J says, it must be capable of adaptation." (e.s.)

Applying that principle I then recounted some incidents tending to show the possible abuse of the powers of the Attorney-General under article 88(5) of the Constitution and concluded as follows:

> "Some of these incidents keep recurring. *Consequently, we consider that the time has come for a realistic revisit to article 88(5). Accordingly we come down on articles 88(5) as follows.* All the constitutionally established independent bodies like the Commission on Human Rights and Administrative Justice, The Electoral Commission, etc can sue and be sued on their own relating to their functions per counsel of their choice.
>
> Any person affected by an action involving the State can upon application be joined to such an action, to protect his or its interest. With regard to the Judiciary and the Legislature, where their position on an issue is in conflict with that of the Attorney-General they may proceed on their own by counsel of their choice. However, any of these bodies referred to may access the services of the Attorney-General if they so choose." (e.s.)

Again, article 157(3) of the Constitution provides as follows:

> "157. (3) Without prejudice to clause (2) of this article, *no person sitting in a superior court* for the determination of any cause or matter shall, *having heard the arguments of the parties to that cause or matter and before judgment is delivered, withdraw as a member of the court or tribunal*, or as a member of the panel determining that cause or matter, *nor shall that person become functus officio is respect of that cause or matter, until judgment is delivered.*" (e.s.)

In *Republic v. High Court, Koforidua; Ex parte Eastern Regional Development Corporation* (2003-2004) SCGLR 21 at 41-42, I explained that this provision was aimed at forestalling certain past events in our judicial history in which some judges wilfully resiled from a panel after the close of arguments or even after decision reached at a conference of the panel of judges and therefore its operation ought to be limited to such a mischief. With the disappearance of that mischief in current times judges no longer feel inhibited by that provision from recusing themselves, even after the close of the parties' arguments, on grounds of natural justice, etc and have not given literal obeisance to that provision.

In this case, it will be noticed from the relevant paragraphs quoted herein from the Proposals for the 1969 Constitution concerning "Discretionary Power" that the anxiety of the Commission was that Parliamentarians paid merely formal attention to delegated legislation laid before Parliament and therefore excesses entailed therein could easily pass through into harmful legislation. Today with active plural party politics, Parliament vigorously scrutinizes and fully argues over delegated legislation and so the mischief once dreaded by the 1969 Constitutional Commission has more or less disappeared and would therefore justify a limitation as to the wide scope of article 296(c). See also *Brownlee v. R* (2001) 5 LRC 180 in which the High Court of Australia held that with changing ideas about jury trial the courts need only concern themselves about its essentials and not its pristine original characteristics.

Constitutional Regulations

It is well settled that the failure of a constitutional body to make the necessary rules for the exercise of a jurisdiction does not invalidate the exercise of that jurisdiction, see *Juandoo v. Attorney-General of Guyana* 1971 AC 972, PC applied in several Ghanaian cases such as *Awuni v. West African Examinations*

Council (2003-2004) SCGLR 471. I view article 296(c) to be of similar nature, as for example, article 157(2) which enjoins the Rules of Court Committee as follows:

> "(2) The Rules of Court Committee *shall*, by constitutional instrument, *make rules and regulations for regulating the practice and procedure of all courts in Ghana*." (e.s.)

Conclusion

Article 1(1) of the Constitution which I view as the controlling provision of the entire Constitution provides as follows:

> "1. (1) *The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.*"

This provision means that all arms of government, the Judiciary inclusive, must exercise their powers solely with the view to achieving the welfare of the sovereign people of Ghana with regard to any matter. It therefore follows that since constituencies have been created since the 1992 Constitution and elections smoothly held in respect of them to the benefit of the sovereign people of Ghana, despite the non-compliance with article 296(c), and assuming the literal and wide meaning of it contended for by the plaintiff is correct how would the welfare of the sovereign people of Ghana be served by the invalidation of the newly created constituencies in respect of which much expenditure in terms of time and other resources have been incurred, on account of the procedural prerequisites of article 296(c) breached by *communis error*? Such a decision would run counter to article 1(1) aforesaid and ought to be discountenanced by this court.

After all, the creation of such constituencies could still be challenged on grounds of constitutionality other than 296(c) thereby resulting in a win-win situation for the people of Ghana and our Constitution.

For all the foregoing reasons, I also dismiss the plaintiff's action.

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ACTING CHIEF JUSTICE

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JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS.)
JUSTICE OF THE SUPREME COURT

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