11-12- 2024

IN THE SUPERIOR COURT OF JUDICATURE, THE SUPREME COURT (CIVIL DIVISION), SITTING IN ACCRA ON WEDNESDAY THE 11TH DAY OF DECEMBER, 2024.

CORAM: PROF. MENSA-BONSU JSC (PRESIDING), KULENDI, ASIEDU, KWOFIE AND DARKO ASARE JJSC.

CIVIL MOTION
NO. J5A/01/2024

THE REPUBLIC

VRS

HIGH COURT (CRIMINAL DIVISION 3) ACCRA

EX PARTE: OLIVER MAWUSE BARKER VORMAWOR

Parties

Oliver Barker Vormawor.

Counsel

Dr. Justice Srem Sai for the Applicant with Abraham Afun.

No representation for the State.

Motion invoking the supervisory jurisdiction of the Supreme Court under article 132 for an order of certiorari to issue up to the High Court (Criminal

Division 3) to quash the decision of the High Court which purported to interpret Article 3(3) instead of a referral to the Supreme Court for interpretation.

Applicant alleges that the charges preferred against him are inconsistent with Article 3(3), Article 19(11) and 21 (1) (a) & (b).

The question before the High Court was whether Section 182 of Act 29 is inconsistent with Article 3(3). It became apparent that the Applicant and the State had put rival meanings on Article 3(3). While the Applicant holds the view that Article 3(3) prohibits both violent means and unlawful means to overthrow the state, the State believes it prohibits only violent means used. Unless the Court interprets it otherwise, that the Applicant contends conduct which is either violent or unlawful is prohibited. That section 182 of Act 29 which also prohibits the use of unlawful means to overthrow the State is inconsistent with Article 3(3).

Article 3 (3), states that:

Article 3(3),

> "Any person who -

(a) by himself or in concert with others by any violent or other unlawful means suspends or overthrows or abrogates the Constitution or any part of it, or attempts to do any such act

(b) aids and abets in any manner any person referred to in paragraph (a) of this clause;

Commits the offence of high treason and shall upon conviction, be sentenced to suffer death."

On its part section 182 provides for the offence of treason – felony as follows:

Section 182 "Treason felony -

A person commits a treason felony and is punishable as for a first felony who

(a) Prepares or endeavours to procure by unlawful means an alteration of the law or of the policies of Government , or
(b) Prepares or endeavours to carry out by unlawful means an enterprise which usurps the execution powers of the Republic in a matter of both a public and a general nature."

Applicant alleges that section 182 cannot co-exist with Article 3(3). The point of inconsistency, applicant alleges, is that while death is the penalty for Article 3(3), Section 182 prescribes life imprisonment. Again while a trial under Article 3(3) is to be conducted by a panel of 3 High Court Judges, the mode of trial under section 182 is for a single judge and a jury. Thus two

people engaging in the same unlawful behaviour may find themselves subject to two different laws. Counsel for Applicant
cited **Appiagyei Atua vrs AG** in support of his contention. He concluded by stating that there is need for interpretation as these are weighty matters that if they arise, the High Court must stay the proceedings and refer the case to the Supreme Court for interpretation.

BY COURT

Applicant prays for an order of certiorari to quash the ruling of the High Court dated 27th May 2024. The Applicant submits in paragraph 9 of his affidavit that he ought to be tried by 3 Justices of the High Court as prescribed under Article 19(17) as having been charged under Article 3(3) and not by a Judge and jury as prescribed by section 182.

The Applicant was charged with the offence of Treason felony under section 182(b) of the Criminal and Other Offences Act 1960 (Act 29) which prescribes the offence as a first-degree felony. It is clear from the dictum of Sophia Adinyira JSC in Kwabena Bomfeh vrs AG (2019-2020) 1 SCGLR 137 that

> *"every conceivable case may originate in the Supreme Court by the stretch of human ingenuity and the manipulation of the language to raise a tangible constitutional question. Practically,* ***every justifiable issue can be spun in such a way as to embrace some tangible constitutional implication."***
> (Emphasis supplied)

The argument that section 182(b) contravenes Article 3(3) and cannot co-exist with it has not been made out. Article 3(3) is about the offence of High Treason and section 182(b) is about the offence of treason felony. There is nothing wrong with a lesser offence being carved out of a greater offence. The mode of trial and prescribed penalty show that this is a lesser offence than what is set down in Article 3(3).

The High Court was right to refuse the referral in the ruling of May 27th 2024 as no constitutional issue arose as to the meaning of article 3(3) in respect of section 182(b).

Application refused by 4:1 majority. Kulendi JSC dissenting

(SGD.) PROF. H.J.A.N MENSA BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

(SGD.) S.K.A ASIEDU
(JUSTICE OF THE SUPREME COURT)

(SGD.) H. KWOFIE
(JUSTICE OF THE SUPREME COURT)

(SGD.) Y. DARKO ASARE
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

KULENDI JSC.

On the 11th of December 2024, I expressed my dissent to the majority opinion delivered by this Honourable Court in the matter before us. Having carefully considered the facts, the applicable law, and the reasoning underlying the majority's decision, I find myself unable to agree with the reasoning and conclusions reached.

In consequence and with due deference to my venerable sister and brethren in the majority, I hereby articulate the basis of my disagreement and the principles that inform my position.

INTRODUCTION:

1. The Applicant, a lawyer by profession, per an amended bill of indictment filed pursuant to an order of the High Court dated 11th day of November, 2022, was charged with the offence of "*Treason Felony*" contrary to section 182(b) of the Criminal Offences Act, 1960 (Act 29).

2. In a twenty (20) paragraphed affidavit in support of the instant application, he alleges that he was arrested, detained, tortured and subjected to degrading treatment before being eventually admitted to bail on March 16th, 2022. Subsequently, on the 1st of August 2022 he

was arraigned before the Ashaiman District Court and committed to stand trial before the Respondent High Court, where the amendment of the Bill of Indictment was ordered, his plea formally taken in respect of the charges preferred in the said amended Bill of Indictment and a seven-member jury has been empaneled for his trial.

3. The Applicant contends that the purpose of section 182 of Act 29 is to operationalize Article 3(3) which creates the offence of High Treason and proscribes conduct which amounts to the use of *violent and/or unlawful means to upset the Constitution, or a part of it*. In consequence, the Applicant argues that by charging him with the offence of 'Treason felony' under section 182, the State was in fact alleging that his conduct was in breach of Article 3(3) of the 1992 Constitution and thus amounts to the offence of high treason.

4. *A fortiori,* the Applicant contends that a person charged under section 182, the purpose of which is to give legislative effect to Article 3(3), must be tried by a panel of three High Court Justices, which is the constitutionally prescribed mode of trial in respect of the offence of High Treason. On this basis, the Applicant, on the 29th of April, 2024, filed an application before the Respondent High Court, challenging the constitutionality of his trial and praying that the Court stays the

proceedings under Article 130(2) of the Constitution to refer to this Court for determination, the issue of:

> "*Whether Section 182 of the Criminal Offences Act, 1960 (Act 29) is inconsistent with or in contravention of Article 3(2), Article 3(3), Article 19(11) or Article 21(1)(a) & (b) of the 1992 Constitution*."

5. This application was fiercely resisted by the State per an affidavit in opposition filed on the 20th of May 2024. On the 27th of May, 2024, the Respondent High Court dismissed the application and adjourned the case to the 7th of June, 2024 for the commencement of trial.

6. It is on this factual backdrop that the instant application filed on the 18th of July, 2024, is predicated. The Applicant has, in reaction to the ruling of the High Court dismissing his application, invoked the supervisory jurisdiction of this Court under Article 132 of the Constitution and Rule 61 of the Supreme Court Rules, 1996 (C.I. 16).

7. Our jurisdiction is invoked on the grounds that the proceedings occasioned a jurisdictional error and therefore the Applicant seeks the following reliefs:

i. An order of certiorari to issue to High Court (Criminal Division 3), Accra to bring up to this Honorable Court to have quashed its decision ... dated May 27, 2024 which decision purported to interpret Article 3(3) of the 1992 Constitution.

ii. An order directing the High Court (Criminal Division 3), Accra to stay proceedings and refer the following question to the Supreme Court for determination:

> "*Whether Section 182 of the Criminal Offences Act, 1960 (Act 29) is inconsistent with or in contravention of Article 3(2), Article 3(3), Article 19(11) or Article 21(1)(a) & (b) of the 1992 Constitution*."

THE APPLICANT'S CASE:

8. The crux of the Applicant's case is that the High Court acted in excess of its jurisdiction when it dismissed his application for referral to the Supreme Court for Interpretation and Enforcement, despite the fact that rival meanings had clearly been placed on the scope and effect of Article 3(3) vis a vis section 182 of the Criminal Offences Act, 1960 (Act 29), by both parties to the dispute.

9. In Applicant's view, where conflicting parties assigned contrary meanings to a specific constitutional provision, a real interpretative issue was made out, within the context of Article 130(2), which invoked the duty of the High Court to refer the said issue forthwith to the Supreme Court for determination. The Applicant consequently contends that having failed and/or refused to do so but rather preferring one of the two positions urged, the Respondent High Court acted in excess of its jurisdiction.

10. Indeed, it is evident from the record of proceedings of the Respondent High Court dated 20th May, 2024, that the State had adopted the position urged by the learned author, P.K Twumasi in his book, "*Criminal law in Ghana"* wherein the revered jurist at page 428, had argued that the offence of treason only encapsulated attempts to overthrow the Constitution by force of arms or by such other violent means.

11. Specifically, the State, in opposing the said application stated as follows:

> "*It is our submission that there is no ambiguity of Article 3(3) of the constitution. Indeed Article 3(3) has formed the basis of a prosecution for High Treason in which this court differently constituted*

painstakingly explained the requirement of proof of Article 3(3). Furthermore, per your own decision of the 11th of November, 2022 in the case against the Applicant, the differences between the requirement of Article 3(3) and Section 182 were acknowledged and differentiated. In so saying, that there is no matter before this court that requires further interpretation of the true meaning of Article 3 or the true meaning of Section 182 ...

It is observed that in the application(sic) in support by(sic) the motion brought by the Applicant, he contends that Article 3(3) is inconsistent with Section 182 of Act 29 but in light of the submissions made, it is clear that there is no ambiguity with respect to Article 3(3) and that the true purpose of this application would then be a determination of the ambit of section 182 of Act 29. It is our submission that, that exercise is not within the original jurisdiction of the Supreme Court as provided for under Article 130 (1) and (2) of the constitution. Indeed, P. K. Twumasi Seminal Book, Criminal Law in Ghana explains that the difference between the offence of High Treason and Treason Felony lies in the use of the words "violent or force" and so under Article 3(3), actions of an accused person which in itself constitutes the use of forceful means or violent means to procure the overthrow of the constitution would be distinct from the requirement under Section 182 which omits the use of the word "violent" ...

12. On this premise, the Counsel for the State then proceeded to submit,

> *"The facts before the Court which the prosecution would be looking to prove are that, the accused person by himself did not use violent means but sought to insight(sic) others with the means to do so to procure a usurpation of the executive powers of the government. There is no suggestion that his actions were themselves violent and that is why he has been charged under Section 182 of Act 29. The question of whether these charges are proved or otherwise in accordance with the meaning required under Section 182 falls squarely within the jurisdiction of this court and does not require interpretation of the meaning of Article 3(3)."*

13. Contrarily, the Applicant had at paragraph 9 of his affidavit in support, in particularizing the inconsistency between section 182 of the Criminal Offences Act 1960 (Act 29) and Article 3(3) of the Constitution, stated the following under the first particular:

> a. *That to the extent that it seeks to re-state the offence of high treason, section 182 of the Criminal and Other Offences Act, 1960 (Act 29), is inconsistent with or in contravention of Article 3(3) of the 1992 Constitution.*

14. In bolstering this position, the Applicant, in his *viva voce* submissions before the Respondent High Court, forcefully advanced the following arguments:

> *"Secondly, that Section 180 of Act 29 was made in excess of the powers conferred on Parliament. Article 3(3) of the constitution makes it High Treason if a person does anything which is unlawful to suspend, overthrow or abrogate the constitution. The key phrase is "unlawful means".*
>
> *Then the constitution goes to provide a specific mode of trial for that conduct of using an unlawful means to abrogate the constitution or any part of it and the mode of trial is three Judges of the High Court to try the matter.*
>
> *Then parliament enacted Section 180 of Act 29 which also prohibits the use of unlawful means to alter any law including the constitution.*
>
> *Now then parliament decides to do two things which are not authorized by the constitution or which are contrary or inconsistent with the constitutional regime. The first one is that parliament decided to change the name of the same prohibited behavior to something called "treason felony" but the problem is not even the name. But most importantly,*

parliament decided to create an entirely different mode of trial for the same prohibited behavior of using an unlawful means to either change the laws or abrogate the constitution or a part of it.

Our contention is that, by creating a different regime for trying the same prohibited behavior from what the constitution prescribes, parliament has acted in excess of its powers and in such a situation, the constitution says that we should stay proceedings and refer the matter whether parliament acted in excess of its powers to the Supreme Court for determination ...

If we should substitute the relevant provision, this is what it would sound like. The selective inclusion of some aspect of Article 3(3) that is unlawful means in Section 180 of Act 29 while excluding the mode of trial prescribed by the constitution that is the three High Court Judges poses a significant risk for abusing the fair trial rights of a person who has been charged for using unlawful means to usurp executive powers and I must say that executive powers is part of the Constitution and that is chapter 8."

15. Furthermore, in concluding his submissions before the Trial High Court, Counsel for the Applicant, in one final attempt to justify the

referral of the alleged constitutional issue to this Court, submitted as follows:

> *"My lady on points of law, in Ex-Parte Akorsah previously cited, one of the grounds for referral is with my lady's permission, I will quote "(where rival meanings have been placed by the litigants on the words of any provision of the constitution". The more I listen to the argument to my learned friend, the more I am convinced that there is a rival meaning being put on Article 3(3). There are two prohibited behaviour in Article 3(3). (Counsel reads). It is clear contrary from my learned friend and the statement attributed to the learned Twumasi, Article 3 is not just about violent overthrow but also other unlawful means. Therefore, to create Section 182 for unlawful means only which could have been fixed under Article 3(3) and to go beyond that, to prescribe a different mode of trial, parliament has acted in excess of the powers given to it. In the Republic vis Oliver Barker Vormawor, the erudite Yanzuh J, underscored the different modes of trials (Counsel reads).*
>
> *Our argument is that so long as the constitution provides for trying a person who uses unlawful means, it is only that procedure that must be used and that parliament cannot go and create a different procedure of trial by jury of 7. We pray that this is a genuine case of referral of Article 130 of the constitution."*

16. The High Court, upon hearing both parties dismissed the application on the ground that no real interpretative issue was made out to justify a referral under Article 130(2) and found as follows:

> *"In my ruling on the 11th of November, 2022 in an application by the Accused/Applicant praying the court to quash the indictment for being duplicitous, I had the opportunity to draw the distinction between the types of treasonous offences provided by our laws. In moving this application, both counsel have referred the court to that ruling.*
>
> *In that ruling, I indicated that our laws provides for High Treason, Treason and Treason Felony.*
>
> *Per Article 3(3) of the Constitution 1992, the object of the violent overthrow is the 1992 Constitution. In Article 19 (17) of the 1992 Constitution, the object of the unlawful act is to levy war against the country or to assist any State or person or to incite or conspire with any person to levy war against Ghana or use violent means to overthrow the organs of government established by or under the 1992 constitution.*

Clause 18 is very specific that an act which aims at procuring by constitutional means an alteration of the law or of policies of the government shall not be considered as an act calculated to overthrow the organs of government.

Per section 182 of Act 29, the object of the unlawful means is to alter the law or the policies of the government, or usurp the executive powers of the Republic in a matter of both a public and a general nature. Clearly the ingredients of both offences are different and clearly set out.

From above, it cannot therefore be said that there is any inconsistency with the constitutional provisions thus requiring an interpretation under Article 130 of the constitution 1992. The acts which both treason offences seeks to prohibit are clearly set out and this court finds no matter or issue raised to require me to refer the matter to the Supreme Court for interpretation."

17. The Applicant argues that this ruling amounted to an endorsement of the State's position on the meaning and scope of the Article 3(3) and an exercise in constitutional interpretation, which the High Court had no jurisdiction to undertake. The Applicant further contends that, the Respondent High Court, in concluding that no interpretative issue had been implicated, despite the rival meanings being urged by either

parties, could only point to the fact that the Court preferred the position of the State and upheld the State's interpretation of the Article 3(3) as being the more tenable of the two arguments.

18. The Applicant concludes his submission before this Court at page 8 of his Statement of case as follows:

> *"By refusing to refer the question to your Lordships for determination and by going on to hold trial with a jury (rather than by the constitutionally prescribed mode of trial) the learned Justice of the Court below has usurped your Lordships' exclusive jurisdiction to interpret Article 3(3) of the Constitution. Hence a jurisdictional error."*

THE LAW:

19. One of the earliest cases that enunciated the legal principles that govern the interpretative and by extension, reference jurisdiction of this Court is the case of **Republic v. Special Tribunal; Ex Parte Akosah [1980] GLR 592** at 604 where, this Court said as follows:

> *"We would conclude that an issue of enforcement or interpretation of a provision of the Constitution under Article 118 (1)(a) arises in any of the following eventualities:*

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

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

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

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

20. The second element of this often-invoked four-pronged test has, over the years, been exploited by opportunistic litigants who, seeking to delay the progress of their cases, ascribe contrived, artificial, or even absurd interpretations to constitutional provisions. By doing so, they request stays of proceedings in order to refer the matter to the Supreme Court for constitutional interpretation. This tactic has been used to create unwarranted delays, relying on the most tenuous and implausible readings of constitutional language.

21. In a bid to curb this menace therefore, this Court in the case of **Kpodo & Another v. Attorney-General [2018-2019] 2 GLR 220** speaking through Akuffo CJ, at page 231 opined as follows: -

> *"The position of the law… is that, inter alia, the existence of an ambiguity or imprecision or lack of clarity in a provision of the Constitution is a precondition for the invocation and exercise of the original interpretative jurisdiction of this court. Where the words of a provision are precise, clear and unambiguous, or have been previously interpreted by this court, its exclusive interpretative jurisdiction cannot be invoked or exercised. This is important for ensuring that the special jurisdiction is not needlessly invoked and misused in actions that, albeit dressed in the garb of a constitutional action, might be competently determined by any other court."*

22. This principle was further entrenched in the case of **Bomfeh v Attorney-General [2019-2020] 1 SCLRG 137,** per **Adinyira JSC** at 151-152 where this Court reiterated the principle as follows**:**

> *"The real test as to whether there is an issue of constitutional interpretation is whether the words in the constitutional provisions the court is invited to interpret are ambiguous, imprecise, and unclear and*

cannot be applied unless interpreted. If it were otherwise, every conceivable case may originate in the Supreme Court by the stretch of human ingenuity and the manipulation of language to raise a tangible constitutional question. Practically, every justifiable issue can be spun in such a way as to embrace some tangible constitutional implication. The Constitution may be the foundation of the right asserted by the plaintiff, but that does not necessarily provide the jurisdictional predicate for an action invoking the original jurisdiction of the Supreme Court."

ANALYSIS AND APPLICATION:

23. The Applicant is charged with two counts of Treason Felony contrary to section 182(b) of the Criminal Offences Act, 1960 (Act 29). The section provides as follows:

"Section *182 (**Treason Felony**)*

A person commits a treason felony and is punishable as for a first-degree felony who:

(a) prepares or endeavours to procure by unlawful means an alteration of the law or of the policies of the Government, or

(b) prepares or endeavours to carry out by unlawful means an enterprise which usurps the executive powers of the Republic in a matter of both a public and a general nature."

24. The Applicant has argued that this section purports to be a restatement of the offence of High Treason created under Article 3(3) of the 1992 Constitution. However, the Applicant argues that offence creating section; section 182, is in contravention of the Article 3(3) by reason of the fact that mode of trial prescribed under the Constitution for the trial of the offence of High Treason, which is trial by three justices of the High Court; is jettisoned under section 182. In substitution, the said section which categorizes the offence as a first-degree felony, prescribes a trial by indictment, to be conducted by the High Court constituted by a judge and jury.

25. A close reading of the sections immediately preceding section 182 of the Criminal Offences Act would however reveal that section 182 is not an attempt to legislate the provisions of Article 3(3), as this has already been achieved under section 180 of the said Act. Section 180 of the Criminal Offences Act provides as follows:

Section 180 (Treason)

"(1) A person who commits ***high treason*** *is liable to suffer death.*

(2) For the purposes of subsection (1), ***high treason*** *has the meaning assigned to it by clause (3) of article 3 of the Constitution.*

(3) A person who is not a citizen is not punishable under this section for anything done outside Ghana, but a citizen may be tried and punished for high treason under this section wherever committed"

26. The offence of High Treason, under Article 3(3) of the 1992 Constitution, is defined as follows:

Article 3(3)

"Any person who –

(a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or

(b) aids and abets in any manner any person referred to in paragraph (a) of this clause; commits the offence of high treason and shall, upon conviction, be sentenced to suffer death."

27. In my considered view, our constitutional architecture admits two variants of treasonable offences; High Treason, and Treason.

28. Per **Article 3(3)**, the offence of High Treason is made out in overthrowing, suspending or abrogating (or any attempt so to do) the Constitution or any part thereof. Contrarily, Treason, under **Article**

19(17) consists in levying acts of war against the state, attempting to overthrow the organs of government established under the Constitution, or inciting or conspiring with persons to undertake any of the above actions.

29. Specifically, Article 19(17) of the Constitution provides as follows:

> "*Subject to clause (18) of this article,* ***treason*** *shall consist* ***only***-
>
> *(a) in levying war against Ghana or assisting any state or person or inciting or conspiring with any person to levy war against Ghana; or*
>
> *(b) in attempting by force of arms or other violent means to overthrow the organs of government established by or under this Constitution; or*
>
> *(c) in taking part or being concerned in or inciting or conspiring with any person to make or take part or be concerned in, any such attempt."*

30. Article 19(18), which the constitution sets out as an exception to Article 19(17), also provides as follows:

> "*An act which aims at procuring by constitutional means an alteration of the law or of the policies of the Government shall not be considered as an act calculated to overthrow the organs of government*."

31. A cursory reading of the terms of section 182, vis a vis Article 19(17) clearly reveals that the said section is an attempt to give legislative effect to Article 19(17) and (18), or at least a portion of the said Articles. For instance, section 182(a) is a clear attempt to legislate the inverse of Article 19(18); therefore, whiles Article 19(18) is phrased as permitting the utilization of ***constitutional means*** to alter the laws and policies of a Government; Section 182(a) makes it an offence, to utilize ***unlawful means*** to alter the laws and policies of Government.

32. Furthermore, whilst Article 19(17)(b) proscribes the overthrowing of any of the arms of government, section 182(b), in a bid to give legislative force to the said article, criminalizes any enterprise which usurps the executive powers of the Republic.

33. The existence of section 180, which clearly and concisely codifies the offence of High Treason under Article 3(3) and Article 19(17), which addresses attempts to overthrow organs of government, dispels any notion that section 182 is an attempt to restate Article 3(3) and must therefore be compliant with the provisions that modulate trial of the offence of High Treason. Section 182, as demonstrated, is more closely aligned with the provisions of Article 19(17) and (18), which specifically deal with Treason, rather than High Treason.

34. I am therefore of the considered opinion that the Applicant's argument that section 182 is inconsistent with Article 3(3) is untenable. The two provisions address entirely distinct constitutional domains, and there is therefore no basis to interpret section 182 as overlapping with or attempting restating the provisions of Article 3(3). Instead, I find that section 182 seeks to operationalize the framework set out in Article 19(17).

35. It is for the above reasons I am an unable to endorse the claim by the Applicant that a real or genuine issue of constitutional interpretation is implicated in respect of whether or not section 182 of the Criminal Offences Act, is inconsistent with, or in contravention of ***Article 3(2) or 3(3) of the Constitution***.

36. The above finding notwithstanding, I take inspiration from Article 129(4) of the Constitution which provides that,

> *"For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgement or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme*

Court shall have all the powers, authority and Jurisdiction vested in any court established by this Constitution or any other law."

37. Article 129(4) of the 1992 Constitution vests the Supreme Court with broad and expansive powers to operationalize its decisions and ensure the effective exercise of the various mandates conferred upon it by the Constitution. This provision empowers the Court to exercise the jurisdiction, authority, and powers of any other court established by the Constitution or law, where necessary, to fulfil its constitutional role.

38. The Constitutional intendment of the said Article is to enable the Supreme Court to avoid the derailment of justice by unnecessary technicalities or procedural hurdles. It ensures that the Supreme Court is adequately equipped to uphold the rule of law, enforce its judgments, and adapt its powers to meet the demands of justice in each case. This reinforces the Court's pre-eminence as the final arbiter in constitutional and legal matters, safeguarding the administration of justice against impediments that might undermine its effectiveness.

39. Consistent with the above, it is my considered position that in exercise of its powers under Article 132, this Court may in the interest of justice, exercise this overarching jurisdiction to suo moto raise and

review certain fundamental issues of jurisdiction, which, thought not averted to by the parties to the case, are so foundational that they deprive the Court of jurisdiction to persist in the hearing of a matter.

40. Additionally, it must be emphasized that the Supreme Court, as the apex Court, has a constitutional duty to ensure that justice is not subverted, and judicial resources are not wasted, by proceeding with matters where jurisdictional defects are apparent but have not been raised by the parties. Turning a blind eye to such fundamental issues simply because the parties failed to avert their minds to them would undermine the authority of the Court and compromise the integrity of its decisions. By proactively addressing jurisdictional issues that are foundational to the validity of judicial proceedings, the Court upholds its role as the ultimate guardian of justice and the rule of law.

41. This approach is further reinforced by Article 132, which empowers the Supreme Court to exercise supervisory jurisdiction over all lower courts and adjudicatory bodies. This supervisory authority includes the power to ensure that cases before the Court are properly grounded in law and jurisdiction, thereby safeguarding judicial integrity. By invoking its supervisory jurisdiction to enquire into jurisdictional defects, even suo moto, this Court ensures that its mandate is effectively discharged and that procedural formalities do not

overshadow the substantive justice the Constitution demands. Such an interpretation preserves the foundational principles of fairness and legality that underpin the judicial system and ensures that the Supreme Court's authority remains a bulwark against errors of jurisdiction that could otherwise jeopardize the legitimacy of its decisions.

42. A critical study of our constitutional history would reveal that, prior to the promulgation of the 1992 Constitution, the offence of High Treason did not exist in our constitutional and criminal jurisprudence. Indeed, a study of all previous constitutions would show that this offence was introduced for the first time, under Article 3(3) of the 1992 Constitution. Prior to this period, all previous Constitutions, with the sole exception of the 1960 Constitution, had specifically provided for the offence of treason and proffered a definition for the said offence which definition has been replicated verbatim in all succeeding constitutions, including the 1992 constitution.

43. Specifically, Article 20 (16) and (17) of the 1969 Constitution provided as follows:

> *"For the purpose of this Article and subject to clause (17) of this article, treason shall consist only-*

(a) in levying war against Ghana or assisting any state or person or inciting or conspiring with any person to levy war against Ghana; or
(b) in attempting by force of arms or other violent means to overthrow the organs of government established by or under this Constitution; or
(c) in taking part or being concerned in or inciting or conspiring with any person to make or take part or be concerned in, any such attempt.

(17) An act which aims at procuring by constitutional means an alteration of the law or of the policies of the Government shall not be considered as an act calculated to overthrow the organs of government."

44. This same provision was provided in Article 26(16) and (17) of the 1979 Constitution, however, the prefix, "*for the purpose of this Article*" was omitted from the phrasing, hence indicating a general applicability of the definition of treason to the entire constitutional architecture of the Country.

45. It is therefore salient to note that until the promulgation of the 1992 Constitution, section 180 of the Criminal Offences Act, was in fact a proscription of the offence of "Treason" and not "High Treason" as the latter offence, until 1992 did not exist in our body politic.

46. Subsequent to the promulgation of the 1992 Constitution and the introduction of the novel offence of High Treason however, section 180 of the Criminal Offences Act was amended to operationalize Article 3(3) of the Constitution. This would explain the disparity between the heading of section 180 as '*Treason*' despite the fact that the content of the said section clearly pertains to the offence of High Treason.

47. Article 19(17) of the 1992 Constitution expressly provides for the offence of Treason and provides a confined scope of activities which may be considered treasonous under our Constitutional architecture. Furthermore, the Constitution, in a clear and emphatic bid to express the circumscribed ambit of the offence of treason employs the word '**only'.**

48. The provision states:

> *"Subject to clause (18) of this article, treason shall consist* ***only*** *—*
> *(a) in levying war against Ghana or assisting any state or person or inciting or conspiring with any person to levy war against Ghana; or*
> *(b) in attempting by force of arms or other violent means to overthrow the organs of government established by or under this Constitution; or*
> *(c) in taking part or being concerned in or inciting or conspiring with any person to make or take part or be concerned in, any such attempt."*

49. In my view, the plain and unequivocal effect of Article 19(17) is that, within Ghana's constitutional framework, treason is exclusively confined to the three categories of conduct explicitly outlined in the provision, subject only to the exceptions specified in Article 19(18).

50. This constitutional provision serves as both a substantive and procedural safeguard, ensuring that the definition of treason is neither expanded nor diminished by any other law, legislative act, or judicial interpretation. No offence of treason (or variant thereof) can therefore be created or defined by any other act or law in a manner that deviates from the strict confines of Article 19(17).

51. Any such definition must conform entirely to the scope and content provided by the Constitution and cannot add to or subtract from it. To do otherwise would be to undermine the deliberate and emphatic circumscription of the offence by the framers of the Constitution, violating the principle of constitutional supremacy and eroding the clarity and certainty intended by the provision.

52. This circumscription ensures that treason, being one of the most serious offences in law, is not subject to arbitrary or expansive reinterpretation.

53. In furtherance of my disagreement with the majority's position, I must emphasize that section 182, which purports to create the offence of 'Treason Felony,' is inseparably tied to Article 19(17) of the Constitution. The section, as I have previously found, is clearly an attempt to operationalize the constitutional definition of treason.

54. However, it is my firm view that this attempt to redefine treason through the creation of a lesser offence, '*Treason Felony*' is constitutionally untenable. No offence of treason, whether termed 'Treason Felony' or otherwise, can be validly created by law in a manner that deviates from the definition provided in Article 19(17) of the Constitution. The definition of treason within Article 19(17) is clear, circumscribed, and exhaustive. Any attempt to introduce a different or lesser offence, particularly one with a distinct definition or mode of trial, constitutes an infringement of the constitutional mandate and undermines the integrity of the constitutional framework.

55. In particular, such a redefinition would contravene the procedural protections guaranteed in Article 19(2)(i), which stipulates the mode of trial for the offence of treason. As such, section 182 cannot validly create an offence of '*Treason Felony*,' which does not comply with the

scope, content, and procedural safeguards required under the Constitution.

56. Furthermore, the argument presented by the majority that '*Treason Felony*' is a distinct and separate offence from 'Treason' fails to convince me. The very description of '*Treason Felony*' reveals that it is, in essence, an offence that proscribes acts of treason, albeit categorized as a felonious crime under section 296 of the Criminal and Other Offences Procedure Act, 1960 (Act 30). While the categorization of 'Treason Felony' as a felony may place it within a specific class of offences, this does not alter its fundamental nature as treason.

57. The offence remains treason, and as such, it must be treated in accordance with the constitutional provisions governing treason, including the specific definition and trial procedures set out in Article 19 of the Constitution. Any attempt to categorize it otherwise is inconsistent with the clear and unambiguous intent of the Constitution, which establishes a precise and limited definition of treason that cannot be expanded or modified by legislative action. Therefore, I am unable to accept that the offence of 'Treason Felony' can lawfully stand as a separate and distinct offence from treason as defined in our Constitution.

58. In any case, Article 19(17) opens with the phrase, "*Subject to clause (18) of this article, treason shall consist only ...*" this phrasing suggests that the Constitution has expressly limited the scope of activities that may be proscribed as being treasonous. In consequence, any argument that the offence of Treason Felony is a separate offence, and creates a distinct range of offences which may be described as treason felony, would be in contravention of Article 19(17) is provides a circumscribed scope of what may, in our legal architecture, be deemed as treasonable.

59. My attention has also been drawn to the the argument canvassed by the learned author **P.K Twumasi** (endorsed by the State in their arguments before the High Court) in his book, "*Criminal law in Ghana*" wherein the revered jurist at page 428 opined as follows:

> *"The distinction between treason and treason-felony lies in the fact that, whereas in the former offence the words "by force" are use, in the latter offence the legislature used "unlawful means". The unlawful means may not necessarily involve the use of force and that makes the difference between the two offences under our law."*

60. This contention that Section 182 of the Criminal Offences Act creates a distinct offence from treason under Article 19(17) of the 1992

Constitution rests upon the proposition that treason under Article 19(17) requires, as a prerequisite, the use of arms or violence. On this view, Article 19(17) would narrowly define treason as acts exclusively connected to the violent overthrow or attempted overthrow of governmental organs.

61. This argument seeks to separate '***Treason Felony***', characterized by unlawful but non-violent endeavours to alter the law or usurp executive authority, from '***Treason***', thereby claiming Section 182 as a legislative innovation addressing a perceived gap in constitutional protections against certain non-violent forms of subversion.

62. With great respect to the learned jurist and the State, I find this construction fundamentally flawed, as it is inconsistent with the principles guiding constitutional interpretation, which require a purposive and expansive reading. It would be exceedingly narrow, and indeed absurd, to restrict the interpretation and application of Article 19(17) to instances of violent or armed overthrow alone, thereby excluding other forms of equally egregious subversion that could undermine the constitutional order.

63. The Constitution, as the supreme law of the land, cannot be construed so rigidly as to fail in its overarching orientation and objective to

safeguard the sovereignty and stability of the Republic against all treasonous conduct. The historical context of Article 19(17) reveals that the use of terms such as “force of arms” or “violence” was influenced by Ghana’s specific history of coups, which typically involved the use of military might.

64. This historical emphasis, however, cannot be read to suggest that the drafters intended the Constitution to overlook other forms of treasonous conduct, such as non-violent conspiracies to usurp governmental authority. Such an interpretation would run counter to the classical definition of a revolution as "the overthrow of a legal system in a manner not contemplated by the existing legal regime." By this reasoning, the "violence" referenced in Article 19(17) must be construed broadly to encompass not just physical force but any measures that result in the overthrow or usurpation of the arms of government or their functions in a manner alien to the constitutional framework.

65. Consequently, a purposive reading of the Constitution would reveal no vacuum in the legal framework that Section 182 was necessary to fill. Article 19(17) already criminalizes all conduct constituting treason, whether violent or non-violent, by aiming to preserve the constitutional order from any subversive enterprise. Section 182

therefore cannot be deemed to create a new or distinct offense but rather serves as a restatement of constitutional principles in a statutory format. To argue otherwise would unjustifiably fragment the seamless legal protections enshrined in the Constitution.

66. Furthermore, a thorough study into the pedigree of the nomenclature '*treason felony*' would reveal its colonial antecedents in the **Treason Felony Act 1847** of the United Kingdom, which came into effect on the 22nd of April, 1848 and prescribed as follows:

> "*And be it enacted, That if any Person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most Gracious Lady the Queen, Her Heirs or Successors, from the Style, Honour, or Royal Name of the Imperial Crown of the United Kingdom, or of any other of Her Majesty's Dominions and Countries, or to* ***levy War against Her Majesty****, Her Heirs or Successors, within any Part of the United Kingdom,* ***in order by Force or Constraint to compel Her or Them to change Her or Their Measures or Counsels****, or in order to put any Force or Constraint upon or in order* ***to intimidate or overawe both Houses or either House of Parliament****, or to move* ***or stir any Foreigner or Stranger with Force to invade the United Kingdom*** *or any other Her Majesty's Dominions or Countries under*

the Obeisance of Her Majesty, Her Heirs or Successors, and such ***Compassings, Imaginations, Inventions, Devices, or Intentions, or any of them, shall express, utter, or declare, by publishing any Printing or Writing, or by open and advised Speaking, or by any overt Act*** *or Deed, every Person so offending shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be transported beyond the Seas for the Term of his or her natural Life, or for any Term not less than Seven Years, or to be imprisoned for any Term not exceeding Two Years, with or without hard Labour, as the Court shall direct."* (emphasis mine)

67. Quite clearly, it is the Treason Felony Act of 1847 which inspired the constitutional definition of treason under Article 19(17) and as I have earlier found, this definition informed the prescriptions of section 182 of the Criminal Offences Act.

68. Having established that section 182 is an attempt at enacting Article 19(17) and (18) of the Constitution, I shall now interrogate the said article to examine whether or not real or genuine constitutional issues arise in respect of the said section and its predicate Constitutional provision.

69. Firstly, it is clear that section 182 proffers a definition to treason felony, which is clearly at variance with the Constitutional definition prescribed under Article 19(17). Specifically, while the constitution defines treason as levying war against Ghana, attempting to overthrow organs of government and being involved in, inciting or conspiring with others to commit these acts; treason felony is defined under section 182 as preparing or endeavoring to change the law or government policies unlawfully or preparing or endeavoring to usurp executive powers of the Republic unlawfully.

70. In a judgment of this Court dated the 21st day of May, 2023 with Suit No.: J1/14/2022 intituled **Prof. Kwadwo Appiagyei-Atua & 7 Ors vrs. Attorney General**, this Court speaking through my respected brother Amegatcher JSC. emphasized the danger in failing to reproduce in full, the applicable constitutional text in legislations seeking to operationalize constitutional provisions:

> "*Further, it is apparent that Act 1012 borrows from Article 31 but does so sparingly and potentially in a manner that fails to align with the principles established by the constitutional provision fully ... The selective inclusion of some aspects of Article 31 in Act 1012, while excluding other crucial requirements and safeguards, poses a*

significant risk for abusing emergency powers and infringing human rights during emergencies."

71. Evidently, the definition of treason felony under Section 182 of the Criminal Offenses Act falls short of fully reproducing the full scope of treason as prescribed under Article 19(17) of the 1992 Constitution. This discrepancy is constitutionally problematic under the principle of non-derogation, which holds that subsidiary legislation cannot narrow or limit constitutional mandates. When the Constitution defines a phenomenon as consisting of a designated scope, any statute that omits a portion of the defined scope inherently derogates from the constitutional boundaries, even if it does not explicitly contradict it. Such omissions result in an unconstitutional limitation of the phenomenon's definition, imposing a scope narrower than what the Constitution explicitly prescribes.

72. Subsidiary legislation is empowered solely to give full effect to constitutional provisions, not to redefine or truncate them. The selective operationalization of Article 19(17) by Section 182 not only distorts the Constitution's intent but also risks undermining its comprehensive nature.

73. By omitting significant portions of the constitutional definition of treason, Section 182 introduces a risk of misapplication of the law and creates an incongruity between the constitutional text and its purported statutory implementation. Such an omission results in an incomplete enforcement of the Constitution's exclusive definition of treason, undermining the principle that legislation exists to give effect to constitutional provisions in their entirety.

74. I am of the considered opinion that these discrepancies raise a genuine constitutional issue of whether the statutory departure from the definition provided in the Constitution thus renders Section 182 inconsistent with and in contravention of Article 19(17), as it fails to faithfully and fully implement its comprehensive definition of treason.

75. Furthermore, it is worthy of note that Article 19(2)(i) prescribes that:

> *"A person charged with a criminal offence shall, in the case of the offence of high treason or* ***treason****, be tried by the High Court duly constituted by* ***three Justices of that Court*** *and the decision of the Justices shall be unanimous."*

76. Additionally, **Article 139(2)(d)** provides that:

"The High Court shall be constituted by three Justices of the Court for the trial of the offence of high treason or ***treason*** *as required by article 19 of this Constitution."*

77. Much like with the offence of High Treason, the constitution prescribes that the trial of the offence of treason must be undertaken by three Justices of the High Court. This prescription is in clear disparity with section 182 of the Criminal Offences Act which suggests that the offence of 'treason felony' be tried as a first-degree felony by a trial on indictment.

78. In the landmark case of **Tuffour v. Attorney General [1980] GLR 637**, this Court said as follows:

"The very first principle that is enshrined in the Constitution is in article 1(2) which provides:

"(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. "

This is the constitutional criterion by which all acts can be tested and their validity or otherwise established."

79. Once again, this point of divergence between clear constitutional imperative and legislative prescription raises genuine issues of whether or not section 182 of the Criminal Offence Act, 1960 (Act 29), under the which the Applicant was charged, meets the fundamental test of constitutional compliance, as is required of any law within our legal system.

CONCLUSIONS:

80. In my opinion, these foregoing issues have raised serious and genuine constitutional questions concerning whether Section 182 of the Criminal Offences Act contravenes Article 19(17), Article 19(2)(i), and Article 139(2)(d) of the 1992 Constitution. These concerns implicate the fundamental principles of constitutional supremacy, statutory consistency with the Constitution, and the full and faithful implementation of constitutional mandates. Ordinarily, such matters would necessitate a formal referral to this Court for definitive interpretation and resolution.

81. However, as this opinion constitutes a dissent, I acknowledge that such a referral will not proceed in this instance. Nonetheless, I strongly urge Parliament to critically examine the contents of Section 182. This provision must be overhauled and aligned with the Constitution to ensure it fully reflects the scope, prescriptions, and requirements set forth under Article 19(17), which defines treason in an exhaustive and comprehensive manner, and the mode of trial prescribed in Article 19(2)(i) and Article 139(2)(d).

82. A legislative intervention to harmonize Section 182 with the Constitution would not only rectify the potential inconsistencies highlighted in this matter but also fortify the rule of law by ensuring clarity, consistency, and fidelity to Ghana's constitutional framework.

(SGD.) **E. YONNY KULENDI**
(JUSTICE OF THE SUPREME COURT)