IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CONSOLIDATED WRIT NOS.
J1/20/2016
J1/21/2016
J1/23/2016

21ST NOVEMBER, 2018

BETWEEN

1.	ELIKPLIM AGBEMAVA	……..	PLAINTIFF
	AND		
	ATTORNEY-GENERAL	…….	DEFENDANT
2.	ALFRED TUAH-YEBOAH	……	PLAINTIFF
	AND		
	ATTORNEY-GENERAL	……..	DEFENDANT
3.	NANA ASANTE BEDIATUO	……..	PLAINTIFF
	AND		
	ATTORNEY GENERAL	…….	DEFENDANT

JUDGMENT

BENIN, JSC:-This matter calls for the court's interpretation of article 72 of the Constitution, 1992, whether or not the exercise of the prerogative of mercy extends to

conviction for an offence founded on contempt of court. The court is also called upon to decide whether the prerogative of mercy is an affront to the independence of the judiciary as conceived under the Constitution. There is yet a third issue whether the absence of regulations disables the President from exercising the power conferred upon him by article 72 of the Constitution. These are the core issues raised in this case.

Background facts

On the 29th of June, 2016 three people namely, Godwin Ako Gunn, Alistair Nelson and Salifu Maase alias Mugabe, uttered certain statements on a talk show broadcast on an Accra radio station known as Montie FM, 100.1 FM, which were believed to be contemptuous of the Supreme Court, inter alia. On the 5th of July, 2016, those people appeared before this Court on a summons issued by the court for them to show cause as to why they should not be held liable for contempt of Court on the grounds of:

1. Scandalizing the Court.
2. Defying and lowering the authority of the Court.
3. Bringing the authority of the Court into disrepute.

The radio discussions concerned an ongoing case before this court. Hence the title to the contempt proceedings partly bore the title to that case and it reads: Civil Motion No. J8/108/2016 Abu Ramadan & 1 other v. Electoral Commission & 1 other. In re 1. The Owner of the Station-Montie FM 2. Salifu Maase @ Mugabe 3. Alistair Nelson 4. Godwin Ako Gunn. That case became popularly known as the Montie 3 case and will be so described in these proceedings.

On the 18th of July, 2016 this Court convicted the three named contemnors on their own guilty pleas and on the 27th of July, 2016 sentenced them to four months imprisonment each and fines of GH₵ 10,000 each.

Subsequent to the conviction and sentence, the convicts on the 1st August 2016 wrote a petition to His Excellency, The President of the Republic of Ghana, urging him to

exercise the prerogative of mercy under article 72 of the 1992 Constitution in their favour. This petition was forwarded to the Council of State for its advice. By a letter dated 19th August 2016, the Council of State advised that the President could exercise the Prerogative of Mercy. By way of a circular issued by the then Minister of Communications on the 22nd August, 2016, the President announced that he had exercised the prerogative of mercy in favour of the three convicted persons, by remitting part of the jail term.

The above-mentioned decision of the President provoked the current suits before this Court. In the first suit, one Elikplim Agbemava, hereafter the 1st plaintiff, sued the Attorney-General, described hereafter as the defendant, claiming these reliefs:

1. On a true and proper interpretation of articles 72 and 296 of the 1992 Constitution of the Republic of Ghana, the power of the President in consultation with the Council of State to grant pardons is discretionary; as such the President and the Council of State are by law required to exercise that discretionary power in a manner that is not arbitrary or capricious.
2. On a true and proper interpretation of articles 72 and 296 of the Constitution, the exercise of the power of prerogative of mercy ought to be governed by regulations that set out, in an open and transparent manner, the grounds and requirements for the submission and consideration of applications for pardon to ensure certainty, consistency and fairness in the processes that lead to the grant of pardons.
3. In the supreme interest of the people of Ghana in whose name and for whose welfare the President's prerogative of mercy is exercised, on a true and proper interpretation of articles 72 and 296 of the 1992 Constitution, the President and the Council of State shall exercise the prerogative of mercy in a judicial manner that assures the people of Ghana of some clarity, consistency and fairness in the process that leads to the granting of pardon.
4. A declaration that any decision by the President in consultation with the Council of State to grant or refuse a pardon is not one to be made on the basis of the

political question doctrine that can be made without reasons being given for the exercise of such power.

5. Interlocutory injunction to restrain the President in consultation with the Council of State from taking a final decision on the petition submitted on behalf of the three persons convicted for contempt by the Supreme Court until the final determination of this suit.
6. Any other order or orders as this Honourable Court may seem meet.

Relief 5 became moot following invocation of the prerogative of mercy to release the three persons from jail.

In the second suit between Alfred Tuah-Yeboah, called the 2nd plaintiff, and the defendant, Attorney-General, the plaintiff seeks the following reliefs:

1. A declaration that upon a true and proper construction and/or interpretation of article 72 of the 1992 Constitution of the Republic of Ghana, the power of the President of the Republic of Ghana to exercise prerogative of mercy is limited to convictions for "criminal offences" and does not include convictions for "contempt arising from the inherent jurisdiction of the Court" under article 126(2) of the 1992 Constitution and ones initiated by private persons.

   Or in the alternative:

   A declaration that upon a true and proper construction and/or interpretation of article 72 of the 1992 Constitution of the Republic of Ghana, the power of the President of Ghana to exercise prerogative of mercy is limited to criminal convictions and convictions from contempt proceedings initiated by the Attorney General of the Republic of Ghana only.
2. A declaration that the grant of remission of sentence to Godwin Ako Gunn, Alistair Nelson and Salifu Maase alias Mugabe who were sentenced to four (4) months imprisonment by this Court based on its own inherent Jurisdiction under article 126(2) of the 1992 Constitution for contempt is contrary to articles 72 and 296(c) of the 1992 Constitution and is therefore void and of no legal effect.

3. An order of the Honourable Court reversing the remission of sentence which was granted to the three (3) persons mentioned supra and the said convicts be made to serve the remaining prison terms.

And in the last suit the plaintiff, Nana Bediatuo Asante, described herein as the 3rd plaintiff, sought these reliefs against the defendant, Attorney-General:

1. A declaration that upon a true and proper interpretation of articles 14(1)(a), (b), 19(11), (12), (21) and 126(2) of the Constitution 1992, the power in the Superior Courts to commit and/or punish for contempt of court when exercised, is not the same as a prosecution/trial for a criminal offence under the laws of Ghana.
2. A declaration that by the combined effect of articles 14(1)(a), (b), 19(11), (12), (21) and 126(2) of the Constitution 1992, contempt of court is not a criminal offence as constituted and known to the laws of Ghana.
3. A declaration that upon a true and proper interpretation of articles 14(1)(b), 19(12), 125(1), (3), 126(2) and 127(1) of the Constitution 1992, the power to commit and/or punish for contempt of court has been vested in the Superior Courts to ensure the independence of the Judiciary in its judicial functions.
4. A declaration that upon a true and proper construction of articles 14(1)(b), 19(12), 125(1), (3), 126(2) and 127(1) of the Constitution 1992, the scope of the President's prerogative of mercy does not encompass the power to pardon, grant a respite for, substitute a less severe form of punishment for or remit a punishment for contempt of court.
5. A declaration that upon a true and proper construction of articles 14(1)(b), 19(12), 72(1), (3), 125(1), (3), 72(1), (3), 126(2) and 127(1) of the Constitution 1992, the purported grant of a remission of the punishment of the four(4) months imposed on Salifu Maase also known as Mugabe, Alistair Nelson and Godwin Ako Gunn, citizens of Ghana held by the Supreme Court of Ghana on 27th July, 2016 for having acted in

contempt of the Supreme Court of Ghana, is in excess of the powers conferred on the President of Ghana by article 72(1) of the Constitution 1992, an unjustified interference with the independence of the Judiciary and thus, an affront to the Constitution of Ghana.

6. An order declaring as null, void and of no effect the purported grant of a remission by the President of the four (4) months imposed on Salifu Maase also known as Mugabe, Alistair Nelson and Godwin Ako Gunn, citizens of Ghana duly held by the Supreme Court of Ghana for having acted in contempt of the Supreme Court of Ghana.
7. Any further order(s) as to this Honourable Court may seem meet.

This Court, in an effort to resolve overlapping issues arising from the three suits, decided *suo motu* to consolidate them.

In brief, the plaintiffs contend that the remission of sentence that was granted to Godwin Ako Gunn, Alistair Nelson and Salifu Maase alias Mugabe (together referred to as the "Convicts") who were sentenced to a term of imprisonment by this Court based on its jurisdiction under article 126(2) of the 1992 Constitution for contempt is contrary to articles 72 and 296(c) of the 1992 Constitution and a violation of the principle of judicial independence and is therefore void and of no legal effect.

The Attorney-General's response to the plaintiffs' case, briefly stated, is that the plaintiffs have failed to appreciate the different types of contempt and that the act of scandalizing the Court is a criminal offence within the meaning of article 19 clauses (11), (12) and (21) of the Constitution for which a person can be charged, convicted and sentenced. The defendant goes further to say that regarding article 296, at no point did the then President breach the said Article or any other Constitutional provision in relation to the exercise of the prerogative of mercy and that Article 72 has safeguards which were not abused by the then President.

Agreed issues

The parties herein agreed on the following as issues for hearing and decision:

1. Whether or not the words "convicted of an offence" in article 72 of the Constitution 1992 includes committal and conviction for the offence of contempt of court by the Superior Court under article 126(2) of the Constitution.
2. Whether or not the prerogative of mercy of the President of the Republic under article 72 of the Constitution, 1992, extends to and covers a power to grant pardon to persons, who have been convicted for contempt of court, by the Superior Courts under article 126(2) of the Constitution, 1992.
3. Whether or not, if the President's prerogative of mercy under article 72 of the Constitution, 1992, extends to, and covers, a power to grant pardon to persons so committed and convicted, such power or prerogative of mercy is discretionary in terms of article 296 of the Constitution, 1992 and ought to be exercised in accordance with article 296(a) & (b) thereof.
4. Whether or not the exercise of the discretionary power of the President in favour of the contemnors was arbitrary and capricious.
5. Whether or not the grant of remission of the sentence of the contemnors by the President constitutes an unjustified interference with the judiciary and an affront to the Constitution.
6. Whether or not the power of the President of the Republic of Ghana to exercise prerogative of mercy is limited to convictions arising from criminal offence.
7. Whether or not the grant of remission of sentence by the President to the contemnors constitutes an abuse of the President's discretion.

Consideration of the issues

The President's exercise of the prerogative of mercy is provided for in the Constitution (Article 72). It is in issue whether it is undoubtedly discretional and must therefore be exercised in strict accord with the letter and spirit of the Constitution or it is an unfettered executive power. The Supreme Court has the power to enquire into the exercise of this power. Indeed the exercise of the power has its roots in the common

law where the courts assumed the jurisdiction to decide the question whether or not the power to exercise the prerogative did exist or not in a given case. In the same vein, this court is called upon to determine whether the prerogative under article 72 is exercisable in matters of contempt of court; it is a legitimate question. For, the exercise of the power to grant mercy is not an arbitrary presidential act of grace or favour, but one that must be justified in terms of the Constitution.

Article 72 of the 1992 Constitution under which the power is exercised provides that:

(1) The President may, acting in consultation with the Council of State-

(a) grant to a person ***convicted of an offence*** a pardon either free or subject to lawful conditions; or

(b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; or

(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or

(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

(2) Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the President.

(3) For the avoidance of doubt, it is hereby declared that a reference in this article to a conviction or the imposition of a punishment, penalty, sentence or forfeiture includes a conviction or the imposition of a punishment, penalty, sentence or forfeiture by a court-marital or other military tribunal. (the emphasis supplied)

Article **126(2)** which grants the court the power to commit for contempt unto itself provides that:

The Superior Courts shall be superior courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this constitution.

The parties herein are seriously contesting the scope and meaning of article 72 of the Constitution, thereby making it a fit case to invoke the court's original interpretative jurisdiction in the light of the guiding principles set out in the case of **Republic v. Special Tribunal, Ex Parte Akosa [1980] GLR 592.** That decision, though it was determined under the 1979 Constitution, (since abrogated), is equally applicable to the 1992 Constitution since the relevant provisions are *in pari materia.*

Issues 1, 2 and 6

These issues will be addressed together. It appears that emphasis should be placed on the expression "convicted for an offence" as appears in clause 1 of article 72, for it is only a person who has been convicted of an offence who can benefit from the exercise of the power of the prerogative of mercy. What is offence in the first place? Is the word 'offence' as used in this provision synonymous with a criminal offence? Having found the meaning of offence, we would proceed to consider whether in its natural meaning, contempt of court is an offence or criminal offence, as the case may be. Finally, if it is an offence or a criminal offence whether conviction for contempt of court is caught within the meaning expressed in article 72 of the Constitution.

These questions have arisen from the case set up by the 2nd and 3rd plaintiffs. The 2nd plaintiff's case is that contempt is not an offence as stated in article 72. According to him, contempt is also not a criminal offence because it is not defined and punishment for it is not prescribed in a written law; this is obviously in reference to article 19(11) of the Constitution. He submitted that the prerogative of the Crown in England is not the same as that envisaged under article 72 and hence the President of the Republic does not have the power to grant pardon or remission of sentence in all matters for which a person has been convicted and sentenced especially in cases of contempt.

Besides, he also submitted that since the President is amenable to punishment for contempt, then equally he does not have the power under article 72 to exercise prerogative of mercy on persons convicted and sentenced for contempt. For this proposition, he relied on this passage from Blackstone's Commentaries on the law of England (1765-1769): "…..it can only be applied to those rights and capacities which the King enjoys alone in contradistinction to others…..not those which he enjoys in common with any of his subjects." The President enjoys special rights under article 57(5) of the constitution, in matters of criminal prosecution. But when it comes to contempt matters the President has the same rights as the ordinary citizen; hence he has no prerogative of mercy in matters of contempt, he submitted.

For his part, the 3rd plaintiff is of the view that the power of the courts to commit for contempt has nothing to do with the criminal laws of the country, having regard to the definition of criminal offence from a combined reading of article 19 clauses (11) and (21) of the Constitution, 1992 and section 1 of Criminal Offences Act, 1960 (Act 29). In sum, contempt of court is not an offence within the meaning of article 72 of the Constitution, he submitted.

The Defendant submitted that, the plaintiff has failed to take notice of the two classifications of contempt, namely criminal contempt as against civil/quasi criminal contempt. That criminal contempt is a criminal offence as known to the laws of the country.

The defendant further submitted that Article 19(12) creates the only exception to Article 19(11). As such, it recognises that certain acts or commissions amounting to contempt of court, though not contained in any written law with no penalties prescribed, may constitute a criminal offence which will result in conviction and punishment by a Superior Court. It is instructive to note that the contemnors in the instant suit were charged, their pleas taken and were convicted and sentences were imposed on them.

The defendant further submitted that, criminal contempt such as an offence of scandalizing the court under the common law, is a criminal offence within the meaning

of Article 19(21) and all relevant provisions in the Constitution relating to fair trial under Article 19 are applicable.

The word **"offence"** while sometimes used in various senses, generally implies a crime or a misdemeanour infringing public rights as distinguished from mere private rights, and punishable under the criminal laws.

Thus in its legal sense, offence is used to mean crime or criminal offence, once it attracts a penalty of death sentence, imprisonment or a fine. See section 1 of Act 29 which defines crime to mean "any act punishable by death or imprisonment or fine.".

The next point to address is whether contempt of court is an offence, in the context of article 72(1) of the Constitution. In order to address this issue effectively, it must be read together with other provisions of the Constitution, particularly article 19 clauses (11), (12) and (21). We should equally have regard to what the criminal statute law says in view of clause 21 of article 19. The constitutional provisions are:

19(11): No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.

19(12): Clause **(11)** of this article shall not prevent a Superior Court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed.

19(21): For the purposes of this article, "criminal offence" means a criminal offence under the laws of Ghana.

From clause 12 of article 19, even if contempt of court is not defined in a statute and no specific penalty is prescribed for it, the court is nonetheless empowered to commit and punish a person for contempt. It follows that contempt of court is an exception to the provision in article 19(11). Clause 21 of article 19 buttresses the position contained in clause 11 that an offence exists only where there is a particular law which has said so. The proviso in clause 12 thus extends to cover clause 21 as well. The legal situation

then is that for there to be a conviction a person must have been charged with a criminal offence which has been defined by law and the penalty therefor prescribed by the law, the only exception being a charge of contempt of court. In that respect contempt of court is sui generis, a peculiar type of offence. In that respect, it is not the type of sentence imposed which determines whether a person has been convicted of a crime or not, but the fact that he is guilty of a punishable offence.

As was observed by Atkinson J. in R. v. London County Quarter Sessions, ex parte Metropolitan Police Commissioner (1948) 1 KB 670 at 679: "A conviction is an act of a court of competent jurisdiction adjudging a person to be guilty of a punishable offence…….A conviction is nonetheless a conviction because the ensuing penalty is not imprisonment, nor fine, but the finding of sureties for good behaviour."

It may be added that a conviction remains a conviction even if a convicted person is merely cautioned and discharged. The power of pardon may thus be exercised even before sentence is imposed by the court, once a conviction has been pronounced. It is only in matters of remission of sentence that will depend on the imposition of a sentence. In short, under article 72, once it is established that a person has been convicted of an offence, the prerogative of mercy becomes exercisable by the President, acting in consultation with the Council of State. Imposition of sentence is not a requirement of clause (1) of article 72 before the power may be exercised to pardon a person convicted. However, if a sentence has been imposed in addition to the conviction, the other provisions of article 72 come into play. A sentence completes the process of adjudication only, but not for the purposes of exercising the power to grant mercy.

What type of contempt, if any, constitutes an offence? It is noted that the common law has always maintained a distinction between criminal and civil contempt. The key distinction being that criminal contempt, as the name implies, is punishable as a criminal offence, whereas civil contempt does not attract a criminal tag even if imprisonment results therefrom.

On what constitutes criminal contempt, Akuffo-Addo C.J. had this to say in the case of **Republic v. Liberty Press Ltd. and Others [1968] GLR 123 at 135**

"…the courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the courts but against the entire community which the courts serve. Such conduct constitutes the offence of contempt of court, and the courts are vested with the power of dealing with it in a manner that is almost arbitrary. For this reason, the power is rarely invoked and only when the dignity, respect and authority of the courts are seriously threatened. It has been said that these powers are given to the courts (and the judges) to keep the course of justice free …

It is contempt of court by deed or word to scandalise the courts. It is contempt of court to make statements amounting to abuse of the courts. It is contempt of court to make statements which tend to expose the courts or parties who resort thereto to the prejudice or hatred or ridicule of mankind."

As earlier mentioned, contempt of court was a development of the common law, and applied in all common law jurisdictions. Naturally, the construction of what constitutes criminal contempt in other common law jurisdictions has been no different from ours. The learned editors of Halsbury's Laws of England, 4th Edition Reissue, vol. 9(1) para. 402 at page 241 define it as "consisting of words or acts which impede or interfere with the administration of justice, or which create a substantial risk that the course of justice will be seriously impeded or prejudiced."

The English case of AG v. Leveller Magazine Ltd. [1979] AC 440 is relevant to consider. At page 449, Lord Diplock said: "Although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a

continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

There is the need to observe that not all types of contempt are punishable as crime. Elsewhere in England, the courts have cast doubt on the distinction between civil and criminal contempt. Lord Scarman has pointed out in the case of Home Office v. Harman [1983] 1 AC 280, p. 310, that the distinction between the two may have less relevance today, but it is still useful for classification purposes: The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the difference between on the one hand contempt such as 'scandalizing the court', physically interfering with the course of justice, or publishing matters likely to prejudice a fair trial, and contempt which arises from non-compliance with an order made, or undertaking required in legal proceedings. Prior to that, Salmon, L.J. in Jennison v. Baker (1972) 1 All ER 997 at 1002 had described the distinction between civil and criminal contempt as "an unhelpful and meaningless classification."

But the position in this country maintains the distinction, albeit for reason of ascribing criminality to one, whilst the other does not. The case of Ackah v. Acheampong & Another [2005-2006] SCGLR 1 highlights the distinction between civil contempt and criminal contempt. Atuguba JSC had this to say at page 13:

"Contempt of court has been judicially described in varying terminology: as quasi-criminal; see Republic v Numapau; Ex parte Ameyaw II [1998-99] SCGLR 639; as a criminal offence; see Asumadu-Sakyi v. Owusu [1981] GLR 201, CA and as an offence; see British Airways v. Attorney General [1996-97] 547. Nonetheless, it is well settled law that there are two types of contempt, namely, civil contempt which consists of disobedience to a court order by a party to a case and criminal contempt which relates to the interference with the administration of justice, often by a third party: see Tetteyga II v. Sarpor {1973}2 GLR 227, CA; Republic v. Mensah-Bonsu; Ex parte Attorney General [1995-96]1GLR 377 SC; and Atta v. Mohamadu [1980] GLR 862.

The clear distinction between civil contempt and criminal contempt resulting in the former not being a crime or offence but the latter being an offence or crime has been forcefully and plainly made by O'shea v. O'shea [1890] 15 PD 59 and Izuora v. R [1953]1 Lord Scarman has pointed out in the case of Home Office v. Harman [1983] 1 AC 280, p. 310, that the distinction between the two may have less relevance today, but it is still useful for classification purposes: The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the difference between on the one hand contempt such as 'scandalizing the court', physically interfering with the course of justice, or publishing matters likely to prejudice a fair trial, and contempt which arises from non-compliance with an order made, or undertaking required in legal proceedings……..In my view therefore the expression "quasi-criminal" applies to civil as opposed to a criminal contempt. I therefore hold that where the contempt is civil no offence or crime is involved……."

In summary, the punishment for civil contempt is remedial in favour of a complainant, in vindication of private rights. On the other hand, the punishment for criminal contempt is punitive, and in the interest of the public in protection of the authority and dignity of the court.

Consequently, for a contempt of court to come within the provisions of article 72, it must be criminal contempt for which a person has been convicted by a court of competent jurisdiction.

Besides the inherent jurisdiction and articles 19(12) and 126(2) which enable the court to suo motu act on contempt matters, the law has always criminalised contempt of court in this country, and has given recognition to the innate power of the court to punish for contempt, through the enactment of section 224 of Act 29. This is contrary to the categorical statement made by counsel for the 3rd plaintiff in his statement of case that "nowhere in the Criminal Offences Act is contempt of court mentioned as an offence." Section 224 of Act 29 says that:

Whoever in the presence of any Court is guilty of contempt of Court by any insulting, opprobrious, or menacing acts or words is guilty of a misdemeanour.

"Presence", as used in this section should not be given a restrictive meaning by applying it to only contempt committed *in facie curiae*. It is absurd to consider that the law maker will not make contempt committed *ex facie curiae* equally punishable as one committed in the clear view or hearing of the court. In these days of massive electronic communication, contempt of court may be found to have been communicated on the airwaves thousands of miles away.

Thus under our laws, a charge of criminal contempt of court may lie by virtue of articles 126(2) and 19(12) of the Constitution or under section 224 of Act 29. Whereas the court can initiate contempt proceedings *suo motu* under article 126(2) of the Constitution, the Attorney-General or somebody else at his direction may do so under section 224 of Act 29.

At this stage in the discussion it is relevant to refer to the famous case of Toledo Newspaper Co. v. United States 247 U.S. 402 (1918). The law upon which the facts of the case arose is in similar vein to section 224 of Act 29. Judicial Code No. 268 (Act of March 2, 1831) declared the inherent jurisdiction of the federal courts to punish summarily for contempt, and provided that the power "*shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice."* The wording of the statute appeared to restrict contempt to those which occurred in the physical presence of the court or within the court premises. In that case there was a newspaper publication which was complained of as containing contemptuous material. The court upheld the claim for contempt and held the company and the editor liable. The court reasoned that as it is the reasonable tendency of such publications that determines their contemptuous character it was immaterial that they were not circulated in the courtroom or seen by the judge. The court stated that the criterion whether an alleged misbehaviour is within

the "so near" (the presence of the court) clause is not the physical or topographical propinquity of the act to the court, but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tending directly to affect the administration of justice.

From the wording of section 224 of Act 29, "presence" as used, must be given liberal meaning to include any conduct or utterance that brings the administration of justice into disrepute, wherever such conduct or utterance occurred, without limitation as to time or space. Section 224 of Act 29 characterizes contempt as a misdemeanour. As was rightly held in the case of Atta v. Mohamadu (1980) GLR 862, a person could only be convicted and sentenced in a case of contempt if the charge of contempt of court was punishable as a misdemeanour. Thus once criminal contempt of court is a misdemeanour and a misdemeanour is a crime, it follows logically that contempt of court is a criminal offence. Thus the provisions of article 19 (11) and (21) are perfectly satisfied, even though contempt of court is excluded by clause 12 of the said article 19. Indeed it is unreasonable and absurd to suggest that a charge of criminal contempt when laid under Act 29 is an offence, but it ceases to be so when laid under article 126(2) of the Constitution. The characteristics of the proceedings are the same, in terms of arraignment, plea taking, hearing in a summary way, and the available punishment.

This court in Ackah v. Acheampong, supra, relying on other authorities both local and foreign, clearly stated that criminal contempt is a crime and I think it is a correct view which we should affirm.

Before proceeding further, let us quickly dispose of the argument of the 2nd and 3rd plaintiffs which considered that article 72 will only apply to convictions for contempt based on the criminal statute, but not in cases founded on the court's inherent jurisdiction or article 126(2) of the Constitution. This last argument is clearly untenable in the sense that it violates the principle of equality before the law. The reason being that two persons who have both been convicted for contempt of court, now face

different consequences as a result of who instituted the action and in what manner. One enjoys the prerogative of mercy because he was charged and prosecuted under Act 29 by the Attorney-General whereas the other is denied because he was prosecuted under article 126(2) of the Constitution. The effect of a conviction for contempt of court must be the same whether prosecuted under Act 29 or the Constitution.

We consider it necessary to re-echo what counsel for the 3rd plaintiff stated that there is dearth of local authority on this subject, hence he resorted to some decisions from India and the USA to support his argument that contempt of court is not an offence known to the laws of Ghana for which reason it does not come within the provisions of article 72 of the Constitution. We should have thought that the two local cases cited above sufficiently decide this question. Having said that, we would nonetheless consider the external decisions counsel referred to for their persuasiveness and to consider whether they could inform a change in the existing position in this country.

The Indian case that counsel for the 3rd plaintiff cited is State v. Padma Kanta Malviya & Anor. AIR 1954 All 523. Counsel's argument was that the case decided that the word 'offence' as used in article 20{3} of the Indian Constitution did not embrace contempt of court, having regard to existing statutory provisions which had not made contempt of court an offence. It is desirable to set out the facts of that case clearly in order to appreciate the court's decision. The matter reached the apex court by way of case stated. Three questions were addressed to the court for answers. The questions were: 1(a) whether contempt of court is an offence within the meaning of section 5(2) of the Code of Criminal Procedure; 1(b) if it is, whether the particulars prescribed by that Code for the investigation, inquiry and trial of an offence must be followed; (2) whether the alleged contemnor is an accused person within the meaning of section 5 of The Oaths Act, 1873; (3) whether the alleged contemnor is a person accused within the meaning of article 20(3) of the Constitution, and can he, if he voluntarily makes an affidavit, be cross-examined upon it.

The said Article 20(3) of the Indian Constitution only deals with the rule against self-incrimination. It provides: 'No person accused of any offence shall be compelled to be a witness against himself.' And section 5 of the Code of Criminal Procedure states that an accused person is one who has been charged with an offence defined by the General Clauses Act. And section 5 of the Oaths Act requires all witnesses before a court to take an oath.

Having regard to the statutes in question, the court provided these answers to the questions submitted to it:

"1(a) Contempt of court is not an offence within the meaning of section 5(2) of the Code of Criminal Procedure. (b) In view of our answer to the previous question, this question does not arise. (2) The alleged contemnor is not an accused person within the meaning of section 5 of the Indian Oaths Act, 1873. (3) An alleged contemnor is not an accused person within the meaning of Article 20(3) of the Constitution and if he has voluntarily filed an affidavit he can be cross-examined on it."

None of the questions raised the specific issue whether or not contempt of court was an offence. The answers provided took into account the state of the law in India as at the time. The Contempt of Court Act of 1926 which was one of the statutes the court considered in rendering its opinion has since been repealed. A new one came into being in 1971, in which a clear distinction has been drawn between criminal and civil contempt and punitive sanctions have been provided for criminal contempt. Be that as it may, both statute and court decisions take contrary position in this country, hence the Indian decision is irrelevant and inapplicable.

Next, counsel cited a case which he said was decided by the Supreme Court of the State of Indiana in the USA. The title and citation given by counsel is State v. Schumaker, 519 P 2d 1116 (Kan. 1974). From the abbreviation "Kan." I knew it was a case from the State of Kansas and not Indiana. I went through the citation and found the case had nothing to do with the issue of whether or not contempt of court was an offence. That case concerned a lawyer who was charged with contempt for violation of

an order barring him from practice for a duration. However, in view of the importance attached to the issue, I searched through the Supreme Court cases decided in the State of Indiana, bearing this title and found one which is on all fours with the arguments of counsel. That is the case of State v. Schumaker, 164 N.E.408 (Ind. 1928). As was rightly stated by counsel, that case decided that under the existing law of the State of Indiana, the Governor had no power to grant a pardon or remission for persons who had been convicted and sentenced for contempt of court. Counsel summed up the three reasons the court relied upon for its decision, and these are:

(a) there is no provision for jury trial in trials of individuals accused of contempt of court;
(b) proceedings are of a summary nature; and
(c) contempt of court is neither defined nor is punishment prescribed or fixed in any statute.

These reasons will not apply in our situation because with the exception of indictable offences, all other offences are tried summarily without a jury. Moreover, Act 29 has criminalised contempt and prescribed a penalty for it. Besides, our jurisprudence has established criminal contempt as a misdemeanour, meaning it is a criminal offence.

However, even in the USA, counsel's reference is not the predominant view, for, the only other State which has also endorsed that view is the State of Texas, in the case of Taylor v. Goodrich, (1897) 25 Tex. Cv. App. 114; 40 S.W. 515. There are some *obiter dicta* coming from the State of Wisconsin and the US 8th Circuit Court of Appeals respectively, also endorsing that view. The *obiter dicta* may be found in these cases: State ex. rel. Rodd v. Verage 187 N.W. (Wis.) 830; In Re Nevitt, 8th Cir. 117 Fed. Rep. 448.

On the flip side, the apex courts of four States have held the view that contempt of court is an offence for which reason the executive prerogative of mercy extends to it. These States are New Mexico in the case of State v. Magee Publishing Co. 29 N.M. 455; 31 N.M. 276; 242 P. 332 (S. Ct. 1925); Louisiana, in the case of State ex. Rel. Van

Orden v. Sauvinet (1872), 13 AM. Rep. (La) 115; Tennessee, in the case of Sharp v. State (1844) 49 S.W. (Tenn) 752; and Mississippi, in the case of Ex parte Helkey (1899) 4 Smedes & M (Miss) 751.

There was yet another decision this time from the US court for the Northern District of Illinois, the case of US v. Grossman, (1924) 1 Fed. (2nd) 941; in that case the court denied the executive prerogative in contempt convictions. It is the only one I found which ended up in the US Supreme Court, reported as Ex parte Grossman, (1925) 267 U.S. 87; 45 Sup. Ct. Rep. 332. The court overturned the decision, thereby affirming that contempt of court was an offence. I will return to this case again in this decision.

The Ex parte Magee case, supra, is of particular significance. In that case the petitioner was sentenced for contempt of court. The State Governor issued him a pardon. However, the Sheriff of the County refused to recognise the pardon on the ground that it was beyond the executive power. The petitioner brought an application before the Supreme Court of the State of New Mexico. And the court upheld the pardon, reasoning as follows:

".....we have reached a firm conclusion that criminal contempt is an offense arising from a contumacious act against the authority of the court.....The offense is therefore one against the community when considered as a social entity.....It is against the state, and the state being the offending party, has the power to extend grace and forgiveness. That power is exercised through another department of the government, namely the executive.....It is trite to say that the power to pardon is not inherent in any official, board or body. It is vested in the sovereign people, and they have the power to repose it in any official or body which they deem wise and expedient."

Thus, from the United States of America it is accepted that contempt of court is punishable as a criminal offence for which reason the prerogative of mercy applies. In the case of Gompers v. United States, 233 U.S. 604 (1914), whilst responding to the argument that contempt was not a crime, Justice Holmes stated at page 610 that "These contempts are infractions of the law, visited with punishment as such. If such

acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech".

Also in Bloom v. Illinois, 391 U.S 194 (1968) it was held that criminal contempt was a crime in every essential respect. At page 201 Justice White who delivered the opinion of the Court said:

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both… Criminally contemptuous conduct may violate other provisions of the criminal law, but even when this is not the case, convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seems identical – protection of the institutions of our government and enforcement of their mandate".

Besides all that has been said, the standard of proof required in a charge of scandalising the court, scurrilous publication about a judge and all matters that bring the administration of justice into public ridicule and hatred or interfere with the administration of justice is proof beyond a reasonable doubt, the same standard as in all criminal offences. See these cases: Republic v. Numapau; Ex Parte Ameyaw and Others (1999-2000) GLR 283; (1998-99) SCGLR 639; Republic v. Alhassan; ex parte Abbey (1989-90) 1 GLR 139; Gbadamosi v. Mohammadu (1991) 1 GLR 283. In Ex parte Ameyaw, supra, the court stated that contempt of court has all the characteristics of a crime, hence there is the need for a prima facie case to be made out before all available defences may be considered.

From the foregoing discussions, it is manifestly clear that the three charges brought against the three convicts fall within the category of interference with the administration of justice, which is in the realm of criminal contempt. This court reached a similar conclusion in the Montie 3 case when it said: "The attack, which was directed at the Chief Justice of the Republic of Ghana and the Apex Court of the land, amounts to criminal contempt of the Judiciary." And as decided in Bloom v. Illinois, supra, a

conviction for criminal contempt is no different from a conviction for any other crime. Hence, a conviction for a criminal contempt is a conviction for a criminal offence; consequently, it is an offence within the meaning of article 72 of the 1992 Constitution.

Consequently, in the light of the analysis made herein, issues 1, 2 and 6 are answered in these terms. Criminal contempt is an offence and attracts criminal penalties as a misdemeanour, whether it is charged under article 126(2) of the Constitution or section 224 of Act 29; the consequences are the same. Consequently, it is an offence within the meaning of article 72 of the 1992 Constitution; therefore the prerogative of mercy extends to persons convicted of criminal contempt. As long as the executive president is given the discretionary power to pardon, he must have the right and priviledge to exercise it untrammelled by any narrow and restrictive construction of the constitutional grant. Unlike the US Constitution, which excludes impeachment from the power to grant pardon, article 72 of our Constitution makes no reservation. Hence in the US, the Supreme Court has held in the case of Ex parte Garland 71 U.S. 4 (Wall) 333 (1866) at 334 that "the power conferred on the President is unlimited except in cases of impeachment, it extends to every offence known to the law." Again in the USA, in the light of the Supreme Court decisions cited above, the President has the power to exercise this power in such situations. And it was lately invoked on 25th August 2017, when the President granted full pardon to Joe Arpaio, a Sheriff in the State of Arizona, who had been convicted on a charge of criminal contempt and was awaiting sentence by the District Court in Arizona State, in the case of Melendres v. Arpaio. In Ghana the power is broad and unqualified.

The same position applies under the common law from where the power derives its source. The position under the common law is stated briefly in Halsbury's Laws of England, 4th Edn. (reissue) vol. 9(1), para. 404 at page 242 thus: `*The prerogative of the Crown extends to the remission of a sentence for criminal contempt, but the Crown never interferes in the case of a contempt that is not criminal."*

Issues 3, 4 and 7

These issues will also be addressed together. The issue 3 as well as issues 4 and 7 cover the exercise of discretionary power under article 296, in relation to the exercise of the power to grant mercy under article 72 of the Constitution.

Article 296 of the Constitution 1992 provides that:

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 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.

(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 1st plaintiff sought to challenge the exercise of this power on ground, inter alia, that no regulations have been enacted to guide the exercise. He stated this in paragraph 48 of his statement of case thus:

"The Supreme Court is humbly invited to……reject the isolationist and restrictive interpretation of Article 72, for a broader and a holistic interpretation of the Constitution and declare that the President's power under article 72 is discretionary which by the nature of the prerogative of mercy should be governed by laid down rules."

In his view, the absence of a constitutional instrument to regulate the exercise of the power under article 72 is a clear breach of article 296(c) which requires the exercise of discretionary power by non-judicial officers to be governed by regulations enacted in an instrument for that purpose.

He further contended that prerogative of mercy has never been a remedy or power reserved for dis-satisfied convicts and their sympathisers, nor is it a power meant to revise the decisions of courts. According to him the prerogative of mercy is supposed to be a constitutional safeguard against judicial mistakes, and he cited these cases in support: R v. Secretary of State for Home Department; ex parte Bentley (1993) 4 All ER 442; Burt v. Governor-General (1992) 3 NZLR 672. He submitted that no mistake occurred in this case to warrant the exercise of the power under article 72. He therefore called for a judicial review of the exercise and should not be made subject to the political question doctrine.

In response to these arguments, the defendant made reference to some decisions of this court which he said set the criteria a plaintiff must prove in an action founded on article 296. There was no evidence of a violation in the exercise of the power. All what is required is fairness and candour, citing in support the case of Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms (1972) 1 WLR 190; (1972) 1 All ER 280. He submitted that the consultation with the Council of State raises a presumption of fairness unless otherwise proven by the plaintiff.

The 2nd plaintiff made reference to section 34(3)(d) of the Prisons Service Act, 1972 (NRCD 46) which disables persons convicted and sentenced for contempt of court from enjoying a remission of sentence. He submitted that the President is bound by this provision and therefore has no discretion under article 72 to grant remission to a person convicted and sentenced for contempt of court. He also endorsed the view that the legal test or criteria for the exercise of discretion under article 296(c) had not been met.

The defendant responded that section 34 of NRCD 46 was inapplicable when the President exercises the power under article 72.

Before proceeding to address the issues raised, it must be pointed out that the exercise of this power in this country has never been subjected to the test whether or not there was a mistake in the court's decision which the pardon sought to rectify. Even in English law, that is not the practice or policy of the law, so the decisions cited should be

read in context, lest the Presidency should be turned into an appellate chamber, which clearly is not the object and purpose of the law. Article 72 does not impose or even imply any such condition.

Let us now talk about the provisions of the Prisons Service Act, called the Act, which are said to be binding on the President. The relevant provisions of the Act read:

Section 34-Remission for Good Conduct

(1) Subject to subsection (3), a prisoner serving a sentence of six weeks or more may by steady industry and good conduct earn a remission not exceeding one-third of his sentence.
(2) All or any of the remission so earned may be forfeited in accordance with regulations for failure by the prisoner to maintain steady industry or good conduct.
(3) This section shall not apply in the case of a prisoner who is-
    (a) serving a sentence of imprisonment for life;
    (b) detained at the pleasure of the National Redemption Council;
    (c) committed to prison for debt; or
    (d) committed to prison for contempt of court.

The argument is that the President is bound by these provisions and thus he cannot grant remission of sentence to persons committed to prison for contempt of court. If this argument is stretched to its logical conclusion, it will mean that even in life imprisonment jail term, the President cannot exercise the prerogative, reading the section as a whole. Certainly, that cannot be the case. Thus the two enactments, namely section 34 of the Act and article 72 of the Constitution must be read independently, and effect given to each of them. That is particularly so in view of the significant differences in the two enactments, both procedurally and substantively. At any rate, if section 34 of the Act is inconsistent or incompatible with article 72, it has to give way to the latter. The provisions in the Act and article 72 are distinct one from the other in six areas. These are:

(i) the bodies that advise on the remission of sentence are not the same;

(ii) there are exceptions to the type of offences for which a remission may be granted under the Act, whereas no exception applies under article 72;

(iii) remission under the Act is dependent upon good behaviour, but no such restriction applies under article 72;

(iv) unlike article 72, a total pardon is unavailable under the Act;

(v) the quantum of remission is limited by the Act itself, whilst there is no restriction under article 72;

(vi) under the Act a remission earned may be revoked once the beneficiary does not continue to exhibit good conduct, but under article 72 a remission cannot be revoked unless such right was reserved in the instrument granting the remission.

These clear dissimilarities confirm the view that the provisions of the Act cannot be imported into article 72. The two enactments can co-exist independently else the Act will have to give way for obvious inconsistency and incompatibility. An instance is that whereas the President has power to grant absolute pardon for all offences under article 72 of the Constitution, it means that if he is bound by section 34(3)(d) of the Act, he could grant a pardon but he could not grant a remission of sentence for the same offence. This is absurdity at its zenith. The President is not bound by these provisions of the Act when he exercises the power conferred on him under article 72 of the Constitution, for the simple reason that they are inapplicable.

In addressing the other questions raised by the issues under consideration, we are aware that in some jurisdictions clear rules and regulations have been put in place to guide the exercise of the prerogative of mercy. Such rules and regulations guide prospective applicants and the advisory body to the Head of State. They ensure a certain level of transparency and certainty as what considerations go into the advisory process. For instance, under the 2009 Constitution of the Cayman Islands, there is a provision similar to article 72 under consideration. In sections 39 and 40 of their Constitution, the Head of State exercises the prerogative of mercy upon consultation

with a body called the Advisory Committee on the Prerogative of Mercy (ACPM). The ACPM has in place a document called Policies and Procedures Manual, which contains the entire process culminating in its advice to the Head of State on the exercise of the power. It is this type of document the 1st plaintiff is saying should be published as an instrument under article 296(c) before the exercise of the power.

However, when this provision came up for interpretation in the case of Ransford France (No 3) v. Electoral Commission & Anor [2012] 1 SCGLR 705, the court held the non-existence of an instrument setting out guidelines for the exercise of a discretionary power was not fatal. One of the issues raised in that case was the impact of a breach of article 296(c) on the validity of an instrument. The court held that an expansive literal meaning of the provision of article 296(c) would lead to grave mischief. It would lead to a nuclear melt-down of government. It would be impractical for public officials and agencies in general to publish regulations governing their discretion before they could exercise them, on pain of invalidity of those discretionary decisions. The court therefore dismissed the action because to accede to it would mean undoing a whole lot of decisions that had been taken in the past that did not conform to article 296(c).

However, that decision should not be construed to mean that failure to comply with the provisions of article 296(c) attracts no consequences in all cases or situations. Each situation should be examined to determine whether or not the provision is applicable and must therefore be complied with. That is so because, on a daily basis, public officials exercise some form of discretion in taking decisions. It would be inconceivable to suggest that in exercising such discretionary power, regulations must be published beforehand. Such absurd and unreasonable expectation could not be attributed to the framers of the Constitution.

Having regard to the wide executive powers conferred on the President by the Constitution, it would be literally impossible for him to function if he were to go to Parliament with an instrument to guide him in taking discretionary decisions. Thus the Constitution has in-built mechanisms to guide most Presidential actions, whether in

consultation with, or on the advice of or with the approval of, etc. and once the President acts in accordance with the particular constitutional mandate, as in the instance, he is not required to comply with article 296(c).

Article 296(c) applies particularly to persons to whom the Constitution has ascribed some duties involving the use of discretion, without prescribing how those duties are to be performed or supervised. The practice has been that the advisory bodies to the President must have rules and regulations to guide their functions, like the Judicial Council, Police Council, the Council of State etc. And even with these advisory bodies, it would suffice if they have general rules to guide their operations, unless a clear intention to the contrary exists, For, it would be absurd and impractical for them to have regulations for each type of activity or advice they undertake or offer by law. In the Cayman Islands situation, the only function the ACPM performs is to advise on the prerogative of mercy so it is necessary for it to be guided by laid down rules and regulations. The Council of State performs several functions besides advising the President under article 72 on the exercise of the prerogative of mercy.

From the foregoing, the proper exercise of discretion should be marked by fairness and candour and thus any conduct in the exercise of such discretion which may be described as being capricious, borne out of resentment, or bias by personal dislike, or falls short of due process, is not the proper exercise of discretional power and constitutes abuse of same. The rational for article 296 is to check the abuse of discretionary power.

Thus in situations where the Constitution itself provides the safeguards like the instant case (Article 72), it is our opinion that the use of the said power must be viewed in the light of the safeguards provided and where it is found that the safeguards were complied with, then that power would be deemed to have been properly utilised in terms of the said provision, unless there is clear evidence that the advice to the President was tainted in some way, as stated above.

The safeguard under Article 72 is the consultation with the Council of State which seems to have been satisfied per Exhibit "AG 3". And we do not have any evidence that the Council of State was in any way unlawfully influenced in its opinion to the President, which would undermine the exercise of the discretion.

In the Supreme Court decision in the case of Prof. Stephen Asare v. Attorney-General (J1/15/2015) [2015] unreported, Her Ladyship Chief Justice Georgina Wood had this to say:

"… the President's Constitutional authority under article 278(1) involves the exercise of discretionary power. I find no breaches or violations of constitutional or other legal requirements proven in the exercise of this lawful authority. Thus, once the President, in the lawful exercise of his discretionary authority under article 278(1), was satisfied that the work of the CRC, were matters of public interest, was well-suited to be addressed by a Commission of Inquiry, I do not think I can legitimately question the exercise of that executive discretionary decision in the manner and terms requested, in much the same way that in our jurisprudence, the exercise of judicial discretionary authority cannot be interfered with, except in those extreme or exceptional cases, which have been carefully circumscribed by the decisions of this Court."

In the light of the reasoning above quoted, it is re-stated that the discretionary power in article 72 when used in accordance with its provisions, such exercise of the power of mercy will not be questioned by the Courts. Hence, so far as the exercise of the power under article 72 does not infringe any provisions in the Constitution, the Courts will not interfere.

Issue 5

Admittedly, the debate on the question whether or not the prerogative of mercy extends to convictions for contempt of court has been raging for a long time and there does not appear to be an end in sight. The argument has largely centred on the independence of the judiciary, which the proponents believe is undermined and its

authority weakened if the executive has the power to pardon or remit sentence for contempt of court. Others are of the view that the offence of contempt of court is an offence committed against the general public and not the judiciary as an institution so a pardon is in order. Thus the latest pardon granted to Joe Arpaio by the President in the USA in August 2017 has provoked several challenges before court. So various jurisdictions have taken position depending on which side of the argument is more appealing, in the context of existing legislation or the common law. We have stated the position under the common law and the USA as far its Supreme Court is concerned. But some States in the USA, as earlier mentioned, have taken a contrary position depending on how they perceive the State constitutional provisions on the subject. It is our turn to take a position.

In this country, it appears this is the first time the question is receiving the full attention of the apex court. Hence there is dearth of local opinion, even among the academia on it. I remember when the convicts were sentenced and subsequently pardoned, albeit partially, the debate ensued particularly on the air waves and in the social media, whether the exercise of the power by the President did not amount to an interference in the affairs of the judiciary, in the sense that it was a direct affront to the independence of the judiciary.

The proponents of the view that the prerogative of mercy violates the concept of judicial independence have some compelling arguments to make. In an editorial comment published in the Notre Dame Law Review on an article by Francis T. Ready titled 'Pardon for Contempt' in the Vol. 5 Issue 1 dated October 1, 1929, Article 5, this is what was written:

"It is a function of the judiciary to declare and enforce private rights. The power to punish for contempt is an inherent power to enforce its orders and decrees and, in general, to enable it to perform the functions for which it was created. The founders of our government intended that the three branches of our government - legislative, executive, and judicial- should be distinct and independent; that in the exercise of their respective constitutional functions each should be free from interference on the part of every other. The judiciary, more than any other department of the government, should

be immune from outside influence and interference. If the government is permitted to pardon those guilty of contempt of court, the judicial branch of the government is, to that extent, made dependent on the executive branch. It is obvious that the judicial branch of the government cannot effectively perform its functions in the administration of justice unless its authority and dignity are accorded the highest respect, and it's dignity and authority are imperiled when the executive branch possesses a veto over the exercise of its power to punish for contempt and disobedience."

Counsel for the 3rd plaintiff urged the court to be guided by the series of questions posed by way of 'obiter dicta' from Justice Owen in the case of State ex rel. Rodd v. Verage, supra at 841:

"Now is it possible that the people intended that executive should possess a veto over the exercise of the power vested in the courts to punish for a contempt and disobedience of their lawful orders? Is not such a power repugnant to the entire governmental scheme of our Constitution? Is it not destructive of a power of the judiciary essential to enable it perform its functions? Does it not make the judiciary a dependent, and not an independent, branch of government? Does it not constitute power in the governor to grant absolution to those who scout and scoff the authority of the court? That such a power would not generally be exercised by the governor may be conceded, but is not the fact that it's exercise would have such effect sufficient reason for believing that the people never intended to lodge the power with the Governor? Does not the power to pardon in such cases involve the power to nullify the authority of the court to enforce obedience, just as the power to tax involves the power to destroy? Does not the very purpose of the power, inherent in the courts, negatived by the strongest implication the existence elsewhere of authority for its nullification?"

The opponents have equally compelling arguments to make. In the Ex parte Magee case, supra, at 278-280 the court said this:

"It is sometimes said that, if the Governor may pardon an offense of this kind, the independence of the judiciary as a co-ordinate branch of the government may be destroyed; that a Governor may, from personal or political bias or hatred, or from a mistaken sense of duty, absolutely destroy the power and usefulness of any given court

in the state. The reason for the suggestion is manifold. In the first place, no assumption can be indulged that a Governor will ever so far violate his oath, and so far depart from his duty, as to be guilty of such conduct.. In the next place, if such calamity should ever befall the state, the remedy is by impeachment if the conduct should be flagrant.....

Again the proposition that the three departments of the state government are independent of each other is only relatively, and not absolutely true. For example, we are engaged in this very inquiry in an examination into the power and action of the Governor in granting the pardon. Should we conclude his action was without power, his whole proceeding would be undone. We may likewise pass upon the validity of the acts of the Legislature and undo its work, if it be beyond legislative power. The Legislature may impeach and remove from office both executive and judicial state officers. The Governor may veto acts of the Legislature and defeat legislation, unless it be passed by certain required majorities. All these things are familiar to all lawyers, and they show, as has been often said, that the co-ordinate branches of the government are not independent, but there has been wisely introduced into American governments a system of checks and balances whereby justice is secured to the people, and public affairs are wisely administered.

It may also be said that while the power to punish for contempt is inherent in the courts, and its exercise is the exercise of the highest form of judicial power, it nevertheless is true it is a one-man power, exercised without the aid and advice of a jury. Judges are human, the same as Governors and legislators. The power to punish for contempt in cases like the present is exercised under the stress and sting of insult, and human nature may not always be able to withstand such stress without losing the poise and calm judgment so necessary to the proper exercise of judicial power. It may be wise, then, to have a check upon such arbitrary power in the form of pardons by the executive."

One notable article written at the time the convicts were released from jail was attributed to Mr. Martin Amidu, a renowned jurist, currently the Special Public Prosecutor. I found the article on the website called Ghanaweb.com, on Wednesday 17 August 2017 under the general heading "Presidential pardon not an affront to

Judiciary." The learned lawyer wrote this relevant piece: "As for the argument that it will be an interference with the independence of the judiciary to grant any pardon, I will like the proponents of that doctrine to tell the whole world which exercise of the President's powers of pardon cannot be said to be an interference with judicial independence in the sense that it pardons convictions and/or sentences already imposed in exercise of the court's judicial power. That is why it is a prerogative of mercy!: to grant to a person convicted of an offence a pardon……It will be an insult to the integrity, professionalism and maturity of our judicial system to say that the Court will be offended by an exercise of the powers of mercy by the President, simply because the conviction was for contempt of the court."

The USA Supreme Court had occasion to take a comprehensive look at the whole concept of pardon in respect of conviction for contempt in Ex parte Grossman, supra. The arguments presented in that case were in similar vein as the various views presented by the plaintiffs herein. The facts of that case were as follows. The defendant sold liquor at his business in violation of Prohibition. The District Court issued an order that the defendant stop. Less than two months later, the defendant was caught selling liquor again. The court found defendant guilty of contempt of court and sentenced him to imprisonment for one year and a fine of one thousand dollars ($1000.00). By way of a pardon, the President reduced the sentence to the fine. The court denied the President's power to pardon for contempt of court. The Supreme Court upheld the pardon. What is relevant to recount from that decision is the summary of the arguments which as I have said are similar to those argued by the plaintiffs herein and the court's responses to the arguments. The arguments as summed up Taft, CJ were these:

"The argument for the defendant is that the President's power extends only to offenses against the United States and a contempt of court is not such an offense; that offenses against the United States are not common law offenses, but can only be created by legislative act; that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempt against his courts chiefly because the judges thereof were his agents and acted in his

name; that the context of the Constitution shows that the word 'offenses' is used in that instrument only to include crimes and misdemeanors triable by jury, and not contempt of the dignity and authority of the federal courts; and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the legislative, executive and judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority."

The court rejected each one of these arguments, holding that contempts are offenses within the meaning of the constitutional power of pardon; that the power of pardon is the same as that exercised by the King of England prior to the separation of the colonies. On the effect that it has on the independence of the judiciary based on the principle of separation of powers, the court pointed out the many instances where the three arms of government overlap each other, and demonstrated that they are not absolutely independent, but only relatively so.

Independence of the Judiciary

Basically, the concept of separation of powers underpins our Constitution, employing checks and balances to sustain it and ensure a healthy and stable balance of power, lest any branch of government should become too powerful and tend to become dictatorial. It is for such reason that the people have entrusted executive power to the President but have not allowed him freedom to appoint anybody of his choice to sit in Cabinet without approval from Parliament. It means Parliament can tell the President it does not want his nominee to become his Minister, and that is the end of the matter. Will that amount to interference in the power and authority of the executive President? The President's budget can be shot down by Parliament, or that Parliament can deny the President funds to do a specific project. Will that amount to interfering with the operations and authority of the President? All these actions do not amount to an interference with the independence, as well as the functions and authority of the

President because article 58(1) of the Constitution which vests executive power of the state in him subjects the exercise of executive power to the Constitution itself.

In respect of Parliament, article 93(2) of the Constitution vests it with the legislative power of state, but it is also subject to other provisions of the Constitution. Thus the President has the power to veto a bill passed by Parliament, and the latter requires a certain majority of its membership to override a presidential veto. And even after a bill has been passed into law, the Suprême Court can strike it down as unconstitutional and void. In none of these situations could it be said that the authority or independence of Parliament has been interfered with. That is the will of the people expressed in the Constitution.

In all the instances mentioned, the clear intent and purpose is to ensure that these organs of state do not enjoy absolute power or authority without any check on possible abuse, since they are manned by human beings who are subject to the frailties of life. Why should we believe that the members of the judiciary, being human as they are, also do not act in excess in situations where they adjudge themselves to be under attack. Justice emanates from the people, according to article 125(1) of the Constitution. So the people can decide that if they err against the law and are found liable, they could be forgiven, and they have entrusted the power of forgiveness to the President, under article 72 of the Constitution, without limitation or exception. Akuffo-Addo, CJ in the case of Republic v. Liberty Press Ltd, supra, at 135 conceded the point that the courts deal with contempt matters in "in a manner that is almost arbitrary". American jurisprudence equally acknowledges its arbitrariness; see the Ex parte Magee case quoted supra. The arbitrariness of contempt charge was admitted by this court in the Montie 3 case; the court said that "nevertheless, we are mindful that the summary power of the court to punish for contempt of court that has been preserved by article 126(2) of the Constitution is almost arbitrary and such awesome power calls for circumspection in its exercise." Therefore, is it not just fair and reasonable justification that there should be a body to tamper justice with mercy when the court has applied its

almost arbitrary power to punish somebody, if the people want the transgressor to be forgiven?

The judiciary is entirely free in taking judicial decisions and that is where its independence is absolutely guaranteed by the Constitution. So the Parliament's authority in passing legislation is equally guaranteed by the Constitution, and so too is the executive decision making power guaranteed. But after the act or decision, the Constitution says these could be tampered with in appropriate cases, and it is the court's duty to respect the limitation on the power enjoyed by each organ, including the judiciary.

It is thus a total misconception and misapplication of the doctrine of judicial independence to suggest that the judiciary is an island unto itself in the scheme of governance under the concept of separation of powers.

The Constitution

The Constitution itself explains what judicial independence entails. Article 127 of the Constitution 1992 states:

(1) In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, is subject to this Constitution and shall not be subject to the control or direction of any person or authority.

(2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions, and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.

(3) A Justice of a Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power.

(4) The administrative expenses of the judiciary, including salaries, allowances, gratuities and pensions payable to or in respect of, persons serving in the judiciary shall be charged to the Consolidated Fund.

(5) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the superior court or any judicial officer or other person exercising judicial power shall not be varied to his disadvantage.

(6) Funds voted by Parliament, or charged to the Consolidated Fund by this Constitution for the Judiciary, shall be released to the Judiciary in quarterly installments.

(7) For the purposes of clause (1) of this article, "financial administration" includes the operation of banking facilities by the Judiciary without the interference of any person or authority, other than for the purposes of audit by the Auditor-General, of the funds voted by Parliament or charged on the Consolidated Fund by this Constitution or any other law, for the purposes of defraying the expenses of the Judiciary in respect of which the funds were voted or charged.

The language used is succinctly lucid, that the independence of the judiciary relates to its core mandate, that of administering justice, and with it its administrative support. Indeed the judicial power has been explained in article 125(4) to mean jurisdiction in all matters, civil and criminal, including matters relating to this Constitution, and such other jurisdiction as Parliament may, by law, confer on it.

Thus it is in the course of performing this core mandate that the judiciary is completely insulated against any external interference. In criminal matters, the process of adjudication ends in a trial court after sentence is pronounced. After the imposition of a jail term on a person, the execution of the sentence is by executive action, and not

judicial. Criminal Contempt of court is a public wrong, in as much as high treason or robbery is, so it is unreasonable to suggest that the people would allow the President to pardon for all criminal offences except criminal contempt of court, without using express words to that effect. In our view if it was intended that conviction for contempt of court should be excluded, clear words to that effect would have been employed. Under the American Constitution for instance, impeachment is specifically excluded from the prerogative of mercy.

It is a cardinal principle of construing statutes that the court should not supply words which the lawmaker did not intend to insert, in Latin parlance called 'cassus omissus'.The principle is that there is no presumption that a 'cassus omissus' exists, so the court should not create one. Countless decisions have been rendered stressing that the court cannot add to or amend the words used in an enactment. See these cases: Crawford v. Spooner, (1846) 6 Moore PC 1 at pp.8-9; Stock v. Frank Jones (Tipton) Ltd. Stock (1978) 1 All ER 948 at 951 (HL). However, this is not an inflexible principle as the courts have imported words into a statute in circumstances or situations where the section of the legislation, as it stands, is meaningless or of doubtful meaning. But even then as stated in Vickers Sons & Maxim Ltd. v. Evans (1910) AC 444 at 445, (HL), the justification must be found within the four corners of the legislation.

This court had occasion to talk about attempt to write words into legislation, be it the constitution or statute. That was the case of Republic v. Fast Track High Court, Accra; ex parte Daniel (2003-2004) SCGLR 364, at 369-370, where the court, speaking through Kludze, JSC, said this:

"The provision in article 139(1)(c) empowers the Chief Justice to request, in writing signed by him, a Justice of the Superior Court of Judicature to sit in the High Court for any period. The only requirement of this constitutional provision is that the person so requested must be a justice of the Superior Court. In this context, it means that the person requested by the Chief Justice, must be a Justice of the Court of Appeal or of the Supreme Court. The applicant, however, is asking us to hold that article 139(1)(c)

must be read subject to article 145(2). In other words, we are being invited to add a proviso to article 139(1)(c) of the Constitution to say something to the effect that 'the person so requested shall not be 65 years or older'. We know of no authority that confers the power on this court to amend the Constitution of Ghana. We must decline the invitation……..We cannot, under the cloak of constitutional interpretation, rewrite the Constitution of Ghana. Even in the area of statutory interpretation, we cannot amand a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise. Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution. Where the words of a statute are unclear or ambiguous, it is only then that we must try to apply the well-known canons of construction to ascertain and enforce the law…….We must not insert our own words or remove words from the legislation in order to arrive at a conclusion that we consider desirable or socially acceptable. If we do that we usurp the legislative function….."

The 3rd plaintiff wants the court to expand article 72(1) to include a proviso, to read: 'The President may, acting in consultation with the Council of State (a) grant to a person convicted of an offence, other than the offence of criminal contempt, a pardon either free or subject to lawful conditions;……..' The court is bereft of power or authority to do that, it will amount to legislating and not adjudicating.

Moreover, there is no provision in the Constitution, whether in its letter or spirit, on which one could rely to say that the meaning of article 72 is not clear and that the framers of the constitution intended to create a proviso to it. Indeed, the antecedents of this provision, both from its roots under the common law and in this country's constitutional history leave no room to doubt that no exception was intended. As earlier mentioned, if it was intended to exclude convictions for contempt of court from the application of article 72, clear words to that effect would have been employed, just like the American Constitution which specifically excludes impeachment from the

prerogative of mercy. The meaning and import of article 72 is clear and precise, and therefore does not call for the importation of any words to bring out its meaning.

Conclusion

In the light of the discussions herein, it is held that the President's power under article 72 of the Constitution extends to and covers convictions for criminal contempt. Consequently, the remission of sentence granted to the convicts cannot be questioned by this court as it followed due process. All the three writs are accordingly dismissed.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

ADINYIRA, JSC (MRS.): - I had the privilege to read beforehand the well-written and erudite opinions of my learned brothers Dotse and Benin JJSC.

Although I agree with my brother Justice Dotse of the need to preserve a truly independent judiciary to ensure the rule of law in Ghana and that it is vital also to protect it from unbridled interference by the over bearing and sometimes intrusive powers of the executive and the legislature as clearly established under Article 125(3) of the Constitution; and that Article 126(2) is one of the constitutional safeguards to achieve this purpose; nevertheless, with due respect, to my esteemed brother I depart from his reasoning and conclusion that the framers of the Constitution 1992, did not intend, to attribute the power of the superior courts to commit for contempt, as a criminal offence, within the meaning ascribed in the Constitution and Act 29.

The basis for my departure is that contempt of court as envisaged under Article 126(2) is an offence arising from a contumacious act against the authority and dignity of a Superior Court that attracts punishment as allowed by Article 19(12), which places such an act, if proved beyond reasonable doubt, in the class of criminal contemp.

Furthermore, the Constitution makes no reservation to exclude convictions for contempt of court from the application of Article 72.

I accordingly agree with the reasoning and conclusion of my brother Benin that, criminal contempt is an offence and attracts criminal penalties as a misdemeanour, whether it is charged under Article 126(2) of the Constitution or section 224 of Act 29; the consequences are the same. Consequently, it is an offence within the meaning of article 72 of the 1992 Constitution; therefore the prerogative of mercy extends to persons convicted of criminal contempt

I will also dismiss the three writs.

S. O. A. ADINYIRA (MRS.)
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

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

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC: - I have been privy to the opinion of my respected and very distinguished brother Benin JSC in which he has dismissed the reliefs claimed by the Plaintiffs in this consolidated suit. I have applied myself very diligently to the scholarly and detailed analysis made therein, but unfortunately I am unable with respect to go with my brother and other brethren who agree with his conclusion. Even though I agree with his narration of the facts, the analysis of the law, I am with respect unable to agree with the conclusions reached that the writs in this consolidated action be dismissed.
For the reasons herein after stated, I will set out in some detail, the reasons why I hold a contrary view.

In my opinion which I rendered ***"In Re Presidential Election Petition; Akufo-Addo, Bawumia and Obetsebi-Lamptey (No. 4) vrs Mahama, Electoral Commission and National Democratic Congress (No.4) [2013] SCGLR Special Edition, 73, at 303 to 304***, I prefaced my opinion therein with the following quotation and analysis.

> *"In 1776, John Adams, one of the United States' most respected statesmen and author, wrote in his* ***"Thoughts of Government"*** *the following profound statement on the working relationship between the three arms of government, to wit, the* ***Executive***, ***Legislature*** *and* ***Judiciary****. He stated thus:*
>
> ***"The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much***

upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislature and executive, and independent upon both, that so it may be a check upon both, and both should be checks upon that."

After a brief narration and reference to the election petition case of 2013, I continued as follows:-

> *"It is generally understood that there are three branches of government, to wit, the* ***Executive, the Legislature*** *and* ***the Judiciary****. Of the three, it is only the Judiciary that is not elected. Whilst both the Executive and the Legislature are elected and appointed for fixed terms, the Judiciary to a very large extent, are appointed by the Executive sometimes with the approval of the Legislature in the case of the Supreme Court Judges, but once appointed in democratic states, the Judges have security of tenure and cannot be removed from office unless upon stated and proven misbehavior.*
>
> *In most parts of the civilized world, including Ghana, the three arms of government are separate, distinct and independent, at least on paper. In practical terms however, even though there are close working relationships between the* ***Executive*** *and* ***Legislature*** *since their memberships overlap,* ***that of the Judiciary is expected to be truly independent in order to ensure strict adherence to the "rule of law".***
>
> *It is in this respect that I am of the view that the statement quoted above, and attributed to John Adams has become a certainty and a road map for the Ghana Supreme Court to navigate delicately during* ***this case as it does in other cases. It cannot be gainsaid that the stability and progress of any nation depend upon an upright and skillful administration of justice.***

Secondly, in the exercise of judicial power, the ***courts should be seen as being distinct and independent from both the Executive and Legislative organs of state.***

Thirdly, in the performance of its duties, all the organs of government must be seen to be independent one of the other, so however that each may become a check on the other.

Finally, whilst the Judiciary is independent of the Executive and Legislature and a check on both, ***the other two should also be a check on the Judiciary not so however in the performance of its duties."*** *Emphasis*

The above statement clearly epitomises the principles of separation of powers which is the bedrock of all modern and truly democratic constitutions of the free world of which Ghana is indeed a proud member.

In Ghana, article 125 (3) of the Constitution 1992 gives constitutional endorsement to the above statements. It states as follows:-

"The Judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power". Emphasis

Articles 127 (1) and (2) of the Constitution 1992, further amplify these hallowed and fundamental principles which underpin the independence of the Ghana judiciary as follows:-

127 (1) "In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority."

127 (2) "Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever ***shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the state shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts subject to this constitution." Emphasis***

The philosophical underpinnings of the above provisions take their source from the report of the Committee of Experts which states in their report on the Judiciary as follows:-

"Paragraph 247: The chequered history of the rule of law and democracy in this country hardly leaves room for doubt that a strong and independent judiciary is a critical ingredient of a viable constitutional order. As to the role of the Judiciary in sustaining the Constitution, the Committee can do no better than to invoke the ringing words of the Akufo-Addo Report in this regard:-

In considering our proposals for the Judiciary we have had one objective in view. Having proposed a Constitution in which is enshrined the sovereign will of the people and which therefore becomes the fundamental, that is the Supreme Law from which all persons and authorities derive their constitutional existence, duties, rights and powers, we conceive it to be indispensable for the effective operation of the Constitution to have a ***strong, courageous and independent judiciary capable in all circumstances of holding the balance evenly between the over-reaching zeal of bureaucrats and politicians on the one hand and the God-given rights of the individual on the other." Emphasis***

See Report of the Committee of Experts (Constitution) on proposals for a Constitution of Ghana – page 115.

My distinguished and respected scholar, a former law lecturer of mine and a distinguished member of this court Dr. Date-Bah JSC, in his seminal book, "*Reflections on the Supreme Court of Ghana"*, writing on this subject at pages 207-208 stated as follows:-

> *"The independence of the Judiciary is obviously an important element in the checks and balances of the Ghanaian constitutional system. Several constitutional provisions and their underlying polices coalesce to enable the maintenance of a reasonable degree of independence for the Judiciary.* ***These include provisions for relatively independent appointment process for Judges and Magistrates and security of tenure for superior courts justices***. Security of tenure requires that Judges should only be removed from office after independent due process. The forum for Ghana's impeachment process for judges is an independent quasi-judicial tribunal which has the jurisdiction to make determinations on accusations of judicial misconduct. ***As already mentioned, there is also the provision made for the separation of powers between the Judiciary and the two other branches of government.*** *Consequently, the Chief Justice heads a separate and distinct administration for the Judiciary* ***which is independent of the executive and is accorded financial autonomy guaranteed by the Constitution****." Emphasis*

Continuing further from page 207 to 208 the distinguished author and jurist writes as follows:-

> *"In the same way as the President and members of Parliament ground their legitimacy on their electoral mandate,* ***the judiciary's mandate to exercise judicial power derives from this constitutional delegation of power from the people.*** *Judges are anointed so to speak, by the people to do justice on their behalf. The* ***judicial power thus conferred on the Judiciary is***

expressly separated from the other powers of government *in the following terms by article 125 (3) supra – emphasis*

In all of the above, it should be properly understood that the framers of the Constitution 1992, carefully arranged a skillful architecture such that, whilst the Judiciary is vested with exclusive judicial and penal sanctions, it also protects it from unbridled interference by the over bearing and sometimes intrusive powers of the executive and the legislature. This therefore in my opinion insulates the Judiciary from interferences of any nature whatsoever in the exercise of their judicial functions.

Since my brother Benin JSC, has already set out all the reliefs being claimed in his judgment, I will adopt them as duly referred to and considered herein.

FACTS OF THE CASE

On 24th and 29th June 2016 Messrs, Alistair Tairo Nelson, Salifu Maase (a.k.a Mugabe) and Godwin Ako Gunn, hereafter referred to as "Montie 3" while speaking on Montie FM, an Accra based radio station made several disparaging remarks against the Supreme Court and some justices of the supreme Court which are so vile and disparaging that they are not worth recounting in this judgment.

On July 18, 2016 the Supreme Court found the three personalities to be in contempt of the Supreme Court and on July 27, 2016 the Supreme Court sentenced the three personalities to four (4) months imprisonment. This was after their pleas in mitigation had been heard and considered by the Supreme Court.

Subsequent to the conviction and sentencing of the trio, a vigil was held by a group called the Research and Advocacy Platform (RAP) to gather support for a call for their pardon by the President under Article 72 of the Constitution.

The RAP also opened a Petition Book aimed at collecting One Thousand (1000) signatures of Ghanaians to serve as a petition to be presented to the President to

exercise his powers of prerogative of mercy in favour of the three (3) under Article 72 of the Constitution. Among the signatories were Ministers of State (some of whom are lawyers) and other dignitaries appointed by the President.

Having gathered the desired number of signatures, the representatives of RAP on Tuesday August 2, 2016 presented a Petition to the President. Meanwhile a similar petition seeking the prerogative of mercy, on behalf of the three personalities, was also presented by the legal team of the three to the President.

The basis for both petitions for the President to invoke article 72 of the Constitution were that the three have shown remorse for their reprehensible acts and that the sentence imposed by the Supreme Court was harsh in relation to the offence committed.

Upon receipt of the said Petition of signatures and that from the Lawyers, same were handed over to the chairman of the Council of State which body the President was required under article 72 of the Constitution to consult before invoking his prerogative of mercy.

The Plaintiffs thereafter filed their separate and independent writs against the Defendant, seeking inter alia declaratory reliefs and an interim injunction against the President acting in consultation with the Council of State from exercising his powers under Article 72 until the final determination of the suit.

Whilst the writs were pending, and awaiting determination, of the application for interim injunction, the President announced through a circular issued by the Minister of Communications on the 22nd of August, 2016 that he has exercised his prerogative of mercy in favour of the 3 convicted persons on compassionate grounds. On the 26th of August 2016 the 3 persons were released from prison.

The joint memorandum of agreed issues that was filed by the parties and agreed to by this court are the following:-

1. **Whether or not the words *"convicted of an offence"* in article 72 of the Constitution 1992 includes committal and conviction for the offense of contempt of court by the superior courts under article 126 (2) of the Constitution?**

2. **Whether or not the prerogative of mercy of President of the Republic under article 72 of the Constitution, 1992, extends to, and covers, a power to grant pardon to persons, who have been convicted for contempt of court, by the superior courts under article 126 (2) of the Constitution 1992.**

3. Whether or not, if the President's prerogative of mercy under article 72 of the Constitution, 1992, extends to, and covers, a power to grant pardon to persons so committed and convicted, such power or prerogative of mercy is discretionary in the terms of article 296 of the Constitution, 1992 and ought to be exercised in accordance with article 296 (a) & (b) thereof.

4. Whether or not the exercise of the discretionary power of the president in favour of the contemnors was arbitrary and capricious.

5. **Whether or not the grant of remission of the sentence of the contemnors by the President constitutes an unjustified interference with the Judiciary and an affront to the constitution.**

6. Whether or not the power of the President of the Republic of Ghana to exercise prerogative of mercy is limited to convictions arising from criminal offences.

7. **Whether or not the grant of remission of sentence by the President to the contemnors constitutes an abuse of the President's discretion.**

For the purposes of this judgment, I will deal with issues 1, 2, 5 and 7. This is because in my considered opinion, the resolution of these issues will effectively and completely resolve all the issues germane to this case.

ISSUE 1

Whether or not the words "convicted of an offence" in article 72 of the Constitution 1992 includes committal and conviction for the offense of contempt of court by the superior courts under article 126 (2) of the Constitution?

Article 126 (2) of the Constitution 1992 provides as follows:-

> *"The superior courts shall be superior courts of record and* ***shall have the power to commit for contempt to themselves and all such powers as were*** *vested in a court of record immediately before the coming into force of this constitution." Emphasis*

At this stage, it is also considered prudent to quote in full the entire provisions of article 72 (1) of the Constitution 1992 which states as follows:-

> *"Prerogative of mercy*
>
> *72 (1) The President may, acting in consultation with the Council of State,*
>
> *(a) grant to a person convicted of an offence a pardon either free or subject to lawful conditions; or*
>
> *(b) grant to a person respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; or*
>
> *(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or*
>
> *(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence."*

In view of the far reaching effect of the provisions of Article 19 (11) and (12) of the Constitution 1992, I deem it expedient to reproduce them for ease of reference

19 (11) "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law." Emphasis

19 (12) "Clause (II) of this article shall not prevent a superior court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed." Emphasis

A perusal of the relevant constitutional and statutory provisions, to wit, Articles 19, with special emphasis and reference to articles 19 (11) , (12) and 21, Article 126 (2) all of the constitution 1992, and Act 29, the Criminal and Other Offences Act, 1960 with emphasis on sections 1 and 10 thereof, among others makes it quite clear to me that committal for contempt of court is not one of the Criminal Offences intended under the scope of Article 72.

From my analysis and evaluation of the said constitutional and statutory provisions, I am of the considered view that, the framers of the Constitution 1992, did not intend to attribute the power of the superior courts to commit for contempt as a criminal offence within the meaning ascribed in the constitution and Act 29 to criminal offences. This is because, article 19 (21) of the Constitution defines a criminal offence as meaning a criminal offence under the laws of Ghana. Furthermore, Section 1 of Act 29 defines "criminal offence as having the meaning assigned to it by Article 19 of this Constitution. It is worthy of note that, section 10 of Act 29, just as Article 19 (12) does, excludes from the purview, the provisions of Article 126 (2) of the Constitution when dealing with what constitutes a criminal offence under the laws of Ghana.

Since it is this article 126 (2) of the Constitution which created contempt of court, and article 19 (12) further excludes it from it being evaluated as a criminal offences it follows that it is not a criminal offence under the laws of Ghana. I have perused the statements of case of all the parties in this case as well as their scholarly further

arguments of law which they filed pursuant to orders of this court. In this respect, I must concede that I am impressed with the written submissions by counsel for the Plaintiffs in their collective conclusions that, criminal offences as denoted in the Constitution 1992 and the laws of Ghana does not include the power of the superior courts to commit for contempt that they have been granted pursuant to article 126 (2). I must also state that I have not been impressed with the arguments of learned counsel for the Defendants in the consolidated suits and accordingly reject them.

It is significant to note and observe that a fundamental principle of our criminal law regime has been stated in article 19 (11) of the Constitution 1992. This bears emphasis to the fact that, in Ghana, nobody can be charged and convicted of a criminal offence, unless

i. The offence is defined and

ii. The penalty for the crime is prescribed in a written law

However, in view of the special nature of the power of the superior courts in respect of contempt of court, these fundamental principles have been excluded.

See the case of ***British Airways v Attorney-General [1996-97] SCGLR 547*** where the Supreme Court, per Bamford Addo JSC, underscored the above principle when the court held that once before conviction the offence was no longer a crime, it does not matter whether it was a crime at the time the offence was committed or not. What mattered most was the status of the offence at the time the trial was concluded.

My understanding of the Constitution 1992 and the powers of the Superior Courts to punish for contempt indicates that, the framers of the Constitution did not intend to make this contempt a criminal offence in the manner and scope in which it has been dealt with by Defendants.

Reference article 14 (1) (a) where the word offence is not added to the contempt where it was recognised that restrictions may be imposed on persons convicted and or punished for contempt. See also article 88 (3) and (4) of the Constitution.

It is therefore not out of place that, the operating constitutional provision in article 126 (2) which grants the power to the Superior Courts to commit for contempt conspicuously avoids the use of the word offence.

When reference is also made to the decision of this court in the case of ***Ackah v Adjei-Acheampong & Anor [2005-2006] SCGLR*** where the Supreme Court spoke with one voice through Date-Bah JSC, at page 11, it is clear "offence" as used in the constitution has the same meaning or, is in the words of the court, an ***"elliptical reference to criminal offences***" which of course has been defined in Article 19 and has been illustrated to exclude the power of the superior courts to punish for the common law quasi-criminal offence of contempt.

Based on the above rendition, **I will respectfully hold and rule that the "words convicted of an offence" in article 72 of the constitution does not include committal and conviction for the offence of contempt of court by the superior courts under article 126 (2) of the Constitution.**

Before I consider the resolution of issues 2, 5 and 7 in the agreed memorandum of issues, I propose to set out the historical background that led to the institution of the writs in the Supreme Court which formed the basis of the exercise of the power of contempt by this court against the Montie 3.

HISTORICAL ANALYSIS OF THE CASE

The facts which have given rise to these writs have been graphically stated elsewhere in this judgment. Suffice it to be that, they arise out of the preparations of the Electoral Commission, the body mandated by the Constitution to compile the Voters Register and revise same at such periods as may be determined by law and mainly to conduct and

supervise all public elections and referenda inter alia other functions, that have been spelt out in Article 45 of the Constitution 1992.

Following preparations of the Electoral Commission towards the Presidential and Parliamentary elections of 2016, serious constitutional issues were raised about the preparations of the voters register. The crux of these issues concerned the use of the NHIS cards as an identification by persons to register.

The failure of the Electoral Commission to address the concerns of the parties concerned led to the institution of two writs in the Supreme Court as consolidated writs Nos. J1/11/2014 and J1/9/2014 intitutled. ***Abu Ramadan & Nimako (NO1) v Electoral Commission & A. G., Danso-Acheampong v Electoral Commission & A. G. consolidated [2013-2014] 2 SCGLR 1654,*** where the Supreme Court speaking through Georgina Wood C.J, held as follows:-

> "*Upon a true and proper interpretation of article 42 of the 1992 Constitution, providing for the right to vote,* ***the use of the National Health Insurance Scheme (NHIS) card to register a voter pursuant to regulation 1 (3) (d) of the Public Elections (Registration of voters) Regulations, 2012 (C. I. 72), was inconsistent with the said article 42. Additionally, the court would grant the plaintiffs in Suit No. J1/11/2014 an order of perpetual injunction restraining the Electoral Commission from using the National Health Insurance Scheme Card in its present form and a voter identification card referred to in regulation 1 (3) of C. I. 72 other than as explained under relief (2) for the purposes of registering a voter under article 42 of the 1992 constitution. Tehn-Addy v Electoral Commission [1996-1997] SCGLR 589 at 595*** *per Acquah JSC (as he then was) at 594-595, and Ahumah-Ocansey v Electoral Commission , Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney-General and Electoral Commission consolidated [2010] SCGLR 575 cited.*

The court qualified this judgment by stating as follows:-

"If the right to vote is important in participatory democracy, the right to register is even more fundamental and critical. It is the gold key that opens the door to exercising the right to vote*." Emphasis*

Following the inability of the Electoral Commission to satisfy the Plaintiffs, ***Abu Ramadan and Evans Nimako in Writ No JI/11/2014*** supra, the duo returned to the Supreme Court in writ No. J1/14/16 intitutled ***Abu Ramadan and Anr. v Electoral Commission and A.G***., and this time the Supreme Court speaking through our respected and distinguished brother Gbadegbe JSC granted substantially the reliefs of the Plaintiffs in unreported judgment dated 5th May 2016 in the case referred to supra.

In the course of it's rendition, the Supreme Court, speaking through Gbadegbe JSC , stated in part as follows:-

"However before we end the consideration of the independent status of the Electoral Commission, ***we wish to say that the independent status of the first defendant does not make it immune from action for the purpose of declaring that it has exceeded its authority or acted in a manner that having regard to its unreasonableness, irrationality, or unfairness cannot be accorded the sanction of legality in view of articles 23 and 296 of the Constitution. We do not agree with the contention pressed on us by the first defendant that the constitution "forbids any control or direction of the 1st defendant as to how to accomplish its work.*** *Plainly the said statement is erroneous as article 46 itself recognises that it's independence may be derogated from either in the constitution or by any other law including but not limited to the instances referred to in regard to articles 48 (1) and 49 (1). There is also the point that as a creature of article 43, the Electoral Commission is subject to the Constitution,* ***to deny that it is not subject is to misconstrue the nature of the independence bestowed on***

it in relation to our exclusive jurisdiction, which is critical to effectuating the supremacy of the law". *Emphasis*

The events following the delivery of the above judgment is what led to the contempt proceedings instituted in the Supreme Court against Salifu Maase, Godwin Ako Gunn, Alistair Nelson, hereafter, the "Montie 3" and the Directors of the Radio Station.

Out of abundance of caution, I reiterate the salient facts as captured by the court itself during the contempt proceedings.

> *"In this case the 3rd and 4th contemnors, willfully, attacked the Chief Justice, whom they mentioned by name, and accused her and the rest of the court of favouring the plaintiffs in Suit No. J1/14/2016 intituled Abu Ramadan & Anor v Electoral Commission & Anor while exhibiting bias against the Electoral Commission. They alleged that the Court was motivated by a desire to assist the opposition New Patriotic Party (NPP) in the forthcoming elections.* ***They defied, insulted and lowered the authority of the court when they stated that they will not accept the decision of the court on the voters' register and they incited listeners in the general public to reject it... They cruelly and callously reminded the justices of the murder of three High Court Judges on 30th June 1982 (a day that will forever remain in the annals of this country as a day of infamy). This was doubtlessly, intended to browbeat and prevent the court from performing its duty to administer justice as it deemed fit."***

Apart from being insulting, these specie of conduct by the Montie 3, should be considered as highly intimidating and calculated to bring fear, panic into the Judiciary and the Court, as well as bring the court into disrepute, ridicule and thereby bring the entire administration of justice to its knees.

HOW DID THE SUPREME COURT DEAL WITH PREVIOUS CASES OF CONTEMPT

Before I proceed further, I wish to make a detour to the ***Presidential election petition 2013 In re Presidential Election Petition*** already referred to supra.

During the said proceedings, the court had occasion to deal with instances of persons who committed contempt ex facie curiae by scandalizing the courts and bring it into hatred and ridicule. People like Sammy Awuku, now the National Organiser of the New Patriotic Party (NPP), Ken Kuranchie, an editor of a national newspaper, Kwadwo Owusu Afriyie, then General Secretary of the New Patriotic Party (NPP), and Atubiga, an activist of the National Democratic Congress, (NDC).

- For his punishment, Sammy Awuku was banned from attending further hearings of the presidential election petition for daring to describe a decision of the court as ***" hypocritical and selective".***
- Ken Kuranchie on the other hand was convicted on 2nd July 2013 for writing in his national newspaper that Sammy Awuku was right in describing the decision of the Supreme Court in those terms and sentenced to 10 days imprisonment.
- Kwadwo Owusu Afriyie on the other hand was convicted on 14th August 2013 as he was found guilty of intentional criminal contempt of the Supreme Court. He however did not get a custodial sentence but was bonded over to be of good behaviour.
- Atubiga was also not lucky as he also spent time in prison following his conviction for contempt.

In his seminal book *"Reflections on the Supreme Court of Ghana",* Justice Date-Bah stated on page 227 on these incidents as follows:-

> *"The Supreme Court clearly considered it, its duty* ***to safeguard the public peace through a firm application of its powers of contempt of court during the tense period of the hearing of the Presidential Election Petition. Its view was that offending statements did not only impugn the integrity of the Justices, but also threatened the security of the state"*** emphasis

I agree entirely with the above observations of our distinguished brother Date-Bah JSC. Every right thinking person in Ghana during the hearing of the presidential election petition will agree with me that the entire country was sitting on a time bomb. The collective decision and wisdom of the Supreme Court in those days to crack the whip on all these contemnors is what led to the prevalence of peace in the country.

Issue 2

Whether or not the prerogative of mercy of President of the Republic under article 72 of the Constitution, 1992, extends to, and covers, a power to grant pardon to persons, who have been convicted for contempt of court, by the superior courts under article 126 (2) of the Constitution 1992.

Issue 5

Whether or not the grant of remission of the sentence of the contemnors by the President constitutes an unjustified interference with the Judiciary and an affront to the constitution.

Issue 7

Whether or not the grant of remission of sentence by the President to the contemnors constitutes an abuse of the President's discretion.

What was the situation in 2016 when President Mahama granted the pardon to the Montie 3?

Before we proceed any further, it is important to reflect on the words of the Supreme court, and consider the rationale they gave for imposing the custodial sentences on the contemnors i.e the Montie 3.

The rationale the Supreme Court gave to justify the reason why it handed the custodial sentences to the contemnors is very instructive and worth recounting at this juncture. Speaking through Sophia Akuffo JSC, (as she then was), the Supreme Court stated

> ***"Our sole focus in this matter is on protecting the paramount public interest in maintaining the independence, dignity and effectiveness of the administration of Justice." Emphasis***

After a consideration of relevant provisions of the Constitution, which have been set out above already, the court made the following poignant and important observations at pages 5-6 of the ruling as follows:-

> *"Among the three arms of government in this country, it is only in respect of the Judiciary that the Constitution has in plain words commanded every state authority and persons in Ghana to accord assistance in protecting its independence, dignity and effectiveness. The reason is simple, in order to sustain the democratic system of government established by our constitution,* ***the Judiciary is the arm of government that has been given the authority to police the other arms, i.e. The Executive and Legislature as well as all governance institutions. The court is, therefore deserving of the utmost respect and reverence if our democratic enterprise, as a nation, is to succeed...***
>
> *Indeed, it is because the judicial function is for the cohesion of society at large that, even during the various periods of military rule which this country endured in times past, the courts were always preserved. There cannot be an efficiently run state wherein all persons could thrive in peace and security without an independent and dignified judiciary, operating fearlessly and competently, beholden to no one:" Emphasis*

It is not surprising that the court, did not mince words in reiterating the now popular view that **it is the Judiciary that has the absolute responsibility of ensuring**

that the other two main arms of Government namely the Executive and Legislature are put in check and within manageable limits. This is in sync with the opening quotation from John Adams referred to earlier in this judgment.

I have already stated supra that, the framers of the Constitution 1992, conscious of the enormous powers and responsibilities that the Judiciary would be expected to play to ensure that the Constitution works perfectly in harmony, granted it the power of contempt in Article 126 (2) of the Constitution 1992.

To further buttress the smooth exercise of this power of contempt, the Constitution again in article 19 (12) excluded a very important and fundamental human rights and common law principle in Article 19 (11), of the Constitution to wit, that *"no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law."*

It must thus be fully understood that, the framers of the Constitution must have had confidence in the ability of the Judiciary to navigate these enormous powers of contempt that they had been granted.

In my understanding of the powers of the Judiciary in cases of contempt, there appears to be little or no problem with contempt *"in faciae curiae"* meaning contempt committed in the face of the court. For example, when a person misbehaves in the court, or utters insulting behaviour in the court or misconducts himself within the court whilst the court is in session, there is little doubt that such a person needs to be penalized for contempt.

This is the type of contempt dealt with in section 224 of Act 29. That type of contempt is not what we are with respect concerned with here.

On the other hand, there is this other criminal contempt which is called, contempt *"ex faciae curiae"* meaning contempt committed outside the court such as we had in the Montie 3 case. These aspects of contempt lie in the person scandalizing the court as had been referred to supra. What must be noted is that the offence of contempt of court, committed through scandalizing the courts must be dealt with promptly such that the authority and dignity of the courts is not thrown away to the dogs. In these days of media pluralism and free expression, a delicate scheme must be maintained in striking a balance between where free expression ends and where the courts have been scandalized. Otherwise we run the risk of endangering the security of the state and it's independent constitutional bodies, such as the Judiciary.

One of the first cases to have been handed down by the Supreme Court in this area of criminal contempt committed ex faciae curiae is the locus classicus case of ***Republic v Liberty Press Limited [1968] GLR 123 at 135***, where Akufo-Addo CJ, laid down the basic principles as follows:-

> *"I need hardly say that the judiciary has never claimed to be above criticism. Indeed I have on more than one occasion stated in public that the judiciary, like any other democratic institution, must justify its continued existence. This implies that its actions and conduct must be subject to the same measure of public scrutiny as any other governmental institution.* ***Justice, it has been said, is not cloistered virtue, and those who have the responsibility to dispense justice will certainly not want to live in cloisters.*** *But the important position of the judiciary in any democratic set-up must be fully appreciated. Performing, as they are called upon to do,* ***the sacred duty of holding the scales between the executive power of the state and the subject and protecting the fundamental liberties of the individual, the courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason any conduct that tends to bring the authority and administration of the law***

into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the courts but against the entire community which the courts serve. Such conduct constitutes the offence of contempt of court, and the courts are vested with the power of dealing with it in a manner that is almost arbitrary. For this reason the power is rarely invoked and only when the dignity, respect and authority of the courts are seriously threatened. It has been said that these powers are given to the courts (and the judges) to keep the course of justice free; power of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible.

It is contempt of court by deed or word to scandalise the courts. It is contempt of court to make statements amounting to abuse of the courts. It is contempt of court to make statements which tend to expose the courts or parties who resort thereto to the prejudice or hatred or ridicule of mankind.

Within these limits and within the further limits set by the legitimate exercise of the freedom of thought and expression criticism of judicial acts is free. The press both high and low must fully realise and appreciate that there is no such species of the freedom of thought and expression as press freedom. The freedom which the press enjoys is no less and no more than the freedom of thought and expression which the humblest illiterate citizen of Ghana enjoys. Emphasis

On these principles, see also the case of ***Republic v Mensa-Bonsu, Ex-parte Attorney-General, [1994-95] GBR 130 .***

Contrast these Ghanaian cases which the case of ***Sunday Times v The United Kingdom [European Court of Human Rights Application No. 6538/74, judgment of 26th April 1979***. See also page 220 of Dr. Date-Bah's book referred to

supra in the Sunday Times case, the European Court of Human Rights in reversing the House of Lords stated as follows:-

> *"As the court remarked in its Handyside judgment, freedom of expression constitutes one of the essential foundations of a democratic society, subject to paragraph 2 of Article 10 (Article 10 -2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference,* ***but also to those that offend, shock or disturb, the state or any sector of the population*** *(page 23, para 49). Emphasis*

Back to the crux of the instant case. Was President Mahama within the remit of his powers when he exercised the power of pardon in Article 72 of the Constitution in granting the Montie 3 who were convicted of criminal contempt?

Having evaluated the case in its proper historical context as well as its constitutional and statutory status, my answer to the above question is that, President Mahama acted unconstitutionally when he sought the advice of the Council of State and exercised the prerogative of mercy to the three convicted Montie 3 and granted them the Presidential pardon.

In my considered view therefore, the prerogative of mercy of the President in Article 72 of the Constitution does not cover and or extend to persons who have been convicted for contempt of court by the superior courts under article 126 (2) of the Constitution 1992. In this respect, it must be noted that, this power extends to only superior courts and does not lie to lower courts. The power to commit for contempt by the lower courts, in my opinion, lies under Section 224 of Act 29, where a person commits an offence which is known as contempt in faciae curiae. Relief 2 is thus resolved in the affirmative.

As a matter of fact, if the Supreme Court had not skillfully handled and dealt with the many commentaries that plagued the country during the hearing of the 2013 presidential election petition, only God knows what would have become of this country.

Assuming without admitting that the President at the material time had granted pardon to those who were dealt with by the Supreme Court in 2013, for having committed contempt of the court, the signal would have been given that the Executive had endorsed the specie of conduct complained about against the Supreme Court.

In my opinion, if this power that the Judiciary has is subjected and surrendered willy willy to the Executive, then it may sound the death knell of the Judiciary. This is because, politics in this country has become so polarized that we need to be very circumspect in surrendering this power of contempt vested in the Judiciary under Article 126 (2) of the Constitution 1992, bearing in mind that our forebears took our chequered political history into consideration before deciding to clothe the Superior courts with this power.

Furthermore, in my opinion in the case of Brown v Attorney-General [2010] SCGLR 183, at 236, I stated on use of foreign authorities as follows:-

> *"I have always held the view that in interpreting a constitution, one must resort to the constitution itself to determine the spirit the framers of the constitution intended to give it in its interpretation. Where the constitution contains guidelines or principles which can be used to interpret the constitution these must be applied. Where in the case of our Constitution, 1992, there are no such express guidelines, the Supreme Court itself must fashion out its interpretative principles on a case by case basis taking into account the contextual nature of the provisions concerned. It is however my firm conviction that in fashioning out these guidelines and interpretative principles which underpin the Constitution 1992, one must first and foremost look at the Constitution itself, that failing then resort will be made to previous decisions of the Supreme Court in the 1st 2nd and 3rd Republican Constitutions of 1960, 1969 and 1979 respectively. I am also of the view that principles of constitutional interpretation and decided cases from foreign countries must be sparingly referred to and whenever these are used,*

the provisions of those constitutions upon which the cases have been decided must be thoroughly digested and analysed to prevent the wholesale and corrupted adoption of foreign rules of constitutional interpretation which have no nexus to our home grown situation. "

I have had to refer to the said opinion because all the learned counsel for the Plaintiffs and Defendants had made copious and extensive references to the use and reliance on foreign authorities. Much as I agree that, as a common law jurisdiction, we can rely and indeed quite frequently use some of these foreign opinions, the unbridled reliance and use of them where the constitutional provisions as in the instant case are to me clear and unambiguous, it makes reliance on them needless. Where the constitutional provision in Article 126 (2) of the Constitution 1992, and all other provisions to wit, Articles 19 (11) (12) and (21) are clear and admit of no ambiguity, effect must be given to it in our interpretative jurisdiction as was decided in the case of ***Republic v Special Tribunal; Ex-parte Akosa [1980] GLR 592.***

It must be noted in this instance that, the provisions of the Constitution that call for interpretation by this court relate to the powers and independence of the Judiciary in it's quest to ensure that it's authority is not diminished and ridiculed in the eyes of the public.

I believe that, it was for this reason, that the Court of Appeal, sitting as the Supreme Court, stated in the monumental case of ***Tuffour v Attorney-General [1980] GLR 637*** particularly at 647 – 648 as follows:-

"A written Constitution such as ours is not an ordinary Act of Parliament. ***It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life****. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of*

the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana.

***Its language, therefore, must be considered as if it were a living organism capable of growth and development**. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of narrow interpretation. A doctrinaire approach to interpretation would not do. **We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time. And so we must take cognisance of the age-old fundamental principle of constitutional construction which gives effect to the intent of the framers of this organic law**. Every word has an effect. Every part must be given effect. Perhaps it would not be out of place to remember the injunction of St. Paul contained in his First Epistle to the Corinthians, Chapter 12, verses 14-20 (King James Version):*

"For the body is not one member, but many. If the foot shall say, Because I am not the hand, I am not of the body; is it therefore not of the body? And if the ear shall say, Because I am not the eye, I am not of the body; is it therefore not of the body? If the whole body were an eye, where were the hearing ? If the whole were hearing, where were the smelling . . . ? But now are they many members, yet but one body."

That Supreme Court, concluded thus:-

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." Emphasis

If we consider the above words of wisdom which has to be taken into consideration when issues of constitutional interpretation such as the instant arise for our determination, then it behoves on us as the apex court to consider these cautions very seriously.

The above quote is also consistent with the report of the Committee of Experts who drafted the Constitution 1992, supra in the sense that it also make reference to our history as a people, aspirations and hope for a better and fuller life. It also states categorically that the Constitution is a living organism capable of growth. It is in respect of this that I am of the view that, the conditions prevailing in Kansas city, in the U.S, India, United Kingdom, Australia etc. are different from what prevails in Ghana. The level of discipline and respect for law and order are also different from country to country. In my opinion, it will be a travesty of justice to import wholesale certain criteria and make them applicable to conditions in Ghana as if the security situation, level of discipline, respect for law and order etc. are the same.

In my candid opinion, at the moment, the last vestige of semblance of authority is the Judiciary. Erode the power of the Judiciary and there will be chaos in the country.

One way of losing this power is the relegation or subjugation of this power of contempt granted the Judiciary by the framers of the Constitution in Article 126 (2) and the other provisions already referred to supra.

Once the framers of the Constitution had taken our history as a nation into consideration, and we have also noted with concern the deteriorating conditions prevailing in the country where there is apparent recklessness and no respect for law and order, there is the absolute need for some form of "arbitrary" power to sanitise excesses as happened in the Montie 3, without Executive Presidential intervention. I am however mindful that these powers should not be exercised recklessly.

In ***Agbevor v Attorney-General [2000] SCGLR 403*** Kpegah JSC whilst concurring with the court in its unanimous decision which nullified the removal from office of the plaintiff therein as a Judicial Officer, had this to say:-

> *"That the President took this advice on the recommendation of the Judicial Council devastates me. The President should expect and indeed, deserves quality professional legal advice from the Judicial Council".*

The learned Judge continued thus:-

> *I agree that the letter is an unnecessary intrusion into the administration of the Judiciary and infringes upon article 127 (1) of the 1992 Constitution. Also the President has no power to sanction any judicial officer and his letter to the Plaintiff directing his removal from the Judicial Service as contrary to article 151 (1) of the Constitution."*

Very strong words indeed. But when the situation demands, it must be said just as it is. It is possible for all the arms of government, i.e. Executive, Legislature and the Judiciary to err, and they do sometimes err. It is however safer for the citizenry to bear with the errings of the Judiciary than the other two. This is because, it is only the Judiciary that is truly independent of the other two arms of government. Our history and aspirations as a people are such that we must be wary of entrusting too much power into the hands of the Executive President. It is for all the above reasons that I will uphold the writs of all the Plaintiffs that the President acted unconstitutionally in granting pardon to the Montie 3.

CONCLUSION

I agree in substance with the discussions of my brother Benin JSC on the exercise of discretionary power by the President vis-à-vis Article 296 of the Constitution relative to the scope of the powers in article 72 of the Constitution 1992.

Much as I think it is desirable to have rules and or guidelines to aid in the application, scope and extent of these discretionary powers, their absence is not fatal either. Indeed I also think the guidelines or rules will be flexible since it is impossible and inconceivable to provide for every known exercise of discretionary power. This is impossible. Under the circumstances, since I have already concluded that the Presidents exercise of the power is even unconstitutional, the lack of discretion for me does not arise because he followed the due process. It is in the exercise of the grant of the pardon that I think the President erred in committing an unconstitutional conduct.

I will therefore hold and rule that the exercise of the power of grant of remission of sentence to the Montie 3, constituted an unjustified interference with the Judiciary and an affront to the constitution.

Finally, since the President in my opinion acted unconstitutionally, all other issues are subordinate to this. I will therefore under these circumstances grant the plaintiffs the reliefs prayed for excluding the injunctive reliefs which are now moot.

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

YEBOAH, JSC: - My respected brother Benin, JSC has already stated the facts of this case with his usual accuracy that it would be unnecessary for me to repeat same. I, however, offer my brief dissenting opinion in support of the opinion of my worthy brother Dotse JSC.

I proceed accordingly to do so on the basis that, the determination of this case, which is to test the independence of the judiciary in contempt matters, may have far-reaching consequences in the administration of Justice in this country since this occasion appears to the first that the issue before us has been raised.

The judicial power of this country, under article 125(3) of the constitution is vested in the judiciary as follows:

"125(3)

The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power"

As if this is not enough, the framers of our constitution (which was subjected to a national referendum) proceeded to provide further safeguards under article 127(2) thus:

"127(2)

Neither the President nor Parliament nor any person acting under the authority of the President or Parliament not any other person whatsoever shall interfere with judges or judicial officers or other persons excersing judicial power, in their exercise of their judicial functions; and all organs and agencies of the state shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts subject to this constitution"

According to the defendant, the President is entirely empowered under Article 72 of the Constitution to grant a pardon to a person convicted for contempt of court by the superior courts. The plaintiffs disagree on the basis that the Presidential powers exercised under Article 72 should be limited to contempt proceedings initiated at the instance of the Attorney-General. Enough material and substantial research went into

the preparation of the respective statements of case presented by the parties for our consideration. As the issues raised for our determination are being raised for the first time upon the coming into force of the 1992 constitution, a careful approach is needed to resolve the issues the determination of which will certainly put to rest the extent of the powers of the President in pardoning persons convicted for contempt by the court under article 126(2).

In my respectful view, the difference between civil contempt and criminal contempt which the Attorney-General has endeavored to stress in the statement of case is well recognized in the common law jurisprudence. In judicial proceedings, as pointed out by the plaintiff in suit number **J1/21/2016**, the distinction is crucial and should always be drawn. A civil contempt will usually arise when a party to any proceedings forms the view that an order of a court of law has been disobeyed or interfered with. Criminal contempt usually arises when a party or stranger to the proceedings scandalizes a court by bringing the administration of justice into disrepute.

It is usually the case that both the Attorney-General or the court on its own motion can initiate criminal contempt proceedings. In this country, the first notable case was the case of THE REPUBLIC v LIBERTY PRESS & ORS [1968] GLR 123 in which the Attorney-General initiated contempt proceedings against the contemnors for scandalizing the courts. The more recent one was the case of THE REPUBLIC v MENSAH-BONSU & ORS; EX PARTE ATTORNEY-GENERAL [1995-96] GLR 377. My research into local case law did not unearth any other reported case in which the Attorney-General applied for contempt against any person scandalizing the courts.

None of the parties is doubting the power of the President to grant pardon in criminal cases but the issue is whether in exercising his constitutional powers vested in him under Article 72 of the 1992 Constitution, the President can do so in criminal contempt cases initiated by the court itself. It must be pointed out that Article 72 is not a new

provision introduced into Ghana's constitution since independence and indeed granting of pardon to convicts have been done on regular basis in constitutional dispensations. However, Article 124(3) of the 1992 Constitution has, in my respectful opinion prohibits the President and Parliament from any interferences in judicial decision in any manner or form. In my view the purpose for this all-important prohibition is as a result of the chequered history which our judiciary had gone through. Perhaps it may be useful for a brief moment to glance at history of Ghana's judicial independence. This country in 1963 witnessed a judiciary which had its judgment declared null and void in the case of STATE v OTCHERE [1963] 2 GLR 463 when the Special Criminal Division Instrument, 1963 (E.I. 161) was passed after acquittal of some accused persons in a treason case. This was done when the 1960 Constitution was in force and subsequent to the passage of E.I. 161 some Superior Court judges were dismissed under the powers vested in the President. The military intervention in 1966 also witnessed the dismissal of several superior court judges under the guise of retirement on 1/10/1966. The 1969 second republican constitution afforded protection of the judiciary from executive interference. Indeed after the military intervention in early 1972 the National Redemption Council sacked the Chief Justice and passed a decree to abolish the Supreme Court and judges who had been appointed to the Supreme Court under the 1969 constitution, were made to revert to their previous positions before their appointments. Under the same military regime the Chief Justice was dismissed in 1977. The 1979 constitution came into force to restore the independence of the judiciary but when it was overthrown in 1981 the judicial intervention continued and on 3/04/1986 several superior court judges were dismissed also under the guise of retirement. I have taken a short trip to the history of the judiciary to demonstrate how executive intervention had plagued the Ghana's judiciary since independence.

In my view, it was to serve a purpose that the judiciary in every modern democracy ought to be protected from executive and legislative interference that led the framers of the Constitution to put beyond doubt and in unambiguous language in Article 125(3) of

the constitution which forms the basis of the protection of the judicial independence from anybody in any manner or form.

In the very recent case of MAYOR AGBLEZE & 2 ORS v THE ATTORNEY-GENERAL & THE ELECTORAL COMMISSION – AND –IN THE MATTE OF: THE REPUBLIC v GLORIA AKUFFO (HON.), JEAN MENSA, DR. ERIC ASARE BOSSMAN & SAMUEL TETTEY; EX PARTE MAYOR AGBLESE & 2 ORS, unreported ruling of the Supreme Court instituted as suit No.J1/28/2018 delivered on 24/10/2018 the worthy president of this court Adinyira, JSC stressed the need for judicial independence under Article 125 (3) as follows:

> "The judicial power of Ghana by article 125(3) of the 1992 Constitution has been vested in the judiciary. This power cannot be fettered by any person, agency or organ including the President and Parliament. Any conduct that contravenes this provision is clearly unconstitutional and a breach of the principle of legality which embraces the rule of law and the independent of the judiciary".

In my respectful opinion, the above pronouncement is a caution to organs of state and institutions to observe this clear constitutional prohibition. Criminal proceedings, both summarily and on indictments are all initiated at the instance of the Attorney-General who under Article 88(3) exercises exclusive powers. As pointed out earlier, the Attorney-General can also initiate contempt proceedings in appropriate cases.

In my view, I think if contempt proceedings is initiated by the Attorney-General who is the principal legal adviser and a Minister of State under Article 88(1) of the 1992 Constitution, the President, upon the conviction of the contemnor can exercise his powers under Article 72 of the constitution as the initiation of the proceedings would be deemed to have been done on his behalf.

However, under Article 126(2) where the initiation of the criminal contempt proceedings is done by the Superior Court ex proprio motu, the powers of the President, in my respectful opinion is ousted. For Article 126(2), beyond the fact that it is an

acknowledgment of the Superior Court's inherent power to commit for contempt, it is in my opinion superfluous for it to be even stated in the constitution. It is indeed inherent in every Superior Court to convict for contempt of court. In the opinion of perhaps the most authoritative jurist in civil procedure of the 20th Century, Sir I.H. JACOB, in his article on THE INHERENT JURISDICTION OF THE COURT, in Current Legal Problems, Volume 23, ISSUE 1, 1 January 1970 at page 29 the famous jurist stated the position thus:

> "The power of the court to punish by summary process for contempt of court provides a protective umbrella under which the litigant parties may fairly proceed to the determination of the issues between them free from bias and prejudice and free from any interference and obstruction of the due process of the court"

It stands to reason that this power of the Superior Courts should not be subjected to any interference from the President and other organs of state when it convicts any person for contempt summarily under it. In my respectful opinion, if the Attorney-General acting on behalf of the President had initiated the proceedings, I would have had no objection whatsoever to the pardon granted.

Before I conclude, I will like to briefly dwell on the court's reliance on the several decided cases from United States of America where Presidential pardons are exercised on regular basis. One of our esteemed sisters, Bamford-Addo JSC in the case of SAM (NO.2) v ATTORYNEY-GENERAL [2000] SCGLR 305 said at page 315 as follows:

> "In interpreting our constitution, it is important that the constitution should be interpreted in the light of its own wording and not by reference to other constitutions in other jurisdictions, for example, that of the United States. Our constitution is peculiar to us and we must therefore interpret it in accordance with its clear words as well as its spirit…
>
> Therefore cognizance must be taken only of the expressed provisions in our constitution and in accordance with the clear intentions of the drafters of the

constitution. No reliance should be placed on the requirements of the constitutions in other jurisdictions, whose constitutions are structured to suit their individual needs"

The framers of our constitution together with the Consultative Assembly had adequately considered the chequered history of our judiciary and therefore wanted to entirely free it from such interference as it has happened in this case. The President's power to pardon should not therefore in contempt cases be extended to cover contemnors convicted by the court under its inherent jurisdiction and under Article 126 (2) read in conjunction with Article 125(3) of the constitution. As my esteemed brother Dotse, JSC has in his usual approach to resolving such issues discussed the other areas, I will adopt same. These are my reasons for the concurrence of the dissenting opinion.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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