IN THE SUPERIOR COURT OF JUDICATURE
SUPREME COURT OF GHANA
ACCRA

CORAM: WOOD (MRS), CJ (PRESIDING)
DATE-BAH (DR), JSC
OWUSU (MS), JSC
DOTSE, JSC
ANIN YEBOAH, JSC

IN THE MATTER OF CONSOLIDATED SUITS:

WRIT NO. JI/4/2008

AHUMAH OCANSEY .... PLAINTIFF

VRS

THE ELECTORAL COMMISSION .... DEFENDANT

AND

WRIT NO. JI/5/2008

CENTRE FOR HUMAN RIGHTS & CIVIL LIBERTIES (CHURCIL) .... PLAINTIFF

VRS

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

23RD MARCH, 2010

J U D G M E N T

WOOD (MRS), CJ:

These two consolidated cases raise important constitutional questions pertaining to the right of prisoners to vote in public elections and referenda,

pursuant to article 42 of the 1992 Constitution, as do other citizens of the Republic, save those below the age of eighteen years, and persons of unsound mind.

SUIT NUMBERED J1/ 5/ 2008-(THE CHURCIL CASE)

In the suit numbered J1/5/2008, instituted by The Centre for Human Rights and Civil Liberties (CHURCIL), pursuant to article 2 (1) of the Constitution, this court is being invited to determine the question in relation to persons being held in prisons and who are usually referred to as remand prisoners. These are persons who have been arraigned before court on criminal charges, are awaiting trial, but are being kept in prison custody, i. e. legal custody, on court orders. Incidentally, not all remand prisoners are detained in prisons Contrary to the law; some spend their period of detention in police cells.

CHURCIL is an advocacy- based organisation, dedicated to the promotion of human rights and the protection of civil liberties through a number of activities including public interest litigation. CHURCIL's action was triggered by the decision of the Electoral Commission (E C), to preclude remand prisoners from exercising their electoral franchise in the then upcoming December 2008 elections, in full recognition of their voting rights under article 42 of the Constitution, unless otherwise ordered by a court of competent jurisdiction to allow them to do so. The Commission had persistently refused to heed to the calls of human rights activists and organisations to respect the voting rights of remand prisoners on the basis that the electoral laws of Ghana, particularly s. 7 (5) of The Representation of The People Law, 1992, P. N. D. C. L.284 (PNDCL 284), disqualify prisons as places of residence for purposes of voter registration, a pre-requisite to voting, thus effectively disenfranchising remand prisoners.

By this court's decision in NPP v A-G (CIBA case) [1996-97] SCGLR 729, the word "person" appearing in article 2 (1) of Constitution, encapsulates natural and artificial or corporate persons. CHURCIL declares its corporate status as a not- for- profit civil society organisation and as plaintiff prays for the following reliefs:

1. "A declaration that section 7(5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of Article 42 of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDCL 284 is void;
2. A declaration that section 7(5) of the Representation of the People Law (PNDCL 284) is null and/or void because the enactment was made in excess of the powers conferred on Parliament by section 93(2) of the 1992 Constitution, or any other head of legislative power;
3. A declaration that section 7(5) when read together with section 8 of PNDCL 284 is inconsistent with and in contravention of article 17(1) and 17(2) of the 1992 Constitution and that consequently, to the extent of such inconsistency the said PNDCL 284 is void.
4. Consequential orders in exercise of the Supreme Court's jurisdiction under article 2(2) of the 1992 Constitution compelling /ordering the Electoral Commission to exercise its constitutional powers under the electoral laws and where necessary under article 45 of the Constitution to facilitate and ensure the registration for effective voting of all remand prisoners entitled to vote by reason of article 42 of the Constitution."

SUIT NUMBERED J/1/4/2008

The second action, numbered J1 / 4/ 2008, is at the instance of Ahuma-Ocansey, a private legal practitioner. He instituted the action, in his capacity as a citizen of Ghana, and an advocate of prisoners' rights. The reliefs he sought, though substantially the same as CHURCIL's, is broader in scope; to the extent that his action covers all categories of prisoners, that is, both remand and convicted prisoners. It is also not restricted to the 2008 elections,

but all future public elections, including all bye elections and referenda. He sought the following declaratory reliefs:

i) Declaration that non-registration of prisoners for voting by the Electoral Commission contravenes Arts 42, 45(a) of the Constitution, and s.1 (a-e) of the Public Elections (Registration of voters) Regulations, 1995 CI 12 and Art 21 of the Universal Declaration of Human Rights (United Nations)

ii) Declaration that refusal or failure of the EC to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings. This conduct of the EC contravenes Art 15 (1) of the Constitution and Principle 3 of Body of Principles for the protection of all persons under any form of detention or Imprisonment (United Nations

iii) Declaration that the conduct of the EC is defeatist of the Civic responsibility of Ghanaians as citizens of this country, to uphold the sanctity of the freedoms and rights of Ghanaians, as enshrined in Arts 35(4) and 41(b) (d) of the Constitution."

The CHURCIL case provokes an important preliminary question, which in my opinion, must be addressed. CHURCIL instituted its action on the 7th of July, 2008, as already noted to enable remand prisoners to vote in the December 2008 presidential and parliamentary elections, whilst the plaintiff in J1/ 4/2008, instituted his action on 20th June, 2008, on account of all prisoners, without targeting any specific national elections or referenda. That it has taken over a year to dispose of these two cases is indeed regrettable. Constitutional disputes, especially those touching on fundamental rights and freedoms deserve to be determined expeditiously. That is not, to say however that, the disposal of these two cases before the 4th December 2008, and in the favour of all categories of prisoners, would have enabled them exercise their franchise in the presidential and parliamentary elections of 2008. However, given the legal calendar and the statutory time frames for filing

statements, the chances that these cases could have been disposed of before the election date were indeed very limited. But, there is an even more fundamental reason why prisoners' participation in the 2008 elections, was not feasible. It appears doubtful, indeed very doubtful to me, that the 2nd defendant, the EC would have had the space to meet all the legal and logistical requirements that would have made the prisoners participation in the December 2008 elections possible.

These challenges do not, however, provide valid justification for the delay. It is hoped that in future, parties and their counsel will assist our courts to carry out their judicial functions in a manner that would promote the timely disposal of constitutional cases, particularly, those related to human rights.

The failure to hear and dispose of the CHURCIL action before the December elections raises the question of whether the action is consequently moot. The scope of the doctrine of mootness has been decisively settled by this court. J.H. Mensah v Attorney-General [1996-97] SCGLR 320, at page359, sets out the parameters as follows:

"The principle guiding the court in refusing to decide the moot questions is quite settled. If the question, though moot, is certainly not likely to re-occur, the courts will not waste their time to determine questions and issues which are dead and buried forever. But where it is not so established, the courts would go into the questions to forestall a multiplicity of suits. Thus for a court to decline deciding a moot question, it must be established or shown that:

'Subsequent events made it absolutely clear that the allegedly wrong behaviour could not reasonably be expected to recur'."

Firstly, public elections, bye elections included, and referenda are key elements of constitutional democracy. The sovereign will of the people of Ghana, as expressed through article 35 (1) of the Constitution, is that Ghana "shall be a democratic state dedicated to the realisation of freedom and justice". Consequently, public elections will remain a permanent feature of

democratic governance in Ghana and will continue to play a central role in our political affairs until the end of time.

Secondly, the detention of persons awaiting trial in prison custody, in the absence of clear legislation to the contrary, will continue to be an essential feature of our criminal jurisprudence. Ordinarily, persons charged with criminal offences are, by virtue of the rule that presumes them innocent, until they are proven guilty, are entitled to be admitted to bail. But bail is not automatic, it is sometimes withheld; with the order that the accused person be detained in legal, i. e. prison custody. Also, under our criminal laws, there are a number of offences on our statute books, in respect of which courts are constitutionally or statutorily mandated to refuse bail, and order the detention of accused persons in legal, i.e. prison custody. The overriding consideration for curtailing accused persons right to liberty in such matters is that they are not likely to appear to stand trial if granted bail, having regard to the nature of the offences and the "severity of the punishment which conviction entails."

Gorman & ors v The Republic [2003-4] SCGLR 784, identifies one other circumstance under which the liberty of persons awaiting trial could be curtailed. The court made this observation:

"…we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of the human rights that seek to balance the rights of the individual as against the legitimate interests of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution. Thus article 14(1) (d) makes it clear that the liberty of certain individuals, including drug addicts may be curtailed not only for the purpose of their own care and treatment, but also "for the protection of the community." Article 14(1) (g) sanctions the deprivation of an individual's liberty upon

reasonable suspicion of the commission of an offence under the laws of Ghana, ostensibly for the protection of the community and the body politic."

The 2nd defendant's past conduct, the continuing existence of section 7(5) of the PNDCL 284 on our statute books, clearly points to the future direction in which matters are likely to go. Who will challenge the fact that some more persons have been admitted into legal custody since CHURCIL filed its writ? The 2nd defendants will continue to deny prisoners the right to vote, unless otherwise directed by this court. We are thus faced with an active controversy over which, this court should adjudicate, in the exercise of its legislative review jurisdiction.

CHURCIL contends that the entrenched provisions of article 42 of the Constitution, confers a constitutional right to vote on all Ghanaian citizens without a single exception, save those below the age of eighteen years and persons of unsound mind. This fundamental right, the argument went, has however been unconstitutionally curtailed by s. 7 (5) of the PNDCL 284 and s. 1 (d) of the Public Elections (Registration of Voters) Regulations, 1995 [CI 12].

The relevant portions of the detailed argument setting forth the manner in which PNDCL 284 effectively trammels on the right to vote of remand prisoners is reproduced for its full impact and effect.

"(19). Section 7 of PNDC 284 sets out a legislative criteria (sic) on who qualifies to be registered as a voter. Section 7(1) provides that a person qualifies to be registered as a voter if he is:

(a) a citizen of eighteen years of age or above, and
(b) of sound mind, and
(c) resident in a polling division, or hails from the constituency and
(d) not otherwise disqualified to be registered as a voter by law."

(20). In the same vein, it prohibits a person's name from being included in the register of more than one constituency or in more than one divisional

register in a constituency. Section 7(3) creates a conclusive presumption of residence by providing that a person is resident in a polling division on a qualifying date if that person has a place of abode in the division on that date. In addition, section 7(4) establishes a conclusive presumption of loss of residence in a polling division if a person has been "absent from that person's place of abode for a continuous period of six months ending on the qualifying date."

(21). "More importantly, section 7(5) provides that:
A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody in a place shall not be treated as resident there for purposes of this section…

(24). If prisons do not qualify as places of residence then legally such places of legal custody and detention cannot be classified as falling within any polling division per se to offer any opportunities for voter registration for the thousands of remand prisoners held in our prisons. The legal and practical result is that when a remand prisoner has been in custody for more than six months ending on a qualifying date the remand prisoner, by reason of the impugned section, automatically loses whatever previous residency status he had in any polling division, for voter registration purposes, because of the remand prisoner's absence from his or her place of abode for a continuous period of six months ending on a qualifying date.

(25). The conclusive presumption of the loss of residency set forth by section 7(5) of PNDC 284 means that all remand prisoners in custody for six months or more ending on a qualifying date are disqualified from registering as voters and therefore denied the right to exercise their constitutional right to vote simply because the impugned section denies legal recognition to prisons as places of residence. Consequently, remand prisoners are unable to meet the "**resident in the polling division"** voter qualification requirement of section 7(1) (c) of PNDC 284.

(26). In the same vein, all remand prisoners are disqualified from having their names included in any register of voters by reason of section 1(d) of the Public Elections (Registration of Voters) Regulation, 1995 [C.I. 12], because the impugned section disqualifies them from being "**resident or ordinarily resident in an electoral area",** a key pre-condition for the inclusion of a person's name in a voters register. C.I. 12 therefore reinforces the disqualification of remand prisoners from voting."

CHURCIL presses the invalidity charge by the further argument that no "legitimate or constitutionally permissible state or governmental interest is served by the non recognition of prisons as places of residence for voter qualification and registration purposes." They urge that since the challenged legislation fails to meet the proportionality test, the same ought to be struck down on the grounds that it is clearly violative of articles 42 and 93 (2) of the Constitution.

In the same vein, he submits that, s.1 of CI 12, made pursuant to article 51 of the Constitution, is unconstitutional, and deserves to be nullified.

Since Ahuma Ocansey's arguments are not fundamentally different from CHURCIL's, I will refer to only those fresh matters that he introduced into the debate. He submitted that having regard to articles 35, 41 & 42 of the Constitution and the body of principles of the United Nations, to which Ghana is a signatory, the E C's refusal to allow all categories of prisoners to enjoy their fundamental right to vote is not only plainly unconstitutional, but robs prisoners of their Ghanaian citizenship, given that in our democratic regime, the right to vote is constitutive of citizenship, and the two, namely, voting and citizenship are inextricably linked

In respect of convicted prisoners in particular, he argues that … "the lawful punishment of persons is not tantamount to psychological annihilation, nor political depersonisation; that denying prisoners the right to vote deprives the

nation of a vital plank in its democratic machinery and compromises the integrity of our democracy."

Prisoners, he further submitted, must have a say in matters affecting their welfare as prisoners, namely, how the political governance and judicial and penal administrative systems are working and as these are matters of political decisions and political ideology, they must exercise their right to vote the government into being that best addresses their concerns."

In response, the 1st defendant argued in favour of validity and the retention of the impugned legislation on the main ground that s.7 (5) of PNDCL 284, is reasonably necessary to meet the constitutional duty imposed on the E C by article 47 of the Constitution, which requires that the country be divided into as many constituencies for the purpose of election of Members of Parliament; and with PNDCL 248, deriving its authority from article 47 of the Constitution. To be eligible to register in a polling division or in a constituency, s.7 (5) of PNDCL 284, the argument proceeded, meets an essential electoral requirement that,

"…a person must have his place of residence in that polling division or constituency on the date of registration for a continuous period of six months."

Counsel contends that having regard to the dictionary and consequently ordinary meaning of the word "resident" as appears in the challenged legislation, as well as s. 7 (5) of PNDCL 284, prisoners do not qualify to register for the purposes of voting in public elections and referenda.

Additionally, counsel justified prisoners' disenfranchisement in terms of article 295 (1) of the Constitution, namely that, it is critical, in the interest of public safety and security, that prisoners, who have deliberately violated the laws of the land and the rights of other citizens, be punished and kept away "under lock and key", as he put it.

The 2nd defendant, the E C, the major player around whom this controversy revolves, set down for our determination, the one broad issue which lies at the heart of this matter. It reads:

"Whether the Electoral Commission has, in this matter, committed any act or made any omission in contravention of the Constitution of the Republic of Ghana."

In the unreported case titled no. J1/8/2009 Daasebre Nana Baah III & 4 Ors v The Attorney- General & Electoral Commission, dated 18th February 2010. I discussed two important principles of constitutional law, applicable in cases relating to judicial review of legislative action. They are the presumptive principle of constitutional validity and the principle of severability of impugned legislation. I explained that the universal principle of validity is so entrenched, "to doubt the constitutional validity of a law, is to resolve it in favour of its validity. In other words, doubts are resolved in favour of constitutionality and not the person challenging or attacking it."

The local case of the Republic v Tommy Thompson Books Ltd. Quarcoo & Coomson [1996-97] SCGLR 804 at 851, and two foreign decisions, Commonwealth v Tasmania (The Tasmanian Dam Case) 158 CLR 1, F Hoffman –La Roche & Co v Secretary of State for Trade and Industry 1974 2 All E R 1128 (HL) are clear authorities on the point. As per Lord Diplock in the Hoffman case,

"Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of the acts done pursuant to the law declared by it, are presumed."

The rule is said to be the result of the respect which one organ of state, the judiciary owes to the other, the elected representatives. Additionally, I think the juridical basis for this principle is the omnia prasemuntur rite et solemniter esse acta rule, meaning all acts are presumed to have been done rightly and regularly. In discussing the rationale for the rule in the Tasmanian Dam Case,

reference was made to a text by Hogg writing "In the Constitutional Law of Canada (1977) Hogg.

"There should be, in other words, a presumption of constitutionality. In this way a proper respect is paid to the legislators, and the danger of covert (albeit unconscious) imposition of judicial policy preferences is minimised."

Another cardinal principle of constitutional law is that in actions challenging the infringement of a fundamental right, the onus is on those alleged to have restricted the right to justify the restriction.

Braithwaite JA of the Trinidad and Tobago Court of Appeal, discussed the principle in the case of Attorney General v Morgan [1985] LRC (Const) 770. He addressed the issue (page 797) in the following terms:

"Where an act is passed into Law …and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such an Act all that is required to do is to show that one more of his rights has been restricted. Having done so, because of the expressed Constitutional Policy, the burden is then shifted to the proponents of the Act to show that the provisions of the Act restricting such rights and freedoms are reasonable 'restrictions'. If the proponents of the Act fail to discharge this burden, then a court of competent jurisdiction may pronounce against the validity of the impugned Act."

The principle is of universal application. Dickson C. J. similarly observed in R v Oakes [1986] 26 DLR (4^{th}) 200 at 225-226, in relation to the Canadian Charter on human rights that:

"The onus praying that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1

can bring itself within the exceptional criteria which justify their being limited."

Admittedly, s. 7 (5) of PNDCL 284, the impugned legislation, is not a direct right creating or right extinguishing provision. The section 7 (5) merely defines what constitutes residence for purposes of voter registration. But in doing so, prisoners find themselves in positions where they cannot meet the "resident in the polling division" voter qualification requirement, of s.7 (1) (c) of PNDCL 248. The impugned legislation thus effectively takes away prisoners' right to register or vote, in that it refused to recognise prisons as residence within the meaning of that specific law, leading to the following far reaching negative consequences, as contended by CHURCIL.

'By virtue of s. 7 (1) (c), a conclusive presumption of loss of residence in a polling division, is thereby established in those instances where the prisoner has been absent from his or her place of residence for a continuous period of six months ending on the qualifying date."

Similarly, all prisoners find themselves unable to meet the residency requirement under s. 1 (d) of the Public Elections (Registration of Voters Regulations, 1995 [C1 12]. Since the offending legislation disqualifies them from being "resident or ordinarily resident in an electoral area", they are unable to have their names included in a voters' register.

PNDCL 284 was enacted principally for the purposes of concretising the representation of the people of Ghana. The crucial question for our consideration is not whether Parliament has power to enact PNDCL 284 to regulate the division of Ghana into constituencies for the purpose of giving effect to the right to vote as provided under article 42 of the Constitution. The general residency requirement is also not the matter in contention. The central question in these two cases is whether ss 7 (5) & 8 of PNDCL 284, are inconsistent with article 42 of the Constitution, leading to the violation of prisoners voting rights as guaranteed by the express provisions of the said

Constitutional provision. Consequently, it is the validity of the express stipulation under s. 7 (5) of PNDCL 284, that prisons shall not qualify as places of residence and the legal consequence or effect of the non – recognition of prisons as places of residence that is under challenge.

The answers to this and other ancillary issues which may emerge, lie largely in the interpretation which we ascribe to article 42 of the Constitution.

The PNDCL 284 predates articles 42 and 47 of the Constitution, the basic law which empowers the Electoral Commission, inter alia to divide Ghana into as many constituencies as may be prescribed. The main purpose, according to its preamble is to:

"provide for the division of the Republic into constituencies for the purposes of the election of members of Parliament and to provide for related matters."

It is trite learning that PNDCL 284, which was made on July 24, 1992 and gazetted on 7th August, 1992, is clearly subordinate to articles 42 and 47 of the Constitution. The fundamental rule is that the Constitution is the supreme law of the land and, in the absence of express constitutional provisions, any other law, whether it pre dates or post dates constitution, which is found to be inconsistent with any of its provisions, shall, to the extent of the inconsistency be void., is further reinforced by the internal provisions of the PNDCL 284.

PNDCL 284, is, within the category of existing laws as contemplated by article 11(4) of the Constitution and must necessarily be construed by the court in terms of article 11 (6) "with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution."

Article 42 of the Constitution provides:

"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

Admittedly, article 42 does not fall under either Chapter Five or Six of the Constitution, which deals with Fundamental Human Rights and Freedoms and The Directive Principles of State Policy, respectively. It falls under Chapter 6. But there is no doubt, that voting rights constitute a fundamental right of such significance or importance it does qualify as a fundamental human right. My stated position is in the light of article 33 (5) of the Constitution, which provides:

"The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man."

Section 7 (1) of PNDCL 284 in setting out who qualifies to be registered as a voter stipulates:

(a) a citizen of eighteen years of age or above, and
(b) of sound mind , and
(c) resident in a polling division or hails from the constituency and
(d) not otherwise disqualified to be registered as a voter

However, s.7 (5) of PNDCL 248 in spelling out the voting criteria provides:

"A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody in a place shall not be treated as resident there for purposes of this section."

The legal impact and consequence of the non recognition of prisons as places of residence implies that prisons cannot also be classified as falling within a polling division for the purposes of voting.

To determine the broader question of whether or not the s7 (5) of PNDCL 284 is inconsistent with article 42 of the Constitution, we must first throw the search light on article 42 of the Constitution, with a view to discovering who qualifies to vote in terms of its provisions. For the sake of clarity I reproduce it:

"Every citizen of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda".

How do we construe this important constitutional provision? The correct approach to interpreting Constitutions generally and fundamental human rights provisions in particular, is clearly so well settled, it does not admit of any controversy. The jurisprudence of this court does show that these must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from it. This court has clearly moved away from the doctrinaire approach adopted years ago in the case of In re Akoto [1961] 2 GLR 523.

The famed words of Sowah JSC as he then was in the celebrated case of Tuffuor v Attorney General [1980] GLR 637 at 647-648, is very much still relevant for our purposes, not to mention the tall list of case law that was cited in one of the most recent decisions of this court namely, the unreported suit numbered J1/1/2009 of William Brown v Attorney –General dated 3rd February 2010. Two of the older decisions of this court are Mensima v Attorney- General [1996-7] SCGLR 676 at p. 714, and New Patriotic Party v Inspector –General of Police [1993-94] 459 at 482. In the latter case, Bamford –Addo JSC as she then was observed that:

"…fundamental human rights are inalienable and can neither be derogated from or taken away by anyone or authority whatsoever. …This court is therefore not permitted to give an interpretation which seeks to tamper in any way with the fundamental human rights but rather to see that they are respected and enforced."

In Minister of Home Affairs & Anor V Fisher [1980] A C 319, Lord Wilberforce in delivering the judgment of the Privy Council stated at page 329:

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language…and to be guided by the principle of giving full effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

Judged along these universal basic principles of constitutional interpretation, I can only but conclude that the express provisions of article 42 of the Constitution confers the right to vote on all Ghanaians, save those below eighteen years and persons of unsound mind. I adopted the purposive – literalist interpretive approach to arrive at this conclusion. In so doing, I ascribed to the words in article 42 of the Constitution, their plain and ordinary meaning, being fully satisfied that such an approach leads to no ambiguity, obscurity, incongruity, confusion or the like. I was also guided in my thinking by other interpretive values and other constitutional principles of universal application, some of which I have already referred to.

It bears emphasis that the Constitution did not set down the residency criteria; it (the residency criteria) is the product of the subordinate PNDCL 284. But the people of Ghana adopted and enacted for themselves a democratic regime of constitutionally guaranteed adult suffrage for all Ghanaians, save only persons under eighteen years of age and persons of unsound mind. We crafted for ourselves a Constitution that set out its own

limitations on the right to vote and perhaps having regard to the value it places on the right in question, never ceded any of its authority to either the E C or some other authority to add further to the list of who shall not have the right to vote.

On the crucial issue of who qualifies to vote, there is a vast difference between Ghana's constitutional arrangement and that of other countries, including Australia, as is clearly borne out from Roach v Electoral Commissioner [2007] HCA 43 (26 September 2007). In such countries, the disenfranchisement of some category of serious criminal offenders is a, deliberate constitutional choice. These offenders are, by express constitutional provisions, forbidden from participating in public elections, in order, as was explained in the Roach case, to "deliver a message to both the community and offenders themselves that serious criminal activity will not be tolerated by the community." Such disenfranchisement is therefore a product of the Supreme Law, not a subordinate law in contravention of the Superior Law. Gleeson CJ points out the underlying philosophy in the Roach case. The learned Chief Justice explained that:

"It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in the temporary deprivation of the right to participate by voting in the political life of the community."

In my opinion, other internal constitutional provisions, point unequivocally to the path Ghana chartered for herself, namely, adult suffrage for all citizens, save the mentally challenged and those under eighteen years could only be described as a deliberate choice.

The general rule that constitutional provisions must be liberally, generously, benevolently or purposively construed, admits of an exception, an exception which in my view, is intended to give full meaning and effect to general

rights, so as not to render them nugatory. The exception to the general rule is that, qualifications, restrictions or limitations on fundamental rights must be strictly or narrowly construed. Indeed, as observed by Heath J in the Ciskei Supreme Court case of ANC (Border Branch) Anor. v Chairman, Council of State, Ciskei & Anor. 1995 (4) BCLR 401 (SA) at 411:

"A restriction in relation to a fundamental right that it qualifies, is to be seen as an exception to a general rule, and therefore to be narrowly construed."

It is to be seen that the narrow and restrictive approach is intended to avoid a negation of the general right. Thus, the Tanzanian Court of Appeal in the case of Pumbun v Attorney –General [1993] 2 LRC 313 at 317, cautioned that if the strictly narrow interpretative approach were not adopted, it would lead to a situation where:

"the guaranteed rights under the constitution may easily be rendered meaningless by the use of derogative or claw back clauses of that very same constitution."

Thus the legal position is that the restrictions or limitations within article 42 of the Constitution, while being given their plain meaning, must, at the same time, be strictly and narrowly construed.

It must be noted that in these matters, there is hardly any room for implicit or implied restrictions. Where the Constitution intends to impose any limitations or restrictions on fundamental rights and freedoms, these must expressly be stated, unless of course implicit restrictions can without any doubt be read from the requisite laws. It is on account of these basic principles, that I have not the slightest doubt that had the framers of the Constitution intended to include persons in legal custody, particularly, convicted persons from those debarred from exercising the franchise, they would have said so in explicit terms.

Articles 62 and 94 of the 1992 Constitution, reinforces the conclusion I have reached that the restrictions under article 42 of the Constitution are only

those clearly intended to apply. Articles 62 and 94 of the Constitution comprehensively set down who qualifies or is eligible to stand as a President and a Member of Parliament respectively. Article 94 (2), which equally applies to a person seeking election to the high office of President, stipulates inter alia that:

"A persons shall not be qualified to be a member of parliament if he-
(a)…
(b) has been adjudged or otherwise declared –
(i)…
(ii) to be of unsound mind or detained as a criminal lunatic under any law in force in Ghana; or
(c) has been convicted-
(i) for high crime under this constitution or high treason or treason or for an offence involving the security of the State , fraud, dishonesty, or moral turpitude; or
(ii) for any other offence punishable by death or by a sentence of not less than ten years; or
(iii) for an offence relating to or connected with election under a law in force in Ghana at anytime; or
(d)…;or

(e) is under sentence of death or other sentence of imprisonment imposed on him by any court…"

This is a classic case in which it can be argued that similarly elaborate restrictions would have been provided under article 42 of the Constitution, if the clear intention of the framers were that convicted prisoners were to be excluded or barred from enjoying the constitutional right to vote.

It is to be emphasised that apart from the restrictions expressly imposed by article 42 of the Constitution, no other constitutional provisions sets out any further limitations on who qualifies to vote. Article 42, unlike other sister rights conferring constitutional provisions, does not vest power in either the E.

C or any other authority to pass legislation for the purposes of further restrictions. As I understand it, the E. C.'s function, as per article 47 of the Constitution, was limited to the division of Ghana into constituencies and polling stations, in a manner such as would not derogate from, but rather effectuate the right to vote as enshrined under article 42. On the other hand, article 21 (1) (d) of the Constitution, which guarantees the right to freedom of assembly, reserves power in the appropriate authority, to pass laws curtailing the right conferred, within the stipulated limits. It states:

"21 (4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-

(a)…

(b)…

(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or

(d) for the imposition of restrictions on the freedom of entry into Ghana, or of movement in Ghana, of a person who is not a citizen of Ghana; or

(e) that is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community; except so far as the provision or, as the case may be, the thing done under the authority of that law shown not to be reasonably justifiable in terms of the spirit of this Constitution.

In interpreting article 42, further light is shed by other relevant human rights provisions, given the elementary rule that a constitution must be construed as a whole, from preamble to post amble. In this regard, it is to be noted firstly, that sovereignty rests with the people and further that the entrenched article 42, the right to vote, provides the basic constitutional democratic framework for securing the exercise of the will of the People of Ghana.

We read from the preamble:

"We the people of Ghana,
In exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity;…

The principle that all powers of government spring from the Sovereign will of the people;

The principle of Universal Adult Suffrage…"

Also, under the directive principles of state policy which this court has held constitute clearly enforceable rights, it is provided under article 35 as an essential part of our political objectives that:

"(1)Ghana shall be a democratic state dedicated to the realisation of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom the government derives all its powers and authority through the Constitution.

...

...

...

(6) (d) make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts and **by affording all possible opportunities to the people to participate in**

decision-making at every level in national life and in government." [Emphasis supplied]

Significantly, the only means of giving effect to the exercise of the sovereign will is through adult suffrage. When this court had opportunity to examine the nexus between the sovereign will of the people and the right to vote it unanimously declared in Tehn-Addy v Electoral Commission [1997-8]1 GLR at p. 595:

"...in order to give meaning and content to the exercise of this sovereign power by the people of Ghana, article 42 guarantees the right to vote every sane citizen of eighteen years and above. **The exercise of this right of voting, is therefore indispensable in the enhancement of the democratic process, and cannot be denied in the absence of a constitutional provision to that effect."(emphasis supplied.)"**

True democracy, with its hall mark of all inclusiveness, recognises certain key fundamental values and principles. Without these there can be no functional democracy. A core value of any democratic system is the concept of sovereignty of the people, and as expressed through the right to choose representatives, through whom the sovereign will of the people, shall be exercised. This choice can only be achieved through the popular participation in public elections. Other foundational values which lie at the heart of democracy include rule of law, judicial independence, with human rights being of paramount importance. As the learned Judge and author Aharon Barak explains:

"**D**emocracy is not just about legislative supremacy- it requires actualizing the values and principles at its core. There can be no true democracy without protecting human rights, rule of law, and the independence of the judiciary. Democracy is not just rule by the majority. It is also rule by fundamental values, in general, and human rights, in particular. Democracy is not just

formal democracy (concerned with the electoral process governed by the majority and expressed in legislative supremacy). Democracy is also substantive democracy (concerned with fundamental values and human rights)."
("Purposive Interpretation in law, page 239")

That s. 7 (5) of PNDCL 248, has no redeeming features, in that it totally flies in the face of all the fundamental democratic core values and principles which lie at the heart of multi -party democracy, the system of governance to which Ghanaians have bound themselves, is evident from a number of entrenched human rights provisions; as for example,

"RESPECT FOR HUMANITY
Article 15
(1)...

(3)A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons".(emphasis supplied)

"EQUALITY AND FREEDOM FROM DISCRIMINATION
Article 17

(1)All persons shall be equal before the law.

(2)A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

(3)For the purpose of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description

are not made subject or are granted privileges or advantages which are not granted to persons of another description."

"FAIR TRIAL
Article 19
(2)A person charged with a criminal offence shall-

(a)...;

(b)...;

(c) be presumed to be innocent until he is proved or has pleaded guilty;"

"GENERAL FUNDAMENTAL FREEDOMS
Article 21
(1)All persons shall have the right to-
(a)...
(b) freedom of thought, conscience and belief, which shall include academic freedom.
The right conferred under article 21 (b) finds expression inter alia through universal franchise.

Anchored to the fundamental right to vote, is the right to be registered, the key precondition for actualising the right to vote. The right to be registered as a voter is thus not a privilege but a right, and the E C has a constitutional obligation to register all persons who are qualified in terms of the express provisions of article 42 and desirous of exercising their franchise.

The proper test for determining an infringement to a fundamental right is to examine its effect and not merely its object. This is the clearly discernible principle from the case of In Bennet Coleman and Co. Ltd. & Ors. v Union of

India & Ors. AIR 1973 SC 106 at 118. The Indian Supreme Court per Ray J explained the principle in relation to the right to free expression thus:

"The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be, related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental, right although its direct subject matter may be different."

The effect of s. 7 (5) of PNDCL 248 is the non recognition of prisons as residences, thus barring prisoners from being registered for the purposes of exercising their fundamental right to vote. Crucially, s. 7 (5) of PNDCL 248 clearly violates a fair number of prisoners' basic rights- right to humanity or dignity, right to equality, and non- discrimination and most importantly, the right to vote.

International treaties provide a legitimate guide to constitutional interpretation. Indeed, this court proceeded to use the African Charter to influence its decision in the case of the New Patriotic party v Inspector – General of Police [1993-94] 2GLR 459, at a time when it had not even been domesticated. Archer C. J. speaking on behalf of the court justified the court's stand in these terms:

"I do not think that the fact that Ghana has not passed specific legislation to give effect to the African Charter, the Charter cannot be relied upon."

Interestingly, the court concluded in that case, that not only was the impugned legislation violative of the article 21 (1) of the Constitution, but actually in contravention of Article 11 of the African Charter on Human and People's Rights adopted by the Assembly of the African heads of State and Government in June 1981 in Nairobi, Kenya."

Ghana ratified the International Covenant on Civil and Political Rights (ICCPR) on the 7th of September 2000. Article 25 (2) of the said covenant provides as follows:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions… To vote…at genuine periodic elections which shall be by universal adult and equal suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the electors."

The Supreme Court of Canada in Richard Suave v Attorney- General of Canada & Ors. 2002 SCC 68 or [2002] 3 SCR 519, held in its ruling of 31st October, 2002, that to ban prisoners serving over two years from voting was too broad. The Court in throwing light on the effect of disenfranchisement observed that:

"denial of the right to vote…undermines the legitimacy of government, the effectiveness of government, and the rule of law…It countermands the message that everyone is equally worthy and is entitled to respect under law."

Of persuasive worth also is the decision of the Constitutional Court of South Africa, which empowered all prisoners to vote through its decision in August and another v Electoral Commission and Others, CCT 8/9 ON 4th April, 1999. The court outlined the importance of adult franchise in these terms:

"the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and person hood. Quite literally, it says that every body counts."

In the case of William Brown vrs. Attorney General suit No. CM J1/1/2009 dated 3rd February, 2010, my respected brother Dotse JSC, cautioned courts against the slavish application of foreign judicial pronouncements, given that

their value systems, history and other circumstances may differ from ours. I agree in principle with this caution, but I must point out that we are here dealing with basic universal adult suffrage, a right common to humanity. Constitutional principles of universal application and decisions from other true democracies on the right to vote, a right which has been described as the "indispensable foundation of a democratic system" serves as useful guides in fashioning our constitutional jurisprudence.

In our jurisprudence, remand prisoners, no matter the heinousness of the crimes they are charged with, are presumed innocent, until their guilt is established in accordance with due process. They do not lose their citizenship as Ghanaians. Prisons form part of Ghana's territory. If a national census were to be ordered, prisoners would be counted, not discounted. More over prisoners do not lose other fundamental constitutional rights by virtue of their status or deprivation of their liberty, whether temporary or permanent. To the contrary, they are entitled to a full enjoyment of these rights and liberties enshrined under the Constitution accorded to other citizens not similarly circumstanced, and the judiciary's duty, as guardians of the constitution, is to unremittingly protect these rights.

Principle 3 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (United Nations), is another set of international instruments which expressly state that persons under detention or imprisonment must not be denied their rights. It reads:

"There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognised or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this body of Principles does not recognise such rights or that it recognises them to a lesser extent."

As emphasised by this court in Republic v Court of Appeal; Ex parte Attorney –General (Frank Benneh Case)[1998-99] SCGLR 559, at 568:

"It is the right of every person in Ghana to enjoy his liberty, freedom of movement, etc, as enshrined in the 1992 constitution. It is also the duty of the courts to protect, defend and enforce these rights whenever they are being suppressed or stifled by any authority or person in authority. Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance."

I have considered the 1st defendant's counter arguments that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not allowed to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short Counsel contends that the legislation meets the proportionality test. These arguments, examined in the best of lights, I am afraid, would have no place in participatory democracy, with the guaranteed rights that are enshrined in the Constitution.

Admittedly, the rights are paired up with corresponding obligations and duties, arising under the directive principles of state policy, under and by virtue of article 41 of the 1992 Constitution. These reciprocal duties and obligations, owed to the State, other citizens and indeed the international community include the following:

"41…the duty of every citizen-

(a)…

(b) to uphold and defend this Constitution and the law;

(d) to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons;

(g) to contribute to the well-being of the community where that citizen lives;…

(i) to co-operate with lawful agencies in the maintenance of law and order."

But to meet the proportionality test, the following must be established. First that the infringement of the right achieves a constitutionally valid purpose and that the chosen means are reasonably and demonstrably justified. This calls for identifying particular problems that require the denial of the right, and the impairment is directed at a pressing and substantial purpose. (see Suave v Canada(Chief Electoral Officer) [2002] 3 SCR 519; 2002scc 68.

The Ghanaian decisional law on the proportionality test, known also as the Oakes test, with its two tier approach, was formulated by Acquah JSC, as he then was in Republic v Tommy Thompson Books Ltd. (No2) [1996-97] SCGLR 484 at 500-501 as follows:

"Now from the language of article 164 and similar provisions like 21 (4) c, the law in question must be 'reasonably necessary or required' in the public interest, national security etc. This really implies that, for any law to qualify as being reasonably necessary or required the objective of that law must be of such sufficient importance as to override a constitutionally protected right or freedom. In other words, the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial.

After this, it must further be shown that, the law itself is a fairly proper means of achieving this important objective. This will involve an examination of the provisions of the law to determine inter alia, whether the provisions infringe any fundamental principle of law like natural justice, and whether they unduly impair the constitutional right. The nature of the examination in the second stage will depend on the nature of the law and issues at stake".

The 1st defendant failed to demonstrate that the s. 7 (5) of PNDCL 284, is in any way justified. Counsel failed to identify any substantial or pressing matters of such importance that justifies the infringement of prisoners' rights. Not surprisingly, he was unable also to demonstrate any clear benefits arising from the impairment. I find no rational connection between the impugned legislation as it stands in achieving the objectives or purpose of PNDCL 284, namely that the denial of prisoners' right to vote is reasonably required in the public interest for the purposes of facilitating or achieving the objectives of dividing the country into constituencies for the election of members of Parliament. I find it extremely difficult to understand what constitutionally legitimate interest is served by the non recognition of prisons as places of residence for the purposes of voter registration; even for those who have been convicted of high crime against the State, such as subversion or high treason. Even for those who attempt to derail the democratic process, voting remains an important means of teaching them democratic values.

The s. 7 of PNDCL 284 is inconsistent with article 42 of the 1992 Constitution. I would grant the core reliefs prayed.

I have based the call on Ghana to join the league of nations who place a high premium on prisoners' fundamental right to vote, not on sentimentality or some other non legal reasoning, but on the just requirements of the Constitution, the Supreme Law of the land we voluntarily enacted for ourselves.

Finally, I commend legal counsel on both sides of this legal divide, but more especially Messieurs Kojo Graham and Ahuma Ocansey for taking up this important constitutional case on behalf of prisoners and for the industry they put into this work, which was done pro bono. In a legal regime where legal aid or pro bono service is virtually non –existent, we cannot overlook the crucial role played by these two gentlemen in advancing the frontiers of human rights law in our jurisdiction.

G. T. WOOD (MRS)
CHIEF JUSTICE

DR. DATE-BAH JSC:

The two consolidated cases before this Court demand of this Court an interpretation of an aspect of the extent of the Ghanaian citizen's right to vote. They are thus of constitutional importance and have civil liberties repercussions. By an order dated the 12th day of November 2009, the two suits were consolidated for determination by this Court. What they have in common is the issue of whether prisoners have the right to vote.

The first suit to be filed was *Ahumah Ocansey v The Electoral Commission* (Suit No. Writ J1/4/2008). This writ was filed on 20th June 2008. The reliefs endorsed on the writ are as follows:

i. "Declaration that non-registration of Prisoners for voting by the Electoral Commission contravenes Arts 42, 45(a) of the Constitution, and s.1 (a-e) of the Public Elections (Registration of Voters) Regulations, 1995 CI 12 and Art. 21 of the Universal Declaration of Human Rights (United Nations).
ii. Declaration that refusal or failure of the E.C. to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings. This conduct of the EC contravenes Art. 15(1) of the Constitution, and Principle 3 of Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (United Nations).

iii. Declaration that the conduct of the E.C. is defeatist of the Civic responsibility of Ghanaians, as citizens of this country, to uphold the sanctity of the freedoms and rights of Ghanaians, as enshrined in Arts. 35(4) and 41(b)(d) of the Constitution."

The plaintiff indicates that the capacity in which he is bringing the action is as a citizen of Ghana, a legal practitioner, a committed writer on national issues, an advocate of the rights of prisoners, and actuated by Article 2(1) of the Constitution.

The plaintiff filed the following issues for determination in its Memorandum of Issues:

1. "Whether or not the matter is a constitutional one for determination by the Supreme Court.
2. Whether or not prisoners are citizens of Ghana.
3. Whether the Constitution of Ghana allows or disallows prisoners to vote.
4. Whether or not the electoral laws of Ghana bar prisoners from voting.
5. Whether or not Representation of the People (Amendment) Act 2006 (Act 669) is in consonance with the provisions of the 1992 Constitution."

The second suit is *Centre for Human Rights & Civil Liberties (CHURCIL) v The Attorney-General and Electoral Commission.* This action was filed on 7th July 2008 and its suit No. is J1/5/2008. The reliefs which it seeks are:

1. "A declaration that section 7(5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of article 42 of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDCL 285 (*sic)* is void.

2. A declaration that section 7 (5) of the Representation of the People Law (PNDCD Law 284) is null and /or void because the enactment was made in excess of the powers conferred on Parliament by section 93(2) of the 1992 Constitution, or any other head of legislative power.

3. A declaration that section 7 (5) when read together with section 8 of PNDC 284 is inconsistent, with, and in contravention of article 17 (1) and 17 (2) of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDC 285 *(sic)* is void.

4. Consequential orders in exercise of the Supreme Court's jurisdiction under article 2(2) of the 1992 Constitution compelling/ordering the Electoral Commission to exercise its constitutional powers under the electoral laws and where necessary under article 45 of the Constitution to facilitate and ensure the registration for effective voting of all remand prisoners entitled to vote by reason of article 42 of the Constitution."

The capacity in which the plaintiff claims to be suing is as a non-profit civil society organisation committed to upholding, *inter alia*, the fundamental human and constitutional rights of remand prisoners under the 1992 Constitution and as protector and defender of the 1992 Constitution, pursuant to article 2(1) of the Constitution.

The arguments proferred by each of the plaintiffs in support of their case in these consolidated suits share a common foundation rock, namely, article 42. In the Statement of Case presented by CHURCIL, the argument is put as follows:

"8. Article 42 of the Constitution confers a constitutional right to vote on all Ghanaian citizens of eighteen years and above. The article states:

> ***"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."***

9. The constitutional sanctity of the right to vote was authoritatively asserted in the Supreme Court case of ***Tehn-Addy v Electoral Commission*** where Acquah JSC (as he then was) in delivering the judgment of the Court declared that,

> "***As a constitutional right therefore, no qualified citizen can be denied of it, since the Constitution is the Supreme law of the land."***

However, before examining the legal argument constructed on the basis of article 42 of the Constitution, it seems to me necessary to establish whether the plaintiffs have adduced any evidence to back their allegation of breach by the defendants in this case of their obligation in relation to article 42. The Electoral Commission sought to highlight this issue by filing only one issue in its Memorandum of Issues relating to both the *Ahumah Ocansey* and *CHURCIL* cases. This one issue was: "Whether the Electoral Commission has, in this matter, committed any act or made any omission in contravention of the Constitution of the Republic of Ghana."

The evidence in support of the plaintiffs' allegation of breach of article 42 is by no means clear. The evidence relied on is the bare affirmations of the plaintiffs in their Statements of Case, as verified by their accompanying affidavit.

Clearly the Electoral Commission takes issue with the plaintiffs on the factual basis of their claim. Apart from the bare affirmations of fact made by the plaintiffs in their Statements of Case, they offer no further proof of the facts alleged in them. In the *Ahumah Ocansey* case, for instance, the only evidence that the plaintiff relies on is the affidavit of Mr. Ahumah Ocansey of the Ghana Penal and Justice System Observatory, dated the 12th April 2007, who swears that the facts and particulars set out in the Plaintiff's Statement of Case "are true and accurate to the best of my knowledge." I have always considered this form of cryptic evidence unsatisfactory and self-serving.

The burden is on the plaintiffs to prove that the Electoral Commission has not registered Ghanaian prisoners for voting. Section 14 of the Evidence Decree, 1975 (NRCD 323) provides as follows:

> "Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

In my view, the plaintiffs have not discharged their burden of proof that the Electoral Commission has not registered prisoners to vote. Accordingly, this court should rather concentrate on the issues of law which arise in these two consolidated cases. Notwithstanding the plaintiff's failure to establish by evidence that the Electoral Commission had breached its constitutional obligations, it is still legitimate for this Court to interpret the relevant constitutional provision in order to determine whether, as a matter of law, prisoners are entitled to register to vote and to vote.

Of course, citizens of Ghana remain citizens, even after their incarceration. Whether or not such incarcerated citizens may vote is, of course, a constitutional question in this jurisdiction because of the provisions of article 42 of the Constitution.

The general principle governing elections in Ghana is that they are held on the basis of universal adult suffrage. This principle is embodied in article 42, an entrenched provision, of the 1992 Constitution, which has already been set out *supra.*

Article 42, although it is not contained in Chapter 5 of the Constitution, which is on "Fundamental Human Rights and Freedoms", is for me the first of the fundamental human rights of our Constitution. For without the general right to vote, the system of representative democratic government set out in the Constitution would fall away and be emptied of content. Without a democratic representative system of government, constructed on the bedrock of universal adult suffrage, the likelihood would be that the rights enshrined in Chapter 5 would be ineffective. It was thus very wise that the framers of our Constitution deemed it appropriate to embody the principle of universal adult suffrage as a specific entrenched provision in our Constitution. The constitutional importance of the principle of universal adult suffrage is further buttressed by the fact it is one of the few principles selected by the framers of our Constitution for highlighting in the Preamble to the Constitution and to which the People of Ghana solemnly declare and affirm their commitment. This constitutional significance of the right to vote is in contrast to the position, for instance, in India where the Supreme Court has held in *Jyoti Basu v Debi Ghosal* AIR 1982 SC 983 at 986 that:

> "A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a Fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of a statute,

there is no right to elect, creations they are, and therefore, subject to statutory limitation."

This position, as it were, brings into sharp relief, the different approach adopted by the law in Ghana where, as already indicated above, there is a constitutionally protected fundamental right to vote. Any statutory derogation from this fundamental constitutional right must therefore fall away. To summarise, in Ghana, the right to vote is a creature of the Constitution and not of statute. The Supreme Court so held in *Tehn-Addy v Electoral Commission* [1996-97] SCGLR 589, where Acquah JSC, as he then, was delivering the unanimous judgment of the court, said (at p. 594):

> "Whatever be the philosophical thought on the right to vote, article 42 of the 1992 Constitution of Ghana makes the right to vote a constitutional right conferred on every sane Ghanaian citizen of eighteen years and above. ...As a constitutional right therefore, no qualified citizen can be denied of it, since the Constitution is the supreme law of the land."

This is a very significant characteristic of our electoral regime. It is a characteristic which, to my mind, this Court should guard jealously. This generous and expansive constitutional protection of the right to vote in Ghana may be contrasted with the position also in the United States of America which has no equivalent comprehensive grant of universal adult suffrage in its Federal Constitution. The United States Constitution has extended piecemeal protection to particular groups of citizens whose voting rights have needed buttressing. Thus, the Fifteenth Amendment was ratified in 1870 to prevent voting rights being abridged on the grounds of "race, color, or previous condition of servitude" and the Nineteenth Amendment was ratified in 1920 to prevent the abridgment of voting rights "on account of sex." The United States Constitution does not thus contain a general provision on the right to vote; the right to vote expressed in it relates only to particular groups whose franchise cannot be denied or abridged on the basis of certain specified

attributes, such as those I have cited above. (Another illustration of these specified attributes is: "by reason of failure to pay any poll tax or other tax" introduced by the Twenty-Fourth Amendment in 1964.)

What needs to be spelt out, on the facts of these consolidated cases, therefore, is the implication for prisoners of this generous and liberal feature of our electoral regime. The most prominent implication is that article 1(2) of the 1992 Constitution renders void any statutory provisions inconsistent with the unqualified right to vote conferred by article 42 on all sane adult Ghanaians.

A second issue raised by the reliefs sought in the *Ahumah Ocansey* case (although it is not listed in the memoranda of issues) is whether a refusal or neglect to register prisoners for voting by the Electoral Commission amounts to a breach of article 15(1) of the Constitution, which reads as follows: "The dignity of all persons shall be inviolable."

This is an issue of law which has to be determined before this Court can decide whether or not to grant the "Declaration that refusal or failure of the E.C. to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings", which is sought by the plaintiff.

What is the interest that article 15(1) is intended to protect and is a denial to prisoners of a right to vote incompatible with that interest? The notion of the protection of the dignity of all persons is one that the Ghana Constitution has adopted from the international human rights movement. In the international context, it has had a certain connotation of grave violation of the core essential rights of human beings. The African Charter on Human and Peoples' Rights, which Ghana has ratified, deals with the matter in its Article 5 as follows:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The African Charter's illustrative, but non-exhaustive, list of exploitative practices that infringe the right to dignity provides guidance on what this court might consider to be an infringement of the right in the Ghanaian context. Its examples are all at the severe end of the continuum of degrading treatment. The African Commission on Human and Peoples' Rights has often based its findings of breach of Article 5 on torture and cruel practices relating to imprisonment. The question is whether denial of a right to prisoners to vote should be put in the same category as such dire examples of degrading treatment. Or should the Ghanaian courts adopt a broad view of the scope of the right to dignity? The decisions of the African Commission are, of course, not binding on this court and we are at liberty to adopt a much more expansive view of what conduct can be brought within the ambit of a breach of the right to dignity.

In my view, however, it is unnecessary to determine, on the facts and pleadings in this case, the scope of the right to dignity under the 1992 Constitution. Since article 42 is determinative of the entitlement of prisoners to register to vote and to vote, there is no further need to determine whether a denial of their right to vote would be an infringement of the inviolability of their dignity under article 15(1) of the Constitution. The legal consequences of adopting a broad view of the scope of the notion of the inviolability of dignity beyond the physical and psychological integrity of individuals will have to be thought through carefully in order to determine whether such an approach is necessary or desirable in policy terms. An expansive understanding of the concept of the inviolability of dignity would involve ensuring that people are treated relatively equally and that no person is treated as less than human or inferior to other people. This is best done in

the context of a case whose facts require a determination of this issue. Certainly, in the case before us, I do not think the issue has been sufficiently argued by counsel for it to be prudent for this court to make an authoritative determination of it.

Finally, in relation to the *Ahumah Ocansey* case, I am reluctant to grant the third declaration sought, since its meaning is not clear to me. The suit is brought against the Electoral Commission, which is an institution of State. However, the third declaration directs its attention at some obligations of Ghanaian citizens under the Constitution and wants this Court to declare that the conduct of the Electoral Commission is defeatist of the civic responsibility of Ghanaians, as set out in the provisions of the Constitution referred to in the declaration. These provisions are Article 35(4) to the following effect: "The State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person"; and article 41(d), which provides that: "The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen –

> (d) to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons".

I do not understand what the legal consequence of such a declaration would be and therefore I am unable to grant it.

In its Statement of Case filed in the *Ahumah Ocansey* case, the Office of the Attorney-General joins issue with the Plaintiff on the extent of the rights of prisoners to vote. The Plaintiff in that case raises for determination the issue of: "whether the Constitution of Ghana allows or disallows prisoners to vote." In other words, though the plaintiff may not have established his entitlement to those declarations sought by him which require factual proof, there are

those declarations which call for a legal interpretation of the Constitution and the determination of the validity of statutory provisions which are inconsistent with the Constitution. The *Ahumah Ocansey* case therefore calls for a legal discussion of the rights of prisoners to vote in Ghana.

The Attorney-General's argument in the *Ahumah Ocansey* case in favour of restricting the rights of prisoners to vote is as follows. The provisions of article 42 require that the following conditions are met before a person can vote:

i) The person must be a citizen of Ghana;
ii) The person must be eighteen years of age or above;
iii) The person must be of sound mind; and
iv) The person must be registered as a voter.

It is in relation to the last condition that the Attorney-General identifies problems for prisoners. The Attorney-General points out that, under section 7(4) the Representation of the People Law, 1992 (PNDCL 284), to be eligible to vote in a constituency, a person must have his or her residence in that constituency on the date of registration for a continuous period of six months. To be registered, a citizen must present himself or herself at a polling division or constituency for registration by electoral officials. The Attorney-General further argues that a person who is in custody in an establishment maintained for the purposes of the reception and punishment of offenders cannot be said to be "in residence" in that establishment. The Attorney-General concludes as follows:

> "The Plaintiff is seeking for a declaration, among others, that the "refusal or failure of the Electoral Commission to register prisoners for voting is a violation of their rights as citizens of Ghana and amounts to derogation of their integrity as human beings." We must be mindful that such reliefs do not open a pandora's box for all kinds of suits to be instituted. It will not be long before another Plaintiff comes along with

an action to allow prisoners to have conjugal visitations because "*their integrity as human beings"* is being violated.

It is submitted accordingly, that prisoners are not resident in their places of incarceration, that they do not qualify in terms of the statute to vote; that the Plaintiff should not be entitled to the reliefs he is seeking and therefore his action should be dismissed."

This argument flies in the face of article 42 which, as we have already seen, gives all Ghanaians, except those below eighteen years of age and those of unsound mind, the right to be registered to vote and to vote. To my mind, therefore, any statute which impedes this constitutional right is void to the extent of its inconsistency with article 42. There is thus an obligation on the Electoral Commission to promulgate an appropriate constitutional instrument enabling the registration of prisoners, notwithstanding any enactment to the contrary, since such contrary provision would be null and void as being inconsistent with article 42. Such constitutional instrument would need to address the challenges that prisoners face in relation to exercising their constitutional right to be registered to vote and ultimately their right to vote.

In the second of the consolidated cases, *the CHURCIL* case, the declarations sought by the Plaintiff focus on section 7(5) of the Representation of the People Law, 1992 (PNDCL 284). That section is impugned as being inconsistent with article 42 of the Constitution. The Plaintiff's case, as set out in its Statement of Case, is as follows:

"21. More importantly, section 7(5) provides that:

"A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody in a place <u>shall not be treated as resident</u>

<u>there for purposes of this section.</u>" (The emphasis is ours)

The legal impact and consequence of section 7(5) on the individual right to vote of remand prisoners forms the premise for the present Application for a declaratory relief to the effect that the said section is in contravention of article 42 of the Constitution and therefore null and void.

VI. LEGAL ARGUMENTS

22. The impugned section 7(5) negatively impacts the registration and voting rights of all remand prisoners "detained in legal custody" because a prison according to the impugned section does not qualify as a place of residence for purposes of meeting the voter qualification requirement of section 7(c) *(sic)* which requires residency in a polling division to qualify for registration as a voter.

23. This Application raises no constitutional or legal objections per se to the residency requirement of paragraph (c) of section 7(1) of PNDCL 284. It is the legal consequence of the non-recognition of prisons as places of residence on the right to vote of remand prisoners which is in issue and not the constitutionality or otherwise of the requirement of residency in a polling division for purposes of registration and voting.

24. If prisons do not qualify as places of residence then legally such places of legal custody and detention cannot be classified as falling within any polling division per se to offer any opportunities for voter registration for the thousands of remand prisoners held in our prisons. The legal and practical result is that when a remand prisoner has been in custody for more than

six months ending on a qualifying date the remand prisoner, by reason of the impugned section, automatically loses whatever previous residency status he had in any polling division, for voter registration purposes, because of the remand prisoner's absence from his or her place of abode for a continuous period of six months ending on the qualifying date.

25. The conclusive presumption of loss of residency set forth by section 7(5) of PNDCL 284 means that all remand prisoners in custody for 6 months or more ending on a qualifying date are disqualified from registering as voters and therefore denied the right to exercise their constitutional right to vote simply because the impugned section denies legal recognition to prisons as places of residence. Consequently, remand prisoners are unable to meet the **"resident in the polling division"** voter qualification requirement of section 7(1)(c) of PNDCL 284.

26. In the same vein, all remand prisoners are disqualified from having their names included in any register of voters by reason of section 1(d) of the Public Elections (Registration of Voters) Regulations, 1995 [CI 12], because the impugned section disqualifies them from being **"resident or ordinarily resident in an electoral area"**, a key pre-condition for the inclusion of a person's name in a voters register. C.I. 12 therefore reinforces the disqualification of remand prisoners from voting.

27. It is our submission that the legislative constraints and shackles on the registration and voting rights of remand prisoners brought into being by the impugned section effectively succeeded in taking away the registration entitlements and voting rights of thousands of eligible voters who were remand prisoners during the 1992, 1996, 2000 and 2004 elections. The Electoral Commission concedes its legal impotence and lack of

power and authority to register remand prisoners as voters because of the impugned section."

In response to these arguments by the Plaintiff, the Attorney-General makes the counter-argument that it is in the public interest that electoral officers are not exposed to prisoners and that prisoners be punished by being deprived of the right to vote. The argument is stated in the following terms:

"The question for us to answer is whether it is in the public interest that electoral officers should be exposed to such persons; whether it is in the public interest that such persons should be allowed to vote; that such persons should have a role in the election of the President of this country and Members of Parliament.

Article 295(1) of the Constitution defines "public interest" to include "*any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana."*

The public interest is paramount. It is in the interest of the public that offenders are punished and that they are kept under lock and key. It is in the interest of the public that access to the prisons should be restricted and that adequate security measures are put in place to secure the prisons before electoral officers are exposed to prisoners, either for the purpose of registration or voting.

The fact that in some jurisdictions, prisoners have the right to vote should not, *ipso facto*, give prisoners the right to vote in Ghana. The absence of the right to vote by prisoners is not a curtailment of their rights under the Constitution, but that in the attempt to get them to exercise the franchise, we do not forget the pain, the mental agony, despair and experiences of a vast majority of Ghanaians, who have at one time or the other been victims of criminals and their hope, desire and expectation that criminals pay for their crimes."

I do not find this public interest argument persuasive and I do not consider that it furnishes any justification for denying prisoners the unqualified right to vote which is conferred on them by article 42. The cumulative effect of the provisions in Chapters 5 and 6 of the 1992 Constitution is to infuse that Constitution with a libertarian spirit. Nothing in the core values and spirit of the 1992 Constitution justifies the restriction on prisoners' right to vote that is advocated by the learned Attorney-General. There is thus no basis for implying the restriction argued for by the Attorney-General to qualify the clear and unambiguous language of article 42.

Conferring a right on prisoners to vote would not be unprecedented in the Commonwealth. Both Canada and the Republic of South Africa, for example, permit voting by prisoners. In the Canadian case of *Sauve v The Attorney-General of Canada, the Chief Electoral Officer of Canada and the Solicitor-General of Canada* [2002] S.C.R. 519, 2002 SCC 68, cited by the plaintiff in the *Ahumah Ocansey* case, the Supreme Court of Canada held, in a 5 to 4 decision that a section in the Canada Elections Act that prohibited voting by inmates serving a sentence of two years or more was unconstitutional and void. The Attorney-General, while admitting that the section infringed the right of prisoners to vote, nevertheless argued that denying them the right was justifiable under the Canadian Charter of Rights and Freedoms since it served several purposes best determined by Parliament. This argument was roundly rejected by the majority. Chief Justice McLachlin, delivering the judgment of the majority, declared that (para. 1) :

> "The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people – those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a "reasonable limit...demonstrably

justified in a free and democratic society." I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here, the reasons offered do not suffice."

She goes on later to conclude as follows (paras. 41-43):

"I conclude that denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits. Punitive disenfranchisement of inmates does not send the "educative message" that the government claims; to the contrary, it undermines this message and is incompatible with the basic tenets of participatory democracy contained in and guaranteed by the *Charter.*

The government also argues that denying penitentiary inmates the vote will enhance respect for law because allowing people who flaunt the law to vote demeans the political system. The same untenable premises we have been discussing resurface here – that voting is a privilege the government can suspend and that the commission of a serious crime signals that the offender has chosen to "opt out" of community membership. But beyond this, the argument that only those who respect the law should participate in the political process is a variant on the age-old unworthiness rationale for denying the vote.

The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient

> and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting – whether by reason of class, race, gender or conduct – played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law."

I wholeheartedly endorse and adopt these percipient observations and analysis of the Canadian Supreme Court. In the Ghanaian context also, the right to vote of all adults of sound mind is not a privilege which the government can withdraw or suspend in the public interest, as perceived by it. Whilst I do not rule out absolutely the possibility of implying a term from the Constitution, read as a whole, to qualify the absolute terms of article 42, the liberal spirit of the 1992 Constitution precludes any such implication to take away the right of prisoners to vote.

The plaintiff in the *CHURCIL* case, in addition to its arguments earlier set out above, also deploys an equality contention to support the right of prisoners to vote. The argument is that Article 17 of the 1992 Constitution provides a constitutional guarantee of equality before the law and freedom from discrimination for all Ghanaian citizens. It puts forward the case that the impugned section of PNDCL 284 discriminates against prisoners in breach of this article 17. It urges a broad and liberal interpretation of article 17 so as to find the impugned section discriminatory on the grounds of the social status of prisoners. It submits that the jurisprudence of the equal protection clause of the Fourteenth Amendment of the United States Constitution provides persuasive guidance and authority for this Court to make a determination on whether the impugned section is unconstitutionally discriminatory and inconsistent with article 17. While this is an interesting and ingenious argument, I do not consider it necessary to make a determination on this

issue in the context of this case. Article 42 provides a sufficient foundation for giving the plaintiff the core remedy it seeks. Relying on article 17 tautologously to deliver a declaration similar in result to that based on article 42 is to my mind imprudent, particularly as the equality argument has much wider constitutional implications and has to be carefully calibrated in order for it not to have unintended and undesirable public policy consequences. I believe that it would be best to leave the interpretation of article 17 to a case whose facts necessarily require a reliance on that article for the determination of the dispute in that case.

In the light of the foregoing discussion, the declarations that I am willing to give in the two consolidated cases are as follows:

In *Ahumah Ocansey v The Electoral Commission,* I would grant the following declarations:

1. Declaration that non-registration of prisoners for voting by the Electoral Commission, if established, would contravene articles 42 and 45(a) of the Constitution.
2. Declaration that refusal or failure of the Electoral Commission to register prisoners for voting would be a violation of their rights as citizens of Ghana, if the only basis of their exclusion from the electoral process is the fact of their being prisoners.

These declarations are the result of Ghanaian law and I find it unnecessary to refer to the Universal Declaration of Human Rights or any other instrument of public international law.

In the *Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney-General and the Electoral Commission* case, I would grant the following declarations:

1. A declaration that section 7(5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of article 42 of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said provision of PNDCL 284 is void.
2. A declaration that section 7(5) of the Representation of the People Law (PNDCL 284) to the extent that it restricts the right of prisoners to vote is null and void, pursuant to article 1(2) of the 1992 Constitution, because the enactment, by virtue of article 11(6) of the Constitution, although existing law, on the coming into effect of the Constitution, is in excess of the powers conferred on Parliament by article 93(2) of the Constitution.
3. A declaration that section 1(d) of the Public Elections (Registration of Voters) Regulation 1995 (C.I. 12) to the extent that it restricts the right of prisoners to vote is null and void, pursuant to article 1(2) of the Constitution.

As a consequence of these declarations, this court orders the Electoral Commission to exercise its power to make regulations under article 51 of the Constitution to make an appropriate constitutional instrument enabling prisoners to exercise their right to vote. This order is to be carried out as soon as practicable and, in any case, within no more than twelve months from today. Any statutory provision which impedes the exercise by the Electoral Commission of its power referred to above is void to the extent of any inconsistency with the enabling of prisoners to vote.

In reaching this result, this Court has heeded the wise counsel of her Ladyship Bamford-Addo JSC, who said in *Apaloo v Electoral Commission* [2001-2002] SCGLR 1, at p.19:

> "Ghana has adopted democracy and those principles are eloquently given force in the Preamble to and article 1 of the 1992 Constitution. In the contemporary world, any limitation on suffrage is rejected. It is

universally accepted that there is no reason at all for exclusion of the right to vote or any limitation to it, considering that all men are created equal and have one vote each. For this reason, it is incumbent on the Electoral Commission to provide by all legitimate means for the free and unlimited exercise of the citizens' franchise in conformity with both the letter and spirit of the Constitution. This is the manner in which electoral laws ought to be interpreted."

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

OWUSU (MS), JSC:

By an order of the court granted on 12-11-09, writs Nos. J1/4/08 titled AHUMAH OCANSEY VRS THE ELECTORAL COMMISSION and J1/5/08 CENTRE FOR HUMAN RIGHTS and CIVIL LIBERTIES (CHURCHIL) VRS THE ATTORNEY-GENERAL and THE ELECTORAL COMMISSION were consolidated.
By both writs, the plaintiffs are invoking the exclusive original Jurisdiction of the court under Article 2 of the 1992 constitution relating to the enforcement of specific provisions of the constitution.
By his writ, the plaintiff a citizen of Ghana, a Legal Practitioner and a committed writer on national issues rights, an advocate of the rights of prisoners, and actuated by Art. 2 (1) of the constitution in suit No. J1/4/08 claims the following declarations:

"(i) Declaration that non-registration of prisoners for voting by the electoral commission contravenes Arts. 42, 45 (a) of the constitution and s. 1 (a – e) of the Public Elections (Regulation of Voters) Regulations, 1995 C.I. 12 and Art. 21 of the Universal Declaration of Human Rights (united Nations)

(ii) Declaration that refusal or failure of the E. C. to register prisoners for voting is a violation of their rights as citizens of Ghana and amounts to derogation of their integrity as human beings. This conduct of the E. C. contravenes Art 15 (1) of the constitution and principle 3 of body of principles for the protection of all persons under Any Form of Detention or Imprisonment (United Nations)

(iii) Declaration that the conduct of the E. C. is defeatist of the civic responsibility of Ghanaians as citizens of this country, to uphold the sanctity as enshrined in Arts 35 94) and 41 (b) (d) of the constitution."

By his writ, the plaintiff in suit No. J1/5/08, a non-profit civil society organization committed to upholding, inter alia, the fundamental human and constitutional rights of remand prisoners and as a protector and defender of the 1992 constitution, also seeks under Article 2 (1) of the constitution the following reliefs:

"(i) A declaration that section 7 (5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with and in contravention of article 42 of the 1992 constitution, and that consequently, to the extent of such inconsistency, the said PNDCL 284 is void.

(ii) A declaration that section 7 95) of the Representation of the People Law (P. N. D. C. Law 284) is null and /or void because the enactment was made in excess of the powers conferred on parliament by article 93(2) of the 1992 constitution, or any other head of legislative power;

(iii) A declaration that section 7 (5) when read together with section 8 of PNDCL 284 is inconsistent with, and in contravention of article 17(1) and 17 (2) of the 1992 constitution, and that consequently, to the extent of such inconsistency, the said PNDCL 284 is void;

(iv) Consequential orders in exercise of the supreme court's Jurisdiction under article 2 (2) of the 1992 constitution compelling/ordering, the Electoral Commission to exercise its constitutional powers under the electoral laws and where necessary under article 45 of the constitution to facilitate and ensure the registration for effective voting of all remand prisoners entitled to vote by reason of article 42 of the constitution."

In both suits, the issues for determination are as follows:

1. "Whether or not the matter is a constitutional one for determination by the Supreme Court.

2. Whether or not prisoners are citizens of Ghana.
3. Whether the Constitution of Ghana allows or disallows prisoners to vote.
4. Whether or not the electoral laws of Ghana bar prisoners from voting.
5. Whether or not Representation of the People (Amendment) Act 2006 (Act 669) is in consonance with the provisions of the 1992 Constitution."

One additional issue was filed by the Defendant in suit No. J1/4/08 and 2nd Defendant in suit No. J1/5/08 as follow:

1. Whether the Electoral Commission has, in this matter, committed any act or made any omission in contravention of the Constitution of the Republic of Ghana.

The plaintiffs in both suits base their cases on Article 42 of the constitution which states that:

"**Every citizen of Ghana of eighteen years of age or above and of a sound mind has the right to vote and is entitled to be registered as a voter for the purpose of public elections and referenda**." (Emphasis supplied)

Under Article 45 (a) of the constitution, the Electoral Commission is mandated to compile the register of voters and revise it at such periods as may be determined by law, among other functions. Section 2 (a) of the Electoral Commission Act, 1993 (Act 451) also states that:

"The functions of the Electoral commissioner are to compile the register of voters and revise it at such periods as may be determined by law."

By a constitutional Instrument C. I. 12 – Public Election (Regulation of Voters) Regulation of 1995 qualification for registration is set out as follows:

A person who

(a) is a citizen of Ghana
(b) has attained the age of eighteen years;
(c) is of a sound mind;
(d) is resident or ordinarily resident in an electoral area; and
(e) is not prohibited by law from registering as a voter;

is entitled to have that person's name included in a register of voters for the electoral area during a period set aside for the registration of voters.

The first plaintiff submits that in pursuit of its functions, the Electoral Commission has registered and continues to register eligible Ghanaians for the exercise of their political and civic rights to vote during elections. He

contends that the word "**Every**" in Art. 42 is inclusive of "All Ghanaians in Ghana except those who are not of a sound mind."

By implication, the plaintiff contends that prisoners under Art. 42 and C. I. 12, do qualify to be registered as voters. However, prisoners were excluded from exercising their franchise in the 1992, 1996, 2000, 2004 and indeed they were so excluded in the 2008 elections, plaintiff argues further that there is no law which expressly takes away a prisoner's right to vote, that right having been guaranteed by the constitution.

It is his case that under Art. 15 (1) of the constitution, "**the dignity of all persons shall be inviolable.**"

In this wise, he referred to "Body of principles for the Protection of All persons under Any form of Detention or Imprisonment (United Nations) principle 3 which states that –

> **"There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognised or existing in any State pursuant to law conventions, regulations or custom on the pretext that this Body of Principles does not recognise such rights or that it recognises them to a lesser extent.**

Plaintiff mentioned countries like Armenia, Bulgaria, Hungary etc. where prisoners have been expressly denied the right to vote and submits in this country there is no such express prohibition.

Where as the plaintiff in suit No J1/4/08 speaks for all prisoners whether convicted or on remand, plaintiff in suit No. J1/5/08 restricted himself to remand prisoners.

Personally, I do not think that the distinction should have been made to start with as both convicted and remand prisoners are covered under section 7(5) of the Representation of the people Law, 1992 (P. N. D. C. L. 284) which states that:

> **"A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or <u>who is detained in legal custody</u> in a place shall not be treated as resident there for purposed for this section."**

The plaintiff's case is that section 7(5) of P. N. D. C. Law 284 negatively impacts on the registration of all remand prisoners "***detained in legal custody***" because a prison according to the impugned section does not qualify as a place of residence for purposes of meeting the voter qualification of section 7 (1) (c) which requires that to qualify as a voter, a person must be "resident in a polling division, or hails from the constituency. According to him, it is not the constitutionality of this requirement which is being questioned but the legal consequence of the non-recognition of prisons as places of residence on the right to vote of remand prisoners which is in issue.

Counsel for the plaintiff argues that if prisons are not places of residence for purposes of registration, then they cannot fall within any polling division to offer remand prisoners opportunity to register and vote while on remand.

These prisoners when they have been on remand for more than six months, loose their residential status in any polling division for being absent from their places of abode for a continuous period of six months ending on the qualifying date.

These prisoners are also disqualified from having their names included in any register of voters to meet the requirement under section 1 (d) of the public

elections (Registration of voters) Regulations of 1995 (C. I. 12) that they should be "resident or ordinarily resident in an electoral area."

The result being that, counsel submitted, these constraints and shackles on the registration of remand prisoners take away the registration entitlements and in effect the voting rights of these prisoners. This, counsel contended is a "a backdoor amendment" of article 42 which is an entrenched provision of the constitution and can only be amended by a referendum. He submits that the impugned section is inconsistent with article 42 and to the extent of the inconsistency, null and void. He is therefore calling upon the court under article 130 of the constitution to declare that it was made in excess of the powers vested in parliament and therefore unconstitutional.

Under article 93(2) of the constitution the legislative power of Ghana shall be vested in parliament and shall be exercised in accordance with this constitution.

Counsel, by the writ, is seeking an enforcement of the constitutional rights of all remand prisoners to vote.

He recognises the presumed validity of the impugned legislation as it is until the proponent of invalidly or assailant of the law shows otherwise. He referred to the F. HOFFMANN-LA ROCHE & CO AG. VRS SECRETARY OF STATE FOR TRADE and INDUSTRY [1974] 2AER 1128 (HL) in which Lord Diplock explained the position as follows:

> **"Unless there is such challenge and if there is, until it has been upheld by Judgment of the court the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed."**

Turning to Article 17 of the constitution, it is the plaintiff's case that the said Article guarantees equality before the law and freedom from discrimination for all Ghanaians.

Article 17(1) guarantees equality of all persons before the law.
17 (2) states further that "A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status."

He contends that the impugned section of P. N. D. C. Law 284 discriminates against remand prisoners in breach of Article 17. By the impugned sections, remand prisoners are disqualified from registering as voters and denied residential status for purposes of registering and thus denied their rights of voting.

On the contrary, by the Representation of the people (Amendment) Act of 2006, Act 699, exemption from the residency requirement of the same law has been granted Ghanaians resident abroad to enable them register to vote in public elections and referenda. He, as a result submits, that the impugned legislation viv-a-vis remand prisoners is discriminatory and therefore in violation of Article 17.

The 1st Defendant does not see eye to eye with the plaintiffs on their submissions of the illegality of the impugned sections of P. N. D. C. 284 which limit prisoners' right to vote in contravention of Article 42 of the constitution.

In the performance of his functions, article 47 requires that the country is divided into constituencies for the purpose of election of members of parliament. To be eligible to register in polling division or in a constituency, a person must have his place of residence in that polling division or constituency on the date of registration for a continuous period of six months. Every citizen has to go through the process of registration before he exercises his right to vote.

Relying on "the Oxford Advanced Learner Dictionary of current English (5th Edition) by A. S. Hornsby, in which a resident is defined to mean **"a person who lives or has a home in a place not a visitor**," he submits that to reside is to have one's home in a certain place."

He argues that a person in custody in an establishment maintained for the purposes of reception and punishment of offenders cannot be said to be "in residence in that establishment or the constituency. Remand prisoners and for that matter convicted prisoners as well cannot present themselves for registration and therefore the non-registration of a citizen who has not presented himself for registration and for that reason cannot vote does not constitute violation of his right to vote.

He submits that prisoners are not resident in their places of incarceration and do not qualify in terms of the law to vote.

He is therefore urging upon the court that the plaintiff is not entitled to the reliefs he is seeking and same must be dismissed.

Counsel refers to the case of MARBURY VRS. MADISON [1803] 1 Cranch 137 quoting Marshall C. J. that:

> **We must never forget that it is a constitution we are expounding - - - intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."**

He also relies on our local cases of TUFFUOR VRS ATTORNEY-GENERAL [1980] GLR 637 and NEW PATRIOTIC PARTY VRS ATTORNEY-GENERAL (the 31st December case [1993-94] GLR 35.

Counsel then deals with the issue of "**public interest**" as defined under Article 295(1) of the constitution to "**include any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana."**

He argues that these prisoners are perpetrators of crime such as murder, manslaughter, robbery and drug related as well as sexual offences. Thus having violated the rights of others, whether it is in the public interest that they be allowed to take part in the election of the president and members of Parliament of the country.

That public interest is paramount and for that reason it is in the interest of the public that these prisoners are punished and that they are kept away from society as a whole and counting the dangers involved in exposing them to electoral officers.

After these arguments however, he referred to the law amending P. N. D. C. L. 284 in 2006, (Act 699) which exempts Ghanaians living abroad from the residency requirement of the law and submits that whatever rights citizens have under article 42 of the constitution can only be exercised when the necessary procedures have been put in place by the Electoral Commission.

Finally he submitted that section 7 (5) of Law 284 as law, existed before the coming into force of the constitution. As such, it can be applied with such modification, adaptation, qualifications, and exceptions necessary to bring it into conformity with the provisions of the constitution.

The 2nd Defendant, the Electoral Commission does not appear to have any answer to the plaintiff's claims. He does not even appreciate why he was sued and therefore prays for an order of the court to strike the commission out as a Defendant.

Article 42 of the constitution confers a constitutional right to vote on **all Ghanaian citizens** of eighteen years and above and of sound mind.

The only limitation on this right is unsoundness of mind.

In the case of TEHN-ADDY VRS. ELECTORAL COMMISSION [1996-97] SCGLR the Supreme Court per Acquah JSC (as he then was) had this to say:

> **"As a constitutional right therefore, no qualified citizen can be denied of it, since the constitution is the supreme law of the land."**

In Article 1 (2) of the constitution it is stated that:

> **"This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency, be void."**

It is for this reason that counsel for plaintiff in suit No. J1/5/08 submits that any law or Act of parliament which dilutes or whittles away the citizen's right to vote is null and void.

In the preamble to the constitution, the people of Ghana "IN THE NAME OF THE ALMIGHTY GOD," solemnly declared and affirmed our commitment to:

> **"The principle that all powers of Government spring from the sovereign WILL of the people;"** and
>
> **"The principle of Universal Adult suffrage**" among others.

Under Article 1 (1) of the constitution,

"The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this constitution."

In the case of TEHN-ADDY VRS ELECTORAL COMMISSION already referred to, the court held that:

"(1) every sane Ghanaian citizen of eighteen years and above, had the right under article 42 of the constitution to be registered as a voter, the exercise of that constitutional right was indispensable in the enhancement of the democratic process and it could not be denied in the absence of a constitutional provision to that effect."

"Per curiam (1) A heavy responsibility is entrusted to the Electoral Commission under article 45 of the constitution in ensuring the exercise of the constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance."

In a recent Canadian case of SAUVÉ VRS ATTORNEY-GENERAL OF CANADA, THE CHIEF ELECTORAL OFFICER OF CANADA & THE SOLICITOR-GENERAL OF CANADA [2002] 3 SCR 519, Richard Suavé, an ex-inmate, challenged the section of the Canada Elections Act that prohibited voting by inmates serving a sentence of two years or more.

Even though the Attorney-General of Canada did not dispute that the law infringed upon the right of inmates to vote, the government sought to justify it as it served several purposes best determined by parliament.

In dismissing the arguments put forward by the Government, the court found that as voting **was a fundamental** right in a democracy, any attempt made to restrict that right had to be made on the basis of a compelling reason that met specific legal tests.

Admittedly, there is no law which expressly takes away the prisoner's right to vote in this country. The argument by the plaintiffs is that by the impugned provisions of P. N. D. C. Law 284, prisoners are denied the opportunity to register and can therefore not exercise their constitutional right under article 42 of the constitution.

P. N. D. C. L. 284 was made on July 24 1992 and therefore predates the constitution. It falls within the category of "***existing laws***" under Article 11(1) (d) of the constitution.

I agree with counsel for plaintiff that it must be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the constitution as a whole and Article 42 in particular to give effect to the prisoner's right to vote.

Section 7(5) with regard to persons in legal custody places a limitation on their residential status for purposes of registration and therefore inconsistent with Article 42 of the constitution and to the extent of the inconsistency null and void.

I would however not say that the law was passed in excess of powers conferred on parliament under Article 93(2) since same was in existence before the constitution came into force. Indeed the law was not an Act of

parliament. The ruling council arrogated to itself the functions of the legislature at the time.

The preamble of the constitution (paragraph 4) provides that one of the values on which the sovereign and democratic state of the Republic of Ghana is founded, is the universal adult suffrage. In this case, the issue is whether prisoners' constitutional right to vote is not being infringed upon if no appropriate arrangements are made to enable them to register and vote.

In a South African constitutional case of AUGUST and Another VRS ELECTORAL COMMISSION and others [1999] 3 SALR 1 where the court was faced with a similar issue, the court pointed out that the right to vote by its very nature imposed positive obligations upon the legislature and the executive. This is the reason why the constitution provides for the establishment of an independent Electoral Commission as an impartial body to manage the elections and ensure that they are free and fair.

August case involved the voting rights of awaiting trial i.e. remand and sentenced prisoners. The constitutional court upheld the appeal against a decision of the Transvaal High Court which held that the independent Electoral Commission had no obligation to facilitate the registration and voting of the said prisoners.

It is also the case of the plaintiffs that denying prisoners the right to vote, is a violation of their fundamental human right of respect for their dignity under Article 15(1) which guarantees respect for human dignity.

Under 2 (b) they as prisoners shall not be subjected to "**any other condition that detracts or is likely to detract from their dignity and worth as a human being".**

This right is reinforced under Article 35(4) of the constitution which places an obligation on the state to cultivate among ALL Ghanaians respect for

fundamental human rights and freedoms and the dignity of the human person.

Plaintiff submits that the fact that a person has fallen foul of the law, is no reason why the very basic rights which define him as a citizen and political being should be taken away from him.

In August case already referred to, the court said that the universality of the franchise is important not only for nationhood and democracy, but that the vote of each and every citizen is a badge of dignity and personhood."

The impugned section of P. N. D. C. Law 284 which indirectly denies prisoners their right to vote infringes upon this in contravention of Art. 42.

The court held that the right to vote must be interpreted to enfranchise rather than disenfranchise eligible voters. Eligible voters of course include eligible prisoners.
Finally, the plaintiffs' contend that section 7(5) of the law unduly discriminates against prisoners in breach of Article 17. They argue that the law denies prisoners residential status for which they cannot be registered and for that matter cannot exercise their franchise.

The law was amended to make it possible for Ghanaians resident abroad to register to vote in public elections.

The Representation of the people Law, 1992 as amended was further amended as follows:

"(b) by the substitution for section 8 of the following:

"Registration of Ghanaian citizens abroad

8. (1) A person who is a citizen of Ghana resident outside the Republic is entitled to be registered as a voter if the person satisfies the requirements for registration prescribed by law other than those relating to residence in a polling division."

The commission is empowered to make Regulations to prescribe the modalities for the implementation of the Act by Constitutional Instrument. Why therefore can the commission not take steps to have the Law amended further to enable prisoners to vote in conformity with Article 42 just as it was done in the case of Ghanaians resident abroad?

What is good for the goose is equally good for the gander.

The Law as it is now vis-à-vis the Representation of the people (Amendment) Act of 2006 (Act 699) is indeed discriminatory and must be frowned upon.

There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in prisons or special votes could be provided to prisoners. Just as registration can be transferred, so can their votes be transferred to their constituencies where they might have registered. If there is the WILL, a way will necessarily be found.

Now turning to the 1st Defendant's case he at the end of the initial resistance to the plaintiffs' case, that non-registration of a citizen who has not presented himself for registration does not and should not constitute a violation of the right to vote, he conceded that the right to vote can only be exercised when the necessary procedures have been put in place by the Electoral Commission. This is exactly what the plaintiffs are asking for. That the law as it stands now, puts a fetter on the exercise of this right and the court must so declare.

Counsel however in another breath, sought to justify the denial of this right by contending that these prisoners are known to have violated the rights of others through commission of crime often times violent and fatal ones. He

posed a question whether it is in the public interest that such persons should be allowed to vote in the election of the president and Member of Parliament of the country. With due deference to counsel, that is not the issue here. The issue is not whether prisoners must be given the right to vote but rather what the position of the law is under the constitution.

It is therefore not a case of they being architects of their own misfortune.

I also do not buy counsel's argument that it is not in the public interest for electoral officers to be exposed to prisoners. What about their exposure to prison officers?

The 1st Defendant's answer does not defeat the plaintiffs' case. On the whole, the plaintiffs have succeeded in making out their claims as the law now stands and they are therefore entitled to the reliefs sought in Writ No. J1/4/08 and in the case of Writ No. J1/508 reliefs (1), (3) and (4). Relief (2) is allowed not as sought for but as varied since the impugned section is inconsistent with Article 42 and to the extent of the inconsistency, void.

I find the Electoral Commission a necessary Defendant as the pivot around whom the whole challenge revolves and thus turn down the call to strike him out as such.

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

DOTSE, JSC:

On the 12th day of November, 2009, this court granted an application for consolidation and accordingly suit No. Writ J1/4/2008 intituled **Ahumah Ocansey vrs The Electoral Commission** was consolidated with suit No. Writ JI/5/2008 intituled **Centre For Human Rights and Civil Liberties**

(CHURCIL) vrs 1. The Attorney –General and 2. The Electoral Commission.

RELIEFS

SUIT JI/4/2008

The plaintiff in the above suit has invoked the original jurisdiction of the Supreme Court pursuant to articles 2 (1) (b) 42, 45 (a) 35 (1) and (4) 41 (d), 15 (1) of the Constitution 1992 and rule 45 (1) of the Supreme Court Rules 1996, C. I. 16 and claims the following reliefs:

i. Declaration that non-registration of prisoners for voting by the Electoral Commission contravenes articles 42, 45 (a) of the Constitution and section 1 (a-e) of the Public Elections (Registration of voters) Regulations, 1995 C. I. 12, and article 21 of the Universal Declaration of Human Rights (United Nations).

ii. Declaration that refusal or failure of the Electoral Commission to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings. This conduct of the Electoral Commission contravenes article 15 (1) of the Constitution, and Principle 3 of Body of Principles for the Protection of all persons under any form of detention or imprisonment (United Nations).

iii. Declaration that the conduct of the Electoral Commission is defeatist of the civic responsibility of Ghanaians, as citizens of this country, to uphold the sanctity of the freedoms and rights of Ghanaians, as enshrined in articles 35 (4) and 41 (a) (d) of the Constitution.

In view of the reliance on some constitutional and statutory provisions, I deem it expedient to quote in extenso the following constitutional provisions for ease of reference.

RELEVANT CONSTITUTIONAL PROVISIONS

Articles 2 (1) (a) and (b) and (2)

A person who alleges that-

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

Articles 11 (1) (a-e) and (2) and (4)

The laws of Ghana shall comprise-

(a) this Constitution;

(b) enactments made by or under the authority of the Parliament established by this Constitution;

(c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;

(d) the existing law; and

(e) the common law;

(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of judicature.

(4) The existing law shall, except as otherwise provided in clause (1) of this article, comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution, and any Act, Decree, Law or statutory instrument issued or made before that date, which is to come into force on or after that date.

Article 15 (1)

The dignity of all persons shall be inviolable.

Article 17 (1) and (2)

(1) All persons shall be equal before the law.

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

Article 35 (4)

(4) The State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person.

Article 41 (b) and (d)

The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen-

(b) to uphold and defend this Constitution and the law;

(d) to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons;

Article 42

Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.

Article 45 (b) (c) (d) (e) and (f)

The Electoral Commission shall have the following functions-

(a) to compile the register of voters and revise it at such periods as may be determined by law;

(b) to demarcate the electoral boundaries for both national and local government elections;

(c) to conduct and supervise all public elections and referenda;

(d) to educate the people on the electoral process and its purpose;

(e)to undertake programmes for the expansion of the registration of voters; and

(f) to perform such other functions as may be prescribed by law.

Article 47 (1) and (5)

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

(5) The Electoral Commission shall review the division of Ghana into constituencies at intervals of not less than seven years, or within twelve months after the publication of the enumeration figures after the holding of a census of the population of Ghana, whichever is earlier, and may, as a result, alter the constituencies.

Article 46

Except as provided in this Constitution or in any other law not inconsistent with this commission, in the performance of its functions, the Electoral Commission, shall not be subject to the direction or control of any person or authority.

Article 51

The Electoral Commission shall, by constitutional instrument, make regulations for the effective performance of its functions under this Constitution or any other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provisions for voting by proxy.

Article 93

(1) There shall be a Parliament of Ghana which shall consist of not less than one hundred and forty elected members.

("There were two hundred elected members of Parliament by virtue of the Representation of the People (Parliamentary Constituencies) Instrument, 1992 (L. I. 1538) made pursuant to powers conferred by the Representation of the People Law, 1992 (PNDCL 284) which in this respect is not inconsistent with article 47 of

the Constitution. The number is now two hundred and thirty members of Parliament by virtue of the Representation of the People (Parliamentary Constituencies) Instrument, 2004 (L. I. 46)")

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

Article 94

(1) Subject to the provisions of this article, a person shall not be qualified to be a member of Parliament unless-

(a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;

(b) he is resident in the constituency for which he stands as a candidate for election to parliament or has resided there for a total period of not less than five years out of the ten years immediately preceding the election for which he stands, or he hails from that constituency; and

(c) he has paid all his taxes or made arrangements satisfactory to the appropriate authority for the payment of his taxes.

Article 130 (1)

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

(a) all matters relating to the enforcement or interpretation of this Constitution; and

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

Article 290 (1) (e)

This article applies to the amendment of the following provisions of this Constitution, which are, in this Constitution referred to as "entrenched provisions"-

(e) Representation of the People: articles 42, 43, 46, 49, 55 and 56;"

RELEVANT STATUTORY PROVISIONS

Having referred to the applicable constitutional provisions above, it is also pertinent to refer to in extenso the relevant and applicable sections of the following statutes and constitutional instruments:

1. Representation of the People Law, 1992 PNDCL 284 sections 7 (1) (a)- (d) and 7 (2) (3) (4) (5) and (6) and section 8 (1) and (2).

PNDCL 284 Section 7

Qualification of Voters

7. (1) A person qualifies to be registered as a voter if he is

(a) a citizen of eighteen years of age or above, and

(b) of sound mind, and

(c) resident in the polling division, and

(d) not otherwise disqualified to be registered as a voter by law.

(2) A person is not entitled to have that person's name included at any one time in the register of more than one constituency or in more than one divisional register in a constituency.

(3) Subject to subsection (2) a person is, for the purpose of this section, resident in a polling division on the qualifying date if that person has a place of abode in the division on that date.

(4) A person is not resident in a polling division if that person has been absent from that person's place of abode for a continuous period of six months ending on the qualifying date.

(5) **A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody**

in a place shall not be treated as resident there for the purposes of this section.

(6) A person who is resident in more than one place and who would, but for subsection (2) be entitled to have that person's name included in the register of more than one constituency or in more than one divisional register in a constituency shall select one constituency and one polling division for the purpose of registration and voting.

(8) Registration of officials abroad

1. A person who is a citizen employed in a post outside Ghana

(a) in the service of the Republic, or

(b) in the service of the United Nations or of any other international organisation is entitled to be registered as a voter if that person satisfies the requirements for registration prescribed under this Act other than those relating to residence in a polling division.

(2) Subsection (1) applies to the spouse of a person to whom subsection (1) applies where the spouse is resident outside Ghana with the employed spouse.

2. Representation of the People (Amendment) Act, 2006, Act 699 sections 1 (a) and (b) and 2

1. The Representation of the People Law, 1992 (PNDCL 284) as amended is further amended as follows:

(a) in paragraph (c) of section 7 (1) by the addition of the words "or hails from the constituency" after "division".

(b) by the substitution for section 8 of the following:

"Registration of Ghanaian citizens abroad"

(2) The Commission may appoint the Head of a Ghana Mission or Embassy abroad or any other person or

institution designated in writing by the Commission as a registration officer to register a person to be a voter (or in an election)

3. Public Elections, (Registration of Voters) Regulations 1995, C. I. 12 sections 1, (a-e) and 2 (1) (2) (3) and (4) thereof

1. Qualification for registration

"A person who

(a) is a citizen of Ghana;

(b) has attained the age of eighteen years;

(c) is of sound mind;

(d) is resident or ordinarily resident in an electoral area; and

(e) is not prohibited by law from registering as a voter,

is entitled to have that persons name included in a register of voters for the electoral area during a period set aside for the registration of voters."

2. Registration Centres

(1) "The Commission shall designate a place it considers appropriate as a registration centre for the registration of voters.

(2) In designating a place as a registration centre, the Commission shall take into account

(a) the suitability of the place for use as a polling station on election day; and

(b) the convenience of prospective applicants for registration.

(3) The Commission shall, at least seven days before the first day of the period set aside for the registration of voters, inform political parties and the general public by publication in the *Gazette,* the radio, television or of any other medium of mass communication, of a place designated as a registration centre.

(4) Unless the Commission otherwise directs, the polling divisions or stations in existence immediately before the coming into force of these Regulations shall constitute registration centres for the registration of voters."

It must be noted that C.I.12 has been enacted pursuant to article 51 of the Constitution 1992, already referred to supra.

FACTS AND PLAINTIFFS STATEMENTS OF CASE

The plaintiff who is a Legal Practitioner, initiated the action in his capacity as a citizen of Ghana and a committed writer on national issues and advocate of the rights of prisoners and claims to have been actuated by article 2 (1) of the Constitution, 1992.

It is the contention of the Plaintiff that under article 42 of the Constitution 1992, every Ghanaian citizen of 18 years and above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.

The Plaintiff, after referring to the various articles of the Constitution 1992, already referred to supra, (but which will be dealt with in detail later) and by making references to the United Nations Universal Declaration of Human Rights, submitted that it is unconstitutional and illegal to exclude prisoners from the class of those qualified to vote. Based on the above arguments, the plaintiff made the following submissions:

1. That the word "every" in article 42 of the Constitution 1992 is inclusive of all Ghanaians including prisoners provided they are qualified to vote and have not been certified as persons of unsound mind. The Plaintiff submitted rather forcefully that the exclusion of prisoners from the electoral process since 1992 to date is unconstitutional and requests from this Court to reverse the situation.
2. The Plaintiff's second submission is that, article 15 (1) of the Constitution 1992 and principle 3 of the United Nations Body of Principles for the Protection of all Persons under any form of Detention or imprisonment upholds the intrinsic dignity of and respect for the freedoms and human rights of Ghanaians. Therefore, prisoners have

no mental impairment to deprive them of the dignity to exercise their political and human rights referred to supra.

3. Thirdly, the plaintiff referred to articles 35 (4) (b) and 41 (d) of the Constitution 1992 and submitted that the fact that a person has fallen foul of the law is no reason why the very basic rights which define him as a citizen and political being should be taken away by the defendant by refusing prisoners to exercise their franchise guaranteed them under the Constitution.

   The Plaintiff concludes this submission by stating that, in the democratic dispensation in Ghana, citizenship and voting are inextricably linked, that is to say that the right to vote is constitutive of citizenship. In support of his case, the plaintiff referred to a number of Ghanaian and foreign decided cases as well as newspaper publications of articles written by him.

DEFENDANTS RESPONSE

The brief response of the defendant to the plaintiff's case is summarised as follows:

1. That the allegations and submissions of the Plaintiff that prisoners are denied registration and voting rights is presumptuous and not based on any concrete and tangible instance. On the contrary, the defendants submitted that since prisoners are the class of persons whose liberties have been curtailed by law, and are subject to control and regulation of the prison authorities, the defendant's have no control over the prison authorities in the discharge of their duties. In this context therefore, the defendants argued that the reference by plaintiff's to the case of **Tehn-Addy vrs Attorney-General and Electoral Commission [1997-98]1 GLR 47** and **[1996-97] SCGLR 589** is inapplicable and irrelevant.
2. That by virtue of the provisions of the Representation of the People Law, 1992 (PNDCL 284) as amended by the Representation of the People (Amendment) Act, 2006 (Act 669) especially sections 7 and 8 thereof, persons detained under law shall not be taken as being resident in the locality of the area where they are detained to satisfy

the requirement of residence in a polling division as is provided for in the law. The defendants argue that since Law 284 is a valid law in operation in Ghana, they have to comply with it, and as such it is irrational to accuse them of denying prisoners the right to vote.

3. Finally, the defendant's submitted that the newspaper articles published by the plaintiff, annexed to the instant suit are not only irrelevant but also an affront to this Court.

For my part, I am of the considered view that apart from the fact that the articles denote the plaintiff as someone who is an ardent crusader for the rights of prisoners to be granted them to exercise their franchise, there is nothing of substance in the said articles.

In reality, the articles portray the defendant as showing gross insensitivity and misunderstanding of the workings of the courts under the criminal justice system.

RESPONSE OF THE ATTORNEY-GENERAL

The Attorney-General referred to the relevant constitutional and statutory provisions governing the conduct of public elections to wit, articles 42, 45 and 47 of the Constitution 1992 and sections 7 (1) (2) (3) and (4) of the Representation of the People Law 1992 (PNDCL 284) and Public Elections (Registration of Voters) Regulations 1995 (C. I. 12) already referred to supra. The crux of the Attorney-General's arguments can be subsumed under the following broad headings:-

1. That since the eligibility to register as a voter is premised under the relevant statutory laws on the fact of the voter having a place of residence in that polling station, division or constituency, for a continuous period of six months, it follows that the voter must present himself for registration at a polling station, division or constituency for registration to enable him qualify to vote in an election.

Referring to the definition of a **resident** in the *Oxford Advanced Learners Dictionary* which defines resident to mean

"a person who lives or has a home in a place, not a visitor"

the Attorney-General concluded that a person who is in custody in an establishment maintained for the purposes of reception and punishment of

offenders cannot be said to be "in residence" in that establishment, since such a place is not their home as is stated in section 7 (5) of PNDCL 284 already referred to supra.

The Attorney-General therefore submitted that the non-registration of persons who are in confinement in a prison and who have not presented themselves for registration by the Electoral Commission does not and should not constitute a violation of the right of that citizen to vote. The Attorney-General therefore forcefully submitted that since registration of persons who qualify to vote is regulated by statute, and a prison is not a residence for the purposes of the statute, persons who have been incarcerated do not meet the requirement of residence in an electoral area.

2. STATUTORY DUTY OF THE ELECTORAL COMMISSION

Having admitted the constitutional and statutory duty of the Electoral Commission to register eligible Ghanaians for the exercise of their political and civic rights to vote in elections, the Attorney General submitted that those rights granted can only be exercised when the necessary procedures have been put in place by the Electoral Commission. For example, even though the right to register and vote is available to all eligible Ghanaians in the Diaspora, it was only after the amendment of Act 284 by the Representation of the People (Amendment) Act, 2006, 2006 (Act 699) that their right to vote can be exercised.

Even then, it must be noted that the said right can only be exercised when the Electoral Commission has put the necessary logistical arrangements in place.

3. PUBLIC INTEREST

The Attorney-General submitted that despite the guarantee of equality of rights to all persons in Ghana without any form of discrimination as enshrined in article 12 (2) of the Constitution 1992, the said rights are subject to respect for the rights and freedoms of others and for the public interest.

The Attorney-General therefore submitted that it is in the interest of the public that offenders are punished and that they are kept under lock and key. It continued that access to the prisons should be restricted and that adequate security measures are put in place to secure the prisons before electoral

officers are exposed to prisoners, either for the purposes of registration or voting.

Comparing prison hostage situations which have happened in other countries sometimes with disastrous consequences, and prison breakouts in Ghana, the Attorney General concluded that it is unsafe to expose electoral staff to the dangers of prisons.

Further comparing the qualifications of a member of Parliament as is contained in article 94 (2) (c) of the Constitution 1992 which debars persons convicted of violent crimes, offences of dishonesty and of election related for periods of up to 10 years, the Attorney General concluded that a person convicted and serving a prison sentence should not be given the right to vote.

The Attorney-General however made a concession that assuming that prisoners have the right to vote, then the legislative regime had to be changed as was made in Act 699 to enable prisoners have the right to vote.

Thus, the Attorney-General's position can be stated that the Electoral commission can extend the right to prisoners to vote provided the necessary legislative amendment is made to the Representation of the People Act, (PNDCL 284) which will in turn allow the Electoral Commission to put the necessary modalities in place.

RELIEFS IN WIRT J1/5/2008

The Plaintiff's in this suit are a non-profit civil society organization committed to upholding, inter alia, **the fundamental human and constitutional rights of remand prisoners** under the Constitution 1992 and as a Protector and defender of the Constitution pursuant to article 2 (1) of the Constitution and claimed the following reliefs:-

1. A declaration that section 7 (5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of article 42 of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDCL 284 is void.
2. A declaration that section 7 (5) of the Representation of the People Law (PNDC Law 284) is null and or void because the enactment was

made in excess of the powers conferred on Parliament by section 93 (2) of the 1992 Constitution, or any other head of legislative power.

3. A declaration that section 7 (5) when read together with section 8 of PNDCL 284 is inconsistent with, and in contravention of article 17 (1) and 17 (2) of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDCL 284 is void.
4. Consequential orders in exercise of the Supreme court's jurisdiction under article 2 (2) of the 1992 Constitution compelling/ordering the Electoral Commission to exercise its constitutional powers under the electoral laws and where necessary under article 45 of the Constitution to facilitate and ensure the registration for effective voting of all remand prisoners entitled to vote by reason of article 42 of the Constitution.

FACTS AND PLAINTIFF'S STATEMENT OF CASE

In a thoroughly and well submitted statement of case, the plaintiff's herein argued their case using the same legal arguments as was used by the plaintiff in suit No J1/4/2008. The only exception is that, in the instant suit, instead of referring to prisoners in general, the plaintiff's herein confine their submissions in respect of remand prisoners only.

It must be noted that the plaintiff's relied on and referred to the same constitutional and statutory provisions that have been referred to supra. In order not to be repetitive in this judgment, I will summarise the plaintiff's statement of case as is captured in their paragraphs 29, 31 and 40.

29. The plaintiff's submits that the impugned section 7 (5) of PNDCL 284 is unconstitutional, enacted in violation of article 42 of the Constitution and also in excess of the legislative powers conferred on parliament by article 93 (2) of the Constitution to the extent that it denies remand prisoners their constitutional right to vote. Further, considering the Electoral Commission's own admission of lack of authority and power to register remand prisoners as voters, it is humbly submitted that it is only a declaration by this court regarding the unconstitutionality of the impugned section that will rightfully and expeditiously restore the constitutional franchise to thousands of remand prisoners.

31. The plaintiff's seeks an enforcement of the constitutional right of all remand prisoners to vote by way of a judicial declaration that the impugned section 7 (5) of PNDCL 284 was made in excess of the powers given to Parliament by the Constitution and therefore null and void. The plaintiff avers that the impugned section 7 (5) is inconsistent with article 42 of the Constitution and therefore void to the extent that it denies remand prisoners the right to vote.

40. The plaintiff's submitted that PNDCL 284 and the impugned section 7 (5) unduly discriminates against remand prisoners in breach of article 17 of the Constitution. The law through the impugned section 7 (5) disqualifies remand prisoners from registering and voting by denying them residency in a polling division. Whilst on the contrary granting exemption from the residency requirement of the same electoral laws via section 8 of PNDCL 284 as amended by Representation of the People (Amendment) Act, 2006, Act 699 which now enables Ghanaians resident abroad to register and vote in public elections and referenda whilst still denying remand prisoners in Ghana the right to register and vote in elections.

Based on the above submissions the plaintiff's requested from this court an interpretation of the Constitution with the relevant constitutional provisions referred to, especially article 17 in a broad and liberal manner, so as to find the impugned section discriminatory on grounds of the social status of prisoners.

RESPONSE OF ATTORNEY-GENERAL

The response of the Hon. Attorney-General is not different from the response given by her in suit No. J1/4/2008. In brief, the submissions of the Attorney-General can be stated as follows:-

1. Relying on section 7 (4) of Law 284, which requires a continuous period of six months residence to qualify as citizen of Ghana to entitle a person to register to enable him vote in an election, the Attorney-General contended as follows:-
    a. A person living in an establishment maintained for the purposes of the reception and treatment of persons suffering from mental

illness cannot be said to be "*in residence"* in the establishment or constituency where the reception centre is situated.

b. A person who is also in custody in an establishment maintained for the reception and punishment of offenders cannot be said to be "*in residence"* in that establishment or the constituency where the custodial centre is situated. The Attorney-General contended that since such persons are compelled by law to be in those places at the particular periods of time, they cannot be deemed to be in "residence" because it is not their home. By relying further on section 7 (1) of Law 284 already referred to supra, the Attorney-General argued that, remand prisoners by virtue of the above laws cannot present themselves at any polling station for registration. The non-registration of remand prisoners by the Electoral Commission for purposes of exercising their rights to vote therefore does not constitute violation of the right of the remand prisoners as citizens to vote.

2. The Attorney-General also requested for an interpretation of the Constitution that will meet the needs of society and relied on celebrated cases such as the following to strengthen her arguments that a constitution as a living document intended to endure for ages and capable of being adapted to the various crises of human affairs needed to be interpreted in such a manner as will give meaning to those aspirations. The cases are:

i. Marbury vrs Madison 5 U.S (1 Cranch) 137, 2L. Ed. 60 (1803)

ii. Tuffour vrs Attorney-General [1980] GLR 637

iii. NPP vrs Attorney –General (31st December case) [1993 -94] GLR 35

3. The learned Attorney-General also relied on public interest considerations and article 295 (1) of the Constitution and argued that it is in the public interest that persons who commit criminal offences and are restricted in correctional centres such as prisons are kept under lock and key. She argued further that it is in the public interest not to

expose electoral officers to the risk posed by prisoners for the purpose of conducting registration to enable them to vote or take part in general elections.

The Attorney-General therefore concluded that the practice in other jurisdictions where prisoners are given the right to vote should not be extended to Ghana. This is because, the Legislative regime in Ghana under Law 284 does not allow the exercise of the franchise by those confined under the provisions of the law. According to the learned Attorney-General, Law 284 as a law which existed before the promulgation of the Constitution 1992 is nonetheless valid and should be applied with such modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the Constitution 1992.

RESPONSE OF THE 2ND DEFENDANTS, ELECTORAL COMMISSION

The crux of the 2nd defendants submissions in their statement of case is as follows:

1. That the reliefs claimed by the plaintiffs are not properly directed at the 2nd Defendants and accordingly prays the court that their name be struck out as parties.
2. That the provisions contained in section 7(5) of Law 284 is a common provision found in electoral laws designed to protect the sanctity of the electoral process by ensuring that the statistics of voters in constituencies where prisons are located is not inflated by reason of the location of the prisons in those districts, or constituencies.

MEMORANDUM OF ISSUES

At the close of pleadings, the following memorandum of issues were filed by plaintiff's and the 2nd Defendant's.

BY THE PLAINTIFF'S

1. Whether or not the matter is a constitutional one for determination by the Supreme Court.
2. Whether or not prisoners are citizens of Ghana.

3. Whether the Constitution of Ghana allows or disallows prisoners to vote.
4. Whether or not the electoral laws of Ghana bar prisoners from voting.
5. Whether or not Representation of the People (Amendment) Act 2006, Act 699 is in consonance with the provisions of the 1992 Constitution.

FILED BY THE ELECTORAL COMMISSION

Whether the Electoral Commission has, in this matter, committed any act or made any omission in contravention of the Constitution of the Republic of Ghana.

PRELIMINARY AND GENERAL COMMENTS

What should be noted is that, the Constitution 1992 does not provide any absolute freedom to individuals and citizens of the country. It should therefore be noted that there are no absolute freedoms guaranteed anywhere such that the beneficiary of the freedom has a field day in the enjoyment of such freedoms.

For example, articles 12 (2) and 14(1) of the Constitution 1992, whilst propounding the protection of personal liberties, also recognises the limitation of the very personal liberties in the following words:-

> *12 (2) " Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter* ***but subject to respect for the rights and freedoms of others and for the public interest.***
>
> *14 (1) "Every person shall be entitled to his personal liberty and no person shall be deprived of his personal* ***liberty except in the following cases and in accordance with procedure permitted by law".***

What this means therefore is that, the personal freedoms and liberties of the citizens of Ghana are inviolable and guaranteed subject to the several exceptions stated in articles 12(2) and 14 (1), sub-clause 1 (a) – (g) of the Constitution, 1992.

The position can therefore be stated that, even though personal liberties and freedoms are protected and granted to all citizens of Ghana, they are subject to for instance,

a. Rights and freedoms of others and in the public interest
b. Execution of a sentence or order of a Court in respect of criminal offence of which the person has been convicted, e.g. convicted prisoner serving his or her sentence.
c. Public safety, public order, public health, in the interest of defence, in the interest of running of essential services etc.
d. For the imposition of restrictions by order of a court that are required in the interest of defence, public safety, or public order etc.

The point I wish to make is that, the Constitution 1992 even though has very progressive and strong provisions which guarantee and protect the fundamental human rights, liberties and other freedoms enjoyable by citizens of Ghana, has provisions which also regulate and control the enjoyment of those rights, freedoms and liberties by operation of articles 12 (2) 14 (1) (a) – (g), 21 (2), (4) (a) (b) (c) and (d) and 24, (4) just to mention a few.

It will therefore mean that the Constitution gives and protects the rights by the right hand, and takes away some of those rights in the interest of protecting certain public interest issues of property, morality, safety, security etc by the left hand.

Similar sentiments were expressed by the Supreme Court, speaking with one voice through Prof. Modibo Ocran JSC of blessed memory in the case of ***Gorman and Others vrs The Republic [2003 – 2004] SCGLR 784***, at 806 as follows:-

> *"However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seek to balance the rights of the individual as against the legitimate interests of the community.* ***While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our***

Constitution. *Thus, article 14 (1) (d) makes it clear that the liberty of certain individuals, including drug addicts, may be curtailed not only for the purpose of their own care and treatment, but also 'for the protection of the community. Article 14 (1) (g) sanctions the deprivation of an individual's liberty upon reasonable suspicion of the commission of an offence under the law of Ghana, ostensibly for the protection of the Community and the body politic. Article 21 (4) (c) further authorises the imposition of restrictions on the interest of public safety, and public health among other concerns".*

The above quotation amply demonstrates the fact that there are no absolute freedoms or liberties without some form of limitation. The Constitution and statute law therefore has provided several mechanisms to ensure protection of law abiding citizens from those who would want to breach the law and bring discomfort to others.

Articles 35 (4) and 41 (b) and (d) referred to supra, give adequate illustration of the above.

There are therefore constitutional and statutory provisions which allows or permits the confinement of the following class of persons whenever they fall foul of the law and are dealt with by appropriate legal institutions of state, mandated and clothed with authority to do so.

1. Juveniles - Under the Juvenile Justice Act, 2003 Act 653
2. Remand Prisoners - Under the criminal and other offences (Procedure) Act, 1960, Act 30
3. Convicted Prisoners - Under the criminal and other offences Act, 1960 Act 29 and Criminal and other offences (Procedure) Act, 1960 Act 30

The crux of the main issue for determination in this case is the interpretation of article 42 of the Constitution 1992. This is so because, a literal and natural meaning of article 42 would give the impression that the Electoral Commission has no discretion whatsoever but to register all citizens of Ghana who are of sound mind and above 18 years of age. Taking the total effect of all the constitutional provisions on the conduct of elections into consideration especially article 51 and the laws and regulations passed thereunder is it

certain that the Constitution intended to give such sweeping and wide interpretation to the words in article 42 of the Constitution 1992?

With the above as general comments let me proceed to deal first with the principle of judicial review and then conclude the main issues for determination in this case.

THE PRINCIPLE OF JUDICIAL REVIEW

The origins of the principle of Judicial review which has found expression in articles 2(1) (a) and (b) and (2) as well as 130 (1) (a) and (b) of the Constitution 1992, already referred to supra commenced from the celebrated U.S. Supreme Court case of **Marbury vrs Madison 5 U.S (1 Cranch) 137, 2L. Ed.60 (1803)**

What are the facts of the above case? In 1800, the Jeffersonians took control of the executive and legislative branches of the government of the U.S.A from President Adams' Federalist Party. Adams who remained President of the U.S.A, until March 4, 1801, responded to his defeat by seeking to make new appointments with a view to taking control of the Judiciary through the appointments. On January 20, 1801, he proposed his Secretary of State, John Marshall, as the new Chief Justice.

Marshall took his judicial office in February, 1801 while continuing his position as Secretary of State until the end of President Adam's term.

William Marbury was one of those Judges who were appointed late by President Adams and Senate completed the confirmation process of the new appointees by March 3rd 1801.

Although the commission of William Marbury as a Justice of the peace in the District of Columbia had been signed and sealed, the Secretary of State had not delivered it by the time that Jefferson took office as President of the United States of America.

Jefferson had no desire to correct this error, so Marbury asked the Supreme Court for a writ to compel Jefferson's Secretary of State, Madison to hand over the Commission.

In his opinion for the Court, Marshall held that Marbury was entitled to his commission and that Madison had withheld it from him wrongfully.

Mandamus, was the appropriate remedy at common law, but the question presented was whether it was available under article 111's grant of original jurisdiction to the Supreme Court. In order to decide that question, Marshall was required to compare the text of Article III with section 13 of the Judiciary Act of 1789, by which congress authorised the mandamus writ.

Finding that the statute conflicted with the federal constitution, Marshall considered it, ***"the essence of judicial duty***" to follow the constitution. He concluded that **"the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that Courts, as well as other departments, are bound by that instrument".** This decision provided the judiciary with a potent weapon for protecting individual rights against the actions of legislative majorities. At the time this opinion was delivered, it was attacked all over the U.S.A and criticized.

But Marshall laid a formidable foundation in the principle of Judicial review and stressed the duty of judges to apply the law to cases before them. Carried to its logical conclusion, it meant that, the life, liberty and property of citizens depended upon the exercise of judicial review as a constitutional check on legislative discretion.

The decision in Marbury vrs Madison had been followed in a long line of cases, which led to the expanded principle in the U.S. Supreme Court case ***of Cooper vrs Aaron 358 U.S. 1 78 SCT. 1401 3L Ed. 2d 5 (1958)*** where the Supreme Court, citing the decision in Marbury unanimously declared that

> *"the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has since Marbury been a permanent and indispensable feature of our constitutional system" per Chief Justice Warren*.

Back home in Ghana, there are clear constitutional provisions which empower the Supreme Court to strike down legislation that is inconsistent with the constitution and declare it as null and void. See articles 2 (1) (a) and (b) and 2 as well as 130 (1) (a) and (b).

The solid foundation for this was laid in the case of ***Tuffour vrs Attorney-General [1980] GLR 637*** where the Court of Appeal, sitting as the Supreme Court on provisions in the Constitution 1979 which are similar to the provisions in the instant Constitution 1992 and already referred to supra expressed similar sentiments.

The Tuffour case was an action where the Court of Appeal, sitting as the Supreme Court under section 3 of the first schedule of the Constitution, 1979 was requested for an interpretation of the status of the holder of the office of Chief Justice, in the person of Justice Fred Kwasi Apaloo as Chief Justice on the coming into force of the constitution, 1979.

The Supreme Court held that, in interpreting the provisions of article 127 (8) and (9) of that Constitution, the duty of the Court was to take the words as they stood and to give them their true construction having regard to the language of the provisions of the constitution, always preferring the natural meaning of the words involved, **but nonetheless giving the words their appropriate construction according to the context.**

The Supreme Court in the unreported case of William Brown vrs Attorney-General and Others suit No. CM JI/1/2009 dated 3rd February, 2010 coram, Wood CJ presiding, Date-Bah, Owusu (Ms), Dotse and Anin-Yeboah JJSC held as follows:

Per Wood C.J

> *"This court has over the years so adeptly dealt with the vexed question of the proper approach to construing national constitutions that, the legal principles governing this area of the law cannot be said to be uncertain. We have drawn from the rich storehouse of both domestic and foreign decisions to fashion out the general principles that serve as interpretive guides to constitutional interpretation. As I observed in the case of* ***Republic vrs High Court, (Fast Track Division) Accra, Ex-parte Commission on Human Rights and Administrative Justice (Richard Anane – Interested Party) 2007 – 2008 SCGLR 213 at 247 the literalist or strict approach, that is a mechanical approach that does not look to the purpose of the contested provisions as a legitimate part of the exercise, is***

clearly deprecated**. It appears to me that generally, in constitutional interpretation, when we speak of the purposive approach we are referring to what is known as the purposive-strained or objective purpose approach. The purposive and literal approach is in proper context commendable, it is a purely mechanical or literal approach that has no place in this area of the law. On this important legal point, I will make reference to the observations of Professor Ocran JSC in* ***Omaboe III vrs Attorney-General and Land Commission [2005-2006] SCGLR 579 Dr. Date-Bah JSC in ***Danso Acheampong vrs Attorney-General SCGLR [2009] 353.*** Professor Ocran JSC expressed himself thus:

> *"We hereby recognize as we did in the Asare case, the utility of the purposive approach to the interpretation of the Constitution, but with the clear understanding that it does not rule out the legitimacy of other techniques of interpretation in appropriate circumstances."*

Whilst Dr. Date-Bah JSC observed:

> ***"These days, a literal approach to statutory and constitutional interpretation is not recommended whilst a literal interpretation of a particular provision may, in its context, be the right one, a literal approach is always a flawed one since even common sense suggests that a plain meaning interpretation of an enactment needs to be checked against the purpose the enactment**, if such can be ascertained. A literal approach is one that ignores the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question".*

Wood CJ in the William Brown vrs Attorney-General case referred to the observations of Acquah JSC as he then was in the case of ***National Media Commission vrs Attorney-General 2000 SCGLR*** *when he stated as follows:*

> *"Accordingly, in interpreting the Constitution,* ***care must be taken to ensure that all the provisions work together as***

parts of a functioning whole. *The parts must fit together logically to form rational, internally consistent frame work. And because the frame work has a purpose, the parts are also to work dynamically, each workings accomplishing the intended goal."*

In his opinion in respect of the William Brown vrs Attorney-General and others case, already referred to supra, Dotse JSC observed as follows:-

"It is therefore my firm conviction and belief that a court like this Supreme Court must in interpreting constitutional provisions read and construe together all related provisions of the Constitution with a view to discovering the real, simple and ordinary meaning of the provisions*. This Court should not interpret related provisions of a Constitution or statute in isolation and in the process destroy the true intended meaning and effect of the particular provisions ascribed to them".*

In the instant suit, the words in article 42 which are germane to the entire suit have to be read together with the relevant and consistent provisions of the Constitution as a whole and in particular articles 45 and 51 of the Constitution 1992 which mandate the Electoral Commission to register citizens for purposes of voting and also mandates the 2nd defendants herein to make regulations for the effective performance of its functions under the Constitution or any other law. It is important to note that, article 51 specifically mentions functions like the registration of voters, conduct of public elections etc.

ARTICLE 42

There is no doubt whatsoever in my mind that the words in article 42 of the Constitution 1992 actually confers in somehow absolute terms the grant of registration and voting rights to all citizens of Ghana subject to their being eighteen years of age and above and of sound mind.

Thus, whenever a citizen of Ghana is eighteen years and above and is of sound mind, then he or she has the right to be registered to enable him or her exercise the right to vote in all public elections and referenda.
The words in article 42 of the Constitution are so clear that they appear not to admit of any controversy whatsoever.
However, taking other relevant and consistent provisions of the Constitution 1992 into consideration, the issue that arises is whether there can be any restriction whatsoever on the exercise of these rights. What comes immediately to my mind is the purpose and use of the right to register and vote in public elections and referenda that has been granted eligible citizens of Ghana as is stated in article 42 of the Constitution?
The purpose of such rights is to elect members of Parliament and also elect a President for the country, Ghana,

Article 94 of the Constitution 1992 deals generally with the qualifications of a member of Parliament. These are elaborate and detailed provisions which are very extensive and in particular prohibit persons who have been convicted of certain criminal offences, reference article 94 (2) (c) (i) (ii) (iii) (d) (e) of the Constitution. Of particular significance to me are the provisions of article 94 (2) (f) of the Constitution 1992 which stipulates as follows:-

> *"A person shall not be qualified to be a member of Parliament* ***if he is not qualified to be registered as a voter under any law relating to public elections".***

The above article is premised on the basis that the Constitution 1992 recognised the existence of laws or law that regulates the right of registration of voters to enable them take part in public elections.

Secondly, the qualifications for the election of a President provided for in article 62 and 63 (1) and (2) of the Constitution 1992 are more stringent than those provided for in article 94 referred to supra.

The point I wish to make here is that, in construing the true intendment of article 42 of the Constitution 1992, reference must be made to the relevant

and consistent provisions of the Constitution which I have referred to. In the pursuit of that exercise, certain legitimate issues and questions come to my mind. These are:

1. Can a person who has been convicted of the offence of high treason as defined in article 3(3) (a) and (b) of the Constitution 1992 and confined to prison be eligible to present himself for registration for purposes of taking part in elections for the same constitutional order that he sought to overthrow?
2. Can a person convicted of a first and second degree felony and facing a sentence of death awaiting execution or is under a sentence of life imprisonment be eligible to present himself to be registered for purposes of taking part in an election?
3. Can a person who has been convicted of other crimes and also of committing an election related offence under C.I.12 and is in confinement in a prison be eligible for registration to enable him take part in general elections?

These and many more questions are those that agitate my mind in the determining of this case and indeed should agitate the mind of every critical observer.

In this regard, I should not be mistaken to be advocating a regime whenever persons convicted of crimes mentioned supra and confined to prisons will be denied of their rights to register and vote. The crux of the matter is that, the provisions in a written Constitution such as ours in Ghana should be construed as a holistic document and whenever applicable, all relevant and consistent provisions of the Constitution should be adequately considered to prevent an incongruous and absurd situation being created.

REMAND PRISONERS

The Philosophical under pinnings of the Constitution 1992 guarantees the rights of all persons to be presumed innocent until proven guilty.

This therefore connotes the principle that remand prisoners whose quilt has not yet been established and proven before a court of competent jurisdiction

should not suffer any disability that convicted prisoners by reason of their conviction suffer.

However, in view of my decision that convicted prisoners in principle should not suffer any disability so far as registration and voting rights are concerned, it follows that there should be no distinction between remand and convicted prisoners.

DETERMINATION OF ISSUES

With the above background, it is clear that the issues raised in the consolidated suit are of a constitutional nature and are definitely cognisable for determination by the Supreme Court. Issue one is thus resolved.

ISSUE TWO

Since the fact of being confined to a prison under a sentence of remand by a court of competent jurisdiction or under conviction for an offence that is known under the laws of Ghana and also under a sentence by a Court of competent jurisdiction, does not make the person i.e. the prisoner any less a citizen of the Republic of Ghana as defined under articles 6, 7 and 8 of the Constitution of Ghana, 1992, the rights of all citizens including prisoners is protected.

In that respect therefore, any citizen of Ghana, who before his conviction or remand is a citizen of Ghana continues with the right of citizenship irrespective of his change of status. This therefore means that the Constitution and laws of Ghana, do not change the rights of citizenship of Ghanaians acquired before their incarceration, conviction, sentence and remand.

ISSUES 3 AND 4 TAKEN TOGETHER

In view of the similarities between issues 3 and 4, they will be treated and dealt with together.

In ordinary terms, it can be said that whilst the Constitution 1992 allows prisoners to vote, the electoral laws of Ghana bar prisoners from voting. However, a critical analysis of the Constitution 1992 gives the impression that it recognises the electoral laws and regulations made pursuant to article 51 of the Constitution. Before the promulgation of the Constitution 1992 which came into force on 7th January, 1993, the Representation of the People Law,

1992, PNDCL 284 was enacted by the PNDC. The date of gazette notification of this law is 7th August, 1992, whilst the date the law was made is 24th July, 1992.

It is the section 7 (5) of Law 284 which is generally regarded as the impugned law in view of the fact that it has declared persons detained in legal custody such as prisons as not qualified in terms of the residency requirement to enable them to be registered as a voter resident in a polling division pursuant to section 7 (1) (c) of Law 284.

Article 11 (1) of the Constitution 1992 mentions "the existing law" as constituting one of the sources of the laws of Ghana. Since law 284 received gazette notification on 7th August, 1992 long before the Constitution 1992, which is the basic source of law of Ghana (reference article 11 (1) (a)) and which came into force on 7th January, 1993 it follows that, Law 284 is one of the sources of law in Ghana but subservient and lower in status to the Constitution. By virtue of the provisions of article 1 (2) of the Constitution 1992, the Constitution is the Supreme law of Ghana, and any other law found to be inconsistent with any provision of the Constitution shall to the extent of the inconsistency be declared void.

Under the circumstances of this case, are the provisions of section 7 (5) of law 284 and the regulations made in C. I. 12, pursuant to article 51 inconsistent with article 42 of the Constitution and therefore void?

In principle the unequivocal answer ought to be yes, that there is such an inconsistency and to the extent of the inconsistency law 284 which was made at a time Ghana did not have a Parliament, but had both Executive and Legislative powers vested in the PNDC would be declared as being null and void pursuant to article 1 (2) of the Constitution already referred to.

But will such an interpretation be in tandem with other provisions of the Constitution relevant and consistent to article 42 of the Constitution 1992?

In this context, it is useful to consider what electoral laws are referred to in article 94 (2) (f) of the Constitution 1992 already referred to supra. There is no doubt in my mind that the reference is to Law 284 which was in existence before the Constitution 1992 was promulgated.

It should be further noted that, there are several instances where the polling divisions or electoral boundaries in the country have been stated to be constituencies (reference articles 45 (b), 47 as a whole, 94 (1) (b) which stipulates residency qualification for a member of Parliament and others). This in my view connotes the fact that the Constitution itself recognises creation of constituencies and the issue of residency as a factor to be considered in relation to where a person should register and or vote and has been interpreted to include prisoners in legal detention. Care must be taken to ensure that the Electoral Commission is not stampeded by this plaintiff into setting deadlines for the performance of this right. This is because, it is clear from the foregoing analysis that, irrespective of the wide and sweeping nature of the rights conferred on all citizens in article 42 entitling them to be registered to enable them vote in general elections subject to their being of eighteen years and above and of sound mind, there is still the need for the passage of constitutional instruments to control, manage, and regulate the effective performance of the functions of the Electoral Commission. This is with particular reference to the registration of voters to enable them take part in pubic elections and referenda.

I will therefore be comfortable with a declaration like this:

Whilst the Constitution 1992 per article 42 allows all citizens of Ghana of eighteen years and above and of sound mind including prisoners both remand and convicted the right to be registered to enable them vote in public elections and referenda, there is still the need for a legislative framework within the confines of the constitution (ref. article 51) to regulate, control, manage and arrange the effective exercise of that function to ensure that the Electoral Commission is not stampeded into taking hasty decision which will result into chaos and confusion.

Reliefs 3 and 4 are thus granted.

Even though I have granted reliefs 3 and 4, let me deal briefly with the scope of the principle stated in the case of **Tehn-Addy vrs Attorney-General and Another [1996-97] SCGLR 589.**

The issue in the above case was that, the plaintiff who was unavoidably absent from the country when the Electoral Commission opened the voters register in 1995, applied and presented himself for registration to enable him vote in the Presidential and Parliamentary Elections of 1996. Unfortunately, the Commission was unable to register him because according to them, just as they were ready to carry out the supplementary registration, they were served with a writ in the High Court which as it were challenged their preparations to compile the supplementary voters register. The plaintiff therefore instituted the action in the Supreme Court invoking its original jurisdiction praying inter alia for a declaration that the conduct of the Commission in failing or refusing to register him as a voter was inconsistent with and in contravention of articles 42, 45, and 46 of the Constitution 1992. The Supreme Court, Coram: Abban C.J, Bamford-Addo, Charles Hayfron-Benjamin, Kpegah and Acquah JJSC speaking with one voice through Acquah JSC (as he then was) stated and held as follows:-

> **"every sane Ghanaian citizen of eighteen years and above has the right under article 42 of the 1992 Constitution to be registered as a voter. The exercise of that constitutional right of voting was indispensable in the enhancement of the democratic process and it could not be denied in the absence of a constitutional provision to that effect".**

The court explaining their decision further expoused the onerous nature of the responsibility cast on the Electoral Commission in the following terms:-

> *"A heavy responsibility is … entrusted to the Electoral Commission under article 45 of the Constitution,* ***in ensuring the exercise of the constitutional right to vote.*** *For in the exercise of this right, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance".*

The facts and the decision in the Tehn-Addy case are somehow different from the instant case save for the fact that both call for the interpretation of article

42 of the Constitution. Whilst the former case is about a specific individual, above 18 years who had duly presented himself for registration and was refused by the Electoral Commission, the latter or instant is about the denial of the right to register remand and convicted prisoners on the basis that they do not satisfy the residency requirement.

In essence, even though the right to register and vote in public elections is deemed to be available to all citizens of Ghana of sound mind and of 18 years and above, pursuant to laws and regulations made thereunder, prisoners because of their confinement seem to lack the qualification of residence imposed in section 7 (5) of the Representation of the People Law 1992, PNDCL 284. The instant action apart from seeking interpretation of article 42 of the Constitution, also seeks the courts intervention that section 7 (5) of Law 284 is inconsistent with article 42 of the Constitution, and by virtue of article 1 (2) of the Constitution ought to be declared void.

It must therefore be noted that, whilst the Tehn-Addy case is authority for the proposition that every sane Ghanaian citizen of eighteen years and above had the automatic right under article 42 of the Constitution 1992 to be registered as a voter, the instant case is authority that irrespective of the provisions of section 7 (5) of Law 284 remand and convicted prisoners confined in a legal detention centre have the right to be registered as voters for the conduct of public elections in Ghana subject to the Electoral Commission making the necessary legislative arrangements to take care of the control, management and regulatory regime of such an exercise.

This in brief is the scope to which Tehn-Addy's case is applicable to the instant case.

RELIEF FIVE

In view of the analysis that has been made in relation to the wide nature of article 42 of the Constitution 1992, there is no doubt in my mind that every sane citizen of Ghana wherever located or settled, who is eighteen years and above is entitled to be registered for the purposes of voting in public elections and referenda in Ghana, in my mind therefore, there was really no need for the passage of the Representation of the People (Amendment) Act 2006, Act

699 since the right that had been given to Ghanaians in the Diaspora in Act 699 had been in existence since 7th January 1992 when article 42 came into existence.

My decision therefore is that, Act 699 is a surplusage since without it, Ghanaians in the diaspora already had the right to be registered.

The only difference is that, like I said, in the case of the prisoners, the Electoral Commission must put the necessary legislative regime in place pursuant to article 51 of the Constitution to ensure a harmonious, equitable, efficient and effective exercise of the right to register Ghanaians in the diaspora to enable them exercise their franchise.

Save for the above clarification, relief 5 is declared to be in consonance with the provisions of the Constitution 1992.

RELIEF FILED BY THE ELECTORAL COMMISSION

In my opinion, the only omission or contravention of the Constitution if I may call it as such by the Electoral Commission in this matter is their reliance on Law 284 and C.I. 12 already referred to supra to deny the right to prisoners to register and vote in public elections.

This is because, in the conduct of their business, the Electoral Commission is completely independent in that regard and is not subject to the control, direction, management, manipulation and or interference from anybody or institution whatever. (see article 46 of the Constitution 1992)

However, in my humble opinion, the Electoral Commission cannot be faulted. This is because, under the Prison Service Act, 1972 NRCD 46, custody of prisoners is in the hands of the Director-General of the Prisons Service as well as officers in charge of the prisons. It is the Minister of Interior who by Executive Instrument declares a place as a prison, section 3 (1) 31 and 32 (1) of the Prison Service Act, NRCD 46 provides as follows:

> Section 3 (1) The Director –General is the head of the Service and is responsible subject to the Constitution for the operational control and administration of the Service
>
> 31." A prisoner is in the legal custody of the officer in charge of the prison while confined in, or is being taken to or from, that prison, and

while working or for any other reason outside the prison is in the legal custody of a prisons officer.

32(1) "A person who is committed to prison in accordance with law may, subject to section 30 (2) be lawfully confined in a prison and shall be committed to a prison as directed by the Minster".

The combined effect of the above sections is that, a prison is not a place that is opened to everybody for the Electoral Commission to go as and when convenient to them to carry out their operations. There are rules and regulations which restrict movement of persons in and out of prisons, which a court like this Supreme Court should not gloss over. The practical realities of the decision which has been reached in the instant case, to wit the grant of registration and voting rights to prisoners is overwhelming. For example, access to political parties and their agents to monitor and observe the registration and conduct of voting including election monitors will have to be provided for. This is because, it is one thing declaring that both remand and convicted prisoners have the right to be registered to enable them exercise their franchise to vote and another thing ensuring that in the implementation of that right, chaos, anarchy and confusion does not prevail. The hallmark of any good electoral system is its transparency. Modalities to ensure that the registration of prisoners is transparent with all the stakeholders in agreement is desirable and this will ensure the sanctity of the electoral process.

Having considered the entirety of the suits as a whole I am of the view that the Electoral Commission even though has contravened the Constitution by refusing to register prisoners to vote such a contravention can be corrected by the Electoral Commission when legislative framework is put into operation after the necessary consultations with all key stakeholders are held. There is no need to stampede them into any hasty decision.

I have in essence dealt with the declaration sought by the plaintiffs in writ no J1/5/2008 before this court.

That is to say that, Plaintiffs are entitled to the following reliefs:

1. A declaration that section 7 (5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of

article 42 of the Constitution, 1992 and Law 284 is to the extent of the inconsistency declared null and void.

2. A further declaration that section 7 (5) of Law 284 being an existing Law under article 11 (1) (d) of the Constitution is by virtue of article 1 (2) of the Constitution declared void and of no effect.
3. In the exercise of the Supreme Courts jurisdiction pursuant to article 2 (2) of the Constitution the Electoral Commission is hereby directed to take steps to put the necessary legislative regime in place such as would entitle them to efficiently and effectively manage, control, direct and operationalise the registration of remand prisoners to enable them vote such as would ensure harmony with the Prisons Service Act, 1972 NRCD 46 and other stakeholders.

CONCLUSION

In the premises, there will be judgment for the plaintiff's in suit No J1/4/2008 as follows:

1. The Constitution 1992 per article 42 grants all citizens of Ghana who are eighteen years and above and are of sound mind the right to be registered to enable them vote in public elections and referenda. This right extends or includes all convicted prisoners irrespective of the provisions of section 7(5) of the Representation of the People Law, 1992, (PNDCL 284) which imposes a residency requirement or qualification under which convicted prisoners were deemed unqualified.
   This section 7 (5) of Law 284 to the extent that it is inconsistent with article 42 of the constitution 1992 is declared void.
2. However, there is still the need to have a regulatory framework within the confines of the Constitution (ref. article 51) to regulate, control, manage and arrange the effective exercise of that function to ensure that the Electoral Commission does not take hasty decisions that will result into chaos and confusion. This will also ensure a harmonious interface with the Prisons Service Act, NRCD 46 already referred to.

3. In this respect therefore, the passage of the Representation of the People (Amendment) Act 2006, Act 699 is indeed a surplusage, as without it, Ghanaians in the Diaspora who are deemed to include "all citizens" as stipulated in article 42 of the Constitution already had the right to be registered to vote.
The only thing left was for the Electoral Commission to come out with rules and regulations pursuant to article 51 to regulate such an exercise.

In respect of writ J1/5/2008, I will conclude as follows:

4. Having declared section 7 (5) of Law 284 to be inconsistent with article 42 of the Constitution 1992 in respect of the provisions of the residency qualification that has been used to deny the remand prisoners the right to be registered to enable them vote as citizens of Ghana, the Electoral Commission is hereby directed to put the necessary regulatory framework in place pursuant to article 51 of the Constitution.
This is to ensure that such an exercise is efficiently and effectively managed, controlled, and directed to operationalise the registration of remand prisoners to enable them vote in future elections and referenda such as will ensure harmonious interface with the Prisons Service Act 1972 NRCD 46 and all the other relevant stakeholders.

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

ANIN YEBOAH, JSC:

The issues raised in these consolidated cases appear simple but have far-ranging consequences. The plaintiffs in these two cases have by separate writs invoked the original jurisdiction of this court for the reliefs which have

been referred to in the judgment of Her Ladyship the Chief Justice. I need not therefore repeat same.

In suit № JI/4/2008, the plaintiff who is a citizen of the Republic of Ghana, a legal practitioner and claims to be a committed writer on national affairs has invoked the original jurisdiction of this court claiming that non-registration of prisoners contravenes Articles 42 and 45(a) of the 1992 Constitution. The sole defendant in this case is the Electoral Commission which is empowered under Article 45 to perform several functions including compilation of register of voters and the conduct and supervision of all public elections and referenda.

In suit № JI/5/2008, the plaintiff has described itself as a non-profit civil society orgainisation which has committed itself to upholding the fundamental human and constitutional rights of remand prisoners in Ghana and defender of the 1992 Constitution. The plaintiff in this suit also contends that under the 1992 Constitution remand prisoners are entitled to be registered and vote in elections. Therefore the several electoral legislations referred to in the writ denying the right of remand prisoners to be registered and vote offend against the constitution of 1992, specifically Article 42.

The Plaintiff in suit № JI/4/2008 set down five issues in the determination. For sake of clarity, I set out the issues as follows:

1. Whether or not the matter is a constitutional one for determination by the Supreme Court.
2. Whether or not prisoners are citizens of Ghana.
3. Whether the constitution of Ghana allows or disallows prisoners to vote.
4. Whether or not the electoral laws of Ghana ban prisoners from voting.
5. Whether or not Representation of the People (Amendment Act 2006 (Act 669) is in consonance with the provisions of the 1992 Constitution.

In my respectful opinion, this issue is a constitutional one in the sense that a class of people, the number of which may vary on regular basis have through the Plaintiff by this writ complained that under Article 42 of our Constitution of 1992 as prisoners have every right as citizens of this country to be registered to vote but the Electoral Commission has denied them their right under the very constitution which gives them the opportunity to vote. Indeed, the Electoral Commission and the Attorney-General do not dispute that this matter is a constitutional one. On the second issue, the provisions of Article 42 itself have clearly stated that the first qualification is that the person must be a citizen of Ghana.

It therefore follows without interpretation that only citizens of Ghana can come under Article 42 to exercise that constitutional right. A prisoner who is not a Ghanaian is therefore prohibited under Article 42 to exercise any rights to vote.
The third, fourth and fifth issues would be jointly addressed as they all come under Article 42 of the 1992 Constitution.

Given the fact that there was only one constitutional provision on which the Plaintiffs in both suits sought our interpretation, the two suits were thus consolidated by this court. It is therefore imperative that Article 42 of the 1992 Constitution must be examined in detail. The said article 42 states as follows:

> "*Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda".*

To the Plaintiffs in these two suits, the provisions of Article 42 of the 1992 Constitution is clear and does not in any way empower the Electoral Commission to deny prisoners their constitutional rights to be registered to enable them exercise their rights to vote. As pointed

out earlier, the Plaintiffs in both cases complain that in the exercise of its functions under the prevailing statutes specifically, Public Election (Registration of voters) Regulations, 1995 CI 12, The Electoral commission Act 1993 (Act 451), Representation of the People Law, 1992 (PNDCL 284) the prisoners were denied their constitutional right to be registered and for that matter exercise their franchise.

In my opinion, Article 42 of the 1992 Constitution appears to be very clear and unambiguous. The time-honoured principle which the courts have kept faith with is that, where the provisions of a constitution are clear and unambiguous, it does not call for any interpretation. This is so on the authority of **AWOONOR – WILLIAMS V GBEDEMAH**
[1970] CC 18 SC.

Nowhere in Article 42 has the framers of the constitution mentioned remand prisoners or prisoner in general as a class of people who are not qualified to be registered to vote. The provisions of Article 42, however, place limitation on citizenship, age and soundness of mind. Like other articles under Chapter 5 of the Constitution which deals with fundamental Human Rights, limitations were placed on such rights by the framers of the constitution, obviously for a purpose. If the framers of the Constitution had wanted to place further limitations on the rights of the citizenry to be registered to vote, nothing would have prevented them from doing so.

As it has been pointed out, almost all rights under the Constitution are limited. The limitations placed on the rights of Ghanaians in Article 42 to me may be enough for framers of our constitution. To expand the limitations on the provisions of Article 42 would amount to importing into the constitution something which the framers had no intension.

I think the memorandum of issues set out in writ № JI/4/2008 though several, only three were worthy of serious attention in this opinion.

In both suits the Attorney – General has advanced a simple argument basing the submission on section 7(1) of PNDCL 284 which deals with qualification of a person to be a voter. The statement of case filed by the Attorney – General touching on section 7(1) of PNDCL 284 is simply that, since prisoners are not resident in the polling division, they cannot under the law offer themselves to be registered at a polling division or at a constituency. The argument further runs as follows: "A prison is not a residence for the purpose of the statute and therefore persons who have been incarcerated do not meet the requirements of residence in an electoral area".

In interpreting Article 42, which obviously is an important provision in our constitution, we must be careful not to blur its image. It is a constitution founded on democratic principles to protect our aspirations as a country. In this regard, I can do no better that to refer to the case of **KUENYEHIA & ORS V ARCHER & ORS** [1993-94] 2GLR 525 at page 562 where Francois JSC said as follows:

> *"It appears that the overwhelming imperatives are the spirit and objectives of the constitution itself, keeping an eye always on the aspirations of the future and not over look the receding footsteps of the past"*
>
> *It allows for a liberal and generous interpretation rather than a narrow legislative one. It gives room for a broader attempt to achieve enlighten objective and tears apart the shifting straight jacket of legalistic constraints that grammar, punctuation and the like may impose".*

It was our quest to be governed by the constitution ensuring that out rights, liabilities and freedoms are regulated in a very predictable manner. It is for that reason that the court should not import words that may blur the meanings of a provision of the constitution.

In the same **KUENYEHIA & ORS V ARCHER & ORS** [supra] Francois JSC at the same page 562 said as follows:

> *"In interpreting the relevant provisions of the constitution, 1992 we must be very careful to avoid importing into the written document what does not appear therein. For there could be no difficulty if an extension was intended as a desired result for it to be explicitly expressed in precise terms. Rules of construction do not permit a passage which has a clear meaning to be complicated or obfuscated by any interpretation, however well intentioned"*

In my respectful opinion, this argument which has ignored Article 42of the 1992 Constitution is based on simple logic arising out of section 7(1) of PNDCL 284 and not on the interpretation of Article 42. The Attorney – General and Electoral Commission's interpretation of Article 42 is with respect misplaced. It amounts to an importation of words from section 7(1) of PNDCL 284 into a constitutional provision, which is obviously wrong.

Article 42, as said earlier is plain and unambiguous. It has limited the citizens of Ghana who should be qualified to vote. It has no clauses and stands on its own. Admittedly, Parliament in the exercise of its power can make laws under Article 93 (2) of the constitution including, of course, laws governing elections but such laws should never limit clear constitutional provisions. It is a fact of history that it was in the exercise of such power that the Representation of the People (Amendment) Act, 2006 (Act 699) known popularly as **ROPA**

was passed by the Parliament of Ghana. It extended the qualification of voters and never limited it to run counter to clear constitutional provisions in Article 42.

Further, the Electoral Commission in the exercise of its functions under Article 45 of the 1992 Constitution may proceed to come out with constitutional

instruments to enable it to carry out its constitutional mandate. Indeed it was in the exercise of such power under Article 51 of the 1992 Constitution that the Public Elections (Registration of Voters) Regulations, 1995 [CI 12] was passed.

However, Article 42 which is under interpretation is a constitutional provision and indeed an entrenched one which stands on its own. Under Article 42 of the Constitution, it is a constitutional right which the framers of out constitution have entrenched in the constitution to be enjoyed as a basic tenet to every democracy in electing our leaders. No wonder the preamble of our constitution talks of the Principle of Universal Adult Suffrage. If in the exercise of the powers of parliament as the ultimate law making body under the Constitution, the laws made or the existing laws already in force before 1992 run counter to any of the existing provisions of the constitution, Article 1 (2) of the Constitution calls for it to be declared void. Equally so, if the Electoral Commission in the exercise of its powers referred to above comes out with any constitutional instrument which by law runs counter to any provisions of our constitution then under Article 1(2) of the constitution, such law or existing law prior to the coming into force of the constitution if found to be unconstitutional ought to be so declared.

In my respectful opinion, the provisions of PNDCL 284 restricting the registration of people to vote by insisting on the residence of the voter and thereby applying it to deny convicted and remand prisoners to register and vote on the simple grounds that prison is not a place of residence runs counter to Article 42 of the 1992 Constitution. Parliament and the Electoral Commission cannot limit the constitutional rights conferred under Article 42 of the Constitution. They can rather expand the rights as was done in Act 699 of 2006.

In coming to this conclusion, I am not unmindful of the fact that some prisoners in utter disregard of the rights of fellow citizens committed serious felonies which culminated in their incarceration at the various prisons dotted

across the country. The Attorney – General has referred us to Article 12(2) of our constitution to be read in conjunction with Article 295(1) of the same constitution. Article 12(2) is not under interpretation in this case. The courts must also respect the rights of persons who are in custody. That explains why due process of the law including proper trials involving appeals are not denied remand and convicted prisoners.

As it was pointed out, this argument in the statement of case does not to me answer the submissions of both plaintiffs in these two cases which have been consolidated. Public interest may be paramount but in this case, we are confronted with interpretation of a very clear and unambiguous provision of our constitution which we as citizens gave life to it through a referendum. Care must be taken not to deny the citizens of Ghana certain rights unless there are clear provisions in the constitution to the contrary.

In coming to this conclusion, I am not unmindful of the fact that there may be problems in the conduction of the Parliamentary elections at our various prisons. This to me could be worked out by the Electoral Commission as part of its official duties as the sole body responsible for conducting such elections. This opinion of mine may be seen as given freedom to vote to some people who have breached the laws of Ghana and are in prison custody. I have taken this course by considering the fact that I owe it as a constitutional duty to dispense justice to all manner of persons. Justice Sutherland in the case of **HOME BUILDING & LOAN ASSOCIAATION V. BLAISDELL**, 290 US 398,483 said as follows when confronted with the effect of a review of legislation:

> "*I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish*

its destruction. If the provisions of the constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned". [Emphasis Mine].

In my opinion, the plaintiff in suit No. JI/4/2008 has made a clear case out of Article 42 of the 1992 Constitution. In examining the reliefs sought I am not prepared, however to go the whole hog with counsel on his argument on Article 21 of the Universal Declaration of Human Rights [United Nations]. To me, this is a clear constitutional matter in which our jurisdiction has been invoked to declare an existing statute as contrary to the constitution of Ghana, and no more. A constitution of a sovereign state like Ghana in such matters takes precedence over any other law. On relief (II), I will limit myself and declare that the refusal or failure of the Electoral Commission to register prisoners for voting is a violation of their rights as citizens of Ghana. In my opinion relief III ought to be refused as irrelevant to the issues raised and discussed in this opinion.

In writ Nº JI/5/2008, I have already held that section 7(5) of the Representation of the People Law, 1992 (PNDC 284) is clearly inconsistent with Article 42 of the 1992 constitution to that extent same is void as it seeks to deny both remand and convicted prisoners their constitutionally conferred rights. Relief one is therefore granted. On relief 2, it does appear that the Representation of the People Law (PNDCL 284) section 7(5) was not made under the

powers conferred on Parliament. At the time the law was enacted there was in fact no parliament in Ghana properly so - called. This is a fact of history. The law as said earlier in discussing relief one appears to be inconsistent with Article 42 of the 1992 Constitution and under Article 1 (2) of the 1992Constitution should be void.

On relief 3 I am unable to grant the declaration sought on the grounds that relief one which I have granted above takes care of relief 3. Secondly, it

must be pointed out that all the rights conferred under Chapter 5 of the Constitution are not rights without limits.

Article 42 it self has limited the age to vote and has further made soundness of mind as a condition for the exercise of such right even though it is a constitutionally conferred right. It must be pointed out that not all prisoners are qualified to vote in that those who are over eighteen years and above but have no sound minds are disqualified by the article 42 itself. I do not think that there could be equality under the constitution in all matters. I however grant the consequential order sought as the plaintiff in this case has made a clear case on the merits.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

COUNSEL:

AHUMAH OCANSEY, PLAINTIFF IN PERSON IN THE 1ST SUIT.
KOJO GRAHAM FOR THE PLAINTIFF IN THE 2ND SUIT.
SAMUEL N. TETTEH, CHIEF STATE ATTORNEY FOR THE 1ST DEFENDANT IN THE 2ND SUIT.
JAMES QUARSHIE-IDUN FOR THE DEFENDANT IN THE 1ST SUIT AND 2ND DEFENDANT IN THE 2ND SUIT.