IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: WOOD (MRS), CJ (PRESIDING)
ATUGUBA, JSC
ANSAH, JSC
OWUSU (MS), JSC
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS) JSC

WRIT
NO. J1/4/2007
2ND JUNE, 2010

HON. P. C. APPIAH-OFORI
H/NO. FM/B/003 B … PLAINTIFF
DOME-ACCRA

VRS

THE ATTORNEY GENERAL … DEFENDANT

J U D G M E N T

WOOD (MRS), CJ:-

Rarely do we find parties in litigation in agreement over issues of fact, let alone issues of law. The norm is for each side to dig their heels and refuse to move away from their respective entrenched positions. Not surprisingly, an open admission that an opponent is entitled to a relief sought is hardly heard of. For which reason, none of those useful procedures provided under the rules of court, for the expeditious but

altogether just resolution of disputes, hardly work in our jurisdiction. Thus, applications for summary judgment or judgment on admissions, motions to have claims or defences struck out on grounds of non disclosure of a reasonable claim or a defence-procedures for achieving judicial economy-are usually met with stiff opposition. Indeed, getting parties who are before the superior courts to the Alternative Dispute Resolution (ADR) table may be likened to the biblical proverbial expression of having a camel pass through a needle's eye. These largely account for the cumbersome legal procedures and tortuous court room trials, which culminate in the frustratingly long delays faced by court users.

Constitutional litigation instituted under articles 2 (1) and 130(1) of the 1992 Constitution is quite common in our jurisdiction. But, understandably, the framers of the Supreme Court Rules, C. I. 16, did envisage that some actions brought under our original jurisdiction, might nevertheless be uncontested, hence the rule 48 of the C. I. 16, which provides:

"(1) A defendant upon whom a writ and statement of the plaintiff's case are served shall, if he wishes to contest the case…."

Uncharacteristically, the defendant in this instant case has presented us with a refreshing change. The defendant, the Honourable Attorney-General, represented by Mr. Cecil Adadevoh, Senior State Attorney, has adopted the approach which in judicial proceedings, we would commend as an honourable step. Speaking for myself, I wish we would have more of such responses from litigants in the ordinary cases which flood our courts on daily basis. It will relieve many from the drudgery of having to shuffle in and out of our court-rooms for months or sometimes years on end to have their simple cases adjudicated.

Notwithstanding this commendable step, it is the duty of a court and indeed sound judicial practice, for a court to subject an admission or concession on a point of law to close judicial scrutiny, before endorsing it as good law. Such judicial probing is not in any way derogation from or contradiction of my earlier proposition that

encourages concessions when one does not have a valid case. The utility of this judicial process cannot be overemphasised. Inter alia, it saves a court from giving wrong decisions, and/or making unlawful orders which might be open to all forms of attack.

Thus, in this clearly important constitutional matter, in spite of the defendant's clear admission that plaintiff is entitled to judgment on his claim, I find myself under an obligation to interrogate all the critical legal issues related to the central question. This approach is to ensure legitimacy and assure both parties procedural and substantive justice. I would be failing in my duty if without testing the soundness or otherwise of neither the arguments nor the claims and answers thereto, I rubber stamped the admissions. I am of the view that I must examine the legal basis for the defendant's stated position; I must test and weigh the constitutional principles undergirding the inferences, deductions and conclusions drawn by the parties. All these, constitute an essential and legitimate part of the adjudication process. In short, this case commands a careful analysis of every principle connected thereto, with nothing being left to chance.

FACTS

In this action, the plaintiff, who is a sitting Member of Parliament for the Asikuma Odoben Brakwa constituency in the Central Region sued in his capacity as a citizen of the Republic of Ghana. He invokes our original jurisdiction under articles 2 (1) and 130 (1) (a) of the 1992 Constitutions to claim for the following reliefs:

"1. A declaration that that by the combined effect of articles 17, 70, 71,144,145,146 and 187 of the 1992 Constitution and on a true and proper interpretation of the Constitution, the retiring age of the Auditor-General is comparable to and in pari materia to that of the Justice of the Court of Appeal.

2. A declaration that on the true and proper interpretation of 1992 Constitution, the Auditor-General is not a public officer within the contemplation of and for the

purposes of articles 191, 195 and 199 of the 1992 Constitution but a public officer within the contemplation of articles 70 and 71 of the Constitution.

3. A declaration that section 10(4) of the Audit Service Act, 2000 (Act 584) is inconsistent with and in contravention of letter and spirit of the 1992 Constitution, and accordingly same to be declared null and void.

4. A declaration that except for stated grounds stated in article 146 of the 1992 Constitution, the Auditor-General shall remain in office until he/she attains the compulsory retiring age which is comparable to that of a Justice of the Court of Appeal".

The kernel of the plaintiff's case as embodied in the written arguments, is succinctly summed up in this portion of his statement of case that he filed pursuant to rule 46 of the Supreme Court Rules C.I. 16. He submitted:

"…by articles 70, 71, 145, 146, 187 of the 1992 Constitution, the Auditor-General is a Public Officer whose office is analogous to that of the Commissioner for Human Rights and Administrative Justice, the Chairman of the Public Services Commission, Chairman of the Electoral Commission, Chairman for National Commission for Civic Education etc and not a Public Officer under Articles 191, 195 and 199 of the Constitution. Consequently, the age of retirement for the Auditor-General should be at par with that of the Heads of those Institutions similarly appointed as the Auditor-General under Article 70, who are remunerated under Article 71, removed from office in accordance with the procedure provided for under Article 146, of the 1992 Constitution and who in exercise or performance of their functions are not subject to the control and direction of any person or authority. Accordingly since the age of retirement of the Heads of these Institutions is pegged to that of a Justice of the Court of Appeal, the Auditor-General who is in the same class should have his retiring age the same as these Heads of Institutions."

The thrust of the argument is that, the 1992 Constitution omits to state the exact retiring age of the Auditor –General, whereas that of other analogous public office holders who are in the same class have had their constitutionally compulsory retiring ages pegged to that of Justices of the Court of Appeal. It was urged that the correct constitutional position in context, is that on a true and proper construction of the constitutional provisions relating to these other public office holders, the Auditor – General is entitled to retire at age seventy.

The corollary argument is that the s. 10 of the Audit Service Act 2000 (Act 528), which sets the retiring age at 60, basing itself on articles 190, 195, and 199 is clearly inconsistent with the constitution, void to the extent of the inconsistency, and the same must be struck down.

The sum of the defendant's response to the detailed submissions of plaintiff's counsel, which spanned some fourteen pages, is as follows:

"It is again submitted that the retiring age of the Auditor-General should be seventy (70) years, the same age at which Superior Court Judges of the Supreme Court and Court of Appeal, the Commissioner, CHRAJ and the Chairman, Public Services Commission retire.

This is more so having regard to the provisions relating to the Chairman and members of the National Commission for Civic Education. The Chairman does not fall within the list provided under article 70. Article 232(2) however provides that members of the Commission shall be appointed by the President acting on the advice of the Council of State.

Article 235(1) provides that the Chairman shall enjoy the same terms and conditions of service as a Justice of the Court of Appeal, and a Deputy Chairman of the Commission shall enjoy the same terms and conditions of service as a Justice of the High Court.

Article 236 then provides that "[t]he procedure for the removal of the Chairman or a Deputy Chairman from office shall be the same as provided for the removal of a Justice of the Court of Appeal and a Justice of the High Court respectively under this Constitution.

It is submitted that in all these cases, the retiring age of the head of the organization appointed by the President in consultation the Council of State is 70 years. The retiring age of the Auditor-General should also be 70 years."

In view of the position I have taken that I find myself under a legal duty to assess the constitutionality of the parties' stated position on this matter, I propose to analyse the arguments carefully by reference to the following pertinent questions:

Does the constitution fail to explicitly provide for the retiring age of the Auditor – General? In other words is there a gap in relation to his retiring age?

Does this court have jurisdiction to supply the missing link via the process of constitutional construction or interpretation by reference to the implicit language of the relevant constitutional provisions as relates to him and other public office holders?

If yes, would the correct age be 70 as claimed by both parties?

The memorandum of issues filed on behalf of the plaintiff, albeit differently worded, pose the same questions. They are:

"**MEMORANDUM OF ISSUES FILED ON BEHALF OF PLAINTIFF (C.I. 16 RULE 50(3))**

1. "Whether or not by the combined effect of Articles 70, 71,144,145,146, 187 and 286 of the Constitution, 1992 the retiring age of the Auditor-General is comparable to and in pari materia to that of a Justice of the Court of Appeal?

2. Whether or not the Auditor-General is a public officer within the contemplation of Articles 70, 71, 144, 145, 146 and 286 of the Constitution 1992 and not a public officer within the contemplation of Articles 189, 190, 191, 195 and 199 of the Constitution 1992?

3. Whether or not Section 10(4) of the Audit Service Act, 2000 (Act 584) is inconsistent with and in contravention of the combined effect of the letter and spirit of Articles 17, 70, 71, 144, 145, 146, 187 and 286 of the Constitution 1992?"

As I pointed out in the unreported case of Brown v Attorney –General, writ J1/1/2009, dated 3rd February 2010(to be published in the 2010 SCGLR 183, sub nom Brown v Attorney-General (Audit Service Case) external auditing is vital to our existence as a constitutional democracy with its underlying values of transparency and accountability. Indeed, reference to Ghanaian people's solemn affirmation to the principles of probity and accountability, in the preamble to the 1992 Constitution of Ghana, is not mere rhetoric. The Constitution provides extensively for the office of the Auditor –General and the Audit Service, the agency through which the Auditor –General, whose office is a public office, discharges his constitutional obligations as embodied under article 187 of the 1992 Constitution.

Crucially, the 1992 Constitution also provides for his appointment and the mode of his removal. Thus, article 70 provides:

70. "(1) The President shall, acting in consultation with Council of State, appoint-

(a) the Commissioner for Human Rights and Administrative Justice and his Deputies;

(b) the Auditor-General;

(c) the District Assemblies Common Fund Administrator;

(d) the Chairmen and other members of-

(i) the Public Services Commission

(ii) the Lands Commission;

(iii) the governing bodies of public corporations;

(iv) a National Council for Higher Education howsoever described; and

(e) the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.

(2) The President shall, acting on the advice of the Council of State, appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission".

Furthermore article 71 provides that:

71. "(1) the salaries and allowances payable, and the facilities, and privileges available, to-

(a) the Speaker and Deputy Speakers and members of Parliament;

(b) the Chief Justice and other Justices of the Superior Court of Judicature;

(c) the Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and his Deputies and the District Assemblies Common Fund Administrator;

(d) the Chairman, Vice-Chairman and other members of-

(i) a National Council for Higher Education howsoever described;

(ii) the Public Services Commission;

(iii) the National Media Commission;

(iv) the Lands Commission; and

(v) the National Commission for Civic Education;

Being expenditure charged on the Consolidated Fund, shall be determined by the President on the recommendations of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State.

Also, the article 187 (13) provides for his removal from office, but nothing is said of his retiring age. The removal provision states:

187 (13) "The provisions of article 146 of this Constitution relating to the removal of a Justice of the Superior Court of Judicature from office shall apply to the Auditor-General".

I am in agreement with the parties that the 1992 Constitution, unlike its predecessor, does not expressly provide for the retiring age of the Auditor–General. Article 135 (13) of the 1969 Constitution expressly stated that he shall retire from office at 60 years. The big temptation is to pick the amended article 199 alone and argue that like all other public officers, he is bound to retire at 60. In other words, a literal reading of article 199 (1) of the 1992 Constitution, standing and read in isolation, in the light of Agbevor v The Attorney –General [2000] SCGLR 403, would lead to the conclusion that because article 187 stipulates that his office is a public office, he, like all public officers, retires from the public service on attaining age 60, which is admittedly subject to contract.

In the Agbevor case, my brother Atuguba JSC provided the meaning to the term 'public officer' as appears under chapter 14 of 1992 the constitution. He aptly stated:

"There is no doubt that the Judicial Secretary is a public officer. The expression 'public officer' is not defined in general terms in the Constitution…Whatever the expression 'public officer' is intended to mean it must certainly include the holder of a public office…"

But, as was observed by Dr. Date-Bah JSC in Danso- Acheampong & Abodakpi v Attorney –General [2009] SCGLR 353:

"These days, a literal approach to statutory and constitutional interpretation is not recommended…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."

Thus, in this case, a non purposive literalist interpretation based on article 199, will present a distorted and clearly wrong construction of the constitutional provisions as

regards the Auditor- General's retiring age. First, this approach flies in the face of all the established legal principles governing the construction of constitutional provisions. The jurisprudence of this court, as has been firmly established, clarified and developed over time is that the literal construction of constitutional provisions in isolation, without reference to other related provisions, nor the Constitution's underlying core values, cannot be the proper approach to constitutional construction. A series of decisions emanating from this court has put the matter beyond disputation. To name a few; see for example, National Media Commission v Attorney- General [2000] SCGLR 1, Republic v Yebbi& Avalifo [2000] SCGLR 149; Asare v The Attorney –General 2 [2003-2004] 823; Ampiah Ampofo v Commission on Human Rights and Administrative Justice [2005- 2006] SCGLR 227; Omaboe 111 v Attorney –General & Lands Commission [2005-2006] SCGLR 579; Republic v High Court (Fast Track Division) Accra; Ex Parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party) [2007-2008]1 SCGLR 213; Republic v High Court Accra ; Ex Parte Yalley (Gyane & Attor) Interested Parties [2007-2008] 1 SCGLR 512; Ghana Lotto Operators Association v National Lottery Authority [2007-2008] 2 SCGLR 1088.

I expressed myself thus in the (Audit Service case -supra):

"The purposive and literal approach in proper context is commendable; it is the purely mechanical or literal that pays no heed to the legislative purpose or intent, that has no place in this area of the law…In the proper context, the objective purpose approach would be the preferred approach, if the Constitution must be read as a whole, in terms of both its explicit and implicit language, and read as a living document, with a view to actualizing core values of the society and meeting the hopes and aspirations of the people for whom it was crafted. The spirit of the 1992 Constitution, a judicially established aid to interpretation, is embodied not only in the actual texts, under consideration, but also the goals and objectives as captured in the Preamble, the Directive Principles of State Policy, and indeed the entire document."

Equally worthy of mention is the dictum of my learned brother Dr. Justice Date- Bah JSC in Agyei v Twum v A. G. case [2005-2006] SCGLR 732.

"The fact that a country had a written constitution did not mean that only its letter might be interpreted. The courts had the responsibility for distilling the spirit of the Constitution from its underlying philosophy, core values, basic structure, the history and nature of the country's legal and political systems, etc in order to determine what implicit provisions in the written constitution would flow inexorably from that spirit."

'Spirit', that frequently used term in constitutional construction which Sowah JSC (as he then was), had years before referred to in the Tuffuor case, Date –Bah describes as "the unspoken core underlying values and principles of the constitution."

The starting point of any discussion on purposive construction has always been the well known dictum of Sowah JSC in Tuffuor v Attorney- General [1980] GLR 637, namely,

"The constitution has its letter of the law. Equally, the Constitution has its spirit… Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of time."

This leads me to a further explanation of the basic objection I have against the application of a doctrinaire, narrow or mechanical interpretation of article 199 in isolation, an approach which this court has clearly moved away from. Again, I am in agreement with the parties that when all the relevant articles pertaining to the Auditor-General are read, objective purposively, we shall discover that the 1992 Constitution has separate provisions covering two distinct classes of public servants.

Chapter 14-"Public Services"- provide for the various organs that constitute this important arm of governance. The mode of appointment of officers, their terms and conditions of service including their retiring age etc. are all clearly stated thereunder.

It is pertinent to note that under this chapter, article 194 specifically sets out the terms and conditions of the members of the Public Services Commission, pegging inter alia, their retiring age to that of Justices of the Court of Appeal, that is age 70. It is worthy of note, however, that no mention is made of the Auditor-General. The question is this; do we imply that he falls under the general provisions of chapter 14 covering public servants in general?

My answer would have been in the affirmative had there being no other 'special class' of public office holders, if I may be permitted to put it this way, under the 1992 Constitution. But there are. They are identifiable under articles 70 and 71, 235 and 236. Their modes of appointment are entirely different from that of the general class identified under Chapter 14 of the 1992 Constitution.

When these provisions are read together and construed objective purposively, when we pay attention not only to the letter but the spirit, the Auditor – General cannot not be grouped with the other class of public office holders, under article 199, but the article 70 public office holders.

The other crucial matter is that whereas, for each article 70 office holder, the Constitution specifically provides for a mandatory constitutional retiring age, it is silent in the case of the Auditor- General. I should think that, on a more liberal and generous construction of the relevant constitutional provisions, with the underlying principles in mind, if it were only in respect of his appointment that he belongs to the article 70 class, the appropriate provisions would have been made relating to his retiring age, emolument, etc. under chapter 14, as has been provided for members of the Public Service Commission, another group of article 70 public office holders, whose retiring age has expressly been fixed at 70 years.

I would reiterate, as already noted, that in the context of this case, it is the objective purposive construction which must be deployed. I have had occasion to fully examine the marked difference between the subjective and objective purposive construction, also known as the strained- and- purposive based construction in the following cases; Richard Anane and Republic v High Court Accra; Ex Parte Yalley (Gyane & Attor Interested Parties) [2007- 2008] 1SCGLR 512 at 519- 20. But so has my learned brother Dr. Date- Bah JSC, in a number of cases. I prefer to quote his opinion in Agyei- Twum v A.G. & Akwetey (supra).

"The concept of the purpose of a constitutional provision reveals that there are two kinds of purpose: subjective and objective. The subjective purpose is what the framers of the Constitution actually intended. The objective purpose, on the other hand, is what the provision should be seeking to achieve, given the general purpose of the Constitution and the core values of the legal system and of the Constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provision in question. In *Asare v Attorney-General* [2003-2004] 2 SCGLR 823, this court held that, in determining the purpose of a provision, the interpreter should balance the two kinds of purpose. The spirit of a constitutional provision includes its objective purpose."

I conclude, as did, the defendants, that there is a lacuna, a gap, which must be filled through the process of constitutional interpretation along the principles analysed. In our jurisprudence, it is legally permissible, in appropriate cases, to fill in gaps or omissions arising under the Constitution or statutes. None of the parties dispute this. The defendant cautions that we do not throw our hands in despair when faced with this stark reality that the Constitution has failed to address this critical question on his retiring age. I do entirely agree with him. Well over two decades ago, I adopted the famous dicta of Lord Denning MR (as he then was) in the English Court of Appeal decision in Nothman v Barnet LBC [1978] 1 WLR 220 at 222, which advises against judges declaring themselves "impotent, sterile, incapable" when faced with glaring injustices when interpreting statutes. On the contrary, he advocates the reading of words into them, in appropriate cases, in order to meet the ends of

justice. I followed this path in two cases; Appiah v Biani [1991] GLR 155 and Eshun v Poku [1989-90] GLRD, by reading words into the bare or literal letter of the statute in one case and held, in the first case that an uncompleted house is a house within the meaning of PNDCL111, and into an association's regulations in the other case, for the purposes of breathing life into them, so as to do substantial justice to the parties in each case.

The importance of reading constitutional provisions as a whole and not piecemeal, in order that all parts would fit logically and form an internally consistent whole, was underscored by my brother Atuguba JSC, in the case of Republic v High Court, Koforidua, Ex Parte Asare (Baba Jamal and Ors. Interested Parties) [2009 SCGLR] 460 at 472. He quoted with approval the following passage from the opinion of Acquah JSC (as he then was), in National Media Commission v Attorney-General I find it quite useful in this case. He stated:

"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 framework. And because the framework has a purpose, the parts are also to work dynamically, each contributing towards accomplishing the intended goal".

The learned Judge author Aahron Barak, in his authoritative book "Purposive Interpretation in Law" under the rubric "Constitutional Language and Constitutional Structure" writes:

"Constitutional language includes both explicit and implicit language. The implications are as much a part of the constitutional text as its explicit provisions. They are written into the constitution between the lines, in invisible ink. The interpreter discerns them from the structure of the text as a whole".

Constitutional construction, in its proper context, therefore provides the legal route for filling in gaps or omissions in a written constitution. It permits the importation of

implicit words to fill in whatever constitutional lacuna or omission appears to exist in a written Constitution. This does not amount to a re-writing the constitution. Again, the parties are ad idem on this matter. The constitutional case of Agyei-Twum v A-G & Akwetey [2005-2006] SCGLR 732, affirms this principle. Date- Bah JSC, speaking through the lead opinion of this court's unanimous stand on the principle said:

"Having identified such a gap, the issue then arises as to whether the gap is to be filled and whether it is legitimate for judges to fill the gap. Does filling the gap come within the concept of interpretation?"

He answered in the affirmative explaining that "…the derivable or discerning principle is that in exceptional cases, additional text may be imported into an enactment in order to give effect to its purpose."

Specifically in relation to constitutional cases the learned justice concluded:

"It is not unprecedented for a common law court to imply a provision into a national constitution to give it efficacy in relation to its purpose. For instance, the High Court of Australia has implied a Bill of Rights into the Australian Constitution. (See, for instance, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 12; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.) In Canada also an implied Bill of Rights was recognised by the Canadian Supreme Court before the enactment of the Canadian Charter of Rights and Freedoms. (See *Reference Re Secession of Quebec* [1998] 2 SCR 217). The United States Supreme Court has long recognised that though the United States Constitution lists expressed powers for each branch of government, it also confers "implied powers" that arise out of the language and intent of the Constitution. (See *McCulloch v Maryland* (1819) 17 US 316.)

The mechanics of filling in the gap is now considered. Agyei –Twum case provides the needed precedent. On this issue, first, I fully endorse and adopt the defendant's stated position that:

"…public officials appointed under article 195(1) are the persons contemplated under article 199(1). The Auditor-General is not appointed under article 195(1) and therefore the provisions of article 199(1) are not applicable to him."

I also find his further submission on the issue clearly sustainable. He argued:

"Other appointees under article 70 retire at 70 years…that the retiring age of the Auditor –General should be seventy (70) years, the same age at which Superior Court Judges of the Supreme Court and Court of Appeal, the Commissioner, CHRAJ and the Chairman Public Services Commission retire."

We must determine an appropriate retiring age for him; for we cannot wring our hands in despair and lament that we are impotent. To achieve this, we must identify and place him in one category of public office holder or the other. I think we should place him in the natural group of analogous office holders to which the Constitution has placed him so he can enjoy that retiring age. On this score, the group to which he has the closest affinity is the article 70 office holders I have identified, whose conditions, including retiring age is pegged to that Justices of the Court of Appeal. It is worthy of note that it is Circuit Court Judges whose retiring age is fixed at 60 years.

What informed this decision? The Auditor –General and the Justices of the Superior Courts enjoy the same mode of appointment and emoluments as per Articles 70 and 71 of the 1992 Constitution. His removal follows the same procedure as Justices of the Superior Courts. The Commissioner for CHRAJ, the Chairman of the Public Services Commission, and the Chairman of the Electoral Commission, as already noted, all have their retiring ages pegged to that of Justices of the Court of. Why would the Constitution want to create this special class and give to each single one

of them the terms and conditions of superior court Justices of Appeal when in fact they are not members of the judiciary? It is the objective purpose of the framers that they enjoy security of definite fixed tenures and also the independence that is common to judiciaries. And that is what it has provided for all those article 70 office holders.

I place reliance on the Agyei-Twum case (supra) in which when faced with a similar difficulty relating to a constitutional gap, this court's thinking was that:

"The purposive approach to interpretation of the 1992 constitution required that in the context of the instant case, implicit words may be read into the Constitution to avert a manifest absurdity. Thus there was room for the unwritten in a written constitution. The fact that a country had a written constitution did not mean that only its letter might be interpreted. The courts had the responsibility for distilling the spirit of the Constitution from its underlying philosophy, core values, basic structure, the history and nature of the country's legal system, etc in order to determine what implicit provisions in the written constitution would flow inexorably from that spirit".

In that case, Mr. Bright Akwetey sought to remove the incumbent Chief Justice, on grounds of judicial misconduct and abuse of power. It became apparent that although in the case of all superior court justices, the Constitution explicitly provides that as a first step, the establishment of a prima facie case is a sine qua non to the establishment of a committee to investigate the complaint and make recommendations, it does not expressly state so in the procedures outlined for the removal of the Chief Justice. This court unanimously concluded that there was a manifest, but inadvertent omission, which must be filled by the importation of that relevant clause in respect of the other superior court justices. Thus Dr. Date – Bah JSC said on the issue of constitutional gap filling:

"I believe that it is necessary to read article 146 as a whole and to make explicit what is implicit within the penumbra of the language employed in article 146(6). I do not believe that the framers of our Constitution would have intended a procedure

which lends itself to manipulation and to interference with the independence of the Judiciary in terms of article 127 of the Constitution."

It follows from my findings that the s. 10 (4) of Act 584, which limits the retiring age of the Auditor-General to 60 years is inconsistent with the 1992 Constitution.

In conclusion, the action succeeds and the plaintiff is entitled to his claims.

G. T. WOOD (MRS)
CHIEF JUSTICE

ATUGUBA, JSC:-

By his writ dated the 20th day of July 2007 the plaintiff claims as follows:

"1. A declaration that by the combined effect of Articles 17, 70, 71, 144, 145, 146 and 187 of the 1992 Constitution and on a true and proper interpretation of the Constitution, *retirement age of the Auditor-General is comparable to and in pari materia to that of a justice of the Court of Appeal.*

2. A declaration that on the true and proper interpretation of the 1992 Constitution, the Auditor-General is not a public officer within the contemplation of and for the purposes of articles 191, 195 and 199 of the 1992 Constitution but a public officer within the contemplation of Articles 70 and 71 of the Constitution.

3. A declaration that section 10 *(4) of the Audit Service Act, 2000 (Act 584) is inconsistent with and in contravention of the letter and spirit of the 1992 Constitution, and accordingly same be declared null and void.*
4. A declaration that except for stated grounds stated in article 146 of the 1992 Constitution *the Auditor General may remain in Office until s/he attains the compulsory retirement age which is comparable to that of a Justice of the Court of Appeal."*

The plaintiff's salient contentions are as stated in his statement of case dated the 2nd day of August 2007 as follows:

"**1.2** The Plaintiff contends by this action that by Articles 70, 71, 145, 146, 187 of the 1992 Constitution, the Auditor-General is a Public Officer whose office is analogous to that of the Commissioner for Human Rights and Administrative Justice, the Chairman of the Public Services Commission, Chairman of the Electoral Commission, Chairman for National Commission for Civic Education *etc and not a Public Officer under articles 191, 195 and 199 of the Constitution.* Consequently, the age of retirement for the Auditor-General should be at par with that of the Heads of those Institutions similarly appointed as the Auditor-General under Article 70, who are remunerated under article 71, removed from office in accordance with the procedure provided for under article 146, of the 1992 Constitution and who in the exercise or performance of their functions are not subject to the control and direction of any person or authority. Accordingly since the age of retirement of the Heads of these Institutions is pegged t that of a Justice of the Court of Appeal, the Auditor-General who is in the same class should have his retiring age the same as these Heads of Institutions. *The Auditor-General should not be discriminated against when it comes to stating his age of retirement.*

x x x

2.4 In exercise of its legislative powers provided for in the 1992 Constitution, Parliament passed into law, the Audit Service Act, 2000 (Act 528). Sections 10(4) and 32 of Act 528 provides that on attaining the age of

sixty years, both the Auditor-General and employees of the Audit Service shall retire from office;

x x x

2.7 The Plaintiff therefore contends that taking into effect the combined effect and meaning behind Articles 70, 71, 145,146,187 and 286 of the Constitution 1992, Parliament by placing or pegging the Auditor-General on the same retiring age as employees of the Audit Service staff, as it did in section 10(4) and 32 of the Audit Service Act, acted in contravention of and inconsistent with the Letter and Spirit of the Constitution 1992.

x x x

3.3

x x x

In this case it is humbly submitted that the division of the Constitution, 1992 into Chapters and Articles, inasmuch as this assists in the readability of the Constitution, also enables or assists in restricting the meaning or applicability of words used. Chapter 14 is entitled *"Public Services"*. This chapter deals mainly with public services. It provides for the various organs that constitute or ensure smooth running of the Country. Issues provided for in this Chapter include the appointment of officers for such public services, their protection, terms and conditions of service and in article 199 their retiring age.

It is accordingly humbly submitted that in proceeding on the basis of the divisions or classification into which the Constitution is so divided or classified, article 199 is only applicable to members of the public services created in article 190 and restricted to members of this class alone. Consequently, the Auditor-General not being a creation of Article 190 nor empowered or protected by this chapter is to all intents and purposes not a public officer properly so-called within the meaning and context of chapter 14 of the Constitution particularly article 199.

To buttress this submission, it is important to re-iterate that the security and tenure and incidents attached to the Auditor-General and a member of the

public services as constituted under article 190 are not only separate but unequal. Whereas the Auditor-General's and his Office is insulated from direction or control from any person or authority, the same cannot be said of members of either the Audit Service in particular or the public services as a whole. Furthermore while the economic rights of the Auditor-General shall not be varied during the tenure of his office, the terms and conditions of service of employees of the Audit Service in particular and public services in general are not afforded similar protection by the Constitution. *Again whereas article 187 under* which the Auditor-General is created is entrenched under article 290 of the Constitution 1992 that of members of the public services is not."

CASUS OMISSUS

There have been conflicting views as to whether it is competent for a court of law to remedy a statutory casus omissus. However this court has decided quite clearly and affirmatively on this matter in *Agyei Twum v Attoreney-General & Akwetey* [[2005-2006] SCGLR 732.

Similarly in *Warioba v Wassira* (1998) 2 LRC 721C.A at 727-728 the Tanzanian Court of Appeal in its unanimous judgment stated per Kisanga J.A as follows:

"The view that nothing should be added to a statutory provision was widely accepted by the courts in England during the nineteenth and the first half of the twentieth centuries. Thus for instance, in *R v Judge of the City of London Court* [1892] 1 QB 273 at 290 the Court of Appeal (per Lord Esher MR) said, inter alia, that-

'if the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.'

Re-affirming that view, the House of Lords (per Lord Atkinson) in *Vacher and Sons Ltd v London Society of Compositors* [1913] AC 107 at 12l , said:

…But, as Lord Halsbury laid down in *Cooke v Charles A Vogeler Co*, a Court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.'

However, over the years this position has changed, and the view today is that in interpreting a statutory provision the court may, in a fit case, read words into the provision. Thus, for instance, in *Kammis Ballrooms Co Ltd v Zenith Investments (Torquay)* Ltd [1970] 2 All ER 871 at 893 the House of Lords (per Lord Diplock) adopted what was described as the 'purposive' approach, instead of the literal approach, and imputed to Parliament-

'an intention not to impose *a prohibition inconsistent with the objects which the statute was designed to achieve,* though the draftsman [had] omitted to incorporate in express words any reference to that intention.'

That approach was re-echoed and elaborated upon by the Court of Appeal in *Nothman v Barnet London Borough Council* [1978] 1 All ER 1243 at 1246 where Lord Denning MR said:

> 'The literal method [of construction] is now completely out of date. It has been replaced by the "purposive" approach. *In all cases now in the interpretation of statute we adopt such a construction as will promote the general legislative purpose underlying the provision*. It is no longer necessary for the judges to wring their hands and say: There is nothing we can do about it. *Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it-by reading words in, if necessary-so as to do what parliament would have done had they had the situation in mind*.'

Consistent with such holding, the court declined to adopt the literal approach, and instead read words into the provision of the statute which it was construing. We find these last two cases to be very persuasive."

Ambit of Power to fill casus Omissus

Two areas of caution, inter alia, have to be particularly observed when a court is called upon to exercise this power of filling a casus omissus. The first is that the casus omissus may be deliberate and therefore not meant to be filled. See *Attorney-General(ex rel Yorkshire Derwent Trust Ltd and another) v Brotherton and others* [1992]1 All ER 230 H.L, at 255 where Lord Jauncey forcefully stated thus:

> "*If the draftsman had intended to bring navigable rivers within the ambit of s 1 he could very easily have done so in simple and comprehensible language*. The 1932 Act is in may respects similar to the Prescription Act 1832 and it has been stated, correctly in my view, that certain words in s 1(6) of the 1932 Act have obviously been taken from the similar words of s 4 of the 1832 Act…. *The omission in the 1932 Act of any reference to watercourses or uses of water suggests that the draftsman, far from intending to bring navigable rivers within the ambit of s 1, consciously omitted them.* "(e.s)

See also Kempe and Another (the Joint liquidators of Mentor Insurance Ltd) v Ambassador Insurance Co (in liquidation) [1998] 2 LRC 619 P.C.

Unsurprisingly therefore in *Warioba v Wassina*, supra the Tanzanian Court of Appeal cautiously posed to themselves this question at p.724: "….*the immediate question which falls for consideration now is whether the omission was deliberate or was through inadvertence."*

The second is that a court should fill a casus omissus only where it is quite clear that the omission was entirely accidental and that the Legislature, had its attention at the time of drafting been drawn to the matter, as by the officious bystander in the law of contract, would have tersely suppressed the significance of the omission by saying that it was of course very obvious that the omitted matter be included in the provision.

Thus in *Worthing Corporation v Southern Railway Co.* (1943) 2 All ER 331 H.L at 336 (per) Lord Wright said:

> "I think the language of the Act might well admit of improvement, but it has to be construed as it stands. I do not derive much help from considering whether there is here a casus omissus, whatever that vaguely and uncertainly used expression may mean. *If a court of construction can fill up what appears to be a gap in a statute by giving an interpretation to the language of the section read in the light of the context as a whole, there is nothing which can be called a casus omissus. There is merely a problem of construction to be solved in the ordinary way. If, however, there is no relevant provision either express or implied there may be a gap which a court cannot supply.* In the present case I think there are sufficient reasons to enable a decision to be arrived at as a matter of construction."

Similarly at 332 Viscount Simon L.C said:

> "The difficulty in the case is that we have to apply the provisions of the Railway (Valuation for Rating) Act, 1930, to a situation which Parliament does not appear to have clearly visualized as likely to occur when the Act was passed. It cannot be supposed that the legislature intended that a rateable hereditament, such as this coal Wharfat Worthing Station goods yard, should escape all liability for rates for 2 years. Yet, that is the result of the decision of the majority in the Court of Appeal, approved as it will be by the judgment of this House. *We are not of course, at liberty to write into the statute additional words in order to bring about a less surprising or inequitable result, unless the additions are fairly to be implied from the actual terms of the statute.*"

In interpreting the constitution we must bear in mind, as forcefully stated by Francois JSC in *NPP v Attorney General* (1993-94) 2 GLR 35 at 79 that:

> "In the celebrated case of Tuffour v Attorney-General [1980] GLR 637 at 647, CA (sitting as SC) the court said:
>
> > "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It *also mirrors their*

history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.

The constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises."

My own contribution to the evaluation of a Constitution is that, a Constitution is the out-pouring of the soul of the nation and *its precious life-blood is its spirit.* Accordingly, in interpreting the Constitution, *we fail in our duty if we ignore its spirit.* Both the letter and t he spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation. In support of this, we may profitably turn to *the Constitution, 1992 itself* which *directs that we accord due recognition to the spirit that pervades its provisions*. "

The REPORT OF THE COMMITTEE OF EXPERTS (CONSTITUTION) ON PROPOSAL FOR A DRAFT CONSTITUTION OF GHANA reveals at pp. 2-3 thereof as follows:

"2. APPROACH TO OUR WORK

As required by Law 252, the Committee took into account the following documents:

1. *The Constitutions of 1957, 1960, 1969, and 1979*
2. The above-mentioned NCD Report
3. The Constitutions of other countries
4. Several memoranda submitted to us from the public.

A reference to the above documents would have been meaningless without *an evaluation of the constitutional practice and experience of Ghana* and other countries. In Ghana, *particular attention was paid to the constitutional practice and experience under the 1st, 2nd, and 3rd, Republics*; the lessons of the NRC, SMC, and the AFRC Governments and the developments within the past ten years. This necessarily involved an assessment of various laws and institutions introduced by the PNDC.

3. *The Committee operated on the cardinal principle that we should not re-invent the wheel. Accordingly wherever we found previous constitutional arrangements appropriate, we built on them. In this connection, with appropriate modifications, we relied substantially on some of the provisions of the 1969 and 1979 Constitutions of Ghana* to the extent that they are relevant to the general constitutional structure proposed in this report."

It is quite clear from the 1969 Constitution that for example the Chairman and Vice-Chairman of the Public Services Commission were placed at par with a Justice of the Court of Appeal in terms of service. Thus article 139 (4) and (5) provided as follows:

"139 (4) Subject to the provisions of the next succeeding clause, *the terms of service of the Justice of the court of Appeal shall apply to the Chairman and the Vice-Chairman of the Public Services Commission.*

(5) The provisions of *article 116 of this Constitution relating to the removal of a Judge of the Superior Court of Judicature*, other than the Chief Justice, *shall apply*,

(a) *to the Chairman and the Vice-Chairman of the Public Services Commission who shall retire at the age of sixty-five years*; and

(b) to the other members of the Public Services Commission before the expiration of their period of service as provided by Parliament."

By stark contrast article 135(10) – (14) provided as follows:

"(10) The salary and allowances payable to the Auditor-General shall be a charge upon the Consolidated Fund.

(11) *The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, retiring award or retiring age shall not be varied to his disadvantage after his appointment*.

(12) The provisions of *article 116 of this Constitution relating to the removal of a Judge of the Superior Court of Judicature, other than the* Chief Justice, from office shall apply to the Auditor-General

(*13) The Auditor-General shall retire from office on attaining the age of sixty years.*

(14) The administrative expenses of the office of the Auditor-General including all salaries, allowances gratuities and pensions payable to or in respect of persons in the Audit Service shall be a charge upon the Consolidated Fund."

It is thus quite clear that from the 1969 constitution the Auditor General was expressly excluded from parity of terms of service with the Court of Appeal.

Then came the 1979 Constitution which expressly put the Electoral Commissioner, the Ombudsman, and the Chairman of the Public Services Commission at par with the terms of service of a Justice of the Court of Appeal. See articles 37(4) and (5), 113(2) and 15(5) and (6). Although the Auditor General retained his titles to the consolidated Fund and mode of removal (same as superior Court Judges), and special ascertainment of salary there was no age limit specified for him. See articles 151(1) (II)-(14) and 58. The reason for this is not hard to seek since for the first time a general compulsory retirement age had been set for public officers at 60 years under article 162 thus:

"162. (1) A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years."

Since the general retiring age from public service was put at 60 and the framers of the constitution retained all the other provisions relating to the Auditor-General in the 1969 Constitution it follows that there was constitutional stare *decisis* with regard to his terms of service and it would have been superfluous still to state expressly that the Auditor-General's retiring age should be 60 years.

It is obvious that this very state of affairs has been retained in relation to the Auditor-General under the 1992 Constitution. There is therefore no gap to be filled with regard to his retiring age. The omission to state any special retiring age for the Auditor General can therefore be easily accounted for. It is simply not necessary to state any. The 1992 Constitution in article 199(1) is quite emphatic that:

"A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years."

This clearly solves the problem. The Constitution has not otherwise provided for a different retiring age for the Auditor General and therefore being a public officer, who upon the foregoing analysis cannot be said to have been envisaged by any of the constitutions from 1969 to 1992 to have any special retiring age other than 60 years, his retiring age is covered by the residue of article 199(1) as amended. It follows that s.10 (4) of the Audit Service Act, 2000(Act 584) which retains his retiring age at 60 years subject to extension contracts for a maximum of 5 years is squarely in line with the history, spirit and true intendment of the 1992 Constitution and is wholly constitutional.

The Memorandum of Proposals for the 1979 Constitution at PP.10 and 12 is quite revealing. It states as follows:

> "27. *We accept the basic soundness of much of the suspended 1969 Constitution, both in structure and content*. It was, therefore, not out of mere modesty that *we decided to base much of our work on that Constitution*: common prudence persuaded us that, *with the short time available to us, it would be neither wise nor useful for us to attempt completely the overhaul of what, in many respects, is an admirable document*. We did not have either the time or inclination to indulge in the luxury of seeking a perfect Constitution, being guided and warned by the wise old adage that 'the perfect is the enemy of the good'. *Moreover, although our terms of reference appeared to require us to prepare a constitution very different from the 1969 Constitution, we were satisfied that the difference in orientation between our draft and the 1969 Constitution could not be as comprehensive or pervasive as appeared in the surface*.
>
> x x x
>
> 3.1 In almost all cases where we have re-enacted the provisions of the 1969 Constitution, we have done so mainly on the basis of the rationale and justification so eloquently and persuasively provided for those provisions by the 1968 Constitution Commission. Accordingly, we have not considered it necessary, in such cases, either to repeat what that Commission said or to attempt to re-formulate the relevant portions of the Memorandum" In view

of all this, though I have not been able readily to lay hands on the 1968 proposals for the 1969 constitution to ascertain the rationale for fixing the retiring age of the Auditor-General at 60 years, that detracts nothing.

CONCLUSION

I wish to stress that the conclusion I have come to in this matter is very much in line with the reasoning of the Tanzanian Court of Appeal in the *Warioba v Wassira* case supra where the court used the historical ramifications of the provision in question to see quite clearly what filling in the court had to do. The facts of that case as stated in the headnote are as follows:

> "Following the General Election of 1995, upon an election petition filed by the appellant, the High Court nullified the election of the first respondent as a member of Parliament, finding that he had committed an act of corrupt practice. However, the judge declined to certify this finding to the Director of Elections and the appellant appealed to the Court of Appeal, arguing that such notification was required under the Election Act. Section 114(1) of the Elections Act 1985 had required findings of corrupt or illegal practice to be notified to the Director of Elections and provided for consequent sanctions; legislative amendment of 1990 had transferred the provisions on corrupt practices to the Prevention of Corruption Act but when these provisions were restored to the elections Act by Legislative amendment in 1995 the reference to corrupt practice was not restored to s 114(1). For the appellant it was argued that the failure to restore the reference to corrupt practice in s 114(1) in 1995 was an inadvertent omission by Parliament and that, to avoid absurdity and discrimination which would be contrary to art 13(2) of the constitution, the court should construe s 114(1) as including a reference to corrupt practice."

Upon these facts the court soundly held as per holding (2) of the headnote thus:

> "(2) *Applying the purposive approach* to the interpretation of s 114 of the Elections Act 1985, *in order to give effect to the legislative purpose of restoring corrupt practices to the Elections Act, the words 'corrupt or' were to be read into the section immediately before the word 'illegal' wherever it*

occurred. Moreover, this was justified in order to avoid the absurdity produced by a literal construction of s 114, *which would require an elections court to certify for sanctions persons guilty of illegal practices but not those guilty of corrupt practices, which were no less, and possibly even more, serious*. Furthermore, reading in a reference to corrupt practices was justified in order to remove the otherwise discriminatory effect of s 114, in distinguishing between persons guilty of illegal practices and those guilty of corrupt practices, which would contravene art 13(2) of the Constitution in a way which could not be justified under art 30(2) as being in the national interest. *Reading in the reference to corrupt practices did not involve amendment of the section or the introduction of words invented by the court or used in the section for the first time: the words had originally been used by Parliament in the Elections Act 1985 and were removed by the 1990 amendment; Parliament had sought to restore them by the 1995 amendment and there was no indication in the objects and reasons for the Bill, nor in the record of the Parliamentary debate itself, that there could be any rational explanation for their omission from s114, which must therefore have occurred through inadvertence.* Reading in the words 'corrupt or' did not offend the rule against retroactivity by subjecting the first respondent to sanctions unknown to him at the time of the relevant acts, because the sanctions available under s 114, including disqualification from voting for five years, were precisely the same as those imposed by s 96 upon conviction of a corrupt practice (see pp 728-730)."

It is clear that in this case we are called upon to pursue a course clearly inconsistent with the course pursued by the Tanzanian Court of Appeal in similar circumstances. The soundness of the reasoning of that court in not dissimilar circumstances should point to a similar conclusion in this matter.

Obviously not all the persons that enjoy certain specialized provisions, for examples, the District Assemblies Common Fund Administrator, the Lands Commission and the National Media Commission, see article 71, enjoy any coupling interms of service with the Court of Appeal. Even in respect of the Chief Justice who has a unique

position from the other justices of the Judiciary, see *Tuffuor v Attorney-General*, and is the 4th highest ranking person in Ghana, see article 57(2) of the constitution there is no special retiring age for him or her. The Chief Justice therefore being a justice of the Supreme Court has, as is well known, to retire compulsorily as provided for by article 145(2) (a) of the constitution. Is there any perceived gap in this situation relating to the Chief Justice? None, Brutus, none. Then none have I offended by my decision herein relating to the Auditor General.

In any case since under the 1969 and 1979 Constitutions the retiring age for superior court judges was 65 whilst that of the Auditor General was 60, now that that of the High Court has been raised to 65 whilst that of the Court of Appeal and Supreme Court is 70, which of these retiring ages did the Constitution envisage for the Auditor General if it is correct to say that there is an omission which is intended to be filled?

Again since the Auditor-General has never been placed on the same salary conditions as with the Court of Appeal even though both come under article 70 is this court going to "provide" that the Auditor-General should have the same salary with the judges of the Court of Appeal? Is there anything in article 70 which requires that position? The simple truth is that the Auditor-General has never been equated, save as regards made of removal from office and a change of his salary and other emoluments upon the Consolidated Fund, with the conditions of service of a Justice of the Court of Appeal.

The omission to state a specific retiring age in respect of the Auditor-General is therefore deliberate.

In this regard it is necessary to bear in mind that an Act of Parliament is presumed to be regular ***donec probetur in contrariam***. The onus of proof is not light. Indeed in *Kuenyehia v Archer* (1993-94) 2 GLR 525 S.C at 590 Edward Wiredu JSC forcefully stated thus:

> "Now to the main issue in controversy between the parties. I think it will be pertinent at this stage to remind ourselves of the standard of proof required to sustain declarations of the nature being sought by the plaintiffs. In my respectful view, the standard of proof is very high since the Constitution,

1992 is the supreme law of the land which the defendants have all sworn to defend and any violation of its provisions is normally punishable. The standard must therefore be equated to that required in penal cases. This would demand that the plaintiffs in order to succeed must rely on the strength of their own case by proving beyond doubt that the actions of the defendants which have provoked their action is unconstitutional. Any weakness therefore in the defence case should not avail the plaintiff."

And in *Pattinson v Finningley Drainage Internal Board* [1970] 2 WLR 622 at 624 Bean J quoted the following passage from Maxwell on Interpretation of Statutes, (12 ed) (1969) with approval:

"A later statute may repeal an earlier one either expressly or by implication. *But repeal by implication is not favoured by the courts*. '*Forasmuch', said Coke, 'as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole nation, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated."*

Even at common law it has been held that a court ought not under its supervisory jurisdiction to quash the decision of an inferior tribunal for error of law if the state of the law on the matter is uncertain? See *Republic v High Court Registrar, Kumasi Ex parte Yiadom I* (1984-86) 2 GLR 606 SC. In this regard in the *Agyei Twum v Attorney & Akwetey* case even though it looked so logical to read in the words "***prima facie case***" into the provision relating to the removal of the Chief Justice there was one uncleared hurdle. Who is to decide whether there is a ***prima facie*** case? In the case of the superior court judges it is the Chief Justice. But in the case of the Chief Justice who is to decide that matter, especially as it has been repeatedly held that so long as the Chief Justice is in office and able to act, no one else can perform the functions of that office. Perhaps owing to that difficulty the framers of the Constitution indulged in that omission. That is not to say that by way of construction it cannot be held that there is an implicit limitation that charges for the removal of the Chief Justice cannot be frivolous.

I am only in all this stressing the fact that the supplemental role of the court in constitutional and other statutory construction must be closely watched if courts of law are not to carve out for themselves an unwarranted field of legislative power.

As regards the consensus of the parties in this matter as to the correctness of the plaintiff's action I adopt the words of Adade JSC in *Kuenyehia v Archer* (1993-94)2 GLR 525 at 548 as follows:

> "In matters of fact a court is generally bound by admissions, concessions, accords etc by or between parties or their counsel or both. In matters of law, a court is not so bound."

Article 36(2) provides as follows:

> "(2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include
>
> x x x
>
> (e) the recognition that the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty."

Misappropriation, misapplication or other misuse of the finances of this country will frustrate the object of this provision and if in the fallible ways of mankind an executively pliant or corrupt auditor-general happens to be implanted in office till 70 years of age the implications will be quite grave. That danger has to be guarded against. I state this matter only as a question of principle without referring to a particular person.

For all the foregoing reasons, though I admire the plaintiff for his staunch adherence to the principles of transparency, integrity and accountability, it is these same principles which require me to reach the conclusion I have reached in this case. I am therefore bound to dismiss the plaintiff's action and I hereby so do.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

ANSAH JSC:

Pursuant to articles 2(1) and 130 (1) (a) of the 1992 Constitution, the plaintiff issued out a writ to invoke the original jurisdiction of this court, for the following relief, namely:

1. A declaration that by the combined effect of Articles 17, 70, 71, 144, 145, 146 and 187 of the 1992 Constitution, and on a true and proper interpretation of the Constitution, the retirement age of the Auditor-General is comparable to and in pari materia to that of a Justice of the Court of Appeal.

2. A declaration that on the true and proper interpretation of the 1992 Constitution, the Auditor-General is not a public officer within the contemplation of and for the purpose of articles 191, 195 and 199 of the 1992 Constitution but a public officer within the contemplation of Articles 70 and 71 of the Constitution.

3. A declaration that section 10(4) of the Audit Service Act, 2000, (Act 584) is inconsistent with and in contravention of the Constitution, the letter and spirit of the 1992 Constitution and accordingly same to be declared null and void.

4. A declaration that except for stated grounds in Article 146 of the 1992 Constitution, the Auditor-General may remain in office until s/he attains the –compulsory retirement age which is comparable to that of a Justice of the Court of Appeal."

***Introduction*:**

In his statement of case, the plaintiff contended that by the combined effect of articles 70, 71, 145, 146, and 187 of the 1992 Constitution (hereafter called the Constitution), the Auditor-General is a Public Officer similar and analogous to certain

such officers like the Commissioner for Human Rights and Administrative Justice, Chairman of the Public Services Commission, Chairman of the Electoral Commission, Chairman for National Commission for Civic Education, but not a Public Officer under Articles 191, 195 and 199 of the Constitution. As such the retirement age of the Auditor-General should be at par with the heads of those institutions.

I perceive reliefs 1 and 4 above deal with the retiring age of the Auditor-General. The plaintiff submitted it should be at par with that of a Justice of the Court of Appeal. The reason was that the Auditor-General was a public officer not as under articles 191, 195 and 199 of the Constitution but as under articles 70, 71, 144, 145, 146 and 187 of the Constitution. Therefore when the Audit Service Act 2000, (Act 584) provided in section 10 (4) thereof that he should retire at 65, that was inconsistent with and contrary to the letter and spirit of the constitution and was pro tanto null and void. So therefore the issues raised in the writ related to first, the status of the Auditor-General as a public officer and having made a declaration to that effect, what his retirement age should be.

It was from the total gamut Articles 70, 71,144, 145, 146, 187 and 286 on one hand and 189, 190,191, 195 and 199 on the other on his status as a public officer, that the following issues in the memorandum of issues were filed consequent upon the writ under Rule 50(3) of C.I. 16:

> **"1. Whether or not by the combined effect of Articles 70, 71, 144, 145, 146, 187 and 286 of the Constitution 1992, the retiring age of the Auditor-General is comparable to and im (sic) pari material (sic) to that of a Justice of the Court of Appeal?**
>
> **2. Whether or not the Auditor-General is a public Officer within the contemplation of Articles 70, 71, 144, 145, 146 and 286 of the Constitution 1992 and not a public officer within the**

contemplation of Articles 189, 190,191 195 and 199 of the Constitution 1992?

3. Whether or not Section 10(4) of the Audit Service Act, 2000 (Act 584), is inconsistent with and in contravention of the combined effect of the letter and spirit of Articles 17, 70, 144, 145, 146, 187 and 286 of the Constitution 1992?"

From these the plaintiff made the following case for the interpretation by this court calling upon it to determine:

(a) "Whether or not the Auditor-General is a public officer within the combined meaning of Articles 70, 71, 145, 146, and 187 of the i992 Constitution so that the age of retirement should be the same as that of a Justice of the Court of Appeal.

(b) Whether or not the Auditor-General is a public officer within the meaning of Articles 190, 195 and 199 of the Constitution 1992 such that he should retire from office on attaining the age of sixty years.

(c) Whether or not section 10(4) of the Audit Service Act, 2000 Act (584) is inconsistent with and in contravention of the Constitution, 1992 and therefore same is null and void."

In brief article 70 deals with the appointments of certain category of officials.

The plaintiff posed for discussion whether the jurisdiction of the court has been properly invoked for interpreting or a case for interpretation has arisen, referring to the lamp posts provided in Republic v Special Tribunal ex parte Akosah [1980] GLR 592. He submitted that article 187 of the Constitution omitted to state the exact retiring age of the Auditor-General unlike the other public officials in the same class,

whose retiring age has been pegged at and equated with that of a Justice of the Court of Appeal. Amidst this omission, Act 528 incorporating the provisions of articles 187 and 188, put the retiring age of the Auditor-General at sixty years. The position of the Auditor-General is that of a public officer under articles 187 and 286 of the Constitution. He was not a public officer under articles 190, 195 and 199 of the constitution, which read:

> "**187 (1) There shall be an Auditor-General of Ghana whose office shall be a public office."**

I do not think article 286 is relevant here and was quoted out of context. I shall therefore ignore it. But to find the sort of public officer he was, Article 199 was quoted and in fact relied upon by the plaintiff, and it is quoted hereunder in full. It read:

> **"199 (1) A public officer shall, except as otherwise provided in this constitution, retire from the public service on attaining the age of sixty years. And article 195 is on the appointment of public officers by the President acting in accordance with the advice of the governing council of the service concerned. It becomes clear that the Auditor-General is appointed under article 70, and not 195."**

The Constitution defined a 'public officer' in article 295 (1) in these terms:

> **"an office the emoluments attached to which are paid directly from the Consolidated Fund or directly out of monies provided by Parliament and an office in a public corporation established entirely out of public funds or monies provided by Parliament and service with a public corporation."**

Article 187 (1) provided that "***the Auditor-General shall be a public officer***" and the salaries and allowances payable under it are charged on the Consolidated Fund under article 187 (11). As to his duties the Auditor-General is part of the Public Service, and his conditions and terms determined by the Audit Service board.

The relevant articles, articles (12) and (13) are also quoted in full hereunder:

> **"(12) The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, retiring award or retiring age shall not be varied to his disadvantage during his tenure of office.**
>
> **(13) The provisions of article 146 of this Constitution relating to the removal of a Justice of the Superior Court of Judicature shall apply to the Auditor-General.**
>
> **(14) The administrative expenses of the office of the Auditor-General including all salaries, allowances gratuities and pensions payable to or in respect of persons serving in the Audit Service shall be a charge on the Consolidated Funds."**

In the discharge of his duties the Auditor-General enjoys much independence for he is not subject to the direction or control of any other person or authority. But notwithstanding these provisions, his retiring age was not specifically provided for under the constitution. Perhaps it was to fill this gaping lacuna that the Audit Service Act was passed. Thus, Section 10 (4) of the Audit Service Act, (Act 528) determined the retiring age of the Auditor-General and fixed it at sixty. It said:

> **"10 (4) The Auditor-General shall retire after attaining the age of sixty years but may be engaged for a limited period of not more than two years at a time but not exceeding five years in**

all and upon such terms and conditions as the President acting in consultation with the Council of State shall determine."

The case for the plaintiff was simply that the Auditor-General and several other persons were appointed under article 70 by the President acting in consultation with the Council of State. These others included the

(a) the Commissioner for Human Rights and Administrative Justice and his Deputies;
(b) **the Auditor-General;**
(c) the District Assemblies Common Fund Administrator;
(d) the Chairmen and other members of-
  i. the Public Services Commission;
  ii. the Lands Commission;
  iii. the governing bodies of public corporations;

  iv. a National Council for Higher Education however described; and

e) the holders of such other offices as may be prescribed by this constitution or by any other law not inconsistent with this Constitution."

Certain emoluments due these persons were determined under article 71 (1) of the constitution thus, that:

"71 (1) The salaries and allowances payable and the facilities and privileges available to-

a. the Speaker and Deputy Speakers and members of Parliament;

b. the Chief Justice and other Justices of the Superior Court of Judicature ;

c. **the Auditor-General**, **the Chairman and Deputy Chairmen of Electoral Commission, the Commissioner for Human Rights and**

Administrative Justice and his Deputies and the District Assemblies Common Fund Administrator;

d. the Chairman, Vice Chairman and other members of –
    i) a National Council for Higher Education however described;
    ii) the Public Services Commission;
    iii) the National Media Commission;
    iv) the Lands Commission; and
    v) the National Commission for Civic Education

being expenditure charged on the Consolidated Fund, shall be determined by the President on the recommendations of a committee of not more than five persons appointed by the President acting in accordance with the advice of the Council of State.

Article 146 of the constitution is worthy of mention as it talked of removal of Justices of Superior courts and Chairmen of the Regional Tribunal and provided more specifically that it shall be in accordance with the procedure specified in the article. The procedure is cumbersome in some respects but not very relevant to quote in this opinion.
The more relevant article was 145 (2) which was that:

"A Justice of a Superior Court or a Chairman of a Regional Tribunal shall vacate his office –

a) in the case of a Justice of the Supreme Court or the Court of Appeal on attaining the age of seventy years.

b) In the case of a Justice of the High Court or a Chairman of a Regional Tribunal, on attaining the age of sixty-five years; or…"

Article 187 of the Constitution was also cited for discussion for it created the office of the Auditor-General in the ensuing terms that:

> **"187. (1) there shall be an Auditor-General of Ghana whose office shall be a public office."**

Article 187 (13) further provided that the provisions of article 146 relating to the **removal *of a Justice of the Superior Court of Judicature from office shall apply to the Auditor-General.***

By the definition in article 295, **"*public office*"** includes an office the emoluments attached to which are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament and an office in a public corporation established entirely out of public funds or moneys provided by Parliament".

The definition of "***public service***" in the same article must be mentioned at this stage. It was that:

> **"public service" in any civil service of Government, the emoluments attached to which are paid directly from the Consolidated Fund directly out of moneys provided by Parliament and service with a public corporation;"**

Article 188 provided that:

> **"188 (1) There shall be an Audit Service which shall form part of the Public service of Ghana."**

187(11) was that the salary and allowances payable to the Auditor-General shall be a charge on the Consolidated Fund."

The appointment of officers and other employees in the Audit service other than the Auditor-General was made by the Audit Service Board under article 189 (2), thus emphasizing the point made earlier that the Auditor-General is appointed by the President under article 70. As the present application deals with the retiring age of the Auditor-General we shall have to necessarily keep our attention and focus on provisions for retirement of Justices of the Superior Courts under article 145, which provided that a Justice of a Superior Court or Chairman of a Regional Tribunal *may* retire at anytime after attaining sixty years, implying voluntary retirement; but a Justice of a Superior Court *shall* vacate his office in the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years, meaning or implying compulsory retirement. A High Court Judge, a judge of the Superior Court of Justice, retires compulsorily at sixty five as under the article 145 (2) (b).

Chapter Fourteen dealing with the Public Services provided in article 194 that a public officer shall except as otherwise provided in this constitution retire from the public service on attaining the age of sixty years. Under that Chapter, the Public Services included the Audit Service: see article 190(1): Article 199 (1) mentioned the retiring age and pensions and said that:

> **"A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years."**

By the use of the words *'except as otherwise provided in this Constitution'*, this article just quoted admits of a limitation. In other words, this constitution makes it compulsory for public officers to retire at sixty from the public service. The Judicial Service is part of the Public Services, *vide* article 190 (1) (a).

As noted above under article 145, a Superior Court Judge proceeds on voluntary retirement at anytime after attaining sixty years but the same Judge retires

compulsorily at 70 in the case of Justices of the Supreme Court or the Court of Appeal.

This particular provision in the Constitution was not made applicable to the Auditor-General. Indeed his retiring age was not provided for by any article in the constitution. But the constitution provided for the appointment of the Auditor-General under article 70, his remuneration under article 71, charged on the Consolidated Fund under 187 (11), removal under article 187 (13). When it came to his age for retirement the constitution was very silent, the so many provisions in the article on other matters notwithstanding.

The sum total of the submissions by the plaintiff in support of relief one was that all the officers appointed under Article 70 which included the Auditor-General retired compulsorily at 70 just like a Justice of the Court of Appeal. Again a Justice of the Court of Appeal was removed from office under the procedure under article 146. So by simple logic or syllogism the Auditor-General should also be made to retire compulsorily at 70. But the constitution was silent on this.

That was why the present application was brought for interpretation by this court and the question facing this court is does section 10(4) of the Audit Service Act, 2000 Act (584) in contradict or/and contravene the 1992 Constitution? Is there any missing gap in so far as the retiring age of the Auditor-General is concerned?

It is a basic tenet in constitutionalism that a constitution is a living document encapsulating nations hopes and aspirations as reflected in its preamble etc, etc. In his seminal judgment which has stood the test of time in Tuffour v Attorney-General [1980] GLR 637, a judgment by the Court of Appeal then sitting as the Supreme Court, Sowah J.A. (as he then was) delivered himself of his famous dictum that:

> **"A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account therefore needs to be taken of it as a**

landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.

The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is a fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana. Its language must therefore be considered as if it were a living organism capable of growth and development. Indeed it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."

Famous words; wise words indeed. They ought to be followed today as they were two or so decades after they were first uttered. Tuffour v Attorney-General (supra) has been cited, referred to, explained and applied in several cases too numerous to mention here.

It is another principle approach which has stood the test of time to give effect to the framers of this organic law in purporting to construe or interpret a national constitution like the 1992 Constitution which I will deal with presently. I believe have said enough to show in my opinion, there is a missing gap in so far as the retiring

age of the Auditor-General is concerned. To recap, the members of the Commission On Human Rights and Administrative Justice (CHRAJ), were appointed under article 70 of the Constitution, article 223 specified that:

> **"(1) The Commissioner and deputy Commissioners shall enjoy the terms and conditions of service of a Justice of the Court of Appeal and High Court respectively.**
>
> **(2) The Commissioner and Deputy Commissioner shall cease to hold office upon attaining the age of seventy and sixty-five years respectively."**

Under article 194 (5) of the constitution, **"subject to clause 6 of this article, the terms and conditions of service including retiring ages of a Justice of the Court of Appeal shall apply to the Chairman of the Public Services Commission and those of a Justice of the High Court shall apply to the Vice-Chairman.**

6 The provisions of article 146 of this constitution relating to the removal from office of a Justice of the Superior Court of Judicature-

(a) to the full time members of the Public Services Commission, etc."
The other appointees under Article 70 had provisions made for them as to their retiring ages.

The question facing this court is does Section 10 (4) of Act 584 conflict with provisions of the Constitution1992? Is there any gap to be filled in it of and concerning the retiring age of the Auditor-General? The basic fact in constitutionalism is as were explained in the words in the judgment of Sowah JSC quoted above.

Now the accepted approach towards interpretation is the purposive whose foundations were embedded in those words. In fact the approach was sufficiently explained in Agyei Twum v Attorney [2005-2006] SCGLR by Date-Bah JSC. The approach has also been to read the four corners of the constitution to discover the legislative intent behind the particular provision.

Another aid is what has been the common law rule to rely on parliamentary history explained in the judgment of Atuguba JSC, and also Francois JSC in Ali-Jiagge v IGP S.C. dated 26 March 1990, unreported. I endorse that rule and as I apply it I find that there is an omission to state the compulsory retiring age for the Auditor-General appointed under article 70 of the 1992 Constitution. It must, following Agyei Twum (supra), even though it is not the duty of this court to legislate on this matter, it is to do so so as to bring it within the needs of the time.

In conclusion, I consider the office of the Auditor-General is an important one, its duties are very important for he keeps or ought to keep an eye on the expenditure on the national kitty so as to ensure probity, accountability and transparency by all. His independence in functioning, his protection against victimization for work done guaranteed under the constitution notwithstanding, he needs to have security of tenure.

In supplying the gap in his interest, I in my opinion grant him the declaration he seeks in the first relief and indeed in the three others.

J. ANSAH
JUSTICE OF THE SUPREME COURT

OWUSU (MS), JSC.

I have read before hand, the Judgment of my brother Atuguba J.S.C. and I entirely agree with the conclusion he arrived at that there is no gap to be filled with regard to the retiring age of the Auditor-General. A public officer, except the Constitution otherwise provides, shall retire from the public service on attaining the age of sixty years. In the case of the Auditor-General who is a public officer, unlike the other appointees under Article 70 whose retiring ages have been explicitly provided for in the Constitution, his retiring age has not been so provided for in the Constitution.

If the framers of the Constitution had intended that he also must retire at age 70, why was it not so expressly stated?

Section 10(4) of the Audit Service Act reflects the amendment of Article 199 which introduces Article 199(4) which reads:

> **"Notwithstanding clause (1) of this article, a public officer who has retired from the public service after attaining the age of sixty years, may where the exigencies of the service require, be engaged for a limited period of not more than two years at a time but not exceeding five years in all and upon such other terms and conditions as the appointing authority shall determine."**

The said section is rather in line with Article 199(4) but not inconsistent with the letter and spirit of the Constitution.

For these reasons and the reasons that informed my brother's Judgment, I will also dismiss the plaintiff's claim and same is hereby dismissed.

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

DOTSE, JSC:-

The facts in this case have been brilliantly set out by Hon. Wood C. J and President of this court in her opinion just delivered, there is therefore no need for me to re-state them here. I will however as and when necessary make references to some facts to elucidate issues being emphasised.

The plaintiff seeks from this court, the following reliefs:-

1. A declaration that by the combined effect of articles 17, 70, 71, 144, 145, 146 and 187 of the 1992 Constitution and on a true and proper interpretation of the Constitution, retirement age of the Auditor General is comparable to and in pari materia to that of a Justice of the Court of Appeal.
2. A declaration that on a true and proper interpretation of the 1992 Constitution, the Auditor General is not a public officer within the contemplation of and for the purposes of article 191, 195 and 199 of the 1992 Constitution but a public officer within the contemplation of articles 70 and 71 of the Constitution.
3. A declaration that section 10 (4) of the Audit Service Act, 2000 (Act 584) is inconsistent with and in contravention of the letter and spirit of the 1992 Constitution and accordingly same be declared null and void.
4. A declaration that except for stated grounds stated in article 146 of the 1992 Constitution the Auditor General may remain in office until he attains the compulsory retirement age which is comparable to that of a Justice of the Court of Appeal.

The constitutional significance and importance of the office of the Auditor-General, and by necessary implication that of the Audit Service in general came up during the unreported Supreme court case suit, no writ No.1 J1/1/2009 to be reported in 2010 SCGLR 183 intituled **William Brown vrs Attorney-General**, where I had the opportunity to state the following concerning the office of the Auditor-General and that of the Audit Service generally as follows:-

"This is particularly gratifying in the sense that if one considers the relevant constitutional importance that the office of the Audit Service is enjoined to perform

as a governance institution, then it is important to ensure that as an institution, it is insulated and protected from undue governmental control and direction.

The Audit Service, together with other institutions of State like the Judiciary, Electoral Commission, Commission on Human Rights and Administrative Justice (CHRAJ) and others play very important and core functions in the protection, preservation and sustenance of democratic governance in line with the Commonwealth (Latimer House) principles, on the three branches of Government. These include the entrenchment of good governance, based on the highest standards of honesty, probity and accountability".

In order to understand the nature, scope, function and importance that the office of the Auditor-General entails, there is the need to make references in extenso to the constitutional provisions in article 187 clauses (1) – (16) which deal generally with the powers, functions and extent of the work of the Auditor-General as provided for and envisaged in the Constitution 1992.

These provide as follows:-

187 (1) "There shall be an Auditor-General of Ghana whose office shall be a **public office**.

(2) **The public accounts of Ghana and of all public officers, including the courts, the central and local government administrations,** of the Universities and public institutions of like nature, of any public corporation or other body or organisation established by an Act of Parliament shall be audited and reported on by the Auditor-General.

(3) For the purposes of clause (2) of this article, the Auditor-General or any person authorised or appointed for the purpose by the Auditor-General shall have access to all books, records, returns and other documents relating or relevant to those accounts.

(4) The public accounts of Ghana and of all other persons or authorities referred to in clause (2) of this article shall be kept in such form as the Auditor-General shall approve.

(5) The Auditor-General shall, within six months after the end of the immediately preceding financial year to which each of the accounts mentioned in clause (2) of this article relates, submit his report to parliament **and shall, in that report, draw attention to any irregularities in the accounts audited and to any other matter which in his opinion ought to be brought to the notice of Parliament.**

(6) Parliament shall debate the report of the Auditor-General and appoint where necessary, in the public interest, a committee to deal with any matters arising from it.

(7) In the performance of his functions under this Constitution or any other law the Auditor-General:-

(a) shall not be subject to the direction or control of any other person or authority;

(b) may disallow any item of expenditure which is contrary to law and surcharge:-

(i) the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure; or

(ii) any sum which has not been duly brought into account, upon the person by whom the sum ought to have been brought into account; or

(iii) the amount of any loss or deficiency, upon any person by whose negligence or misconduct the loss or deficiency has been incurred.

(8) Paragraph (a) of clause (7) of this article shall not preclude the President, acting in accordance with the advice of the Council of state, from requesting the Auditor-General in the public interest, to audit at any particular time, the accounts of

any such body or organisation as is referred to in clause (2) of this article.

(9) A person aggrieved by a disallowance or surcharge made by the Auditor-General may appeal to the High Court.

(10) The Rules of Court Committee may, by constitutional instrument, make Rules of Court for the purposes of clause (9) of this article.

(11) The salary and allowances payable to the Auditory-General shall be a charge on the Consolidated Fund.

(12) The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, **retiring award or retiring age shall not be varied** to his disadvantage during his tenure of office.

(13) The provisions of article 146 of this Constitution relating to the removal of a Justice of the Superior court of Judicature from office shall apply to the Auditor-General.

(14) The administrative expenses of the office of the Auditor-General including all salaries, allowances, gratuities, and pensions payable to or in respect of persons serving in the Audit Service shall be a charge on the Consolidated Fund.

(15) The accounts of the office of the Auditor-General shall be audited and reported upon by an auditor appointed by Parliament.

(16) A person appointed to be the Auditor-General of Ghana shall, before entering upon the duties of his office, take and subscribe the Oath of the Auditor-General set out in the Second Schedule to this Constitution". Emphasis supplied.

Admittedly, the provisions just referred to even though contain very elaborate constitutional provisions, touching and relating to the office of the Auditor-General, are however silent on the provisions on the appointment and retirement age of the Auditor-General.

APPOINTMENT OF THE AUDITOR-GENERAL

Article 70 (1) (b) of the Constitution 1992 however contains provisions on the appointment of the Auditor-General.

In order to understand the context in which the appointment of the Auditor-General has been placed, it is crucial to quote the entire provisions of article 70 (1) and (2) of the Constitution 1992. This is to enable the proper linkages to be made such that if there are any gaps inherent in the provisions regarding the retirement age of the Auditor-General vis-à-vis the other positions contained therein, that missing link can be tracked down, indentified and dealt with by a Constitutional court such as this court.

It is provided as follows in the Constitution 1992:-

70 (1) "The President shall, acting in consultation with the Council of State, appoint-

(a) the Commissioner for Human Rights and Administrative Justice and his Deputies;

(b) the Auditor-General

(c) the District Assemblies Common Fund Administrator;

(d) the Chairmen and other members of-

(i) the Public Services Commission;

(ii) the Lands Commission;

(iii) the governing bodies of public corporations;

(iv) a National Council for Higher Education howsoever described; and

(e) the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.

(2) The President shall, acting on the advice of the Council of State, appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission".

It is explicit from the above provisions that, the President acting in consultation with the Council of State is the appointing authority for the following constitutionally mandated offices:

1. The Commissioner for Human Rights and Administrative Justice and his Deputies.
2. The Auditor-General
3. The District Assemblies Common Fund Administrator
4. The Chairmen and other members of
   (i) the Public Services Commission;
   (ii) the Lands Commission;
   (iii) the governing bodies of public corporations;
   (iv) a National Council for Higher Education howsoever described, and
5. Other unspecified constitutional and statutory office holders, provided their appointment is not inconsistent with the Constitution.
6. The Chairman, Deputy Chairmen and other members of the Electoral Commission.

RETIREMENT AGE OF ARTICLE 70 OFFICE HOLDERS

i. Commission on Human Rights and Administrative Justice

Articles 216-230 of the Constitution 1992 contains provisions on the office of the Commission on Human Rights and Administrative Justice. Article 223 (1) and (2) and 228 of the Constitution 1992 contains provisions that deal with conditions of service, retirement and removal of the CHRAJ Commissioners and his deputies. It is specifically provided in article 223 (1) and (2) and 228 of the Constitution 1992 as follows:-

223 (1) "The Commissioner and Deputy Commissioners shall enjoy the terms and conditions of service of a Justice of the Court of Appeal and High court respectively.

(2) The Commissioner and Deputy Commissioners shall cease to hold office upon attaining the ages of seventy and sixty five years respectively.

228 The procedure for the removal of the Commissioner and Deputy Commissioners shall be the same as that provided for the removal of a Justice of the Court of Appeal and a Justice of the High Court respectively under this Constitution".

From the above constitutional provisions, it is clear that whilst the position of the Commissioner is equated to that of a Justice of the Court of Appeal, those of his Deputies have been equated to that of a Justice of the High Court.

ii. Office of The District Assemblies Common Fund Administrator

Article 252 (5) of the Constitution provides that:-

"Parliament shall by law prescribe the functions and tenure of office of the Administrator in such a manner as will ensure the effective and equitable administration of the District Assemblies Common Fund".

In this respect, Parliament was specifically mandated under the Constitution to make laws for the effective and efficient management of the District Assemblies Common Fund. It will therefore be in keeping with the constitutional provisions that Parliament has regulated by law the conditions and terms of service including the retirement age of the Administrator of the District Assemblies Common Fund. This is consistent with the Constitution. In pursuance of the above constitutional provisions Parliament passed the District Assemblies Common Fund Act, 1993 Act 455. Section 3 of Act 455 stipulates that the President acting in consultation with the Council of State and with the approval of Parliament, appoint the Administrator. Section 4 (1) of the Act provides a four year tenure for the Administrator subject to re-appointment for another term. It must be noted that the Common Fund Administrator is not limited to any retirement age, but is subject to be removed from office by the President for a just cause or by resignation. Reference section 6 thereof.

iii. Chairmen and other members of the following Constitutional bodies

a. Public Services Commission

Article 194 (1) and (2) of the Constitution established the Public Services Commission and its principal office holders. On the other hand, article 194 (5) and (6) of the Constitution contains provisions on the terms, conditions and removal from office of the Chairman, vice Chairman, and other full time members of the commission.

Out of abundance of caution, let me refer specifically to the constitutional provisions.

194 (1) "There shall be a Public Services Commission which shall perform such functions as assigned to it by this Constitution or by any other law.

(2) The Public Services Commission shall consist of –

(a) a chairman, a vice-chairman and three other members who shall be full-time members of the Commission; and

(b) such other members as Parliament may, subject to article 70 of this Constitution, by law prescribe.

(5) Subject to clause (6) of this article, the terms and conditions of service including retiring ages of a Justice of the Court of Appeal shall apply to the Chairman of the Public Services Commission and those of a Justice of the High Court shall apply to the Vice-Chairman.

(6) The provisions of article 146 of this Constitution relating to the removal from office of a Justice of the Superior Court of Judicature shall apply-

(a) to the full-time members of the Public Services Commission;

(b) to the members of the Commission referred to in paragraph (b) of clause (2) of this article, before the expiration of their period of service as provided by law".

It is also clear from the above provisions that whilst the Chairman of the Public Services Commission has his position equated to that of a Justice of the Court of Appeal, the Vice Chairman has his position made equivalent to a Justice of the High Court. It therefore means that the retiring ages applicable to the Superior Court Justices apply to these offices as well.

b. The Lands Commission

It should be noted here that, article 259 provides on the membership of the Lands Commission inter alia as follows:-

"The Lands Commission shall consist of the following persons appointed by the President under article 70 of this Constitution.

(a) a chairman who is neither a Minister of State nor a Deputy Minister."

The rest of the membership is drawn form identifiable institutions, professional bodies and technocrats.

The tenure of the Chairman and members of the Lands Commission both at the National and Regional levels have been provided for in article 264 (1) of the Constitution 1992 as follows:-

> *"The Chairman and members of the Lands Commission and also the Chairman and members of a Regional Lands Commission other than the Executive Secretary and the Regional Lands officer shall hold office for four years and may be eligible for re-appointment."*

This therefore has created a fixed term for the membership of the Lands Commission at any particular time in contra distinction to the equivalent position that has been made to most of the article 70 office holders to that of a Justice of the Court of Appeal and the High Court.

iv. Electoral Commission

The last position I wish to examine before I come to the core and relevant issues germane to this case is the position of the Chairman, Deputies and other members of the Electoral Commission.

Article 43 (1) and (2) and (44) (1) (2) and (3) of the Constitution 1992 provides as follows:-

43 (1) "There shall be an Electoral Commission which shall consist of-

(a) a Chairman

(b) two Deputy Chairmen; and

(c) four other members.

(2) The members of the Commission shall be appointed by the President under article 70 of this Constitution.

44 (1) A person is not qualified to be appointed a member of the Electoral Commission unless he is qualified to be elected as a member of Parliament.

(2) The Chairman of the Electoral Commission shall have the same terms and conditions of service as a Justice of the Court of Appeal.

(c) The two Deputy Chairmen of the Commission shall have the same terms and conditions of service as are applicable to a Justice of the High Court."

It is again apparent and clear from the above constitutional provisions that the terms and conditions of service of the Chairman of the Electoral Commission have been made equivalent to that of a Justice of the Court of Appeal, whilst those of his Deputies have been equated to that of the High court.

The question which then comes to mind is that, what are the salient and relevant terms and conditions of the Superior Court Judges that these positions have been made equivalent to and applicable..

It should however be noted that since the relevant constitutional issue here is that of retirement, only the terms and condition of the retirement of a justice of Appeal and of the High Court, will be considered.

RETIREMENT AGES OF JUSTICE OF COURT OF APPEAL AND HIGH COURT

It is provided in article 145 (2) (a) and (b) of the Constitution 1992 on the retirement of a Justice of the Court of Appeal and of the High Court as follows:-

145 (2) "A justice of a Superior Court or a Chairman of a Regional Tribunal shall vacate his office-

(a) **in the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years;** or

(b) in the case of a **Justice of the High Court or a** Chairman of a Regional Tribunal, on attaining the age of sixty-five years; or"

This therefore means that, whenever a provision is stated, equating the terms and conditions to an article 70 office holder and the particular retirement age is not mentioned, but reference is made in the Constitution equating it to that of a Justice of the Court of Appeal, it means that the retirement age for that office is seventy (70) years and where the

reference is to a Justice of the High Court, the retirement age is sixty five (65) years.

THE POSITION OF THE AUDITOR-GENERAL

As indicated earlier in this judgment, there is no retirement age mentioned anywhere in the elaborate constitutional provisions in article 187 on the office of the Auditor-General. There is also no mention of any specific retirement age for the Auditor-General in articles 188 to 189 which deals with the Audit Service, of which the Auditor-General is the Head.

However, article 190 (1) (a) of the Constitution 1992 mentions the Audit Service as one of the many institutions of state making up the Public Services of Ghana, including the Judicial Service.

I have also taken note of the provisions of article 199 (1) of the Constitution 1992 which has been amended by the Constitution of the Republic of Ghana (Amendment) Act, 1996 Act 527 section 6 of the Act provides thus:-

Article 199 of the Constitution is amended by the insertion after clause (3) of the following:

(4) **"Notwithstanding clause (1) of this article, " a public officer who has retired from the public service after attaining the age of sixty years may, where the exigencies of the service require be engaged for a limited period of not more than two years at a time but not exceeding five years in all and upon such other terms and conditions as the appointing authority shall determine."**

It is clear from the said article that it is not a provision that is capable of being generally applied to all category of persons mentioned in the Public Service. This is because, the Judicial Service for example has specific provisions on the retirement of its superior Court Judges.

Again, if one looks at the category of office holders mentioned in article 70 of the Constitution and referred to supra, it is clear that they are special breed of public office holders whom I may refer to as crème de la crème of either the Public Services of Ghana and or of core constitutional bodies performing very critical, and sometimes delicate constitutional functions.

Generally speaking, it is clear that virtually, all the office holders mentioned in article 70 perform such delicate governance functions that regulate, control and give meaning to the democratic dispensation that Ghana has been enjoying since 7th January, 1993.

It is in pursuit of the above that the said office holders need to be protected first from early retirement as other public office holders do at sixty years.

The rationale for this is to ensure that the state benefits from the rich experience that they will gather on the job by their long stay in office up to seventy or sixty five as the case might be.

Secondly, there will also be the need to insulate the said office holders from the ravages and spoils of politics and change of governments as has happened in 2001 and in 2009.

In a country, where party foot soldiers and sometimes even well educated and well informed feel that with the advent of a new Government must be swept clean from office every category of a public office holder irrespective of the security of tenure that the said office holder enjoys there is the need for the said article 70 office holders to be protected in office, either in terms of the specific constitutional provisions or from the spirit and letter of the Constitution.

For example, the Electoral Commissioner and his two Deputies have been in office since the 1996 elections and have continued in office since then because of their tenure of retiring at 70 or 65 years which is secured.

The same position goes for the Commissioner of Human Rights and Administrative Justice and the Chairman and Vice-Chairman of the Public Services Commission.

Even though Judges are not article 70 office holders, it is their terms of conditions of Service which have been made applicable to the said article 70 office holders. Judges of the superior courts therefore also have security of tenure up to 70 or 65 years as the case might be.

Is it therefore by accident, or a slip that the position of the Auditor-General, a very important and core public officer should be left out of this important constitutional provision of article 70 office holders? Certainly not. There certainly was a slip or omission by the framers of the Constitution which this Supreme Court has a duty to

fill and make meaningful taking into account the objective purpose of the Constitution.

For example, when one considers article 187 (12) and (13) already referred to supra, then it becomes very apparent that there definitely was an omission by the framers of the Constitution in not making a definite provision touching the retirement age of the Auditor-General.

This conclusion of mine is premised upon the fact that once the Constitution 1992 made definite provisions that neither the retiring award nor the retiring age of the Auditor-General shall be varied to his disadvantage during the tenure of his office, it meant that the framers of the Constitution had a retiring age in mind.

Secondly, by equating the procedure for the removal of the Auditor-General from office to the procedure outlined under the Constitution 1992 for removal of a Justice of Superior court as outlined in article 146 of the Constitution 1992, it means that the framers of the Constitution intended to grant security of tenure to the Auditor-General, just like superior court Judges.

The question which logically then comes to my mind is which class of Superior court Judges?

A quick reference to article 70 suggests that whilst most of the substantive office holders mentioned therein had their retiring ages equated to that of a Justice of the Appeal Court, their deputies were equated to that of a Justice of the High Court.

In the instant case, since the Auditor-General does not have a deputy appointed under the Constitution, it is safe to conclude that he, as the principal office holder must have his position equated to that of the Justice of the Court of Appeal.

Is there any justification for such an analysis, deduction and conclusion?

A similar situation arose in the case of ***Agyei Twum vrs Attorney-General & Akwetey [2005-2006] SCGLR 732 holding 2, at 756-770.***

Facts:

The facts of the *Agyei Twum vrs Attorney - General* case were that, Mr. Bright Akwetey the second defendant in the Supreme Court case, a Lawyer and citizen of Ghana submitted a petition dated 15/1/2006 to the President of the Republic of Ghana seeking the removal of the then Chief Justice on grounds of judicial misconduct and abuse of power. On 9th March, 2006 the President's Press Secretary,

issued a public statement that in compliance with article 146 of the Constitution, the President was setting up a Committee to inquire into the petition.

Subsequently, the plaintiff, (Agyei Twum) complained that the appointment of the Committee by the President to inquire into the petition was unwarranted and unconstitutional. He therefore commenced in his capacity as a citizen of Ghana, the instant proceedings in the supreme court, invoking the original jurisdiction of the court, citing inter alia article 2 (1) 127 (1) and (2) and 146 (1) and (6) of the Constitution 1992.

The plaintiff sought inter alia the following reliefs and declarations from the Supreme court:-

1 That article 146 (6) of the Constitution should be construed concurrently with article 146 (3) and (4), which required the establishment of a prima facie case prior to the setting up of a committee to investigate complaints in a petition against a Justice of a superior court because the Chief Justice was first and foremost a Justice of the Superior court.

2. That by virtue of such construction, the consultation by the President with the Council of State in respect of the appointment of a Committee to inquire into a petition for the removal of the Chief Justice should first determine whether the said petition had disclosed a prima facie case before the Committee was appointed.

Even though the Attorney-General did not file any response to the said action, the 2nd defendant, in his response to the declarations stated supra submitted that, **the insistence of a prima facie case in the context of article 146 (6) would amount to re-writing of the Constitution, contrary to the duty of the court**. The second defendant submitted that the duty of the court was to give effect to the intention of the framers of the constitution as expressed in article 146 (6) and not to import into the Constitution what the Court considered the intentions of the framers of the Constitution. The Supreme Court, in a unanimous decision coram: Sophia Akuffo, Georgina Wood, Dr. Date-Bah, Prof. Ocran, Julius Ansah, Sophia Adinyra and Asiamah JJSC held as follows:-

"The purposive approach to interpretation of the 1992 Constitution required that in the context of the instant case, ***implicit words be read into the***

Constitution to avert a manifest absurdity. *Thus, there was the unwritten in a written Constitution.* ***The fact that a country had a written Constitution did not mean that only its letter might be interpreted****.*

> ***The courts had the responsibility for distilling the spirit of the Constitution from its underlying philosophy, core values, basic structure, the history and nature of the country's legal and political systems, etc. in order to determine what implicit provisions in the written Constitution would flow inexorably from that spirit.***
>
> *Thus a comparative examination of the relevant provisions dealing with petitions for the removal of other Superior Court Justices in articles 146 (3) and (4) would reveal an omission in the plain language of article 146 (6) relating to the impeachment process of the Chief Justice, which could not have been intended by the framers of the Constitution.* ***The omission to provide for prior determination of a prima facie case would lead to a manifest absurdity which the court had power to avert. In effect, there was a logical gap or inadvertent mistake in article 146 (6) which the court should correct by process of interpretation.*** *Thus the requirement of the establishment of a prima facie case against a Chief Justice before a Committee was empanelled to consider a petition filed for his removal was an implicit provision. The authority of the courts to imply such implicit provision through purposive interpretation was not a license for the Judges to re-write the Constitution.* ***The interpretative authority was a limited one to make explicit what was implied within the penumbra of the letter of the Constitution given the constitution's objective, purpose, core values and underlying philosophy".*** *Emphasis supplied.*

The above were the general principles the Supreme Court evolved in it quest to fill in the missing parts in the constitution to ensure as Prof. Ocran JSC of blessed memory puts it:-

> *"There is the need to insulate the Chief Justice from frivolous petitions while insisting on transparency and accountability in the execution of his functions."*

Explaining the rationale why the Supreme Court had to fill in the missing links, to ensure that the procedural regime for presentations of petitions for the removal of a Chief Justice are made consistent with the procedural regime provided in the same Constitution for the removal of a Superior Court Judge, Sophia Adinyira JSC stated thus:-

> *"Article 146 (3) affords Justices of the Superior Courts procedural safeguards whereby the President is required to refer a petition for the removal of a Justice of the Superior Court to the Chief Justice to determine whether there is a prima facie case before a panel is appointed to investigate the matter. There is no compelling reason why such procedural protection should not be afforded the Chief Justice who is first and foremost a Justice of the Superior Court. Failure to do so may, erode the whole spectrum of the benefits of security of tenure that article 146 (1) seeks to accord Justices of the Superior Courts. It is obvious that the drafters of the Constitution made an inadvertent omission."*
>
> Based on the above principles and policy measures which the Supreme Court read into the interpretation of the Constitution, the court finally decided as follows:-
>
> *"The Court would, therefore, declare that upon a proper purposive construction of the whole of article 146 in the context of the 1992 Constitution viewed in its entirety, the Chief Justice must be given the benefit of a prior determination of whether a prima facie case had been established against him before the President might lawfully establish a Committee to consider a petition for his removal…"*

I have had to quote in extenso from the Agyei Twum vrs Attorney-General case because this case is on all fours with the instant case.

Secondly, it is a unanimous decision of the Supreme Court.

Thirdly, it should be noted that article 129 (3) of the Constitution 1992 provides that while the Supreme Court may treat and regard its previous decisions as normally binding on it, it has the right to depart from a previous decision whenever it appears to it right to do so.

In the instant case, I do not find any good, sufficient and plausible reason to depart from the decision of the Court in the *Agyei Twum vrs Attorney-General* case.

The said decision is not only sound in law, but is in accord with the philosophical basis of a constitutional court such as this Supreme Court. It is the Supreme Court alone that has exclusive original jurisdiction in all matters relating to the enforcement and interpretation of the Constitution, see article 130 (1) (a) of the Constitution and also the obiter dictum of Acquah JSC as he then was in the case of **Amidu vrs President Kufour [2001-2002] 86 at 100**.

It should also be noted that, since all courts are bound to follow the decisions of the Supreme Court on questions of law, there must be certainty and consistency in its decisions, reference article 129 (3) of the Constitution.

As the constitutional and final appellate court of the State, the Supreme Court must only depart from its previous decisions when cogent, and very good reasons are given to justify the need that there appears to be the need to so depart. In so doing, it will be worthwhile for the court to make reference to its previous decisions and state clearly and boldly that it is departing from it. It is only when such clear statements are made, indicating a change in the decision of the Supreme Court that courts below it will be given guidance and directions.

It is for the above reasons that I adopt and apply the decision of the Supreme Court in the Agyei Twum case to the circumstances of the instant case.

INTERPRETATIVE PRINCIPLES OF THIS AND OTHER CONSTITUTIONS AND CASE LAW

By far the most important breakthrough in asserting the power of the Judiciary embodied in the work of the Supreme Court in what has come to be known as "Judicial review" in its current form began with the decision of the U.S. Supreme Court in ***Marbury vrs Madision 1 Cranch (5 US) 137 (1803).***

This was the seminal decision of the U.S Supreme Court which gave the court the power of judicial review to determine what is and is not constitutional and the co-ordinate power to nullify government actions and laws if they violate the Constitution. This decision has had a landmark and far reaching effect not only on the concept of democracy as practiced in the U.S. but it served as a model for constitutional democracies throughout the world, including Ghana.

This is because our 4th Republican Constitution 1992 has similar features to the U.S. system of Government and Judiciary especially, the Supreme court whose Justices were described in the words of Justice Robert H. Jackson as follows:-

> *"We are not final because we are infallible, but we are infallible only because we are final".*

The Ghana Supreme Court has also had its Marbury vrs Madison in the landmark decision of ***Sowah JSC in Tufuor vrs Attorney-General [1980] GLR 637*** CA sitting as Supreme Court where he described the spirit of a Constitution and its objective purpose at page 647 as follows:-

> "*The Constitution has its letter of the law. Equally, the Constitution has its spirit – its language, therefore, it must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear in bringing it into conformity with the needs of the time".*

The spirit being referred to supra is the underlying philosophical values and principles upon which the Constitution has been built.

Indeed, there is a long line of case law, spanning the 4th Republican era which give the clearest indications that in understanding the objective purpose of the Constitution 1992, the practical realities of the operation of the Constitution will have to be seen through the legal text i.e. the words used in the basic source book or the important values of the entire legal regime being operated. See cases like:-

1. **Asare vrs Attorney-General [2003-2004] 2 SCGLR 823**
2. **Awuni vrs West African Examinations Council [2003-2004] 1 SCGLR 471**
3. **NPP vrs Attorney-General (31st December case) [1993-94] GLR 35**

To sum up these cases, permit me to borrow the words of Date-Bah JSC in the Agyei Twum case at page 758 already referred to.

> *"Analysis of the concept of the purpose of a constitutional provision reveals that there are two kinds of purpose: Subjective and objective. The*

subjective purpose is what the framers of the Constitution actually intended. The objective purpose on the other hand is what the provision should be seeking to achieve, given the general purposes of the Constitution and the core values of the legal system and of the Constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provision in question".

With these broad principles of constitutional interpretation in place, let me now attempt to deal directly with the issues that have been identified and settled in this case.

Determination of issues involved in this case

From the nature of the reliefs filed in this case, I find the memorandum of issues filed on behalf of the plaintiffs as having captured all the relevant issues that have arisen out of the case for determination. These are as follows:

1. Whether or not by the combined effect of articles 70, 71, 144, 145, 146, 187 and 286 of the Constitution 1992 the retiring age of the Auditor General is comparable to and in pari material to that of a Justice of the Court of Appeal.
2. Whether or not the Auditor-General is a public officer within the contemplation of articles 70, 71, 144, 145, 146 and 286 of the Constitution 1992 and not a public officer within the contemplation of articles 189, 190, 191, 195 and 199 of the Constitution 1992?
3. Whether or not section 10 (4) of the Audit Service Act 2000 (Act 584) is inconsistent with and in contravention of the combined effect of the letter and sprit of articles 17, 70, 71, 144, 145, 146, 187 and 286 of the Constitution 1992?

I have read the statement of case filed by learned Counsel for the plaintiffs and defendants. On the position of the Auditor-General, learned Counsel for the defendants, stated as follows:-

"The Auditor-General is appointed under article 70. The Constitution did not state the retiring age of the Auditor-General. Other appointees under article 70 retire at seventy (70) years. Act 584, by limiting the retiring age of the Auditor-General to sixty (60) years was therefore not in conformity with the Constitution. It is

submitted that section 10 (4) of Act 584 by limiting the retiring age of the Auditor-General to sixty (60) years is ultra vires the Constitution and therefore void. It is again submitted that the retiring age of the Auditor General should be seventy (70) years, the same age at which Superior Court Judges of the Supreme Court and Court of Appeal, the Commissioner of CHRAJ and the Chairman Public Services Commission retire."

I will therefore proceed with the determination of the issues taking the above statement into consideration.

ISSUE ONE

From the general discussions that have been made supra, in particular to the public office holders in article 70 of the Constitution 1992, it is clear that unless specifically mentioned either in the Constitution or in any other law, all the office holders therein mentioned have had their terms of conditions and retiring age equated to those of a Justice of the Court of Appeal or of the High Court or stated in the laws applicable. Furthermore, it is clear that, from the combined effect of articles 70, 71, 144, 145,146, 187 and 286 of the Constitution 1992, there is only one logical conclusion that can be drawn from an objective interpretation of the said articles.

That interpretation is that, the office of the Auditor-General is to be read as having the effect of the same retiring age as a Justice of the Court of Appeal just as the following which have all been specifically stated to retire at 70 years.

1. Commissioner CHRAJ
2. Chairman of PSC
3. Chairman Electoral Commission

This meaning and or interpretation is consistent with the provisions of the letter and spirit of the Constitution just referred to supra. This is because, in all other cases of article 70 office holders, specific term of years has been created for the positions, e.g. Chairman Lands Commission, Administrator District Assemblies Common Fund.

Again if one considers the context in which the public office holders in article 70, 71 and 187 in particular have been mentioned in which specific provisions have been made regarding the office of the Auditor-General, it is apparent that it is in the class of office holders mandated to retire at 70 years.

There is therefore a perfect scenario where the court is obliged to fill the missing link in the constitutional provisions and insert the retiring age of the Auditor-General at 70 years, in contra distinction to other public office holders who are to retire at 60 years, (sometimes stretched at the pleasure of the appointing authority to 65 years). On the authority of the decision in Agyei Twum vrs Attorney-General referred to supra, I feel really emboldened, to hold that the plaintiff should succeed in respect of issue one supra, so as to bring the said retiring age of the Auditor-General in line with the letter and spirit of the Constitution.

The U.S Supreme Court **also reframed the law of sexual harassment in the workplace in the cases of:**

1. **Burlington Industries Inc. vrs Ellerth 118 S. CT 2257 1998 and**
2. **Faragher vrs City of Boca Raton 118, S.CT 2275 1998**

It should be noted that, even though these two cases were filed and argued separately, they both involved Title VII of the Civil Rights Act of 1964, they both were decided on the same day, they both engendered the same voting pattern among the Justices 7 – 2, they both shared important language and they both substantially clarified the law of sexual harassment in the workplace. The effect of the two decisions was to make some lawsuits against employers easier to win while rewarding companies with effective anti-harassment policies by limiting their legal exposure.

The court decided the cases at a particularly crucial time in the history of the U.S. The law of sexual harassment in the workplace had become substantially confused since the Justices first addressed the issue in ***Meritor Savings Bank vrs Winson 477 U. S. 57 1986 40, 123.***

The sexual harassment suit filed by Paula Corbin Jones against President William Jefferson Clinton at the time also served to heighten press interest in both cases.

With the above cases also as a persuasive guide, issue one above is decided in the affirmative.

ISSUE TWO

From the general discussions and analysis that has already been done in this case, the resolution of issue two admits of no controversy and difficulty. As a result, it is

my decision that, the Auditor-General is a public officer within the remit of articles 70, 71, 144, 145, 146 and 287 of the Constitution 1992 and not within the ambit of articles 189, 190, 191, 195 and 199 of the Constitution 1992.

ISSUE THREE

In order to put the resolution of this issue in proper perspective, it is necessary to quote in extenso the provisions of section 10 (4) of the Audit Service Act, 2000, Act 584. It provides as follows:-

> *"The Auditor-General shall retire after attaining the age of sixty years but may be engaged for a limited period of not more than two years at a time but not exceeding five years in all* ***and on any other terms and conditions that the President, acting in consultation with the Council of State, shall determine." Emphasis supplied.***

Having already held in this case that this court should provide the missing link in article 70 of the Constitution so as to construe the retiring age of the Auditor-General to be constitutionally stated at 70 years in line with the letter and spirit of the Constitution therein, it goes without saying that the provisions of section 10 (4) of Act 584, will be inconsistent with the constitutional provisions on the retiring age of the Auditor-General. Accordingly, by and under articles 1 (2) and 2 (1) (a) & (b) of the Constitution 1992, section 10 (4) of Act 584 is void and is declared as such.

What must be noted is that, the Supreme Court has power under the combined effect of articles 1 (2) and 2 (1) (a) and (b) and 2 of the Constitution 1992 to strike down any law such as the section 10 (4) of the Audit Service Act, 2000 Act 584 as null and void for being inconsistent with the letter and spirit of the Constitution as interpreted supra reference the case of **Sam (No.2) vrs Attorney-General [2000] SCGLR 305 holding 2, per Bamford Addo JSC.**

In the unreported Supreme Court case suit No. writ No. J1/4/2008 Ahumah Ocansey – plaintiff vrs The Electoral Commission – defendant and suit No. writ No. J1/5/2008 intituled Centre for Human Rights and Civil Liberties (CHURCIL) – plaintiff vrs The Attorney-General and The Electoral Commission – defendants dated 23rd March 2010, coram Wood (Mrs) CJ, Date-Bah(Dr), Owusu (Ms), Dotse and Anin-Yeboah (JJSC), the power of the Supreme Court to strike down inconsistent provisions of a statutory law with the Constitution 1992 was given effect to.

This was a consolidated suit in which the plaintiffs sought to declare section 7(5) of the Representation of the People Law, 1992, PNDCL 284 as being inconsistent with article 42 of the Constitution 1992 which actually granted voting and registration rights to all Ghanaians of 18 years and above and of sound mind.

Wood (Mrs) C.J. in her opinion which was also concurred in by all the members of the court in their written opinions stated thus and I quote:

"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."

Wood C.J., continued thus,

> "It must be noted that in these matters, there is hardly any room for implicit or implied restrictions."

Continuing, the Honourable C.J stated as follows:-

> *"That section 7(5) of PNDCL 284 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".*

Based on the above principles the Honourable Wood (Mrs) C.J finally declared thus:-

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

This case is definitely good and fresh authority for the decision to strike down section 10 (4) of Act 584 as inconsistent with the letter and spirit of the Constitution 1992.

It should further be noted that the office of the Auditor-General is a very important position which should not be toyed with whatsoever.

It is thus a dangerous precedent to have made the continued stay in office of the Auditor-General after 60 years at the suffrance of the President.

It should be noted that in view of the very important watchdog role that the Auditor-General plays or is supposed to superintend in the transparent use and accountability of the public purse, any attempt to prejudice and or compromise his position by linking it to the pleasure of a sitting President is untenable.

This is because the President is the head of the Executive Branch of Government whose use of moneis entrusted to them the Auditor-General is constitutionally mandated to Audit.

Any provisions as it were that has the tendency to compromise the continuation in office of the Auditor-General after attaining sixty (60) years as section 10 (4) of Act 584 stipulates must not only be frowned upon but utterly deprecated. Once appointed into that position, the Auditor-General must have his continued stay in office subject only to this Constitution and no more.

CONCLUSION

In totality, the plaintiff succeeds on his claims as follows:-

1. The retiring age of the Auditor-General is seventy (70) years and the missing constitutional provision will be filled up so as to bring consistency into all the holders of office under article 70 of the Constitution 1992 to give real effect and meaning to the letter and spirit of the Constitution.
2. The Auditor-General is a public officer under the contemplation of article 70, 71 and its related articles of the Constitution and not under article 191, 199 etc.
3. Section 10 (4) of the Audit Service Act, 2000 Act 584 is inconsistent with the letter and spirit of the Constitution 1992 and to the extent of the inconsistency is struck down as unconstitutional, null and void and of no effect.

J.V.M DOTSE
JUSTICE OF THE SUPREME COURT

YEBOAH, JSC:-

I had the opportunity of reading beforehand the various opinions in this case. I have considered the legal issues raised by the various opinions. I am of the opinion that the Auditor-General is a Public Officer under Article 187 (1) of the 1992 Constitution.

However, his retiring age has not been spelt out in the 1992 Constitution and has culminated in the invocation of our original jurisdiction to fix the retiring age of the Auditor-General by declaring section 10 (4) of the Audit Service Act, Act 584 of 2000 as void and inconsistent with the constitution. I have considered the opinion of my brother ATUGUBA JSC and I agree with his conclusions reached to the effect that section 10 (4) of the Audit Service Act, 2000 (Act 584) is not inconsistent with any of the provisions of the 1992 Constitution.

For this reason, I will also dismiss the claim of the Plaintiff.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE, JSC:-

I had the benefit of reading beforehand the opinion of my learned brother ATUGUBA JSC, which he has just read, as well as the opinion of my brother GBADEGBE JSC, about to be read. It is my view that the retiring age of the Auditor General is not comparable to and is not in pari material to that of the Justice of the Court of Appeal. Flowing from this l hold that Paliament was perfectly within its mandate when it passed section 10(4) of act 584 that seeks to peg the retiring age for the Auditor General at 60. This section is not inconsistent with the 1992 constitution.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

GBADEGBE, JSC:-

The 1992 Constitution provides in Article 70 thus:

(1) "The President, shall acting in consultation with the Council of State, appoint-

(a) The Commissioner for Human Rights and Administrative Justice and his Deputies;

(b) The Auditor General;

(c) The District Assemblies Common Fund Administrator;

(d) The Chairman and other members of -

(i) the Public Service Commission;

(ii) the Lands Commission;

(iii) the governing bodies of public corporations;

(iv) a National Council for Higher Education howsoever described; and the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution."

(2) "The President shall, acting on the advice of the Council of State, appoint the Chairman, Deputy Chairman and other members of the Electoral Commission."

Article 71 of the Constitution then provides in relation to the offices specified in Article 70 as well as the National Media Commission and the National Commission for Civic Education that their ***"salaries and allowances payable, and the facilities and privileges available to them……. being expenditure charged on the Consolidated Fund, shall be determined by the President acting on the recommendation of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State."***

Clause (3) of Article 71 provides as follows:

"For the purposes of this article, and except as otherwise provided in this Constitution, "salaries" includes allowances, facilities, and privileges and retiring benefits or awards."

Subsequently, the Audit Service Act, 2000, Act 584 was passed by Parliament. The Act provides in section 10(4) as follows:

" The Auditor-General shall retire after attaining the age of sixty years but may be engaged for a limited period of not more than two years at a time but not exceeding five years in all on any other terms and conditions that the President, acting in consultation with the Council of State, shall determine."

Sometime after the coming into being of the Audit Service Act, the plaintiff brought the instant action invoking the original jurisdiction of the Court under articles 2(1) and 130(1) of the 1992 Constitution seeking the following reliefs:

1. A declaration that on the true and proper interpretation of the 1992 Constitution, the Auditor-General is not a public officer within the contemplation of and for the purposes of Articles 191, 195 and 199 0f the 1992 Constitution but a public officer within the contemplation of Articles 70 and 71 of the Constitution.
2. A declaration that section 10(4) of the Audit Service Act, 200, (Act 584) is inconsistent with and in contravention of the letter and spirit of the Constitution and accordingly same be declared null and void.
3. A declaration that except for stated grounds stated in Article 146 of the 1992 Constitution the Auditor- General may remain in office until he attains the compulsory retiring age which is comparable to that of a Justice of the Court of Appeal."

In the statement of case filed on behalf of the plaintiff, it was contended that since the Constitution does not provide for the retiring age of the Auditor General unlike that in respect of some Article 70 appointees namely the Chairman of the Electoral

Commission and the Chairman of the National Commission for Civic Education, there is a lacuna and or a gap that calls for this Court to interpret the Constitution. In this regard, the plaintiff urged that since the Auditor- General was appointed under Article 70 of the Constitution like the Chairmen of the Electoral Commission and the National Commission for Civic Education the said officer became a public servant by virtue of Articles 70, 71,144, 145, 187 and 286 and not under articles 190, 195 and 199 of the Constitution. It appears from the case put up on behalf of the plaintiff that the invitation urged on us is planked mainly on the spirit of the Constitution. The essence of that argument is that having created a certain category of public officers outside that which is established under Articles and 190 and 195, the Auditor-General cannot have his retiring age regulated by Article 199. Article 199 is expressed in the following words:

> ***"A public officer shall, except as otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years."***

In response to the case submitted on behalf of the plaintiff, the learned Attorney General has made a concession. In my thinking, since this is a constitutional matter that raises purely a point of law relating to the true and proper interpretation to be placed on the provisions of the Constitution that are alleged to have been breached by section 10(4) of Act 584, the position taken by the learned Attorney- General only meant that she has no assistance to offer the Court in the matter. The result is that we must proceed in the exercise of our constitutional duty (one that I consider to be onerous), to interpret the provisions in contention and express a definitive position on the issues joined between the parties for our determination that are contained in the memorandum of agreed issues filed on 27th November 2007 as follows:

1. "Whether or not by the combined effect of Articles 70, 71, 144, 145, 146, 187 and 286 of the Constitution the retiring age of the Auditor-General is comparable to that of a Justice of the Court of Appeal?

2. Whether or not the Auditor-General is a public officer within the contemplation of Articles 70, 71, 144, 145,146 and 286 of the Constitution of 1992?
3. Whether or not section 10.4 of the Audit Service Act, 2000, Act (584) is inconsistent with and in contravention of the combined effect of the letter and spirit of the 1992 Constitution?"

I think that in determining the questions posed above, one should first consider the relevant provisions of the Constitution on which great reliance is placed by the plaintiff. Article 70 of the Constitution provides for the appointment of specified public officers including the Auditor- General by the President acting either on the advice of or in consultation with the Council of State.
Article 71 provides the mode by which the ***"salaries and allowances payable, and the facilities and privileges available"*** to the said officers mentioned in Article 70 may be determined.

Whiles Article 144 deals with the appointment of Justices of the Superior Courts and Chairmen and other members of the Regional Tribunal, Article 145 provides for the retiring age of Justices of the Superior Court and Chairmen of the Regional Tribunals. The mode by which such judges may be removed is clearly provided for in Article 146. Article 187 of the Constitution on the other hand creates the office of the Auditor-General. In clauses 12 and 13 of Article 187 the following provisions are made regarding the office of the Auditor-General.

> ***"12. The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, retring award or retring age shall not be varied to his disadvantage during his tenure of office.***
>
> ***13. The provisions of Article 146 of this Constitution relating to the rem in interpreting oval of a Justice of the Superior Court from office shall apply to the Auditor- General."***

The plaintiff also relies on Article 286, which creates a constitutional obligation on specified public office holders such as the President, his vice, ministers of state, Article 70 appointees and ambassadors to declare their assets to the Auditor-General. The Auditor General himself is required to declare his assets to the President.

I must say at once that in my opinion the provisions on which reliance was placed by the plaintiff to sustain the claim regarding the Auditor-General occupying a position analogous to that of Justices of the Court of Appeal do not in their ordinary meaning lend support to his case. The only provisions that remotely mention anything regarding his office in connection with Justices of the Superior Courts are contained in Article 187 clauses(12) and (13), which deal with matters that in my view border on security of tenure. I do not think that merely because it is provided in clause (13) of Article 187 that he cannot be removed except in accordance with the provisions contained in Article 146, which deal with the procedure for the removal of Superior Court Judges makes his office analogous with such persons. Again, although the provision contained in clause 12 of Article 187 relating to the Auditor-General's salaries and retring benefits though similar to that provided for Justices of the Superior Court is not in substance the same. For a better appreciation of the differences, I wish to refer to the applicable provisions that are contained in Articles 127(5) and 187 (12) of the Constitution as follows:

> ***"127 (5) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the Superior Court or any judicial officer or other person exercising judicial power, shall not be varied to his disadvantage.***
>
> ***187(12) The salary allowances payable to the Auditor-General, his rights in respect of leave of absence, retiring award or retiring age shall not be varied to his disadvantage during his tenure of office."***

In my opinion, a careful reading of the two provisions of the Constitution reveals that that relating to Superior Court Judges is more extensive in scope than that of the auditor-General. Whiles the provision for Justices of the Superior Court is that the "salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service……..shall not be varied to his disadvantage." that of the Auditor- General is limited to his duration in office only as appears from the use of the words " the salary, allowances……his rights in respect of leave of absence, retiring award or retiring age shall not be varied to his disadvantage during his tenure of office."

I think that even regarding retiring benefits, the lawmaker clearly intended a different scheme for the Auditor General than is available to Justices of the Superior Court. Considering the elaborate provision made for Justices of the Superior Court in Article 155 of the Constitution, I do not think that in the absence of a clear stipulation as was done in the case of the Electoral Commissioner and the Chairman of the National Commission for Civic Education that they are intended to apply to the office of the Auditor-General. In my thinking one cannot legitimately read the provisions of Article 155 into Article 187(12) and it is no wonder that learned counsel for the plaintiff in his statement of case made no reference whatsoever to it. It does not appear to me that the framers of the Constitution intended Article 155 to apply to the office of the Auditor-General. Clause 3 of the said article for example provides:

> ***"A Justice of the Superior Court of Judicature may, in lieu of retiring under clause (1) of this article, retire if he has attained the age prescribed as retiring age for public officers generally and shall be paid retring awards based on his total public service, including service as a Justice of the Superior Court of Judicature, but otherwise at the same rate as is, for the time being applicable to the public service generally."***

Although in the memoranda of agreed issues filed by the parties on which this case turns was silent on the provisions relating to the offices of the Electoral

Commission, Public Service Commission, the Commission of Human Rights and Administrative Justice as well as the National Commission on Civic education, I am of the considered opinion that since in the statement of case filed by the plaintiff , a considerable time was expended on the various articles of the Constitution that equate these office holders to Justices of the Court of Appeal, in order to do substantial justice to his case, I desire to turn my attention to the said provisions namely Articles 194, 44,223 and 235.In all these cases, the Constitution expressly provided that these public office holders shall have the same terms and conditions as Justices of the Court of Appeal. For the purpose of a better understanding of the constitutional provisions relating to them, I seek the indulgence of my Lords to detain their precious time in referring to the relevant provisions. I propose in this regard to refer to the said provisions in the order in which they are arranged in the Constitution. Article 44 (2) provides regarding the Electoral Commission as follows:

> ***"The Chairman of the Electoral Commission shall have the same terms and conditions of service as a Justice of the Court of Appeal."***

The Constitutional provision that regulates the service conditions of the members of the Public Service Commission states in Article 194 (5) thus:

> ***"Subject to clause (6) of this article, the terms and conditions of service including retiring ages of a Justice of the Court of Appeal shall apply to the Chairman of the Public Service Commission and those of a Justice of the High Court shall apply to the Vice- Chairman.***

Turning to the situation regarding the Commissioner for Human rights and administrative Justice, Article 223(1) plainly makes the following provision:

> ***"The Commissioner and deputy Commissioners shall enjoy the terms and conditions of service of A Justice of the Court of Appeal and High Court."***

Although having regard to the said equation, their retiring ages could be determined by reference to the provisions of the Constitution that provided for

Justices of the Court of Appeal and the High Court namely Article 145 (2), clause (2) of Article 223 made express provision to the same effect.

Now, I turn my attention to Article 235, which provides the retiring ages for the Chairman of the National commission for Civic education and his two deputies. The formulation that appears in Article 235 (1) runs thus:

> ***"The Chairman of the Commission shall enjoy the same terms and conditions of service as a Justice of the Court of Appeal, and a Deputy Chairman of the Commission shall enjoy the same terms and conditions of service as a Justice of the High Court."***

My Lords, in my considered opinion the provisions that I have referred to contextually are not supportive of the case of the plaintiff. The plaintiff bases his claim to retiring at age 70 on the letter and spirit of the Constitution, but as may be discerned from the relevant provisions concerning some Article 70 appointees, the analogy with Justices of the Court of Appeal was expressly provided for in the Constitution and not left to be gleaned from a reading of various other provisions of the Constitution in order as it were to "exorcize" its spirit for the purpose of determining whether by reference to section 10(4) of Act 584, the latter legislation being subordinate to the supreme law of the land may be affected by the repugnancy clause contained in Article 2(1) of the Constitution such that it may be consequentially struck down by us as being null and void.

This being the case, I next proceed to consider the various provisions of the Constitution in order to determine if a careful reading of them would reveal its spirit in a manner different from their ordinary meaning. I commence with a reference to a portion of the plaintiff's statement of case that cites the case of ***NPP v GBC*** [1992-1993] GBR 522 at 524 wherein this Court held to the following effect:

> ***"A Constitutional document must be interpreted sui generis to allow the written word and the spirit that animates it to exist in harmony. Reference must be made to stated objectives in***

the Constitution so that the emphatic pointers to its spirit are not missed. The Constitution itself points the way to its liberal interpretation....."

Delivering his opinion in the case of ***AGYEI TWUM v AKWETEY*** [2005-2006] SCGLR 732, Date-Bah JSC observed of the approach that seeks to bring out the objective of the framers of the Constitution in the following words:

"Analysis of the concept of the purpose of a constitutional provision reveals that there are two kinds of purpose; subjective and objective. The subjective purpose is what the framers of the Constitution actually intended. The objective purpose, on the other hand, is what the provision should be seeking to achieve, given the general purposes of the Constitution and the core values of the legal system and of the Constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provisions in question. In Asare v Attorney –General [2003-2004] 2 SCGLR 823, this Court held that, in determining the purpose of a provision, the interpreter should balance the two kinds of purpose. The spirit of a Constitutional provision includes its objective purpose."

See: ***PEPPER v HART*** [1993] AC 593.

As I have already pointed out in the course of this delivery, the meaning of the Constitution that the plaintiff has placed on the relevant provisions of the Constitution that were referred to is not derived from the subjective meaning of the Constitution but rather what he describes as the spirit of the constitution.-the objective meaning. But then is there indeed a spirit of the Constitution that is clearly and unequivocal that one can reasonably discern such as to come to the view that for the original meaning of the words to prevail there would be some absurdity or unreasonableness that should compel us to prefer a different interpretation? The

question may similarly be formulated thus: Is the objective meaning of the texts of the Constitution the proper or reasonable interpretation in the case before us?

Whiles the plaintiff contends that a careful reading of the various provisions of the Constitution dealing with Article 70 appointees shows that the Auditor -General by virtue of his ***"mode of appointment, oath of office, emoluments, independence, removal from office among others places him in the same category of the following officers, the Chairman of the Electoral Commission, Commission for Civic Education, Public Service Commission, etc which said officers have their age of retirement pegged with that of a Justice of a Court of Appeal",*** the effect of express provision being made for these officers outside the general provision tends to render his urgings to lose their appeal.

In my thinking in so far as the provisions of the Constitution that equated those officers to Justices of Appeal goes they were specifically made when considering the institutions to which they belong and therefore the Auditor General, not having had the same provision made in respect of his office must necessarily fall under the general provision regarding other public officers that is contained in Article 99(1) thus:

> ***"A public officer shall, except otherwise provided in this Constitution, retire from the public service on attaining the age of sixty years."***

In my view if the framers of the Constitution thought that all persons who derive their appointment from Article 70 of the Constitution should be analogous with Justices of Appeal, they would have made provision to that effect instead of making specific provisions for only some of them. I also wish to say that the mere provision of a process of removal of the Auditor-General in accordance with that available to Justices of the Superior Court does not inextricably equate his office to Justices of the Court of Appeal. In coming to this view of the matter, I am not disregarding the fact that the said provision was originally provided for Justices of the Superior Court. Article 187(13) provides:

"The provisions of Article 146 of this Constitution relating to the removal of a Justice of the Superior Court of Judicature from office shall apply to the Auditor-General."

I think that to come to a contrary view would have the effect of expanding the scope of the Constitutional provisions relating to his office beyond that which is reasonably imaginable. On the contrary, this goes to show that the framers of the Constitution thought that the only attribute of the office of a Superior Court judge that the Auditor-General should enjoy in common with Superior Court Judges is that which protects him while in office by ensuring that he is insulated from insecurity of tenure. I think that we should not lose sight of the fact regarding the office of the Lands Commission, membership of which is also appointed by the President under Article 70 of the Constitution, that clause (1) of Article 264, makes express provision for their tenure of office. Again, not all the appointees under Article 70 have had their positions made by the Constitution analogous with Justices of the Court of Appeal. I mention by way of example, the Administrator of the District Assemblies Common Fund, the governing bodies of public corporations, and the National Council for Higher Education.

The above reasons are sufficient in my opinion to dispose of issue (1) of the memorandum of agreed issues set out by the parties for our determination, which issue receives a negative answer; the effect of which is that the retiring age of the Auditor General is not comparable to and is not in pari materia to that of a Justice of the Court of Appeal. In my thinking this necessarily disposes of issue (3) which concerns and touches the alleged inconsistency of section 10 (4) of Act 584, the Audit Service Act. It is plain from the reasons adduced above that it is consistent with the provisions of the Constitution. I am of the opinion that Parliament was within its mandate when it made the said provision for the retiring age of the Auditor-General. This provision is consistent with Article 199 of the Constitution as earlier on alluded to in the course of this delivery.

There remains for determination issue (2) which was formulated in the memoranda of agreed issues thus:

> ***"Whether or not the Auditor-General is a public officer within the contemplation of Articles 70, 71, 144, 145,146 and 286 of the 1992 Constitution and not a public officer within the contemplation of Articles 189, 190, 195, and 199 of the Constitution of 1992?"***

It appears to me that based on the reasons above, he is a public officer within the contemplation of Articles 70, 71, 146 and 286 but not within the contemplation of Articles 144 and 145, which provisions deal with the Judiciary and in particular Superior Court Judges. In my view, the Auditor-General having been appointed under Article 70 of the Constitution does not come within the designation of a public officer under Article 195.However, like many others appointed under Article 70 of the Constitution whose emoluments are paid directly from the Consolidated fund, he belongs to the category of offices that by Article 190 constitute the Public Services of Ghana. Further to this, since he derives his appointment from Article 70 of the Constitution, he does not come within the contemplation of Article 195. As pronounced earlier on his office comes within the contemplation of Article 199 which explains why his retiring age was pegged in the Audit Service Act at sixty years.

The result is that the action herein fails and the reliefs endorsed on the writ herein are dismissed.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

AKOTO-BAMFO (MRS), JSC:-

In an action invoking the original jurisdiction of this Court under Articles 2(1) and 130(1), (a) of the 1992 Constitution, the plaintiff claims the following reliefs;

1. A declaration that by the combined effect of Articles 17, 70, 71, 144, 145, 146 and 187 of the 1992 Constitution and on a true and proper interpretation of the Constitution, retirement age of the Auditor-General is comparable to and in pari materia to that of a Justice of the Court of Appeal.
2. A declaration that section 10(4) of the Audit Service Act, 2000 (Act 584) is inconsistent with and in contravention of the letter and spirit of the 1992 Constitution, and accordingly same be declared null and void.
3. A declaration that except for stated grounds stated in article 146 of the 1992 Constitution the Auditor-General may remain in office until she/he attains the compulsory retirement age which is comparable to that of a Justice of the Court of Appeal.

In sum, the plaintiff's case is that by the combined effect of the articles 70, 71, 145, 146 and 187 of the Constitution, the office of the Auditor-General is analogous to the offices of the Commissioner for Human Rights and Administrative Justice and the office of the Electoral Commissioner among others; that since retiring ages of the afore-mentioned officers have been pegged to those of the Justices of the Court of Appeal, the retirement age of the Auditor-General should be 70 years. According to the plaintiff that in so far as the retirement age has not been specifically provided for under Article 70; there is a lacuna or gap in the Constitution which ought to be filled by a judicial decision.

It is further the prayer of the plaintiff that the retiring age fixed at 60 under section 10(4) of the Audit Service Act be declared null and void as being inconsistent with and in contravention of the letter and spirit of the 1992 Constitution.

The main issues confronting this court are;

1. Whether Article 70 of the Constitution creates a special breed of public officers, the Auditor-General inclusive all of whose tenure should necessarily fall under article 145.
2. Whether there is an omission or a gap which should be filled by this Court.

Article 70 of the Constitution provides;

1. The President shall, acting in consultation with the Council of State appoint-

a. The commissioner for Human Rights and Administrative Justice and his Deputies;
b. The Auditor-General;
c. The District Assemblies Common Fund Administrator;
d. The Chairmen and other members of –
    i. The Public Services Commission;
    ii. The Lands Commission;
    iii. The governing bodies of public corporations;
    iv. A National Council for Higher Education howsoever described; and
e. The holders of other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.

2. The President shall, acting on the advice of the Council of State, appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission.

Undoubtedly the officers named under Article 70 have a common feature, appointments to all those offices have to be made by the President acting in consultation with the Council of State; the common denominator is therefore the appointing authority.

Financial provisions for those appointees under Article 70 are under Article 71: which provides as follows:

1. "The salaries and allowances payable, and the facilities, and privileges available, to-
    a. the Speaker and Deputy Speaker and members of parliament;
    b. The Chief Justice and other Justices of the Superior Court of Judicature;
    c. The Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and his deputies and the District Assemblies Common Fund Administrator;
    d. The Chairman, Vice Chairman and other members of-
        i. National Council for Higher Education howsoever described;

ii. The Public Services Commission;
iii. The National Media Commission;
iv. The Lands Commission; and
v. The National Commission for Civic Education;

being expenditure charged on the consolidated fund, shall be determined by the President on the recommendations of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State.

2. The salaries and allowances payable, and the facilities available, to the President, the Vice President, the Chairman and other members of the Council of State; Ministers of State and Deputy Ministers, being expenditure charged on the consolidated fund shall be determined by parliament on the recommendations of the committee referred to in clause (1) of this Article.
3. For the purposes of this Article and except as otherwise provided in this Constitution, 'salaries' includes allowances, facilities and privileges and retiring benefits or awards."

The office of the Auditor-General is created under Article 187 which provides "there shall be an Auditor-General of Ghana whose office shall be a public office."

Indeed Article 190 leaves one in no doubt that the Audit Service whose head is the Auditor-General as established under Article 187 is a public office whose officers' emoluments are to be paid directly from the consolidated fund or monies provided by Parliament among others as per Article 295 the interpretative clause.

A public officer, it is provided for under Article 199(1) of the Constitution "shall except as otherwise provided in this constitution, retire from the public service on attaining the age of sixty years".

What is the effect of Article 199(1) on the Auditor-General, whose office is created under Article 187, appointed under Article 70 and whose removal is provided for under Article 146?

What is the intendment of the framers of the Constitution with regard to Article 70? Is it the intention to create a special class of public officers who shall all enjoy the same privileges; facilities and conditions of service, including that of retirement; or

to bring under one umbrella, as it were, those public officers whose appointments have to be made by the President acting in consultation with the Council of State?

A Constitution must, inter alia, be given a broad, benevolent, liberal and purposive construction, Tuffuor v Attorney General 1980 GLR 637. Therein, Sowah JSC reminded us of the major aids to interpretation, bearing in mind the goals that the Constitution intends to achieve. "Our 1st duty is to take the words as they stand 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".

The Court must additionally avoid importing into the Constitution what does not appear therein. Attorney General (No.2) v. Tsatsu Tsikata (No. 2) 2001-2002 SC GLR 620 and as cautioned by Kludze JSC in Rep. v. Fast Track High Court, Accra ex Parte Daniel

"Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our own wisdom for the collective wisdom of the framers of the Constitution;"

Additionally, in construing the Constitution, we must look at all the provisions as a whole and care taken to ensure that all the provisions work together as part of a functioning whole:

Under Article 70 among the public officers whose appointments have to be made by the President in consultation with the Council of State are the District Assemblies Common Fund Administrator, the Chairmen of Lands Commission, the National Council for Higher Education and the Governing Bodies of Public Corporations.

The Administrator of the Common Fund is therefore in the same category as the Auditor-General, the Electoral Commissioner as well as the Commissioner for Human Rights and Administrative Justice, Of all the public officers named in Article 70; the Administrator of the Common Fund has to be appointed by the President in consultation with the Council of State and notably with the approval of Parliament, the same procedure provided for the appointment of Justices of the Supreme Court, yet under Section 5 of Act 455, the District Assemblies Common Fund Act, he shall hold office for 4 years and may be removed by the President upon a just cause but not Significantly by the procedure established under Article 146 of the Constitution. Can it then be argued that the administrator is being discriminated against since

procedures for his removal are not the same as some of the appointees under Article 70? I think not.

Again even though the Chairman of the Lands Commission is appointed under Article 70(1), (d)(ii) of the Constitution, he is required to hold office for 4 years under Article 264 of the Constitution. Is there an inconsistency in Articles 70 and 264 since it is the contention that all appointees under Article 70 should have their retirement ages pegged at 70 years?

With regards to the National Council for Higher Education, even though the President is vested with authority to appoint under Article 70 (1)(d)(iv) of the Constitution, Section 6 of the Act stipulates that an officer so appointed shall serve for a period of three (3) years.

It is clear therefore that even though the above-mentioned officers are appointees under Article 70, they are treated differently for purposes of their tenure and it cannot therefore be said that all other officers under Article 70 have their retiring ages pegged at 70 as obtained in the cases of Justices of the Superior Court, and therefore the Auditor-General is a victim of discrimination.

The argument that the framers of the Constitution intended creating a special class whose tenure etc. ought to be uniform cannot therefore be sustained.

I am of the view that the officers were put under one heading to ensure elegance in drafting, for instead of having various appointees by the President scattered under different Chapters of the Constitution dealing with public administration as obtained under the 1979 Constitution, all the appointees are placed under one heading- Apppointments by the President

It is obvious that even though it is provided specifically under Article 233 that the Chairman and the Deputy Chairman of the CHRAJ enjoyed the same terms and conditions of service of a Justice of the Appeal Court and High Court respectively and equally Article 194 makes provision for the Chairman and Vice Chairman of the Public Services Commission to enjoy the same conditions of services of an Appeal and High Court Judge respectively, the provisions did not cover all appointees under Article 70; notably the Administrator of the Common Fund of the District Assemblies, the Chairman of the Lands Commission and the governing board of Public Corporations among others. Even though the determination of salary of the

administrator falls under Article 71, his removal procedures do not fall under Article 146.

The focal point of any Public Administration is to ensure stability so that programmes run their full courses. Such stability is certainly not assured by arbitrary and summary removal of such public officials.

The removal procedure in respect of some officials including the Auditor-General named under Article 70 have accordingly been made stringent as set out under Article 146 of the Constitution, so that while in office, they do not only enjoy independence but have security of tenure.

In addition it is provided for under Article $187^{(7)}$, that the Auditor-General shall not be subject to the control of any person in the performance of his duties, neither could his salaries, allowances and retiring awards be not varied to his disadvantage during his tenure. Article $187^{(12)}$.

Indeed Article 191 amply affords protection to a public officer including the Auditor-General.

There are therefore adequate safeguards in the Constitution to give the Auditor-General security of tenure. The length of time has nothing to do with such security; in other words longevity of service should not be the focal point.

Indeed it is of significance that both Articles 146 and $187^{(1)}$ establishing the office of the Auditor-General and the removal procedure are entrenched provisions.

Is there an omission?

Article $199^{(1)}$ of the Constitution provides:

"A public officer shall, except as otherwise provided in this Constitution, retire from Public Service on attaining the age of sixty years."

To my mind, the phrase 'except as otherwise provided in this Constitution' is referable to the public officers specified in the Constitution. Those officers can continue to work beyond the mandatory retiring ages of 60 years e.g. the Chairman and Vice-chairman of the Public Services, the Commissioner and Deputy Commissioner of the CHRAJ.

Since Article 187 expressly states that the Auditor-General is a public officer and the retiring ages of public officers have been expressly stated; but more importantly since the officers envisaged to work longer than the 60 years have been expressly

stated and the Auditor-General has been excluded, it is my view that the framers of the Constitution did not intend to include him. The phrase 'except as otherwise provided' in Article 199 of the Constitution is in line with the expressio rule which states that the expression of one person or thing implies the inclusion of other persons or things of the same class but not mentioned.

Therefore assuming for the purposes of argument that Article 70 created a special class, 'the fact that members of the class who were to work beyond the 60 years were specifically mentioned, the exclusion of the Auditor-General evinces an intention to exclude him. It is a deliberate act which cannot be described as an omission.

Having regard to the fact that under Article 199 the retiring age has clearly been expressed for all categories of public officers except those specifically provided for under the Constitution, it cannot be said that there is a gap which required filling.

Is Section $10^{(4)}$ of the Audit Service Act inconsistent with and in contravention of the combined effect of the letter and spirit of Articles 17, 70, 71, 144, 146, 187 and 286 of the Constitution?

The thrust of the plaintiff's argument is that since the Auditor-General is appointed under Article 70 and should enjoy same conditions of service by retiring at age 70, Section 10 which pegs the retiring age at 60 is inconsistent with the letter and spirit of the Constitution.

Undoubtedly the Constitution has its letter and spirit, for as Francois JSC in his opinion in support of the majority decision in New Patriotic Party v. Attorney-General 1993-94 2 GLR459 at 476 stated:

"A Constitution is the outpouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore the spirit. Both the letter and the spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation."

Having regard to the fact that Article 187 which establishes the office of the Auditor-General stipulates that it is a public service and Article 199 fixes the retiring age of all public officers except as otherwise provided under the Constitution, Section 10 of the Audit Service Act which only amplifies the Constitutional provision as per Article 199 cannot be said to be inconsistent with the letter and spirit of the Constitution

which enjoins us to lean towards an interpretation which seeks to find the purpose or rationale or the underlying principles or the effect which the provision seeks to achieve.

I would therefore decline the invitation to make the declarations sought in the indorsement and dismiss the plaintiff's action in its entirety.

V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

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