# IN THE SUPERIOR COURT OF JUDICATURE
# IN THE SUPREME COURT OF GHANA
# ACCRA, GHANA

**CORAM: ATUGUBA, J.S.C. (PRESIDING)**

**AKUFFO,(MS.) J.S.C.**
**DATE-BAH, J.S.C.**
**ADINYIRA, (MRS.)J.S.C.**
**ANIN-YEBOAH, J.S.C.**
**GBADEGBE, J.S.C.**
**AKOTO-BAMFO (MRS), J.S.C.**

**WRIT**

**No. J1/8/ 2012**

**26TH JULY 2012**

**JANET NAAKARLEY AMEGATCHER ... PLAINTIFF.**

**VERSUS**

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

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# J U D G M E N T

## DR. DATE-BAH JSC;

The plaintiff's writ invoking the original jurisdiction of this Court, filed on 6th February, 2012, was originally issued against the Attorney-General, the Speaker of Parliament, the Electoral Commission and the Minister of Local Government. By a ruling on 9th May, 2012, however, this Court struck out the Speaker of Parliament and the Minister of Local Government, relying on article 88(5) of the 1992 Constitution. Accordingly, the reliefs set out in the plaintiff's writ are now against the Attorney-General as first defendant and the Electoral Commission as second defendant. Those reliefs are as follows:

i. "A declaration that section 1(2) of the Local Government Act, 1993 (Act 462) which provides that the President may declare an area a district and assign a name to the district by executive instrument is inconsistent with article 241 (2) and 106 (1) of the 1992 Constitution and is consequently void.

ii. An order restraining the President from making any executive instrument pursuant to section 1 (2) of the Local Government Act, 1993 (Act 462) or pursuant to any other section or provision in any enactment.

iii. A declaration that section 1 (3) and section 2 of the Local Government Act, 1993 (Act 462) which provides that the President shall in the exercise of the power under subsection 2 (a) of section 1 of the Local Government Act, 1993 (Act 462) direct the Electoral Commission and or request the Electoral Commission to review areas of authority of unit committees, town, area, zonal, urban and sub-metropolitan district councils and districts, municipal and metropolitan assemblies and make

such recommendations as it considers appropriate to the President is inconsistent with articles 45, 46, 241 (2) and 106 (1) of the 1992 Constitution and is consequently void.

iv. An order restraining the Electoral Commission from acting in any way whatsoever pursuant to directions made by the President in furtherance of section 1 (3) of the Local Government Act 1993 (Act 462).

v. A declaration that sections 3 (1) and 2 of the Local Government Act, 1993 (Act 462) which provides that the Minister shall, by legislative instrument, establish an Assembly for each district, municipality and metropolis which, in accordance with clause (3) of Article 241 of the Constitution shall constitute the highest political authority in the district and also provide for what shall be specified in the said legislative instrument respectively, are inconsistent with article 241 (2) and 106 (1) of the 1992 Constitution and are consequently void.

vi. An order restraining the Minister responsible for Local Government or any other Minister, from laying in Parliament any legislative instrument made pursuant to section 3 of the Local Government Act, 1993 (Act 462) or pursuant to any other section or provision in any enactment or if laid prior to the commencement of this action, a mandatory injunction directed at the Minister responsible for Local Government to withdraw any such Legislative Instrument from Parliament pending the hearing and determination of the constitutionality of the Instrument.

vii. An order restraining the Speaker of Parliament of the Republic of Ghana from permitting to be laid in Parliament for the consideration of Parliament by the Minister responsible for Local Government or any

other Minster, any legislative instrument made pursuant to any other section or provision in any enactment or if laid prior to the commencement of this action, a mandatory injunction directed at the Speaker of Parliament to cause to be withdrawn any such Legislative Instrument from Parliament pending the hearing and determination of the constitutionality of the Instrument.

viii. Any further order(s) that this Honourable Court may deem fit."

In the light of these reliefs, it is germane to set out the provisions of section 1 of the Local Government Act, 1993 (Act 462):

**"Section 1—Creation of Districts.**

(1) The districts in existence immediately before the coming into force of the 1992 Constitution shall continue as districts for the purposes of this Act.

(2) The President may by executive instrument—

(a) declare any area within Ghana to be a district;

(b) assign a name to the district.

(3) The President shall in the exercise of his powers under sub-section (2) (a) direct the Electoral Commission to make appropriate recommendations.

(4) The Electoral Commission shall, before making recommendations to the President under sub-section (3), consider factors including—

(a) in the case of—

(i) a district, that there is a minimum population of seventy-five thousand people;

(ii) a municipality, that the geographical area consists of a single compact settlement and that there is a minimum of ninety-five thousand people;

(iii) a metropolis, that there is a minimum of two hundred and fifty thousand people; and

(b) the geographical contiguity and economic viability of the area, namely, the ability of an area to provide the basic infrastructural and other developmental needs from the monetary and other resources generated in the area."

Article 241(1) and (2) of the 1992 Constitution provide as follows:

"(1) For the purposes of local government, Ghana shall be deemed to have been divided into the districts in existence immediately before the coming into force of this Constitution.

(2) Parliament may by law make provision for the redrawing of the boundaries of districts or for reconstituting the districts"

Article 106(1) of the Constitution in turn states that:

> "(1) The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President."

Based on these legal provisions, the plaintiff's argument in support of her writ is that the power to create districts is vested in Parliament by the Constitution, and not the President. This power is to be exercised by Parliament by making laws. The mode of making this law, in her view, should, as prescribed by article 106(1) of the 1992 Constitution, be by a bill passed by Parliament and assented to by the President. She contends, therefore, that section 1(2) of the Local Government Act, 1993 (Act 462) by giving power to the President to create a district breaches article 241(2) of the Constitution and is therefore void.

She further elaborates on the rationale for her position as follows in her Statement of Case:

> "12. The plaintiff further avers that when one uses the purposive approach to interpretation, one will arrive at the same conclusion that Parliament is responsible for creating districts. The reason being when one contrasts the limited role of Parliament in subsidiary legislation with the role of Parliament in making law, it is clear that the framers of the 1992 Constitution wanted the people through their representatives to create districts and Parliament may in its process of making law accept and consider memorandum from the public.

13. A review of the history of the creation of districts in Ghana over the past forty years will reveal that it is the representative of the people through Parliament that was vested with the power and not the President. Paragraph 658 of the Memorandum on the Proposals for a Constitution for Ghana, 1968 recommended that "**considering the several factors to be taken into account in determining the area of a District Council, we propose that this should be left to Parliament to determine the areas of District Councils by or under an Act of Parliament which should as far as possible take account of factors such of (*sic)* ethnicity, demography, economic viability and geographical contiguity."** Article 156(3) of the 1969 Constitution adopted the proposals by providing that "**Subject to the provisions of this article, Parliament may, by or under an Act of Parliament, establish rural, urban, municipal or other local government councils or area committees".**

**14.** Similarly, paragraph 269 of the Proposals of the Constitutional Commission for Constitution for the Establishment of a Transitional (Interim) National Government for Ghana, 1978 stated that **"We have not proposed provisions on the criteria for determining the size, population and boundaries of the areas of authority for local government councils. We consider that this is a subject most suitable for determination by Parliament by or under an Act of Parliament."** Article 182(1) of the 1979 Constitution also adopted the proposals by providing that **"For the purposes of local**

**government in Ghana there shall be established by an Act of Parliament district and other local government councils."**

**15.** Also in paragraph 337(2) of the Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, 1991, the committee proposed that **"Parliament should by law make provision for the alteration of the boundary or name of a District or its abolition"** This recommendation resulted in the provisions made in Article 241(2) to the effect that "**Parliament may by law make provision for the redrawing of the boundaries of districts or for reconstituting the districts."**

**16.** The philosophical reason for the constitutional provision allowing Parliament to make laws for the demarcation of local government and not the President under Article 241(2) of the Constitution is because of the fact that a President can abuse such a power by creating local government areas for partisan political purposes without the necessary safeguards which Parliament is equipped to undertake."

The first defendant vigorously refutes these arguments of the plaintiff. He contends that the plaintiff's contention that Parliament is required to create districts is incorrect, and that rather what the Constitution enjoins Parliament to do is to make provision for the redrawing of boundaries of districts or the reconstitution of districts. He accordingly argues that on a true and proper interpretation of the 1992 Constitution and sections 1(2),

1(3), 2, and 3(1) and (2) of the Local Government Act, 1993 (Act 462), these provisions are not inconsistent with article 241(2) of the 1992 Constitution.

In response to the plaintiff's resort to the history of the provisions enabling the establishment of districts in Ghana, the first defendant also gives his account of the history as follows (in his Statement of Case):

"9. A critical (not a chronological) review of the history of the creation of districts in Ghana since its independence will reveal both continuities and discontinuities in the legal formulation of the vesting of the power to bring new districts into being in particular persons and/or institutions.

10, The Ghana (Constitution) Order in Council, 1957 in Article 65(2) maintained existing Local Government Councils that were provided for by law (Ordinances of 1953) and subsequent Councils were to be by *provision* made in that regard. The 1960 Republican Constitution did not expressly provide for district Administrative Units. However, the Constituent Assembly in *The Regions of Ghana Act, 1960* in section 3 specified existing Councils in the first column of the first Schedule of the Act as sub-regional Units under their respective regions. The said Units were constituted by statutory instruments between 1952 and 1960.

11. A departure was made in the 1969 Constitution in Article 156(3) where Parliament was expressly enjoined by an Act of Parliament to *establish* rural, urban, municipal and other local government councils

and area committees. The 1979 Constitution similarly, in article 182(1) provided for Parliament to by an Act of Parliament *establish* district and other local government councils.

12. The formulation in the 1992 Constitution in Article 241(2), taking its source from paragraph 337(2) of the Committee of Experts (Constitution) proposals of 1991, (departing from the 1969 and 1979 constitutional formulations) enjoins Parliament to by law *make provision for* the redrawing or reconstitution of districts.

13. It is submitted that to *establish* a district by an Act of Parliament as contained in the 1969 and 1979 Constitutions is not the same as to *make provision for* the redrawing of district boundaries and reconstitution of districts. According to the Oxford Advanced Learner's Dictionary (current English, 4th edition) the meaning of the word *establish* is to *set something up on a permanent or firm basis* while the phrase *make provision for* means *a preparation that is made to meet future needs or in case something happens.* In the latter case therefore Parliament enacted the Act to create districts etc.

14. There is no philosophical reason that can be gleaned from any of the background documents to the framing of Article 241(2) in the 1992 Constitution to the effect that it was to forestall possible abuse by a President for partisan political purposes. Judicial notice can be taken of the fact that the Government of the National Democratic Congress

(NDC) created a number of districts between 1993 and 2000 and lost national elections. Likewise, the New Patriotic Party Government between 2004 and 2007 created 70 districts and municipalities and lost elections in 2008."

After the exchange of Statements of Case between the plaintiff and the first defendant, the parties agreed on the following Memorandum of Issues:

1. "Whether or not section 1(2) of the Local Government Act, 1993 (Act 462) which confers powers on the President to create or declare an area a district and assign a name to it by Executive Instrument is not inconsistent with article 241(2) and 106(1) of the 1992 Constitution.
2. Whether or not the power vested in Parliament under the 1992 Constitution to make law for redrawing the boundaries of districts or for reconstituting districts in Ghana can be validly delegated by it to other institutions.
3. Whether or not sections 1(3) and 2 of the Local Government Act, 1993 (Act 462) which purport to give power to the President to direct and or request the Electoral Commission to review areas of authority of district, municipal and metropolitan assemblies, town , area, zonal, urban and sub-metropolitan district councils, and unit committees do not violate articles 45, 46, 241(2) and 106)(1) of the 1992 Constitution.
4. Whether or not section 3(1) and (2) of the Local Government Act, 1993 (Act 462) which grants powers to the Minister of Local Government to establish an Assembly for each district, municipality and metropolis is consistent with articles 241(2) and 106(1) of the 1992 Constitution.

5. Whether or not any acts done or being done pursuant to sections 1(2), 1(3), 2 and 3(1) and (2) of the Local Government Act, 1993 (Act 462) by Parliament or the Electoral Commission of Ghana are inconsistent with the 1992 Constitution and should be declared null and void and same struck down as unconstitutional."

These issues will next be considered *seriatim.*

***Issue 1***

The first of the agreed issues to be addressed in this case relates to whether the President's power under section 1(2) of the Local Government Act, 1993 to create districts falls within the limits of permissible legislative authorisation of executive action. In other words, are there limits to the executive action that Parliament may authorize and does the President's power under section 1(2) fall outside those limits. Clearly, there are limits to the executive power. The very notion of constitutionalism implies that there are limits to the power of the executive. Those limits are set in the Constitution, both expressly and impliedly. However, it is very normal constitutional practice for the legislative branch of Government to give the executive branch power to carry out an activity under an enabling authority set out in a statute. The mere fact that Parliament delegates such authority to the executive does not make it unconstitutional. Indeed, it is the remit of the Executive to carry out laws enacted by the legislature. There is nothing unusual in that. In this connection, it should be noted that article 58(2) of the 1992 Constitution provides that:

> "The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution."

The plaintiff's complaint can thus be hardly that the President acted unconstitutionally by doing what Parliament had entrusted to him by statute. Her argument, to be credible, would have to be rather that the language of Article 241(2) does not authorise Parliament to delegate to the President the power to create districts. Issue number one thus becomes one of interpretation of the language in article 241(2), rather than an argument about exceeding the bounds of permissible legislative authorisation of executive action. It is true, though, that the execution of laws made under or continued in force under the 1992 Constitution is subject to a limiting constraint, already referred to above, which is spelt out in article 58(1) to the following effect:

> "(1) The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution."

The limitation which is evident from this provision is that the execution of the laws must be in accordance with the provisions of the Constitution. Thus any unlawfulness will not come from the fact that Parliament does not itself execute a task that the Constitution enables it to do, but rather from whether the delegation of that task to the executive breaches a provision of the Constitution. The fact of delegation *simpliciter*, to my mind, is not a lawful basis for challenge. The challenger needs to go further to indicate what specific provision of the Constitution has been breached.

As seen above, article 241(2) authorises Parliament to "make provision" by law for the redrawing of the boundaries of districts or for their reconstitution. I am persuaded by the first defendant's argument that *making provision* for the redrawing of boundaries is different from *creating* districts. Thus article 241(2) gives authority to Parliament to exercise the legislative power of Ghana to provide for the redrawing of the boundaries of districts, including the enabling authority for the executive to carry out this exercise. That enabling authority could have been exercised by Parliament passing legislation to vest the power of creation in itself. However, Parliament chose not to do so in the Local Government Act of 1993. Rather, it chose to vest enabling authority in the President to carry out the redrawing of the boundaries. This is an approach that appears to be within the constitutional authorisation to make provision by law for the redrawing of the boundaries of districts or for their reconstitution.

However, the plaintiff thinks otherwise and has made extensive submissions on the issue as follows, in paragraphs 17 to 21 of her Statement of Case:

> 17. "The expression "make provision for" has been used five times in the Constitution and once in the Transitional Provision. Article 9 (1) and (5) mandated Parliament as follows:
>
> > "(1) Parliament may **make provision for** the acquisition of citizenship of Ghana by persons who are not eligible to become citizens of Ghana under the provision of this Constitution.

(5) Parliament may **make provision for** the renunciation by any person of his citizenship of Ghana"

18. Parliament consequently passed the **Citizenship Act, 2000 (Act 591)** in which Parliament itself made provision for the acquisition and renunciation of Citizenship but in the administration of the procedures for the acquisition and renunciation gave that responsibility to the Minster for Interior and the President. Similarly, Articles 108 (b), 252 (2) and section 8 (3) of the Transitional Provision had the phrase used as follows:

"108. Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of, the President-

(b) proceed upon a motion, including an amendment to a motion, the effect of which, in the opinion of the person presiding, would be to **make provision for** any of the purpose specified in paragraph (a) of this article."

"252 (1) There shall be a fund to be known as the District Assemblies Common Fund.

(2) Subject to the provision of this Constitution, Parliament shall annually **make provision for** the allocation of not less than five percent of the total revenues of Ghana to the District Assemblies for development; and the amount shall be paid into the District Assemblies Common Fund in quarterly installments."

"8 (3) This section shall be without prejudice to any powers conferred by or under this Constitution or any other law not being inconsistent with any provision of this Constitution, upon any person or authority to **make provision for** the abolition of office, for the removal from office of persons holding or acting in any office and for requiring those persons to retire from office."

19. It is submitted that in all provisions of the Constitution where the phrase was used, Parliament acted to create or establish the body, law or institution charged by the Constitution leaving the procedures to a Minister or some other person appointed to administer the law passed by Parliament.

20. Other words used in Article 241 (2) are "redrawing" and "reconstitution". In their ordinary meaning, redrawing means to remark, recreate, delineate, outline, reframe. Reconstituting in its ordinary meaning means form, account for, make up, compose, comprise, inaugurate, establish, initiate, create, set up, organize, develop and commission. In effect the role given by the Constitution to Parliament under Article 241 (2) is to pass an Act to create, delineate, set up, make establish and form new district assemblies and their boundaries and not to pass a law to delegate that responsibility assigned to it by the Supreme law of the land to the President, a Minister or any other person.

21. Constitution are to be read as a whole to make up the intention of the framers and in this case if this is done it will lead one to the same conclusion that it is Parliament that has the power to create a district. It is submitted that when the Constitution wanted the President to have a role in matters relating to the territories of Ghana it said so specifically in article 5 of the Constitution by giving the President power to create new regions."

With respect, the fact that in the situations listed by plaintiff above, Parliament has, in her view, acted directly to create or establish the body, law or institution concerned does not necessarily mean that the expression "make provision for" should be interpreted as meaning that Parliament cannot delegate or allocate to the executive the carrying out of an activity for which Parliament is responsible for making provision. What the plaintiff is attempting to do is to construct an inaccurate (and logically flawed) definition by enumeration.

It is dangerous, from a public policy standpoint, to construe the legislative authority of Parliament too restrictively, since this is likely to incapacitate it from dealing with exigencies and contingencies in relation to which the public interest may require it to take legislative action, of necessarily different kinds within a wide range. Undesirable legislation needs to be distinguished from unconstitutional legislation. The plaintiff clearly prefers that districts should be created by Parliament itself and that task not delegated or allocated to the President. (This was indeed the situation under the 1969 Constitution.) This preference should not, however, necessarily mean that such delegation or allocation is unconstitutional. Parliament should have the option to choose what

the plaintiff prefers or what is embodied in the Local Government Act, 1993. To proscribe the option adopted in the Act would be tantamount to limiting the plenitude of the legislative authority of Parliament too narrowly. According to article 93(2) of the 1992 Constitution:

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

The legislative power thus vested in Parliament should be expansively interpreted in the interest of the effective representative democratic governance of this country. Parliament should be regarded as authorised to pass any legislation on any matter so long as in doing so it does not breach any express or implied provision of the Constitution. This is axiomatic! Were the legislative power of Parliament to be restricted beyond what the provisions of the Constitution require, this would be an assault on the sovereignty of the people, whose representatives constitute Parliament. To me therefore, it is clear that Parliament has the fullest of legislative power, subject only to what the Constitution prohibits, expressly or impliedly. Democratic principles demand this conclusion.

Of course, to say this does not imply that Parliament is sovereign under our Constitution. The 1992 Constitution is supreme and limits the legislative power conferred on Parliament, for instance, through the provisions of Chapter 5, our Bill of Rights, and Chapter 6, which sets out the Directive Principles of State Policy. However, the plaintiff has not constructed any submissions based on these Chapters. Where persuasive arguments of unconstitutionality have been made, this Court has not shirked its responsibility of striking down enactments that are

in conflict with the Constitution, as witness the recent case of *Adjei-Ampofo v Attorney-General and President of the National House of Chiefs* [2011] 2 SCGLR 1104 and a string of other decisions. (See, for instance, *Adofo v Attorney-General & Cocobod* [2005-2006] SCGLR 42, *Sam (No.2) v Attorney-General* [2000] SCGLR 305 and *Mensima v Attorney-General* [1996-97] SCGLR 676.)

Another matter that is clear is that executive power is at its most legally authoritative level when it is backed by legislation, as it is on the facts of this case. This is an insight that Justice Jackson of the United States Supreme Court communicates, in relation to the powers of the United States President, in his famous concurring judgment in the *Youngstown Sheet & Tube Co. et al v Sawyer (The Steel Seizure Case)* (1952) 343 US 579. (The issue in this well-known case was whether the President of the USA was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the steel mills in the US). Justice Jackson there said, *inter alia*:

> "….The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their

disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events

and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter…. "

Whilst I am not suggesting that this Court should allow itself to be bogged down by the specificities of United States constitutional law (and it should be said that Justice Jackson's opinion has been much analysed), it is useful to take a cue from Justice Jackson to the effect that where the Executive branch of government acts with the authorisation of the legislature, one would be hard put to question the authority of the executive, unless, of course, the legislature itself exceeded its constitutional authority in enacting the enabling power for the executive. Scrutinising the legal enactments relied on by the plaintiff, I do not see any such excess of authority by Parliament.

To sum up on Issue 1, where executive action is authorised expressly by legislation, a rebuttable presumption of regularity and constitutionality is to be made in its support. To rebut this presumption, the person impugning the executive action will need to demonstrate clearly that the authorising legislation is inconsistent with the Constitution. This the plaintiff has failed to do on the basis of the legal submissions that she has advanced in this case.

***Issue 2***

The position that I have adopted in relation to Issue 1 practically disposes of Issue 2 as well. It is clear that I am of the view that the power vested in Parliament under the 1992 Constitution to make law for redrawing the boundaries of districts or for reconstituting districts in Ghana is a basis for a valid allocation to the President of the task of creating or reconstituting districts. The language of the agreed memorandum on this issue is somewhat misleading and therefore I have not repeated it. However, the substance of what it intends to convey is what I have expressed my view on. The power vested in Parliament to make law for the redrawing of boundaries of districts cannot itself be delegated. What can be delegated is either the power of subsidiary legislation or executive action to carry out the redrawing of the boundaries of districts or their reconstitution.

Indeed, it is, strictly speaking, inaccurate to refer to the allocation of responsibility to the President by Parliament in this context as being an act of delegation. What Parliament has done is to use its enabling authority to make provision for the determination of districts to choose the option of authorising executive action by the President to achieve this purpose.

The situation on the facts of this case is therefore different from that in *Professor Kwaku Asare v Attorney-General* (**WRIT J1/6/2011,** decided on 22nd May 2012**).**

In that case I said:

> "If the Minister by the exercise of his or her discretion excludes dual nationals from such a wide range of public office as to impair their right to participate in political activity intended to influence the composition and policies of the Government, then that would be unconstitutional. But beyond this, there is a serious question as to whether section 16(2)(m) of

> Act 591 is constitutional. It is against the spirit of the Constitution for Parliament to delegate to the Minister the authority which Parliament itself had received by delegation from the Constitution. This is against the sound policy embodied in the maxim: *delegatus non potest delegare.* In other words, my interpretation of article 8(2)(g) of the 1992 Constitution is that the mandate it gives to Parliament to specify offices from which dual nationals are excluded does not include a mandate to further delegate that authority to a Minister to exercise by Legislative Instrument. I am thus inclined to adjudge section 16(2)(m) to be unconstitutional, but I will say more about this later."

The plaintiff has seized on this passage to argue that it is authority for saying that Parliament cannot delegate the performance of functions imposed on it by the Constitution. In the plaintiff's reply to the 1st defendant's Statement of Case, she says:

> "When the framers of the constitution used the phrase "make provision for" in article 241(2) of the Constitution, they intended to impose an exclusive obligation on Parliament to use its law-making devices and procedures under article 106 to redraw or reconstitute boundaries of districts whenever the need arises. This power to so redraw and reconstitute district boundaries may not be delegated."

This view, with respect, is incorrect for the reasons already demonstrated in the discussion under Item 1 above. Furthermore, one should repeat, for emphasis, that the power allocated by Parliament to the President is not strictly speaking a delegation of its power of primary legislation, but rather the assignment of an

executive task to the President. The power of primary legislation is retained by Parliament; only the executive action needed for the determination of the districts is assigned. If my *dictum* referred to above gives the impression that an executive task cannot be given or "delegated" to the executive branch of government by Parliament, then it is clearly erroneous and it is hereby corrected. On the facts of *Professor Kwaku Asare v Attorney-General*, what was there delegated was the legislative task of expanding the categories of offices from which dual citizens are excluded. That was a task that went beyond executive action.

***Issue 3***

It will be recalled that this issue relates to whether or not sections 1(3) and 2 of the Local Government Act, 1993 (Act 462) which purport to give power to the President to direct and or request the Electoral Commission to review areas of authority of district, municipal and metropolitan assemblies, town, area, zonal, urban and sub-metropolitan district councils, and unit committees do not violate articles 45, 46, 241(2) and 106)(1) of the 1992 Constitution.

Article 46 provides as follows:

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

Thus though Article 46 prohibits the subjection of the Electoral Commission to the direction or control of any other person or authority, it seems to contemplate, by way of exception, the possibility of a law other than the Constitution providing for direction of the Electoral Commission, provided that that law is not inconsistent with the Constitution. The issue that arises then is whether the direction provided for in section 1(3) of the Local Government Act, 1993 is inconsistent with the Constitution. It could be argued that the independence of the Electoral Commission that is protected relates to electoral matters. On those matters, it is unconstitutional for any direction or control to be exerted over the Commission. However, on non-electoral matters, there could be scope for direction provided for by statute, so long as such direction does not reduce or imperil the efficacy of the Electoral Commission in the discharge of its electoral responsibilities. It is in this context that one should assess the constitutionality of section 1(3) of the Local Government Act, 1993, which, it will be recalled, states that:

> "(3) The President shall in the exercise of his powers under sub-section (2) (a) direct the Electoral Commission to make appropriate recommendations".

In my view, this direction is unlikely to impair the performance of the Electoral Commission's electoral responsibilities, whilst, on the other hand, it may improve the quality of the President's decision-making in the declaration of new areas as districts. On balance, therefore, I am inclined to decide that the President's power of direction under section 1(3) of the Local Government Act, 1993 is not unconstitutional. The argument laid out above would apply equally to section 2 of the Act, which provides as follows:

"The Electoral Commission shall at the request of the President review areas of authority of unit committees, town, area, zonal, urban and sub-metropolitan district councils and district, municipal and metropolitan assemblies and make such recommendations as it considers appropriate to the President."

***Issue 4***

Sections 3(1) and (2) of the Local Government Act, 1993 (Act 462) grants powers to the Minister of Local Government as follows:

**"Section 3—Establishment of District Assemblies, Etc.**

(1) The Minister shall by legislative instrument establish an Assembly for each district, municipality and metropolis and the Assembly shall constitute the highest political authority in the district.

(2) The instrument establishing a District Assembly, shall specify—

(a) the name of the Assembly and the area of authority of the Assembly;

(b) the number of persons to be elected to the Assembly and the number of persons to be appointed to the Assembly by the President;

(c) the jurisdiction, functions, powers and responsibilities of the Assembly;

(d) the place where the principal offices of the Assembly are to be situated; and

(e) such other matters as are required by this Act to be included in the instrument or are consequential or ancillary to it."

The question under Issue 4 is whether this provision is consistent with articles 241(2) and 106(1) of the 1992 Constitution. Clearly, this question has already been answered by the discussion under Issue 1. The Minister is part of the executive and acts for the President and therefore the discussion under Issue 1 relating to whether the language used in article 241(2) provides a sufficient legal basis for lawful legislative delegation of executive action applies here also, *mutatis mutandis.* Accordingly, on Issue 4, I would hold that sections 3(1) and 3(2) of the Local Government Act, 1993 (Act 462) are not unconstitutional.

***Issue 5***

Issue 5, it will be remembered, relates to whether or not any acts done or being done pursuant to sections 1(2), 1(3), 2 and 3(1) and (2) of the Local Government Act, 1993 (Act 462) by Parliament or the Electoral Commission of Ghana are inconsistent with the 1992 Constitution and should be declared null and void and same struck down as unconstitutional. It follows from the foregoing discussion that any acts done pursuant to the statutory provisions mentioned above by the Parliament or the Electoral Commission of Ghana is not inconsistent with the 1992 Constitution. Accordingly, no such act needs to be struck down as unconstitutional.

**Conclusion**

In sum, the plaintiff's action fails and the same is hereby dismissed.

**[SGD] DR. S. K. DATE-BAH**

**JUSTICE OF THE SUPREME COURT**

## ATUGUBA J.S.C

I have had the advantage of reading the transcendent judgment of my ultra distinguished brother Dr. Date-Bah JSC whose legal ability and sheer mental power act like a quarry, able to grind to fine sand the biggest and hardest rocks of legal problems. But even generals have batmen and so with much diffidence I venture the pursuant concurring opinion.

The first storm rages around the proper construction of article 241(2) as follows:

> "241(2) Parliament may by law *make provision* for the redrawing of the boundaries of districts or for reconstituting the districts." (e.s.)

It is difficult to think that the making of provision for something to be done is the same thing as doing that thing. I should have thought that the first expression is preparatory whereas the second one is direct effectuation. In any

case I have come to realise that statutes do construe themselves inherently. That is the intendment of Lord Denning MR in *Buchanan & Co. Ltd v. Babco Forwarding & Shipping (UK) Ltd* (1977) 1 All ER 578 C.A. at 522 – 523 when he said, with characteristic originality as follows:

> " … judges do not go *by the literal meaning* of the words or *by the grammatical structure of the sentence*. They go *by the design or purpose which lies behind it.* When they come upon *a situation* which is to their mind, *within the spirit – but not the letter of the legislation* they solve the problem by looking *at the design and purpose of the legislation* – at *the effect it was sought to achieve*. They proceed then to interpret the legislation *so as to produce the desired effect* …" (e.s.)

**The Constitution itself can be said to have made provisions for certain things to be done and in doing so has, inter alia, identified the person or persons who are to take certain steps towards the realisation of the objective sought to be achieved.** Thus in *Commission on Human Rights and Administrative Justice v. Attorney-General & Baba Kamara* [2011] SCGLR 746 it is stated as per holding 3 of the head note in response to the second defendant's contention that CHRAJ's mandate cannot be held to extend to the investigation of private individuals involved in a scheme of alleged corruption which engulfs both private and public officials, as follows:

> "The Supreme Court would grant the first declaratory relief endorsed on the plaintiff's writ because *the contention by the second defendant as to the mandate of the plaintiff commission under article*

*218(e) of the 1992 Constitution* was intended to stultify a significant part of the investigative operations of the plaintiff. *It was intended to defeat one of the purposes for which the Constitution had made provision for the establishment of the Commission on Human Rights and Administrative Justice.* …"

The articles of the Constitution which can be said to have made provision for the establishment of CHRAJ are as follows:

**"CHAPTER EIGHTEEN**

**COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTCE**

216. *There shall be established by Act of Parliament* within six months after Parliament first meets after the coming into force of this Constitution, *a Commission on Human Rights and Administrative Justice* which shall consists of –

(a) a Commissioner for Human Rights and Administrative Justice; and

(b) two Deputy Commissioners for Human Rights and Administrative Justice.

*APPOINTMENT OF MEMBERS OF COMMISSION*

*217. The President shall appoint the members of the Commission under article 70 of this Constitution.*

*FUNCTIONS OF COMMISSION*

218. The functions of the Commission *shall be defined and prescribed by Act of Parliament* and shall include the duty –

(a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;

(b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services ; … ”
(e.s.)

Again in *Fattal v. Minister for Internal Affairs* (1981) GLR 104 S.C. at 128 Taylor JSC said:

“*The Constitution, 1979, has made elaborate provisions spelling out* the circumstances under which, and *the authority by which a person who is a citizen by naturalisation can be deprived of his citizenship.* The provisions contained in article 17(3) are:

"17. (3) *The High Court of Justice may*, on an application *made in that behalf by the Attorney-General*, deprive a person who is a citizen of Ghana, otherwise than by birth, of that citizenship on the ground -

(a) that the activities of that person are inimical to the security of the State or prejudicial to public morality or the public interest; or

(b) that that citizenship was acquired by fraud, misrepresentation or any other improper or irregular practice."

Article 17 (3) (a) is virtually identical with section 10 of the Ghana Nationality Act, 1971 (Act 361), which provides:

"10. *The High Court of Justice may, on an application* made in that behalf *by the Attorney-General*, deprive any person who is a citizen of Ghana, otherwise than by birth, of that citizenship on the ground that the activities of any such person are inimical to the security of the state or prejudicial to public morality or the public interest."

*Under the constitutional scheme contained in article 17 (3) the authority to deprive a naturalised person of his citizenship is neither the executive nor the legislature. It is the judiciary acting by the High Court and upon constitutionally specified and proven grounds.* This provision is not new; article 17 (3) was substantially culled from article 10 (3) of the Constitution, 1969." (e.s.)

Quite clearly Taylor JSC here is saying that the Constitution, 1979 made provisions for the deprivation of citizenship by naturalisation and in so doing had identified the authority that is to effect the deprivation, i.e. the High Court of Justice.

Similarly in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd* (1995) 3 LRC 179 P.C. at 199 Lord Nicholls said concerning the assessment of the rate of interest payable for compulsorily purchased property:

> "The fourth issue concerns the rate of interest payable on the compensation. Under s 17(3) of the Resumption Ordinance money payable as compensation automatically carries interest *('shall bear interest')* from the date of resumption of the land. *Section 17(3A) makes provision concerning the rate of interest, in these terms*:
>
> > "*The rate of interest for the purposes of subsection (3) shall be such rate as the Lands Tribunal may fix* having regard *to the lowest rate payable* from time to time *by Members of the Hong Kong Association of Banks* on time deposits.'" (e.s.)

That in making provision for something to be done a Constitution or other law can co-opt the services or functions of any suitable person or authority is abundantly made clear by article 17 (4) of the 1979 Constitution as follows:

> " (4) There shall be published in the Gazette *by the appropriate authority* and within three months thereof the name, particulars and other details of a person who, pursuant to the provisions of this article –
>
> > (a) applies to be registered as a citizen of Ghana; or
> >
> > (b) has been registered as a citizen of Ghana." (e.s.)

It is axiomatic that these provisions of the 1979 Constitution are the same as their counterparts under the 1992 Constitution.

**Clearly then Parliament cannot be faulted for following the model precedents of the Constitution itself regarding the mechanics of making provision for something to be done.** The only rider to all this is that as Dr. Date-Bah JSC, the owner of the Laws, has discerned, the co-opted authority is one that can appropriately be co-opted having regard to the provisions of the Constitution or other relevant law.

The question that arises is whether the President has been validly and appropriately co-opted by section 1(2) of the Local Government Act, 1993(Act 462) to create and ascribe a name to a District.

As my invaluable brother Dr. Date-Bah JSC has already demonstrated the creation of a District is an executive function. Clearly, if the 1992 Constitution in article 5 views the creation of a region of Ghana as an executive act which the President can perform then it follows that the creation of a District which is only a sub-division of a region is also an executive act which can be properly performed by the President. The maxim *Magnus continet in se minus* is apposite here.

In any case article 58(1) and (2) of the 1992 Constitution provides as follows:

> "58(1) *The executive authority of Ghana* shall *vest in the President* and shall be *exercised in accordance with the provisions of this Constitution*.
>
> (2) *The executive authority of Ghana* shall *extend to the execution and maintenance* of this Constitution and *all laws made under* or continued in force by *the Constitution*." (e.s.)

Clearly therefore since the creation of a District is a matter of the executive authority of Ghana, Parliament has properly mandated the President to create a District under section 1(2) of Act 462 and **the President is constitutionally bound under article 58(2) to execute the same**.

As Lord Reid (Lords Morris and Guest concurring), said in *Westminster Bank Ltd v. Minister of Housing and Local Government* (1970) 2 WLR 645 H.L. at 651: "When we are seeking *the intention of Parliament* that *may appear from express words* but *it may also appear by irresistible inference from the statute read as a whole*." (e.s.)

**The inference that the creation of a district is an executive one flows from the framework of the Constitution. The Constitution itself makes such inferences. For example in consequence of the provisions of article 297(a) that an appointing authority is the authority to exercise disciplinary control over or remove an appointee from office and the President being the appointing authority for superior court judges, article 146(3) has no doubt as to whom a petition for the removal of such a justice should be made. It straightaway provides thus**:

> "146(3) If *the President receives a petition for the removal of a Justice of a Superior Court* other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal, he shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case. …." (e.s.)

Other deductions as to the location of statutory power from the framework of a statute are the series of cases beginning from *Akufo-Addo v.Quarshie-Idun* (1968) GLR 667, *Kuenyehia v. Archer* (1993-94) 2 GLR 525 S.C. etc which held that since the Chief Justice has the constitutional power to oversee the proper administration of the Judiciary the power to empanel a court being an administrative act, belongs to him/her.

Similarly, in *Amlalo v. The Republic* (1979) GLR 162 C.A. it was held that though the Criminal Procedure Act 1960 (Act 30) did not specify who is to file amended indictments or endorse the order of the court for separate trial on the bill of indictment, these duties fell to be performed by the Prosecution and the Registrar of the court respectively. This flow of judicial reasoning enriches the similar deduction in this case that the President being the head of the Executive is eminently suited to perform the administrative act of creating a District under the provisions of article 241(2).

It is true that statutes *in pari materia* whether current or expired are to be taken and construed as one. This however does not apply where the provisions of the subsequent statute are materially different from those of the earlier one. Even where a statute provides that it should be read as one with another statute, it is established as was stated by the Earl of Selborne L.C. delivering the judgement of the Privy Council in *Canada Southern Railway Co. v. International Bridge Co* (1883) 8 App. Cas. 723 at 727 that:

> "*It is to be observed that those two Acts are to be read together* by the express provision of the seventh and concluding section of the

amending Act; and *therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act.*" (e.s.)

Applying these principles to this case it is noticeable upon the plaintiff's own paragraphs 13 and 14 of her Statement of Case that the 1969 Constitution provided in article 156(3) as follows:

"(3) Subject to the provisions of this article, *Parliament may*, by or under an Act of Parliament, *establish* rural, urban, municipal or other local government councils or area committees."

And the 1979 Constitution provided in article 182(1) as follows:

"182.(1) For the purposes of local government in Ghana *there shall be established by an Act of Parliament* district and other local government councils."

However the 1992 Constitution has in varied language provided, aforesaid as follows:

"241(2) Parliament may by law *make provision for the redrawing of the boundaries of districts or for reconstituting the districts.*" (e.s.)

In *Sallah v. Attorney-General* (1970) 2 G&G 493 the issue that arose for determination by the Supreme Court is captured in Dr. S.Y. Bimpong-Buta's invaluable book: "The Role of the Supreme Court in the Development of Constitutional Law in Ghana" at 275 – 276 as follows:

> "*The plaintiff* in this case *was on 16 October 1967 appointed as a manager of a statutory corporation set up under the Statutory Corporations Act, 1961*. His *appointment was subsequently terminated by a letter issued by the Presidential Commission in purported exercise of its power of dismissal under the Constitution, 1969 Sched 1, s 9(1)* which provided:
>
> "9(1) Subject to provisions of this section, and save as otherwise provided in this Constitution, every person who immediately before the coming into force of this Constitution held or was acting in *any office established*
>
> (a) *by or in pursuance of the Proclamation* for the constitution of a National Liberation Council for the administration of Ghana and for other matters connected therewith dated the twenty-sixth day of February, 1996, or
>
> (b) *in pursuance of a Decree of* the National Liberation Council, or
>
> (c) *by or under the Authority of* that Council,
>
> shall, as far as is consistent with the provisions of this Constitution, *be deemed to have been appointed as from the coming into force of this Constitution to hold or to act in the*

*equivalent office under this Constitution for a period of six months* from the date of such commencement, unless before or on the expiration of that date, any such person shall have been appointed by the appropriate appointing authority to hold or to act in that office or some other office."

The plaintiff therefore brought an action before the Supreme Court *for a declaration that* on a proper and true construction of section 9(1), *the government represented by the Presidential Commission, was not entitled to terminate his appointment.* At the hearing, counsel for the plaintiff argued that on a proper construction of section 9(1) of the transitional provisions, the plaintiff's appointment as a manager did not fall within the phrase "*in any office established*" appearing in section 9(1)."

As carried at 277 of Dr. Bimpong-Buta's said book:

"The Supreme Court, by a majority decision, rejected the technical meaning and interpretation sought to be placed on the phrase *"in any office established."* The majority held that the word *"established" in the context of section 9(1)* must be construed as meaning that any person who held or acted in *any office created or set up* by the NLC Proclamation, a Decree of the NLC or under an authority of the NLC was caught by section 9(1). Since the plaintiff's appointment did not fall under any of the above heads, the termination of his appointment was unlawful. The majority did not mince its words in

rejecting the technical meaning and interpretation founded on Kelsen's jurisprudential theory of law." (e.s.)

**I hold therefore that the word "*establish*" in relation to the creation of Districts, etc by Parliament in the 1969 and 1979 Constitutions has the same meaning as expounded in the *Sallah* case and that by their replacement in the 1992 Constitution by the words of limitation *"may by law make provision for the redrawing of the boundaries of districts or for reconstituting the districts"* the framers of the 1992 Constitution did not intend that Parliament should by itself establish, create or set up the Districts but that Parliament should provide the legislative machinery to enable the boundaries of the Districts to be redrawn or for the Districts to be reconstituted.**

That being so and having regard to the framework of the separation of powers under the 1992 Constitution between the Executive, Legislature and the Judiciary it should be clear that the act of creating a District is an executive matter more suitable for the President as an executive president than any other arm of Government. Since the Legislature or the Constitution can provide otherwise as it did in the 1969 and 1979 Constitution, the Legislature had to create "the Districts" but whereas the 1992 Constitution has departed from that mode it clearly evinces a change of mind on the issue and the body that naturally can effectuate that change of mind is inferentially the Executive branch of government headed by the President.

Surely if the 1992 Constitution changed its mind from empowering Parliament to establish Districts by itself as did the 1969 and 1979 Constitutions it

would defeat the intent or purpose of making that change to hold that it is still Parliament that is to establish them. But it may be, as Dr. Date-Bah JSC has held that the 1992 Constitution left it open to Parliament to decide who, inclusive of itself, is to establish them. In *Labour Commission v. Crocodile Matchet* J4/52/2011, dated 22/6/2011 S.C., unreported, this court held that delegation of statutory power can be allowed either expressly or by necessary implication by a statute. Clearly if the different wording of article 241(2) is to have any new or changed effect then it clearly evinces an intent that with regard to the power therein conferred *Parliamentum potest delegare* if that were necessary, to effectuate that provision.

In any case a close look at the contentions of the plaintiff in paragraphs 17 to 21 of her statement of case shows that their effect as summarised in paragraph 19 thereof, namely "It is submitted that in all provisions of the Constitution where the phrase was used, Parliament acted to create or establish the body, law or institution charged by the Constitution leaving the procedures to a Minister or some other person appointed to administer the law passed by Parliament" is partly fallacious. I have already given the reasons on this score. However a cursory look at article 252 on the creation of the District Assemblies Common Fund and Grants-in-aid shows that both Parliament and the President have appropriate roles to play therein and therefore **the appropriateness of the role played is still the key test as already stated at length.**

As to whether sections 1(3) and 2 of Act 462 violate articles 45, 46 and 241(2) and 106(1) of the Constitution the swiftest answer is article 45(f) as follows: -

"45 The Electoral Commission shall have the following functions –

X X X

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

In view of section 10(4) of the Interpretation Act, 2006 (Act 792) and the Memorandum to that Act it will be wrong to unduly limit the scope of this provision by any common law canons of construction such as *ejusdem generis* (except when appropriate). It is trite law, even at common law, that the rules of the construction of statutes cannot be used to prejudice the scope or effect of a statute where the same is clear. Under section 10(4) of Act 792 the operative consideration, inter alia, is whether a particular construction conduces to good governance. Certainly the Electoral Commission in carrying out its functions under article 45(a) to (e) would have covered the whole country and thereby gained immense experience about, *inter alia*, the geographical and social factors of the communities of Ghana which can assist the president in determining the creation of a District and this conduces to good governance. In giving that Commission the directions covered by section 1(3) and (2), some functions are merely conferred by the President on the Commission. As to direction in the form of controlling that Commission, that notion is exploded by the fact that under those provisions the Electoral Commission is entirely free as to the kind of recommendations it is to make to the President. The Commission's independence is thereby wholly preserved and should be applauded.

As to the role of the Minister of Local Government in establishing the District Assemblies I have the support of the plaintiff who upholds such a role in

some paragraphs of her own statement of case. In paragraph 18 the plaintiff commenting on article 9(1) and (5) concerning the powers of Parliament to make provision for the acquisition or renunciation of citizenship referred to in her preceding paragraph 17 states thus:

> "Parliament consequently passed the **Citizenship Act, 2000 (Act 591)** in which *Parliament itself made provision for the acquisition and renunciation of Citizenship but in the administration of the procedures for the acquisition and renunciation gave that responsibility to the Minister for Interior and the President*. …" (e.s.)

Again in paragraph 19 referred to supra the plaintiff states thus:

> "It is submitted that in all provisions of the Constitution where the phrase was used, *Parliament acted to create or establish the body*, law or institution charged by the Constitution *leaving the procedures to a Minister or some other person appointed to administer the law passed by Parliament.*" (e.s.)

In any case, article 78(2) provides thus:

> "78(2) The President shall appoint *such number of Ministers of State* as may be necessary *for the efficient running of the State.*" (e.s.)

Surely if this provision is to have ample effect such tasks as are not inconsistent with the Constitution are to be assigned to such ministers by the President or other appropriate authority to ensure the smooth running of the State. Certainly in matters concerning Local Government the sector Minister must have a pivotal role, inclusive of the setting up of the District Assemblies in the

various Districts established by the President. Some instances of irresistible statutory deductions have already been given *ut supra*. In the same vein in *Merricks v. Heathcoat-Amory* (1955) 2 All ER 453, section 1 of the Agricultural Marketing Act, 1931 which fell for construction, provided thus:

> "*A scheme regulating the marketing of an agricultural product* by the producers thereof *may be submitted to the Minister* in accordance with Part 1 of Sch. 1 to this Act, *and the Minister, may* subject to the provisions of this section, *approve the scheme*."

At 455 it is stated thus:

> "Counsel's submission is that *this action is not against the Minister in his representative capacity but in another capacity.* He submits that the Minister has two other capacities: first, he may have an official capacity, not as representing the Crown but as *a person designated to carry out certain functions prescribed by Act of Parliament*, that is to say, *a person designated to carry out the function of laying before each House of Parliament a draft of the scheme, and, if the scheme be approved, of making an order.* That function, he submits, is performed by the Minister as a person designated and not as a representative of the Crown. *Alternatively, he submits that the functions of the defendant are purely personal and not performed in any official capacity at all.*" (e.s.)

Upjohn J, in rebuffing these submissions stated poignantly at 456 thus:

"I have heard full arguments from counsel for the plaintiff and from the Attorney-General, and I think in those circumstances I can properly express my own views as to the capacity in which the Minister acts in carrying out or proposing to carry out the relevant functions under s. 1 of the Agricultural Marketing Act, 1931. *It seems to be clear that in carrying out his functions under that section he is acting as representative or as an officer of the Crown. He is the Minister of Agriculture who is responsible for the conduct of agricultural matters in this country. As part of his general responsibility, he is the person who would naturally be designated in the Agricultural Marketing Act as the person to carry out the functions, purposes and policy of that Act.* It was no doubt for that reason that it was the Minister who was to approve any scheme under s. 1 (1). It was his duty, not , as I venture to think, merely as a delegated person, but acting in his capacity as Minister of Agriculture, that he had to consider the scheme, that he had to hear objections and representations, and hold inquiries, and he had the power and duty of making such modifications as he thought fit. It was his duty in his capacity as Minister of Agriculture and not merely as a delegated person that, if he were satisfied – *with the satisfaction he felt in his capacity as Minister of Agriculture and an official of the Crown* – that the scheme would conduce to the more efficient production and marketing of the regulated product, to lay before the Houses of Parliament a draft scheme, and so ultimately in the same capacity to make an order bringing the scheme into effect. *It seems*

*to me that from start to finish he was acting in his capacity as an officer representing the Crown.*" (e.s.)

**CONCLUSION**

It is important to stress that since the Constitution has vested the legislative power of the State in the Legislature under articles 93(2) and 106(1) an Act of Parliament, if wrongly declared as unconstitutional would itself be a grievous contravention of the Constitution. On the other hand one has to bear the admonition to the Judiciary in the Tanzanian case of *Ndyanabo v. Attorney-General* (2002) 3 LRC 541 C.A., where at 551 Samatta CJ said:

> "As was correctly stated by Mr. Justice E.O. Ayoola, a former Chief Justice of The Gambia, in his paper presented at a seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998:
>
> > '*A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.*'"

However, Samatta CJ qualified this statement by stressing that:

> " … *until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative. …[S]ince,* as stated a short while ago, *there is a presumption of constitutionality of legislation*, save where a claw-back or exclusive clause is relied upon as a basis

for constitutionality of the legislation, *the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption.*"(e.s.)

The plaintiff here is contending for an interpretation of constitutional provisions which by their letter, purport or framework do not clearly and necessarily, in substance at any rate, compel the upholding of the same against the impugned legislation. She has therefore failed to rebut the presumption of the constitutionality of the impugned provisions of Act 462.

For all the foregoing reasons I concur in the fulsome and translucent judgment of my uniquely able brother Dr. Date-Bah JSC dismissing the plaintiff's action.

**[SGD] W. A. ATUGUBA**

**JUSTICE OF THE SUPREME COURT**

**[SGD] S. A. B. AKUFFO [MS]**

**JUSTICE OF THE SUPREME COURT**

**[ SGD] S. O. A. ADINYIRA [MRS]**

**JUSTICE OF THE SUPREME COURT**

**[SGD] ANIN-YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**[SGD] N. S. GBADEGBE**

**JUSTICE OF THE SUPREME COURT**

**[SGD] V. AKOTO-BAMFO [MRS]**

**JUSTICE OF THE SUPREME COURT**

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