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

CORAM: AKUFFO (MS) JSC, (PRESIDING)
BROBBEY, JSC
DR. DATE-BAH, JSC
ANSAH, JSC
OWUSU (MS), JSC
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC

REFERENCE
NO. J6/1/2010
7TH JULY, 2010

T. T. NARTEY … PLAINTIFF

VRS

GODWIN GATI … DEFENDANT

R U L I N G

DR. DATE-BAH, JSC:-

This is the unanimous ruling of the Court on this reference.

Introduction

His Worship Ali Baba Abature, the Magistrate who has in this case made a reference to this Court, has exhibited commendable legal awareness. This is the first

reference that we are aware of that has come from a Magistrate's Court. He is, of course, well within his rights, under article 130(2) of the 1992 Constitution, to refer to this court:

> "(a) all matters relating to the enforcement or interpretation of this Constitution; and
>
> (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any authority or person by law or under this Constitution."

The context within which this Court will exercise its original jurisdiction, whether by way of a reference or otherwise, was set out lucidly by Anin JA in the *locus classicus* in *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592 at p. 604 as follows (in relation to the 1979 Constitution):

> "From the foregoing dicta, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118(1)(a) arises in any of the following eventualities:
>
> (a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;
>
> (b) where the rival meanings have been placed by the litigants on the words of any provision of the Constitution;
>
> (c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail;
>
> (d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up

under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's *original* jurisdiction under article 118. Again, where the submission made relates to no more that a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises."

Summing up the received learning from the many cases on this issue, I said in *Bimpong-Buta v General Legal Council* [2003-2004] SCGLR 1200 at p. 1253 that:

"Lower courts may *apply* the Constitution, but only the Supreme Court may, under its original jurisdiction, *interpret* or *enforce* the Constitution, within the meaning discussed above".

Accordingly, lower courts are to apply, themselves, unambiguous provisions of the Constitution which come before them, but they are obliged to refer to this Court provisions which are unclear for interpretation or enforcement. The learned Magistrate correctly appreciated this point and, although he did not fully comply with the details required to be submitted to this Court under Rule 67 of the Supreme Court Rules, the matter he has submitted to this Court for interpretation is interesting and appears to present a genuine issue for interpretation. His reference was in the following terms:

"In view of the fact that both parties are linking up the provisions of Section 30 of Act 32 with the provisions of section *(sic*) 17(1) of the 1992 Constitution, I am referring the matter to the Supreme Court for

interpretation as to whether or not the provisions of section 30 of Act 32 is *(sic)* inconsistent with the provisions of Article 17(1) of the 1992 Constitution."

This reference thus calls for an interpretation of article 17 of the 1992 Constitution on Equality and Freedom from Discrimination, which provides as follows:

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

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

(3) For the purpose of this article, "discriminate" means to give different treatment to different attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender occupation, religion or creed, whereby persons, of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons or another description.

(4) Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide:-

(a) for the implementation of polices and programme aimed at redressing social, economic, or educational imbalance in the Ghanaian society;

(b) for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for that matters relating to such persons ; or

(d) for making different provision for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of this Constitution.

(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter."

Interpretation of Article 17

This reference presents a genuine issue for interpretation because the concept of equality embodied in article 17 is by no means self-evident. To our mind, it is clear what article 17 does not mean. It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable. Soldiers, policemen, students and judges, for instance, have certain rights that other persons do not have. The fact that they have such rights does not mean that they are in breach of article 17. The crucial issue is whether the differentiation in their rights is justifiable, by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law. In other words, article 17(1) is not to be construed in isolation, but as part of article 17. This implies that the equality referred to in article 17(1) is in effect freedom from unlawful discrimination. Article 17(2) makes it clear that not all discrimination in unlawful. It proscribes discrimination based on certain grounds. The implication is that discrimination based on other grounds may not be unlawful, depending on whether this Court distils from article 17(1) other grounds of illegitimate discrimination which are not expressly specified in article 17(2).

Thus, for instance, in India, the Supreme Court has there held that mere differentiation or inequality of treatment is not *per se* equivalent to discrimination within the proscription contained in that country's equal protection clause. That clause, which is article 14 of the Indian Constitution, reads as follows:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The Supreme Court of India has said in relation to this clause that:

> "When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view." (See *K. Thimmappa v Chairman, Central Board of Directors* AIR 2001 SC 467. Quoted in Jain, Indian Constitutional Law,(LexisNexis Butterworths Wadhwa, 2009, 5th Ed.) p. 858.)

This approach is a reasonable one and flows from the obvious fact that no two human beings are equal in all respects. Accordingly, if the law were to treat all human beings rigidly equally, it would in fact result in unequal outcomes. Rigid equal treatment would often result in unfair and unequal results. Accordingly, it is widely recognized that equality before the law requires equal treatment of those similarly placed, implying different treatment in respect of those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as far as practicable, to attain the objective of equality of outcomes or of

fairness. In effect, equality of opportunity will often entail the law treating people differently in order to give them a fighting chance of attaining equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not conforming with the constitutional prescription that all persons are equal before the law, it would be thoroughly counterproductive.

Indian constitutional cases have grappled with this need for differentiation in order to attain legitimate legislative objectives. Thus in *Kedar Narh Bajoria v State of W.B.* AIR1953 SC 404, at 406 (quoted in V.N. Shukla's Constitution of India 11th Ed. By M.P. Singh (Eastern Book Company, 2008 at p.47) the Supreme Court of India said:

> "The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation."

In India, the test of validity of a statute which discriminates between classes of people is whether the "legislative classification" is reasonable. The Indian case law establishes that to pass the test of permissible classification two conditions must be met. These are: first, the classification must be founded on an intelligible differentia which distinguishes between persons or things that are grouped together from others left out the group; and secondly, the differentia must have a rational relation to the object sought to be achieved by the statute in question. (See Shukla's Constitutional of India pp. 47-48.)

This Indian approach is a useful one that can beneficially inform this Court's own approach to the interpretation of article 17. The constitutional prescription in Article 17(1) that all persons shall be equal before the law should not, and does not, disable Parliament from enacting legislation that gives different rights to different classes of people, so long as the differentiation in rights bears a reasonable relationship to the legislative purpose that Parliament is seeking to achieve and Parliament does not fall foul of any of the grounds set out in article 17(2). Of course, one should also add the caveat that the legislative purpose sought to be achieved by Parliament must be

constitutional. And, one of the constitutional prescriptions that must be complied with, pursuant to article 17(1), is that a law must operate equally on all persons similarly situated. The constitutional slogan has to be: equals must be treated equally by the law.

The facts underlying the reference.

At this point, it is useful to set out the facts of the case before the Magistrate from which this reference has arisen. The plaintiff, a lawyer, testified before the Magistrate that he had agreed with the defendant that in exchange for his legal services to secure damages in respect of a motor accident that had killed the defendant's sister, the plaintiff would be paid 15% of any damages that he would succeed in obtaining in court. The plaintiff's conduct of the case resulted in an award of 8,000 ghana cedis together with costs of 1,000 ghana cedis at the Krobo Odumase Circuit Court. In the plaintiff's view, if interest calculated in accordance with the provisions of CI 52, the Court (Award of Interest and Post Judgement Interest) Rules, 2005, was added to the judgment debt against the tortfeasor the total debt amounted to 15,000 ghana cedis. The plaintiff became aggrieved when the defendant agreed to allow the judgment debtor to pay the debt by monthly instalments of 500 ghana cedis. Accordingly he brought action against the defendant for 2,800 ghana cedis, representing 15% of the judgment debt. On 22nd September 2009, the Magistrate gave the plaintiff judgment by default on this action. On 30th October 2009, however, an application was made on behalf of the defendant to set that judgment aside on the ground that the plaintiff's writ against the defendant was for his legal fees and that by virtue of section 30(1) of the Legal Profession Act 1960 (Act 32) the action was a nullity. That section provides as follows:

> "A lawyer is not entitled to commence a suit for the recovery of fees for a business done as a barrister or solicitor until the expiration of one month after the lawyer has served on the party to be charged a bill of those fees ."

The plaintiff's response to this application was to argue that section 30 of Act 32 was inconsistent with Article 17(1) of the 1992 Constitution and therefore not binding. It was as a result of this argument that the Magistrate has found it necessary to refer this case to this court for interpretation.

Before we proceed to consider the applicability of article 17(1) to the facts of this case, we think it appropriate to draw the attention of courts which make references to this court to the need to comply fully with the relevant rule in the Supreme Court Rules which provides as follows:

"PART VII-REFERENCES TO THE COURT

67. (I) A reference to the Court for the determination of any question, cause or matter pursuant to any provision of the Constitution or of any other law shall be by way of a case stated by the court below, or by the person or authority making the reference.

(2) A case stated under sub-rule (I) of this rule shall contain-

(a) a summary of the action or matter before the court below or the person or the authority from which the reference is made;.

(b) the issue involved in the matter before the court or that person or authority;

(c) the matter or question referred for determination by the Court;

(d) any findings of fact relevant to the matter or question referred to the Court;

(e) the arguments of counsel, if any;

(f) the ruling or decision of the court below or of that person

or authority; and

(g) a statement by the court below that the determination of the constitutional matter or question is necessary to a decision of the action, where the reference is made under clause(2) of article 130 of the Constitution."

It would be helpful if courts referring cases stated to this court for interpretation would methodically attend to each of the items in the list set out in sub-rule 2 *supra*. Although the trial Magistrate in this case did not comprehensively deal with the list referred to above, the materials attached to his reference, including the judgments delivered in the case and the arguments by counsel, gave this Court a sufficient basis to give an opinion in this case, without remitting it to the Magistrate for a better and more detailed reference complying with Rule 67 of the Supreme Court Rules.

Applicability of Article 17(1) to the facts of this case.

In *Ayarna & Anor. V Agyemang & Ors* [1976] 1GLR 306, the Court of Appeal held that the true object of section 30 of the Legal Profession Act, 1960 (Act 32), was to enable the court to oversee and supervise the charging of professional fees if a dispute arose between a lawyer and his client as to the quantum or propriety of the fees charged and that compliance with section 30 of Act 32 was a mandatory pre-condition for the commencement of an action by a lawyer to recover his fees. This decision provides a rational and legitimate basis for differential treatment between lawyers and their clients. Parliament, with a view to protecting the interests of clients of lawyers, has thought it fit to enact section 30 of Act 32. This is a legitimate use of the legislative authority which is not inconsistent with Article 17(1) whose meaning has been explained above. In other words, the inequality or discrimination necessitated by section 30 of the Legal Profession Act, 1960 bears a just and reasonable relation to the purpose of that provision, which is to protect the clients of lawyers. The provision does not, thus, provide for unlawful discrimination

or unlawful inequality. It represents justifiable discrimination; it is not arbitrary nor unreasonable. Indeed, article 109 (1) expressly gives Parliament the authority to regulate professional, trade and business organizations. That article therefore confirms the interpretation of article 17(1) which has been laid out above.

Conclusion

In our view, therefore, the response to the issue referred to this Court by the Magistrate is that, in the context of the facts of this case, section 30 of the Legal Profession Act, 1960 is not inconsistent with the provisions of Article 17(1) of the 1992 Constitution.

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

DOTSE, JSC:-

I have had the advantage of reading the Ruling delivered by my respected brother, Dr. Date-Bah JSC and I agree with the summary of the facts, the statement and analysis of the law as well as the conclusions reached therein. This concurring opinion is just to re-emphasise my understanding of the issues referred to this Court by His worship Ali Baba Abature, presiding over the District Court, Community Centre, Accra.

In my opinion, the reliance by the plaintiff, (a Legal Practitioner of some years standing) on article 17(1)(2) and (3) of the Constitution 1992 to mount a defence for his non-compliance with section 30 of the Legal Profession Act, 1960 Act 32 before the issuance of a writ, demanding the payment of his professional fees is not only unwarranted but is clearly untenable and also inapplicable under the circumstances of this case.

In order to put the matters in proper context, it is appropriate to refer to the provisions of section 30(1) of the Legal Profession Act, 1960, Act 32. It provides as follows –

> **"A Lawyer is not entitled to commence a suit for the recovery of fees for a business done as a barrister or solicitor until the expiration of one month after the lawyer has served on the party to be charged a bill of those fees."**

Since the Constitutional reference is in respect of article 17(1) of the Constitution 1992, it is worthwhile to consider the provisions of the said article as well as the context in which those provisions have been provided in order for their full force and effect to be understood.

Articles 17(1)(2) and (3) of the Constitution 1992 provide as follows:-

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

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

(3) For the purpose of this article, "discriminate" means to give different treatment attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons, of one description are subjected to disabilities or restrictions to which persons of another description are not made subject

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

In the first place, what must be noted is that, article 17(2) is under chapter five of the Constitution 1992 which deals generally with Fundamental Human Rights and Freedoms. As a matter of fact, article 17 of the Constitution 1992 comes under the sub-heading "EQUALITY AND FREEDOM FROM DISCRIMINATION."

Under the circumstances, it is my considered opinion that in order to understand the philosophical underpinnings of article 17(1)(2) & (3) of the Constitution 1992, the entire provisions of chapter five of the Constitution 1992 must be read together and put in that context. If this is done, it is clear that the type of discrimination envisaged in article 17(1)(2) & (3) of the constitution when read alongside articles 12(2) and 17(1) of the Constitution 1992, gives the clearest indications that the fundamental rights and freedoms contained in chapter five of the constitution shall be enjoyed by all Ghanaian citizens subject only to the respect for the rights and freedoms of others and for the public interest. The provision that all persons shall be equal before the law is therefore to be understood in such a context, taking a cue from the fact that there are no absolute rights contained in the Constitution 1992.

Secondly, the Legal Profession Act, 1960, Act 32 must be understood and taken as a statutory law passed by Parliament of Ghana to regulate professional practice of law in Ghana. Act 32 is in my opinion consistent with the constitution 1992 in view of the clear provisions of article 109(1) of the Constitution which provides thus:-

1) **"Parliament may by law regulate professional, trade and business organisations.**

2) **The affairs of an organisation referred to in clause (1) of this article shall be conducted on democratic lines."**

Since legal practice is a profession, it is safe to conclude that an Act of Parliament such as the Legal Profession Act, 1960, Act 32, is not only consistent with article 109 of the Constitution but also consistent with article 11 of the Constitution on the Laws of Ghana.

Under article 11 of the Constitution, the Laws of Ghana consist among others, the constitution and enactments made or passed under the authority of parliament. Since Act 32 was passed by parliament and assented to by the President, it forms part of the Laws of Ghana, and there being no inconsistency or conflict with it and any provision of the Constitution 1992, the contention that section 30 of Act 32 is inconsistent with and violates article 17(1)(2) & (3) is not only absurd, but is untenable and clearly without any basis.

In my opinion, the request for Lawyers (under Act 32) to give a written demand for their fees one month before the commencement of a suit is mounted in the law courts to demand their legal fees pursuant to section 30 of Act 32, is only regulatory of the affairs of Lawyers and not discriminatory. The rationale for this to me is not only sound but in line with the ethics of the legal profession. This is further to ensure that the client of a lawyer is notified before the commencement of the suit at the instance of the lawyer that so much is either in arrears or due in the nature of legal fees. Apart from being regulatory of the Legal Profession, Section 30 of Act 32 must be seen also as preventing situations where the client is taken by surprise. In any case the right of the Lawyer to go to court has never been taken away.

Clearly therefore, the plaintiffs contention that section 30 of Act 32 is inconsistent with article 17(1)(2) & (3) of the Constitution 1992 and therefore discriminatory of him as a Lawyer must fail.

The trial District magistrate is therefore directed to dismiss as inapplicable the invocation of the Constitutional provisions in article 17(1)(2) & (3) and apply the provisions of the Legal Profession Act, 1960 Act 32 the way he understands it, there being no constitutional interpretation involved in the case.

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

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