THE MEANING OF 'JUDICIARY' IN LIGHT OF ARTICLES 126(1), 127(4) AND (5) OF THE COSTITUTION 1992: A CRITIQUE ON THE SUPREME COURT DECISION IN JUDICIAL SERVICE ASSOCIATION OF GHANA V ATTORNEY-GENERAL & NATIONAL PENSION REGULATORY AUTHORITY, FAIR WAGES COMMISSION[1]:

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Introduction

The venerable Lord Denning in his seminal book, the *Closing Chapter, Butterworth's*, 1983 at page 93 on the legislative approach or purposive approach in the construction of statutes as:

"…..The judges ought not to go by the letter of the statute. They ought to by the spirit of it. As to what is meant by the spirit, Lord Denning gives this answer at page 98 of his book of the above reference.

"The Judges always say they look for the intention of the legislature. That is the same thing as looking for its purpose. They do it in this way. They go by words of the section. If they are clear and cover the situation in hand, there is no need to go further. But if they are ambiguous or doubtful the judges do not stop at the words of the section. They will call for help in every direction open to them. They look at the statute as a whole. They look at the social conditions which gave rise to it. They look at the mischief which it was passed to remedy. They look at factual 'matrix'. They use every legitimate aid."

I will quote in graphic the statement by Jeremy Taylor in his book, *Holy Living* at page 189 as follows:

"In obedience to human laws we must observe the letter of the law where we can, without doing violence to the reason of the law and the intention of the law- giver; but where they cross each other, the charity of the law is to be preferred before his discipline, and the reason before the letter."

This paper seeks to analyse the decision of the Supreme Court in the JUSAG case supra and the interpretation placed on the word 'JUDICIARY' in light with the

[1] [2018] 116 GMJ 1 SC

Constitutional provisions as stated in articles 126(1), 127(4) and (5) of the Constitution 1992.

It is my humble estimation, respectfully to the Highest Court of the Land, that his Lordships placed a narrow and mechanical meaning on the word 'judiciary' as stated in the constitutional provisions *supra*. His Lordships interpretation using the narrow and literal approach to interpreting constitutional provision in this modern era of our jurisprudence runs counter to modern jurisprudence in constitutional interpretation.

This was a case that bordered on the interpretation of certain provisions of the Constitution 1992 and for the purposes of this paper I will limit my discussions to provisions of articles 126(1), 127(4) and (5) of the Constitution 1992, because most of the issues raised in the case has been brilliantly dealt with by the court. It behoves the court to apply the principles of constitutional interpretation as the yardstick in arriving at its decision. Lately, in our legal jurisprudence, constitutional interpretation abhors the primitive doctrinaire and literal approach to interpreting constitution. However, I know his lordships are not oblivious of this fact. In the celebrated case and oft-quoted case of *Tufuor v Attorney*[2] the Supreme Court faced with the interpretation of the constitution said:

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

Justice Aharon Barak, President of the Supreme Court of Israel, also said thus:

"….the aim of interpretation in law is to realize the purpose of the law; the aim in interpreting a legal text (such as a constitution or a statute) is to realize the purpose for which the text was designed. Law is thus a tool designated to realize a social goal."

[2] [1980] GLR 637 at 647

The learned justice is of the view that the purposive approach to interpreting a Constitution is the preferred approach and therefore strict and doctrinaire approach has outlived its usefulness and it is therefore behind time.

In a more recent case of *Sabbah(No.2) v The Republic (No.2)*[3], the Supreme stated per Wood CJ at page 422 that:

"Another cardinal rule of construction requires that the constitutional text under consideration must not only be broadly and liberally interpreted, but purposively construed as a whole, in the context of its own wording. Constitutional adjudication does not therefore admit piecemeal and out-of-context mechanical interpretation of words in the written text."

This principle was earlier reiterated and applied by the Supreme Court in the case of *New Patriotic Party v Attorney-General*[4]; per Archer CJ.

These views of the Supreme Court are in conformity with the Interpretation Act, 2009 (Act 759). Section 10(4) provides:

"Without prejudice to any other provision of this section, a court shall construe or interpret a provision of the Constitution or any other law in a manner,

a. that promotes the rule of law and the values of good governance;

b. that advances human rights and fundamental freedoms;

c. that permits the creative development of the provisions of the Constitution and the laws of Ghana, and

d. that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of laws of Ghana.

Having stated these few principles that govern Constitutional interpretation, I will proceed on the voyage of analyzing the decision of the Supreme Court by first stating the facts of the case.

Facts of the case

[3] [2015-2016] SCGLR 402
[4] [1993-94] 2 GLR 35 at 50

The Plaintiff instituted the instant action as a corporate citizen of Ghana pursuant to article 2(1) of the Constitution 1992 for the benefit of its members, whose pension rights guaranteed by the Constitution 1992 are allegedly being infringed upon by the defendants. Additionally, the plaintiff states that, in so far as some of the reliefs it seeks against the defendants, go beyond the immediate confines of its members, (who are to a large extent the non-bench members of the Judicial Service) the plaintiff should be deemed to have commenced the action as a matter of public interest also pursuant to article 2(1) of the Constitution 1992. In that respect, the plaintiff is deemed to be seeking to enforce the pension rights of the Judges of the Superior Court of Judicature and also of the lower court, who by the nature of their profession cannot pursue their own grievances through the court system whilst still in active public service. This then explains the basis of the reliefs which the plaintiff claims against the defendants which are as follows:

i. Declaration that upon a true and proper construction of article 127(4) and (5) of the Constitution 1992, all the persons serving in the judiciary were entitled to be placed on CAP 30 pension scheme upon the coming into force of the 1992 Constitution.

ii. Declaration that the practice of placing or continuing to place some of the persons serving in the Judiciary on or under the SSNIT pension scheme after the coming into force of the Constitution 1992 was wrongful and violates article 127(4) of the Constitution 1992.

iii. Declaration that the practice of placing or continuing to place Judicial Officers falling under article 161(b) and (c) of the Constitution 1992 on the SSNIT pension scheme, while leaving the Judicial Officers on the bench, namely Judges and Magistrates under article 161(a) of the Constitution 1992, on CAP 30 pension scheme was discriminatory, contrary to article 17(2) of the Constitution 1992.

iv. Declaration that all persons serving in the Judicial Service were and are entitled to have their gratuity and pension entitlements computed or re-computed under CAP 30 pension scheme and paid the difference of sums due and owing them between the two schemes, if any, together with interest, including a refund of all SSNIT contributions deducted from their salaries with effect from 1992.

v. Declaration that section 213 (1) (a) of the National Pensions Act, 2008 (Act 766), seeking to bring to an end the operation or continuing operation of CAP 30 pension scheme in Ghana and compulsorily placing Judges of the Superior Courts and Judicial Officers under a contributory pension scheme under Act 766 violates the letter and spirit of Articles 127(4) and (5) of the Constitution 1992.

vi. Declaration that section 220 of the National Pensions Act, 2008 (Act 766) offends and contradicts article 71(1) and 127(4) and (5) of the Constitution 1992 and the same is null and void to the extent of the inconsistency.

vii. Declaration that upon a true construction of article 149 of the 1992 Constitution, Judicial Officers falling under article 161 of the Constitution 1992 are not amenable or do not fall under the purview of SSSGS scheme administered by the 3rd Defendant.

viii. Declaration that the continuing placement of the Judicial Officers within the plaintiffs rank on SSSGS scheme after migrating the Judges and Magistrates, is not only discriminatory, contrary to article 17(2) of the Constitution 1992, but violates their rights.

ix. An order directed to the 3rd Defendant to ensure the restoration of the said affected persons to their positions status quo ante, away from the 3rd Defendant's jurisdiction.

Analyses of the decision of the Supreme Court

For the purposes of this article I am not going to analyse all the reliefs because the Constitutional court brilliantly dealt with most of the issue in an impeccable manner. Those issues do not call in question, therefore I will only limit myself to the issue touching on articles 126(1), 127(4) and (5) of the Constitution 1992.

i. Whether or not the constitutional requirement in article 127(4) of the Constitution 1992 that the 'gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the

consolidated fund' imposes a duty to place the plaintiff's members on the CAP 30 pension scheme and not the SSNIT pension scheme alternatively.

ii. Whether or not the expression "all persons serving in the judiciary" appearing in article 127(4) of the Constitution 1992 applies only to the judges and magistrates, to the exclusion of all other judicial service employees, including the non-bench judicial officers.

The defendants raised jurisdictional issue that the plaintiff's relief under the provision of the Constitution 1992 did not raise any genuine and real issues of constitutional interpretation and therefore its invocation of the original jurisdiction of the court was moot. The Supreme Court declined the invitation by the defendants and unanimously held through the eminent jurist, Dotse JSC as follows:

"Indeed, the details of the relief which the plaintiff's are seeking before this court has been considered and the responses of the defendants have been taken into consideration. It is thus obvious that serious and real issues of constitutional interpretation have been raised to evict the type of concern and response given thereto. Taking the plaintiff's reliefs 1 and 2 into consideration, it is clear that serious, genuine and real constitutional issues have been raised. For example, the question of who are to be considered members of the judiciary under article 127(4) and (5) of the Constitution 1992 to bring them under the CAP 30 pension scheme when the Constitution 1992 came into force is crucial. Furthermore, the second relief claimed by the plaintiff also raises some genuine issues of interpretation such as who among the Judiciary under the Constitution 1992 have been placed on SSNIT pension scheme contrary to article 127(4) of the Constitution."

The Supreme Court in coming to the above decision took a cue from the seminal book of Justice Date-Bah, "*Reflections on the Supreme Court of Ghana*" in which the learned Judge discussed and analysed some of the notable pronouncements on the issue of jurisdiction of the Supreme Court in the case of *Republic v Special Tribunal, Ex-parte Akosah*[5].

Decision of the court

[55] [1980] GLR 592 at pages 604-605

The Supreme Court by a majority of 4-1 with Atuguba JSC dissenting held that:

"…it is clear that, the expression "judiciary" as used throughout the Constitution 1992, can only be deemed to refer to the body of persons exercising judicial power in the sense that they are charged with the responsibility of administering justice. Thus, article 127(4) can ***literally*** be said to mean that, "*the administrative expenses including all the salaries, allowances, gratuities, and pensions payable to or in respect of persons administering justice or who have been given responsibility of interpreting the laws of the country shall be an encumbrance or a lien on the consolidated fund*".

With the above definition and explanation of the entire article 127(4), it is clearly apparent that, taken in context, where the word "judiciary" is used in article 127(4) there is a clear reference to only person exercising judicial power and administering justice, in the sense that they are those persons entrusted with the responsibility of interpreting the Constitution and laws of the country in contra distinction to those in the Executive and Legislative branches of Government and therefore does not include the supporting staff of the judiciary who do not exercise judicial power….."

Dissenting opinion by Atuguba JSC.

"It is therefore quite clear that at common law, employees such as registrars, bailiffs, court clerks, etc are part of the courts. This is statutorily supported by section 112 of the Courts Act, 1993 (Act 459). It must also be said that it is notorious that the Constitution has largely been based on the 1969 and 1979 Constitutions of Ghana. Therefore, since the judiciary has been set out in virtually the same manner under these constitutions and the officers that have referred to supra, have consistently been judicially held to be part of the courts, it follows that they are part of the judiciary. It is trite law that the legislature legislates with regard to the existing law and is deemed not to alter the same unless very expressly or by necessary implication otherwise.

The fact that the whole of Chapter 11 of the Constitution 1992 is headed "THE JUDICIARY" should be noted. It therefore stands to reason that this chapter, *inter alia*, sets out the organs or components of the judiciary. Furthermore, article 127(1) provides that "*in the exercise of the judicial power of Ghana, the judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority*." This clearly shows that for the purposes "*of the exercise of the judicial*

power of Ghana", it is necessary for the judiciary to perform both judicial and administrative functions.

Clearly since it is not judges or magistrates who perform, at any rate, the bulk of the administrative functions for the benefit of the judges and magistrates but the constitution categorises those functions as ones performed by the judiciary, it must follow that those other persons who perform them are constitutionally constituted as part of the judiciary. Since all these actors in the said judicial and administrative functions must be paid for their services and purchases incurred for their undertaking must also be paid for, article 127(4) provides starkly to that effect. Quite clearly the phraseology, "the judiciary, in both its judicial and administrative functions, including financial administration" means that the constitution envisages that apart from the judicial functions, the Judiciary will be performing also administrative functions including even final administration.

I respectly submit that the majority decision of the Supreme Court adopted a literal approach in interpreting the provisions of the Constitution. Literal approach used in the interpretation of the constitution is outmoded and therefore in this our modern day constitutional dispensation the preferred approach is the purposive to interpretation. In the case of *Asare v Attorney-General*[6] the Supreme Court unanimously held thus:

"modern judicial technique had tended away from the simple literalism towards a purposive approach to interpretation which was more like likely to achieve the ends of justice. It was a flexible approach which would enable the judge to determine the meaning of a provision, taking into account the actual text of the provision and the broader legislative policy underpinnings and purpose of the text……"

In *Danso Acheampong v Attorney-General*[7], the Supreme Court unanimously held that:

"this reading of the constitutional provisions is very literal. These days, literal approach to statutory and constitutional interpretation is not recommended. Whilst the literal interpretation of a particular provision may, in this context, be the right one, a literal approach is always a flawed one, since even common sense suggests that a plain meaning interpretation of an enactment needs to be checked

[6] [2003-2004] SCGLR 823
[7] [2009] SCGLR 353 at 358

against the purpose of the enactment, if such can be ascertained. A literal approach is one that ignores the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question."

I humbly disagree with the majority decision of the Supreme Court respectfully and to my mind, the dissenting opinion represent the true position of the law. His Lordship Justice Atuguba JSC used the purposive approach in analyzing the above constitutional provisions.

Discussions

I will start by quoting in *extensor* the provisions as contained articles 126(1) 127(4) and (5) of the Constitution 1992 for ease of reference and better appreciation of the discussing.

"Article 126

The Judiciary shall consist of-

a. the Superior Courts of Judicature comprising-

    i. the Supreme Court;
    ii. the Court of Appeal; and
    iii. the High Court and Regional Tribunals.

b. Such lower courts or tribunals as Parliament may by law establish.

"Article 127(4) and (5)

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

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

First and foremost the provision in article 126(1) of the Constitution 1992 defined "JUDICIARY" in terms of "COURTS" and not in terms of "JUDGES" even though judges are considered *all in all* in the courts.

The Black's Law Dictionary 9th edition, by Bryan A. Garner, at page 924, defines "Judiciary" as follows:

1. The branch of government responsible for interpreting the laws and administers justice.
2. A system of courts.
3. A body of Judges – also termed Judicature – Judiciary – adj.

A careful look at this definition from the authoritative dictionary, suggest that the term "Judiciary" cannot be interpreted to mean only Judges looking at it from a broader perspective and within the context of constitutional interpretation. The Supreme Court used a literal approach in coming to a conclusion that a "Judiciary" meant only judges.

Applying one of the canons of interpretation, *noscitur a socii rule*, which means that a word or phrase is not to be construed as if it stood alone but in the light of its surroundings. Simply put, the rule posits that a word or phrase must always be construed in the light of its surrounding words.

The *Black's Law Dictionary* defines it at P. 1084 as follows:

"A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."

In *Bourne v Norwick Crematorium Ltd*[8], Stamp J said:

"English words derive colour from those which surround them. Sentences are mere collection of words to be taken out of the sentence, defined separately by references to the dictions or decided cases and put back into the sentence with the meaning which you have assigned to them as separate words."

In *Republic v Minister of Interior; Ex Parte Bombelli*[9], the court per Koranteng-Addow held that, by the canons of interpretation, i.e *noscitur a sociis rule*, the word "Orders" in article 47(a) of the Constitution 1979 meant "orders" in the form of rules and regulations – not a command such as the order issued by the minister."

A.D. Badaiki, *Interpretation of Statutes* at P. 56 offers a very elucidating explanation and incisive example of this uncommon rule:

[8] [1961] 1 WLR 691 at 696
[9] [1984-86] 1 GLR 204

"this is a presumptive principle in statutory interpretation. It means that the meaning of a word should be understood from its context. Ambiguous or doubtful words may be determined by reference to those words appearing in association with them …. For example, the word "bull" in the Stock Exchange Act should; under this rule of construction, be construed as meaning a "spectacular" who acts as a middleman between the sellers and buyers of shares."

Having stated this canon rule of interpretation, I shall apply it to meaning of the words or phrases which defines "judiciary" in the Black's Law Dictionary supra.

From the first definition, "a branch of government" can never be interpreted to mean only judges but judges and its supporting staff, like bailiffs, court clerks, registrars, typist etc.

A system of courts comprises not only judges but those who support the judges to make the administration of justice very effective and efficient.

A body of judges means judges and its supporting staff and not judges in isolation.

The unanimous decision of the Supreme Court that "Judiciary" means only "Judges" was a narrow and literal view. This approach to interpretation, especially constitutional interpretation has outlived its usefulness and it is dead and buried. It is behind time and stale.

The courts have consistently recognized the Registry staff as part of the courts.[10] It is therefore quite clear that at common law, employees such as registrars, bailiffs, court clerks, etc are part of the courts. This is statutorily supported by section 112 of the Courts Act, 1993 (Act 459).

The effective administration of justice by the judiciary is not a lonely path, no man is an island, but interdependent on each another. It is common knowledge that, apart from the judges the "judiciary" has other units like the court registry, court clerks, court secretaries, typist etc. In mathematical parlance, I would say the judges are the 'set' and the staff a 'subset' of the Judiciary. They come together and make the "judiciary" a complete whole. Judges alone cannot effectively administer justice without the help of its supporting staff. Cases cannot be mentioned in court without court clerks, judgments of courts cannot be made public without the registries of court, adjournments, recording information cannot be done effectively

[10] See Forson v the Republic [1976] 1 GLR 128 at 147; Ameyibor v Komla [1980] GLR 820 CA at 824

without the help of a court clerks and typist. Cases cannot be filed in court without the help of the registry of courts. In *Ampiah Ampofo v Commission on Human Rights and Administrative Justice*[11], the plaintiff challenged as unconstitutional the panel of CHRAJ that investigated corruption charges against him on the ground that the CHRAJ consists of only three person enumerated in article 216, whereas the panel that investigated him included some other persons. Rejecting the contention Dr. Twum JSC (his brethren concurring), held at 234-235 as follows:

"it is not clear whether the Commission was established as a body corporate. In such situations it is advisable to proceed empirically. In my view, the word "Commission" appearing in Chapter Eighteen of the Constitution is used in two senses. In article 216 and 217, it must refer to three persons, namely, the Commissioner and two Deputy Commissioners. In particular, when article 217 speaks of appointing the members of the Commission, it can only be referenced to these three persons. But where article 220 provides for the creation of regional and district branches of the Commission, this can only refer to something which can have branches. It would lead to manifest absurdity if the word "Commission" in article 220 were to be interpreted to mean the three person who would thus have regional and district branches. In this context, the word must refer to an organisatuon, a body, an institution, an establishment or a bureaucracy."

Similarly, at page 242 Dr. Date-Bah JSC forcefully said:

"Applying a purposive to the interpretation or the provisions of Chapter Eighteen of the Constitution 1992 and the CHRAJ Act, 1993 (Act 456), I am of the view that the interpretation contended for by the plaintiff is not viable and not in keeping with the spirit and purpose (both subjective and objective) of the provisions concerned. *See Asare v Attorney-General [2003-2004] 2 SCGLR 823*. I am further of the view that the Commission should be viewed as a particular kind of statutory corporate entity comprising the Commissioner, the two Deputy Commissioners and the staff employed by them to assist them in carrying out the functions of the Commission."

His Lordship continued in this vein at p. 244 thus:

"A concept of the commission as a corporate body comprising the Commissioner and his or her two deputies as well as the staff employed by them to assist them in carrying out their functions is compatible with the language of the relevant

[11] [2005-2006] SCGLR 227

provisions and make better sense. Although section 2 of Act 456, reflecting article 216 of the Constitutions, provides that the Commission and the Deputy Commissions, this provisions need not be interpreted to mean that the Commission consists exclusively of these three. The employees of an organization can hardly be sensibly conceived of as part from the organization. Thus the employees of the Constitution, for which section 20 of Act 456 makes provision, can reasonably be interpreted as forming a part of the Commission. This implies that what the Commission does through its employees, it does itself."

In this sense, the constitution must be interpreted in a way to satisfy the susceptibilities of Ghanaian society. The Constitution does not donate a right with one hand and snatch it away with the other hand at once.[12] The Constitution must be construed in line with the constitutional democracy which it has established for the country.

It has been frequently said that jurisdiction attaches to the court and the judges.[13]

Altogether, in interpreting the Constitution, its provision must be given broad, global, liberal and positivist approach in order not to defeat the well the well-thought out objects for which it is made. That way, the expected beneficial construction, *ut res magis valeat quam pereat*, of the Constitution will be actualized with salutary ends.

This reasoning should apply to the word "Judiciary" as used in the Constitution 1992. It is to be emphasized however that the word "Judiciary" cannot be given the same preemptory and narrow meaning throughout the constitution.

Consequently, in my arguments so far advanced, I associate myself with the purposive approach used in interpreting article 127(4) as held in the dissenting opinion by Atuguba JSC. It therefore follows that any gratuities and/or pensions payable to the employees of the judicial service must be charged on the Consolidated Fund and payable to them therefrom and not from the SSNIT pension.[14] However, as stated by the learned Justice, Atuguba JSC, "the constitution has not set up any particular pension fund for the plaintiff and I cannot therefore peg the same for them on CAP 30 pension scheme. Whatever pension scheme there is for them the moneys payable for same must come from

[12] Osadebay v A-G, Bendel State (1991) 1 SCNJ 162
[13] Asare v the Republic [1968] GLR 37
[14] Brown v Attorney-General (Audit Service Case) [2010] SCGLR 183

the Consolidated Fund". This line of reasoning by the learned judge is in tune with modern day constitutional interpretation and it is very commendable.

CONCLUSION

I will conclude my discussion by quoting a case from the Nigerian jurisprudence on the reason which propel the courts to chart different considerations in construing the Constitution. In *Director SSS v Agbakoba*[15], where Ogundare JSC said:

"One does not expect to find a Constitution minute details for it is necessarily brief and comprehensive. It prescribes outlines, leaving the filing up to be deduced from the outlines. In setting up an enduring framework of government, the framers of our Constitution undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men and women, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative provisions which are subject to continuous revision with the changing course of events, but as the revelation of great purposes which were intended to be achieved by the Constitution as a continuing instrument of Government. The courts will give especially broad, liberal construction to those constitutional provisions designed to safeguard fundamental rights."

Respectfully, I am persuaded by this principle from our Nigerian jurisprudence and I submit that articles 126(1) 127(4) and (5) of the Constitution 1992 cannot be interpreted literally, but broad and liberal approach is the preferred one. In the light of this, "Judiciary" cannot only be interpreted to mean only judges who exercise judicial power but it also includes employees of the judicial service who perform the administrative functions at the judiciary.

*B.A (Ghana); LLB (Ghana), BL.

[15] (1993) 3 NWLR (pt. 595 314 at 357