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WRITE-UP

OVER THE BAR - JUSTICE KULENDI'S SHOT.

A REVIEW OF THE DECISION OF THE SUPREME COURT IN THE CASE OF ASSOCIATION OF FINANCE HOUSES VS. BOG & ATTORNEY-GENERAL

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A review of the decision of the Supreme Court in the case of ***ASSOCIATION OF FINANCE HOUSES vs. BoG & ATTORNEY-GENERAL***

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A. INTRODUCTION.

The author publishes this paper for three main reasons.

First, it is a contribution to our administrative and constitutional law from my own viewpoint. A practitioner's view is not the law as it is entirely within the province of the Supreme Court to lay down the law and we are all bound to follow it. Nevertheless, it is has been the practice to subject decisions of the courts to some scrutiny especially when the decisions deal with matters of importance, in this case our constitutional law.

Secondly, it appears practitioners have abandoned the practice of subjecting decisons of the courts to scrutiny. The practice of subjecting decisions of the court to review promotes a healthy bench bar interaction that serves the justice system better as the debates yield suggestions which are useful for guidance of both bench and bar.

Also, reviewing judgments of the courts ensures judicial accountability. This is necessary because, as the courts are busily acting watchdog over the rest of us ensuring that we are all acting in alignment with the law, there must also be eagle eyes placed on them to ensure that the courts are themselves aligned with the law when they carry out their constitutional task of teaching us where we should stand in relation to the law. The watchman himself must be watched.

In recent times the Judges have reaffirmed the right of citizens to subject their judgments to microscopic scrutiny. This happened just before the Supreme Court delivered its judgment in the recent election petition. Indeed this position was thunderously echoed by His Lordship Justice Emmanuel Yonny Kulendi whose decision, concurred in by the rest of his brothers and sisters, is the subject of my present paper.

In affirming the right of persons to subject judgments of the courts to scrutiny and even vicious criticism, His Lordship's only caveat was that such criticism must ensure that the sanctity and

respect for the justice system which protects all of us be maintained and statements which tend to interfere with the due administration of justice be avoided.
It is provided by article 11(1)(c) and (7) of the 1992 Constitution of the Republic of Ghana thus;

> "(1) The laws of Ghana shall comprise
> (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
> (7) Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall -
> (a) be laid before Parliament;
> (b) be published in the Gazette on the day it is laid before Parliament; and
> (c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two thirds of all the members of Parliament."

It will appear that the above constitutional provisions are plain and free of any ambiguities whatsoever. Practically, however, lawyers and others, have disagreed regarding when the provisions of article 11(7) are applicable rendering it mandatory to lay before Parliament, standards, principles and/or guidelines prescribed or made by persons or authorities exercising power pursuant to the Constitution or other statute, and in accordance with which all persons or specific persons must comply and order their affairs.

The question that arises is whether such standards, principles and/or guidelines prescribed or made in accordance with which all persons or specific persons must comply and order their affairs, are Orders, Rules and Regulations within the meaning of articles 11(1)(c) and (7) which must be laid before Parliament as a condition sine qua non to their coming into force?
Reading the constitutional provisions under consideration, and in their plain context, one can easily reason that to the extent that such standards, principles and/or guidelines prescribed or made by persons or authorities exercising power pursuant to the Constitution or other statute, partake of Orders, Rules or Regulations, then they are squarely caught by the provisions of article 11(7) of the Constitution.

A few cases however justify describing the view above taken as simplistic. When the courts were called upon in some of these cases to decide whether a particular standard, principle and/or guideline prescribed or made by a particular person or authority in the exercise of a power pursuant to the Constitution or other statute are Orders, Rules and Regulations within the

meaning of article 11(7), the courts have provided a clear explanation as to why the standard, principle and/or guideline made by the person or authority, does not fall within the meaning of an Order, Rule or Regulation within the meaning of article 11(7) of the Constitution thereby making them exempt from being laid before Parliament.

B. ASSOCIATION OF FINANCE HOUSES vs. BANK OF GHANA AND ATTORNEY GENERAL [2021]DLSC10757

In Writ No. 31/04/2021 the Supreme Court decided in the case of **ASSOCIATION OF FINANCE HOUSES vs. BANK OF GHANA AND ATTORNEY GENERAL [2021]DLSC10757** dated the 28th day of July, 2021 that directives made by the Bank of Ghana [BoG] in the exercise of powers conferred on the BoG pursuant to sections 56 and 92 of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) [the Act or Act 930] were administrative directives which did not fall within the provisions of article 11 clause 7 of the Constitution.

The Supreme Court encapsulated the context of the dispute in the following words;

> "Before us is a writ invoking the original jurisdiction of this Court brought by the Plaintiff seeking the interpretation and the enforcement of the 1992 Constitution, and appropriate orders and directions to give effect to any orders made."

The Court then observed as follows;

> "The Plaintiff is of the view that "the directives of 27th December 2018, which were made pursuant to Sections 56 and 92 of Act 930, are legislative instruments that is to be precise, rules and regulations within the intendment of Article 11(1)(c) of the 1992 Constitution and therefore ought to be promulgated in accordance with Article 11(7) of the 1992 Constitution of the Republic of Ghana and as a result, could only come into force upon being laid before parliament for a period of 21 sitting days and published in the gazette on the day it was laid before parliament". The Plaintiff contends that the failure of the 1st Defendant to comply with this provision of the Constitution renders the directives unconstitutional, and for that matter, null and void."

Distilling the question that the Court was required to determine, the Court set it out thus;

> "At issue in this case is the nature of the directives made by the 1st Defendant entitled *The Bank of Ghana (BoG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs and Non-Executive Directors of Regulated Financial Institutions* made

> pursuant to the provisions of sections 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930).

It is important to note from the quotation above extracted from the Court's judgment that there is no question whatsoever that the directives the subject matter of the proceedings before the Court were made in accordance with the BoG's powers under sections 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930).

Also important is the Court's observation that;

> "The Plaintiff reproduce[d] section 92(1) and 92(2) of the Act 930 and says that the heading alone of section 92 "makes it clear" that section 92 differs from section 56 in the sense that section 92 is for regulation **via directives** and section 56 is for regulation **via rules."**

C. DECISION OF THE COURT AND CRITIQUE.

The unanimous decision of the Court as earlier noted, was delivered by His Lordship Justice Emmanuel Yonny Kulendi. His Lordship Kulendi JSC took the view that the directives in contention were administrative and not legislative in nature for which reason the said directives did not fall within the ambit of article 11(7) of the Constitution. His Lordship's words are as follows;

> "We are of the considered opinion that the directives issued by the 1st Defendant are **administrative actions** that the 1st Defendant is charged with the responsibility of crafting and given the power to issue. A ruling to the contrary would subject the administratively regulatory functions of the 1st Defendant, to Parliament, and caused a fossilized approach to what may only require an administrative and regulatory mechanism to correct a peculiar situation within the financial sector."

The conclusion reached is as bad as the reason advanced to justify it. In the first place, there is no premises from which [to use His Lordship's own words] the "inferential leap" was made to the conclusion that the directives were administrative in nature. What is it that distinguished the directives as administrative rather than legislative? His Lordship Justice Kulendi provided no basis for this conclusion. If therefore the practitioner were confronted with the question whether a particular directive was legislative or administrative, what will be the tests or principles to apply? And if I may then take an "inferential leap" of my own, what is the ratio of this decision? Or has the decision added any insight or given practitioners and students of

constitutional and administrative law any better guidance and understanding of the scope and application of article 11(7) of the Constitution? My answer to this question is negative.
The decision messes up a terrain which was gradually becoming clearer from the earlier decisions on the subject, beginning with the decision of the High Court in the case of **Republic v. Minister for Interior; Ex Parte Bombelli [1984-86] 1 GLR 204.** In this case the High Court presided over by the distinguished and respected Cecilia Korateng Addow J, held that where the "order" or "rule" ***is not legislative in nature,*** then it must not be laid before parliament. Her Ladyship held thus;

"By the canon of interpretation, ie the noscitur a sociis rule, the word "Orders"in article 4 (7) (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. According to that rule of interpretation,aword took its meaning from the company it kept, and "Orders" in article 4 (7) (a) had to be interpreted as "orders" such as rules and regulations. Consequently, to fall within the definition of article 4 (7) (a) an order must be a legislativeorder. And since the Statutory Instruments Act, 1959 (No 52), s 5 defined executive instruments as "Statutory Instruments other than legislative instruments of a judicial character", executive instruments such as EI 27 of 1980 did not partake of the nature of rules and regulations. They fell outside the orders which under article 4 (7) (a) of the Constitution, 1979 were to be laid before Parliament before they became effective."

The **Ex parte Bombelli** decision dealt with provisions identical to article 11(7) of the 1992 Constitution and which were set out in in article 4(7) of the 1979 Constution. The sound legal basis of the Bombelli decision can be demonstrated from three main legal points;

i. first, it relied on a well-known canon of construction which is the noscitur a sociis rule.

ii. secondly, the decision supported the reasoning behind it by reference to the Statutory Instruments Act, 1959 (No 52), s 5.

iii. finally, the decision explained the nature of an executive act and how to recognize it by adding that the executive act was usually one which is in the nature of a "command".

In contrast with the decision of Yonny Kulendi JSC there was no legal basis, no clarity and no direction as to how to distinguish "an administrative act" from "Orders, Rules and Regulations" provided for in article 11(7) of the 1992 Constitution. Before I am asked whether the **Ex parte Bombelli** decision regardless of its brilliance holds more force than the decision under discussion, I will add that the principle of stare decisis makes it clear that where the ratio

decidendi of a decision, like the one under consideration is not discernible, it is of no binding authority.

The second point to make in so far as the **Ex parte Bombelli** decision is concerned is that, it has been applied by the Supreme Court quite recently and affirmed. **See the case of Osei Akoto v The Attorney-General [2013-2014] 2 SGLR 1295**. The decision in the case of **Osei Akoto v The Attorney-General [2013-2014] 2 SGLR 1295** delivered by Dr. Date-Bah JSC (whose judgments in the Supreme Court are revered by many lawyers for their vintage) distinguished executive instruments from legislative instruments applying the **Ex parte Bombelli** test. For this reason whilst **Ex parte Bombelli** can be said without any fear of contradiction to have added to the jurisprudence on the subject, the decision under consideration did not.

Thirdly, the conclusion that the directives made by the BoG are **administrative** in nature does not end the matter. The question that arises is whether although they are so characterized or christened by the Court, they are of such a nature as to properly partake in the nature of Orders, Rules and Regulations within the meaning of article 11(7) of the Constitution. An earlier decision of the Supreme Court warned against using the ruse that an Order, Rule or Regulation is **administrative** rather than **legislative** and accordingly exempt from the application of article 11(7). In the case of **PROF. STEPHEN KWAKU ASARE vs. THE ATTORNEY GENERAL AND THE GENERAL LEGAL COUNCIL [2017] DLSC2604.** Writ No. J1/1/2016 Judgment dated the 22nd June 2017 Gbadegbe JSC had this to say:

> "In any case, it is evident that administrative instructions cannot be issued in contravention of article 11(7) of the Constitution and statutory rules cannot be set at naught by administrative fiat for the simple reason that rules made statutorily have the force of law while administrative instructions are not enforceable."

The decision above quoted must have escaped His Lordship Kulendi. Clearly therefore, just by christening the BoG's directives as '**administrative'** should not decide the matter. Whilst it is true that administrative directives as distinguished from legislative directives are not subject to the article 11(7) procedure, the learned Justice failed to state one example of what is considered an administrative rather than a legislative directive to provide practitioners with a guide to understanding the distinction. He provided no guidance to understanding this distintion. Discussing ISSUE THREE under the topic, MAKING SUBSIDIARY LEGISLATION the Constitutional Review Commission (CRC)wrote in paragraph 54, page 149 of its report thus;

> "Administrative acts, however, include the adoption of a policy, the making and

> issue of a specific direction or order or the application of the general rule to a particular case in accordance with the requirement of policy or expediency."

It was important for His Lordship to have provided some guidance in relation to the directives in question. Using the test provided by the CRC His Lordship did not tell us what policy the BoG directives adopted, or how specific the directive was in relation to a particular matter, or whether the directive applied a specific general rule to a particular case in accordance with some specific policy. The directives in question regulated several matters. A cursory readiong of those directives will leave no one in doubt about this.

His Lordship Kulendi JSC did not end there. The learned Justice posed the question "is every requirement created by any person or authority with power granted them by law, required to be promulgated in the manner contemplated under Article 11(7)?" The answer to this question is very simple. My answer would have been thus; **If that is the law, so be it.** His Lordship however gave a negative answer to the question he posed and resorted to sophistry of no antecedence to explain it. He held as follows;

> "In our considered view, surely the answer to this question is no, for a number of reasons. In more general terms, doing so would severely slow down the already slow-paced manner in which Parliament works, inundating the body with Legislative Instruments which, although it is not to debate and pass, it still has the mandate to consider and interject. This will undermine the purpose of giving powers to persons and authorities to make administrative decisions."

The confidence with which His Lordship answers his own question is admirable. The reasons advanced to support the answer however will find no foundation to sit on, upon furtherinterrogation. His Lordship says that his negative answer to his question is supported by "a number of reasons." Reading the decision however, one will struggle to find two, let alone "a number". His Lordship's own judgment hinted at two reasons, a general and a specific answer.

The general answer according to His Lordship is that to answer the question otherwise "would severely **slow down** the already **slow-paced manner in which Parliament works"**. If this is His Lordship's first reason, then the following questions must be answered to validate His Lordship's answer.

i. by what evidence did His Lordship reach the conclusion that Parliament's work is "slow-paced"?
ii. did not His Lordship take judicial notice of this slow-paced manner in which Parliament works, bearing in mind that there are tests which define the scope for taking such judicial notice?
iii. how did His Lordship reach the view that it is the making of legislation

> which takes all of Parliament's time, bearing in mind that legislation forms just a fraction of Parliament's work?

The point here is that if it is true that Parliament is so busy that it does not want issues like subsidiary legislation taking its time, Parliament could initiate and cause the constitutional provisions of article 11(7) to be amended by deletion. After all, the Constitution has suffered a few amendments already. The Supreme Court has no power in the exercise of its original jurisdiction to advocate non-compliance with constitutional provisions on grounds of convenience. And just when did Parliament request the assistance of His Lordship to spare them the tedium of having to preside over subsidiary legislation?

Even though some Constitutional experts have suggested that pressure on Parliament is one of the reasons for granting power to make subsidiary legislation to certain persons and bodies, such pressure has never been the reason for granting such persons and bodies from Parliamentary oversight. This is recognized by the learned writers A W Bradley and K D Ewing. Whilst recognising the time constraints in the work of Parliament, they write thus;

> **"Pressure on parliamentary time**
> If Parliament attempted to enact all legislation itself, the legislative machine would break down, unless there were a radical alteration in the procedure for considering Bills. The granting of legislative power to a department which is administering a public service may obviate the need for amending Bills. Although many statutory instruments are laid before Parliament, only a minority of them gives rise to matters which need the consideration of either House and Parliament spends a very small proportion of its time on business connected with them."
> **See Constitutional and Administrative Law, Fourteenth edition by A W Bradley and K D Ewing at page 751.**

The quotation above made emphasizes clearly that although it relieves Parliament of the rigors of elaborate parliamentary procedures which must be deployed in making laws, nevertheless Parliament is required to "spend[s] a very small proportion of its time on business connected with them." This is to ensure that there is no detraction from its legislative power which is exclusively vested in Parliament. The legislative power of the Republic of Ghana is exclusively vested in Parliament. This is clearly stated in the provisions of article 93(2) which provides as follows;

> "(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 provision above quoted is only made subject to the Constitution and nothing else. His Lordship's justification would therefore have sat on some legal foundation if His Lordship had pointed to a specific constitutional provision which made rules and regulations made by the BoG exempt from parliamentary scrutiny. The point just made confirms as very serious the "reason" deployed by his Lordship to justify non-compliance with constitutional provisions of article 11(7). This is because His Lordship suggests that constitutional imperatives can be waived on grounds of convenience. I do not know of any thinking more subversive of our constitutional development and ruinous of our democratic order than His Lordship's theory of convenience as a justification for constitutional aberrance.

Quite startling also, is His Lordship's further explanation that subjecting

> "Legislative Instruments which, although it [Parliament] is not to debate and pass, it still has the mandate to consider and interject… will undermine the purpose of giving powers to persons and authorities to make administrative decisions."

Inherent in the logic which informed the point captured in the judgment of Kulendi JSC is the suggestion that expedition is the reason for which power is given to statutory bodies to make such instruments and that by reason of expedition, such Orders, Rules and Regulations should not be subjected to parliamentary approval. That is plainly incorrect. The expedition canvassed by His Lordship is catered for by providing that these Orders, Rules and Regulations, although are laws, do not go through the normal law-making procedure in Parliament. This point is underscored by an earlier decision of the Court in the case of **PROF. STEPHEN KWAKU ASARE vs. THE ATTORNEY GENERAL AND THE GENERAL LEGAL COUNCIL [2017] DLSC2604.** Writ No. J1/1/2016 (Judgment dated the 22nd June 2017). In that case, Gbadegbe JSC held as follows;

> "... Of statutory instruments, it can be said that they are easier to make than statutes because they are intended to cater for changed circumstances and may in this context be described as ambulatory. And the process involved in the making of a legislative instrument which requires it to be laid before parliament for 21 days and mature into law if before the expiry of twenty-one parliamentary sitting days, it has not been annulled…"

The learned Justice set out the purpose of laying the regulation and/or rules before parliament

for 21 days as follows;

> "if before the expiry of twenty-one parliamentary sitting days it has not been annulled, is to ensure that such proposed regulations conform with not onlythe enabling Act, Act 32 but the fundamental law of the land, the 1992 Constitution. Inherent in article 11(7) regarding the making of statutory instruments is the power of the legislative body to scrutinize instruments laid before it to bypass the constitutional mode provided is clearly in breach of the doctrine of separationof powers and an affront to the exclusive domain of Parliament to make laws. The requirement of publication of such an instrument in the gazette is also an additional safety net which informs the entire citizenry of the contents of the law by way of guidance."

The point must be made again that Kulendi JSC's suggestion that the oversight responsibility of Parliament regarding Orders, Rules and Regulations made by persons and authorities on which the Constitution or other statute has conferred power must give way to the convenience required in making such instruments does grave violence to our Constitution which vests legislative power exclusively in the Parliament of the Republic of Ghana.

My view is that, His Lordship would have treaded more cautiously if he had deferred to the erudite thinking of Atuguba JSC in the case of **Okane & Others v Electoral Commission of Ghana & Attorney-General [2011] 2 SCGLR 1136 at 1151** and that of Ampiah JSC in the earlier case **Apaloo v Electoral Commission of Ghana [2001-2002] SCGLR 1 at 27** in which cases the distinguished Justices, while admitting that in a common law democracy, Parliament usually has oversight control over the acts of the executive, its controlling power over delegated legislation is often of a very restricted nature but added immediately that the oversight control was necessary **"to give the legislature, an opportunity to have a look at the intended constitutional instrument."**

Further, Kulendi JSC was clearly in error when he took the view that expedition is the reason for delegating the power to make some types of legislation to certain persons and authorities under the Constitution or other law. The learning on the subject of subsidiary legislation informs us that there are four main reasons for delegating such power to statutory bodies. Expedition is not one of them.

The first reason for creating the power to make delegated legislation is the pressure on parliamentary time which has already been stated. The second is expertise. This allows

specialized statutory institutions to make rules appropriate to their area of governance such as in this case, the BoG. This second reason does not exempt such specialized institutions from parliamentary oversight when making rules and regulations. The third and the fourth reasons are the need for flexibility and times of emergency. **See Constitutional and Administrative Law, Fourteenth edition by A W Bradley and K D Ewing at pages 751 to 752.**

Justice Kulendi then descends to the second reason for holding that the directives the subject matter of the suit are insulated from the provisions of article 11(7) of the Constitution. This is what he calls the "specific" reason as distinguished from the "general" one discussed. He says that,

> "In more specific terms, ruling that the 1st Defendant is required to present requirements, regulations and directives it uses to regulate and administer the financial sector of this country to Parliament, undermines the independent nature of the 1st Defendant while placing unnecessary fetters on the efficiency with which the 1st Defendant can work and take steps to create an enabling financial and economic environment. This is the "mischief" for which these rules are in place and for which these powers have been granted to the 1st Defendant."

This thinking is definitely fallacious. First, it subverts our constitutional order which vests legislative power exclusively in the province of the Parliament of the Republic of Ghana. Secondly, the reason for which the power to make subsidiary legislation is delegated to persons and authorities outside Parliament is not because such bodies are **independent** and less still to avoid **"placing unnecessary fetters** on the efficiency with which [such bodies] can work". The reason for which a body like the BoG is delegated power to make subsidiary legislation have been discussed already. There is no need to repeat them. Thirdly, it posits the argument that independent institutions are above the ambit and supervision of parliament, the same Parliament that passes the enabling laws that regulate their activities.

It is strange that His Lordship will use the independence of the BoG to justify this absolutely subversive suggestion that the BoG's independence does not conduce to subjecting its power to make subsidiary legislation to parliamentary oversight. How about the Electoral Commission whose power to make delegated legislation is subject to such parliamentary oversight? Is the Electoral Commission not independent? And did His Lordship forget the Judiciary whose independence and expertise in legal matters does not insulate the subsidiary legislation they make to regulate the conduct of suits before the Courts from parliamentary scrutiny?

The philosophical and jurisprudential underpinnings of our Constitution has no place for laissez

faire on the part of any institution created by the same Constitution. Such an institution is still subject to the very limits structural, institutional and procedural placed by the Constitution to ensure that our constitutional order operates to serve the interest of the people in whom sovereignty resides and for whose welfare the powers of government are exercised. The following statement made by Kulendi JSC therefore is clearly, objectionable in terms of our present constitutional dispensation.

> "Finding in favour of the Plaintiff would subject the 1st Defendant to undue parliamentary oversight, thereby upsetting the necessary independence of the 1st Defendant. The system of separation of powers ingrained in Ghanaian constitutionalism, and regulatory functions of specified institutions within the 1992 Constitution would be undermined."

This thinking in so far as the doctrine of separation of powers is concerned is sad. Numerous decisions of the Supreme Court have been clear on the fact that the doctrine of separation of powers enshrined in our Constitution has transcended that propounded by its originating fathers and I shudder to think that rather than follow its refinement as developed in other common law countries like the United States of America whose constitutional model is akin to ours and applied by our Supreme Court, Kulendi JSC chose to take us back into theories of constitutional law long abandoned. **(See Asare v Attorney-General [2003-2004] 2 SCGL 823, particularly the judgment of Kludze JSC).**

When the learned Justice expresses the view that it "could not have been **the intention of the framers** of the constitution who created the 1st Defendant, to subject the internal workings and the regulatory responsibility of the 1st Defendant to the constant supervision of Parliament", he shows no basis for this belief. There is no need to subject this thinking to any scrutiny. Recourse to legislative intention is resorted to by demonstrating why it is necessary to leap to reading the mind of the law maker rather than gathering his intention from what he says. **See Republic v High Court (Fast Track Division) Accra; Ex parte Commission on Human Rights and Administrative Justice (Richard Anane-Interested Party) [2007-2008] 1 SCGLR 213, Kuenyehia v Archer, [1993-94] 2 GLR 525 SC Republic v High Court, Accra (Commercial Division); Ex parte Hesse (Investcom Consortium Holdings SA & Scancom Ltd – Interested Parties) [2007-2008] 2 SC GLR 1230** among others.

Lord Simon states the consequences of rejecting this principle in search of the esoteric in **Black-Clawson International Ltd v Papierwerke Waldof-Aschaffenburg AG [1975] 1 All ER 810 at 847** as follows:

> "It is refusing to follow what is perhaps the most important clue to meaning. It is perversely neglecting the reality, while chasing shadows. As Aneurin Bevin

> said: 'Why gaze in the crystal ball when you can read the book? Here the book is already open; it is merely a matter of reading on."

In any case, in statutory interpretation, there is a difference between the subjective and the objective intention of the lawmaker. See the cases of **Brown v Attorney-General (Audit Service case) [2010] SCGLR 183 at page 219,** Per Dr. Date-Bah JSC and **Asare v Attorney-General [2003-2004] 2 SCGLR 823 at 834.** which of these intentions was His Lordship referring to? The points just discussed expose His Lordship's point that it is the **"mischief"** of avoiding a situation which **"undermines the independent nature"** of the BoG which justifies the conclusion as untenable. Beyond using the word "mischief, His Lordship did not apply the "mischief" test known to us in the common law world. In any case, from the discussion on the reasons for delegating power to make subsidiary legislation, any attempt to apply it to the facts of the case would have floundered. **See the rule in Heydon's Case, 3 Rep. 7a (1584).**

It is from the argument above canvassed that I find the following statement made by the learned Justice also unacceptable;

> "Additionally, there is a certain level of absurdity or repugnancy in making every executive or administrative action take the nature of a legislative function."

I have always argued that it is poor coming from any lawyer to start his understanding of a statute by mouthing 'absurdity'. This is because, we must first appreciate the literal connotation to be assigned the statutory provision under consideration, apply it to the facts in question in order to demonstrate the absurdity before canvassing it. It has been held that:

> "rules of construction do not permit, a passage which has clear meaning, to be complicated or obfuscated by any interpolation, however well intentioned." Per Francois JSC in the case of **Kuenyehia v Archer, [1993-94] 2 GLR 525 SC at page 562**

In so far as the facts under consideration are concerned, what absurdity or repugnance will result from laying before Parliament, rules which require a person with financial interest in a banking institution to stay away from the management of the bank after a period when the person has travailed and invested his time and money to grow such an institution? None, was suggested, hinted at or even implied by His Lordship. In the absence of any information as to how His Lordship reached the conclusion that requiring the BoG to subject its rules through the article 11(7) procedure would lead to absurdity and repugnance, that conclusion is certainly vacuous and perhaps, absurd?

D. DIRECTIVE ISSUED BY THE BoG.

As already noted, Kulendi JSC's conclusion that the BoG directives in contention were administrative for which reason they did not fall within the purview of article 11(7) was reached without any legal or even logical justification. In the course of his reasoning, Justice Kulendi observed that the BoG

> "…is a body entrusted with the object of maintaining price stability and secure management of economic policy with a view to create growth of the economy to create opportunity for the people of Ghana and has been granted independence to do so per section 3 of the Bank of Ghana Act, 2002, (Act 612)."

This observation is very right and is clearly borne out by the statute the learned Justice referred to. No sophistry is required to discern that. If His Lordship had taken his own observation seriously, he would have done more justice to his discussion of the subject. The learned Justice, in my view, would have been headed in the right direction if he had paid attention to the fact that from his own observation, the power conferred on the BoG to *maintain price stability and secure management of economic policy* is exercised under Act 612. This power is completely different from the BoG's statutory power under Act 930. The two statutes regulate completely different matters.

His Lordship therefore should have borne in mind the fact that the directives in contention were made in exercise of the BoG's power under Act 930 not Act 612. The BoG's powers under Act 612 are conferred on the BoG to enable the BoG achieve its statutory objects of maintaining the

i. stability in the general level of prices.
ii. supporting the general economic policy of the Government; and
iii. promoting economic growth and development, and effective and efficient operation of the banking and credit system; and
iv. contributing to the promotion and maintenance of financial stability in the country. **See section 3 of Act 612.**

The matters above stated as provided for by statute fall within the BoG's province under Act 612 to regulate. The directives in question, however, did not fall under any of these matters which the BoG is statutorily mandated to regulate. These are matters regulated in line with the BoG's policies which are intended to support the general economic policy of the Government as well as promote economic growth and development and contribute to the promotion and maintenance of financial stability in the country.

The directives in issue in the case under consideration, fell under Act 930 which regulates matters relating to deposit-taking and institutions which carry on deposit-taking business, and other matters. It has been noted that the rules were made under section 56 and 92 of Act 930. If

the learned Justice had paid attention to this basic fact, it would have been easier to relate to the reasons on which the decision under discussion is anchored.

As pointed out earlier, the BoG has power to regulate the matters covered by its statutory mandate under Act 930 under two specific sections of the said Act. The BoG can do that either under section 56 of Act 930 to regulate **Corporate Governance** matters or under section 92 to regulate the affairs of the institutions falling within its statutory mandate in relation to matters such as licensing, the minimum level of capital, prescription of prudential norms on asset quality, bad debt and write-offs among others. It is the learned Justice's failure to appreciate that the issues raised by the suit fell for determination under Act 930 rather than Act 612 which led him into error. It is this fact which led him to say thus;

> " It could not have been the intention of the framers of the constitution who created the 1st Defendant, **to subject the internal workings** and the regulatory responsibility of the 1st Defendant to the constant supervision of Parliament"

The case under consideration had nothing to do with the BoG's internal workings which is provided for clearly under Act 612. Under Act 930, the BoG's powers exercised pursuant to section 56 are exercised by way of rules, whereas powers exercised in accordance with section 92 are exercised by way of directives. It is my view that the clear inferences to be drawn from the use of the two words, "rules" on the one hand and "directives" to delineate the manner in which the BoG may exercise its regulatory powers pursuant to sections 56 and 92 respectively, gives a clue as those matters which are considered administrative and those which are considered legislative. Administrative matters are regulated by directives under section 92 and legislative matters are regulated by rules under section 56.

My justification for taking this view first of all is that a look at the examples of the matters which may be regulated by way of directives under section 92 of Act 930 will reveal that these are matters which share affinity with the BoG's objects specified in section 3 of Act 612 already discussed. The second reason and even better one in my view is the fact that the BoG appears to appreciate the fact that the two powers and manner, basis and reason for their exercise are separate. For this reason, the BoG has in the year 2021 alone issued a number of directives under section 92 of Act 930 without reference to section 56. Examples of such directives are;

i. Treatment of captured payments in Automated Tellers Machine (ATM) Directive, June 2021.
ii. Risk Management Directive, June 2021.
iii. Unclaimed Balances and Dormant Accounts Directive issued in February 2021 pursuant to Act 930.

iv. Cyber and Information Security Directive.
v. Fit and Proper Persons Directive.

It is important to note that all the above directives were specifically made pursuant to section 92 of Act 930. They do not mention section 56 at all. Quite interestingly however, the directives that are the subject matter of the suit referred to both sections 56 [which deals with rules] and section 92 [which deals with directives].

The directives in question regulate tenure for Managing Directors/Chief Executive Officers, Board Chairs and Non-Executive Directors of Regulated Financial Institutions. The effect of the directives is that persons who promote a corporate institution to carry on the business of banking regulated by the BoG and have invested not only time and personal resources in growing such institutions in their capacities as Managing Directors/Chief Executive Officers, Board Chairs and Non-Executive Directors are required after a period of time to resign and hand over to others who may have contributed nothing to their establishment and who may not be as committed and passionate about such financial institution as their original promoter(s). The directives extensively provide as to how such succession must be achieved. These matters definitely affect the rights of specific individuals.

It is my view that the Bank on introspection knew that the matters it sought to regulate could not honestly fall within the matters which fall for regulation by way of directives under section 92. It is the reason for which they adopted a "grafted" or maybe "hybrid" approach.

The BoG could either have decided that the matters it sought to regulate were directives and made in accordance with section 92 of Act 930 as it did in the examples above stated, in which case the debate will be whether those matters can be regulated by way of such directives administratively. The 'Captain Planet' approach of combining all powers in a sphere of endeavour whose spirit and blood are drawn from rules is what created the problem.

E. CONCLUSION.

My conclusion in so far as this review is concerned is that Justice Kulendi's decision did not do a good job of the case the Court was required to consider and failed to decide for posterity, the important constitutional issue that required resolution by the Court. The suggestion that directives made by independent are not subject to parliamentary oversight is quite monstrous. The failure to lay down clear directions as to what constitutes an administrative as opposed to a legislative directives is problematic.

Right after the decision of the Court, the Insurance Commission also issued directives almost akin to those the subject matter of the Court's decision. Very soon other institutions will follow and we will be stuck with the confusion introduced by the Court. Although in the context of dissent, I find Atuguba JSC's view in the case of **Kpobi Tettey Tsuru III (No 2) v Attorney-General (No 2) [2011] 2 SCGLR 1042** very useful. Atuguba JSC held in that case that

> "Inadequate consideration of a case is also serious enough to warrant review when an important matter, though considered, is only cursorily considered..."

The review has so far exposed a number of instances in which the learned Justice delivered himself of statements whose logic sat in vacuo and not justified by any known principle of law. Indeed, in some instances, the statements were clearly repugnant to well- known principles of law. I refer to two examples in this conclusion. In his analysis of the case of the parties, His Lordship made the following observation.

> "Before proceeding to answer this question, I think it is necessary to note that while Article 11(1)(c) talks about Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution, Article 11(7) talks about Orders, Rules and Regulations made by a person or authority under a power conferred by this Constitution or any other law. **It is intriguing that neither party brought up this difference between the two provisions,** which would have invoked this Court's jurisdiction **to interpret the Constitution where there is seemingly a conflict between two of its provisions,…"**

In the first place, the case before the Court did not raise any issue of ambiguity or imprecision regarding the meanings to be placed on the provisions of article 11(1)(c) on the one hand and that of article 11(7) on the other. The main issue that required resolution was whether the BoG's directive ought to have been laid before Parliament in accordance with the provisions of article 11(7) of the Constitution. Article 11(1)(c) was almost irrelevant to the question and was only referred to because it formed part of the general provisions of article 11 and provides for the Laws of Ghana. None of the parties therefore required the Court "to interpret the Constitution" because there was NO "conflict between two of its provisions" as His Lordship suggested.

In any case, if His Lordship thought that there was **"seemingly a conflict between two of [the] provisions,…"** of the Constitution and this arose for determination in the suit, was the Court barred or precluded from so doing only because the parties supposedly overlooked it?

Certainly not. His Lordship did not state the consequences or effect of the **"intriguing"** failure by either party to bring it up and the "difference between the two provisions, which would have invoked this Court's jurisdiction **to interpret the Constitution".** What point then was made by making an observation which clearly was not relevant to the issue to be determined by the Court and worse still not stating the effect of what the learned Justice thought was an oversight by the parties?

The other example is Justice Kulendi's observation that in paragraph 18 of the plaintiff's statement of case, the plaintiff relied on paragraph 731 of the Memorandum on the Proposals for A Constitution for Ghana, 1968, to canvass its case that the BoG's directives are subject to parliamentary approval. The learned Justice observed that it was based on this paragraph that the plaintiff invited the Court to make **"an inferential leap-that is, to accept that something that the Plaintiff has defined as applicable to Ministers should apply mutatis mutandis to institutions such as the 1st Defendant."**

It is true that the paragraph quoted by the plaintiff referred to Ministers but the learned Justice did not do justice to the context in which the passage was quoted when he went on to add that the plaintiff continued to press his point "ignoring the fact that the 1st Defendant is neither a minister nor a ministry and therefore not covered by this particular reference to the Memorandum on the Proposals for a Constitution for Ghana, 1968." The paragraph preceding quotation which was made in paragraph 18 of the plaintiff's discussion of the first issue that arose for determination is paragraph 17. In that paragraph,the plaintiff submitted as follows;

> **"17. It should also be noted that the 1st Defendant as is the case with other institutions forming part of the executive arm of government is permitted to make rules or directives in recognition of the fact that government operations are to a very large extent, carried on by means of rules made by members of the executive and other bodies under powers delegated to them by the 1992 Constitution or by Parliament in a specific statute, and in the case of 1st Defendant, Act 930."**

It is clear from this paragraph that the plaintiff was under no illusion whatsoever that the BoG is either a Minister or a Ministry as suggested by Kulendi JSC. The next paragraph which is 18, and which set out the paragraph 731 of the Memorandum on the Proposals for A Constitution for Ghana, 1968, was then a follow-up of paragraph 17 above which was meant to demonstrate by analogy how **"in recognition of the fact that government operations are to a very large extent, carried on by means of rules made by members of the executive and other bodies**

[ARE] delegated" powers to make delegated legislation. Paragraph 731 of the Memorandum on the Proposals for A Constitution for Ghana, 1968 provides as follows;

> "Exercise of Discretionary Power
>
> 731. Experience has shown that it is practically impossible for any Parliament however well-intentioned to carry out all its legislative duties properly. It has thus become the fashion for discretionary power to be given to Ministers under Acts of Parliament for certain things to be done, usually of an administrative nature. **This is often noted referred to as delegated legislation."**

A reading of the plaintiff's statement of case will confirm that the plaintiff highlighted the sentence this is often noted referred to as delegated legislation putting it without any shred of doubt whatsoever that the plaintiff's submission was intended to emphasize the fact that the rules in contention were made in the context of delegated legislation. If there was any doubt at all, paragraph 19 of the Plaintiff's statement of case which immediately followed the quoted submitted thus;

> "19. From the above, the body of rules by which **the business of government is usually carried on is known as delegated legislation.**"

It is surprising that this context was completely lost on His Lordship Kulendi JSC and which led him to say that the;

> "remainder of the Plaintiff's argument that is built on this premise therefore requires us to make one too far an inferential leap — that is, to accept that something that the Plaintiff has defined as applicable to Ministers should apply mutatis mutandis to institutions such as the 1st Defendant."

This statement does not arise at all from the plaintiff's submissions. And to then say that the Court took the view "that this **gap** in the Plaintiff's reasoning renders the Plaintiff's argument short of a conclusion that the 1st Defendant's directives are 'Orders, Rules and Regulations' under Article 11" is incorrect as this conclusion is completely off the mark.

From this analysis, I prefer to put the final words of Justice Kulendi at the beginning of his judgment. His final words in the judgment are as follows; "This action **ought** to fail." His understanding and rendition of the plaintiff's submissions makes it more appropriate if the words were placed at the beginning of his judgment. The learned Justice's own summary of the plaintiff's case earlier in his judgment does not sit well with how he eventually conceived of the

crux of the plaintiff's submission.

I part with the words of Taylor JSC who is reported to have written that;

> "Precedents whether declaratory or creative must accord with the general principles which lie at the root of the common law and are the bricks with which over centuries it has been structured. A precedent no matter how long it had even stood if it blatantly violates these fundamental and paramount principles is not likely to survive the ravages of time. If the courts fail to deflate its claim to legal validity, the legislature may mute its pretensions. And if the legislature condones this illegitimate creature, the people in their righteous anger will assuredly consign it to the limbo to which it belongs**." See Taylor J. N.K. Judicial Precedent in Ghana [1991-92] VOL. XVIII RGL 159—192 .**