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“Taming Archer’s Octopus”- Freedom of Contract vs. Judicial Review: A critical examination of *Republic v High Court, Ex parte Zanetor Rawlings*

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Introduction

The case of *The Republic v. The High Court; Ex-Parte Dr. Zanetor A. Rawlings* drew great attention and public interest, ostensibly due to the profile of the parties involved: one of whom was the daughter of former President Flt. Lt. Jerry John Rawlings. It is also worthy of note that, it was an election related case, in an election year. The political stakes were understandably high; with the two major parties going toe to toe for the ultimate prize. In addition, both parties were seeking to do something unprecedented: while the opposition New Patriotic Party (NPP) sought to avoid a third consecutive defeat, the ruling National Democratic Congress (NDC) endeavoured to retain power for a successive third term.

However, for legal scholars, practitioners and students whose interests in such matters were more academic than political, the case presented a unique opportunity to gain insight into the interpretative jurisprudence of the highest court of the land as it pertains to the 1992 Constitution.

This latter aspect concerning the Supreme Court's interpretative jurisdiction, will be the focus of this paper. I examine the reasoning of the Supreme Court (SC) and demonstrate how the judgment failed to do justice to the relevant provisions of the Constitution resulting in far reaching consequences beyond those intended by the framers of the 1992 Constitution.

The facts of the case under review are briefly presented below, followed in subsequent parts, by an analysis of the legal bases for the court's decision. The discussion seeks to provide answers to lingering questions about the case including the following: (a) whether the SC wrongly granted certiorari to quash the High Court's ruling; (b) whether the Supreme Court properly invoked its exclusive and original interpretative jurisdiction under the Constitution; (c) and what is the effect of incorporating the Constitution into a private document? The discussion will also look at whether the SC correctly answered the specific question which it referred to itself, and conclude with a critical analysis of the court's interpretation of Article 94(1) (a).

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Facts and procedural history

The applicant, Dr. Zanetor Rawlings and the first interested party, Hon. Nii Armah Ashittey, are both registered members of the NDC. They participated in the NDC's parliamentary primaries held on November 15, 2015.

Following the outcome of the contest, which Dr. Rawlings won, Hon. Nii Armah Ashittey, instituted an action in the High Court (HC) against Dr. Zanetor Rawlings and the NDC claiming that the applicant (Dr. Rawlings) should not have been allowed to contest the elections as she was not a registered voter in Ghana. The thrust of his argument was that to qualify to contest the parliamentary primaries of the NDC, a prospective candidate had to meet certain criteria outlined in the party's constitution. One such criteria was that the aspirant had to be qualified to be a Member of Parliament under the 1992 Constitution. Accordingly, since Dr. Zanetor Rawlings was not a registered voter at the time of the NDC primaries, she was not qualified under the NDC's constitution to contest the primaries.

The NDC guidelines for internal parliamentary elections stipulates as follows:

QUALIFICATION:

A person wishing to contest to be a parliamentary Candidate of the party must:

- (1) Be a citizen of Ghana, who has attained the age of 21 years.*
- (2) Be a card bearing member of the party who has paid party membership dues*
- (3) Be a known and active member of a branch of the party in the constituency*
- (4) Not be a member of any other political party*
- (5) Be qualified in accordance with the 1992 National Constitution to be elected as Member of Parliament.*

The NDC constitution continues to provide the criteria for disqualification of aspiring parliamentary candidates under Article 43 (9) thus;

DISQUALIFICATION:

A member shall not be qualified to contest primaries for any parliamentary seat if he:

- a. Is disqualified under national electoral laws from contesting for any parliamentary seat.*

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- b. Is not an active member of the party at the constituency level for four years immediately preceding the date of filing the nomination.*
- c. Is for any reason disqualified from being a party member as spelt out under article 8 of the party's constitution.*
- d. Fails to meet the requirements for election of Member of Parliament under Article 94 of the 1992 Constitution of Ghana. (Emphasis mine)*

The Constitutional provision at the heart of this discussion reads:

Subject to the provisions of this article, a person shall not be qualified to be a Member of Parliament unless -

(a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;¹

In the High Court, whereas Nii Armah Ashithey claimed that the relevant time frame for the application of article 94(1)(a) was the time of the primaries, Dr. Rawlings and the NDC insisted that the relevant time was at the opening of nominations by the Electoral Commission (E.C.) for the national parliamentary elections.

After entering conditional appearance, the applicant applied by motion to dismiss the writ of summons and the statement of claim. The application was dismissed and the applicant proceeded to file her statement of defence. The applicant again filed a motion to dismiss the writ and statement of claim on grounds that the action was premature and further, the jurisdiction of the High Court was wrongfully invoked. The trial court heard arguments and on the 22/03/2016 refused the application to dismiss the action.

The applicant subsequently filed an application for Certiorari at the Supreme Court to quash the ruling of the High Court for lack of jurisdiction. In granting the application, the Supreme Court held that, the High Court inadvertently interpreted article 94(1) (a) of the Constitution when it concluded that the NDC had violated it.² Per the Court, this was ultra vires the powers of the High Court since at that point a question of interpretation of the Constitution had arisen and the High Court was as such

¹ Article 94(1)(a) of the 1992 Constitution of Ghana

² Republic v High Court, General Jurisdiction, Accra; Ex-parte Zanetor Rawlings (Ashithey and National Democratic Congress interested party) (No. 1) [2015-2016] 1 SCGLR 53-76

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required to refer the matter to the Supreme Court for determination, which it had failed to do.³ For this reason, the SC concluded that, the High Court had wrongly assumed jurisdiction and effectively usurped the interpretative powers of the Supreme Court. In hearing the application for certiorari and granting it, the Supreme Court simultaneously and *suo motu* referred to itself the following question under the powers granted it by article 130 of the Constitution:

‘When can it be properly said that a Ghanaian citizen is by reason of non-registration as a voter “not qualified to be a member of parliament” within the meaning of article 94(1) (a) of the 1992 Constitution of Ghana?’⁴

Discussion and Analysis.

This part will provide, with due reverence to the Supreme Court of Ghana, an exposition on the shortfalls of its majority decision in the case under review. As has been stated from the outset, I disagree with the Supreme Court’s decision for a number of reasons which could be grouped into two broad categories; namely **jurisdiction/admissibility** and **substantive** or **interpretational** issues.

Jurisdiction/Admissibility

- Firstly, the document which formed the basis for the High Court action, despite incorporating a provision of the 1992 Constitution, was a party constitution which in law, is akin to a contract and as such the High Court had full powers to deal with it and its interpretation. Therefore, it was *intra vires* the High Court and as such, the Supreme Court wrongly granted certiorari to quash its decision.
- Secondly, I share in the view of the sole dissenting judge Anin Yeboah JSC to the effect that, in relation to article 94(1) (a) which had been incorporated by reference into the “contract”

³ *ibid*

⁴ Republic v High Court, General Jurisdiction, Accra; Ex-parte Zanetor Rawlings (Ashithey and National Democratic Congress interested party) (No. 2) [2015-2016] 1 SCGLR 92-113

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there was no real need for interpretation for which the Exclusive Original jurisdiction of the Supreme Court could be invoked; as the impugned provision was sufficiently unambiguous.

- And thirdly, that in such circumstances, the appropriate recourse to an appellant, is by way of appeal to the Court of Appeal and not certiorari.

Certiorari

The Supreme Court, by virtue of article 132 of the 1992 Constitution, has supervisory jurisdiction over all courts and may in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power. One such order is Certiorari, a discretionary order granted inter alia, on grounds of the court below exceeding its jurisdiction as was purported by the Supreme Court in the case under review. The key to resolving this issue therefore, is to properly identify the jurisdiction of the High Court, and by reference to the facts of the case, determine, whether it exceeded it or not.

The High Court's jurisdiction

Our first point of call must therefore be article 140(1) of the 1992 Constitution, which provides that:

The High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law.

Whereas section 15(1) (a) of the Courts Act 1993 (Act 459) confers original jurisdiction in all matters on the High Court. The section provides as follows:

(1) Subject to the provisions of the Constitution, the High Court shall have—

(a) an original jurisdiction in all matters;

This means that, generally, the High Court has jurisdiction to hear all civil matters such as inter alia contract, tort, divorce and land unless its jurisdiction is specifically ousted by the Constitution such as is the case with Chieftaincy matters. At this juncture, it is important to note, that as far as the law in Ghana is concerned, a political party's constitution is synonymous with a contract between the

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party and its members as well as the members *inter se*.⁵ Therefore the usual rules of contract apply to its validity and even to its interpretation.

The Court of Appeal (C.A.) decision in *Ghana Muslims Representative Council and Others v Salifu and Others*,⁶ further reinforces the above statement of the law. In that case, where by a resolution of the majority of the members of an unincorporated club it was sought to raise the subscription payable by members, the C.A. quoted Joyce J. with approval as follows:

*‘Indeed, so far as there can be said to be authority upon the subject, and, as I think, upon principle, there is no more inherent authority in the members of the club by a majority in general meeting to alter the rules against the wishes of a minority than there is in the members of any other society or association the constitution of which depends upon and is matter of contract—there being as there is here a written contract expressing [p.264] the terms upon which the members associate together. In my opinion, there is no power in the majority of the members to alter those terms and the constitution of the club as they may think fit, when such a power forms no part of the written contract by which the members are bound’.*⁷

Consequently, so long as it was legal and entered into voluntarily and with full capacity, the parties are bound by its provisions as they would be the terms of a contract, which the High Court has jurisdiction to interpret and enforce. Although the decisions of lower courts such as the Court of Appeal and High Court are not binding on the Supreme Court, I cite them for persuasive effect as there is unfortunately a dearth of relevant case law at the level of the Supreme Court.

Incorporation by reference

The question of the effect of referencing the National Constitution in a private document or contract, should in my considered view not necessarily override the manifest intentions of the contracting

⁵ Pennie and Another v Egala and Another [1980] GLR 234-257. The court held at page 252 of that case that: “... As a voluntary society, the constitution of the organization is an enforceable agreement based on contract. It is a binding agreement between the members: see Dawkins v. Antrobus (1881) 17 Ch.D. 615, C.A. It is a contract that the rules and regulations by which the society is to be governed will be binding on the members. The position of the political parties is analogous to that of Trade Unions. By statute their rules are bound to provide the manner in which their rules are to be made, altered, amended and rescinded, but the same general principles apply to them as to any other unincorporated association. Since the basis of the association is contractual, breach of the terms of the constitution will give cause of action to the individual members...”

⁶ [1975] 2 GLR 246-265 263

⁷ Harington v. Sendall [1903] 1 Ch. 921 926

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parties, as appears to have been the thinking of the Supreme Court.⁸ After all, the parties could equally have written out the provisions of article 94(1) (a) *in extenso*, without reference to their origin. In such a case, we would nonetheless restrict ourselves to the words of the contract only⁹. Why then, should the meaning of the contractual terms depend on the form in which the parties have expressed their substantial agreement?¹⁰ Whether Constitutional provisions are transcribed verbatim into a contract or adopted by a general reference to the Constitution, they become the contract's terms and must be construed as such. In the case of *Kuenyehia and Others v Archer and Others*¹¹, Bamford Addo JSC, while dealing with the effect of incorporating section 4 of the transitional provisions of the 1992 Constitution into NRCD 6, explained at pg. 539 as follows:

'...Furthermore the rule is that where a later statute, incorporates by reference the whole or any part of an earlier statute into the later statute, the whole of the provisions in the earlier statute should be read into the later one (in this case as amended) as [p.539] if set out in full therein...'

Also the Court of Appeal per Anin JA in *Ex Parte Akosah*,¹² opined as follows:

*"... When a document is [p.602] declared to be incorporated by reference in another document, it means that one document shall be taken as part of another document in which the declaration is made just as if it were set out at length therein. The effect of bringing into a later Act, by reference, sections of an earlier Act is to introduce the incorporated sections of the earlier Act into the later Act as if they had been enacted in it for the first time. Referring to an instance when certain sections of an Act of 1840 were incorporated by reference in an Act of 1855, Lord Esher M.R. in *In re Wood's Estate* (1886) 31 Ch.D. 607 at pp. 615-616 said:*

'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if

⁸ Ibid. (n 2)

⁹ *Allan Sugar (Products) Ltd. v. Ghana Export Co. Ltd.* [1982-83] GLR 922, CA

¹⁰ *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.*, 1 D.L.R. (3d) 513 (1968, BCCA. Per Justice Bull of the British Columbia Court of Appeal: "Every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to.

¹¹ *Kuenyehia and Others v Archer and Others* [1993-94] 2 GLR 525—643

¹² *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592-608

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*they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855. '...'*¹³

As the forgoing authorities show, the provisions of article 94 (1)(a) of the Constitution should have simply been read into the NDC constitution and read as one with the rest of the document, making no distinctions between them and other provisions of the contract. They should have been treated as having been written into the document *ab initio* and treated like any other provision of the contract. However, if any technical or particular meaning has previously been placed on the referenced text by its authors, that meaning is carried into the adoptive document, unless qualified expressly or by necessary implication. Therefore in the case under review, the constitutional enforcement date of article 94 (1) (a) if any, would have also been the effective date for the NDCs' constitution, barring any intention to the contrary. However, it was patently clear what the intention of the drafters of NDCs' constitution was, viz. that a parliamentary aspirant had to meet the criteria under the National Constitution, **at the time of the party's primaries**¹⁴ consequently that presumption had been rebutted.

It has been argued, rather eruditely that, parties cannot purport to derogate from Constitutional requirements under the umbrella of freedom of contract, a position I fully agree with. The High Court in *Pennie v Egala*¹⁵ supra held at page 255 that,

*'...When a statute has decreed this or that, it would be against public policy to allow a group of persons to contract out of the provision of the statute...'*¹⁶

However, there seem to be no rules or laws proscribing the converse that is, contracting in addition to the statute; adding to the requirements or sometimes rights established by the statute. The autonomy of political parties to define the terms of their membership and constitutions, is circumscribed by the 1992 Constitution, consequently any choices made which do not contravene the 1992 Constitution

¹³ Ibid.

¹⁴ The NDC guidelines for internal parliamentary elections 2016

¹⁵ *Pennie and Another v Egala and Another* [1980] GLR 234-257

¹⁶ Ibid.

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are within their prerogative and power. In this regard, the words of Anin Yeboah JSC, resonate my thinking on the subject. He articulated in his dissenting opinion on the case under review as follows:

*'...It must be noted that the second interested party as a political party has its own Constitution. The Constitution of the party could have its own eligibility criteria but same cannot run counter to the 1992 Constitution. It may be expansive of the constitutional provisions under Article 94 but certainly it cannot take away anything that is conferred by the Constitution. Indeed, the Constitution which is in evidence has done nothing of the sort...'*¹⁷

I could not agree more. It is doubtful that anyone would question the basis for requiring that candidates aspiring to run on party tickets should not belong to any other party, that much is obvious. In the same manner, provisions requiring such aspirants to have been in good standing as regards dues and other such obligations to the party even though not part of the criteria in article 94(1) of the 1992 Constitution, are also not likely to be questioned or seen as discriminatory or unconstitutional.

In fact, no one has ever questioned a party's right to impose dues on its members. By parity of reasoning therefore, persons who are required by their party to meet certain requirements under the Constitution earlier than usual, ostensibly to enable them forestall any unforeseen obstacles, or surprises come the critical time of election cannot be seen as being discriminated against. A last-minute hitch or disqualification of a party's previously branded and advertised candidate would no doubt cause significant inconvenience to any such party. Therefore provisions of a political party constitution requiring an aspirant to meet the national constitutional requirements at the time of primaries, would not only be rational and non-arbitrary thus meeting the article 17¹⁸ requirement, but also very prudent and strategic. After all the party has every reason to want to protect their investments and by the doctrine of *ut res magis valeat quam pereat*,¹⁹ such intentions must be given effect to.²⁰

It is important to note that, the Constitution **does not confer any right to belong to any specific political party**. No party may be compelled to accept any person who does not meet their

¹⁷ Ibid. (n 2)

¹⁸ Article 17 of the 1992 Constitution of the Republic of Ghana.

¹⁹ "It is better for a thing to have effect than to be made void"

²⁰ Ibid.(n10) "If the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained...."

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membership criteria, however, the party's discretion to determine who becomes a party member is limited to lawful grounds, for example they cannot proscribe membership based on ethnic, religious and other unlawful grounds as laid down in article 17 of the Constitution and section 3 of the Political Parties Act, 2000 (Act 574). If for any reason, some individuals are rejected by a political party, they still have a Constitutional right to run as independent candidates or form their own party or participate in the political process in different ways.

It is trite, that in construing a contract, the ultimate goal is to give effect to the intentions of the parties as far as possible and discernible.²¹ For this reason, documents which are incorporated by reference into the contract, and which become part of the contract should also be construed with a view to giving effect to the intention of the parties. If therefore, the parties intend that the requirements of Article 94(1) (a) should apply to them at a different time than in the Constitution, they are free to do so, so long as it is within the law.²² This is a cardinal principle of contract law known as party autonomy. It may only be disturbed in specific circumstances; where the contract is for instance unconscionable, or there are other vitiating factors such as duress, illegality, public policy,²³ etc.

Exclusive original jurisdiction of the Supreme Court

One of the reasons, the Supreme Court gave for quashing the High Court's ruling and subsequently assuming jurisdiction to interpret Article 94(1) (a) of the Constitution was that the High Court acted ultra vires when it inadvertently interpreted the said article albeit while purporting to merely apply it to the facts before it. The Supreme Court maintained that the High Court should instead, have suspended proceedings and referred the matter to the Supreme Court for interpretation. The above position is based on article 130(1) of the Constitution, which reads:

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution,

²¹ Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724 per Lord Diplock "the object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to their legal obligations by the words in the text".

²² Printing & Numerical Co. v. Sampson (1975) LR 19 Eq.462, 465.

²³ Catherine Elliot and Francis Quinn: Contract Law (7th edn, Pearson Education Limited 2009).

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Under this heading, my basis for disagreeing with the decision in the Zanetor case is two-fold.

Firstly, there was no breach of article 130

The ACTION at the High Court was not one primarily for the *enforcement* or *interpretation* of the 1992 Constitution, which could have been argued to be a breach of article 130 supra, but rather, for the enforcement of the NDC's constitution.

The ISSUE of article 94(1) (a), was only incidental to the action properly in contract. In *Samuel Osei Boateng v National Media Commission*,²⁴ Atuguba JSC held that:

“No court other than the Supreme Court has jurisdiction to entertain an ACTION to enforce any article of the Constitution even if its clarity is brighter than the strongest light. However, when an enforcement ISSUE coincidentally arises in any court and the article involved is crystal clear such court may apply the Constitution to it.”

Secondly, the learned trial judge merely applied the law.

The learned trial judge acted within his powers when he applied the law; he did not usurp the powers of the Supreme Court because the provision in question was sufficiently clear and unambiguous. Although plaintiff's first relief²⁵ appears to have invited the court to interpret article 94(1) (a), the court by its conduct and even statements, clearly declined that invitation.²⁶ It must also be noted that the court made no pronouncement on the meaning of registered voter. If a certain amount of room or discretion is not given to the lower courts to apply the law, the Supreme Court is at risk of being inundated with cases for interpretation, if that is not already the case. This would be most undesirable as in my view the case load at the Supreme Court ought to be kept at a minimum to allow greater efficiency of the court.

²⁴ Samuel Osei Boateng v National Media Commission, Berifi Afari Apenteng, Writ No. J1/1/2012 9th May 2012

²⁵ “A declaration that the decision by the 1st Defendant to allow the 2nd Defendant to contest parliamentary primaries in the Klottey-Korle Constituency when she was not a registered voter within the meaning of article 94(1) (a) of the 1992 Constitution at the time of the said contest, violates the Constitution and the Internal Regulations governing the conduct of parliamentary primaries of the 1st Defendant and same is illegal and of no effect.”

²⁶ Ibid. (n 2) Per Justice Kweku T. Ackah Boafo “Now, without attempting to interpret the provision of the Constitution because as stated clearly above that is the exclusive preserve of the Supreme Court so to do and that my jurisdiction as a Justice of the High Court only begins and stops with applying the provisions of the Constitution to cases in given situations, it is my respectful view that the words in the article of the Constitution quoted above are not imprecise and/or ambiguous to necessitate an interpretation of the Constitution by the Law Lords of the Supreme Court. Consequently, I roundly disagree with learned Counsel for the 2nd Defendant/Applicant's contention that because the Constitutional provision is relied upon this is not the proper forum for the suit.”

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In this belief, I find myself in good company with a quote from Date-Bah JSC in the case of *Ex parte CHRAJ (Richard Anane Interested Party)*²⁷ where he opined as follows:

*“... ‘On the authorities, it is clearly wrong to suppose that an issue of Constitutional interpretation in the sense established by cases such as Ex-parte Akosah (supra) would arise wherever Parties take rival positions or make rival arguments as to the meaning or effect of a Constitutional provision. The authorities, as established above, are indeed overwhelming that an issue of distinctive interpretation which would warrant a reference under Article 130(2) will arise if and only if the words or provision in issue are really doubtful or ambiguous etc. Hence if the meaning of the provision at stake is very plain in context and admits of no such doubt or ambiguity, there will be no basis for a referral, even if the Parties purport to put rival meanings on them: ...’ I consider this to be an impeccable summation of the relevant case law...”*²⁸

I share Dr. Date-Bah JSC’s view that the above analysis is an impeccable summation of the relevant case law and as such, strongly oppose the assertion that the mere ascription of rival meanings to any provision of the Constitution by contesting parties constitutes sufficient grounds to invoke the exclusive jurisdiction of the SC. This is not only inaccurate but also manifestly untenable and impractical.

The dictum of Gbadegbe JSC in the recent case of *Musah Mustapha vrs University Of Ghana*,²⁹ helps to drive home the point, he opines at page 4 thus:

“...To make an accession to the claim herein would mean that lower courts cannot handle any claim in which there is a reference to a constitutional provision; a situation which would lead to absurdity since in a constitutional democracy such as ours any act or omission to be good must be measured with the provisions of the constitution and have the effect of the Supreme Court by a single pronouncement depriving other courts in the realm of exercising

²⁷ Republic v High Court, (Fast Track Division) Accra; Ex parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party), 213 [2007-2008] SCGLR.

²⁸ Ibid.

²⁹ Musah Mustapha vrs University Of Ghana, The Attorney General, & Minister For Justice, Writ No. J1/10/2014 16TH July, 2015

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*the jurisdiction conferred on them to inquire into disputes giving effect to provisions of the Constitution which pose **no real issue** for interpretation. ...” (Emphasis mine)*

In the case under discussion, the article at the centre of the controversy provides:

*‘Subject to the provisions of this article, a person shall not be **qualified** to be a **member** of Parliament **unless** - (a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;³⁰ (emphasis mine)*

The words of the provision are crystal clear and in fact self-explanatory. A person shall not be qualified to be a Member of Parliament unless; this means a person is initially presumed not to be qualified and will continue to be so presumed until they meet all three criteria therein outlined. The sufficiently analogous dicta of Atuguba JSC in the *Appiah-Ofori* case,³¹ may help elucidate the above point. In answer to the question of whether there was a lacuna in the 1992 Constitution in relation to the retirement age of the Auditor General, the learned justice had this to say:

“...There is therefore no gap to be filled with regard to his retiring age. The omission to state any special retiring age for the Auditor General can therefore be easily accounted for. It is simply not necessary to state any. The 1992 Constitution in article 199(1) is quite emphatic that:

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

This clearly solves the problem. The Constitution has not otherwise provided for a different retiring age for the Auditor General and therefore being a public officer, who upon the foregoing analysis cannot be said to have been envisaged by any of the constitutions from 1969 to 1992 to have any special retiring age other than 60 years, his retiring age is covered by the residue of article 199(1) as amended. ...”³²

All one needs to do is replace the words “**except as**” in the above quotation, with the word “**unless**” and the ensuing analysis still stands perfectly. If that is the case, the words of article 94(1) (a), by

³⁰ Article 94 (1) (a) of the 1992 Constitution of the Republic of Ghana.

³¹ *Appiah-Ofori v. Attorney General* [2010] SCGLR 484

³² *Ibid.*

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parity of reasoning should also be interpreted as meaning that the starting point of this analysis ought to be that everyone is prima facie not qualified and that, that status quo persists until reversed by a determination *ex facto*, that any particular individual has fulfilled or met the ensuing criteria; i.e., being a Ghanaian, twenty-one years and above and a registered voter. In other words, article 94(1) (a) creates a rebuttable presumption which may ONLY be reversed once ALL the requirements are met and not before! As the foregoing analysis demonstrates, there is no ambiguity as to the meaning of article 94(1) (a) as it permits only one plausible meaning. It is difficult if not impossible to justify any other interpretation. As a result, there was simply no need to invoke the exclusive jurisdiction of the Supreme Court.

Appeal was the appropriate remedy not certiorari

The question of whether the appropriate remedy for the applicant in the instant case should have been an appeal or certiorari was succinctly articulated by the venerable Justice Dr. Date-Bah at pg. 40 of the *Anane Case*³³ as follows:

*'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'*³⁴

As has been pointed out already, the words of Article 94(1) (a) are clear, precise and unambiguous, therefore the appropriate remedy to the dissatisfied party should have been by way of appeal to the Court of Appeal.

Substantive / interpretation

I will show here that, not only did the court fail to answer the specific question it referred to itself, but that, in relation to the question which it in fact answered, that interpretation was not a true and

³³ Republic v High Court, (Fast Track Division) Accra; Ex parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party), 213 [2007-2008] SCGLR

³⁴ Ibid.

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proper one of the article 94(1)(a). It is my contention that on a true and proper interpretation, whether using the literal and purposive approach, the outcome ought to have been different.

Answering the wrong question

As previously discussed, the SC ought not to have assumed jurisdiction in the case under review, nevertheless, the SC did in fact assume jurisdiction on account of the rival meanings placed by the parties on the article in question. The Court then proceeded to address the question of when the provisions of article 94(1) (a) were to come into force and also when a cause of action would ripen against a candidate or a prospective candidate could be disqualified for not meeting the relevant criteria. Respectfully however, both questions were unfortunately, not the questions before the court. The question before the court was: *“When can it be properly said that a Ghanaian citizen is by reason of non-registration as a voter not qualified to be a Member of Parliament within article 94(1)(a) of the 1992 Constitution of Ghana?”*

To this, the response of the court speaking through Benin JSC at pg. 10 of the judgment was as follows:

“These views expressed above are apt and germane to the ongoing discussion and the view of Article 94(1) (a) that we have expressed herein. In short the eligibility criteria do not arise unless the Electoral Commission has put up a notice of election of Member of Parliament.

To recap in a nutshell, the time when a Ghanaian citizen of twenty-one years of age can be said not to be qualified to contest for a seat in Parliament because he is not a registered voter, within the meaning of Article 94(1)(a) of the 1992 Constitution, is when the Electoral Commission, acting under the mandate conferred upon it by Articles 45(c) and 51, has declared that a public election of member of Parliament be held on a particular date and has also set the period for the filing of nominations by prospective candidates. That is, the eligibility criteria under Article 94(1) (a) will become applicable only when the actual electoral process has been set in motion by the Electoral Commission. For it is only then that time could be imported into the said provision to make it completely viable and enforceable.”³⁵

³⁵ Ibid. (n 4)

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From the above, the SC appears to have skipped the actual question of fact before them and dealt with the concomitant question of law, viz. “**when does an *actio popularis* cause of action accrue against a parliamentary candidate for not meeting the criteria under article 94(1) (a) of the Constitution**”; which relates the practical effect or consequences of not being qualified, i.e. the legal import of lacking the qualifications under article 94(1) (a), the court probably having considered the latter to be more germane and the former, somewhat moot. With celestial respect however, I must reiterate, that was not the question before the court! There is a difference between being ‘*unqualified*’ which is a synonym of ‘not qualified’, and being ‘*disqualified*’. Whereas the former refers to the factual state of lacking the legal requirements for a post³⁶, the latter refers to the legal sanction of being excluded from participating in the relevant process or activity.³⁷

I respectfully submit that, this in effect reinforces the position of this paper that, the answer to the question before the court was so obvious, it went without saying; and I mean that literally! The SC literally went without saying! Clearly therefore the matter properly before them posed no **REAL** issue for interpretation. The court however, could have avoided the much unhelpful confusion following its judgment if it had adopted a two-tier approach and distinguished the two legal points. That is, separating the factual conclusions, from their legal consequences.

Wrong interpretation of the “wrong” question

Even if indeed, the aforementioned alternate question, was in fact the proper question before the court, I disagree with the assertion that, a cause of action would not ripen until the E.C. opens nominations for prospective candidates and submit that the electoral process does not necessarily begin with the E.C. issuing a writ of election, but even with party primaries; a point which is demonstrated in the next few paragraphs.

The words of Kpegah JSC (dissenting) *infra* in the case of *Yeboah v Mensah*³⁸ lend support to my assertion as well as a more accurate answer to the purported alternate question. They are thus very instructive. He provides at pg. 71 thus:

³⁶ Black’s Law Dictionary 8th edition, pg. 1275

³⁷ *Ibid.* pg. 506

³⁸ [1997-1998] 2 GLR 245

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“... These words must be given their ordinary meaning which will accommodate only factors which vitiate or affect the results of the particular election; and not extend their meaning to include those primary or basic constitutional requirements in article 94 of the Constitution, 1992 which an intended candidate must comply with even before he can legitimately file his nomination papers. If a candidate does not satisfy these primary requirements he can be stopped from taking part in the election all together, because compliance with the conditions in article 94 of the Constitution, 1992 is sine qua non since these are basic rules of conduct. And, like all rules of conduct, they are intended to be obeyed.”

To further reinforce this position, I rely once again on the words of Atuguba JSC in *New Patriotic Party v National Democratic Congress and Others*³⁹ which shed great light on this subject. He stated at pg. 568 of the judgment as follows:

*“It has been contended that the plaintiff’s case does not disclose any cause of action, in that it is speculative as to whether the National Democratic Congress Party, the first defendant herein, will in fact adopt him as their parliamentary candidate when the writ for parliamentary elections is issued. I would enjoin myself from readily acceding to this contention. As stated in *Kwakye v Attorney-General (supra)* at 13, SC: “If we construe article 2(1)(b) alright,” person “is entitled to invoke the jurisdiction of this court as soon as the act complained of was committed or even threatened.” See also *Sam (No 2) v Attorney -General [2000] SC GLR 305*. This means that the jurisdiction of this court covers actions in which the act complained of has actually been committed as well as *quia timet* actions. See as to the latter, *Nyame v Mensah (supra)*. In my opinion the nature of a *quia timet* action involves some amount of speculation, the acceptable limits to which must be ascertained with care. And it has been said in *Bilson v Attorney-General [1993-94] 1 GLR 104 at 108, SC, per Adade JSC* that this court’s jurisdiction “is to interpret the Constitution, 1992 in the context of disputes broadly interpreted.” (The emphasis is mine.) It has further been said that for an act to be actionable in this court the conduct need not contravene a provision of the Constitution, but it suffices if it is [p.569] of [1999-2000] 2 GLR 506 merely inconsistent with the Constitution: see *New Patriotic Party v Attorney-General [1993-94] 2 GLR 35, SC (31st December case)*. Again in *Ekwam v Pianim (supra)*, at the time the action was brought, the facts that grounded*

³⁹ [1999-2000] 2 GLR 506

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it were the defendant's open declaration of intent and his offering of himself to contest for election as a presidential candidate of the New Patriotic Party for the 1996 presidential elections. The issue of an election writ being issued or not did not seem to have been material to sustain that action. Even though that case was an action for declaration and the present one is for enforcement of the Constitution, I do not think this difference is material; for even a declaratory action cannot be hypothetical."⁴⁰

The question of whether a person is qualified to be an MP or not, is a question of FACT which is easily answered by reference to article 94 for the checklist of requirements, the lack of any of which renders the subject of the inquiry undoubtedly unqualified at the material moment of the assessment. It does not mean he cannot in future become qualified, but for the time being, he is not! This factual determination is not inseparable from the question of when a cause of action against them shall lie for that fact (their ineligibility), which is a question of LAW. Not having a drivers licence renders you unqualified to drive, but no action may be taken against you merely for that fact, so long as you do not purport to drive a car, it does not matter that you are 18 years and of sound mind and that you could take steps to acquire one, you do not become qualified to drive until the minute you acquire a drivers licence period! It is settled law that the former of the two enquiries is a task uniquely suited and squarely situated within the competence of the trial court. This position was explicated in the celebrated case of *Republic v Special Tribunal; Ex parte Akosah*,⁴¹ CA, where the learned Anin JA (as he then was) when delivering the unanimous judgment of the Court of Appeal, held that:

"... 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... Again where the submission made relates to no more than 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 ..."

In the case of *Bimpong-Buta v General Legal Council*,⁴² Date-Bah JSC reiterated the above position of the law as held in *Ex Parte Akosah (supra)* as follows:

⁴⁰ Ibid.

⁴¹ [1980] GLR 592 at 605

⁴² *Bimpong-Buta v General Legal Council and Others* [2003-2005] 1 GLR 738

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“...This dispute, to my mind, does not raise issues as to the interpretation or enforcement of the Constitution, 1992 within the meaning discussed above. This dispute is as to certain facts relating to the employment of the plaintiff, the second defendant and the third defendant; the interpretation of those facts; the application of clear and unambiguous provisions of the Constitution, 1992 to those facts and the interpretation of certain statutory provisions. Such interpretation of the facts and relevant statutes and the application of the clear provisions of the Constitution, 1992 is not a task for the Supreme Court exercising its original jurisdiction. These are tasks for a lower trial court, in this case, undoubtedly, the High Court....”

Public policy

If it is the case, as indeed it appears to be, that the question properly before the court was a question of fact, more suited to the trial court and not a question of law, then the apparently incongruous conclusion reached by the majority in relation to the specific question before the court may perhaps be explained, as I believe it indeed was, by public policy considerations. As anyone ordinarily acquainted with our judicial tradition, viz. the common law would know, “public policy” and the “flood gates” doctrine are considerations that judges are mindful of. In fact, one could make the argument that given the period when this action was initiated and heard, the threat of an avalanche of court cases from election related disputes was conspicuously evident to most, if not all, legal minds within the jurisdiction, especially being so close to scheduled National elections. One can therefore pardon *pro tanto* the enthusiasm of the Supreme Court to err on the side of caution if indeed they were so minded.

One may describe the courts’ decision as a “*pre-emptive strike*” of sorts designed to forestall any abuses on the legal system and their consequent effects, viz. the potential ransoming of our country by hijacking the electoral process using court actions. No doubt, this is a generally commendable approach which has indisputably served the country well in the past and may still do in the future. There is little doubt therefore that their hearts were in the right place. However, on other public policy grounds, discussed in the following paragraphs, the decision is also problematic.

One such ground is the potential confusion and even injustice that may result from a wholesale and strict application of this decision; which in my considered view is inestimable. The Court’s

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interpretation unfortunately has the potential to create the erroneous impression in the minds of many that, party constitutions and regulations are basically irrelevant or of little moment and that members may flout them with impunity, when indeed this is not the case, as demonstrated in the preceding paragraphs.

Also, as demonstrated in the *Tehn-Addy* case,⁴³ article 94 is not only applicable to candidates for the office of Member of Parliament but extends to many other public offices, such as the Commissioner of the NCCE or Ministers of State etc.

Therefore to argue as the SC appears to have done that, the article only kicks in or has force subsequent to the issuance of the writ of elections by the electoral Commission⁴⁴, will result in absurdity and as a result, is untenable. For instance, where there is a need to appoint a Minister of State or Commissioner for the NCCE, three years before a general election, would we accept the argument that since the E.C. has not yet opened nominations by issuing the writ of elections, the provisions of article 94 have no legal force and as such the prospective candidate need not meet the criteria under the said article? Of course not!

Again, can a nominee Minister of State, who is not a registered voter be allowed to insist that she was qualified to be a Minister contrary to article 78(1) simply because the writ of election had not yet been issued by the E.C.?

This would be the result if we were to take the court's interpretation to its logical conclusion. The foregoing analogy just goes to buttress the point that **there cannot be a fixed time when the requirements under article 94 should be met as opposed to them having no force at any other time.**

Although the words used in article 94 are, **“to be a member of parliament”** not **“to be elected a member of parliament”**, a strict interpretation of this could result in manifest absurdity, since a person who was not yet twenty-one but would turn twenty-one, a day before the national elections or the swearing-in of parliament, could make the argument that they were qualified to participate in the parliamentary elections and get elected, therefore their rights had been violated if they are prevented.

⁴³ *Tehn-Addy v Attorney-General and Electoral Commission* [1997-98] 1 GLR 47

⁴⁴ *Ibid.* (n4) Per Justice Benin 'That is, the eligibility criteria under Article 94(1)(a) will become applicable only when the actual electoral process has been set in motion by the Electoral Commission. For it is only then that time could be imported into the said provision to make it completely viable and enforceable'.

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This would certainly not be desirable. In fact, I submit that this would be in contravention of the law, specifically PNDC Law 284.⁴⁵

As we have already seen, the Supreme Court has in some instances gone even further to treat prospective candidates as being subject to the same requirements even before their nomination by their party. Case in point being the case of *Ekwam v Pianim*⁴⁶. Bearing in mind that, in that case the eligibility of Mr Kwame Pianim to stand for the 1996 Presidential Elections, was challenged when the E.C. had not even issued the relevant writ of election. Indeed, his party primaries had not yet even been conducted unlike in the *Zanetor* case.

It could be argued that the two aforementioned cases can be mutually distinguished on the basis of the relative permanence of Mr Pianim's disability vis-à-vis *Zanetor*'s; whereas the latter could be remedied by registering as a voter, the former was a permanent one. Respectfully however, this argument would miss the point. The point being that in principle, a prospective candidate who is unqualified at the time of his party primaries, is not, and cannot be otherwise deemed qualified only on account of the fact that he or she may take steps to become qualified before the national election itself.

As we see from the above, both parliament through section 8 of PNDCL 284 and the courts through judicial pronouncement⁴⁷ apply the requirements of being an MP to candidates as well and even intended candidates. Treating them basically as being inseparable or synonymous. Thus the criteria applied under article 94 to a person seeking to be a Member of Parliament may be applied *mutatis mutandis* to a prospective candidate for the parliamentary elections.

As previously discussed in this article, a *cause of action* qua *cause of action* against a prospective parliamentary candidate can accrue to a member of his party for breach of contract resulting from the violation of internal party regulations. As was indeed the situation in the case under review when it was at the High Court. This means that, even if one rejects the above arguments and authorities to the effect that, a person could sustain a *quia timet* action under article 2 and 130 of the Constitution for a threatened, impending or imminent breach of the Constitution, they could nevertheless not deny

⁴⁵ Section 9 of PNDC Law 284 on —Qualifications and Eligibility of Members of Parliament provides inter alia as follows: (1) A person shall not be qualified to be a **candidate** for the office of Member of Parliament unless— (a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;...

⁴⁶ (No2) [1996-97] SCGLR 120

⁴⁷ *Ibid.*

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that such persons could be sued for breach of contract by members of their party. It can therefore not be accurate to simply say that a cause of action simpliciter cannot accrue until the E.C. issues a writ of elections.

True and proper interpretation of article 94(1) (a)

Having established the basis for my major premise, I believe any potential confusion on the application of Article 94 to prospective parliamentary candidates has been sufficiently addressed. I will now proceed to the million cedi question which was before the Supreme Court; the interpretation of Article 94(1).

This exercise became necessary as a result of the incorporation by reference of Article 94(1) of the 1992 Constitution into the NDC constitution. In a nutshell, it required candidates for the party's primaries to be "qualified" to be Members of Parliament under the 1992 Constitution at the time of the primaries. Naturally therefore, one had to look to the impugned article for guidance to determine who is qualified to be a Member of Parliament.

It must be admitted, that even the most unambiguous provisions, involve some interpretation, no matter how subconscious and imperceptible. One could plausibly describe that sort of interpretation as simply an incontrovertible literal interpretation. Incontrovertible on account of how obvious its meaning is.

That being said, any interpretation of the words of article 94(1) (a), inadvertent or otherwise, must be in accordance with settled rules of construction for the provisions of written constitutions such as ours. These rules generally demonstrate a preference for the plain meaning of a text as far as possible over any strained meaning. To buttress this point, two of the most relevant canons are highlighted below. Firstly, I refer to the words of Dotse JSC in the case of *William Brown v Attorney-General And Others; Unreported Cases Of The Supreme Court 2010*, where he observed as follows:-

"It is therefore my firm conviction and belief that a court like this Supreme Court must in interpreting constitutional provisions read and construe together all related provisions of the Constitution with a view to discovering the real, simple and ordinary meaning of the provisions. This Court should not interpret related provisions of a Constitution or statute in

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isolation and in the process destroy the true intended meaning and effect of the particular provisions ascribed to them”.

Secondly, Aikins JSC in the *JH Mensah* case,⁴⁸ where he quoted Abban JSC (as he then was) in the *Ghana Bar Association case*⁴⁹ at pg. 13 when he said:

‘It must also be borne in mind that in construing any statute, for that matter any of the provisions of the Constitution, the duty of the court is to stick to the ordinary meaning of the actual words used. After ascertaining the general purport and the meaning of the provision in question from the words used, effect must be given to it, unless by so doing it would be at variance with the intention of the law makers or could result in or lead to some obvious absurdity.’

Literal interpretation still valid

Acknowledging that the prevailing jurisprudence of the Supreme Court is one which embraces a purposive approach to interpretation over a literalist one, I however submit, as Anin Yeboah JSC does in his dissenting opinion in the *Zanetor* case that care should be taken not to create the impression that the “ONLY” tool of interpretation applicable to the Constitution is the purposive one.

A fortiori, that either approach; literal or purposive would yield the same result. That is to say that, the objective purpose of article 94(1)(a) could only be to prevent persons lacking the required criteria from becoming members of parliament, or of occupying certain positions such as members of NCCE or Commissioner of the Electoral Commission. In that case, what could possibly be the sense in allowing a person who was not qualified to BE a Member of Parliament to take part in parliamentary elections in the first place!

Indeed Anin Yeboah JSC in his dissenting opinion in the *Zanetor* case, points out that her ladyship the former Chief Justice Georgina Wood in the *Anane* case⁵⁰ acknowledged, in the course of her judgment that the ‘subjective-based purpose, as already noted, is not the sole criteria for construing a

⁴⁸ *JH Mensah v Attorney-General* [1997-98] 1 GLR 227 - 281

⁴⁹ *Ghana Bar Association v Attorney-General* (1995) 1 GSCJ

⁵⁰ *Ibid.* (n 27)

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national Constitution'⁵¹. The Supreme Court has held a good number of times that, purposive interpretation is to be relied on where the literal meaning results in ambiguity, absurdity, or injustice.⁵²

In the case of *ex parte Yalley*⁵³, the then Chief Justice once again elucidates the rules of interpretation thus:

“...Indeed, the purposive rule of construction is meant to assist unearth or discover the real meaning of the statutory provision, where an application of the ordinary or grammatical meaning, produces or yields some ambiguous, absurd, irrational, unworkable or unjust result or the like. In the Anane case, I made reference to the mechanics of the purposive approach as expounded by Bennion, the learned author on statutory interpretation. He stated that:

“A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this code called purposive - and- literal construction) or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in this code called a purposive-and strained meaning”.

A similar position was taken in *Ex Parte Hesse Investcom Consortium Holdings SA & Scancom Ltd*,⁵⁴ in which the Supreme Court held that on the construction of statutes, the literalist, i.e. the ordinary, plain or grammatical meaning should be adhered to if it clearly advances the legislative purpose or intent and does not lead to any outrageous consequences.

The former Chief Justice⁵⁵, elsewhere in the Anane case supra had this to say about the literal interpretation:

“In other words, I do not get the faintest impression from the authorities that the ordinary and plain meaning rule, known also as the textualist or originalist or literalist rule is dead and

⁵¹ Ibid.

⁵² Republic v High Court, Accra; ex parte Yalley (Gyane and Attor Interested Parties), [2007-2008] SCGLR 512

⁵³ Ibid.

⁵⁴ Republic v High Court, Accra (Commercial Division); Ex parte Hesse Investcom Consortium Holdings SA & Scancom Ltd. Interested Parties [2007-2008] SCGLR 1230

⁵⁵ Her Ladyship Mrs. Georgina T. Wood

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buried, no longer applicable to constitutional construction, and perpetually consigned to history. To the contrary, the speech of my respected brother, Dr. Date-Bah JSC in Asare v Attorney-General [2003-2004] SCGLR coincides with my views that, though it may not be the preeminent or the often used rule of constitutional construction, it is still relevant and in appropriate cases, might be the answer to the controversy. ... See also this court's decision in Republic v Yebbi & Avalifo [2000] SCGLR 149, which demonstrates that in compelling cases, the general rule that constitutions must be benevolently or liberally construed would not apply.”

This is exactly the sort of interpretation the Supreme Court should have done, if for no other reason than to achieve the sense of consistency and predictability which every good judicial system should have and which the people of Ghana expect. Let us begin!

Interpreting Article 94(1) (a)

When the Constitution talks about being qualified to be a Member of Parliament, what does it mean? What is the ordinary meaning of “qualification” within the context of a person vying for a position or office? The Black’s law dictionary 8th Edition, defines “**Qualification**” as such:

“the possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function” It also defines “**Eligible**” as, “**Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status**”

Lack of any one of them at any given time would render such a person unqualified at that material moment. The criteria outlined by article 94(1) (a) is not met until all three requirements are present, viz. being a Ghanaian citizen, being twenty-one years or above, and being a registered voter, thus for one to be said to be qualified to be a Member of Parliament, he must necessarily possess the above mentioned criteria at the moment when his eligibility is being assessed by whichever authority which requires such qualification for whatever reason.

In the *Tehn-Addy Case*⁵⁶, the Supreme Court held,

⁵⁶ Ibid. (n 37)

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“... Especially so, since under the Constitution, 1992 as opposed to the previous Constitutions of Ghana, failure to register does not only forbid one from voting at national and district level elections, but also disqualifies one from being a member of Parliament. For article 94(1) (a) of the Constitution, 1992 provides that a person shall not be qualified to be a Member of Parliament unless: "he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter." (The emphasis is ours.) And if one is not qualified to be a Member of Parliament, that person is thereby disqualified from holding a number of public positions, like:

(a) a minister of state-article 78(1)

(b) a member of the Electoral Commission-article 44(1)

(c) President or Vice-President-article 62(c)

(d) a member of the Public Services Commission-article 194 (1), and

(e) a member of the National Commission for Civic Education-article 232 (3).

The disabilities attached to non-registration are therefore quite onerous. It is for the above reasons that we made the order set out above on the 26 July 1996...”

From the dicta of the Supreme Court in the **Tehn-Addy** case (supra), the court evidently is of the view that a person is not qualified to be a Member of Parliament until that person has their name in the voters register or in other words is registered as a voter. This is clearly evidenced by their emphasis on the words “**registered voter**” The court then goes on to find that, a person cannot therefore occupy any of the other public offices thereto mentioned. At this point, it might be helpful to pause and contemplate that, these other offices are not filled on a regular 4-year cycle which coincides with elections. Therefore, candidates for such positions, will necessarily be evaluated according to the criteria in article 94 at whichever time they are nominated or considered for such offices.

It would thus stand to reason that from the above cited authorities and canons of interpretation, there can only be one conclusion which would be consistent with the jurisprudence of our courts. As per

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article 129 of the Constitution,⁵⁷ the court is generally bound by its previous decisions although it may depart.

In that regard, the corollary and inescapable conclusion is that, the relevant time for a person to be qualified to be a Member of Parliament is the time of his assessment by WHATEVER group (private or public), for WHATEVER purpose. As was demonstrated in the “minister of state” or “NCCE commissioner” appointment scenario above⁵⁸, the individual in question must meet or possess the set of criteria outlined by the Constitution if that is the requirement for the position in question at the time of his assessment. In the instant case, that would be parliamentary aspirant for the NDC as a political party.

This means that the date or time to meet these criteria is not necessarily fixed and will always take colour from the context within which it is presented or discussed as a requirement for any particular endeavour.

As already stated, the time contemplated under article 94(1) (a) of the Constitution is not static or permanently fixed. The Constitution per article 51 mandates the E.C. to determine by constitutional instrument, the modalities and therefore dates for all the relevant electoral processes, such as registration, nominations, filings etc.

These are essential aspects of organizing and conducting elections, as candidates have to be vetted, ballot papers designed and printed amongst other things. A prospective candidate cannot be heard for instance a day to the elections, claiming that his right to stand for elections has been infringed if the deadline for nominations and registration with the E.C. for parliamentary candidacy has passed. Same would go for a potential voter who failed to avail himself of the registration process within the allocated time frame. The alternative would be the absurd result if we were to blindly insist that the Constitution gave every Ghanaian an absolute right to vote so long as they were 18 years and of sound mind.

In the Tehn-Addy case (supra), the words of the Supreme Court are very instructive, primarily because in that case, the court took note of the fact that, the failure to register was not due to an

⁵⁷ Article 129 provides: (3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.

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inaction on the part of the plaintiffs, but rather by the E.C. failing to provide them with enough opportunity to register, citing the court action by two political parties and subsequent injunction as the reason. The court also took into consideration the timetable of the election, presumably considering that, there was reasonable time to allow them to register.

To drive home the point, allow me at this juncture take “academic notice” of the proposed changes to our electoral landscape, being the processes of changing our election date from 7th December to 7th November.⁵⁹ A change which when effected, will no doubt have a resultant domino effect in shifting forward other deadlines in the electoral calendar, this is simply to underscore the point that, there is no constitutionally fixed or permanent date on which a person must be registered as a voter in order to be qualified to be a Member of Parliament as described in article 94(1) (a) and that it will always depend on the surrounding circumstances.

Conclusion

Wrongful assumption of jurisdiction

So far, it has been demonstrated that the SC wrongly assumed jurisdiction to interpret article 94(1) (a) of the Constitution when indeed there was no ambiguity in the said article and therefore no real interpretative issue for which the HC should have halted proceedings and referred the question to the SC. In addition, upon assuming jurisdiction and referring a specific question to themselves, they failed to accurately answer that very question.

That being said, the proper answer to the question before the court, i.e. **“when can it be properly said that a Ghanaian citizen is by reason of non-registration as a voter “not qualified to be a member of parliament” within the meaning of article 94(1) (a) of the 1992 Constitution of Ghana?”** is most likely obvious to anyone following this discussion. It is to put it plainly **“AT ALL TIMES, UNTIL AND UNLESS THE SAID INDIVIDUAL REGISTERS AS A VOTER”**, they cannot be described as qualified to be a Member of Parliament.

It is in my view, difficult to come to any other conclusion on this matter. The plain words of article 94(1) (a) of the 1992 Constitution simply do not permit it. Its words could generate only one plausible answer in light of the specific question posed by the Supreme Court to itself in the case under review;

⁵⁹ < <https://www.myjoyonline.com/politics/2015/October-19th/ec-pushing-for-november-7-as-new-date-for-2016-elections.php> > accessed 25 February 2018

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which is that, **until and unless any particular individual registers as a voter, in addition to the other requirements therein stated, they cannot be described as qualified to be a member of parliament.** (Emphasis mine).

As mentioned earlier, even if one were to assert that, a purposive interpretation should be applied to the article 94(1) (a), that would not necessarily exclude a literal or plain meaning approach.

The Supreme Court's decision in the Zanetor case as discussed above has some potentially far reaching consequences. Consequences exacerbated by virtue of the binding nature of Supreme Court decisions. Continually seizing jurisdiction from the High Court by the Supreme Court in almost every matter affecting the Constitution is unsustainable.

Not only is it detrimental to the High Court by effectively eroding its power and in the process emasculating it, it is also counterproductive for the Supreme Court which ends up over burdening itself.

Public policy

The rule CANNOT be that, every time parties to a suit before the High Court ascribe rival interpretations to a constitutional provision, no matter how ridiculous they are, the High Court must relinquish jurisdiction and refer the matter to the Supreme Court. Taken to its logical conclusion, such a position will leave the SC at the mercy of any mischievous persons who may be so minded to “highjack” the SC with an avalanche of fictitious, frivolous and vexatious interpretation cases effectively clogging the wheels of our apex court and jeopardising our judicial system.⁶⁰

Literal interpretation

Also, the impression in the minds of many that any literal interpretation is ipso facto a wrong or flawed interpretation, needs to be erased. As the cases cited in this article reveal, it is indeed a key part of the purposive interpretation model and in certain circumstances the right model.

A cardinal principle of law and one which has given birth to an integral part of our everyday lives is the principle of *Pacta Sunt Servanda*.⁶¹ This principle which forms the mantle on which the continent of contract law stands, expounds one simple principle, which is that, agreements willingly entered

⁶⁰ Pratt v South Eastern Rly. Co. [1897] 1 Q.B 718 per Cave J ‘Doubtless, no words form of words have ever yet been framed by human ingenuity with regard to which some ingenious counsel would not suggest a difficulty’

⁶¹ According to the Black's law dictionary 8th Edition: ‘Agreements must be kept’.

Article 94 of the 1992 Constitution, a cornerstone of participatory democracy or a manacle on freedom of contract and association?

into must be respected or honoured.⁶² The Zanetor case, by purporting to lay down a constitutional “enforcement date” had the effect of rendering the contract (the NDC constitution) which had set an earlier date, nugatory.

Unfortunately, all lower courts are constrained from departing from this decision, which as has been previously pointed out, provides a recipe for injustice and a fertile ground for unscrupulous persons to violate party regulations and make a mockery of our democratic system and rule of law. In ending, let me re-echo the famous words of Archer CJ in the case of *NPP v AG*,⁶³ where he cautioned the SC as follows: *‘This court should not behave like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it.’*⁶⁴ In that vein therefore, and for the reasons discussed above, I must maintain my opposition to the Supreme Court’s majority decision and interpretation as well as advocate a rectification of this unfortunate situation at the soonest available opportunity which presents itself to the Supreme Court.

⁶² Ibid. (n 17)

⁶³ *New Patriotic Party V Attorney-General* [1993-94] 2 GLR 35

⁶⁴ Ibid.