IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: ATUGUBA, AG. CJ (PRESIDING)
AKUFFO (MS), JSC
BROBBEY, JSC
DR. DATE-BAH, JSC
ANSAH, JSC
OWUSU (MS), JSC
YEBOAH, JSC
GBADEGBE, JSC
BAMFO (MRS), JSC

WRIT
NO. J1 /

6 / 2011

22ND

MAY, 2012

PROFESSOR STEPHEN KWAKU ASARE .. PLAINTIFF

VERSUS

THE ATTORNEY-GENERAL .. DEFENDANT

J U D G M E N T.

ATUGUBA, J.S.C:

In modern times the courts have shed much of their conservatism in the construction of statutes. The purposive rule of construction is now the dominant rule for the construction of statutes. This in effect gives reality a triumph over dogmatic theories of law. However the ascertainment of the true purpose of a statute has to be watched so as to prevent conjectures of all sorts having an undue sway on the construction of statutes. In this connection certain rules of construction of statutes should now gain more weight than they had before. Some of them are, that, as Taylor JSC said in *Mekkaoui v. Minister of Internal Affairs* (1981) GLR 664 S.C. at 719: "I believe it is now trite law and there is no need to cite any authority to support it, that in all statutes, *the legislature or the lawgiver is presumed to have legislated with reference to the existing state of the law.*" Very similar to this view is the view that the context of the statute inclusive of its surrounding circumstances are relevant matters to its proper construction – per Lord Simmonds in *Attorney-General v. Ernest Augustus (Prince) of Hanover* (1957) AC 436 at 461 H.L.

Happily all this has been **captured by the Memorandum to the Interpretation Act, 2009 (Act 792)** as follows:

"The general rules for the construction or interpretation used by the Courts were formulated by the Judges and not enacted by Parliament. From the Mischief Rule enunciated in *Heydon's Case* [1584 3 Co Rep. E.R. 637] to the Literal Rule enunciated in the *Sussex Peerage Case* [(1844) 11 Co & F 85; E.R. 1034], to the Golden Rule enunciated in *Grey v. Pearson* [(1857) 6 H.L. C. 61; 10 E.R. 1216] *the courts in the Commonwealth have now moved to the Purposive Approach to the interpretation of legislation and indeed of all written instruments. The Judges have abandoned the strict constructionist view of interpretation in favour of the true purpose of legislation.*

The Purposive Approach to interpretation takes account of the words of the Act according to their ordinary meaning as well as the context in which the words are used. *Reliance is not placed solely on the linguistic context, but consideration is given to the subject-matter, the scope, the purpose and, to some extent, the background. Thus with the Purposive Approach to the interpretation of legislation there is no concentration on language to the exclusion of the context. The aim, ultimately, is one of synthesis.* …

Clause (2) of article 1 of the Constitution 1992, places the Constitution on a pedestal high above that of the ordinary law of the land. The Constitution is the supreme law. A law found to be inconsistent with, or in contravention of, a provision of the Constitution is void to the extent of the inconsistency or the contravention. The Constitution is thus not an ordinary law of the land. *It is a legal document as well as a political testament.* It embodies the soul of our people in a sense that the ordinary law cannot achieve. *It is organic in its conception and thus allows for growth and progressive development of its own peculiar conventions.* Indeed, in obvious and subtle ways it is an instrument of rights and limitations and not a catalogue of powers.

But section 1 of the Interpretation Act, 1960 subjects the interpretation of the Constitution to that Act. Thus an inferior law is made the vehicle by which the construction of the supreme law of the land is determined. In this sense the Constitution is subordinated by an inferior law. It detracts from the Constitution's supremacy. This Bill seeks, among other things, to do away with that concept. *By that process the construction and interpretation of the Constitution, 1992 will not be tied down by the Interpretation Act but will take account of the cultural, economic, political and social*

developments of the country without recourse to amendments which can be avoided if the spirit of the Constitution is given its due prominence. A Constitution is a sacred document. *It must of necessity deal with facts of the situation, abnormal or usual.* It will grow with the development of the nation and face challenging changes and new circumstances. *It must be allowed to germinate and develop its own peculiar conventions and construction not hampered by niceties of language or form that would impede its singular progress.*

In musical terms the interpretation and construction of the Constitution should involve the interplay of forces that produce a melody and not the highlighting of the several notes." *In other words, the legislative intent behind section 10(4) of the Interpretation Act, 2009 (Act 792) appears to be to set the courts relatively free from the usual aids to construction of ordinary enactments and to oblige the courts to apply the purposive approach outlined in that provision, when construing the 1992 Constitution."* (e.s.)

Consequently, **section 10(4) of the Interpretation Act, 2009 (Act 792)** provides as follows:

"10(4) Without prejudice to any other provision of this section *a court shall construe or interpret a provision of the Constitution or any other law in a manner*

(a) *that promotes the rule of law and the values of good governance*,

(b) that advances human rights and fundamental freedoms,

(c) *that permits the creative development of the provisions of the Constitution and the laws of Ghana*, and

(d) that avoids technicalities and niceties of form and language which defeats the purpose and spirit of the Constitution and the laws of Ghana."(e.s.)

<u>The context and background to the impugned provisions</u>

What then is the context or background to the impugned provisions? This is revealed by paragraphs 374 to 381 of the Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana at 175-176 as follows:

" **CHAPTER SEVENTEEN**

CITIZENSHIP

374. *The Committee considered the recommendations in the NCD report that the question of prohibition of dual citizenship for Ghanaians as provided in the 1979 Constitution should be examined by it.* Our law provides among others, that if a Ghanaian of full age voluntarily swears allegiance to another country and becomes a citizen of that country then he loses his Ghanaian citizenship. The issue before the Committee was whether there was any justification for altering this law so as to enable Ghanaians acquiring the nationalities of other countries to retain their status as Ghanaian citizens. On this opinion was divided.

375. *One view was that the Committee could not dismiss the question of allegiance which is indeed at the root of citizenship.* A country owes specific duties to its citizens; for example it is its responsibility to evacuate them in times of war or crisis from any foreign land – There is reciprocal responsibility of the citizen not to engage in acts that would put the security of his country at risk, to mention just one

duty. *The question of allegiance should therefore not be taken lightly.*

As the Akufo-Addo report stated:

"we do not want an occasion

where allegiance to Ghana is shared

with allegiance to some other country."

The opposite view was that such a dual citizenship could be justified.

376. *Citizenship in most countries today is a requirement for securing a job* and most Ghanaian emigrants into other countries cannot avail themselves of such a facility because they do not want to lose their Ghanaian citizenship.

377. The above apart, the idea of "economic refugees" status of most Ghanaians has become a reality of Ghana today. Whatever the moral objections that may be to this to reality, it is an acknowledged fact that most of *these refugees invariably bring home their economic gains abroad. Some invest such gains in useful ventures which compliment*

the domestic mobilisation of financial resources to national development.

378. This fact is underscored in the light of the constitutional proposal that if a person is to stand for election in a constituency he must be ordinarily resident in the area. *Ordinary residence has been given an expanded meaning to include identification of a person with the area in terms of visits and participation in the development efforts of the area.*

380. It has been observed, over the years, that *most of the so-called economic refugees have made substantial contributions to the development efforts of their respective communities in Ghana.*

381. Thus, *a case could be made for permitting dual citizenship to Ghanaians, a situation which would* not only alleviate the misery of many Ghanaians abroad, but would also *open up prospects of indirect external financial mobilisation for national development.*" (e.s.)

Quite clearly then the Committee of Experts had diagnosed the policy reason why before then dual citizenship was constitutionally, except for involuntary situations, disallowed in Ghana, namely the risk of reliable allegiance to Ghana from a dual citizen. The Committee then felt that since Ghanaians in the diaspora were contributing by way of heavy monetary remittances to and investment in Ghana and since dual citizenship helped them to access employment outside Ghana, dual citizenship should be allowed. This recommendation cannot reasonably be understood as requiring allowance of the acquisition of dual citizenship in Ghana without any regard to the risk factor of allegiance to Ghana involved.

Consequently, as I understand the impugned provisions in this case, they seek to cater for both interests namely, the risk of allegiance and the need to allow dual citizenship.

The Equality argument

Professor Bondzi-Simpson held us in intellectual captivity without bail for many days unless we conceded that article 8(2) of the Constitution inserted by the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) and section 16(2) of the Citizenship

Act, 2000 (Act 591) which extended the ban, in article 8(2) on the dual citizen of Ghana from holding certain specified offices are, unconstitutional for infringing the entrenched provisions of articles 15(1) and 17 relating to Equality of persons before the law and freedom from inhuman and degrading treatment, without compliance with the Constitutional procedure for amending entrenched provisions of the Constitution and in any case in substantially infringing them to an extent impermissible by accepted principles relating to constitutional amendments.

To begin with it seems to me that citizenship is a matter of state sovereignty and has a unique and intricate character which has been specially dealt with in Chapter 3 of the Constitution and therefore the *verba generalia* of the fundamental human rights provisions of Chapter 5 have to be applied with caution in relation to the *specialibus* of Chapter 3. Consequently there are varieties of citizenship with varying rights in Chapter 3 itself. Thus in *Govindan Sellappah Nayar Kodakan Pillai v. Punchi Banda Mudanayake & Ors* (1955) 2 All E.R. 833. P.C. the head notes state as follows:

> "By the Ceylon (Constitution and Independence Order in Council, 1946 (as amended), s. 29: "(1) Subject to the provisions of the order, Parliament shall have power to make laws for the peace, order and good government of the

island. (2) *No such law shall – … (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable* …"

The appellant, an Indian Tamil living in Ceylon who was born in India, *whose application to have his name entered on the register of electors was rejected on the grounds that he was not a not citizen of Ceylon* within the meaning of the Citizenship Act, No. 18 of 1948, contended s.4 and s.5 of that Act (which laid down the qualifications necessary for a person born outside Ceylon to become a citizen of Ceylon), and the Ceylon (Parliamentary Elections) Order in Council, 1946, s. 4(1) (a), as amended by the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 *(which provided, inter alia, that no person should be qualified to have his name entered in any register of electors in any year if he was not a citizen of Ceylon)*, were ultra vires s. 29(2) (b) of the Ceylon (Constitution And Independence) Order in Council, 1946, in that they imposed a disability or restriction on the Indian Tamil Community in Ceylon.

Held: the Acts in question were intra vires of the Ceylon legislature since the legislation concerned was

legislation on citizenship, and *it was a natural and legitimate function of the legislature of a country to determine the composition of its nationals; standards of literacy, of property, of birth or of residence were standards which a legislature might think it right to adopt in legislation on citizenship and did not create disabilities in a community as such*, since the community was bound together by its race or its religion and not by its illiteracy, its poverty or its migratory character.

Appeal dismissed.

[Editorial Note. In reaching their conclusion in the present case the Judicial Committee applied to the problem before them the same test as had been applied to determine the validity of legislation in Canada and Australia, viz., *what was the pith and substance, the true character, of the legislation challenged* (see p. 838, letter B. post). A consequence of the application of this principle in relation to provincial legislation in Canada has been that *if the legislation challenged is truly within a description of legislative power ascribed to a provincial legislature it is immaterial that incidentally it affects a matter assigned to the central legislature* (see HALSBURY's LAWS (3rd Edn.) 498). *Regard is*

had to what is the true essential character of the legislation in issue. In reaching their conclusion, the Judicial Committee considered that, as regards evidence, *they ought to take judicial notice of such matters as reports of parliamentary commissions and such other facts as should be assumed to be within the contemplation of the legislature when the legislation was passed* (see p. 837, letter D, post) …"

It is therefore noticeable that unless amended, only a Ghanaian citizen by birth can be a president or vice-president of Ghana, see articles 60(3) and 62(a). Nor can a dual citizen be a member of Parliament, a speaker or deputy speaker of Parliament, see articles 94(2) (a), 95(1) and 96(3). Furthermore a person who acquires citizenship otherwise than by birth may through the High Court be deprived of such citizenship whereas a Ghanaian citizen by birth cannot be so deprived. Therefore this constitutional framework on citizenship contemplates some necessary discrimination or inequality in citizenship. It is noticeable that this variation in citizenship rights is not arbitrary but based on the need for security of allegiance to the state of Ghana proportionate to the type of office of state involved. In particular the dual Ghanaian citizen is a unique creature of the Constitution as amended. He was hitherto proscribed by the Constitution (save in very limited situations) because he would pose a much greater threat to national loyalty since he will be torn in loyalty

between two or more countries, and therefore the question of equality of rights in relation to him simply did not arise. What his rights should be upon being let into dual citizenship of Ghana can only depend on what has been conferred on him by the Constitution, with due regard for national security as evidenced by the limitations on the holding of certain offices.

The Security of the State

The plaintiff's argument that a Ghanaian dual citizen has inviolable equality of rights with all other persons under articles15(1) and 17 also ignores articles 12(2) and 17(5) which subject the fundamental human rights and freedoms to, *inter alia*, respect for the public interest. Therefore at the time of the constitutional amendment allowing dual citizenship in Ghana there was in place constitutional policy *inter alia*, articles 12(2) and 17(5) in favour of the public interest which could not be ignored and was not ignored. Thus in *R v Secretary of State for the Home Department, Ex parte Puttick* [1981] 1 All ER 776, the head note adumbrates this point as follows:

> "*The applicant was a German citizen who committed serious crimes in Germany.* She obtained entry into the United Kingdom on a false passport in the name of another German citizen and, using that name, went through a marriage

ceremony with a United Kingdom citizen at a register office and signed the marriage certificate in that name. The German authorities discovered her real identity and began extradition proceedings. In order to avoid extradition the applicant applied to the Secretary of State in her real name for registration as a United Kingdom citizen under s. 6(2) of the British Nationality 1948 Act. The Secretary of State refused her application and on appeal the Court of Appeal refused to grant her leave to apply for judicial review of the Secretary of State's decision. The applicant then applied to the court for a declaration of the validity of her marriage. On the hearing of that application the court determined ([1979] 3 All ER 463) that the marriage was valid but exercised its discretion by refusing to make a declaration of validity. Subsequently the Secretary of State, although accepting the court's decision that the applicant's marriage was valid, affirmed his refusal to register her as a United Kingdom citizen unless the court directed otherwise. The applicant applied for an order of mandamus requiring him to register her as a United Kingdom citizen on the grounds that she fulfilled the express terms of s 6(2) for registration, she was not affected by any disqualifying provisions of the Act, and therefore she has an absolute entitlement to be registered

under s 6(2) and her registration thereunder was mandatory. *The Secretary of State submitted that, even though the applicant fulfilled the requirements of s 6(2), he was entitled in an exceptional case to refuse registration on the grounds of public policy.*

Held – *Where there was a statutory duty involving the recognition of some right, then, notwithstanding the mandatory nature of the terms imposing that duty, it was nevertheless subject* to the limitation that the right would not be recognised if the entitlement to it had been obtained by criminal activity and (per Donaldson LJ) *to the limitations implied by the principles of public policy accepted by the courts at the time when the statute was passed.* It followed that the Secretary of State *was not bound to give effect to an entitlement to registration under s 6(2) of the 1948 Act which had been directly obtained by criminal activity, because* (per Donaldson LJ) *it was well established when the 1948 Act was passed that public policy required the courts to refuse to assist a criminal to benefit from his crime.* Since the applicant had achieved her marriage, and therefore her entitlement to registration under s. 6(2), by the crimes of

fraud, forgery and perjury, and could not claim to be entitled to registration without relying on her criminality, the Secretary of State was entitled, despite the mandatory terms of s 6(2), to refuse to register her as a United Kingdom citizen. The application for mandamus would therefore be dismissed." (e.s.)

Parliament, as aforesaid, amended the 1992 Constitution of Ghana to admit dual citizenship but without disregard for the element of risk to stable allegiance to Ghana. Hence even though article 94(2)(a) is not an entrenched provision it nevertheless did not delete it but expressly retained it. It is obvious that the *expressio unius est exclusio alterius* rule cannot exclude articles 95(2)(c) and 96(3). Nor in the same vein can articles 60(3) and 62(a) be reasonably contemplated as prejudiced by the amendment. It is striking that Sri Lanka has similar thinking on this matter as Ghana. Thus in *Peters and Another v. Attorney General and Another* [2000] 3 LRC 32, the head note teaches thus:

"On 11 December 2000 the appellants, P and C were elected to the House of Representatives in Trinidad and Tobago. The second respondents, Farad Khan and Franklin Khan, were the defeated candidates in, respectively, P and C's constituencies. *The second respondents applied under s 52*

of the Constitution and s 106(1) of the Representation of the People Act 1967 ('the RPA') for leave to bring election petitions challenging the election of each of the appellants on the basis that each was disqualified for election by s 48 of the Constitution since he held, in addition to citizenship of Trinidad and Tobago, citizenship of another country. Those applications for leave were heard and granted, ex parte. The appellants filed constitutional motion under s 14(1) of the Constitution of Trinidad and Tobago, which provided that 'if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion', arguing that their constitutional rights would be infringed by the election petitions. The relief sought by the motion was: a declaration that the proceedings commenced by way of election petitions by the second respondents contravened the appellants' fundamental human rights guaranteed by the Constitution since they had been obtained ex parte, since they were entitled to have the matters in the petitions interpreted in proceedings from which there was a right of appeal to the

Privy Council; a declaration that the election petitions were incapable of terminating their membership of the House of Representatives, were null and void and of no effect and were a contravention of the 'subordinate legislative powers of the Rules of Committee and of the President'; and a declaration that each appellant was 'duly qualified to be, and is entitled to remain, a member of House of Representatives duly elected.' The appellants therefore sought by their constitutional motions not only to have the Election Court declared incompetent to pass on the validity of their election but also to have the Constitutional Court determine the issue of their qualification to be elected to the House of Representatives. The trial judge dismissed the motions and the appellants appealed to the Court of Appeal.

HELD: … (5) Per de la Bastide CJ (Nelson JA concurring). *In considering whether a citizen of Trinidad and Tobago was becoming a citizen of another country, by his voluntary act, disqualified from election to the House of Representative, it was necessary to look at ss47, 48 and 49 of the Constitution.* Section 47, subject to s 48, laid down the primary qualification for election – that a person had to be a citizen of Trinidad and Tobago for two years immediately before the date of his nomination or be domiciled and resident in

Trinidad and Tobago at that date. *Section 48(1) (a) disqualified those who were citizens of a country other than Trinidad and Tobago, having become such citizens voluntarily, or were under a declaration of allegiance to such a country. Whilst the 1998 amendment to the Citizenship of the Republic of Trinidad and Tobago Act 1976 had made dual citizenship possible, the meaning of s 48(1) (a) was too clear for it to be interpreted out of existence. It was not as though giving it its plain meaning produced a palpably absurd result – it was clearly not the policy of the Constitution to confer the right to be elected to the House of Representatives on every citizen of Trinidad and Tobago. It was conceivable that there was good reason for withholding that right from those citizens who had voluntarily acquired the citizenship of another country, even though the acquisition of that citizenship no longer resulted in the forfeiture of Trinidad and Tobago citizenship. It was for Parliament, and not for the courts, to decide whether the voluntary acquisition of a second citizenship was to continue to disqualify a person from election to Parliament.* If that produced a result which was no longer considered desirable in the light of the liberalisation of the law relating to dual citizenship, then it was the function of the Parliament to

amend or repeal the law. *For the court to do so would amount to a clear usurpation of the legislative function which could not be justified by claims to be interpreting the Constitution as a living instrument.*" (e.s.)

In the case of Ghana not only have the impositions on offices that are not open to the dual citizen been retained but they have been expanded by the impugned provisions. It is noticeable from the offices which cannot be held by a dual citizen of Ghana that they are all high profile or leadership positions (see article 286(5)) which involve confidentiality and unalloyed allegiance to Ghana and if some other countries do not consider them to be such Ghana is not precluded from doing so. Dual loyalty has been denounced in the book of the Universe, the Bible. In the Holman Illustrated Study Bible, Matthew chapter 16 verse 24 states thus:

"No one can be a slave to two masters, since either he will hate one and love the other, or be devoted to one and despise the other. You cannot be slaves of God and of money." (e.s.)

A classic example of the dangers of dual loyalty is given in the First Book of Samuel Chapter 29, verses 1 to 11:

"**Philistines Reject David**

29 [1]The Philistines brought all their military units together at Aphek while Israel was camped by the spring in Jezreel. [2]As the Philistine leaders were passing [in review with their units of] hundreds and thousands, David and his men were passing [in review] behind them with Achish. [3]Then the Philistine commanders asked, “What are these Hebrews [doing here]?”

Achish answered the Philistine commanders, “That is David, Servant of King Saul of Israel. He has been with me a considerable period of time. From the day he defected until today, I’ve found no fault with him.”

[4]The Philistine commanders, however, were enraged with Achish and told him, “Send that man back and let him return to the place you assigned him. He must not go down with us into battle only to become our adversary during the battle. What better way could he regain his master’s favor than with the heads of our men? [5]Isn’t this the David they sing about during their dances:

Saul has killed his thousands,

but David his tens of thousands.?"

[6]So Achish summoned David and told him, "As the Lord lives, you are an honourable man. I think it is good to have you working with me in the camp, because I have found no fault in you from the day you came to me until today. But the leaders don't think you are reliable. [7]Now go back quietly and you won't be doing [anything] the Philistine leaders think is wrong."

[8]"But what have I done?" David replied to Achish. "From the first day I was with you until today, what have you found against your servant to keep me from going along to fight against the enemies of my lord the king?"

[9]Achish answered David, "I'm convinced that you are as reliable as an angel of God. But the Philistine commanders have said, 'He must not go into battle with us.' [10]So get up early in the morning, you and your masters' servants who came with you. When you've all gotten up early, go as soon it's light." [11]So David and his men got up

early in the morning to return to the land of the Philistines. And the Philistines went up to Jezreel."

At least Ghana has had some experience in this sphere of loyalty not long ago. Even in a game of football Ghanaians and the world would recall the fears held when Ghana's National team, the Black Stars were to meet Serbia in the 2010 World Cup opening match since the coach of the Black Stars Milovac Rajevac was a Serbian. There were fears as to his loyalty to the interests of Ghana represented by the Black Stars. When Ghana beat Serbia one nil, the Serbian coach Milovac Rajevac visibly had to restrain himself from any reaction whatsoever. That notwithstanding his home in Serbia was attacked by Serbians. This situation arose even though Rajevac was not even a Ghanaian citizen! His country could not forgive his apparent breach of allegiance to it.

All these concerns are confirmed by the Memorandum that accompanied the Constitution of the Republic of Ghana (Amendment) Bill as follows:

" **MEMORANDUM**

The object of this Bill is to amend the Constitution to revise or repeal some provisions that have created difficulties in their implementation or the continued

existence of which is considered not justified for the reasons given.

Clause 1: following the numerous petitions to government on the issue of dual citizenship, particularly from Ghanaians resident outside the country, coupled with the known sizeable contribution towards national development made by these Ghanaians, government considers it appropriate that the constitutional provision which prohibits dual citizenship for Ghanaians should be repealed.

Pursuant to this, clause 1 of this Bill repeals article 8 of the Constitution which deals with the prohibition of dual citizenship and substitutes a new article 8. The proposed article 8(1) states that *a citizen of Ghana may hold the citizenship of any other country* in addition to his Ghanaian citizenship. However, *one cannot overlook the fact that it is absolutely essential that certain offices must be held by persons who owe allegiance only to Ghana.* For this reason, exceptions to this general provision have been provided in the proposed article 8(2) in respect of *specific crucial public offices.*" (e.s.)

This stance is reinforced by article 35(5) and (6) (a) thus:

> "(5) The State shall actively promote the integration of the people of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed and other beliefs.
>
> (6) Towards the achievement of the objectives sated in clause (5) of this article, the State shall take appropriate measures to –
>
> > (a) *foster a spirit of loyalty to Ghana that overrides sectional, ethnic and other loyalties*;" (e.s.)

This latter provision is well served by, *inter alia*, the impugned provisions. Certainly the Ghanaian society will be better integrated if the causes of suspicion on grounds of loyalty to Ghana are removed by not allowing access to sensitive public positions which involve potential conflict of national loyalties.

Article 284 also provides:

> *"CONFLICT OF INTEREST*

284. A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of this office."

The allowance of the holding of sensitive offices by persons of dual citizenship will certainly run counter to this provision. For these reasons I also share, though with reversionary caution, the idea of positive discrimination held by my allodially learned brother Dr. Date-Bah JSC, as being within the contemplation of the Constitution. In this regard, see *Nartey v. Gati* [2010] SCGLR 745, *Customs, Excise & Preventative Service v. National Labour Commission and Attorney-General* [2009] SCGLR 530 and *Minister of Defence v. Potsane* (2002) 3 LRC 579. The latter two cases uphold different treatment for the Security Services, such as the army.

Conclusion

In conclusion I hold that the impugned provisions are intended to protect the interest of Ghana as far as crucial loyalty to Ghana is concerned and since such provisions are permissible in the public interest by articles 12(2), 17(5), 35(5) and 6(a) they are not only sound but also their introduction does not involve any amendment of the

provisions of the Fundamental Human Rights because they allow such provisions to co-exist with them when introduced. Article 8 is not an entrenched provision and was therefore validly amended.

The power of the Minister to add to the list of offices which are not open to a dual citizen is not as frightful or open-ended as it appears, for *inter alia*, it has to be read *ejusdem generis* with the preceding offices enumerated but it cannot be validly exercised by a legislative instrument as provided by section 16(2) of the Citizenship Act, 2000 (Act 591) instead of an Act of Parliament as provided by article 8(2) (g). It is clear that article 295(1) which defines an Act does not include a legislative instrument which is a matter governed not by article 106 but by article 11(7) read together with the definition of "statutory instrument" under article 295(1) and section 1 of the Interpretation Act, 2009 (Act 792) . Even there, a further question arises as to the constitutionality of Article 8(2) (g) itself relating to a simple Act of Parliament which is governed by article 106 as opposed to the procedure for the amendment of the Constitution laid down in respect of non-entrenched provisions by article 291. But since Parliament could amend the Constitution to introduce dual citizenship it could make provisions relating to the rights and duties of the dual citizen as a new and special matter as it did, inclusive of article 8(2) (g). See by analogy article 285(j) and, if necessary article 296 (c). There is a further possible answer namely, to hold that articles 289(2) (a) and 291

have been indirectly or impliedly amended as far as the power given in article 8(2) (g) is concerned since that provision itself has been duly passed in accordance with those articles. In view of the provisions of section 10(4) (a) (c) and (d) of the Interpretation Act, *supra*, the Memorandum to that Act which, *inter alia*, requires an interpretation of the Constitution which as much as possible avoids the necessity of its amendment and the principles laid down in *Tuffour v. Attorney-General* (1980) GLR 637 C.A. (sitting as the Supreme Court) as to the organic nature of the Constitution I would also sustain this latter view.

As far the provisions relating to certification of dual citizenship status are concerned, after long reflection I think the Indian example suffices. In *Hari Shanken Jain v. Gandi* [2002] 3 LRC 562 the Indian Supreme Court held that a citizenship registration certificate creates a rebuttable presumption of such citizenship. The certification provisions therefore cannot validly go further than that.

Subject to this last qualification I would also dismiss the plaintiff's action.

(SGD) W. A. ATUGUBA

AKUFFO, (MS) JSC.

I have been privileged to read beforehand the opinion read by my esteemed Brother, Dr, Date-Bah, and I agree generally with the conclusions he has arrived. However, I have serious misgivings concerning the constitutionality of section 16(2) of the Citizenship Act, 2000 (Act 591).

Citizenship (whether or not on a dual or multiple basis) of a country is a precious right which carries with it invaluable privileges. The means by which any of these rights and privileges may be limited are normally governed by clear legal provisions, because such limitations derogate from the incidents of citizenship. Thus, in the case of Ghanaians with dual citizenship, the limitations imposed on their eligibility to hold public office are set by article 8(2) of the Constitution, as amended by the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) which provides that:-

> "... no citizen of Ghana shall qualify to be appointed as a holder of any office specified in this clause if he holds the citizenship of any other country in addition to the citizenship of Ghana:
>
> (a) Ambassador or High Commissioner
>
> (b) Secretary to the cabinet
>
> (c) Chief of Defence Staff or any Service Chief
>
> (d) Inspector-General of Police
>
> (e) Commissioner, Customs, Excise and Preventive Service
>
> (f) Director of Immigration Service and

(g) any office specified by an Act of Parliament

Hence, dual citizens of Ghana are prohibited, by the Constitution, from holding these listed positions. Clause (g) however, makes it possible for this list to be expanded by an Act of Parliament, to include other positions. Since the Constitution sets out a certain and specific list, it follows that any addition to the list would amount to an amendment of the Constitution. It is for this reason that, in his Statement of Case, the Plaintiff seeks to argue that the Act of Parliament stipulated in the clause is one that must necessarily comply with the provisions of Chapter Twenty-Five of the Constitution, Article 289 of which provides that:-

> "(1) Subject to this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.
>
> (2) This Constitution shall not be amended by an Act of Parliament **or altered whether directly or indirectly** unless –
>
> (a) **the sole purpose of the Act is to amend this Constitution**; and
>
> (b) the Act has been passed in accordance with this Chapter."

In my view, these clear, specific and basic requirements for a valid amendment of the Constitution were not complied with in the enactment of Section 16(2) of Act 591. The long title of the Act reads as follows:-

> "An Act to consolidate with amendments the law relating to citizenship of Ghana, to state in respect of citizenship by birth the legal conditions applicable at the given points in time, to bring the law in conformity with the Constitution as amended and to provide for related matters."

The declared purpose of the Act, to my understanding, is therefore that it was being enacted to consolidate and bring into pursuant effect the

amended provisions of the Constitution. It was not declared to be, itself, a constitutional amendment act. Thus its sole purpose was not to amend the Constitution, and as far as the Ghanaian public is formally aware, there has been only one amendment of article 8(2) of the Constitution, and the terms of that amendment are those set out in Act 527. Yet it is clear that section 16(2) has purported to amend and alter the provisions of Article 8(2). These amendments added to the list of offices that may not be held by persons holding dual citizenship. Additionally, and of even greater concern, they also weakened the process integrity originally envisaged by the constitutional amendment Act, by passing downward to the Minister the power to further add to the list of prohibited offices by legislative instrument. The power thus conferred on the Minister is quite excessive, in my view. Thus, whereas the Constitution stipulates more stringent measures and processes at higher levels for the amendment of its provisions, under the Citizenship Act, an even greater number of persons with dual citizenship may be disqualified by way of a mere legislative instrument issued by a Minister, thereby by-passing the checks mounted by the Constitution, in Articles 291 and 292.

Now, every provision of the Constitution is presumed to be there for a purpose and cannot be disregarded for the sake of convenience. Whilst it may be arguable that the Act of Parliament referred to in article 8(2)(g) of the Constitution (as amended by Act 591) is simply an ordinary Act of Parliament, passed in accordance with Article 106, I am fortified in the position I have taken to the contrary, by the well established principle that in the construction and interpretation of a Constitution, every provision must be given its effect. Therefore, it must be read as whole and not as though each provision exists in isolation, oblivious of the import of any other provisions. Yes, an Act of Parliament to add to the list of offices is referred to in the said clause (g). Yet article 289 also states in categorical terms that an Act of Parliament may not amend or directly or indirectly alter the Constitution unless certain conditions are

met. Doubtlessly, in enacting the clause, Parliament was fully aware of Article 289. Hence, if clause (g) was intended to create an exception to the requirements of article 289 it should have been so stated therein expressly that, in respect of the clause, the said requirements are excepted. Clearly this was not done and, therefore, there would be no justification for reading any such exception into the provisions of clause (g). To hold otherwise would be very dangerous and make a mockery of constitutional provisions such as article 8(2), which particularise specific matters, thereby eventually reducing the Constitution to the status of an ordinary statute, as evidenced by what Parliament has attempted to do in section 16(2) of Act 527.

In my humble opinion, therefore, the fact that an ordinary Act of Parliament undergoes certain levels of scrutiny before enactment is not sufficient justification when there is clear non-compliance with the prescribed procedures and processes stipulated, by the same Constitution that empowered Parliament to alter article 8(2), for the enactment of alterations to the Constitution. For the foregoing reasons, I am of the view that the addition of the offices of:-

> Chief Justice
> Commissioner, Value Added Tax Service
> Director General, Prisons Service
> Chief Fire Officer
> Chief Director of a Ministry and
> the rank of a Colonel in the Army or its equivalent in the other security services

in section 16 (2) (a), (h) – (l), to the list of proscribed positions is unconstitutional. So too is section 16 (2) (m) which purports to empower the Minister to prescribe additional offices by legislative instrument. I would, therefore, declare those provisions null and void.

(SGD) S. A. B. AKUFFO (MS.)

JUSTICE OF THE SUPREME COURT

BROBBEY J.S.C:

I have had the opportunity of reading all the opinions expressed in this case.

My own opinion which I wrote down happened to co-incide with much of the reasoning and conclusions expressed by Date-Bah JSC.

I therefore concur with the reasoning and conclusions expressed by Date-Bah JSC.

I would grant the plaintiff's reliefs 5, 6 and 7 .

All the other reliefs are dismissed.

(SGD) S. A. BROBBEY

JUSTICE OF THE SUPREME COURT

DR. DATE-BAH, J. S. C:

This case raises intriguing general questions as to the constitutionality of new provisions introduced into an existing Constitution, where the new provisions are claimed to be in conflict with some core constitutional values and entrenched

provisions embodied in the existing Constitution. The plaintiff's case invokes the general idea that for a constitutional amendment to be valid, it must not only comply with the prescribed constitutional procedure, but must also measure up to substantive standards prescribed by the existing constitution. In effect, the plaintiff's general argument suggests that modern constitutions embodying notions of constitutionalism have a ratchet effect, in the sense that the standards of constitutionalism and human rights contained in them cannot be effectively diluted, or at least, not easily. In other words, an increase in the fundamental rights of a constitution will generally be irreversible, or at least not be easily reversible. This implies, to take an extreme example, that a constitution providing for a multi-party liberal democracy cannot be amended to provide for a dictatorship, even if the right constitutional procedure is followed. At the general level, this is a radical argument that comes into conflict with another principle of democracy, namely, that the will of the people or of the electorate shall prevail. Accordingly, if the popular will is expressed, through the prescribed constitutional procedure, as a constitutional amendment, do the courts have a mandate to stand in the way of the implementation of this change? This is an issue which, to an extent, is at the heart of this case and it is a fascinating one.

In an article cited by the plaintiff in support of the general notion that constitutionalism imposes a restriction on the amendments possible to a constitution, the author, one Dante B. Gatmaytan of the University of the Phillipines, concludes as follows (in "*Judicial Review of Constitutional Change*: *Defending Constitutions with Constitutionalism".* Constitutional Adjudication and Democracy):

> "Constitutions are too easily amended and often times these exercises are carried out only to serve the interests of parties in power. Fortunately, there is a growing understanding that constitutionalism is a function of a constitution. We should further explore the idea that changes to the constitution should always preserve the elements of constitutionalism. Courts have assumed an important role in government of late – serving as guardians of the constitution against the excesses of the other branches of government. The next logical step would be to invoke the power of judicial review to protect constitutions from regressive amendments. As I suggest here, the theoretical and institutional infrastructure for defending constitutions along these lines are already in place,"

However, the actual facts of this case make the choice less stark for this Court. In my view, the general question raised above has to be resolved in relation to particular constitutions by reference

to the actual language and spirit of that particular constitution. In relation to the Ghanaian Constitution, therefore, the specific arguments to be assessed need to be at a lower level of abstraction and, indeed, the arguments of the plaintiff, which will be set out below, are.

The facts of this case are that the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) received the Presidential Assent on 16th December 1996. The object of the Act was to amend the Constitution of Ghana. Section 1 of the Act provides as follows:

> "Article 8 of the Constitution is repealed and the following inserted: Article 8 ofthe Constitution substituted

" Dual 8.(1) A citizen of Ghana may hold the citizenship of any other country in addition to his
Citizenship citizenship of Ghana

> (2)Without prejudice to article 94 (2) (a) of the Constitution, no citizen of Ghana shall qualify to be appointed as a holder of any office specified in this clause if he holds the citizenship of any other country in addition to his citizenship of Ghana.

(a) Ambassador or High Commissioner;

(b) Secretary to the Cabinet;

(c) Chief of Defence Staff or any Service Chief;

(d) Inspector-General of Police;

(e) Commissioner, Customs, Excise and Preventive Service;

(f) Director of Immigration Service; and

(g) any office specified by an Act of Parliament

(3) Where the law of a country requires a person who marries a citizen of that country to renounce the citizenship of his own country by virtue of that marriage, a citizen of Ghana who is deprived of his citizenship of Ghana by virtue of that marriage shall, on the dissolution of that marriage, become a citizen of Ghana."

Pursuant to this Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527), the Citizenship Act, 2000 (Act 591) was enacted which contains a section 16(2) which the Plaintiff in this action claims is unconstitutional. Accordingly, on 27th June 2011 he filed a writ invoking the original jurisdiction of this court, seeking the following reliefs:

1. "A Declaration that section 16(2) of the *Citizenship Act,* 2000 (Act 591) is null, void and of no effect as it contravenes the letter and spirit of Article 17 of the 1992 Constitution, in that the section discriminates against a Ghanaian citizen who has acquired the citizenship of another country by disqualifying the citizen from holding any of the offices specified in the said section.
2. A Declaration that section 16(2) of the *Citizenship Act,* 2000 (Act 591) is null, void and of no effect as it contravenes the letter and spirit of Article 15(1) of the 1992 Constitution, in that the section singles out Ghanaians who have acquired citizenships of other countries and treats them in a way that violates their dignity as human beings and doubts their status as honest citizens capable of holding high office.
3. A declaration that the prohibitions in Section 16(2) of the *Citizenship Act*, 2000 (Act 591) deny a Ghanaian who has acquired the citizenship of another country the rights to participate fully in the affairs of the State and violate the principle of equal citizenship which is a bedrock principle of the 1992 Constitution.

4. A declaration that the prohibitions in Section 16(2) of the *Citizenship Act,* 2000 (Act 591) are not designed to protect any compelling, important, legitimate or even rational national interest.
5. A declaration that section 16(2) of the *Citizenship Act,* 2000 (Act 591) is null, void and of no effect as it delegates excessive, unnecessary and unreasonable power to the Minister of Interior to ban citizens who have acquired the citizenship of other countries from holding any public office that the Minister may prescribe.
6. A Declaration that the administrative requirement of the Republic of Ghana for a dual citizen to obtain a dual citizenship card is discriminatory, unreasonable, burdensome, serves no legitimate constitutional purpose and thereby is null, void and of no effect as it contravenes the letter and spirit of Article 17 of the 1992 Constitution.
7. A Declaration that the administrative requirement of the Republic of Ghana for a dual citizen to obtain a dual citizenship card is discriminatory, unreasonable, burdensome, serves no legitimate constitutional purpose and thereby is null, void and of no effect as it

contravenes the letter and spirit of Article 15(1) of the 1992 Constitution.

8. An order directing the Attorney-General, the Minister of Interior, the Director of Immigration, their deputies, agents, or employees or any other servant or agent of the Republic to permanently cease and desist from enforcing section 16(2) of the *Citizenship Act,* 2000 (Act 591) or engaging in any acts designed to discriminate against Ghanaians who have acquired other citizenships.
9. An order directing the Attorney-General, the Minister of Interior, the Director of Immigration, their deputies, agents, or employees or any other servant or agent of the Republic to permanently cease and desist from enforcing section 16(2) of the *Citizenship Act,* 2000 (Act 591) or engaging in any acts designed to discriminate against Ghanaians who have acquired other citizenships.(*sic)*
10. Such further or other orders as the honourable Supreme Court will deem fit to make.
11. Costs for court expenses and counsel fees."

The plaintiff is a Ghanaian citizen who had his education up to the tertiary level in Ghana before moving to reside in the United

States of America, where he is currently employed as a Professor with the University of Florida. The plaintiff claims to have been active in the public affairs of Ghana since the late 1970s and to have continued in this role since the coming into force of the 1992 Constitution.

At the initial oral argument of this case on 22nd February, 2012, some members of the court expressed their difficulty with the notion that one part of the Constitution could be declared unconstitutional because it was inconsistent with another part of the Constitution, but were more open to considering arguments challenging the constitutionality of an Act amending the Constitution which contained provisions inconsistent with existing provisions of the Constitution. The plaintiff was offered the opportunity to question, through a Supplementary Statement of Case, the constitutionality of the new Article 8(2) of the Constitution, which Parliament had purported to enact in the Constitution of Ghana (Amendment) Act, 1996 (Act 527). Was this constitutional amendment valid at the point of enactment? If it was invalid at the point of enactment, then it never became a part of the Constitution and thus this Court would have jurisdiction under article 2(1) of the Constitution to declare it inconsistent with, or in contravention of, a provision of the Constitution.

The plaintiff filed a Supplementary Statement of Case on 28th February, 2012 and the first issue it addressed was: "whether the purported amendment (Article 8(2) of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)) imposing public office-holder exclusions on certain citizens of Ghana is defective, null and void and therefore unconstitutional?" The plaintiff's submission is that the answer to this question is in the affirmative. Although he concedes that a provision that is lawfully inserted into the Constitution cannot be said to be unconstitutional, he however contends that a purported Constitutional amendment which is procured by unlawful means or even one that is procured by lawful means that is inconsistent with the basic structure of the Constitution is null and void and unconstitutional.

In support of this proposition, the plaintiff cites the Indian Supreme Court case of *Kesavananda Bharati v State of Kerala* AIR 1973 S.C. 1461. The plaintiff's interpretation of this case is that it held that the judiciary could strike down amendments to the constitution passed by Parliament that conflict with the constitution's "basic structure". In fact what Sikri CJ actually held in this case was that: "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution." He also held that: "There are no inherent limitations on the

amending power in the sense that the Amending Body lacks the power to make amendment so as to damage or destroy the essential features or the fundamental principles of the Constitution." In other words, the authority claimed by the Indian Supreme Court to strike down amendments in conflict with the basic structure of the Indian Constitution was based on a specific article of that Constitution and not on any inherent judicial power. Secondly, Sikri CJ expressly conceded that the power of an Amending Body to amend a constitution could not be restricted by an inherent limitation on the amendment power intended to preserve the essential features or fundamental principles of the Constitution. This Indian authority thus comes down on the side of the ultimate democratic principle that the will of the people or of the electorate is determinative in matters of constitutional amendment. If the right amendment procedure is followed, the courts cannot prevent even fundamental principles or essential features being modified. What the courts can do is to so interpret such amendments as to minimize their impact on such essential features or fundamental principles.

The plaintiff correctly identifies procedural constraints on constitutional amendments in Ghana as those set out in Article 289. More controversially, he identifies the substantive constraints on constitutional amendments as including "illegality

of amendments that conflict with fundamental principles of the Constitution, including an amendment to create a Caste system or citizens without full political rights." This substantive constraint is at the heart of his argument in this case that the purported new Article 8(2) of the 1992 Constitution is unconstitutional.

Article 289 of the 1992 Constitution, which is referred to above, reads as follows:

> "(1) Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.
>
> (2) This Constitution shall not be amended by an Act of Parliament or altered whether directly or indirectly unless -
>
> (a) the sole purpose of the Act is to amend this Constitution; and
>
> (b) the Act has been passed in accordance with this Chapter."

The provisions of Chapter 3 of the Constitution, which deal with citizenship, are not entrenched and therefore can be amended by Parliament without any need for a referendum, among other requirements, on the Bill proposing to amend those provisions.

On the other hand, provisions contained in Chapter 5 of the Constitution, which deal with Fundamental Human Rights and Freedoms, are entrenched and may only be amended by Parliament after a referendum, among other requirements.

Article 290(2) to (6) provides as follows:

> "(2) A bill for the amendment of an entrenched provision shall, before Parliament proceeds to consider it, be referred by the Speaker to the Council of State for its advice and the Council of State shall render advice on the bill within thirty days after receiving it.
>
> (3) The bill shall be published in the Gazette but shall not be introduced into Parliament until the expiry of six months after the publication in the Gazette under this clause.
>
> (4) After the bill has been read the first time in Parliament it shall not be proceeded with further unless it has been submitted to a referendum held throughout Ghana and at least forty percent of the persons entitled to vote, voted at the referendum and at least seventy-five percent of the persons who voted cast their votes in favour of the passing of the bill.

(5) Where the bill is approved at the referendum, Parliament shall pass it.

(6) Where a bill for the amendment of an entrenched provision has been passed by Parliament in accordance with this article, the President shall assent to it."

The plaintiff, therefore, argues as follows in his Statement of Case in relation to article 8(2):

"13. It is respectfully submitted that an attempted amendment of any part of the Constitution that has the effect of diluting or extinguishing the rights entrenched by Articles 17, 15 and 55(10) is impermissible and unconstitutional in so far as the attempted amendment does not follow the procedure outlined in Article 290.

14. Parliament clearly did not follow the procedures outlined in Article 290 when it inserted Article 8 (2) in 1996.

15. Plaintiff does not argue that Parliament cannot extinguish the rights entrenched by Article 17, 15 and 55 (10). Rather, Plaintiff is simply asserting that Parliament must use the proper procedures to amend the Constitution, if Parliament seeks to disturb those fundamental rights, which inured to dual citizens recognized in the 1992 Constitution.

16. Parliament has no authority to use an ordinary amendment process to insert a new clause in the Constitution, which has the effect of disturbing provisions that are entrenched by the Constitution and which extinguishes rights that are deemed fundamental and requiring of heightened protection.

17. The fundamental rights defined by the Constitution are not to be treated as statutory rights subject to the whims of Parliament and Parliamentary majorities."

The plaintiff accordingly contends that if Article 8(2) is not held to be void and unconstitutional it would have the effect of amending articles 55(10), 17 and 15(1) of the 1992 Constitution, without following the prescribed procedure.

Article 55(10) provides as follows:

> "(10) Subject to the provisions of this constitution, every citizen of voting age has the right to participate in political activity intended to influence the composition and policies of the Government."

Article 17 also states that:

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

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

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

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

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

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

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

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

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

Finally, article 15 says:

"(1) The dignity of all persons shall be inviolable.

(2) No person shall, whether or not he is arrested, restricted or detained, be subjected to -

(a) torture or other cruel, inhuman or degrading treatment or punishment;

(b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

(3) A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons.

(4) A juvenile offender who is kept in lawful custody or detention shall be kept separately from an adult offender."

The plaintiff's general case in respect of the constitutionality of Article 8(2) of the Constitution is that it constitutes a purported amendment of the Constitution which was never valid because it infringed the above three entrenched fundamental human rights embodied in Chapter 5 of the Constitution. Accordingly, the procedure for amending entrenched clauses of the 1992 Constitution should have been followed. Not having followed this procedure, Parliament had exceeded its authority in enacting Article 8(2) of the Constitution and therefore the provision was dead at birth.

Next, in relation to article 15, the plaintiff has claimed that the Constitution of the Republic of Ghana (Amendment) Act,1996 (Act 527) and its consequential legislation, the Citizenship Act, 2000

(Act 591) have the obvious and intended effect (if not the express purpose) of violating the dignity of a certain class of citizens in violation of the Dignity Clause of the Constitution and that the grounds for the exclusions of dual citizens from certain public offices are not permissible under the Dignity Clause of the Constitution.

In relation to article 17, the plaintiff has asserted that the amendment (that is, article 8(2) and the consequential Citizenship Act, 2000 (Act 591)) is unconstitutional because it has the obvious and intended effect (if not the express purpose) of discriminating against a certain class of citizens in violation of the Equality Clause of the Constitution and because the office-holding exclusions contained in article 8(2) are not permissible under the Equality Clause of the Constitution.

Finally, in relation to article 55(10), the plaintiff's argument has been that the impugned article 8(2) and its consequential legislation have the obvious and intended effect (if not the express purpose) of restricting political participation by dual citizens in violation of the Equal Participation Clause of the Constitution and that the grounds for the exclusions of dual citizens from the specified public offices are not permissible under the Participation Clause of the Constitution.

The conclusion of the Supplementary Statement of Case was:

"29. In sum, the purported amendment (Article 8(2) of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) and consequential legislation (Citizenship Act, 2000 (Act 591) *is defective and it is null and void and has no effect on the Constitution.*

30. In sum Article 8(2) never became a provision of the Constitution; having never become a provision of the Constitution, it cannot trigger the question of whether a provision of the Constitution can be considered Unconstitutional."

In response to these arguments, the defendant, the Honourable Attorney-General of the Republic argued in his Reply to the Plaintiff's Supplementary Statement of Case that, under the law which existed on the coming into force of the 1992 Constitution, a citizen of Ghana who had voluntarily acquired the citizenship of another country lost his or her Ghanaian citizenship. He challenged the accuracy of the proposition of law contained in paragraph 6 of the Plaintiff's original Statement of Case which asserted that:

"Furthermore, under the original provisions of the 1992 Constitution, citizens of Ghana who had acquired the citizenships

of other countries before the coming into force of the 1992 Constitution remained citizens of Ghana since the constitutional provision could not be retroactively applied to them."

The defendant correctly points out that both under the Ghana Nationality Act 1971 (Act 371) and under the original Article 8 of the 1992 Constitution, dual nationality, with a few minor exceptions, was proscribed. Since the existing law at the time of the coming into force of the 1992 Constitution was preserved by article 11(5) of that Constitution, it is clear that both before and immediately after the coming into force of the 1992 Constitution, dual nationality, with minor exceptions, was not permitted under Ghanaian law.

This is an important element in the argument against the plaintiff's case, although the defendant does not fully develop its import. The fact is that if a Ghanaian citizen could not voluntarily acquire the nationality of another State and retain his Ghanaian citizenship, it could be cogently argued that this was a worse inequality than being allowed by the impugned Article 8(2) to retain his or her citizenship but to be excluded from certain offices. Accordingly, it would be reasonable to interpret the impugned provision as increasing, rather than diminishing, the rights of a Ghanaian who has voluntarily acquired the citizenship of another country.

In other words, assuming without admitting that excluding Ghanaians with dual nationality from the posts referred to by the impugned article 8(2) constitutes an infringement of articles 15, 17 and 55(10), the total deprivation of voluntary would-be dual citizens of all their rights of citizenship entailed by the pre-existing law, which prohibited dual nationality, was a worse inconsistency with those provisions. Yet, it was an accepted orthodoxy that this total deprivation of citizenship was constitutional since it was part of the Constitution as originally enacted. The impugned provision could thus not be viewed as a dilution of pre-existing entrenched rights, but rather as an improvement of those rights. Indeed, the framers of the impugned provision saw it as a measure of reform.

When the essence of this analysis was put to counsel for the Plaintiff, Professor Bondzi-Simpson, during a further oral argument before this court on 14th March 2012, his response was that the focus of the court should be on preventing discrimination among citizens and that it was unacceptable for different classes of citizens to be treated differently. His response thus re-echoed the following paragraph in the plaintiff's original Statement of Case:

> "12. The Plaintiff's case is that the Constitution forbids a caste system that treats some citizens as less than full citizens with limited rights. The plaintiff contends that

banning dual citizens from holding the specified offices render them second class citizens and curtail their fundamental right to full participation in the civil and political life of the country."

This response is not persuasive. The fact is that, before the enactment of the impugned article 8(2), there was unequal treatment of citizens in the sense that a citizen who voluntarily acquired a foreign citizenship lost his Ghanaian citizenship and all the rights entailed in that citizenship. Although such a person was no longer a Ghanaian citizen, his loss of his citizenship rights was a consequence of the unequal treatment he had received from the law. Now, if the law is reformed to preserve for him a part of his rights as a citizen, in contrast to the total loss of those rights consequent on his choosing to acquire voluntarily another nationality, I consider that reform to be an advance towards greater equality, rather than the opposite. To insist on comparing only the rights of those who remained Ghanaian citizens to see whether there were unequal classes of such citizens, whilst ignoring the fact of the loss of citizenship resulting from an act of a former citizen would be to present a distorted picture of the equality among citizens under the law existing prior to the enactment of the challenged article 8(2).

Section 8 of the repealed Ghana Nationality Act, 1971 (Act 361) provided in part as follows:

"(1) Any person who , upon the attainment of the age of 21 years, is a citizen of Ghana and also a citizen of some country other than Ghana shall, subject to subsection (7) of this section, cease to be a citizen of Ghana upon the specified date unless –

(a) he has renounced his citizenship of that other country; and

(b) he has, in the case of a citizen of Ghana born outside Ghana, made and registered with the Minister a declaration of his intention to reside in Ghana.

(2) Any person who –

(a) has attained the age of 21 years on the coming into force of the Constitution; and

(b) becomes a citizen of Ghana on that day by virtue of the provisions of article 5 of the Constitution; and

(c) is on or after that day also a citizen of some country other than Ghana,

shall, subject to the provisions of subsection (7) of this section cease to be a citizen of Ghana upon the specified date unless he has renounced his citizenship of that other country and taken the oath of allegiance.

(3) A citizen of Ghana shall cease to be a citizen of Ghana if having attained the age of 21 years –

(a) he acquires the citizenship of some country other than Ghana by voluntary act other than marriage; or

(b) he otherwise acquires the citizenship of some country other than Ghana and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered with the Minister a declaration of his intention to reside in Ghana.

…..

(7) The Minister may in such special circumstances as he thinks fit extend beyond the specified date the period in which any person may make a renunciation of citizenship, take an oath or make and register a declaration for the purposes of this section."

Furthermore, the original article 8(1) of the 1992 Constitution read as follows, before its unchallenged amendment:

> "Subject to this article, a citizen of Ghana shall cease forthwith to be a citizen of Ghana if, on attaining the age of twenty-one years, he, by a voluntary act, other than marriage, acquires or retains the citizenship of a country other than Ghana."

This was the existing law which insisted on sole citizenship for Ghanaians, with a few minor exceptions. This was the law which the challenged article 8(2) sought to change and reform. It was the Citizenship Act, 2000 (Act 591) which repealed the Ghana Nationality Act, 1971. To my mind, therefore, against this backdrop, article 8(2) expanded, rather than diluted, the fundamental rights of a Ghanaian and the argument that it created more inequality or loss of dignity or less rights of political participation is clearly misconceived and should be rejected.

However, the Plaintiff is of a different view. He expresses this view in his Reply to the Defendant's Arguments of Law (Statement of Case) filed pursuant to this Court's order of March 15th 2012 as follows:

23. "The Attorney-General insists that on the coming into force of the 1992 Constitution, "all citizens of Ghana who were

citizen of Ghana and at the same time citizens of other countries were deemed not to be citizens of Ghana."

24. This interpretation is plainly inconsistent with the Constitution 1992, which states that "Subject to this article, a citizen of Ghana shall cease forthwith to be a citizen of Ghana if, on attaining the age of twenty-one years, he by a voluntary act, other than marriage, acquires or retains the citizenship of a country other than Ghana."

25. The Constitution of the Republic of Ghana, 1992 plainly recognizes only a limited class of dual citizens – those who acquired dual citizenship by marriage or by an involuntary Act or who had not attained the age of twenty-one years.

    Constitution of the Republic of Ghana 1992, 8(1).

26. The Attorney-General predicates his interpretation on Article 11 (5), which states that "subject to the provisions of this Constitution, the existing law shall not be affected by the coming into force of this constitution."

27. The Plaintiff has no difficulty with this argument. Indeed, it is trite law. However, with the greatest respect, the Attorney-General once again has misconstrued the real import of the "saving existing statutes under the Constitution" That is, existing laws that are consistent with

the Constitution are saved. But those that are not consistent with the constitution are not saved. That was the essence of Kangah v Kyere [1982-83].

28. Thus, dual citizens recognized by the 1992 Constitution remained citizens of Ghana notwithstanding the Ghana Nationality Act, 1971 (Act 361). This is the essence of Article 11 (6): "The existing law shall be construed with any modification, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution."

29. As argued, these dual citizens recognized by the 1992 Constitution were not subject to the public-office holding exclusions in Act 527. Thus, it cannot be said that the framers wanted them to be excluded from holding those positions."

Whilst the plaintiff is right to point out that the proposition of law contained in para. 23 above, articulated by the defendant, is incorrect, this does not detract from the argument made in this judgment that the majority of Ghanaian citizens who acquired a foreign nationality prior to the enactment of the impugned article

8(2) ended up losing their Ghanaian citizenship. This is the mischief that the new article 8(2) sought to cure.

The next point which needs to be considered is whether even if article 8(2) were inconsistent with the constitutional provisions identified by the plaintiff, the right remedy should be a declaration that only article 8(2) is null and void or whether rather, in fairness to the intent of the framers of the reform of the law on dual citizenship, article 8(1) which is the primary reform provision should also be struck down. As is evident from the discussion above, the object of Parliament in enacting section 1 of the Constitution of Republic of Ghana (Amendment) Act, 1996 (Act 527) was to change the law on dual citizenship by allowing a citizen of Ghana to hold a nationality of a country other than Ghana in addition to his Ghanaian citizenship, but subject to certain restrictions set out in the impugned article 8(2). Accordingly, articles 8(1) and 8(2) were part of a package deal of reform. In my view, it would constitute a distortion of the legislative intent of Parliament, if the restrictions, set out in article 8(2), subject to which the right to hold dual citizenship was permitted by the new article 8(1), were alone excised. The resultant constitutional provision would not be the one that Parliament intended to enact and it would be unconscionable for this Court to enforce that provision as a valid constitutional

provision. Accordingly, if I were to decide that article 8(2) were unconstitutional, I would have held that the provision to be declared null and void should be both article 8(1) and (2).

However, as I have explained above, compared to the pre-existing law, article 8(2) does not introduce greater inequality, loss of dignity or deprivation of rights of political participation into the 1992 Constitution and therefore does not deserve to be struck down as unconstitutional, even though it limits the rights of dual nationals.

The plaintiff's argument to the contrary is somewhat artificial and contrived. He contends in his original Statement of Case as follows:

> 11. "It is further stipulated that the Parliament of Ghana lawfully amended Article 8(1) of the Republic of Ghana Constitution, 1992 and properly inserted Article 8(1) in the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527).
>
> Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) Article 8(1).
>
> 12. The effect of Article 8(1) of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) is to extend dual citizenship to any Ghanaian

who holds the citizenship of another country. If a citizen of Ghana becomes a citizen of another country, then that citizen of Ghana becomes a dual citizen by operation of amended Article 8(1) as long as that other country allows dual citizenship.

13. Article 8(2) of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) and Section 16(2) of the Citizenship Act, 2000 (Act 591) disqualify dual citizens from holding specified as well as unspecified public offices, with the unspecified public offices to be prescribed by Parliament or the Minister.

14. Therefore, Article 8(2) of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) and Section 16(2) of the Citizenship Act, 2000 (Act 591) extinguish the rights of citizens. Parliament has no express or implied rights under the Citizenship clauses of the Constitution to extinguish, interfere, curtail, or otherwise diminish the rights of citizens.

15. While Article 8(1) of the Constitution, 1992 allowed for a limited class of dual citizens, these dual citizens were not disqualified from holding the public offices specified by the amendment (Article 8(2) of

the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)) and the enabling legislation (Section 16(2) of the Citizenship Act, 2000 (Act 591). Thus, the amendment and enabling statute disturb rights that were previously guaranteed to and enjoyed by these dual citizens.

16. Further, because some citizenship rights are entrenched, they can be extinguished, interfered with, curtailed, or otherwise diminished only by the procedures outlined in Article 290 of the Constitution, 1992."

The Statement of Case makes the important point that, under the law existing prior to the enactment of the impugned article 8(2), a limited class of dual citizens was permitted and these had no exclusions from office imposed on them. However, the numbers of those other citizens who lost their citizenship on account of their voluntary acquisition of the nationality of a state other than Ghana dwarfed the dual nationals allowed under the earlier existing law: namely, for instance, Ghanaians below the age of 21 who had acquired a foreign nationality or Ghanaians who through an act of marriage had acquired a foreign nationality. There was accordingly little need to impose the exclusions from office on these few dual nationals. The fact remained, though,

that the majority of those who acquired a nationality other than the Ghanaian would lose their Ghanaian nationality and, to me, this was a worse deprivation of rights than the exclusions from office complained of by the Plaintiff.

That brings me next to the issue of whether this Court has the jurisdiction to strike down a provision in an Act amending the Constitution which is inconsistent with an entrenched provision of the Constitution. The determination of this issue requires an interpretation of Article 2(1) of the 1992 Constitution, which states that:

> "(1) A person who alleges that -
>
> (a) an enactment or anything contained in or done under the authority of that or any other enactment; or
>
> (b) any act or omission of any person;
>
> is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

The defendant made a submission on this issue in his Supplementary Statement of Case, which I will now proceed to assess. The defendant's argument is that article 8(2) was regularly enacted in accordance with the right procedure and accordingly the Supreme Court cannot strike it down as unconstitutional. This is not a correct statement of the law. The Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) is definitely an "enactment", within the terms of Article 2(1), whose provisions have to be consistent with the Constitution, otherwise the Supreme Court has the jurisdiction to declare any such inconsistent provision to be null and void. The mere fact that a challenged provision was enacted in accordance with the right procedure does not necessarily imply that this Court may not strike it down as unconstitutional. This is particularly so in relation to provisions enacted in accordance with article 291, which deals with the amendment of provisions which are not entrenched. Where a provision has seemingly been validly introduced into the Constitution in accordance with article 291, but the provision is inconsistent with an entrenched clause of the Constitution, this Court has the jurisdiction to declare that provision null and void.

The plaintiff's case is that while the original article 8 of the 1992 Constitution could validly be amended by Parliament without a referendum because it was not entrenched, the impact of the amendment contained in the impugned article 8(2) on the equality, dignity and political participation rights was such that the amendment should be construed as amending the entrenched articles 15, 17 and 55(10). How cogent is this case?

The plaintiff's case on this issue is not persuasive, in the light of article 289(2) of the 1992 Constitution, which, as we have already seen, states that the Constitution may not be amended by an Act or altered whether directly or indirectly unless the sole purpose of the Act in question is to amend the Constitution and the Act has been passed in accordance with Chapter 25 of the Constitution. The upshot of the plaintiff's argument is that article 8(2) has indirectly amended, or attempted to amend, the entrenched clauses that he has identified. However, this contention is not sustainable in the face of article 289(2). What can more credibly be argued is that the challenged article 8(2) is inconsistent with the entrenched articles referred to above and should therefore be declared null and void. As pointed out above, this Court clearly has jurisdiction under article 2(1) of the Constitution to declare section 1 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)) to be unconstitutional and

therefore void. The issue is one of interpretation. My next task is thus to interpret article 8(2) of the Constitution, contained in section 1 of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)), to determine whether it is inconsistent with articles 15, 17 and 55(10).

The text of Article 15 of the 1992 Constitution has already been set out (*supra).* This article is what the plaintiff refers to as the "Dignity Clause." The issue which arises is whether the impugned article 8(2) is inconsistent with this provision. In *Ahumah-Ocansey v Electoral Commission* [2010] SCGLR 575, I had occasion to attempt an interpretation article 15(1), although I did not come to any firm view on it. I would like to reproduce what I said then (at p. 616) as an aid to the analysis in this case :

> "A second issue raised by the reliefs sought in the *Ahumah Ocansey* case (although it is not listed in the memoranda of issues) is whether a refusal or neglect to register prisoners for voting by the Electoral Commission amounts to a breach of article 15(1) of the Constitution, which reads as follows: "The dignity of all persons shall be inviolable."
>
> This is an issue of law which has to be determined before this Court can decide whether or not to grant the

"Declaration that refusal or failure of the E.C. to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings", which is sought by the plaintiff.

What is the interest that article 15(1) is intended to protect and is a denial to prisoners of a right to vote incompatible with that interest? The notion of the protection of the dignity of all persons is one that the Ghana Constitution has adopted from the international human rights movement. In the international context, it has had a certain connotation of grave violation of the core essential rights of human beings. The African Charter on Human and Peoples' Rights, which Ghana has ratified, deals with the matter in its Article 5 as follows:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

> The African Charter's illustrative, but non-exhaustive, list of exploitative practices that infringe the right to dignity provides guidance on what this court might consider to be an infringement of the right in the Ghanaian context. Its examples are all at the severe end of the continuum of degrading treatment. The African Commission on Human and Peoples' Rights has often based its findings of breach of Article 5 on torture and cruel practices relating to imprisonment. The question is whether denial of a right to prisoners to vote should be put in the same category as such dire examples of degrading treatment. Or should the Ghanaian courts adopt a broad view of the scope of the right to dignity? The decisions of the African Commission are, of course, not binding on this court and we are at liberty to adopt a much more expansive view of what conduct can be brought within the ambit of a breach of the right to dignity."

The question therefore remains as to how expansively this Court should interpret article 15(1). Is the granting of less rights to dual citizens than accorded to other citizens to be regarded as an infringement of the right to dignity of the dual citizens? This is a very difficult question, particularly as dignity has a hallowed place in international human rights law. Indeed, it is referred to in the

Preamble to the Charter of the United Nations, adopted in 1945, which states:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small … have resolved to combine our efforts to accomplish these aims."

However, giving justifiable meaning to article 15(1) is a complex task because the legal meaning of "dignity" is not easy to pin down. Because there is no Ghanaian case law spelling out the meaning of dignity, the danger in an over-expansive interpretation of article 15(1) is that it is likely to result in the granting of vague rights whose boundaries are difficult to determine. There is thus merit, in this context, in the common law approach of building up an understanding of article 15(1) on a case by case approach, instead of engaging in a sweeping interpretation of the provision not called for by the facts of the present case.

The plaintiff sought to tackle this issue of vagueness by praying in aid decisions from the United States, Canada and South Africa to

flesh out the meaning of dignity in our Constitution. He cited the Canadian Supreme Court's view in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, at para 53 of what constitutes human dignity. The Court there said:

> "What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full

> place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"

However, a subsequent Supreme Court of Canada case has cast doubt on the utility of the concept of human dignity as a legal test. In *R v Kapp* [2008] 2 SCR 483, McLachlin CJ and Abella J. of the Court said (at paras 19 – 22):

> "[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the

law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v.Oakes*, [1986] 1 S.C.R. 103:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to

> social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]
>
> [22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.1 Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike."

This Canadian experience makes me somewhat reluctant to base the unconstitutionality of an enactment on the subjective criterion of compatibility with human dignity, especially where an expansive definition of the concept is relied on, in a situation where there is an alternative basis for determining that constitutionality. In short, not only am I not inclined to give a

definitive exhaustive interpretation to article 15, but also I am not prepared to hold that the exclusions from office contained in article 8(2) are incompatible with the dignity provided for in article 15. As the Canadian cases show, human dignity is often intertwined with equality issues and indeed in this case the issue relating to it has been argued alongside the equality submission. I think that one is on surer ground in considering the issue raised in this case on the basis of equality, rather than in terms of human dignity. Accordingly, this is what I will proceed to do. That means interpreting article 17 of the 1992 Constitution.

The text of Article 17 has also been quoted earlier in this judgment. The Supreme Court has expressed unanimously an interpretation of the article in *Nartey v Gati* [2010] SCGLR 745. It is a useful starting point for the analysis in this case and therefore the relevant passage from it is reproduced here ([2010] SCGLR 745 at p. 754):

> **"Interpretation of Article 17**
>
> This reference presents a genuine issue for interpretation because the concept of equality embodied in article 17 is by no means self-evident. To our mind, it is clear what article 17 does not mean. It certainly does not mean that every

person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable. Soldiers, policemen, students and judges, for instance, have certain rights that other persons do not have. The fact that they have such rights does not mean that they are in breach of article 17. The crucial issue is whether the differentiation in their rights is justifiable, by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law. In other words, article 17(1) is not to be construed in isolation, but as part of article 17. This implies that the equality referred to in article 17(1) is in effect freedom from unlawful discrimination. Article 17(2) makes it clear that not all discrimination in unlawful. It proscribes discrimination based on certain grounds. The implication is that discrimination based on other grounds may not be unlawful, depending on whether this Court distils from article 17(1) other grounds of illegitimate discrimination which are not expressly specified in article 17(2).

Thus, for instance, in India, the Supreme Court has there held that mere differentiation or inequality of treatment is not *per se* equivalent to discrimination within the proscription contained in that country's equal protection

clause. That clause, which is article 14 of the Indian Constitution, reads as follows:

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

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

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

Law,(LexisNexis Butterworths Wadhwa, 2009, 5th Ed.) p. 858.)

This approach is a reasonable one and flows from the obvious fact that no two human beings are equal in all respects. Accordingly, if the law were to treat all human beings rigidly equally, it would in fact result in unequal outcomes. Rigid equal treatment would often result in unfair and unequal results. Accordingly, it is widely recognized that equality before the law requires equal treatment of those similarly placed, implying different treatment in respect of those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as far as practicable, to attain the objective of equality of outcomes or of fairness. In effect, equality of opportunity will often entail the law treating people differently in order to give them a fighting chance of attaining equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not conforming with the constitutional prescription

that all persons are equal before the law, it would be thoroughly counterproductive."

From the approach of this Court set out above, it is obvious that the mere fact that "sole" citizens and dual citizens are treated differently is not necessarily a breach of article 17 of the Constitution. The determinative issue is whether the differentiation in their rights is constitutionally justifiable by reference to the object that is sought to be served by the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)). If, for instance, the object of that statute conflicts with the letter or spirit of Article 17, then the unequal treatment of the two classes of citizens would be unconstitutional. However, if there is no such conflict between the object of the statute and the article, then the differentiation in the rights of the two classes of citizens would be constitutional. In short, inequality in rights *simpliciter* is not a sufficient basis for declaring the unconstitutionality of the rights complained of. One needs to undertake a further inquiry. During the oral argument before this Court, Professor Bondzi-Simpson grounded the unlawfulness of the alleged breach of article 17 on discrimination on the grounds of social status, contrary to the prohibition in article 17(2). My comment on this argument would be that even discrimination on the grounds of social status is not unlawful *simpliciter.* It is

unlawful if it is not for a lawful and legitimate purpose. After the fact of discrimination on the ground of social status has been established, a further inquiry is needed to find out why the discrimination has taken place. It is the result of this inquiry which will determine the unlawfulness or not of the offending discrimination.

At face value, the plaintiff seems to be arguing the contrary of the above formulation of the law. In his original Statement of Case, he contends that the Constitution forbids invidious discrimination and affords all citizens the right to undertake lawful work and engage in lawful employment. He further submits that it is in the best interest of the State that all its citizens are eligible to occupy any office not specifically and unambiguously precluded by the Constitution. He asserts that the Constitution forbids a caste system that treats some citizens as less than full citizens with limited rights.

With regard to the object of the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527), the plaintiff contends that its section 1's exclusion of dual nationals from certain offices is disproportionate to any legitimate concern that the State might have. In his original Statement of Case, he puts forward the view that "the right-extinguishing amendment achieves no constitutionally valid purpose and the chosen means are not

reasonably and demonstrably justified." He contends that nothing in the core values and spirit of the 1992 Constitution justifies the restriction on the rights of dual citizens.

In response, the defendant, in his Supplementary Statement of Case argues that citizenship raises issues of loyalty and fidelity. He says:

> "I am inviting this Honourable Court to ponder over these two hypothetical cases. How can the loyalty of say a Colonel in the Ghanaian Army be guaranteed if there is a war between Ghana and Nigeria and the said colonel holds both citizenship of Ghana and Nigeria? How can one be sure of the commitment and loyalty of Ghanaian High Commissioner to UK if there is a diplomatic row between Ghana and UK when the same Ghanaian High Commissioner holds a British citizenship as well?"

This passage points to the perceived mischief which the framers of article 8(2) sought to remedy. A State, even a democratic one, is entitled to adopt measures to secure the loyalty of its citizens to it. If there is a limited differentiation in the rights of classes of its citizens with a view to attaining this objective of putting in place a framework conducive to loyalty, can it be said that the

differentiation is not based on a justifiable rationale? Whilst an individual citizen may or may not agree with Parliament on the wisdom of this legislative intention, I do not think that one can reasonably reach the conclusion, on the facts of this case, that the legislative object is not constitutionally justifiable in the public interest. In my view, this evident legislative purpose is legitimate. Of course, the legislative object would not be justifiable in the public interest, if its pursuit would necessarily entail the infringement of the fundamental human rights protected under Chapters 5 and 6 of the Constitution, except where, in accordance with article 12(2), "respect for the rights and freedoms of others and for the public interest" requires that the legislative object shall prevail over any other rights. If the legislative object is justifiable, then according to the test adopted by the Supreme Court in *Nartey v Gati (supra),* the differentiation in rights is not unconstitutional. Accordingly, I do not find that the challenged article 8(2) is inconsistent with article 17 of the 1992 Constitution.

I should, however, point out that the plaintiff strongly disagrees from accepting loyalty and fidelity arguments as a rationale for legitimate differentiation in rights. He contends in his Reply to the Defendant's Arguments of Law (Supplementary Statement of

Case), filed pursuant to the Court's order of 15th March, 2012 that:

> "16. It must also be mentioned that Ghanaian *(sic)* have held the high office of Chief Justice in various countries without a question being raised about their loyalty and integrity. Their Lordships justices F.K. Apaloo, Abban and S.A. Brobbey have been Chief Justices in Kenya, Seychelles and the Gambia – where they all served with distinction. Numerous other judges have served elsewhere, including Justices Aboagye, Roger Korsah and countless others. With respect, the loyalty argument is neither legally nor empirically sound.
>
> 17. The loyalty and fidelity arguments are not legal arguments; thus the Attorney-General is unable to cite a single legal authority or adduce empirical evidence to support those imaginations and hypothetical scenarios. Indeed, it may rather be observed that all those who have engaged in treason by overthrowing the constitutionally empowered government of this country have all been single citizen Ghanaians."

This is a cogent argument. However, I do not think a court has to be persuaded by the cogency of the rationale for a legislative purpose before it can see its way clear to enforcing that purpose. A court may not necessarily agree with the logic or coherence of a particular purpose sought to be achieved by the legislature, but that is no justifiable basis for refusing to enforce the legislation that seeks to implement this purpose. The conception of legislative purpose is for the legislature and, unless that purpose can be said to conflict irreconcilably with the letter or spirit of the Constitution, the courts have a duty to enforce the legislation embodying that purpose. Legislative policy is for Parliament to make and not for the courts. Thus bad or unsound legislative policy is not necessarily unconstitutional. It is not the function of the courts to declare what legislative policies are sound or not. The determination of the constitutionality of legislation is a completely separate issue. My interpretation of article 17 above is tantamount to holding that the legislative purpose implied in the impugned article 8(2), namely, the devising of a putative framework for loyalty is not irreconcilably in conflict with the letter and spirit of article 17, whether or not that framework is logically flawed.

Finally, I need to examine the third ground for the challenge of the constitutionality of the impugned article 8(2), namely, that

the ban on holding the indicated public offices restricts the right to political participation. This challenge is based on article 55(10) whose text has been set out *supra.* In the plaintiff's original Statement of Case, he explains his position as follows:

> "86. It is respectfully submitted that the Constitution forbids a caste system that treats some citizens as less than full citizens with limited rights. The plaintiff further submits that banning dual citizens from holding the specified offices render them second class citizens and curtail their fundamental right to full participation in the civil and political life of the country.
>
> …
>
> 89. In interpreting the Constitution as a living document, not only past and present events, but also future possibilities must be kept in mind. If Parliament is allowed to curtail the right that dual citizens have to fully participate in the political life of this country, it sets a precedent for creating additional classes of citizens with rights fixed by Parliament. This will derail the principle of equal citizenship that animates the Ghana Constitution, 1992 and that has served us well.

90. It is also respectfully submitted that Article 17(4)(d) of the Constitution, 1992, enjoins Parliament not to enact laws "inconsistent with the spirit of this Constitution." Further in Article 33(5) of the Constitution, 1992, all are enjoined to go beyond the written provisions enshrining human rights, and to extend the concept to areas not specifically or directly mentioned but which are "inherent in a democracy and intended to secure the freedom and dignity of man." Therefore, in interpretation of the Constitution, not just the words but the underlying spirit and philosophy must be honored.

New Patriotic Party v Attorney-General [1993-94] 2 GLR 35.

Constitution of the Republic of Ghana, 1992, Article 17(4)(d).

Constitution of the Republic of Ghana, 1992, Article 33(5).

91. It is respectfully submitted that there are thousands of dual citizens whose views, interests, ideas, and values are worth considering in our polity.

92. It is respectfully submitted that there is nothing democratic about freezing their views by denying these dual citizens the right to hold public office at all levels."

The plaintiff is quite right in pointing out the citizen's inalienable rights to political participation under the 1992 Constitution. However, this right is not absolute and what is the crucial issue in determining the constitutionality of article 8(2) is the extent to which it goes in restricting the citizen's right to political participation. Article 55(10), on which the plaintiff bases his argument, is one of the directive principles of State Policy, which though held to be presumptively justifiable in *Ghana Lotto Operators Association v National Lottery Authority*,[2007-2008] SCGLR 1088, have to be construed to be subject, by analogy, to the qualification contained in article 12(2) that such freedoms are to be enjoyed, "subject to respect for the rights and freedoms of others and for the public interest."

I am of the considered view that the disqualification of dual citizens from holding the offices of Ambassador or High Commissioner; Secretary to Cabinet; Chief of Defence Staff or any Service Chief; Inspector-General of Police; Commissioner of the Customs, Excise and Preventive Service; and Director of Immigration Service does not constitute such a denudation of their political rights as to infringe their right, pursuant to article

55(10), to participate in political activity intended to influence the composition and policies of the Government. What gives me cause for concern is the power given to Parliament under article 8(2) to specify any office from which dual citizens will then be disqualified from holding. In my view, the spirit of the Constitution imposes a limit on the legislative discretion thus conferred. For instance, if Parliament were to enact a law specifying that dual citizens are disqualified from all public office, that would be an unconstitutional infringement of article 55(10).

The arguments considered thus far in this case belong to what plaintiff's counsel has called the third strand of the plaintiff's case. Under this third strand, counsel contended, in his oral argument before us, that the Constitution contains provisions directly dealing with equality, non-discrimination, political participation and the dignity of the citizen and that the seeming discrimination against the dual citizen should lead to a declaration of unconstitutionality of the offending provisions. Apart from these arguments, already dealt with above, which were rehearsed in the third strand of counsel's presentation, he presented two other strands. The first strand contended that to the extent that section 16(2) of the Citizenship Act, 2000 (Act 591) had added offices not included in the impugned article 8(2), those additional offices were unconstitutional. Under the second strand, the

plaintiff urges that the additional administrative requirements made of dual citizens, to which sole citizens are not subject, such as the need to obtain a special card, are an unconstitutional administrative imposition.

I wiil deal next with the first strand, which relates to the constitutionality of the additional posts from which dual nationals are excluded by section 16(2) of Act 591. Section 16(2) states that:

> "(2) Without prejudice to article 94(2)(a) of the Constitution, no citizen of Ghana shall qualify to be appointed as a holder of any office specified in this subsection if he holds the citizenship of any other country in addition to his citizenship of Ghana—
>
> (a) Chief Justice and Justices of the Supreme Court;
>
> (b) Ambassador or High Commissioner;
>
> (c) Secretary to the Cabinet;
>
> (d) Chief of Defence Staff or any Service Chief;
>
> (e) Inspector-General of Police;
>
> (f) Commissioner, Custom, Excise and Preventive Service;
>
> (g) Director of Immigration Service;
>
> (h) Commissioner, Value Added Tax Service;

(i) Director-General, Prisons Service;

(j) Chief Fire Officer;

(k) Chief Director of a Ministry;

(l) the rank of a Colonel in the Army or its equivalent in the other security services; and

(m) any other public office that the Minister may by legislative instrument prescribe."

A comparison of this section 16(2) with article 8(2) of the Constitution reveals that the following are the additional posts added by section 16(2): Chief Justice and Justices of the Supreme Court; Commissioner, Value Added Tax Service; Director-General, Prisons Service; Chief Fire Officer; Chief Director of a Ministry; and the rank of Colonel in the Army or its equivalent in the other security services. In addition, it adds the residuary category of "any other public office that the Minister may, by legislative instrument, prescribe." This residuary category raises an issue similar to what I have already commented on in relation to the comparable power given to Parliament under article 8(2). Again, I consider that the spirit of article 55(10) limits the discretion of the Minister to disqualify dual nationals from public office, always assuming that the delegation of this power of disqualification to the Minister is constitutional. If the Minister by the exercise of his or her

discretion excludes dual nationals from such a wide range of public office as to impair their right to participate in political activity intended to influence the composition and policies of the Government, then that would be unconstitutional. But beyond this, there is a serious question as to whether section 16(2)(m) of Act 591 is constitutional. It is against the spirit of the Constitution for Parliament to delegate to the Minister the authority which Parliament itself had received by delegation from the Constitution. This is against the sound policy embodied in the maxim: *delegatus non potest delegare.* In other words, my interpretation of article 8(2)(g) of the 1992 Constitution is that the mandate it gives to Parliament to specify offices from which dual nationals are excluded does not include a mandate to further delegate that authority to a Minister to exercise by Legislative Instrument. I am thus inclined to adjudge section 16(2)(m) to be unconstitutional, but I will say more about this later.

As far as the additional specified posts are concerned, I do not consider that the exclusion of dual nationals from those particular posts is a sufficient derogation from their right to participate in political activity as to lead to unconstitutionality. The weight of the posts from which dual nationals are excluded, compared to the range of public posts for which dual nationals remain eligible, is such that, on balance, I am not able to come to the conclusion

that the right of dual nationals to participate in political activity has been infringed. Moreover, the posts in question are not even political, although it has to be admitted that the holders of them can affect the policies of government.

The plaintiff's case under the second strand is, as stated in para 16 of his original Statement of Case, as follows:

> "The Plaintiff's case, furthermore, is that any subsidiary legislation or administrative practice that calls for dual citizens to possess additional documentation that sole citizens are not require *(sic)* to possess is unreasonable, unnecessary and not constitutionally warranted and is the*re*fore null, void and of no effect,."

This, to my mind, is the most powerful contention in the plaintiff's case. It is important to stress that the rights of citizenship of dual nationals are unconditional. It is true that dual nationals are lawfully excluded from particular offices, but that does not derogate from the proposition that the citizenship rights of dual nationals are unconditional. Accordingly, any administrative procedures or practices or subsidiary legislation which seek to impose fetters or conditions on the exercise by dual nationals of their rights as citizens are unconstitutional. The authority for this view of the law is article 8(1) of the 1992 Constitution. The plain

language of that article makes it quite clear that a Ghanaian may hold the citizenship of any other country in addition to the citizenship of Ghana. No conditions are attached to this primary constitutional provision. The fact that article 8(2) then imposes certain exclusions from office on dual nationals does not make their rights conditional.

Accordingly, the only remedies endorsed on the plaintiff's Writ of Summons which I would grant are the sixth and seventh reliefs (in addition to the fifth relief the extent of whose I grant I will explain presently), which are in the following terms:

6 "A Declaration that the administrative requirement of the Republic of Ghana for a dual citizen to obtain a dual citizenship card is discriminatory, unreasonable, burdensome, serves no legitimate constitutional purpose and thereby is null, void and of no effect as it contravenes the letter and spirit of Article 17 of the 1992 Constitution.

7 A Declaration that the administrative requirement of the Republic of Ghana for a dual citizen to obtain a dual citizenship card is discriminatory, unreasonable, burdensome, serves no legitimate constitutional purpose and thereby is null, void and of no effect as it

contravenes the letter and spirit of Article 15(1) of the 1992 Constitution."

To the extent that the administrative requirement referred to above is mandatory and conditions the exercise of the rights of dual citizens on it, I would regard it as unconstitutional. If the card is intended to be optional and to ease the exercise by dual nationals of their rights, then it would be constitutional. In other words, dual nationals are citizens by operation of the Constitution and do not need any mandatory documents before exercising their rights of citizenship, in the same way as sole citizens do not need any mandatory documents before exercising their rights as citizens. However, if the State wishes to assist dual nationals in the enjoyment of their rights by providing them with evidence of their dual nationality, this would be permissible. What is not lawful or constitutional is for the State to prescribe that, without possession of a dual nationality card, a dual national may not exercise his or her rights granted under the Constitution. I would thus grant the plaintiff's sixth and seventh declarations. However, for me the constitutional authority for those declarations is more article 8(1) itself than those referred to by the plaintiff in the said declarations. I say this by way of an interpretation of article 8(1) similar to that put on article 42 in

Ahumah-Ocansey v Electoral Commission [2010] SCGLR 575, by the Supreme Court, where it was held that the right to vote, conferred by that article on Ghanaian citizens of eighteen years or above and of sound mind, being unqualified, embraced even prisoners. Similarly, the right of dual nationals to the rights of citizenship, conferred by article 8(1), being equally unconditional and unqualified, except as otherwise provided by the Constitution, cannot lawfully be abridged, or derogated from, by any administrative practice, procedure or subsidiary legislation.

In addition, I am inclined to grant the fifth declaration to the extent that it makes void s. 16(2)(m) of the Citizenship Act 2000 (Act 591) which I consider to be void as conferring excessive, unnecessary and unreasonable power in excess of Parliament's authority on the Minister of the Interior to ban dual citizens from holding any public office that the Minister may prescribe. This delegated Ministerial authority is subject to abuse and would not have the protective process of Parliamentary debates which attend the passage of a Bill into an Act.

Accordingly, in the result, save for the fifth, sixth and seventh reliefs of the plaintiff, I would dismiss, for the reasons extensively set out above, the plaintiff's claim for the reliefs endorsed on his Writ of Summons.

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT.

ANSAH, J.S.C.;

I also agree that the plaintiff's application be dismissed save reliefs 6 and 7 endorsed on the writ granted and for the reasons by Dr. Date-Bah JSC.

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT.

OWUSU (MS), J.S.C.;

On 22nd May, 2012, when Judgment was delivered in the above case, I, after reading the Judgments of my respected brother Dr. Date-Bah J.S.C and sister Akuffo J.S.C. respectively, I said I agreed with the sentiments expressed by my sister and added that I would make a few remarks of my own.

Upon further reflection, I have no such remarks to make.

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT.

YEBOAH, J.S.C.;

I had the opportunity of reading the three opinions and I am in agreement with the opinion expressed by my brother Dr Justice Date-Bah. I will accordingly grant reliefs five, six and seven as endorsed on the plaintiff's Writ of Summons. I must put on record, however, the industry put into this case by counsel on both sides especially on behalf of the plaintiff who went far a field to unearth cases from other jurisdictions bodering on citizenship. Save the above reliefs granted, I will also dismiss the plaintiff's claim.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

GBADEGBE, J.S.C.;

I have had the opportunity of reading in draft the opinions just delivered in the matter herein by my worthy colleagues. Whiles commending the industry and having exhibited by them individually in their opinions, after giving anxious thought to the views raised therein. I associate my self with the reasons and conclusion contained in the judgment of Dr. Date-Bah JSC. For this reason, I also agree that save for relief 5, 6 and 7 the plaintiff's action be and is hereby dismissed.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

BAMFO (MRS.), J.S.C.;

I have had the benefit of reading before hand the well reasoned opinions of my esteemed brothers, Atuguba Acting Chief Justice and Prof. Date-Bah J.S.C.

I however agree with the conclusions of my respected brother Atuguba Acting Chief Justice that the plaintiff's case be dismissed in its entirety.

(SGD) V. AKOTO-BAMFO (MRS.)

JUSTICE OF THE SUPREME COURT

COUNSEL

PROFESSOR BONDZI-SIMPSON (WITH HIM AGYEI-KODIE NUAMAH) FOR THE PLAINTIFF.

HON. MARTIN AMIDU (ATTORNEY GENERAL) WITH HIM SYLVESTER WILLIAMS (PRINCIPAL STATE ATTORNEY) FOR THE DEFENDANT.