`IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
AD 2011

CORAM: DR. DATE-BAH, JSC (PRESIDING)
ANSAH, JSC
ADINYIRA, JSC
OWUSU, JSC
DOTSE, JSC
BONNIE, JSC
ARYEETEY, JSC
GBADEGBE, JSC
A.BAMFO, JSC.

WRIT
SUIT NO J1/8/2008
20TH JULY, 2011

NANA ADJEI AMPOFO

VRS

THE ATTORNEY-GENERAL

&

THE PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS

J U D G M E N T

DR. DATE-BAH JSC:

All members of this Court are agreed on the following judgment. Chieftaincy is a revered and constitutionally entrenched institution in Ghana. The reach of chiefs extends even beyond the formal machinery of the Ghanaian State. Some of the rural settlements or communities without a permanent local resident representative of the Ghanaian State will, almost inevitably, have a chiefly leadership. The social value of the institution of chieftaincy is thus given widespread recognition by the Ghanaian public. Nevertheless the rights of even chiefs are subject to the 1992 Constitution. Indeed, as Coussey JA percipiently observed in *Republic v Techiman Traditional Council, Ex parte Tutu* [1982-83] GLR 996 at 999:

> "Chieftaincy, since the British colonial administration, has been governed by statute and this has continued since the independence of Ghana in 1957."

Thus, the institution of chieftaincy, although it has evolved in accordance with customary law, has been subjected to regulation by statute since the advent of British colonialism in this jurisdiction. This remains true even now, subject to the qualification that article 270 of the 1992 Constitution limits the extent of statutory intervention permitted in relation to the institution of chieftaincy. This Article 270 provides as follows:

"**270.**

> (1) The institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed**.**

(2) Parliament shall have no power to enact any law which-

(a) confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever; or

(b) in any way detracts or derogates from the honour and dignity of the institution of chieftaincy.

(3) Nothing in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, clause (1) or (2) of this article if the law makes provision for-

(a) the determination, in accordance with the appropriate customary law and usage, by a traditional council, a Regional House of Chiefs or a Chieftaincy Committee of any of them, of the validity of the nomination, election, selection, installation or deposition of a person as a chief;

(b) a traditional council or a Regional House of Chiefs or the National House of Chiefs to establish and operate a procedure for the registration of chiefs and the public notification in the Gazette or otherwise of the status of persons as chiefs in Ghana."

In this present suit, the plaintiff wishes this Court to clarify the extent of certain rights and obligations of chiefs enacted by the Chieftaincy Act, 2008 (Act 759) and to determine whether those rights and obligations as currently

formulated in that statute are constitutional. The case accordingly calls for a careful evaluation of the challenged rights and obligations against certain entrenched constitutional freedoms and norms contained in the 1992 Constitution.

More specifically, the plaintiff's claim (as contained in his amended Writ filed on 11th May 2010) is as follows:

a. "A declaration that sub-section (d) of section 63 of the Chieftaincy Act 2008 (Act 759) is an encroachment on the liberty generally and freedom of movement in particular of citizens and accordingly in contravention of and or inconsistent with the spirit and letter of Articles 14 & 21 of the Constitution of the Republic of Ghana, 1992.
b. A declaration that the said sub-section is legally vague and overbroad and also accordingly unconstitutional.
c. A declaration that sub-sections a, b, c, e of section 63 of the said Act are legally vague and overbroad and also inconsistent with the spirit and letter of Articles 14 and 21 of the Constitution of the Republic of Ghana, 1992 and accordingly void.
d. An order deleting, expunging or striking out the said sub-sections from the said Act on grounds of their unconstitutionality."

The plaintiff, who is a lawyer and former Paramount Chief and member of the National House of Chiefs, brings this action in his capacity as a citizen of Ghana. The plaintiff issued his Writ of Summons to invoke the original jurisdiction of this Court on 26th August 2008. As mentioned above, this Writ was amended on 11th May 2010, after leave had been granted by this Court to do so.

The provisions of the Chieftaincy Act, 2008 challenged by the plaintiff are all contained in section 63, which reads as follows:

"**Certain offences in connection with chiefs**

63. A person who

a) acts or performs the functions of a chief when that person is not qualified to act,
b) being a chief assumes a position that the person is not entitled to by custom,
c) knowingly uses disrespectful or insulting language or insults a chief by word or conduct,
d) deliberately refuses to honour a call from a chief to attend to an issue,
e) refuses to undertake communal labour announced by a chief without reasonable cause, or
f) deliberately fails to follow the right procedures to destool a chief,

commits an offence and is liable on summary conviction to a fine of not more than two hundred penalty units or to a term of imprisonment of not more than three months or to both and in the case of a continuing offence to a further fine of not more than twenty-five penalty units for each day on which the offence continues."

The plaintiff argues in his Statement of Case that because s. 63(d) of Act 759 compels a citizen to honour a call by a chief to attend to an issue, whether he likes it or not, it is unconstitutional as an undue restriction on, and interference

with, his freedom of movement. He also points out that the person summoned by the chief may not even be his subject. He contends that the power could be used by chiefs as a tool for oppression and suppression. He further submits that the provision is vague as it does not explain the word "issue". It is also overbroad in that it creates no limits as to time or place etc. He poses the question: if the President of the Republic of Ghana cannot compel a citizen to honour his invitation to attend to an "issue", why should a chief, qua chief, have that power?

The plaintiff also raises an issue in relation to s. 63(a), namely, that it is also vague and does not clearly define when a person qualifies to act as a chief. Furthermore, he expresses the view that the provision is defective in not providing a definition or description of the functions of a chief.

In relation to s. 63(b), he complains that it is unclear and overbroad and does not give notice of what specific conduct is being made criminal.

He concludes that:

> "A penal statute has to be clear in its meaning, application and scope to enable the citizenry know what specific conduct [it] prohibits so that they can steer away from what it prohibits. That is a due process requirement and an attribute of the doctrine of the rule of law and due process: U.S. v Brewer 139 U.S. 278, 288."

In short, he contends that most of the crimes created by s. 63 of Act 759 are unconstitutional for the reasons outlined above.

The constitutionality of section 63(d) of Act 759

We begin by affirming that this Court has jurisdiction to determine this suit. Though *Edusei v Attorney-General* [1996-97] SCGLR 1 held that the cumulative effect of articles 33(1), 130(1) and 140(2) was to vest the High Court, as a court of first instance, with an exclusive jurisdiction in the enforcement of the fundamental human rights and freedoms of the individual contained in Chapter 5 of the 1992 Constitution, in effect Ghana's Bill of Rights, nevertheless when an action raises a genuine issue for interpretation of any provision of the Constitution or requires a decision as to whether an enactment is inconsistent with any provision of the Constitution, the Supreme Court has jurisdiction over it, pursuant to article 130 of the 1992 Constitution. (See *Adjei-Ampofo v Attorney-General* [2003-2004] SCGLR 411 at 417.) This case raises a legitimate justiciable constitutional issue as to the consistency of the provisions of s. 63 of Act 759 with articles 14 and 21 of the 1992 Constitution.

Proceeding next, then, to the merits of the issue of the constitutionality of section 63(d) of Act 759, it should be pointed out that in the amended Statement of Case filed on behalf of the first defendant, namely the Attorney-General, the response put forward against the plaintiff's argument on s. 63(d) of Act 759 was that chiefs have an adjudicating function alongside their administrative one. Accordingly, s. 63(d) can be equated to a subpoena to attend the chief's summons. A telling passage from the Statement of Case is as follows:

> "As stated earlier in our submission, the chief has traditional authority in the adjudication of cases brought before him.
>
> In the process of adjudicating such traditional cases, there may be need to summon or make an order for a person to be brought before him for

> the proper adjudication of the matter in the interest of justice and fairness.
>
> Respectfully my Lords, considering that the Chief's Palace can pass for a traditional court, any order made by a chief for a person to appear before it to resolve an issue, cannot be an encroachment on the liberty generally and freedom of movement of a particular citizen called before that court and accordingly such an act cannot be in contravention of nor inconsistent with the spirit and letter of Articles 14 & 21 of the 1992 Constitution of the Republic of Ghana."

With respect, this is a flawed and troubling argument. Its fundamental flaw is to accord a judicial role to chiefs as individual chiefs. Individual chiefs do not have, and have not had, a judicial function in independent Ghana. By article 125(3) of the 1992 Constitution,"[T]he judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power." Nowhere in the Courts Act, 1993 (Act 459) are individual chiefs given a judicial function. Thus individual chiefs are not vested with judicial power by the Constitution nor by statute. However, though individual chiefs are not vested with judicial power, the Constitution gives judicial committees of chiefs limited judicial responsibility. Judicial Committees of the Traditional Councils, the Regional Houses of Chiefs and the National House of Chiefs are given judicial functions in relation to causes or matters affecting chieftaincy by Chapter 22 of the Constitution and section 39 of the Courts Act, 1993. In contrast to this collective exercise of judicial responsibility by committees of chiefs, individual chiefs continue to exercise an adjudicatory

role only as customary arbitrators, which role is to be sharply distinguished from a judicial one. Section 30 of Act 759 states that:

> "The power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the arbitration is guaranteed."

The distinction between a judicial and an arbitration process lies in the consensual nature of an arbitration. Nobody can be compelled to submit himself or herself to arbitration. Accordingly, if all that individual chiefs can carry out are customary arbitrations, the first defendant's argument, which endeavours to equate a chief's call to a subpoena, collapses. If what the chief is undertaking is based on the consent on the parties, why must he have a power to compel the parties to appear before him?

A second dimension to the flaw in the first defendant's argument is the fact that a subpoena is for a very specific purpose, to compel a witness to attend judicial proceedings and to testify in them. A chief's call under Act 759 is, in contrast, not at all targeted. It is not limited to judicial proceedings. On an initial plain language reading of it, it appears to authorise a person to be summoned by a chief to attend to any issue. The first defendant is thus not comparing like with like.

The Written Submission of counsel for second defendant, namely the President of the National House of Chiefs, formulates a different defence to the plaintiff's complaint about a chief's call. That defence responds to the first of the issues contained in a Memorandum of Agreed Issues filed by counsel for the second defendant, Mr. Ayikoi Otoo, on 31st December 2010. These issues were agreed between the plaintiff and the second defendant. At the hearing of this suit, counsel for the Attorney-General, that is, the first defendant,

acknowledged that he too was in agreement with the issues filed in the Memorandum of Agreed Issues, although in fact the Attorney-General had filed a different set of issues. However, on analysis, the Attorney-General's different issues are subsumed in the Memorandum of Agreed Issues. The first of the latter issues is expressed as follows:

> "Whether or not "a call from a chief to a person" forms part of the institution of Chieftaincy as established by customary law and usage."

In addressing this issue, the Written Submission of Counsel for the Second Defendant relies on Article 270(1) of the 1992 Constitution, which provides, as already seen above, that:

> "The institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed."

The Submission lays emphasis on the words "*as established by customary law and usage."* It points out that Article 270(1) does not refer to chieftaincy as established by statute. Its argument is therefore that the drafters of the Constitution intended to ensure that the customs and usages of the institution of chieftaincy remained intact. It contends therefore that the interpretation of article 270(1) must have reference to the institution of chieftaincy as it is known and practised under the customary law. It then reviews some literature on the functions of chiefs in the traditional scheme of things, before concluding as follows:

> "The instances I have cited supra show at least, the traditional functions of the Chiefs as was known in the days of yore. If the Chief was highly respected and considered the father of the traditional state over which he presided, it stands to reason that

> such a personality can "call" a person, which is the same as "a call from a chief".
>
> It is therefore finally submitted on issue '1' that having regard to the traditional functions of a Chief and the language used in the offence creating section of the Chieftaincy Act 2008 (Act 759), the offence is in accordance with Article 270(1) which guarantees the institution of Chieftaincy together with its traditional Council as established by customary law and usage."

The implication of counsel's argument is that all the incidents at customary law of the institution of chieftaincy, as traditionally conceived, are to be imported intact into the current constitutional regime under the 1992 Constitution, even if they are in conflict with other provisions of the Constitution. This is palpably incorrect. For instance, chiefs traditionally had the customary law right to exercise judicial functions and to incarcerate those adjudged by them to be guilty of crime. The Constitution does not allow them any longer to exercise such judicial functions and this has been accepted by them. Thus, the fact that, as counsel puts it, "in the days of yore" chiefs could compel anybody within their jurisdiction to attend to their call does not necessarily mean that such a power will pass the test of constitutionality under the 1992 Constitution. Furthermore, the Chieftaincy Act, 2008 (Act 759) makes it abundantly clear that the institution of chieftaincy is not only as established by customary law and usage, but also as recognised by statute. For instance, s. 57 of the Act on the "definition of a chief" provides in part as follows:

> "(1) A chief is a person who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled,

enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage.

(2) A person does not qualify as a chief if that person has been convicted of high treason, treason, high crime or for an offence involving the security of the State, fraud, dishonesty or moral turpitude."

Thus a person who is nominated and enstooled as chief, in accordance with the relevant customary law and usage, would not be a chief, if he has been convicted of any of the offences referred to in s. 57(2). The customary law of chieftaincy cannot thus be applied in contemporary Ghana in its pristine purity, ignoring the impact of statute and of the Constitution.

Moreover, the interpretation of article 270 (1) on which counsel's argument is based relies on a misreading of the text of the article. The words *"as established by customary law and usage"* in the context of the article would seem to be referring to the "traditional councils", rather than to the "institution of chieftaincy."

Secondly, what is being challenged by the plaintiff is a provision in a statute. The correct issue of law to be determined is thus not whether a customary law rule relating to a chief's right to call a person is constitutional, but rather whether a statutory provision in the terms of s.63(d) is void as being in conflict with a provision in the Constitution. We do not think that the mere fact of the institution of chieftaincy being guaranteed by the Constitution would be enough to save that statutory provision if this Court reached the conclusion that the criminal offence of deliberately refusing to honour a call from a chief to attend to an issue were an unjustified interference with the right to freedom of movement.

In sum, our response to counsel's argument that the institution of Chieftaincy is established by customary law and usage and not by statute and therefore its pristine ancient rights must be recognized as intact is that chieftaincy, though guaranteed by the Constitution, is not insulated from the normal operation of statutory and constitutional law. To express this proposition in other words, the institution of chieftaincy is subject to the rule of law. As already noted, Coussey JA recognized as much in *Republic v Techiman Traditional Council, Ex parte Tutu* [1982-83] GLR 996 at 999. Chieftaincy is thus not an inviolable obscurantist institution but a part of the contemporary constitutional regime and its incidents must measure up to the standards set in the Constitution. The traditional incidents of chieftaincy cannot therefore be used to shore up a statutory provision which is held by this court to be in breach of a provision in Chapter 5 of the Constitution.

In the light of the arguments of the plaintiff and the first and second defendants summarised above, the issue which arises is whether this Court should grant the plaintiff the first remedy claimed in his Writ of Summons, namely, "A declaration that sub-section (d) of section 63 of the Chieftaincy Act 2008 (Act 759) is an encroachment on the liberty generally and freedom of movement in particular of citizens and accordingly in contravention of and or inconsistent with the spirit and letter of Articles 14 & 21 of the Constitution of the Republic of Ghana, 1992."

Several of the issues listed in the Memorandum of Agreed Issues are germane to a resolution of the question whether this declaration should be granted. These are issues 3, 4, 5, 8 and 9 which state as follows:

3. "Whether or not the offence creating Section of the Chieftaincy Act 2008 (Act 759) Section 63, particularly sub paragraph (d)

constitutes an undue restriction, encroachment and interference with the liberty and freedom of movement.

4. Whether or not the said sub-section (d) leaves any discretion or excuse for the citizen to refuse a call upon a reasonable or just cause.

….

5. Whether or not the person to be called by the Chief should be a subject within the traditional area where the Chief exercises his authority having regard to the definition of customary law.
8. Whether or not Setion 63 (d) can be equated to a subpoena to attend the Chief's Summons.
9. Whether or not the fact of the deliberate refusal to honour a call of a Chief being an offence makes conviction automatic."

Counsel for the second defendant argues that s. 63(d) does not create an offence that unduly restricts the freedom of movement of persons because articles 12 and 14 in Chapter 5 of the Constitution do not confer an unfettered right to liberty. He points out that article 12(2) of the Constitution qualifies the amplitude of the freedoms and rights of the individual conferred by Chapter 5 by making them "*subject to respect for the rights and freedoms of others and for the public interest."* He refers to *dicta* by Kpegah JSC in *Republic v Tommy Thompson Books Ltd., Quarcoo & Coomson* [1996-97] SCGLR 804 where the learned judge applies a balancing concept that endeavours to reconcile individual and societal rights in the interests of harmony. In that case, Kpegah JSC had held that the Constitution in articles 12(2) and 164 had placed limitations on freedom of speech that are reasonably required for the protection of the rights of other persons and in the public interest and

subjected the freedom of the press to laws that are reasonably required in the interest of national security, public order, public morality and for protecting the reputations, rights and freedoms of other persons. Counsel for the second defendant thus advocates for an analogous balancing of the rights of individuals to freedom of movement against limitations to that right which are reasonably required for the protection of the rights of chiefs. He stresses that article 14 which confers the right to personal liberty is limited by the use of the following words in its clause (1): "except in the following cases and in accordance with procedure permitted by law."

In any case, he contends that s.63(d) is not couched in such absolute terms as to infringe the provisions of Article 14. He denies that the provision leaves a person invited with no discretion or excuse. He bases this contention on the fact that the section commences with the adverb "deliberately". He refers to the definition of "deliberate" in Words and Phrases Legally Defined and concludes that when applied to s.63(d) it means that in order to constitute an offence, a failure to honour the call of a Chief must be "well-weighed or considered;; carefully thought out; done of set purpose; studied not hasty or rash." He expresses the view that Parliament intended to exclude from the offence anything done on the spur of the moment. In his view, the offence is committed only when a person has considered and carefully thought out his action of not showing respect to the Chief. He insists that respect to chiefs is demanded by traditional society and recognized by the law. He again quotes Kpegah JSC on this point. The learned judge in *Republic v Tommy Thompson Books Ltd., Quarcoo & Coomson* [1996-97] SCGLR 804 at p. 856 said:

> "Our culture and custom abhor insulting the occupant of a Stool (that is a Chief); and such a conduct is taken to be disrespect for the Stool itself, ipso facto, the state."

Before considering whether the sting has been taken out of the plaintiff's complaint about s. 63(d) by the interpretation advocated by the second defendant's counsel, we would like to comment on this point about showing respect to chiefs. It would not be correct to assert that each time a person fails to honour the call of a chief, that person intends to disrespect the Chief, nor that an objective bystander would necessarily infer that the conduct of the person summoned is disrespectful. Whether or not there is an issue of disrespect will depend on the particular facts of each case.

Now to return to the second defendant's preferred interpretation of s. 63(d): We do not see the perceived advantage, in terms of consistency with the Constitution, in criminalising only deliberate conduct, in contrast to spur of the moment conduct. If a businessman in Accra receives a call from a chief, say in Brong-Ahafo, in connection with a fund-raising drive to build a new Chief's Palace in his traditional area and the businessman, who is not from that traditional area, decides after careful consideration that he is unable to honour the call because of pressing commitments in Ghana and abroad, we do not see why he should be liable for the criminal offence created in s. 63(d), whereas if he had turned down the call without a moment's thought, he would not be liable; according to the interpretation of counsel for the second defendant.

Equally, we are unimpressed with the argument made in the second defendant's amended Statement of Case that:

> "The use of the word **"deliberately"** at the start of the section, sufficiently offer the person invited if he has a reasonable excuse to the **call** and the use of the word ***"issue"*** means that the invitation would state why the person is being invited. It is only when the Law omits the reason for the call or invitation that it can be said that the Law is vague."

In our view, the use of the word "deliberately" does not logically imply that if the person called by the chief has an excuse he need not heed the call.

Clearly, the crime created by s. 63(d) imposes a restriction on the freedom of movement of residents in Ghana. The crime is committed if a person "deliberately refuses to honour a call from a chief to attend to an issue." The plain language meaning of the text would appear to make it very wide in scope. Whenever a Chief calls a person to attend to an issue, the person commits a crime if he deliberately declines to honour the call. However, the second defendant in his Statement of Case has endeavoured to narrow the scope of the plain meaning interpretation by proposing the purposive interpretation that a person called by a Chief must be either a subject or resident within his or her traditional area. Counsel for second defendant has submitted that, having regard to the definition of customary law, the text of s. 63(d) should be given the narrower purposive interpretation indicated above. Article 11(3) of the 1992 Constitution, as is well-known, defines "customary law" as "the rules of law which by custom are applicable to particular communities in Ghana."

Accordingly, counsel for the second defendant urges for the consideration of this Court the following position:

> "It appears far fetched that a Chief with authority over Mamprusi Traditional Area would send for a Ga subject in Accra to attend an issue in Mamprusi Traditional Area when the Ga subject is not resident within the area and he is not a subject. Obviously when the Ga subject goes to reside in the said Mamprusi area and an issue arises involving the Ga subject who hurriedly leaves the jurisdiction, then the call can be extended to him in Accra. The section is not unreasonable. There must be an issue, to be determined concerning the citizen" as described by the Plaintiff. I do not think that Chiefs who over the years have exercised that jurisdiction to invite citizens have abused the said discretion granted them. It is not necessary to define the issue or the citizen who must be called. What about a situation where a non-citizen, be it a European, Arabic or American marries a Ghanaian subject and an 'issue' arises. These days when we have educated Chiefs, I belief (*sic}* such a Chief could extend a call to the Foreigner provided there is an issue to be determined. Since the legislature cannot foresee every issue which may arise, it would be unwise to define the issue. The discretion is for the Chief and it is assumed he would act lawfully. The Chief cannot call anybody when the issue would be against the laws of Ghana such as to settle such serious offences as murder and robbery. In any case the call must be limited to the area of authority of the Chief."

We are quite unimpressed by this argument. A major impediment to the success of the argument made above is the fact that there is no hint of these limitations to the scope of the crime in the text of s. 63(d), which, it has to be stressed, is a penal statute. As the plaintiff points out, a penal statute should be clear and not depend on recondite interpretation in order for persons subject to it to know what their liability under it is. Presumably the purpose of

the impugned provision, as deciphered by the second defendant, is to buttress the authority of, and respect for, chiefs in their areas of authority. However, the actual text of the provision is much wider than is needed to fulfil this purpose. It would appear to authorise a chief based in Worawora, for instance, to call a person resident in Axim to attend to his call in Worawora. The issue which arises is thus whether the response of this court to this situation should be to strike the impugned provision down as an unconstitutional invasion of the freedom of movement of persons within the Ghanaian jurisdiction, on its plain meaning, or so to interpret the impugned provision as to narrow the scope of the liability that it imposes and save it from unconstitutionality. Even the narrower interpretation may not save the provision from unconstitutionality unless a defence is implied into the provision which exculpates an accused if he has a reasonable excuse.

On a literal interpretation of the text of s. 63(d), any deliberate refusal of any person to honour a Chief's call from any part of Ghana may result in criminal liability. This prospect of criminal liability is likely to constrain the freedom of movement of any person who receives a call from a Chief. As the plaintiff puts it in his Statement of Case, a "citizen's Freedom of Movement includes his freedom to stay away from where he does not want to be." It is true that this court has held that a purposive interpretation is usually to be preferrred. (See, for example, the recent case of *CHRAJ v Attorney-General & Baba Camara* (Writ No. J1/3/2010, unreported judgment of the Supreme Court dated 6th April, 2011)). However, in the circumstances of this case, since more than one purposive interpretation could be extrapolated from the text of the provision in question, it is difficult to establish authoritatively which of them is correct. Thus, although a purposive interpretation could be attempted by this court to cut down the scope of the restriction on the freedom of movement

consequent from the text of s. 63(d), our inclination is rather to invite Parliament to try again to formulate a clearer and narrower penal provision, by striking down the existing provision. Indeed, it may well be that the purpose of Parliament was to confer the wide power of summons that the plaintiff is complaining about, in order to strengthen the authority of chiefs beyond the borders of their traditional areas. In other words, one of the purposive interpretations available is equivalent to the literal interpretation. Another purposive interpretation would be to limit the scope of the chief's power to call a person to that which he or she has under customary law.

As we have already indicated, striking down s. 63(d) as unconstitutional would, to our mind, be preferable to maintaining it with a fudged meaning. The extent of the fudge that may result from a purposive interpretation to narrow the scope of the impugned provision is evidenced by the fact that the first and second defendants are not even agreed on what the scope of s. 63(d) should be. Thus, the first defendant, in his Statement of Case filed on 1st February 2011 in response to the additional issues agreed to between the plaintiff and the second defendant, submits as follows:

> "The Constitution gives us the framework for laws that govern the people of Ghana, all citizens are subject to the constitution and it is submitted that since customary law in *(sic)* included in the common law of Ghana, all persons within the confines of Ghana are affected by the customary law existing in our diverse traditional systems, whether you are a subject of the area or not. If no one is exempt from enactment made under the authority of Parliament, which form part of the laws of Ghana, then by logical implication no one is exempt from the common law of which customary law is part. From this logic it is submitted that a

> person called by a Chief need not be a subject of that particular area where the Chief exercises his authority insofar as the summons is in respect of a matter that has arisen within the constituency of customary law within the Chiefs *(sic)* area of operation, even though you are not a subject of that customary law area. For example customary law marriages have different rules depending on the customs of the area which the woman hails from. In Ashanti, the man is expected to bring drinks, cloth, dowry to the woman's father and ask her hand in marriage whilst in some Northern Ghana customary marriages, the man has to take a cow, kola, cowries, these customs are different but an Australia man going to marry from Northern Ghana has to do custom and the customary laws of the area will apply to him in respect of marriage so also will the situation be vise *(sic)* versa for a man from Northern Ghana marrying a woman from Australia. It is submitted that having regard to the definition of customary law in the Constitution, it applies to everyone in Ghana and insofar as a Chief summons a person for a matter that pertains to the customary law of this area for which that person is obliged to heed the call."

When this passage is compared with the earlier passage quoted from the Submission of the second defendant's counsel, it is clear that the first defendant has a wider conception of who may lawfully be called by a chief, having regard to the definition of customary law.

Of course, this court cannot strike down the impugned provision if the defendants can show that the interference with the freedom of movement of individuals is justified in terms of the Constitution. The next question, therefore, which needs to be addressed is whether the restriction on the

freedom of movement of persons called by chiefs to attend to an issue, that is imposed by the offence created by s 63(d), is justifiable under Chapter 5 of the 1992 Constitution.

Article 12(2) of the 1992 Constitution provides that:

> "Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter *but subject to respect for the rights and freedoms of others and for the public interest."* (Emphasis supplied).

In the light of this Article 12(2), can the freedom of movement conferred on residents of Ghana by article 21(1)(g) of the 1992 Constitution be justifiably restricted by s. 63(d) of Act 759 out of respect for the rights and freedoms of chiefs or for the public interest? In our considered view, the wide power of chiefs to summon, on the pain of a criminal sanction, anybody at all in Ghana to attend to an issue of any kind represents an unwarranted interference in the freedom of movement of residents of Ghana and the width of the power does not make it justifiable in the public interest. Even though criminalising a deliberate refusal to honour a chief's call may strengthen the authority of chiefs and the respect accorded them, this consideration is not a sufficient justification for the restriction that s. 63(d) imposes on the freedom of movement of individuals, even in a society which reveres its chiefs.

The first defendant endeavours in its Statement of Case to find a justification for the restriction on freedom of movement entailed by s. 63(d) by invoking clause 4 of article 21 of the Constitution. Article 21(1) proclaims the right of all persons to certain general fundamental freedoms which it lists. Among them,

as clause 21(1)(g) is: “freedom of movement which means the right to move freely in Ghana, the right to leave and to enter Ghana and immunity from expulsion from Ghana.” Clause 4 then provides certain derogations from these freedoms in the following words:

> “Nothing in, or done under the authority of a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision –
>
> a) for the imposition of restrictions by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or
> b) for the imposition of restrictions, by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana; or
> c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or
> d) for the imposition of restrictions on the freedom of entry into Ghana, or of movements in Ghana, of a person who is not a citizen of Ghana; or
> e) that is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana,

> the national symbols and emblems, or incites hatred against other members of the community."

With respect, none of these derogations justifies the restriction on freedom of movement entailed by s. 63(d).

In our view, therefore, the declaration sought by the plaintiff in paragraph (a) of the reliefs endorsed on his Writ of Summons should be granted. The inconsistency of s. 63(d) of Act 759 is primarily with article 21 (g) of the 1992 Constitution. An invocation of article 14 is less relevant in this context, since, prior to conviction, a person "called" by a chief does not lose his personal liberty, by which is meant his freedom from confinement. The text of article 14(1) is as follows:

> "Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law –
>
> (a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or
>
> (b) …"

However, our upholding of the plaintiff's argument relating to article 21(g) implies that s. 63(d) of Act 759, being void for unconstitutionality, cannot serve as a viable legal basis for a criminal prosecution that could deprive an accused of his or her personal liberty. The fundamental freedom infringed by s. 63(d) is thus freedom of movement as prescribed in article 21(g), rather than the personal liberty protected by article 14(1) of the 1992 Constitution.

That takes us next to a consideration of the unconstitutionality of s 63(d) of Act 759 from the other angle advocated by the plaintiff, in paragraph (b) of the reliefs sought in his Writ, namely, that it is "legally vague and overbroad and also accordingly unconstitutional".

The plaintiff relies on *Tsatsu Tsikata v The Republic* [2003-2004] SCGLR 1068 to found his argument. In that case Modibo Ocran JSC, delivering the majority judgment of the Supreme Court, said (at p. 1091 of the Report):

> "Thus our constitutional case law has already taken affirmative cognizance of the doctrine of void-for-vagueness. The absence of provisions in the 1992 Constitution directly mentioning the doctrine is of no import to its relevance and validity. Indeed, in the the United States Supreme Court case of *Papachristou et al* (supra), Justice Douglas put the general rationale for the doctrine in a wider context: "Living under a rule of law", he wrote, "entails various suppositions, one of which is that all persons are entitled to be informed as to what the state commands or forbids." And in *Kolender, Chief of Police of San Diego* (supra), the United States Supreme Court declared that the doctrine of void-for-vagueness, even though not expressly mentioned in the United States Constitution, was squarely placed within the ambit of the Due Process Clause of the Fourteenth Amendment. The Due Process Clause, it should be noted, is analogous to articles 14 and 19 of the 1992 Constitution of Ghana. We therefore hold that the void-for-vagueness doctrine represents a legitimate standard under the 1992 Constitution for the judicial review of legislation."

What this court needs to do therefore is to measure s. 63(d) of Act 759 against the void-for-vagueness standard in order to determine whether it is

constitutional or not. Does s. 63(d) sufficiently inform persons who are charged under it of the conduct prohibited under it and what they must have done to comply with the statute? Conversely, does s. 63(d) sufficiently inform law enforcers of the prohibited conduct which they must prosecute? Answering these two questions should assist in determining whether s. 63(d) is void for vagueness. These two questions can alternatively, borrowing from Mr. Justice Douglas' formulation in *Papachristou et al v City of Jacksonville* 405 US 156; 92 S.Ct. 839; 31 L. Ed 110; 1972 US Lexis 84, be put as follows: does the impugned provision fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or does it encourage arbitrary and erratic arrests and convictions?

In his submission made in response to the twelth issue of the Memorandum of Agreed Issues, counsel for the second defendant urges that the onus rests on the plaintiff to demonstrate in what manner s. 63(d) is "vague" and "overly-broad". Issue twelve states: "Whether or not the subsections of Section 63 of the Chieftaincy Act 2008 (Act 759) by being referred to as "overly broad or vague" are meant to say that they are inconsistent with Article 19 of the Constitution 1992." As shown above, *Tsatsu Tsikata v The Republic* has demonstrated that the void-for-vagueness doctrine is part of our constitutional law. The response of the defendants to the plaintiff's complaint that the impugned provisions are legally vague is an assertion that in fact they are clear and unambiguous. This is the argument which needs to be dwelt upon.

S. 63(d) may have given chiefs excessive power, but the range of that power would appear to be clear enough, if one goes by the literal interpretation of the provision. On the literal interpretation used earlier in this judgment to declare the provision unconstitutional in relation to relief (a), which

interpretaion, as pointed out earlier, could also be a purposive one, a person must not deliberately refuse to honour a call from a chief to attend to an issue. Although the nature of the issue is not specified, this fact, to us, implies that it can be any issue whatsoever. What the sub-section gives fair notice of to any person of ordinary intelligence is thus that if a chief calls him to attend to any matter at all, he should honour that call. The mischief in the provision is not its lack of clarity, but the width of the power it confers on chiefs. Although it could be argued that the fact that there are credible purposive interpretations alternative to the literal one outlined above demonstrates that the provision is incurably vague, we are not impressed by that argument.

That brings us to the other prong of the plaintiff's challenge under relief (b), namely that the impugned subsection is "overbroad". His Statement of Case does not spell out what he means by overbroad. It would seem that he wants to invoke case law from the United States that deals with overbreath in criminal statutes. In the United States the concept of overbreath is distinct from the concept of vagueness. Since the plaintiff has done so little to spell out his case on this issue, we are not inclined to accept his invitation to import United States case law on this matter, particularly as we have already found s.63(d) void for unconstitutionality on other grounds. In fairness to him, we do acknowledge that in his counsel's Written Submission filed after the plaintiff's agreement on issues with the second defendant, counsel explains that legislation is overbroad if it is so broadly written as to cover both legitimate and illegitimate actions. He asserts that, under the doctrine of overbreath, even legislation prohibiting acts which may legitimately be prohibited may be struck down, if its breath includes both legitimate and illegitimate conduct. This is because of the chilling effect of overbroad legislation in potentially prohibiting legitimate conduct. He further contends that It may also give

unfair discretion to police and other law enforcement agencies and, like vague statutes, offend due process. While counsel's submissions flesh out the plaintiff's Statement of Case a little, we would still prefer not to base our decision on the unconstitutionality of s. 63(d) on this ground. We think that more detailed legal argument is needed before this Court decides whether to apply the doctrine of overbreath of a criminal statute to strike it down.

Our conclusion on whether s. 63(d) is constitutional is thus that the first remedy endorsed on the plaintiff's writ should be granted, since the plain meaning of s. 63(d) authorises conduct by chiefs which is likely to interfere with the freedom of movement of persons, including those not subject to them, and in relation to issues whose nature is unspecified and therefore wide. As the plaintiff points out, not even the President of the Republic, who is vested with the Executive authority of the State, has a direct power similar to that conferred on chiefs to compel persons to honour their invitation. Whilst this potential unjustified interference by chiefs with the freedom of movement of persons within the Ghanaian jurisdiction could be averted to a degree with a purposive interpretation which narrows the scope of s. 63(d), such an interpretation would result in an unclear criminal statute which would pose a challenge for due process. It would be unwise for this court to rewrite a criminal statute which appears, on its plain meaning, to be unconstitutional. It is a much better outcome for this court to strike down the offending legislation and for Parliament itself then to rewrite the statute in the light of the Supreme Court's view. In our view, a statutory provision which limits itself to a chief's call within his or her Traditional Area and provides a defence for a person who is called but has a reasonable excuse not to heed the call would have a better chance of passing the constitutionality test.

However, we would not grant relief (b) since we do not consider s. 63(d) as legally vague. As to whether the impugned provision is overbroad or not, we do not find that the plaintiff has done enough to challenge the constitutionality of the provision on this score and therefore we do not find it justifiable to give judgment in his favour on that issue.

The constitutionality of subsections (a), (b),(c), and (e) of Section 63 of Act 759.

The plaintiff's case on subsection (a) is that it is vague as it does not clearly define when a person qualifies to act as a chief and what are the functions referred to in its text. He indicates that some functions performed by chiefs are also legitimately performed by people who are not chiefs, for instance, the pouring of libation on ceremonial occasions. In relation to subsection (b), he maintains that it is simply unclear and overbroad and does not give notice to the subject as to what specific conduct is made criminal. The specific defects of the other impugned subparagraphs, namely, (c) and (e) are not spelt out, except that the plaintiff asserts that a penal statute has to be clear in its meaning, application and scope. In relation to these subparagraphs, the plaintiff seeks relief (c), which is a declaration that the subsections are legally vague and overbroad and also inconsistent with the spirit and letter of articles 14 and 21 of the 1992 Constitution and accordingly void.

The plaintiff's case on subsection (a) is adequately answered by both defendants who point out that both article 277 of the 1992 Constitution and Act 759 define who a chief is. The second defendant maintains that subsection (a) is clear and that the functions of a chief need not be defined in it to make it clear. The functions of a chief are clear enough under customary law. We

agree with the second defendant that the subsection is self-explanatory and its language admits of no ambiguity. Our view on issue 6 of the Memorandum of Agreed Issues, namely, "whether or not sub-section (a) of Section 63 of the Chieftaincy Act (Act 759) can be said to be vague when the Chief is defined by both the Constitution 1992 and the Chieftaincy Act 2008 (Act 759)", is thus that it is not vague and does not fall foul of the void-for-vagueness standard.

Equally, we do not consider that subsections (b), (c) and (e) of s. 63 of Act 759, which were earlier set out in this judgment, are legally vague and inconsistent with the spirit and letter of articles 14 and 21. Furthermore, we do not intend to base any decision as to unconstitutionality on the doctrine of over breath, for the reasons we have already set out. Accordingly, we are unable to grant the declaration sought by the plaintiff under relief (c) endorsed on his Amended Writ of Summons.

Relief (d)

Finally, regarding relief (d) endorsed on the plaintiff's Amended Writ, this court will grant it only in relation to relief (a). In other words, s 63 (d) of Act 759 is hereby expunged, deleted and struck out from Act 759 on the grounds of its unconstitutionality. This court unquestionably has the authority to make this order under article 2 of the 1992 Constitution. The order is made for the reasons already extensively canvassed above. No other subsections are to be deleted, expunged or struck out.

Conclusion

The plaintiff's action thus succeeds only in part. Relief (a) is granted in full and relief (d) in part. Subject to this, the action is dismissed.

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

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

(SGD) J.V. M. DOTSE
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(SGD) P. BAFFOE-BONNIE
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PLAINTIFF APPEARS IN PERSON

MR. AYIKOI OTOO FOR THE 2ND DEFENDANT