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RESEARCH ARTICLE

Reconciling Constitutional Values in Ghana Through Purposive Interpretation

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Abstract

In the recent case of *Ezuame Mannan v Attorney General and Speaker of Parliament*,[1] the Ghanaian Supreme Court in a 5-4 decision struck down the Narcotics Control Commission Act, 2020 (Act 1019), on grounds that the parliamentary processes leading to its enactment were unconstitutional. In arriving at this decision, the court strived to define the limits of Parliament's legislative powers. While some clarity was achieved, difficult contradictions emerged. Prominent among these was the extent to which the constitutional power of judicial review over legislative actions should interfere with the autonomy of Parliament. In this article, I propose that a proper understanding and application of the purposive approach to interpretation offers an effective tool for reconciling these seemingly conflicting constitutional values.

Keywords: constitutionalism; constitution; Ghana; judicial review; purposive interpretation; separation of powers

Context and approach

The aftermath of the Second World War saw the rise of written constitutions in many post-colonial states, including Ghana.[2] Constitutionalism was seen as a way to guarantee political stability, promote the rule of law and deliver the aspiration of economic development.[3] In Ghana, before the 1992 Constitution which has seen some stability, four separate constitutions were experimented with: 1957, 1960, 1969 and 1979.[4] All these four were overthrown by military adventurers who justified their coups partly because the supposed democratic institutions created under them did not produce their expected dividends.[5]

The appetite for coups and insurrections in new states even in the face of written constitutions that outlaw them drew attention to the need for radical reforms in constitution-making.[6] To achieve stability, the 1992 Constitution of the Republic of Ghana (the Constitution) adopted principles typical

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1 [2022] DLSC11608.
2 VT LeVine "The fall and rise of constitutionalism in West Africa" (1997) 35/2 *Journal of Modern African Studies* 181.
3 Ibid.
4 See generally EK Quashigah "Constitutionalism and constitutional reforms in Ghana" in MK Mbondenyi and T Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013, Pretoria University Law Press) 115.
5 M Ocquaye *Politics in Ghana 1972–1980* (1980, Tornado Publications).
6 Quashigah "Constitutionalism and constitutional reforms", above at note 4 at 126.

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of written constitutions in stable democracies.[7] This bundle of principles has defined the limits of the various state organs to ensure the balance of power.[8] However, the interpretation and application of these principles have sometimes produced a conflict of values.[9] This conflict sometimes emerges in the exercise of the court's power of judicial review over legislation and legislative processes. Judicial review of legislative acts seeks to ensure that enactments conform with the Constitution.[10]

How far the judiciary can go and under what circumstances may implicate the principle of separation of powers and its objectives.[11] Article 2(1) and (2) and article 130(1)(b) of the Constitution give power to the Supreme Court to strike down any action found to be inconsistent with the Constitution.[12] The broad power given to the Supreme Court has been interpreted to include a power to interfere with all processes and procedures in Parliament leading to or preceding an enactment in so far as those processes are found to violate the Constitution.[13] Whether or not a particular method or procedure in Parliament is unconstitutional may first require interpretation.[14] Thus, the court must find the correct meaning of the constitutional provision under controversy. The court may be confronted with choices between several plausible meanings in seeking the proper interpretation. This article argues that the purposive approach to interpretation, correctly applied, helps navigate these complex choices. The work is presented in five sections.

The first, as detailed in this section, provides the background and outline of the study. The second part provides further context by focusing on the principle of constitutionalism as a bundle of values. The third examines the principle of separation of powers and checks and balances and establishes their interaction with judicial review within the context of written constitutions. The fourth section discusses the purposive approach to interpretation and how various academic and judicial opinions deconstruct its complexities. The fifth section examines relevant case law on the purposive approach in Ghana with particular focus on the most recent Ghanaian decision of *Ezuame Mannan v Attorney General and Speaker of Parliament* and evaluates the extent to which the courts effectively utilize the tools of the purposive approach to achieve the goals of constitutionalism. The final section provides a conclusion highlighting the study's key observations.

Constitutionalism as a bundle of values

There is a broad understanding that social contract theory which emerged in the seventeenth century and sought to justify a more secular foundation for government provided the catalyst for what today

7 LeVine "The fall and rise of constitutionalism", above at note 2.

8 See generally NW Barber *The Principles of Constitutionalism* (2018, Oxford University Press).

9 The Ghanaian courts have broadly described these principles as values. See note 43 below.

10 See generally the Constitution of Ghana (1992) (the Constitution), art 1 and art 2. Also see E Barendt "Is there a United Kingdom constitution?" (1997) 17/1 *Oxford Journal of Legal Studies* 137 at 141. Barendt calls the ability of the court to strike down legislation a strong form of judicial review.

11 See Barber *The Principles of Constitutionalism*, above at note 8 at 222–25.

12 The Constitution, art 2 provides: "(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. (2) The Supreme Court shall, for a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made". Art 130 also provides: "[s]ubject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in Article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in – (a) all matters relating to the enforcement or interpretation of this Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution".

13 *Justice Abdulai v Attorney General* [2022] GHASC 1.

14 The Supreme Court of Ghana has in several cases held that its enforcement jurisdiction could only be invoked correctly if there is a prior interpretative issue: see for example *Osei Boateng v National Media Commission and Apenteng* [2012] SCGLR 1038; *Aduamoah II v Twum* [2000] SCGLR 165.

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is known as constitutionalism.[15] Contractarianism in its basic form opines that in exchange for their collective peace and security people are prepared to surrender their self-interest to the control of a sovereign.[16] In Locke's view, the sovereign remains legitimate so far as he can guarantee public order and not interfere with three fundamental natural rights: life, liberty and estate.[17]

Hobbes held a similar view. To him, individuals as rational beings give their allegiance to a government because it is in their rational self-interest to do so.[18] Hobbes asserts that without government, life will reflect the state of nature where life was short, nasty and brutish.[19] Contractarians however broadly accept that the power to rule is constrained by goals that promote the common interest of the citizenry.[20] Governments must therefore be guided by values that broadly promote mutual coexistence.[21] The concept of constitutionalism resonates with this thinking.[22] It broadly represents a set of values that limits the powers of state organs with the ultimate goal of safeguarding individual liberties.[23] The question about what should be the ultimate source of these limitations has yielded differing opinions.

Two broad viewpoints are dominant; political and legal constitutionalism. Political constitutionalists assert that legislation should provide the limits within which governmental power should operate.[24] This view holds that a parliament should define the values that must constrain governmental action and enforce these values through a system of political accountability.[25] The justification for this is that it is parliament that represents the people and therefore has the legitimate authority to determine what rights are and how they should be enforced. Simply put, the political process manifested by parliaments' political debates, consultations and compromises is considered to be more effective in promoting rights. Thus, to political constitutionalists, embedding rights in a document and handing over its interpretation to a supreme court only projects a view of rights as understood by an elite few who constitute the courts. Bellamy summarises the point in the following words: "The test of a political process is not so much that it generates outcomes we agree with as that it produces outcomes that all can agree to, on the grounds they are legitimate".[26] To Bellamy, where there are competing visions and opinions about which values are the best for society, majority opinion is the fairest approach to resolving disagreements.[27] Also, to him, since what society considers the right values keeps evolving, it is counterproductive to set up these rights in a rigid political document called a constitution.[28]

Many modern republican constitutions, with the USA being a typical example, adopt the legal constitutionalist approach.[29] The central feature of these constitutions is that they are often codified in one document spelling out the functions and powers of various organs of government. As captured by Griffiths, the theory behind a written constitution is that it is antecedent to government and forms the basis of all governmental powers.[30] As stated expressly in its text or subsequently interpreted

15 M Forsyth "Hobbes's contract theory and modern constitutionalism" (1971) 19/3 *Political Studies* 281.
16 Ibid.
17 J Locke *Two Treatises of Government* (first published 1689, Peter Laslett ed, 1988, Cambridge University Press) at 350–52.
18 D Runciman *The World According to Hobbes* (2009, Princeton University Press) at 45–48.
19 Ibid.
20 Ibid.
21 Ibid.
22 Q Skinner *Hobbes and Republican Liberty* (2008, Cambridge University Press) at 110–15.
23 G Winterton *Constitutionalism in Australia* (2003, Oxford University Press) at 33–36.
24 R Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007, Cambridge University Press) at 78–81.
25 Ibid.
26 Bellamy *Political Constitutionalism*, above at note 24 at 98–101.
27 Ibid.
28 Ibid.
29 M Tushnet *Advanced Introduction to Comparative Constitutional Law* (2014, Edward Elgar Publishing 2014) at 45–48.
30 G Gee "The political constitutionalism of JAG Griffith" (2008) 28 *Legal Studies* 20.

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by courts, written constitutions provide two complementary but also sometimes contradictory mechanisms for limiting governmental power.[31] First, they establish a balance of power through separation of powers and checks and balances among the various organs of government so that no arm of government can rule without consulting the other.[32] Second, a system of judicial review, by which the courts are empowered to determine whether the actions of the various organs of government are constitutional.[33]

Following the Second World War and the collapse of the Soviet Union, it is not in doubt that many states including post-colonial states in Africa such as Nigeria, Kenya, South Africa and Ghana have adopted written constitutions that incorporate these mechanisms in varying degrees.[34] Any categorization of these constitutions as political or legal will however be inaccurate. Though these constitutions significantly show features of legal constitutions such as the power of the judiciary over legislative acts, there are also significant notable features about political constitutions such as political checks by parliament through its oversight roles as well as systems of ministerial responsibility and accountability through parliament.[35] Even in the UK, where elements of political constitutionalism seem to be dominant, there are several elements of legal constitutionalism including the power of the judiciary to strike down subordinate legislations and define the content of rights and the limits of state power in relation to rights.[36] What is remarkable in the constitutional practice in Ghana and many post-colonial states in Africa however is the adoption of the twin principles of separation of powers and checks and balances, and judicial review of legislative actions as part of their constitutional design.[37] These tools are broadly viewed as essential vehicles for preventing arbitrariness and protecting and promoting the fundamental rights and values that the Constitution stands for. However, where the various organs push beyond their limits, this constitutional design may lead to results counterproductive to constitutionalism. An activist judiciary may for instance excessively interfere in the legislative process beyond what its constitutional power allows it to do which may lead to undesired conflicts and hamper institutional cooperation.

An appropriate balance must therefore be struck between constitutional values to ensure stable and effective governance. This work argues that correctly utilizing the tools of purposive interpretation produces interpretative outcomes that harmonize constitutional values and advance the goals of constitutionalism.

Separation of powers and checks and balances

The standard understanding of the principle of separation of powers divides the functions of states between three organs of government which are the legislature, executive and judiciary.[38] The two main goals of the principle are to ensure efficiency and promote liberty.[39] The functional division of labour achieves the efficiency rationale by ensuring that the task is performed by the particular organ structurally well-equipped to do so.[40]

31 RA Dahl *How Democratic is the American Constitution?* (2001, Yale University Press) at 15–20.

32 JAG Griffiths "The political constitution" (1979) 42/1 *Modern Law Review* 1; Gee "The political constitutionalism of JAG Griffith", above at note 30.

33 Ibid.

34 M Loughlin "The paradox of constitutionalism: Constituent power and constitutional form" in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007, Oxford University Press) chap 2. Also see generally G Robbers "Constitutional developments in Africa" in S Cassese and V Barsotti (eds) *Constitutionalism: The Global and the Local* (2010, Ashgate Publishing) 173.

35 Ibid.

36 See Loughlin "The paradox of constitutionalism", above at note 34.

37 Ibid.

38 Barber *The Principles of Constitutionalism*, above at note 8.

39 Id at 52–55.

40 Ibid.

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The liberty rationale thrives on the assumption that liberty and a strong state are rivals and so the only way by which the freedom of the individual can be ensured is through institutional conflict between the branches.[41] The complementary device of checks and balances provides the context for healthy conflict and friction within which the individual branches correct constitutional errors of each other.[42] In Ghana, separation of powers and checks and balances are important underlying values of the Constitution. Wood CJ, in illustration of this fact, held that "[s]eparation of powers and the equally salutary principle of checks and balances, with the aim of ensuring that all organs of State, as far as is possible, operate harmoniously within the constitutional framework is a core value underpinning the 1992 Constitution".[43]

The objective of checks and balances is to reinforce the constitutional limits within which all the organs should operate.[44] It reinforces the mutual watchdog role of each organ over the other.[45] In Ghana, unlike the USA, the power of judicial review of legislation is a creation of the Constitution itself. Acquah JSC affirms this in the following words:

> "Where it is alleged before the Supreme Court that any organ of Government or an institution is acting in violation of a provision of the Constitution, the Supreme Court is duty bound by articles 2(1) and 130(1) to exercise jurisdiction, unless the Constitution has provided a specific remedy … no individual nor creature of the Constitution is exempted from the enforcement provision of article 2 thereof. No one is above the law. And no action of any individual or institution under the Constitution is immune from judicial scrutiny if the constitutionality of such an action is challenged."[46]

From the above statements of Wood CJ and Acquah JSC, it could be deduced that separation of powers and checks and balances on one hand and judicial review on the other are both underlying commitments of the Constitution. Also, it is clear that both operate to achieve the common goal of constitutionalism which is to limit the state and its organs. The need for interpreting the constitutional text in a manner that harmonizes these principles need not be over-emphasized. In advancing this solemn goal of constitutionalism, judicial review must ensure that it keeps all organs of states within its constitutional limits including the judiciary itself.

Barber points to a very important dimension of the principle of separation of powers and checks and balances which, in his view, is essential to constitutionalism.[47] This element must be contemplated by the judiciary in defining the limits within which it interacts with the legislature. This is what he calls defense mechanisms.[48] He defines this mechanism as powers and immunities that serve to protect institutions or officials within those institutions from unjustifiable interference from other organs.[49] He exemplifies this as follows: "For example in many systems debates in the legislature are often insulated from part of civil or criminal law". Barber opines that the defense mechanisms limit how disagreement between the branches can be expressed and also limit the level of control that may be exercised by one institution over the other.[50] Negative defense mechanisms according to him act as a shield by preventing certain types of interference. Positive defense mechanisms act as a sword by providing a sanction or threat that one institution can use against others.[51]

41 Ibid.
42 Ibid.
43 *Brown v Attorney-General (the Audit Service Case)* [2010] SCGLR 183.
44 See Barber *The Principles of Constitutionalism*, above at note 8.
45 Ibid.
46 *Martin Alamisi Amidu v President Kufour and the Attorney General* (2001-2002) SCGLR 138.
47 Barber *The Principles of Constitutionalism*, above at note 8.
48 Ibid.
49 Id at 79–81.
50 Ibid.
51 Ibid.

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In Ghana, a typical defense mechanism for Parliament is provided for in article 115 of the 1992 Constitution. It states "[t]here shall be freedom of speech, debate, and proceedings in parliament and that freedom shall not be impeached or questioned in any court or place outside parliament". The Ghanaian Supreme Court has in recent decisions recognized this insulating mechanism. In *Abdullai v Attorney General*, the Supreme Court observed that the court should exercise restraint in matters that entirely concern parliamentary procedure. The court observed:

> "If the disparate interpretations proffered by the parties exclusively implicated the Standing Orders, procedures and practices of Parliament, without more, we would have had no difficulty in concluding that Parliament is and ought always to be the master of its procedures, orders, and practices, without let or hindrance from the Court. In such a case, these would have been matters that lie peculiarly within the domain of Parliament and would, therefore, not be matters appropriate for judicial determination."[52]

The court has also in several cases upheld the common law position that acts of parliament are presumed to be valid and has gone further to set a high threshold for dislodging this presumption.[53] The court requires proof of clear transgression by Parliament before a claim that an act of parliament is unconstitutional can be sustained.[54] This standard of review set by the Ghanaian court in relation to legislative acts is consistent with the attitude of the judiciary in analogous jurisdictions with similar constitutional structures. In South Africa, the Constitutional Courts have emphasized that the courts will intervene in the legislative process where there are breaches of a constitutional obligation.[55] The Kenya court succinctly expressed the nature of the court's powers in the following words:

> "This court is acutely aware that the three arms of government, that is to say, the Executive, the Legislature, and the Judiciary have their respective mandates set out in the Constitution and that, as far as possible, each arm of Government must desist from encroaching on the functions of the other arms of government. The court's position has always been that it can only interfere with the exercise of the Executive and the Legislature's mandates if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of the constitution."[56]

Broadly, what is obvious from these constitutional arrangements and their related judicial opinions is that legislative acts will only yield to the court's power of judicial review where it is clear that there are manifest breaches either in the manner in which the legislation was passed or in its substance.

The purposive approach to constitutional interpretation

Courts have broadly approached the interpretation of an enactment from three theoretical perspectives: originalism, textualism and purposivism.[57] To the originalist, the meaning of an enactment is fixed at the time the enactment is made.[58] As such, interpretation should reflect the meaning of the words as intended by the lawmakers at the time of enactment. Meaning from the point of view of

52 *Justice Abdullai v Attorney General* [2022] GHASC 1.

53 Ibid. Also see *Solomon Faakye v University of Ghana and The Attorney General* [2024] DLSC17479.

54 Ibid.

55 In the case of *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) the court was confronted with the failure to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 as required by sec 72(1)) (a) of the Constitution. The court concluded that the failure to involve the public before passage renders the law unconstitutional.

56 Constitutional Petition 203 of 2020 [2020] eKLR.

57 Generally see A Scalia *A Matter of Interpretation: Federal Courts and the Law* (1997, Princeton University Press). Also see J Smith *Statutory Interpretation: Theories and Principles* (2021, Oxford University Press) at 123.

58 Ibid.

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the originalists, it must be construed from the semantic context as well as all background materials related to the enactment at the time it was passed.[59]

Textualists, on the other hand, posit that the meaning of enactment should be ascertained from the plain words used by the maker within its semantic context and not by resorting to extraneous materials.[60] In the words of Scalia J, "where the language of the law is clear, we're not free to replace it with unenacted legislative intent".[61] Scalia J argues strenuously that the statutory text always overrides unenacted legislative intent.[62] To the textualist, purpose is only an accessory in understanding what the text says. It only becomes useful when semantic ambiguity arises. In the absence of any such ambiguity, the text must prevail.[63]

There is a growing consensus that judges have moved away from finding the meaning of constitutions and other enactments based on the plain or dictionary meaning.[64] The contemporary approach called the purposive approach finds the meaning of words by giving effect to the purpose of parliament or the framers.[65] This requires the judge to pay attention to the underlying principles or values of the text under interpretation.[66] The ascendancy of the purposive approach as a technique for constitutional interpretation in the Ghanaian jurisdiction could be linked to the rise of the purposive approach to statutory interpretation in the common law world.[67]

Indeed, references to this approach in the context of constitutions by Ghanaian judges have heavily drawn from the principles as they pertain to statutory interpretation with little or no modifications.[68] In several decisions in which the purposive interpretation has been invoked in relation to the interpretation of the Ghanaian Constitution, reference has been made to English cases in which the purposive approach has been applied to interpret statutes.[69]

More recently, the Ghanaian court has stated clearly that the modern purposive approach to interpretation is reflected in section 10(4) of the Interpretation Act, 2009 which provides as follows:

> "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."

Clearly from the above, we see that the law makes no distinction between the purposive approach as it relates to the Constitution on one hand and as it relates to other enactments on the other. The Supreme Court has, in several decisions, applied the above provision of the Interpretation Act to both the Constitution and statute without any distinction.[70] The Ghanaian situation is similar to

59 Ibid.

60 Ibid.

61 *INS v Cardoza-Fonseca* 480 US 421, 452-55 (1987) (Scalia J concurring). Also see A Scalia "Common-law courts in a civil-law system: The role of United States federal courts in interpreting the constitution and laws" in A Gutmann (ed) *A Matter of Interpretation: Federal Courts and the Law* (1997, Princeton University Press).

62 Ibid.

63 WN Eskridge Jr "The new textualism" (1989) 37 *UCLA Law Review* 621 at 651, footnote 116.

64 Ibid.

65 See *Agyei Twum v Attorney General* [2006] DLSC403.

66 Ibid.

67 See, for example, A Burrows *Thinking about Statutes: Interpretation, Interaction, Improvement* (2018, Cambridge University Press) at 5 and 6. Also see *Carter v Bradbeer* [1975] 3 All ER 158 at 161. It was observed that the purposive approach has been the dominant approach to interpretation in the last thirty years.

68 *Agyei Twum v Attorney General,* above at note 65.

69 Ibid (per Date Bah JSC). Also see *Asare v Attorney General* [2012] DLSC2681.

70 See the case of *CHRAJ v AG and Baba Camara* [2011] GHASC 19 where the court was emphatic that the provision in the Interpretation Act provides the legislative endorsement for using a purposive approach to constitutional interpretation in Ghana. Kulendi JSC also made this point in *Ezuame Mannan v Attorney General* [2022] DLSC11608.

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the approach adopted by the Kenyan courts. Section 10(4) of Ghana's Interpretation Act is similar to section 259 of the Kenya Constitution. The latter provides "1) This Constitution shall be interpreted in a manner that (a) promotes its purposes, values, and principles; (b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance". In practice, the Kenyan courts just like its Ghanaian counterparts make no distinction between the purposive approach as it applies to statutes and as it applies to the Constitution. Mativo J, citing several authorities, in *Stephen Wachira Karani and another v Attorney General and 4 others* demonstrates this in the following words: "[t]he purposive approach (sometimes referred to as purposive, or purposive construction, or purposive interpretation, or the modern principle in construction) is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law's purpose".[71]

This trend is consistent with practices in other analogous common law jurisdictions.[72] Also, it accords with theoretical perspectives on the purposive approach. Barak, who provides one of such leading perspectives, makes no distinction between a purposive approach to the Constitution on one hand and statute law on the other. To him, the purposive approach is a technique for ascertaining the "purpose" of a legal norm.[73]

To Barak, a legal norm is an abstract concept made up of both subjective and objective purposes. The first reflects the intention of the text author and the second, the intention of the reasonable author as reflected in the fundamental values of the legal system. The first reflects the true intention at the time the text was made and does not change with time; the second reflects the meaning that the reasonable interpreter will give to it taking into account the values of the legal system. The first is a fact established in the past; the second represents a legal norm that reflects the present.[74] In Barak's view, to diagnose the objective purpose, the hypothetical reasonable man must be guided by the current normative environment including relevant judicial case law in which the text that has come up for interpretation operates.[75] Where the subjective and objective intent clash the interpreter should choose the outcome from objective interpretation so as not to enslave today's generations to the values of past generations.[76]

Burrow's views of the purposive approach are substantially similar to Barak's. Burrows agrees broadly with Barak that the essence of the purposive approach is for the judge to ascertain the meaning of words by looking at their context including its policy environment. Burrows however takes the view that the use of the term parliamentary intent and its further categorization into objective and subjective is misleading.[77]

Burrows, in support of Kirby J's view, strongly argues that judges exercise the power of interpretation in finding meaning to words by making sense of the context and not by merely giving effect to the intent of parliament.[78] This comes out clearly in his words as follows:

> "Identifying the policy is not dependent on identifying any person's intentions. It may be said to be analogous to identifying the principle behind a common law precedent and that, too, is not dependent on trying to identify any person's (i.e. judge's) intention. Indeed to expose the practical irrelevance of the legislator's intention, it may be helpful to focus on the statute,

71 *Stephen Wachira Karani and another v Attorney General and 4 others* [2017] eKLR.
72 See note 67 above.
73 A Barak *Purposive Interpretation in Law* (2005, Princeton University Press) at 141.
74 Ibid.
75 Ibid.
76 Ibid. See also *R v Secretary of State for Health ex parte Quintavalle* [2003] UKHL 13.
77 Burrows *Thinking About Statutes*, above at note 67.
78 Ibid.

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> rather than the legislator, and to say that we are concerned with the meaning of the statute, ascertained by considering the statute's words, context and purpose."[79]

Similar to Barak, Burrows points out that purposive interpretation requires that the law evolves according to current circumstances and needs.[80] To him, an enactment must be interpreted with the benefit of hindsight to save it from being ossified in the past.[81] Burrows points out three key legacies of the purposive approach to the law of interpretation.[82] First, he argues that the purposive approach has come to subsume many of the so-called old canons of interpretation. To him, these rules have lost primacy with the demise of literalism and will only be relevant to the extent that their application leads to arriving at the purpose of the object of interpretation.[83]

Second, he argues that legislative history is now admissible as part of the context of interpretation.[84] Third, he asserts that in exceptional cases the court has power to amend the words of legislation if it can establish that there has been a drafting mistake. Such a situation may arise where the words used in the statutory provision conflict with the statutory purpose.[85]

The opportunity offered to the judge by the purposive approach to resort to non-legal considerations sometimes leads to radical change in the ordinary meaning of an enactment. Changing the ordinary meaning without sufficient basis in the text itself and historical documents relating to it may lead to the conclusion that the judiciary is pushing its constitutional limits too far through judicial law-making. Even more problematic is what constitutes a "sufficient basis" for changing the ordinary meaning of an enactment duly enacted by the lawmaker. Some judicial opinion has suggested that the power of the court to stray outside the text is nearly limitless. The concurring opinion of Mutunga CJ of the Kenya Supreme Court in laying down the interpretative powers of the court under section 3 of the Kenya Supreme Court Act is revealing:[86]

> "In my opinion, this provision grants the Supreme Court a near-limitless and substantially elastic interpretative power. It allows the Court to explore interpretative space in the country's history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment."[87]

Mutunga CJ's ambitious statement extends the judges' interpretative powers beyond the historical documents that precede the text. Ghanaian judicial opinions regarding how far the judge can go beyond the text in this purposive endeavour further demonstrate these complexities. Three cases are illustrative.

The first is the case of *Asare v Attorney General.*[88] The constitutional provision that generated the controversy was article 60(11) of the 1992 Constitution which provides: "[w]here the President and the Vice-President are both unable to perform the functions of the President, the Speaker of Parliament shall perform those functions until the President or the Vice-President is able to perform those functions or a new President assumes office, as the case may be".

79 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28. Also see Kirby J "Constitutional interpretation and original intent: A form of ancestor worship?" (2000) 24 *Melbourne University Law Review* 1.

80 Burrows *Thinking About Statutes*, above at note 67.

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 Ibid.

86 *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others* [2014] eKLR.

87 *In Re the Speaker of the Senate and Another v Attorney General and 4 Others* Supreme Court Advisory Opinion No 2 of 2013, [2013] eKLR I at 56 and 57.

88 [2012] GHASC 31.

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The president and vice president had temporarily travelled outside the jurisdiction as such and the speaker of parliament was sworn in as president in accordance with article 60(11) of the Constitution. The plaintiff filed a public interest action at the Supreme Court, invoking the court's original jurisdiction. The plaintiff argued that in the light of the principle of separation of powers, a narrow interpretation should be placed on the words "unable to perform the functions of the President" in article 60(11), such that it is confined to situations of real inability to perform the functions such as "grave or terminal illness affecting physical or mental capacity, kidnapping, absconding, missing – and not temporary travel of the President".[89]

Referring to the purposive approach to interpretation as laid down in previous decisions including English decisions relating to purposive statutory construction, the court stated that the phrase "unable to perform his duty" includes situations where the president is temporarily absent. The court speaking through Date Bah JSC explained what constitutes purpose and context:

> "The subjective purpose of a constitution or statute is the actual intent that the authors of it, namely, the framers of the constitution or the legislature, respectively, had at the time of the making of the constitution or the statute. On the other hand, the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history, and values, etc of the society for which he is making law. This objective purpose will thus usually be interpreted to include the realization, through the given legal text, of the fundamental or core values of the legal system. Where the subjective and objective intent leads to inconsistent results, the objective intent thrives but at all times, the subjective intent must be considered."[90]

Date Bah JSC strived to provide clarity in the *Asare* case by stating what purpose is composed of and how it can be ascertained. The interesting formula he presents, however, is not without some confusion. The first is that it mixes intention and purpose. He explains objective purpose as the objective intention of the author and subjective purpose as the subjective intention of the author. This approach appears to create conceptual difficulties in light of fine academic distinctions made between intention and purpose.

As Burrows puts it within the context of statutory interpretation, "[w]hen we are talking of purpose, we are looking for the policy behind a statute or statutory provision. Identifying the provision is not dependent on identifying any person's intentions. Interpretation requires focusing on the law to be interpreted and not on its author or framer".[91] Thus, to Burrows, the concept of parliamentary intention is a fiction. What interpretation requires is ascertaining the plausible meaning of the provision in issue from the words, context and purpose. In this argument nonetheless, the distinction between subjective and objective purpose may be of no practical relevance. This is because as stated by Date Bah JSC, the subjective purpose will only have relevance if it agrees with the objective purpose. Once it disagrees, the objective purpose overrides.[92]

89 Ibid.

90 Id at 5: "The distinction between subjective and objective purposes of a legal text can be significant. An emphasis on the objective purpose may be important to respond to social and other changes. At the same time, authorial intent (subjective purpose) cannot be ignored. The interplay between subjective and objective purposes, therefore, has an important influence on a judge's approach to constitutional and statutory interpretation" (per Date Bah JSC). He further states that the objective purpose in the Ghanaian context can then be obtained by looking at chaps five and six of the 1992 Constitution. Date Bah JSC's approach seems to be consistent with prominent academic opinions regarding various conceptualizations of purpose. See generally Barak A "A judge on judging: The role of a supreme court in a democracy" (2002) 116 *Harvard Law Review* 19 at 69.

91 Burrows *Thinking about Statutes*, above at note 67.

92 Ibid. See also *R v Secretary of State for the Environment, Transport and the Regions and Another, ex parte Spath Holme Ltd* (7 December 2000) House of Lords where Lord Nicholls said: "'The intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used".

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The second is his enunciation of the term "context". Date Bah JSC's context seems to plunge the interpreter into an open-ended endeavour. In relation to context, he talks *about* the underlying legal system, history, values, etc of the society. This is a very broad spectrum within which to draw the meaning of a provision. At another breadth, he includes the purpose in the context. He says, "[a]n important part of this contextual analysis is the determination of the purpose of the provision under construction".[93] These semantic complexities perhaps plunge his formula into further conceptual difficulty. In this regard, Bingham in the *Quintavalle* case[94] appears to be more conservative and clearer with what constitutes context. As observed, he talks about context being the whole statute as viewed in its historical context.[95]

Date-Bah JSC had the opportunity to further clarify his approach in the case of *Frank Agyei-Twum v Attorney General*.[96] The case concerned the requirements for the removal of the chief justice under the 1992 Constitution of Ghana. The removal of a justice of a superior court is initiated by a petition to the chief justice.[97] The chief justice is first required to establish a prima facie case. Once this is done, the chief justice is required to refer the matter for investigation by a committee which membership is prescribed by the Constitution.[98] In the case of removal of the chief justice, the process is initiated by petition to the president.[99] The president is required to refer the petition to a committee set up by him in consultation with the council of state. Unlike the case of justices of superior courts, he is not required to make a prima facie determination before reference of the petition to the committee.

The question before the court in *Agyei Twum* was whether on a true and proper interpretation of the 1992 Constitution, in removing the chief justice, a prior requirement of prima facie determination by the president must be read into the Constitution to precede the requirement of reference to a committee as provided for in the Constitution. Before proceeding to resolve the issue, Date-Bah JSC laid down his preferred approach to interpretation as follows:[100]

> "In interpreting constitutional language, one should ordinarily start with a consideration of what appears to be the plain or literal meaning of the provision. But that should not be the end of the process. That literal meaning needs to be subjected to further scrutiny and analysis to determine whether it is a meaning that makes sense within its context and in relation to the purpose of the provision in question. In other words, the initial superficial meaning may have to yield to a deeper meaning elicited through a purposive interpretation."

What happens when the literal meaning is completely in disagreement with its purpose as discerned from the context? What must the judge do?

According to Date-Bah JSC, once an interpreter concludes that the literal meaning of words do not make sense in the light of its context and purpose, the interpreter should explore other semantic possibilities including inserting new words, to achieve a meaning that is consistent with the context and purpose of the provision.[101] This approach is similar to the English "filling in" approach canvassed by Burrows and already mentioned.[102]

Date Bah JSC made this point by relying on portions of the judgment of Taylor J in *Sasu v Amua-Sekyi*.[103] This was a case in which the court sought to rectify the absurdity in the literal

93 *Agyei Twum v Attorney General*, above at note 65; *Asare v Attorney General*, above at note 69.
94 *R v Secretary of State for Health ex parte Quintavalle*, above at note 76.
95 Ibid.
96 *Agyei Twum v Attorney General*, above at note 65.
97 See Constitution of Ghana 1992, art 146(3)(4).
98 Ibid.
99 Id, art 146(6) and (7).
100 *Agyei Twum v Attorney General*, above at note 65.
101 See generally *Agyei Twum v Attorney General*, above at note 65; *Asare v Attorney General*, note 69.
102 See above at note 67. See also *Inco Europe Ltd and Others v First Choice Distribution* [2000] 1 WLR 586.
103 1987 DLSC805.

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interpretation of a statute by reading words into the provision. Taylor J, relying on English authorities, observed: "[t]he judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute".

This filling-in device employed by Date Bah JSC as part of the purposive approach seems to be substantially similar to the power to rectify a statute as expressed in the *Inco Europe* case.[104] Just as Date Bah JSC refers to the inherent limitations in exercising this jurisdiction, that is to say, it must be used to make explicit what is already implicit, the English court was clear that it must only be used when legislative errors are patent. This constraint takes into account the constitutional strictures of separation of powers within which a judge performs his role. Cooke J clarifies further: "the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended".[105] The Ghanaian Supreme Court has expressed similar views in the following words:

> "The court cannot and must not substitute its wisdom for the collective wisdom of the constitution or statute. The courts undertake to be faithful to the principle of and the tradition of jurisprudence. The courts must not insert or remove words from legislation in order to arrive at a conclusion that we consider desirable or socially acceptable. If the Courts do that, we would have usurped legislative functions that have been given to the legislator and that will be a recipe for tyranny and harbinger of constitutional crises if not chaos and anarchy."[106]

As observed by Date Bah JSC, a core objective of the purposive approach is to ensure that underlying values are accounted for within the meaning of a constitutional provision. The filling in or amendment jurisdiction utilized in finding a purposive meaning must therefore ensure a balanced engagement of these principles.

How far has Ghana fared in reconciling constitutional values in its application of the purposive approach? How can the purposive approach effectively respond to the needs of a harmonious construction? Three cases from Ghana's constitutional history discussed below are illustrative.

Purposive interpretation and the Ghanaian Constitution

The case of *Tuffour v Attorney General*[107] represents one of the significant judicial applications of the purposive approach in Ghana. The plaintiff, acting in the capacity of a public interest litigant in accordance with article 2 of the Constitution, brought an action before the Supreme Court seeking among other things, a declaration that upon the coming into force of the 1979 Constitution, the chief justice (Apaloo J) immediately preceding the Constitution should be deemed as the chief justice in accordance with article 127(8) of the 1979 Constitution. Article 127(8) provides: "[s]ubject to the provisions of clause (9) of this article, a Justice of the Superior Court of Judicature holding office as such immediately before the coming into force of this Constitution shall be deemed to have been appointed as from the coming into force of this Constitution to hold office as such under this Constitution".

Before initiation of the case, Apaloo J had appeared before Parliament to be vetted for the position of chief justice and had been rejected. The speaker of parliament was made a second defendant in the suit. For purposes of this paper, two of the questions that came before the courts shall be examined.

104 See above at note 102.
105 *Northern Milk Ltd v Northland Milk Vendors Association (Inc)* [1988] 1 NZLR 530 (CA).
106 *In the Republic v High Court ex parte Daniels* [2003 – 2004] SCGLR 304.
107 [1980] GLR 637.

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The first was the correct construction to put on the word "deemed" as used in article 127(8) of the Constitution. The second which was a preliminary question was whether the speaker of parliament was a proper party to the suit. In answering the first question, the court for the first time laid down broad constitutional principles for the construction of the Constitution. Sowah JSC forcefully opined:[108]

> "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority that each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature, and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana. Its language, therefore, must be considered as if it were a living organism capable of growth and development Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time. And so, construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say 'inconsistent' results, the spirit of the Constitution would demand that the more reasonable of the two should be adhered to. We must have recourse to the Constitution as a whole."

Having laid this foundation, the court proceeded to explain how the so-called letter and spirit should be decoded. It canvassed thus:[109]

> "The duty of the court in interpreting the provisions of article 127 (8) and (9) was to take the words as they stood and to give them their true construction having regard to the language of the provisions of the Constitution, always preferring the natural meaning of the words involved, but nonetheless giving the words their appropriate construction according to the context. Thus. the phrase 'shall be deemed' in article 127 (8) (a legislative devise resorted to when a thing was said to be something else with its attendant consequences when it was in fact not) had been employed and used in several parts of the Constitution and thus an aid towards ascertaining its true meaning."

Sowah JSC's approach had three key features. First, it prescribed what can be termed an evolving approach to constitutional interpretation. By this thinking, Sowah JSC established that the interpretation of the law must be responsive to changing circumstances. Secondly, he established context as an important consideration in interpretation. Finally, he prescribed a solution to rival meanings arising from interpretation – in such a scenario, he opined that the most reasonable interpretation should prevail. Though Sowah JSC's approach did not expressly mention the word purpose or purposive approach, subsequent Ghanaian decisions have referred to his approach as the hallmark of the purposive approach.[110] Date Bah JSC subsequently stated that Sowah JSC's use of the term spirit is synonymous with purpose.[111]

108 Id at 647.
109 Ibid. See also dicta of Lord Radcliffe in *St Aubyn v Attorney-General* [1952] AC 15 at 53.
110 See *Agyei Twum v Attorney General*, above at note 65; *Asare v Attorney General*, above at note 69.
111 Ibid.

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As much as Sowah JSC offered a useful guide, he was also confounding. He did not tell us the appropriate test to unravel what constitutes reasonable interpretation in a situation where interpretation leads to two inconsistent results.

The court was confronted with the more practical problem of reconciling the principles of separation of powers and judicial review within the framework of the purposive approach when it sought to answer the question of whether the speaker of parliament had been appropriately sued. In answering this question, Sowah JSC approached this difficult balancing task by first stating the applicable principles as follows:[112]

> "This then brings us to the question of how far the courts can question what, under our Constitution, has been done in, and by, Parliament? There is a long line of authorities which establishes two important principles governing the relationship that subsists or should exist between Parliament and the courts:
> (a) that the courts can call in question a decision of Parliament; but that the courts cannot seek to extend their writs into what happens in Parliament; and
> (b) that the law and custom of Parliament is a distinct body of law and, as constitutional experts, do put it, 'unknown to the courts'."

Having laid down what he considered to be the relevant principles; he concludes:

> "The courts did not, and could not, inquire into how Parliament went about its business. That constituted the state of affairs, as between the legislature and the judiciary which had been crystallized in articles, 96, 97, 98, 99, 103, and 104 of the Constitution. Of particular importance were the provisions of Article 96 which has stated categorically that the freedom of speech, debate, and proceedings of Parliament should not be questioned in any court or place out of Parliament. In so far as Parliament had acted by virtue of the powers conferred upon it by the provisions of Article 91 (1), its actions within Parliament were a closed book. The Speaker therefore ought not to be a party in the instant proceedings and the court would accordingly discharge him as a party."[113]

The Sowah JSC approach represents an attitude of judicial restraint in applying the powers of judicial review. Obviously, it did acknowledge the constitutional power of judges to review legislation but clearly defined the limits of the power as it relates to the business of Parliament. This was in recognition of the fact that the Constitution itself had imposed limits on the power of judicial review within the broad context of the principle of constitutional supremacy.

The case of *Justice Abdulai v Attorney General*[114] provides a contrasting perspective. The facts are as follows: article 102 of the 1992 Constitution provides that the quorum in Parliament shall except the person presiding be one-third of all members of parliament. Upon the temporal leave of the substantive speaker, a member of parliament who was also the first deputy speaker assumed the position of the speaker of parliament in accordance with the Constitution. While presiding, he counted himself as part of the quorum for the purposes of voting in the house. The main question before the court was whether or not the deputy speaker of parliament when presiding over a siting of Parliament in the absence of the speaker retains his right to vote as a member of parliament in the light of article 102 of the Constitution.

In determining this matter, the Supreme Court pronounced on the applicability of the political question doctrine to the interpretation of the Ghanaian Constitution. The doctrine generally is a

112 *Tuffour*, above at note 107 at 650.
113 Ibid.
114 [2022] DLSC11238.

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feature of American constitutional jurisprudence considered relevant to the separation of powers.[115] It requires the court to restrain itself from adjudicating on matters that falls within the constitutional competence of other organs of state. The seminal USA decision of *Marbury v Madison*[116] laid the foundation for this principle as follows: "[t]he province of the court is solely to decide on the rights of individuals, not to inquire how the Executive, or Executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the Executive, can never be made in this court".

A full statement on how a political question should be determined was made by Brennan J in *Baker v Carr* as follows:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[117]

Brennan J further linked the doctrine to the concept of separation of powers. He observed "[t]he no justiciability of a political question is primarily a function of the separation of powers".[118] The Ghanaian courts have also established that the doctrine is central to the separation of powers.[119]

Kulendi JSC in the *Abdulai* case outrightly rejected the application of the political question doctrine as inapplicable to Ghana on the preponderance of probabilities. In support of this view, Kulendi JSC frantically made his point as follows: "[t]his Court has predominantly, on a preponderance of the authorities, long held the view that the political question doctrine does not apply within our jurisdiction".[120]

The problem with this categorical statement is twofold. First, having outrightly rejected the political question doctrine it would have been proper for the learned judge to offer an alternative solution that adequately takes into account the limits imposed on the judiciary in the exercise of its power of judicial review within Ghana's constitutional framework. This is because at the very least, in line with Barber's thinking, there are negative defense mechanisms that shield the Ghanaian legislature from unrestrained judicial interference.

Second, it failed to take into account the entire context of constitutional history as required by the purposive approach before reaching this conclusion. Even though he claimed to apply a purposive approach, he arrived at his preponderance of probabilities by drawing upon only two relevant cases.[121]

There existed a litany of Ghanaian judicial pronouncements which he could have adverted his mind to and distinguished where appropriate those that had upheld the doctrine as essential in

115 MV Tushnet "Law and prudence in the law of justiciability: The transformation and disappearance of the political question doctrine" (2002) 80 *The North Carolina Law Review* 1203.

116 *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

117 *Baker v Carr* 369 US 186 (1962) at 217.

118 Ibid.

119 See *NPP v Attorney-General* [1993-94] 2 GLR 35 (per Kpegah JSC); *Ezuame Mannan v Attorney General* [2022] DLSC11608 (per Tanko JSC); *Amidu v Kufour* [2001–2002] SCGLR 86 (SC) (per Acquah JSC).

120 *Justice Abdulai v Attorney General* [2022] GHASC 1.

121 Many relevant decisions have upheld the doctrine. See *Ghana Bar Association v Attorney-General (Abban Case)* [1995-96] 1 GLR 598, where the majority in the Supreme Court speaking through Kpegah J explained that Ghana's constitutional design recognizes the "political question" doctrine as part of the separation of powers. Other relevant cases that affirm the doctrine include *Centre for Public Interest Law v Attorney-General* 8 [2012] 2 SCGLR 1261.

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promoting the constitutional principle of separation of powers.[122] In the *Amidu* case, for example, Acquah JSC noted as follows:

> "There is no doubt that the Constitution, 1992 prescribes a government consisting of three branches: the legislature, executive and the judiciary. Each plays a distinct role. Apart from these three branches of government, the Constitution, 1992 also establishes a number of offices, bodies and institutions. Now each of these branches of government, offices, bodies and institutions is, of course, subject to the Constitution, 1992 and is therefore required to operate within the powers and limits conferred on it by the Constitution. And in order to maintain the supremacy of the Constitution and to ensure that every individual organ of State, body or institution operates within the provisions of the Constitution, 1992 authority is given in article 2 thereof to any person who alleges that the conduct or omission of anybody or institution is in violation of a provision of the Constitution to seek a declaration to that effect in the Supreme Court.
>
> Thus, so long as an individual, body, institution or organ of the government performs its functions in accordance with the relevant constitutional provisions and the law, the Supreme Court has no business or jurisdiction to interfere in the performance of its functions."[123]

This approach of the Ghanaian court acknowledges some limits in the application of the power of judicial review. Even though, the court specifically referred to the earlier case of *Tuffour v Attorney General* in its justification of the purposive approach as the correct approach to interpretation, it failed to consider the case's pronouncement on the extent of interference that the judiciary could exercise over the legislature. As discussed earlier, the *Tuffour* case interpreted article 96 of the 1979 Constitution to mean that the courts have no jurisdiction to interfere with the freedoms of Parliament.[124] Article 96 of the 1979 Constitution is the same as article 115 of the 1992 Constitution.[125] Both provisions emphasize the fact that parliamentary proceedings and debates cannot be questioned in any court of law. Because the *Tuffour* case was among the few cases that had specifically defined the extent to which the judiciary could interfere in what happens in Parliament, the purposive approach required some look at this very important aspect of the constitutional context of Ghana.

Ironically, in applying the purposive approach, Kulendi relies on the case of *Kuenyehia v Archer*[126] which requires him not to be oblivious to past judicial practices. It states:

> "A constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one."[127]

Kulendi, in his approach, seemed to have been oblivious to the receding footsteps of the past.

The minority decision in the Supreme Court case of *Ezuame Mannan v Attorney General*[128] in my view provides some insight into how the purposive approach can be effectively deployed to achieve

122 Ibid.

123 *Amidu v Kuffour and Others* [2001] DLSC1161.

124 One of the issues in the *Tuffour* case was whether the speaker of parliament was a proper party to the suit.

125 The 1992 Constitution, art 115: "There shall be freedom of speech, debate and proceedings in Parliament and that freedom shall not be impeached or questioned in any court or place out of Parliament".

126 [1993-1994] GLR 525 at 561.

127 Ibid.

128 [2022] DLSC11608.

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a more harmonious interpretation. The court was almost split in half with four in the majority and three in the minority. The majority opinion was delivered through Kulendi J. Three separate but agreeable dissenting opinions were offered by Tanko J, Amegatcher J and Professor Kotey JJJSC, all of which are worth some analysis.

The facts of the case in so far as material were that the plaintiff brought an action in the Supreme Court questioning the validity of section 43 of the Narcotics Control Commission Act (Act 1019) on grounds that it was not passed in accordance with the manner and procedure prescribed by article 106 of the Constitution. The relevant parts of article 106 which was the subject of controversy read:

> "1) The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President.
> 2) No Bill, other than such a Bill as is referred to in paragraph (a) of article 108 of this Constitution, shall be introduced in Parliament unless; (a) it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the Bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction; and (b) it has been published in the Gazette at least fourteen days before the date of its introduction in Parliament.
> 3) A Bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of Chiefs.
> 4) Whenever a Bill is read for the first time in Parliament, it shall be referred to the appropriate Committee appointed under article 103 of this Constitution which shall examine the Bill in detail and make all such inquiries in relation to it as the Committee considers expedient or necessary.
> 5) Where a Bill has been deliberated upon by the appropriate Committee, it shall be reported to Parliament.
> 6) The report of the Committee, together with the explanatory memorandum to the Bill, shall form the basis for a full debate on the Bill for its passage, with or without amendments, or its rejection by Parliament by Parliament by a resolution supported by the votes of not less than two-thirds of all the members of Parliament, the President shall assent to it within thirty days after the passing of the resolution."

After the bill and the memorandum to the now Narcotics Control Act (Act 1019) had been gazetted and introduced in Parliament, section 43 of the act was inserted during the second reading stage as an amendment to the bill.

The initial bill introduced in Parliament intended a blanket prohibition of all forms of cultivation of narcotics without lawful authority. The later introduced section 43 gave power to the minister to grant licenses for the cultivation of cannabis "which has not more than 0.3% THC content on a dry weight basis for industrial purposes for obtaining fibre or seed or for medicinal purposes".[129] Three main claims of the plaintiff formed the basis of the controversy before the court. First, that section 43 was not contemplated or mentioned in the memorandum to the bill neither was there any disclosure of any intended change of the existing law in the memorandum. Second, subsequent changes were not published in the gazette and third, there was no full debate of the changes.

The overall question arising from these claims was whether or not section 43 of the act should be struck out for not complying with article 106 of the Constitution. Speaking for the majority of the court, Kulendi J began by seeking to clarify the constitutional relationship between Parliament and the courts. He stated categorically that Parliament is autonomous but the Constitution is supreme

129 Ibid.

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and therefore all acts of parliament are amenable to the review of the courts once they breach a constitutional provision.[130] He further establishes that the evidential presumption that acts of parliament are valid is applicable to the circumstances of the case. He explained:[131]

> "It would at this point, also be a worthwhile exercise to reiterate the law on the independence of Parliament as expounded on by this Court in the recent case of Justice Abdulai v. The Attorney General as follows; 'no arm of Government or agency of the State, including Parliament, is a law unto itself because, without exception, everyone and everything in Ghana is subject to the Constitution. As a result, an allegation that Parliament has acted and/or is acting in a manner that is inconsistent with, in contravention of and/or ultra vires to the Constitution, will render Parliament, the actions, orders, rules or procedures in issue, amenable to the Jurisdiction of this Court. We cannot overemphasize our view that even though Parliament is independent, the Constitution is supreme. Consequently, Parliament, like every organ of the State, including the Judiciary is subject to the Constitution. Accordingly, the clear terms and spirit of article 2 entrenches the traditional role of the Judiciary, as the final arbiter of what a statute means, and how it should be interpreted'.
>
> Parliamentary Acts are presumed to be valid, and enacted in accordance with the basic law, the Constitution. However, this presumption is rebuttable and not conclusive. Therefore, absolute deference to parliamentary acts and enactments should not be the standard of the judiciary. In our view, it will be a serious dereliction of the duty of this Court to ignore a clear violation of the spirit of the Constitution."

Kulendi J adopts a very expansive view of judicial review without disclosing the constitutional limits of this power. Even though he says absolute deference is not the standard, he does not state with any clarity the extent of deference permissible or the extent of judicial restraint required. In answering the first claim of whether the memorandum contemplated the changes made by section 43, Kulendi J stated that the modifications fell outside the scope of the memorandum and as such section 43 is unconstitutional.[132] In my view, the starting point for the court should have been whether there was any constitutional requirement for the impugned section 43 to have been specifically expressed in any form in the explanatory memorandum before the debate and subsequent bill amendment.

Article 106(5) and (6) prescribe the procedure that should precede the amendment of a bill. It states that "[t]he report of the Committee together with the explanatory report shall form the basis of full debate of the bill for its passage with or without amendment".[133] The power of Parliament to amend as part of their proceedings is thus not constrained by a requirement that such amendment should have first been contemplated or expressed in any form in the explanatory memorandum. As provided for in article 106(5), a debate by Parliament leading to an amendment happens after the explanatory memorandum and the bill have been introduced and gazetted. Secondly, the debate by Parliament leading to the amendment is supposed to be based not only on explanatory memoranda but also on the report which contains deliberations on the bill. It can therefore not be the purpose of article 106 that the reasons and principles behind every amendment will be captured in the explanatory memorandum preceding the amendment. As Tanko JSC rightly observed in his dissenting opinion:

130 This is controversial because the learned justice did not refer to any legal authority. In some other common law jurisdictions the presumption that acts of the legislature are valid is conclusive. See *Planned Parenthood Affiliates v Swoap* (1985) 173 Cal App 3d 1187 at 1196. In the UK, the principle of parliamentary sovereignty operates to make the rule not just an evidential rule but a substantive constitutional injunction against judicial interference in legislation and its processes.

131 See note 128 above.

132 Ibid.

133 Ibid.

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> "Clause (6) of article 106 of the Constitution therefore clearly and reasonably contemplates a situation where the Bill as introduced will suffer changes by way of amendments. The amendments could be based on the explanatory memorandum which was gazetted and introduced in parliament together with the Bill or the report of the appropriate committee which deliberated on the Bill although the report was not gazetted together with the explanatory memorandum and the Bill."[134]

In Ghana and many presidential systems of government, most bills are initiated by the executive from a sector ministry. There are several legal and practical limitations on private members' bills.[135] Thus in most cases, explanatory memoranda of bills are essentially prepared by the interested sector ministry in addition to its proposed bill and approved by the cabinet.[136] After approval, it is published in the gazette for 14 days as required by law and introduced in Parliament.[137] Explanatory memoranda to bills and the bills themselves are thus in most cases executive creations. Following these events, Parliament exercises its power as a corporate body to make inputs to the bill through debates which produce a report with or without an amendment.[138] To say that Parliament's power to amend is controlled and fixed by the content of the explanatory memorandum is in my view to limit the deliberative and amendment powers of Parliament largely to the legislative intentions of the executive as expressed in the memorandum. Separation of powers and checks and balances demand that while the executive may interact with the legislature in the law-making process through the introduction of bills, the core power of the legislature to debate bills and determine its final product as law is also preserved and respected.[139]

In the absence of a clear breach of constitutional procedure in the passage of section 43, the approach employed by Kulendi JSC raises many difficult questions relating to the purposive interpretation and the limits of the power of the courts. As observed by Kulendi JSC in the *Justice Abdullai* case mentioned earlier, a genuine reason for upsetting parliamentary autonomy arises where the Constitution has been breached. The demands of the burden on the plaintiff in this case required that he point specifically to breaches of the Constitution in the procedure leading to the amendment. This duty in my respectful view was not discharged by the plaintiff merely pointing to the fact that the changes in the bill were not contemplated by the memorandum. Tanko JSC in establishing the unconstrained power of Parliament to amend legislation beyond the strictures of memoranda observed as follows:

> "The Plaintiff further submits that Parliament is deemed to have exceeded and acted ultra vires its legislative powers if it entertains such subsequent amendment of a Bill to include matters which were not gazetted with the Bill and its explanatory memorandum. If this contention is accurate then the following questions must be answered; i. How does Parliament exercise its constitutional power to amend the Bill under Article 106 clause (6) of the Constitution during the second reading of the Bill? ii. If Parliament's power to amend the Bill as submitted by the Plaintiff requires only of Parliament to rubber stamp the Bill and its explanatory memorandum in their pure form as introduced in Parliament during the next stage of second reading of the Bill, then why did the Constitution give Parliament the option of amending the Bill? iii. If Parliament's power to amend the Bill as submitted by the Plaintiff requires Parliament to rubber stamp the Bill and its explanatory memorandum in their pure form, why did Article

134 Ibid.

135 See for example the 1992 Constitution, art 108.

136 Friedrich Ebert Stiftung *The Law-Making Process in Ghana: Structures and Procedures* (2011), available at <https://library.fes.de/pdf-files/bueros/ghana/10506.pdf> (last accessed 25 March 2025).

137 The 1992 Constitution, art 106.

138 Ibid.

139 See Burrows, *Thinking about Statutes*, above at note 67.

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> 106 clause (6) of the Constitution not close the options to Parliament in the course of the second reading of the Bill, to just passing the bill; a. without amendments, or b. its rejection? iv. Better stated, why did Article 106 clause (6) of the Constitution not just take out the power of Parliament in the course of the second reading of the Bill, to pass the bill with amendments? v. Further, what then is the relevance of the Committee's report during the deliberative process, if all that is intended is to endorse the Bill and its explanatory memorandum as introduced in Parliament, and even then, is the deliberative process even necessary at all. A proper interrogation of the above questions naturally drifts to a position that Parliament has Constitutional power even at the latter stages of the legislative process to introduce the amendment to the subject of the Plaintiff's first relief. The provisions of Article 106 clause (2)(a) and (b) of the Constitution which require the Bill and its explanatory memorandum to be gazetted before introduction into Parliament must be read together with the provisions of Article Clause (6) of the very Article 106 and Standing Order 127 which permit Parliament in the course of the second reading of the Bill in Parliament to make amendments to the Bill taking into account not just the explanatory memorandum but also the report submitted to Parliament by the appropriate Committee on the Bill. The settled practice is that the Constitution must be read as a whole. This is a consistent and a trite rule of interpretation."

On the second claim of breach of the publication requirements, the court established a further ground for impugning section 43. The court concluded that the changes captured in section 43 were not published in accordance with the constitutional requirements and as such were unconstitutional. It was evident that the initial bill together with the memorandum had been published for 14 days before its introduction. After the introduction, an amendment was made to introduce section 43. Under article 106(6) an amendment can be made based on a full debate of the explanatory memorandum, the bill and the committee report. No reference was made by the majority to a provision in the Constitution nor its antecedent historical documents that require publication in the gazette after changes by amendments. This leads to the irresistible conclusion that the framers of the Constitution intended to give power to Parliament as a democratic body to determine the evolution of the law after it had been introduced without further constraints.[140]

The question of whether there was a full debate in Parliament before section 43 was introduced was also answered in the negative by the majority. Similar to the other grounds, they concluded that changes were not debated by Parliament and therefore were unconstitutional. There was no doubt that there was evidence of some proceeding in Parliament at the second reading stage regarding the provision.[141] The plaintiff argued that the proceedings cannot be said to constitute a full consideration of the policy of the bill as required.[142] The Constitution does not prescribe the form a debate should take nor does it set a standard or define any elements of the full debate requirement specified in article 106(6). Therefore, what a full debate is or is not becomes a matter of parliamentary procedure and practice. Once Parliament says that a proceeding or its outcome constitutes full debate, devising judicial standards to determine whether or not it is a full debate or otherwise when the Constitution has not provided any standards for such a debate is stretching the boundaries of justiciability. As Tanko J rightfully puts it:

140 Id at 38–40.

141 Details of the proceedings as provided in the *Ezuame* judgment are as follows: "a cursory and oblique reference was made to the failure to present a policy document for debate on the inclusion of this new clause in the following: 'Honourable Chairman, I was advised about a policy issue but I told them to tell you. What is the position? Should I put the question?' Without waiting for an answer to this inquiry, the next words recorded are: 'Very well. I would put the Question Thereafter, a Question was put and this new clause described as "Special Provision relating to cannabis" that would allow the cultivation and production of the illicit and prohibited drug of cannabis on license was accepted for insertion in the law"'. See above at note 128 at 40.

142 See above at note 128.

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> "It may well be true that there was insufficient consideration of the policy reason for introducing Section 43 of Act 1019 but how is this to be measured? The rules which the Court has been presented with by the Plaintiff with which the Court is to measure the constitutionality or otherwise of the introduction of Section 43 of Act 1019 into the said Act do not expatiate on the extent of engagement required to introduce such an amendment. It is for this reason that I disagree with Plaintiff that clause 11 of Article 106 was breached by Parliament when it introduced Section 43 of Act 1019."

Besides the Constitution, the standing orders of parliament which were before the court did not provide for what full debate constitutes. What constitutes full debate had been purely a matter of parliamentary practice. Questioning whether a proceeding constitutes full debate or otherwise in my view, without reference to the Constitution, was a subtle encroachment on the freedoms of Parliament.[143] The underlying principle of separation of powers will require that the judiciary respects the autonomy of the legislature on a matter like this that falls within parliamentary practice.

Amegatcher JJSC, referring to a Ghanaian Supreme Court decision, explains the need for careful restraint by the judiciary in interfering with matters within the domain of Parliament as follows:

> "The legislative power thus vested in Parliament should be expansively interpreted in the interest of the effective representative democratic governance of this country. Parliament should be regarded as authorized to pass any legislation on any matter so long as in doing so it does not breach any express or implied provision of the Constitution. This is axiomatic! Were the legislative power of Parliament to be restricted beyond what the provisions of the Constitution require, this would be an assault on the sovereignty of the people, whose representatives constitute Parliament. To me, therefore, it is clear that Parliament has the fullest of legislative power, subject only to what the Constitution prohibits, expressly or impliedly. Democratic principles demand this conclusion."[144]

Also siding with the minority view, Kotey JSC expressed a similar view: "I have also had the privilege of reading the dissenting opinions of my esteemed colleagues Amegatcher and Amadu JJ.S.C. I agree with them that 'the original jurisdiction of this Court to determine issues of constitutionality, particularly in relation to constitutionality of an Act of Parliament, must be exercised with utmost circumspection'."[145]

As earlier observed, what Barber calls constitutional defense mechanisms which shield the individual organs of government from encroachment on their lawful powers by other organs is evident from several provisions of the Ghanaian Constitution.[146] Also as demonstrated, the semantic and historical context of article 106, which was the subject matter of interpretation,[147] offered no basis for judicial interference with section 43 of the Narcotics Control Act. A purposive interpretation that contemplates the principle of separation of powers, checks and balances, and judicial review as complementing values in a constitutional framework would have arrived at an outcome that accommodates the full extent of legislative powers in the Court's exercise of its powers of judicial review.

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143 Ibid.

144 *Amegatcher (No 2) v Attorney-General* (2012] SCGLR 933 at 953—54.

145 See above at note 128.

146 As severally noted, a core value of the Ghanaian Constitution is the separation of powers. Powers of state are divided between the three arms of government in chaps eight (executive), ten (legislature) and eleven (judiciary) of the 1992 Constitution.

147 1992 Constitution, art 115 guarantees "freedom of speech debate and proceedings in parliament" and says that these freedoms shall not be impeached in any court of law. This provision was previously interpreted by the Ghanaian Supreme Court in *Tuffour v Attorney General* to have the effect of restraining the courts from interfering in the business of Parliament.

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Conclusion

The fundamental argument of this paper has been that constitutionalism represents a bundle of principles that require underlying principles of the Constitution to be harmonized in the public interest. This requirement of constitutionalism coincides with the fundamental objective of the purposive approach to interpretation which is to realize the meaning of a constitutional text by taking account of its words and context. Based on a comprehensive analysis of Ghanaian constitutional jurisprudence, the article analysed the extent to which the purposive approach has been effective in achieving this important goal of constitutionalism. It discovered that lapses arising from the interpretation and application of the approach have led to unsatisfactory outcomes. In particular, it observed that the *Justice Abdullai* case and the majority opinion in the *Ezuame Mannan* case broadly overlooked the salience of separation of powers as a key value. Based on the minority opinion in *Ezuame Mannan*, the article proposed a solution that in the view of the author meets the aspirations of constitutionalism.

Competing interests. None

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