

Exclusive constitutional jurisdiction | Equality before law | Prohibits discrimination | Different treatment defined | Rights subject public | Restrictions proportional | Judges avoid legislature | Ascertain Constitution meaning | Guidelines constitutional | FDA regulation constitutional | Commercial free speech | Challenge unconstitutional law | Inconsistent law struck

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: SACEY TORKORNOO (MRS), CJ (PRESIDING)
BAFFOE-BONNIE, JSC
OWUSU (MS), JSC
PROF. MENSA-BONSU (MRS), JSC
ACKAH-YENSU (MS), JSC
ASIEDU, JSC
KOOMSON, JSC

WRIT
NO. J1/05/2023
19TH JUNE, 2024

MARK DARLINGTON OSAE

.....

PLAINTIFF

VRS

1. FOOD AND DRUGS AUTHORITY
2. ATTORNEY GENERAL

}

DEFENDANTS

JUDGMENT

ASIEDU JSC:

[1]. Introduction:

My lords, on the 11th November 2022, the Plaintiff in this matter filed a writ to invoke the original jurisdiction of this court against the 1st and the 2nd defendants herein for reliefs in the nature of the following:

- a. A declaration that on a true and proper interpretation of article 17(1) and (2) which guarantee equality before the law and prohibits discrimination against persons on grounds of social or economic status, occupation, among others, Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016 which provides that “No well-known personality or professional shall be used in alcoholic beverage advertising” is discriminatory, inconsistent with and in contravention of article 17(1) and 17(2) of the 1992 Constitution, and thus unconstitutional.
- b. A declaration that on a true and proper interpretation of article 17(1) and (2), Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016 which prohibits well-known personalities and professionals from advertising alcoholic products is inconsistent with and in contravention of article 17(1) and 17(2) of the 1992 Constitution which guarantee equality before the law and prohibit discrimination against persons on grounds of social or economic status, occupation amongst others, and consequently null, void and unenforceable.
- c. An order striking down guideline 3.2.10 of the Guidelines for the advertisement of foods published by the 1st Defendant on 1st February 2016 as being inconsistent with and in contravention of the letter and spirit of the 1992 Constitution and as such a nullity.
- d. An order of perpetual injunction restraining the Defendants, their agents or servants or assigns under the pretext of acting under guideline 3.2.10 of the Guidelines for advertisement of foods published by the 1st Defendant on 1st February 2016 from doing anything to prevent any well-known personality or professional from advertising alcoholic products.

On the same date, the Plaintiff filed a statement of case in support of his writ in accordance with the requirements of rule 46(1) of the Supreme Court Rules, 1996, CI.16. The 1st and 2nd Defendants, in accordance with rule 48 of CI.16, respectively, filed their statement of case in answer to the Plaintiff’s statement of case on the 14th February 2023 and the 7th March 2023. The parties, subsequently filed a joint memorandum of issues for the consideration of this court.

[2]. Facts:

My lords, the facts of this case are not complex. The Plaintiff is a Ghanaian by birth and brings this action in that capacity by virtue of the provisions in article 2(1) and 3(4) of the Constitution, 1992. The Defendants do not contest the capacity of the Plaintiff.

The 1st Defendant is a corporate body established by section 80 of the Public Health Act, 2012, Act 851. By section 82 of the Act, the 1st Defendant is charged with responsibility to:

- “(a) ensure adequate and effective standards for food, drugs, cosmetics, household chemicals and medical devices;
- (b) monitor through the District Assemblies and any other agency of State compliance with the provisions of this Part;
- (c) advise the Minister on measures for the protection of the health of consumers;
- (d) advise the Minister on the preparation of effective regulations for the implementation of this Part;
- (e) approve the initiation and conduct of clinical trials in the country; and
- (f) perform any other functions that are ancillary to attaining the objects of the Authority”.

The 2nd Defendant, by article 88 of the Constitution, 1992, is the principal legal adviser to the Government and within the meaning of article 88(5) of the Constitution and section 9(1) of the State Proceedings Act, 1998, Act 555, civil suits against the State are to be filed against the 2nd Defendant.

My lords, on the 1st February 2016, the 1st Defendant published “guidelines for the advertisement of foods” per document number FDA/FID/GL-AD/2026/01. Paragraph 3.2.10 of the said publication stated that: ***“no well-known personality or professional shall be used in alcoholic beverage advertising.”*** The Plaintiff says in paragraphs 4.7 and 4.8 of his statement of case that:

“The 1st Defendant has caused various advertisements to be made on the media landscape in respect of Guidelines 3.2.10 and has taken steps to ensure that well-known personalities do not advertise alcoholic products by refusing to approve any advert of alcoholic products which features persons 1st Defendant classifies as a well-known personality

Your Lordships, it is Guidelines 3.2.10 that the present action is seeking to have declared unconstitutional to the extent that it violates the letter and spirit of article 17(1) and 17(2) of the 1992 Constitution.”

On the basis of the Plaintiff’s assertion as stated in paragraphs 4.7 and 4.8 above, the Plaintiff claims the reliefs indorsed on his writ quoted above. As expected, the Defendants challenge the Plaintiff on various fronts.

[3]. Plaintiff’s legal arguments:

The Plaintiff says that “the crux of his case is the principle of equality before the law and freedom or right against discrimination on grounds of socio-economic status or occupation.” The Plaintiff argues that the effect of Guideline 3.2.10 is that it prevents people who have worked very hard in various fields of endeavour to build their reputation from monetizing their goodwill by advertising alcoholic products. The Plaintiff referred generally to the Directive Principles of State Policy in chapter 6 of the 1992 Constitution and in particular to article 36(2)(b), and submitted that the State is enjoined to afford “ample opportunity for individual initiative and creativity in economic activities and foster an enabling environment for a pronounced role of the private sector in the economy.” It was submitted on behalf of the Plaintiff that article 36(2)(b) must be read together with article 17 of the 1992 Constitution for its full effect.

The Plaintiff admits that the provisions in article 17(1) and (2) are not intended to be applied in a manner that all persons in society will be treated in the same way. Counsel for the Plaintiff cited the case of **Nartey vs. Gati [2010] SCGLR 745** and submitted that “the right to be treated equally before the law and against discrimination on socio-economic grounds, cannot be taken away by statute or any person acting under an authority conferred by an Act of Parliament except in exceptional cases.” The Plaintiff’s

counsel also cited the case of the **Republic vs. Eugene Baffoe-Bonnie and Others [2018-2019] 1 GLR 42** and submitted that for a statute to successfully limit a constitutional right, the limitation must be reasonable, necessary and proportional. It has also been submitted on behalf of the Plaintiff that the 1st Defendant has not provided any scientific, empirical or intellectual basis for restricting well-known persons and professionals from advertising alcoholic products. Counsel submits, in addition, that the provisions in section 15 of the Liquor License Act, 1970, Act 331 are enough to ensure responsible sale of alcohol and therefore Guidelines 3.2.10 is unnecessary. Finally, counsel submits, on behalf of the Plaintiff, that the discrimination imposed by Guidelines 3.2.10 is neither reasonable nor proportional.

[4]. 1st Defendant's legal arguments:

It was submitted on behalf of the 1st Defendant that the Guidelines issued by the 1st Defendant on the 1st February 2016 were based on extensive research, international best practices and the 1st Defendant's statutory mandate to protect public health and safety. Reference was made to research findings made by the World Health Organisation which was published as "The global strategy to reduce the harmful use of alcohol" under the link <https://www.who.int/publications/i/item/9789241599931>. Reference was also made to publications by the World Health Organisation in which it stated that "the most cost-effective actions, or 'best-buys' include increasing taxes on alcoholic beverages, enacting and enforcing bans or comprehensive restrictions on exposure to alcohol advertising across multiple types of media, and enacting and enforcing restrictions on the physical availability of retailed alcohol".

It was also argued on behalf of the 1st Defendant that the assertion by the Plaintiff that there is no scientific basis for restricting well-known persons and professionals from advertising alcohol, is far-fetched. Counsel submitted that these persons have strong appeals and influence on brands and products. Counsel referred to various research publications to buttress his arguments.

It was further submitted on behalf of the 1st Defendant that article 17(1) and (2) of the 1992 Constitution, had already received interpretation and, therefore, the instant action by the Plaintiff calling for the interpretation of this same article is unnecessary. Counsel

submits that the rights conferred by article 17(1) and (2) are not absolute. Counsel also relies on the provisions in article 21(4) of the Constitution in support of his arguments.

It was further argued that the 1st Defendant is a statutory institution and that it has the mandate to protect public health and safety and that the Guidelines complained of were issued in pursuance of its mandate. Finally, it was argued, on behalf of the 1st Defendant, that the Plaintiff's case does not raise any issue for the invocation of the original jurisdiction of this court.

[5]. 2nd Defendant's legal arguments:

Most of the arguments made on behalf of the 1st Defendant also find expression in the submissions made for and on behalf of the 2nd Defendant, and for the sake of judicial economy, they will not be repeated in the summary of the arguments made on behalf of the 2nd Defendant. It has poignantly been submitted on behalf of the 2nd Defendant that the Plaintiff's action fails to raise issues that legitimately call for an interpretation of the Constitution based on which it can be contended that the enforcement jurisdiction of the court has arisen and that, therefore, the invocation of the court's jurisdiction is thereby rendered improper. The 2nd Defendant cites the case of **Bimpong-Buta vs. General Legal Council and Others [2003-2004] 2 SCGLR 1200** in support. Counsel submits that in reality, the instant action by the Plaintiff seeks to enforce the personal human rights of the Plaintiff in this matter and that there is absolutely no cause of action disclosed in the Plaintiff's writ.

The 2nd Defendant, like the 1st Defendant, also further submitted that the Guidelines contained in paragraph 3.2.10 published by the 1st Defendant, is not discriminatory, inconsistent with and does not contravene article 17(1) and (2) of the 1992 Constitution. The 2nd Defendant referred to a research finding on the Power of Social Media Influencers by Lynsey Dobbs, a Senior Recruitment Officer, in which it was stated among others that the "picture-perfect life that influencers portray on social media has a negative impact on teens. The unrealistic body figures, branded dresses and make-ups, advanced gadgets, and even what movies and series to watch, and what music to listen to, they watch them talk about and try to adapt to their lives. All of it has an

impact on the teens, in addition to the peer pressure which already exists in our society”.

It was submitted therefore, on behalf of the 2nd Defendant, that it was because of the influence that well-known personalities and professionals have on society that the 1st Defendant issued Guidelines to eliminate the use of these personalities from advertising and promoting alcoholic beverages. Finally, it was argued that the 1st Defendant has the legal right to issue the guidelines for the regulation of advertisement of alcoholic beverages.

[6]. Memorandum of Issues:

In view of the arguments advanced, a joint memorandum of issues was filed by the parties on the 31st July 2023, in which they collectively agreed to the following issues for the determination of the Court:

- (a). Whether or not the jurisdiction of the Supreme Court has been properly invoked
- (b). Whether or not the guidelines 3.2.10 issued by the 1st Defendant is inconsistent with or in contravention of article 17(1) and (2) of the 1992 Constitution and hence void.
- (c). Whether or not Guidelines 3.2.10 of the guidelines issued by the 1st Defendant on 1st February 2016, is justifiable under Article 12(1) of the 1992 Constitution.

[7]. Determination of the issues raised:

In view of the first issue agreed by the parties, that is whether or not the jurisdiction of the Supreme Court has been properly invoked, it behooves on us to determine the jurisdiction of this court with respect to the Plaintiff’s reliefs. By the first and second reliefs of the Plaintiff, he seeks a declaration from this court that *"on a true and proper interpretation of article 17(1) and (2) which guarantee equality before the law and prohibit discrimination against persons on grounds of social or economic status,*

occupation, among others, Guideline 3.2.10 of the Guidelines for the advertisement of foods published by the 1st Defendant on the 1st February 2016 which provides that 'no well-known personality or professional shall be used in alcoholic beverage advertising' is discriminatory, inconsistent with and in contravention of articles 17(1) and (2) of the 1992 Constitution, and thus unconstitutional and consequently null, void and unenforceable."

Article 2(1) and article 130(1) of the Constitution, give power and capacity to all persons to bring actions for the interpretation and the enforcement of the Constitution, 1992, where a violation of the Constitution is alleged. The said articles provide that:

"2. Enforcement of the Constitution

(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.

130. Original jurisdiction of the Supreme Court

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

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

(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.

These provisions have received interpretation by this court in a plethora of cases. In **Sam (No.2) vs. Attorney General (No.2) [1999-2000] 2 GLR 336**, this court held in respect of article 2(1) that:

“the original interpretive and enforcement jurisdiction of the Supreme Court under article 2(1) of the Constitution, 1992 was a special jurisdiction available to any citizen of Ghana irrespective of personal interest. Under article 2(1) of the Constitution, 1992 any person who was a citizen was entitled to bring a suit to the Supreme Court if he alleged that an enactment or anything contained in that enactment was inconsistent with or in contravention of the Constitution and to obtain a declaration to that effect. Hence other requirements for standing like the dispute or controversy requirement or the personal requirement, were not necessary when invoking the jurisdiction of the Supreme Court under article 2(1) of the Constitution, 1992. Consequently, the provisions of article 2(1) were to be distinguished from those of article 33(1) which dealt with the protection of human and other rights by the courts and in which case the personal interest requirement was a condition for standing to enable a plaintiff to enforce his human rights and freedoms. The words “in relation to him” and that “person” used in article 33(1) of the Constitution, 1992 implied that a plaintiff ought to have a personal interest in the litigation, which invariably also meant that there should have arisen a controversy or a dispute concerning an infringement or intended infringement of the plaintiff’s said rights. Accordingly, the Plaintiff in the instant case, who was a citizen of Ghana and who was seeking the interpretation of the Constitution as well as its eventual enforcement, was entitled under article 2(1) to invoke the special original jurisdiction of the Supreme Court.”

As pointed out above, the Defendants have no quarrel with the Plaintiff on his capacity to institute the instant action, and we believe that this is because the Plaintiff’s capacity as a Ghanaian has, on the face of the evidence presented by him, which includes a copy of his passport, been proved and, therefore, the Defendants concede his Ghanaian citizenship and the consequent right vested in him to bring an action seeking declaratory reliefs on the constitution. The capacity of the Plaintiff to defend and enforce the Constitution, generally, is granted by chapter one thereof, read as a whole. What the Defendants contest is whether the jurisdiction of this court has been properly invoked by the Plaintiff.

In shedding light on the scope of the provisions in article 2(1) and 130(1) of the Constitution, this court observed in **Abu Ramadan & Nimako (No.2) vs. Electoral**

Commission & Attorney General (No.2) [2015-2016]1SCGLR 1 specifically at page 29 that:

“Under the 1992 Constitution, this court and none other has the onerous responsibility of determining whether an act, legislation and or any act or conduct of any person is within the boundaries of the Constitution as provided for in article 2(1) and 130(1) The essence of the jurisdiction conferred on the Supreme Court under the said articles is to enable the court to intervene in appropriate instances to declare and enforce the law regarding the extent and exercise of power by any person or authority. Although the said constitutional provisions have not used the words ‘judicial review’, their cumulative effect is to confer on the court jurisdiction to declare what the law is and to give effect to it as an essential component of the rule of law. The nature of the court’s obligation is to measure acts of the executive and the legislative bodies to ensure compliance with the provisions of the Constitution; but the jurisdiction does not extend beyond the declaration, as to the enforcement or the interpretation of the constitution and where necessary giving directions and orders that may be necessary to give effect to its decisions as contained in article 2(2) of the Constitution. The court’s original jurisdiction thus enables it to determine the limits of the exercise of the repository’s powers.”

[8]. In paragraph 3.13 of his statement of case, counsel submits on behalf of the Plaintiff that:

“It is not in dispute that article 17(1) of the Constitution, 1992, received extensive judicial consideration in the case of Nartey vs. Gati [2010] SCGLR 745. It is for this reason that the Plaintiff in this suit, invokes the enforcement jurisdiction of the court to apply provisions of article 17(1) and (2) and construe whether the impugned regulation of the 1st Defendant, violates article 17(1) and (2) and to strike down the offensive provision in the public interest. This honourable court has had occasion to state that its interpretative and enforcement jurisdictions are separate and independent of each other. In other

words, one can approach the honourable court solely to enforce the provisions of the Constitution without demonstrating the need for interpretation”

Indeed, in **Kor vs. Attorney-General & Justice Douse [2015-2016] 1 SCGLR 114**, this court held that:

“There is express authority in the Constitution itself for the view that the enforcement jurisdiction of this court is a conspicuously independent item of jurisdiction of this court. Indeed, though it will be erroneous to say that a declaratory action cannot be brought within article 2 towards the enforcement of an ambiguous provision of the Constitution, it appears that while the enforcement purpose of that article is clear on the face of its provisions, its interpretative purpose is comparatively latent.”

See also *Sumaila Bielbiel vs. Dramani* [2011] 1 SCGLR 132

There is no doubt therefore, that one could bring an action in this court solely to enforce and seek compliance with a provision of the Constitution, 1992 and in the same vein, one could also bring an action in the Supreme Court solely to seek interpretation of a provision of the Constitution. But the Plaintiff seeks the interpretation and enforcement of article 17(1) and (2) per the reliefs indorsed on his writ.

It has been submitted on behalf of the 1st Defendant in paragraph 24 of its statement of case that:

“The earlier interpretation by this honourable court provided enough guidance for the meaning of articles 17(1) and (2) of the 1992 Constitution and there was no need at all for the instant action which in effect calls for the interpretation of the self-same provision”.

For the 2nd Defendant, it was submitted at paragraph 12 of his statement of case that:

“The presence of a genuine issue for interpretation in a constitutional provision relied on for the institution of an action under articles 2(1) and 130(1), is a *sine qua non* for a cause of action. The failure of a Plaintiff to raise issues that legitimately call for an interpretation of the Constitution based on which it can be contended that the enforcement jurisdiction of the court has arisen, renders the invocation of this court’s jurisdiction improper”.

Article 17(1) and (2) of the Constitution provide that:

“17. Equality and freedom from discrimination

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

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

Indeed, in *Nartey vs. Gati* (supra), the view was expressed by this court in respect of article 17(1) and (2) of the Constitution that:

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

If the law were to treat all human beings rigidly equally, it would in fact result in unequal outcomes. Rigid equal treatment would often result in unfair and unequal results. Accordingly, it is widely recognized that equality before the law requires equal treatment of those similarly placed, implying different treatment in respect of those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law

must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as far as practicable, to attain the objective of equality of outcomes or of fairness. In effect, equality of opportunity will often entail the law treating people differently in order to give them a fighting chance of attaining equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not conforming with the constitutional prescription that all persons are equal before the law, it would be thoroughly counterproductive....

The constitutional prescription in Article 17(1) that all persons shall be equal before the law should not, and does not, disable Parliament from enacting legislation that gives different rights to different classes of people, so long as the differentiation in rights bears a reasonable relationship to the legislative purpose that Parliament is seeking to achieve and Parliament does not fall foul of any of the grounds set out in article 17(2). Of course, one should also add the caveat that the legislative purpose sought to be achieved by Parliament must be constitutional. And, one of the constitutional prescriptions that must be complied with, pursuant to article 17(1), is that a law must operate equally on all persons similarly situated. The constitutional slogan has to be: equals must be treated equally by the law.”

The above interpretation given to article 17(1) and (2) was endorsed by the Supreme Court in *Asare vs. Attorney General* [2012] SCGLR 460.

[9]. The Plaintiff admits that article 17 of the 1992 Constitution has been interpreted by this court. At paragraph 3.13 of his statement of case, it was submitted on behalf of the Plaintiff that:

“It is not in dispute that article 17(1) of the Constitution, 1992, received extensive judicial consideration in the case of *Nartey v Gati* [2010] SCGLR 745. It is for this reason that the Plaintiff in this suit, invokes the enforcement jurisdiction of the Court to apply the provisions of article 17(1) and (2) and construe whether the impugned regulation of the 1st Defendant, violates article 17(1) and (2) and to strike down the offending provision in the public interest.

This honourable court has had occasion to state that its interpretative and enforcement jurisdictions are separate and independent of each other. In other words, one can approach the honourable court solely to enforce the provisions of the Constitution without demonstrating the need for interpretation”.

The indorsement on the writ filed by the within named Plaintiff on the 11th November 2022 says something different from what is portrayed in paragraph 3.13 of the Plaintiff’s statement of case which had been quoted above. In reliefs (a) and (b), the Plaintiff seeks interpretation of article 17(1) and (2) and in reliefs (c) and (d), the Plaintiff seeks to enforce its perceived human rights by praying for the striking down of guideline 3.2.10 issued by the 1st Defendant as well as a perpetual injunction to restrain the 1st Defendant from enforcing the guidelines in 3.2.10. Thus, clearly, the Plaintiff is not seeking only an enforcement of the provisions in article 17(1) and (2) as stated in paragraph 3.13 of his statement of case.

It is the view of this court that once a provision of the Constitution had received interpretation by the Court, a person who claims that his rights under the said article have been violated need not seek a re-interpretation of the self-same provision but to apply to the appropriate court for the enforcement of his rights; unless, the person alleges a different interpretation and therefore calls upon the court to exercise its powers under article 129(3) of the Constitution to depart from its previous interpretation. The parameters under which one may seek interpretation of a provision of the Constitution have been outlined in many cases.

In **Republic vs. Special Tribunal; Ex parte Akosah [1980] GLR 592**, the Court of Appeal (sitting as the Supreme Court) gave meaning to article 118(1)(a) of the 1979 Constitution which is in pari materia with article 130(1) of the 1992 Constitution and stated at page 605 as follows:

“From the foregoing, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118 (1) (a) arises in any of the following eventualities:

(a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words

of the article have a double-meaning or are obscure or else mean something different from or more than what they say;

(b) where rival meanings have been placed by the litigants on the words of any provision of the Constitution;

(c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail;

(d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of “enforcement or interpretation” where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court’s original jurisdiction under article 118. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises”.

Thus, the view was expressed in *Kor vs. Attorney General* (supra) that:

“It is rather trite law that no action can be brought in this court to interpret a clear and unambiguous provision of the Constitution”

In the instant matter, as pointed out above, the Plaintiff concedes that article 17 has been interpreted and given meaning by this very Court. The Plaintiff in his statement of case made references to various cases in which this court exercised its jurisdiction and interpreted article 17 of the 1992 Constitution. It is not the case of the Plaintiff herein that the said article bears a different meaning from what this court has already given to it. It is also not the case of the Plaintiff that this court should exercise its jurisdiction under article 129(3) of the Constitution and depart from the meaning which it has already given to article 17 of the Constitution. It follows therefore that the Plaintiff has no business calling upon this court to interpret article 17(1) and (2) of the 1992

Constitution. It comes to us as no surprise that under paragraph 3.13 of his statement of case, the Plaintiff made submissions to the effect that his case before this court is an invitation to the court to enforce the provisions of article 17(1) and (2).

[10]. For the 1st Defendant, the argument was made that the whole action mounted by the Plaintiff is unnecessary because article 17 has already been interpreted by this court.

It has been argued on behalf of the 2nd Defendant at paragraph 22 of their statement of case that:

“This court has in a number of cases decided under the Constitution, 1992, explained the circumstances under which the exclusive original jurisdiction of the Supreme Court ought to be invoked. Through this, this court has dismissed many actions that do not raise any genuine case of interpretation or enforcement yet were paraded as such. This action just like other failed attempts has been paraded as one that requires the enforcement or the interpretation lenses of this court but in reality, can at best be described as an action for the enforcement of the Plaintiff’s personal human rights”

At paragraph 24, counsel for the 2nd Defendant finally submitted that:

“In conclusion, the Defendant submits that the Plaintiff has not throughout his statement of case, demonstrated an essential condition precedent for the invocation of this court’s original jurisdiction, i.e. the presence of ambiguity, imprecision or lack of clarity with any of the constitutional provisions he relies on to institute his action”.

The main issue before this court at this juncture is whether the Plaintiff has a genuine cause of action which should be entertained by us. In other words, having come to the conclusion that article 17 has already been interpreted by this court and therefore the Plaintiff cannot pray the court for a re-interpretation of the same article, has the Plaintiff any further business which demands the attention of this court? We have already pointed out that the Plaintiff in his writ is asking for the interpretation and

enforcement of article 17(1) and (2) of the Constitution, 1992. Has he, therefore, any issue for enforcement?

The use of the word 'or' between 'enforcement' and 'interpretation' in article 130(1)(a) underlines the independence of these causes of action, so that a Ghanaian who alleges a violation or a lack of clarity of the Constitution can bring an action in the Supreme Court for the enforcement of the Constitution or for the interpretation of the Constitution. He can also bring an action in respect of the two causes of action. That is to say, a person is not bound to tag an action for the enforcement of the Constitution with the cause of action of interpretation of the Constitution. The two causes of actions are distinct in themselves and can be invoked either independently and exclusively or simultaneously. Thus, in *Kor vs. Attorney General & Justice Duose* (supra), the independence of these two causes of action was asserted, when this court, speaking through Atuguba JSC observed that:

"It will be seen that article 2 of the Constitution is headed "Enforcement of the Constitution" and the ensuing provisions are meant to attain the enforcement of the Constitution. There is therefore express authority in the Constitution itself for the view that the enforcement jurisdiction of this court is a conspicuously independent item of jurisdiction of this court. Indeed, though it will be erroneous to say that a declaratory action cannot be brought within article 2 towards the enforcement of an ambiguous provision of the Constitution, it appears that while the enforcement purpose of that article is clear on the face of its provisions, its interpretative purpose is comparatively latent.

The *ratio constitutionis* for an action to invoke the enforcement jurisdiction of this court under article 130 is stated in article 2 to be that the event specified in its clauses (1) (a) and (b) "is inconsistent with, or is in contravention of a provision of this Constitution." Therefore, a cause of action thereupon accrues for access to this court for enforcement of the Constitution....

As particularly explained by Azu Crabbe CJ, delivering the judgment of the Court of Appeal in *Okorie alias Ozuzu and Another v The Republic* (1974) 2 GLR 272 at 282, the basis for enforcing a constitutional provision is that "Any breach of the provisions of the Constitution carries with it not only illegality, but also

impropriety, arbitrariness, dictatorship, that is to say, the breaking of the fundamental law of the land....

As Apaloo C.J, delivering the judgment of the Supreme Court in *Yiadom v Amaniampong* (1981) GLR 3 at 8 said, inter alia, "To enforce a provision of the Constitution is to compel its observance."

Certainly, it cannot be said that this court cannot compel the observance of a provision of the Constitution unless it first acquires the murkiness of ambiguity and is processed in the interpretative refinery of this court".

Further, it was pointed out by this court in **Abu Ramadan & Another vs. The Electoral Commission & Another [2015-2016] 1 SCGLR 1** that:

"Under the 1992 constitution, this court and none other has the onerous responsibility of determining whether an act, legislation and or any act (conduct) is within the boundaries of the constitution as provided for in articles 2(1) and 130(1)

The essence of the jurisdiction conferred on us under the said articles is to enable us intervene in appropriate instances to declare and enforce the law regarding the extent and exercise of power by any person or authority. Although the said constitutional provisions have not used the words "judicial review", their cumulative effect is to confer on us the jurisdiction to declare what the law is and to give effect to it as an essential component of the rule of law. The nature of the court's obligation is to measure acts of the executive and legislative bodies to ensure compliance with the provisions of the constitution, but the jurisdiction does not extend beyond the declaration, enforcement of the constitution and where necessary giving directions and orders that may be necessary to give effect to its decision as contained in article 2(2) of the Constitution. The court's original jurisdiction thus enables it to determine the limits of the exercise of the repository's powers".

[11]. To answer the question whether or not the Plaintiff has any issue for enforcement which can be entertained by this court, we need to analyse reliefs (c) and

(d) of the reliefs which the Plaintiff has indorsed on his writ. In relief (c), the Plaintiff seeks an order from this court to strike down Guideline 3.2.10 of the Guidelines for Advertisement of foods published by the 1st Defendant on 1st February 2016 as being inconsistent with and in contravention of the letter and spirit of the 1992 Constitution and as such a nullity. In relief (d), the Plaintiff seeks an order of perpetual injunction to restrain the 1st Defendant and her agents from doing anything to prevent any well-known personality or professional from advertising alcoholic products. One issue that flows from the cause of action mounted by the Plaintiff is the question of whether the Plaintiff has properly invoked this court's jurisdiction which happens to be the first issue raised by the parties in their joint memorandum of issues filed on the 31st July 2023. This is so because essentially, the Plaintiff is, by the indorsement on his writ praying this court to enforce article 17(1) and (2) of the Constitution, 1992 which is a provision which comes under chapter 5 of the 1992 Constitution on fundamental human rights and freedoms.

Article 130 (1) of the Constitution which spells out the exclusive original jurisdiction of this court begins with the phrase 'subject to' and these have received meaning by this court in many cases. At the risk of repetition, article 130(1)(a) states as follows:

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

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

In **Edusei (No.2) vs. Attorney General [1998-1999] SCGLR 753**, this court held that:

"The Supreme Court's powers of enforcement under article 2 of the 1992 Constitution did not cover the enforcement of human rights violations, which are expressly reposed in the High Court under article 33(1) of the Constitution. Thus, a reading of articles 33(1) and 130(1) together does not, in any way bear out the contention that the Supreme Court has concurrent original jurisdiction with the High Court in human rights abuses. Such a contention is clearly inconsistent with the exclusiveness of the original jurisdiction vested in the Supreme Court in the

main part of article 130(1). It is, indeed, a failure to appreciate the import of the 'subject to' part of article 130(1) and the meaning and effect of the word 'exclusive' in the main part of the same article that leads to the untenable concurrence notion".

[12]. A distinction has however been drawn between a situation where a Plaintiff seeks to enforce his personal or private rights as conferred under chapter 5 of the Constitution on the fundamental human rights provisions, as opposed to a suit which seeks to enforce a communal human right conferred under chapter 5 of the Constitution. The position of the law as asserted by this court is that where a person seeks to enforce a personal human right under chapter 5 of the 1992 Constitution, then the forum for the enforcement is the High Court as stated under article 33(1) of the Constitution to the effect that:

"33. Protection of rights by the Courts

- (a) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress".

However, where a Plaintiff seeks the enforcement of a communal right under chapter 5 of the 1992 Constitution, then the forum is the Supreme Court as provided under article 130(1)(a) and not the High Court. In **Adjei-Ampofo (No.1) vs. Accra Metropolitan Assembly & Attorney General (No.1) [2007-2008] SCGLR 611**, this court, speaking through Sophia Akuffo JSC (as she then was), stated at page 621 of the report that:

"In the instant case, the 1st Defendant submitted that, in article 33(1), the Constitution has prescribed a procedure for enforcing article 15(1) and (2) (guaranteeing respect for human rights and dignity). Whilst it is true that article 33(1) designates the court wherein a person must commence an action to enforce his or her fundamental human rights and freedoms, it is also patently

clear that such an action must be a personal one instituted by the individual whose rights or freedoms have been or are being or are threatened to be violated. An analysis of the clear language of this article 33(1) shows that it does not operate to fetter the civic-minded citizen who embark upon a mission to enforce under article 2(1), a provision of the Constitution (including any of those under chapter 5 of the Constitution, relating to fundamental human rights and freedoms) in the general interest of the people.

Admittedly, there is a previous line of cases wherein this court, in dealing with the question of relative jurisdiction of the Supreme Court and the High Court in cases involving the enforcement of rights and freedoms under chapter 5, has, it appears, held that so long as the matter involves the enforcement of this chapter, the Supreme Court has no jurisdiction. Included in this line of cases are *Edusei vs Attorney General* [1996-97] SCGLR 97 and *Edusei (No.2) vs Attorney General* [1998-99] SCGLR 753. We therefore wish to take the opportunity offered by this case to correct any such impression and clarify the matter. To do this we need to look only at the applicable articles of the Constitution that assign the relative enforcement jurisdiction to the two courts, i.e. articles 130(1) and 140(2) which define the jurisdiction and articles 2(1) and 33(1) which confer access to the respective courts. Although the High Court's jurisdiction in article 140(2) appears to be very broad, the provision is nothing more than a practical restatement of the exception to the Supreme Court's jurisdiction, as defined by article 130(1), in cases brought under article 2(1). The High Court's enforcement power is therefore, to be exercised within the scope of article 33(1), the language of which is clear. Hence the emphasis we must not lose sight of in article 33(1) is the phrase 'in relation to him'. In other words, in the High Court, the actual, ongoing or threatened contravention of the fundamental human right and freedom must be in relation to the Plaintiff and no one else. However, where the human right or freedom sought to be enforced is not in relation to the Plaintiff's personal rights and freedoms, but for the purpose of enforcing a provision of the Constitution under article 2(1), the proper court is the Supreme Court. In the latter case, such a Plaintiff would not have access to the High Court for lack of locus standi. Likewise, in the former case a Plaintiff would not have

access to the Supreme Court because he or she would be seeking to invoke the Supreme Court's original jurisdiction to enforce his or her personal fundamental right or freedom. Thus, the two jurisdictions are not concurrent. However, the jurisdiction of the Supreme Court is not ousted simply because of the provision sought to be enforced. The court's jurisdiction in such a case is determined by whether or not the Plaintiff is pursuing a personal interest (as in the *Edusei and Bimpong-Buta* cases as well as the case of *Oppon vs Attorney-General* for example) or the enforcement of a provision of the Constitution in the interest of the public good (as in the *CIBA Case* and *Sam (No.2) vs Attorney-General*)."

The position of the law espoused in the *Adjei-Ampofo* case was followed by a majority of this court in **Federation of Youth Association of Ghana (FEDYAG) vs. Public Universities of Ghana & Others [2010] SCGLR 265** where at page 291, Adinyira JSC stated that:

"The Supreme Court in previous cases has considered the relationship between articles 2(1) and 33(1) of the 1992 Constitution in the enforcement of the provisions of the Constitution. A clear distinction was made between public interest actions and personal interest actions, the locus standi of persons initiating the actions and the forum for such actions. In the case of *Sam (No. 2.) v. The Attorney- General [2000] SCGLR 305*, the eminent Joyce Bamford- Addo J.S.C (as she then was) in making a comparison of articles 2(1) and 33(1) of the 1992 Constitution, said (as stated at page 314 of the report: The Plaintiff in this case is a 'person...' He is also a citizen of Ghana and he has alleged that the section ... is inconsistent with the constitutional provision in articles 2(1)(a) and (b) of the 1992 Constitution. These are the requirements for standing when invoking the jurisdiction of the Supreme Court under article 2(1). "Other requirements like the existence of a "dispute" or "controversy" requirement or "personal interest" requirement are not necessary. However, under 33(1), which deals with protection of Human Rights and Freedoms and other rights by the courts, the personal interest requirement is a pre-requisite condition for standing, which would enable a plaintiff to enforce his Human Rights and Freedoms. The said article 33 (1) reads:

“33 (1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.” (The emphasis mine)

The words in “relation to him” and “that person” imply that a plaintiff must have personal interest in the litigation. Therefore, it is only when a person seeks the enforcement of his fundamental human rights and freedoms that he ought to have “personal interest” in the case and this would invariably mean that there must have arisen a controversy or dispute concerning an infringement or intended infringement of the plaintiff’s said rights which he seeks to enforce through the High Court.”

In the case of *Adjei- Ampofo v. Accra Metropolitan Assembly & Attorney-General* (No1) [2007-2008] SCGLR 611 the same distinction was made by Sophia Akuffo JSC (as she then was) delivering the unanimous opinion of the Court. She said at page 620 that:

“Whilst the outcome of an action under article 2(1) is, invariably, primarily of benefit to the citizens in general, it may not necessarily inure to the direct or personal benefit of the plaintiff therein.... For that reason, therefore, every Ghanaian, natural or artificial, has locus standi to initiate an action in the Supreme Court to enforce any provision of the Constitution.

In respect of article 33 (1), however, the objective is to facilitate the enforcement by any person of his or her individual fundamental human rights and freedom under Chapter Five of the 1992 Constitution through access to the High Court, in the first instance, for redress”

Ampiah J.S.C. in the case of *New Patriotic Party. v. Attorney-General* (CIBA Case) *supra*, succinctly stated at page 756 that:

“Of course where there is a violation of a particular right and there is a request for enforcement, the courts have held that it is the High Court

which has the jurisdiction to adjudicate on the issue...But where the action is for a mere declaration as to the contravention of or inconsistency with the provision of the Constitution then any person including a body of persons recognised under the Constitution has a right to seek that declaration... to maintain an action under Article 2(1) (a) of the Constitution”

The issue then to be determined in this ruling is whether the plaintiff has complained of a violation of the educational rights of any of its members and is therefore seeking redress. If such is the complaint then the proper forum is the High Court. But if the complaint is for a mere declaration as to the inconsistency of the full fee-paying policy with the provision of the constitution then the proper forum is the Supreme Court”.

From the authorities, two schools of thought have emerged. There is the school of thought which advocates that once a Plaintiff seeks to enforce the fundamental human rights provisions given under chapter 5 of the Constitution, the appropriate forum is the High Court as provided under article 33(1) of the Constitution. This school of thought has support in cases like: *Edusei (No.2) vs. Attorney General (supra)*; *Bimpong-Buta vs. General Legal Council and Others [2003-2004] 2 SCGLR 1200*.

The second school of thought takes the view that the enforcement jurisdiction of the fundamental human rights provisions under chapter 5 of the 1992 Constitution granted the High Court under article 130(1) and 33(1) of the Constitution is only cognizable where the action seeks to enforce the personal fundamental human rights of the Plaintiff and that where a Plaintiff seeks the enforcement of a communal human right as opposed to his personal human right, then the appropriate forum is the Supreme Court and not the High Court. This view has support in cases like *Adjei-Ampofo (No.1) vs. Accra Metropolitan Assembly & Attorney General (No.1) (supra)*; *Federation of Youth Association of Ghana (FEDYAG) vs. Public Universities of Ghana & Others (supra)*.

I must say that the views expressed by the second school of thought as captured in *Adjei-Ampofo (No.1) vs. Accra Metropolitan Assembly & Attorney General (No.1) (supra)* reflect my understanding of the provisions in articles 12(1), 33(1) and 130(1) of

the 1992 Constitution. As held by this court in **Adjei-Ampofo vs Attorney General & President of the National House of Chiefs [2011] 2 SCGLR 1104**;

“Even though the cumulative effect of articles 33(1), 130(1) and 140(2) of the 1992 Constitution 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 has raised a genuine issue for the interpretation of any provision of the Constitution or required a decision as to whether an enactment was inconsistent with any provision of the Constitution, the Supreme Court would have jurisdiction over it, pursuant to article 130(1)(b) of the 1992 Constitution”.

The question which naturally flows from the instant matter is whether the Plaintiff in this action seeks to enforce his personal or private human rights? My answer is that there is nothing in the Plaintiff’s writ which shows that the right which he seeks to enforce is a personal or private human right. Rather, the writ is clear that the Plaintiff seeks the enforcement of the human rights of a group of people described as “well-known personalities and or professionals” who are affected by the provisions in guideline 3.2.10 issued by the 1st Defendant on the 16th of February 2016. The enforcement aspect of the Plaintiff’s action is therefore properly before this court.

[13]. We now proceed to consider the second and the third issues agreed by the parties in the joint memorandum of issues filed by them; that is: (b). Whether or not the guidelines 3.2.10 issued by the 1st Defendant is inconsistent with or in contravention of article 17(1) and (2) of the 1992 Constitution and hence void; and, (c) Whether or not guideline 3.2.10 of the guidelines issued by the 1st Defendant on 1st February 2016, is justifiable under article 12(1) of the 1992 Constitution.

[14]. Indeed, on the 1st February 2016, the 1st Defendant issued Guidelines for the Advertisement of Foods. A copy of the said Guidelines was exhibited as Exhibit MD2 to the Plaintiff’s statement of case. Paragraph 3.2 provided as follows:

"3.2 SPECIFIC REQUIREMENTS FOR ALCOHOLIC BEVERAGES

In addition to the general requirement for the advertisement of food these requirements apply to alcoholic beverages.

3.2.1 The advertisement shall contain Health Warnings as follows:

- a). Drink Responsibly
- b). Not for sale to persons under 18 years of age
- c). Not recommended for pregnant women
- d). Any other health warnings that may be prescribed by the Authority.

3.2.2 Conventional symbols with the same meaning are allowed for the above.

3.2.3 Health Warnings when shown on Television, Print and Social media shall be legible.

SPECIFICATIONS

The minimum specifications for these Health Warnings are as follows;

The Health warnings must be placed at the bottom of the advertisement and must not be less than thirty percent (30%) of the biggest font size.

The Health warnings are to run as crawls for Television and Social media advertisement.

The Health warnings should run for the entire duration of the TV and social media advertisement.

Where health warnings are read on TV and Radio media, they shall be clear, audible and well-placed.

3.2.4 All alcoholic retail outlets shall display health warnings on its premises.

3.2.5 An advertisement shall not promote or depict excessive consumption of alcohol.

3.2.6 Radio and Television advertisements shall not be aired between the hours of 6.00am to 8pm.

3.2.7 An advertisement shall not imply that consumption of alcoholic beverage is required for:

- a. social or professional achievement
- b. personal success
- c. any sporting activity
- d. sexual prowess
- e. pleasure
- f. resolution of social, physical or personal problems
- g. appetite

3.2.8 No advertisement shall enhance or promote vices, general misconduct or be offensive to public policy. Advertising shall not associate consumption to any activity which requires care and skill or elements of physical danger (e.g. sports, recreation, crafts and hobbies).

3.2.9 A character in alcoholic beverage advertisement must not be shown to be in control of motorized equipment after consumption.

3.2.10 ***No well-known personality or professional shall be used in alcoholic beverage advertising."***

The Plaintiff's complaint is specifically about the provision in paragraph 3.2.10 of the guidelines. The Plaintiff says that guideline 3.2.10 is discriminatory and that the 1st Defendant has taken steps to ensure that well-known personalities do not advertise alcoholic products by refusing to grant approval for any advertisement of alcoholic products that feature persons whom the 1st Defendant classifies as well-known personalities. The Plaintiff asserts that the "present action is seeking to have declared unconstitutional to the extent that it violates the letter and spirit of articles 17(1) and (2) of the 1992 Constitution". In showing how guideline 3.2.10 is discriminatory, counsel for the Plaintiff submits at paragraph 7.2 of the statement of case that:

"The real effect of the application of Guideline 3.2.10 is that persons who would have succeeded in working hard to build a reputation in an industry, either as

musicians, footballers or academics will be unable to monetize their goodwill by advertising alcoholic products. Such persons, who are already under obligations per Guideline 3.2.1 to 3.2.9 to advertise the responsible use of alcohol, will be unjustly denied the right to exploit their goodwill for economic benefits”.

The above submission creates the wrong impression as though the advertisement of alcoholic beverages is the only means by which the so-called well-known persons or professionals could exploit and monetize whatever goodwill they might have built for themselves.

Whiles admitting that the provisions in article 17(1) and (2) of the Constitution are not intended to be applied in a manner that all persons in society will be treated in the same way, it was submitted on behalf of the Plaintiff that the right to be treated equally before the law and against discrimination on socio-economic grounds cannot be taken away by statute or any person acting under an authority conferred by an Act of Parliament **except in exceptional** circumstances.

We do not think that the Plaintiff has succeeded in showing that the Guidelines issued by the 1st Defendant portend discrimination against personalities described as well-known persons or professionals. Discrimination has been defined under article 17(3) of the Constitution. The said article states that:

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

The Plaintiff has not shown that the well-known personalities or professionals who have been prohibited by the 1st Defendant from indulging in the advertisement of alcoholic beverages have been so prohibited due to their race, place of origin, political opinions, colour, gender, occupation, religion or creed. Guideline 3.2.10 is a prohibition against all well-known personalities or professionals from engaging in the advertising of alcoholic beverages and the reasons behind this prohibition have not been proved, by the

Plaintiff, to be due to any of the factors outlined in article 17(3) of the Constitution. There are a lot of professionals of varying background and description in the country and none of them can safely argue that whiles they are prohibited from engaging in the advertisement of alcoholic beverages, other professionals have been granted the liberty to do so. Again, no well-known personality can correctly argue that he is affected by the prohibition in Guideline 3.2.10 but that some other well-known personality is not affected by the prohibition in the Guideline. In order for a Plaintiff to succeed in an action on discrimination, he must be able to prove that within persons of the same class, some of them have been given advantageous treatment or privileges which are denied to other persons of the same class or description and that the denial was due to the prohibitive factors stated in article 17(3) of the Constitution. As explained by this court in the Nartey vs. Gati case: "the crucial issue is whether the differentiation in their rights is justifiable by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law. In other words, article 17(1) is not to be construed in isolation, but as part of article 17. This implies that the equality referred to in article 17(1) is in effect freedom from unlawful discrimination. Article 17(2) makes it clear that not all discrimination is unlawful. It proscribes discrimination based on certain grounds. The implication is that discrimination based on other grounds may not be unlawful, depending on whether this court distils from article 17(1) other grounds of illegitimate discrimination which are not expressly specified in article 17(2)"

A Plaintiff is therefore enjoined to prove, in an action based on discrimination brought under article 17(1) and (2), that he is being discriminated against on grounds stated in article 17(2) and (3) which have been proscribed by the Constitution or on grounds which, though not specifically stated in article 17(2) and (3), are intrinsically unlawful because they are not cognizable or acceptable in democratic societies. In the instant matter, the Plaintiff has not succeeded in proving any of these requirements. The plaintiff herein has not been able to show that the prohibition against well-known personalities or professionals from engaging in the advertisement of alcoholic beverages infringes any law of the land or that the 1st Defendant has no power under any law to impose such a restriction.

[15]. It has been explained time and again that the provision on all persons being equal before the law granted under article 17(1) and the prohibition of discrimination based on gender, race, colour, ethnic origin, religion, creed or social or economic status given under article 17(2) are all part of the fundamental human rights and freedoms recognised under chapter five of the 1992 Constitution and that, these rights and freedoms guaranteed under the Constitution are not absolute rights in themselves, such that, they cannot be detracted from. They are all subject to the rights of other members of the public and even more importantly to the rights and interest of the public generally. For these reasons, article 12 which begins the provisions on the fundamental human rights and freedoms under the 1992 Constitution commences with a caution in clause 2 of the article. The said clause states that:

“12(2) 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 is mine)

Article 21(1) of the Constitution contains provisions on general fundamental freedoms but clause 4(c) states that:

“21(4) 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 –

(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;

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution”.

It is therefore very clear that the rights and the freedoms which have been guaranteed under the Constitution are not absolute but are subject to limitations imposed,

sometimes by the Constitution itself and or by Acts of Parliament and that it is also incumbent upon any person who complains of discrimination by virtue of acts done under the authority of an Act of Parliament to show that either the Act of Parliament or the conduct complained of was not reasonably justifiable in terms of the spirit of the Constitution. Thus, in **Civil and Local Government Staff Association of Ghana (CLOGSAG) vs. Attorney General and Others [2016-2017] 1 GLR 462** (supra) this court speaking through Sophia Akuffo CJ. stated at page 479 that:

“Prima facie, constitutional rights and freedoms are to be enjoyed fully but subject to the limits which the Constitution itself places thereon, in the terms of Article 12(2). However, in recognition of the fact that the enjoyment of political rights must be also governed by certain regulations and standards, Article 21(3) makes room for ‘laws and qualifications’ so as to assure that, in the enjoyment of the fundamental freedom to form or join political parties, there will be order as well as proper service to the public good. This is an important aspect of good governance. Hence, in determining the validity of any statutory or other limitation placed on a constitutional right, the questions that need to be determined are:

- a. Is the limitation necessary? In other words, is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?
- b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the constitution?”

[16]. The truth is that if individual members of the public are to insist on the enjoyment of the fundamental human rights guaranteed under the Constitution without regard to the rights of others and the public interest, there will be anarchy and chaos in society to the extent that no one will be able to enjoy any right at all. Hence, it is imperative that the enjoyment of individual rights must be balanced and held up against public right so however that where there is a conflict between individual right and societal or public right, the issue must be resolved in favour of the choice that advances justice and democratic governance as a whole.

The protection of the fundamental human rights of the individual and the public, is at the core of the functions and calling of Judges to do justice to all manner of people without fear or favour, affection or ill-will. Human rights and democracy are inextricably linked together. There cannot be true democracy without the observance of human rights just as human rights cannot exist without democracy.

The eminent jurist, Aharon Barak recognised this fact in his book: "The Judge in a Democracy" (2006), Princeton University Press, when he stated at page 81 to 84 that:

"Indeed, a central element of modern democracy is the protection of constitutional, statutory and common law human rights. Without these rights, we cannot have democracy. Take human rights out of democracy and democracy loses its soul; it becomes an empty shell. It is the task of the Judge to protect and uphold human rights. Justice McLachlin of the Supreme Court of Canada rightly said that 'the Courts are the ultimate guardians of the right of society, in our system of government'. These rights are the right of man as an individual, as well as his rights as a member of minority group. Judges must protect these rights. Judges must resolve cases of conflict between individual and group rights.

Human rights are not absolute; the scope of the right of one individual is limited by the right of another. The right of the individual is also limited by the needs of society. Every legal system has its own express or implied limitation clauses for balancing the right of the individual against society's demands. In Canada, the limitation clause operates so that the human rights set out in the Canadian charter of Rights and Freedoms are subject 'only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In Israel, the limitation clause provides that 'the rights under this basic law may only be infringed by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive In other constitutions and international instruments, particular rights have their own unique limitation formulas ... Such limitations, whether in the written Constitution or outside it, reflect the idea that human rights are not the rights of a person on a desert island. Human rights are the rights of a human being as part of society. The right of the individual must conform to the existence of society, the

existence of a government, and the existence of national goals. The power of the State is essential to the existence of the State and the existence of human rights themselves. Therefore, limitations on human rights reflect a national compromise between the needs of the state and the rights of the individual. This balance is intended to prevent the sacrifice of the state on the altar of human rights... Similarly, human rights should not be sacrificed on the altar of the state. After all, human rights are natural rights that precede the state. Indeed, human rights protection requires preservation of the sociopolitical framework, which in turn is based on recognition of the need to protect human rights. Both the needs of the state and human rights are part of one constitutional structure that simultaneously provide for human rights and allows them to be limited. A unique feature of democracy is that the scope and limits of human rights derive from a common source.... This is the constitutional dialectic. Human rights and the limitations on them derive from the same source, and they reflect the same values. Human rights can be limited, but there are limits to the limitations. The role of the Judge in a democracy is to preserve both of these limitations. Judges must ensure the security and existence of the state as well as the realisation of human rights; Judges must determine and protect the integrity of the proper balance”.

The issue for consideration is whether the limitation or the prohibition imposed by the 1st Defendant, in the instant matter, is necessary or proportional. This must be viewed against the backdrop that the 1st Defendant does not seek by Guideline 3.2.10 to prohibit well-known personalities or professionals from exploiting their calling or trade. The 1st Defendant does not seek by the Guideline in 3.2.10, which is the subject of the instant suit, from engaging in advertisement at all. All that the 1st Defendant seeks to do, by the Guideline in paragraph 3.2.10, is to prohibit well-known personalities and professionals from advertising alcoholic beverages.

[17]. It has been argued on behalf of the Plaintiff that the limitation or prohibition imposed by the 1st Defendant is not necessary because there are other provisions

(Guidelines 3.2.1 to 3.2.9) in the general Guidelines issued by the 1st Defendant that promote the purpose of the Guidelines which have been stated in the Guidelines to be:

- “a. Ensure that advertisement of foods will be conducted in a manner which is responsible and does not mislead or deceive the consumer.
- b. Ensure the regulation of advertisements of alcoholic beverages in order to reduce the exposure of minors to such advertisements.
- c. Instill responsible use of alcoholic beverages.
- d. Ensure the responsible use of energy drinks
- e. Provide Food Industry operators with the requirements of the Food and Drugs Authority and the procedures by which food advertisements shall be brought into compliance with the Public Health Act, 2012, Act 851 part seven, sections 100(2) and 103.”

Closely linked to the above argument is the submission that the 1st Defendant did not provide any scientific, empirical or intellectual basis for the prohibition imposed on well-known personalities and professionals. The Plaintiff nonetheless neither responded to nor challenged the evidence adduced by the 1st Defendant in respect of findings borne out of research work carried out in respect of the harm caused by the unrestrained consumption of alcohol and the negative effect of the advertisement of alcoholic beverages by well-known personalities on the youth and persons below the age of majority and even persons of full age. The Plaintiff will therefore be deemed to admit the evidence adduced by the Defendants in that direction. See *Fori vs. Ayirebi* [1966] GLR 627. Reference is hereby made to the research work titled: “The Global strategy to reduce the harmful use of alcohol” published by the World Health Organisation under the link,

<http://www.who.int/publications/i/item/9789241599931>.

The strategy advocated by the publication is stated to have five main objectives which are;

- “(a) raised global awareness of the magnitude and nature of the health, social and economic problems caused by harmful use of alcohol, and increased commitment by governments to act to address the harmful use of alcohol;
- (b) strengthened knowledge base on the magnitude and determinants of alcohol related harm and on effective interventions to reduce and prevent such harm;
- (c) increased technical support to, and enhanced capacity of, Member States for preventing the harmful use of alcohol and managing alcohol-use disorders and associated health conditions;
- (d) strengthened partnerships and better coordination among stakeholders and increased mobilization of resources required for appropriate and concerted action to prevent the harmful use of alcohol;
- (e) improved systems for monitoring and surveillance at different levels, and more effective dissemination and application of information for advocacy, policy development and evaluation purposes”.

Indeed, the strategy advocates the adoption of national policies by member countries including Ghana which are aimed at reducing the consumption of alcoholic beverages in order to avoid its harmful effect. It is also suggested, as part of the policies to attain reduction of the consumption of alcohol, the implementation of policies to increase taxes on alcoholic beverages, enacting and enforcing bans or comprehensive restrictions on exposure to alcohol advertising across multiple types of media, and enacting and enforcing restrictions on the physical availability of retailed alcohol”. Reference is also made to various research findings on “the strong appeal for young people in particular and the public in general towards featuring well-known personalities and professionals”.

Research has shown that well-known personalities, sometimes referred to as celebrities, have a strong appeal on people and that people tend to believe, sometimes, wholesale, what they hear these personalities say about various products offered for sale including alcoholic beverages. The 1st Defendant, in our view, violated no law in prohibiting these celebrities from engaging in the advertisement of alcoholic beverages. The Plaintiff, in

our opinion, has not shown that the ban on the well-known personalities from the advertisement of alcoholic beverages infringes any known law in the country.

It was also argued on behalf of the Plaintiff that section 15 of the Liquor License Act, 1970, Act 331 “places the responsibility of ensuring responsible sale of alcohol on the person who is selling the alcohol. The person advertising the alcoholic products should therefore not be held accountable for the responsible sale of the alcohol”. It must be borne in mind that guideline 3.2.10 does not prohibit the advertisement of alcohol. What it prohibits is the advertisement of alcohol by well-known personalities and professionals in order to avoid the influence and appeal which these personalities and professionals wield on young people specifically and the members of the public in general. At any rate the person advertising the alcoholic beverage is not entirely innocent of the sale of the alcoholic beverage since his actions contribute directly or indirectly towards the sale of the product; otherwise, it will be pointless in engaging these persons to advertise the existence of the alcoholic product.

[18]. The 1st Defendant is a public institution with legal and corporate personality established under section 80(1) of the Public Health Act, 2012, Act 851. Sections 81 and 82 state the object and the functions of the 1st Defendant in the following terms:

81. Object of the Authority

The object of the Authority is to provide and enforce standards for the sale of food, herbal medicinal products, cosmetics, drugs, medical devices and household chemical substances.

82. Functions of the Authority

To achieve its object, the Authority shall—

- (a) ensure adequate and effective standards for food, drugs, cosmetics, household chemicals and medical devices;
- (b) monitor through the District Assemblies and any other agency of State compliance with the provisions of this Part;

- (c) advise the Minister on measures for the protection of the health of consumers;
- (d) advise the Minister on the preparation of effective regulations for the implementation of this Part;
- (e) approve the initiation and conduct of clinical trials in the country; and
- (f) perform any other functions that are ancillary to attaining the objects of the Authority.

Is the regulation of advertisement on alcoholic products not part of the object and functions of the 1st Defendant within the meaning of sections 81 and 82 of Act 851 by way of the provision and enforcement of standards 'for the sale of food'? And, where is the unlawfulness in the performance of this statutory duty imposed on the 1st Defendant when it has, through Guidelines 3.2.10, prohibited well-known personalities and professionals from being used in advertising the sale and consumption of alcoholic beverages? Indeed, section 148(1) of Act 851 goes further to provide that:

“148. Guidelines and codes of practice

i. The Authority may issue guidelines and codes of practice in connection with food and drugs and any other products or devices regulated by the Authority to persons in the food and drugs industry and the persons shall comply with the guidelines and codes of practice”.

Section 148 (2) gives very wide powers to the 1st Defendant to regulate the production and sale of food for public consumption with the overall aim of securing the public health of the Ghanaian population. Thus, clearly, the 1st Defendant has been given legal authority to regulate the food industry and hence, the issuance of guideline 3.2.10 cannot, correctly, be described as unlawful.

[19]. Conclusion:

We find from the above that the 1st Defendant has authority under the Public Health Act, 2012, Act 851, to issue guidelines in connection with food and drugs, including alcoholic beverages in order to regulate the production and consumption of these items

with the aim of protecting and promoting the general well-being and health of all persons in Ghana. We find that guideline 3.2.10 was issued by the 1st Defendant within the general powers conferred on the 1st Defendant by the Public Health Act, 2012, Act 851. We hold that guideline 3.2.10 is not unreasonable or excessive and that it is in the interest of the public health of Ghana. Consequently, guideline 3.2.10 is not discriminatory and it is neither inconsistent with nor contravenes articles 17(1) and (2) of the 1992 Constitution. The Plaintiff's action therefore fails in its entirety and it is therefore dismissed.

(SGD) S. K. A. ASIEDU
(JUSTICE OF THE SUPREME COURT)

(SGD) P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

(SGD) M. OWUSU (MS)
(JUSTICE OF THE SUPREME COURT)

(SGD) G. K. KOOMSON
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

SACKEY TORKORNOO CJ:

BACKGROUND

[1.] Article 17(1) and (2) of the 1992 Constitution provide that:

17. Equality and freedom from discrimination

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

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

By operation of **section 82 of the Public Health Act, 2012, Act 851**, the 1st defendant is enjoined to

"(a) ensure adequate and effective standards for food, drugs, cosmetics, household chemicals and medical devices;

(b) monitor through the District Assemblies and any other agency of State compliance with the provisions of this Part;

(c) advise the Minister on measures for the protection of the health of consumers;

(d) advise the Minister on the preparation of effective regulations for the implementation of this Part;

(e) approve the initiation and conduct of clinical trials in the country; and

(f) perform any other functions that are ancillary to attaining the objects of the Authority.

[2] It is in the discharge of this statutory duty that the 1st Defendant published **"GUIDELINES FOR THE ADVERTISEMENT OF FOODS"** in document number FDA/FID/GL-AD/2026/01 (hereafter also referred to as the Guidelines). Document number FDA/FID/GL-AD/2026/01 was exhibited with the Plaintiff's Statement of Case as

exhibit MD2. On its outer cover page, it is noted as first adopted on 1st February 2013 and first issued on 1st February 2016. The INTRODUCTION of the contents of the Guidelines stated that it was issued in exercise of the powers conferred on the 1st defendant by **Part Seven, section 148 of Act 851** and made *'to apply to all advertisements of foods either locally manufactured/prepared or imported into Ghana with specific requirements for Alcoholic Beverages and Energy Drinks'*.

[3] Part 3.2 of the Guidelines is captioned **'SPECIFIC REQUIREMENTS FOR ALCOHOLIC BEVERAGES'** and directs that *'In addition to the general requirements for the advertisement of foods these requirements apply to alcoholic beverages'*.

In addition to other provisions under the caption **SPECIFICATIONS**, paragraph 3.2.10 of document number FDA/FID/GL-AD/2026/01 stated that:

10 ***No well-known personality or professional shall be used in alcoholic beverage advertising."***

[4] DISPUTE

It is the inclusion of this specification for the advertisement of alcoholic beverages in the Guideline that has led to this constitutional dispute for the determination of whether Guideline 3.2.10 constitutes discrimination against well-known personalities and professionals and so is contrary to **article 17 of the 1992 Constitution**. The Plaintiff has endorsed his writ for the following reliefs:

- e. *A declaration that on a true and proper interpretation of article 17(1) and (2) which guarantee equality before the law and prohibits discrimination against persons on grounds of social or economic status, occupation, among others, Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016 which provides that "No well-known personality or professional shall be used in alcoholic beverage advertising" is discriminatory, inconsistent with and in contravention of articles 17(1) and 17(2) of the 1992 Constitution, and thus unconstitutional.*

- f. *A declaration that on a true and proper interpretation of article 17(1) and (2), Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016 which prohibits well-known personalities and professionals from advertising alcoholic products is inconsistent with and in contravention of article 17(1) and 17(2) of the 1992 Constitution which guarantee equality before the law and prohibits discrimination against persons on grounds of social or economic status, occupation amongst others and consequently null, void and unenforceable.*
- g. *An order striking down guideline 3.2.10 of the Guidelines for the advertisement of foods published by the 1st Defendant on 1st February 2016 as being inconsistent with and in contravention of the letter and spirit of the 1992 Constitution and as such a nullity.*
- h. *An order of perpetual injunction restraining the Defendants, their agents or servants or assigns under the pretext of acting under guideline 3.2.10 of the Guidelines for advertisement of foods published by the 1st Defendant on 1st February 2016 from doing anything to prevent any well-known personality or professional from advertising alcoholic products.*

[5] While concurring with the majority opinion that the plaintiff's action is not sustainable, as ably articulated in the opinion of my brother Asiedu JSC, I wish to add the following reasons that convince me that **Guideline 3.2.10** of the **Guidelines for the Advertisement of Foods** published by the 1st Defendant on 1st February 2016 which prohibits well-known personalities and professionals from advertising alcoholic products is not inconsistent with and in contravention of **article 17(1) and 17(2) of the 1992 Constitution**.

WHAT CONSTITUTES NON- DISCRIMINATION UNDER ARTICLE 17?

[6] It is the established position of the law that the concept of equality expressed in **article 17 (1)** is by no means evident within the expression, and so a proper question for constitutional interpretation. To this end, the provisions in **article 17(1) and (2)**

are not intended to be applied in a manner that every person, regardless *of gender, race, colour, ethnic origin, religion, creed or social or economic status* will be treated in the same way in every context. What then are the parameters for interpretation and application of the equality conferred by article 17 (1).

The jurisprudence of this court has well settled this position to enable understanding by parties who find themselves subject to differentiation in law or regulation. As admitted by counsel for the Plaintiff, the case of **Nartey vs. Gati [2010] SCGLR 745** laid out a framework for interpreting the doctrine of non-discrimination and the concept of equality before the law that is protected by article 17 as a fundamental right.

[7] First, there must be the consideration whether the differentiation in rights conferred on specific groups or restraints imposed on specific groups is just, by reference to an objective to be served by a particular statute, constitutional provision or some other rule of law. Any discrimination, to be sustainable, must therefore be referable to law, or must be lawful discrimination.

[8] The second necessary consideration is whether the discrimination is reasonable, and to arrive at that standard of reasonableness, two conditions must be met. Is the stated differentiation distillable and recognizable? Is the classification founded on intelligible differentia which distinguishes between persons grouped together and others left out of the group? Second, does the differentiation that is compelled have a rational relation to the object sought to be achieved by the statute or regulation in issue?

[9] A third necessary consideration is the factor of even application to persons similarly placed. Equal treatment must be given to those similarly placed, so that equals are must be treated equally, while persons not equal in a generic context may be treated differently, subject to the just and fair standard.

[10] So in **Nartey v Gati**, this court established that the constitutional prescription in **article 17 (1)** that 'all persons shall be equal before the law' should not, and does not, disable Parliament from enacting legislation that gives different rights to different classes of people, so long as the differentiation in rights bears a reasonable relationship to the legislative purpose ought to be achieved.

[11] This interpretative framework, given to article 17(1) and (2) was expanded by this Court in **Asare vs. Attorney General [2012] SCGLR 460** through a necessary condition of attention. That is, the duty of this court to evaluate if the differentiation in rights compelled by the statute (or regulation as in this case, or rule of law) is constitutionally justifiable when the object sought to be served by it is raised up to the light of the spirit and letter of the Constitution itself. In **Asare**, the legislation under consideration was the **Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527)**. It amended article 8 of the 1992 Constitution which had prohibited dual citizenship, with fresh provisions allowing dual citizenship, but restricting its conferment on certain identifiable groups. The issue for consideration was whether this restriction constituted violation of article 17 (1) inter alia. This court disagreed, because the restriction was relatable with other provisions of the Constitution. This is the final test that I see. And within this context, the Directive Principles of State Policy provide direction.

NECESSITY AND PROPORTIONALITY TESTS

[12] The next critical brick in this consideration of the constitutionality of restrictions to the fundamental right to equality and non-discrimination lies in the tests of necessity and proportionality of the restriction. On satisfaction that a restriction is justifiable through legality, it is the duty of this court to satisfy ourselves on whether the restriction is an unjustified interference with any constitutionally conferred right, or excessive on account of the stated object of the legislation, regulation or rule of law, or on the contrary, it is necessary for the achievement of a public interest or lawful objective. As clarified in **Civil and Local Government Staff Association of Ghana (CLOGSAG) vs. Attorney General and Others [2016-2017] 1 GLR 462 at 484**, *'with every guaranteed human right under the Constitution, comes an overriding responsibility, which is toward the public interest or greater good. It is for this reason that the framers of the Constitution 1992 placed limitations on the exercise of some human rights by certain classes of persons.'*

In **Center for Juvenile Delinquency v Ghana Revenue Authority & Another 2019 GHASC 29**, this court was clear that the requirement to obtain a tax

identification number (TIN) prior to accessing the fundamental right to justice through the courts was an unreasonable restriction and limitation on the right to access the law courts, and therefore fails the proportionality test.

On the other hand, in **Kwasi Afrifa v Ghana Revenue Authority Reference J6/02/22 (30th November 2022)**, I stated, on behalf of this court that *‘On the balance between the public interest and a constitutional right, this court was satisfied that the decision (to compel persons assessed with a quantum of tax to pay a percentage of the assessed tax pending determination of an objection to the quantum of tax obligation) would not be subversive of the important public duty of every citizen to comply with his or her tax obligations as expected by the Constitution and revenue statutes, because it seeks to balance the democratic rights of all citizens (not only those subject to taxation) to have unimpeded access to justice in the courts against bureaucratic impediments, imposed obviously in the public interest for the GRA to settle an efficient tax administration machinery. The circumstances of that case were therefore in vast contradistinction to the circumstances envisaged under Section 42(5) (In the Center for Juvenile Delinquency Case). First, while section 11 applies to all citizens including those who may not be in a position to obtain a TIN before needing access to the courts, section 42(5) can only be applicable to those who have actually placed themselves in a position to incur a tax liability through importing goods into Ghana, or obtaining taxable income, thereby bringing themselves into the bracket of persons with obligations and rights within the tax regime.’*

[13] So in cases such as stand before us where a class of people have been restrained from enjoying what they point to as a constitutional right, this court must necessarily ask in determination of the validity of the statutory or other limitation placed on a constitutional right as was done in **Civil and Local Government Staff Association of Ghana (CLOGSAG) vs. Attorney General and Others (cited supra) on page 479**

- a. Is the limitation necessary? In other words, is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?
- b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the constitution?”

What makes the discrimination against well-known persons reasonable, proportionate and non-excessive?

[14] Although the parties to this action did not invest in quibbling over the concept of 'well-known personality', it is important to clarify same for the jurisprudence on the subject.

Concept of 'well known personality' or 'well known' brand

The prohibition or restriction or discrimination complained of in Guideline 3.2.10 is restricted to a well-defined group through words: ***"no well-known personality or professional shall be used in alcoholic beverage advertising."*** It thus passes the first test of equality in clear identification of the group subjected to the limitation on enjoyment of a fundamental right.

[15] 1st defendant also asserts in paragraph 7 of its Statement of Case, that one of the purposes of the impugned guideline is to ensure *'that advertisement of foods will be conducted in a manner which is responsible and does not mislead or deceive the consumer'*;

The concept of 'well known' personalities and marks is well established in the common law on intellectual property rights and supported in Ghana's statutory regime within Trademark and Competition law. In the same vein, the legal concepts of 'misleading' or 'deceiving' the consumers during conduct of advertisements is an established context of trademark law and competition law.

[16] The business of advertising is primarily to project the value of brands of products and trade-marks of companies, and attract market users to the said brands or trade marks on account of the value projected by the advertising and related factors.

In the **Protection Against Unfair Competition Act 2000 Act 589**, the statute focuses on protecting market users from causing confusion with respect to another's enterprise or activities (**section 1**), damaging another person's goodwill or reputation

(**section 2**) and misleading the public (**section 3**). I will set out them out hereunder for clarity.

Activities

(1) Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another person's enterprise or its activities, in particular, the products or services offered by that enterprise, constitutes an act of unfair competition.

(2) Confusion may, in particular, be caused with respect to—

- (a) a trademark, whether registered or not;*
- (b) a trade name;*
- (c) a business identifier other than a trademark or trade name;*
- (d) the presentation of a product or service; or*
- (e) a **celebrity or well-known** fictional character.*

Section 2—Damaging Another Person's Goodwill or Reputation

(1) Any act or practice in the course of industrial or commercial activities, that damages or is likely to damage the goodwill or reputation of another person's enterprise or its activities constitutes an act of unfair competition, whether or not the act or practice causes confusion.

(2) Damaging another person's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to—

- (a) a trademark, whether registered or not;*
- (b) a trade name;*
- (c) a business identifier other than a trademark or a trade name;*
- (d) the appearance of a product; (c) the presentation of a product or service; or*
- (f) a **celebrity or a well-known** fictional character.*

Section 3—Misleading the Public

(1) Any act or practice in the course of industrial or commercial activities, that misleads or is likely to mislead the public, with respect to an enterprise or its activities, in particular, the products or services offered by that enterprise, constitutes an act of unfair competition.

(2) Misleading may arise out of advertising or promotion and may, in particular, occur with respect to—

(a) the manufacturing process of a product;

(b) the suitability of a product or service for a particular purpose;

(c) the quality or quantity or other characteristics of a product or service;

(d) the geographical origin of a product or service;

(e) the conditions on which a product or service is offered or provided; or

(f) the price of a product or service or the manner in which the price is calculated.

Section 5 of the Trademarks Act 2004 Act 664 provides:

"No trade mark shall be registered if,

- 1) it is a trade name;*
- 2) it is incapable of distinguishing the goods or services of one enterprise from the goods or services of another enterprise;*
- 3) it is contrary to public order or morality;*
- 4) it is likely to mislead the public or trade circles with particulars references to the geographical origin of the goods or services, their nature or characteristics;*
- 5) it is identical to or is an imitation of or contains as an element, an armorial bearing, flag, emblem, name, abbreviation or initials of the name, official sign or hallmark adopted by a State, intergovernmental organization or organization created by an international convention unless authorized by the competent authority of that State or organization;*
- 6) it is identical to or confusingly similar to or constitutes a translation of*
a trade mark or trade name which is well known in the

country for identical or similar goods or services of another enterprise, or the trade mark is well known and registered in the country for goods or services which are not identical or similar to those under application but the use of the trade mark will indicate a connection between those goods or services and the owner of the well-known trade mark and the interests of the owner of the well-known trade mark are likely to be damaged by the use of the trade mark;

- 7) *the trade mark is identical to a trade mark of another owner already on the register or identical to a trade mark the subject of an application with an earlier filing of priority date for the same goods or services or closely related goods or services or if it resembles that trade mark so closely that it is likely to deceive or cause confusion”.*

[17] Thus the restriction by the FDA Guideline on ensuring that advertisements are not misleading, or confusing, and in particular diluting of the goodwill and reputation of persons who are celebrities or well-known is supported by statute.

Further, the 1st defendant has clarified that the guidelines it issued are premised on world-wide best practice and research and intentioned towards the protection of public health and safety. The guidelines are reactive to existing state of affairs and proactive in preventing public health emergencies. In paragraph 7 of its Statement of Case, it sets out the purposes of the impugned guideline to include ensuring *'that advertisement of foods will be conducted in a manner which is responsible and does not mislead or deceive the consumer; ensure the regulation of advertisements of alcoholic beverages in order to reduce the exposure of minors to such advertisements';* and *'instill responsible use of alcoholic beverages'.*

[18] These purposes must be kept in mind when evaluating whether the discrimination complained of are excessive, or reasonable or arbitrary. From this background, it is easy to appreciate that the duty cast on the FDA to determine what standards to set on the presentation of brand value of food and drinks includes a duty to determine what

constitutes fair and unfair competition in the marketing of brands and trademarks of alcoholic beverages.

[19] What **Guideline 3.2.10** of the **Guidelines for the Advertisement of Foods** does is to prevent any equity and value obtained from the development of a professional career or projection of self in the public arena in any context to merit description as 'celebrity' or 'well known' personality to be attached to the value that the public must perceive of any alcoholic beverage. This is particularly necessary because of the likelihood of confusion of market users regarding the enterprise and use of alcoholic beverages, and the goodwill, equity and influence that the well-known personality or professional has garnered from the different enterprise that the goodwill was created from. It is easy to see that the unfair competition that may arise from the cross referencing of influence that can feed into confusion, misleading or deception of the market is the public good that the regulation is aimed at. This objective has been clearly stated in the Guidelines, and the Statement of Case by the 1st Defendant.

[20] The reasonableness of this objective, necessity of the limitation, and proportionality thereof must be viewed against the backdrop that the 1st Defendant does not seek by Guideline 3.2.10 to prohibit well-known personalities or professionals from exploiting their calling or trade. The 1st Defendant does not seek by the Guideline in 3.2.10, which is the subject of the instant suit, to limit well-known personalities or professionals from engaging in advertisement at all. All that the 1st Defendant seeks to do, by the Guideline in paragraph 3.2.10, is to prohibit well-known personalities and professionals from advertising alcoholic beverages.

[21]The duty imposed on the FDA by **section 82 of the Public Health Act, 2012, Act 851** is to:

"(a) ensure adequate and effective standards for food, drugs, cosmetics, household chemicals and medical devices;

(b) monitor through the District Assemblies and any other agency of State compliance with the provisions of this Part;

- (c) advise the Minister on measures for the protection of the health of consumers;*
- (d) advise the Minister on the preparation of effective regulations for the implementation of this Part;*
- (e) approve the initiation and conduct of clinical trials in the country; and*
- (f) perform any other functions that are ancillary to attaining the objects of the Authority”.*

[22] When viewed from this statutory background aimed at protecting market users from ‘confusion’ ‘deception’ and ‘misleading’ use of trademarks and brand names, it is appropriate to evaluate that the duty discharged in **Guideline 3.2.10** as a response to the duties of the FDA under **Section 82 of the Public Health Act, 2012, Act 851** **was** not done unreasonably, excessively or arbitrarily

[23] This is especially so when balanced within the Constitutional direction in article 23 requiring that:

[24]. Administrative Justice

*Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements **imposed on them by law** and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.* (emphasis mine)

[25] It is to be noted that usually the provisions of Act 589 are used as a shield for protecting the reputation of ‘well known’ personalities and ‘celebrities’ from being unlawfully exploited or damaged. It seems as if in the present case, the plaintiff is seeking to utilize the equity obtained in the development of their personalities for use in the market place. The plaintiff has argued that the effect of Guideline 3.2.10 is that it prevents people who have worked very hard in various fields of endeavour to build their reputation from monetizing their goodwill by advertising alcoholic products.

[26] What this submission fails to appreciate is that the policy position taken by FDA, on the crest of its statutory duties and obligations, is that there should be no misleading regarding the goodwill of the reputation of a well-known personality and the value of

drinking alcoholic drinks. Again, there should be no confusing or deceiving links between the achievements and influence that the personality that has been developed and the alcoholic drink and brand the personality is endorsing for market users.

[27] Can the shield raised by the FDA to protect the market from the exploitation of this equity within the limited context of alcoholic beverages be considered as unreasonable, and excessive? I do not think so. I am in agreement with the majority opinion that with the expressed objectives, the statutory duty conferred on the 1st defendant was properly discharged and without any constitutional violation when the 1st defendant restrained persons with influence from other spheres from advertising alcoholic drinks.

[28] And I hold, with the majority members of the Court, that the plaintiff has failed to make out a case that the restrictions on 'well known' personalities advertising alcoholic beverages are inconsistent with, and in contravention of the constitutional provisions on equality and protection from discrimination found in article 17 (1) and 17 (2).

The action is dismissed.

(SGD) G. SACKY TORKORNOO (MRS)
(CHIEF JUSTICE)

DISSENTING OPINION

ACKAH-YENSU JSC:

INTRODUCTION

My Lords, I have had the privilege of reading the opinion of my brother Asiedu, JSC in this action. While I agree with his rendition of the facts as well as the recounting of the contentious issues for determination, I am unable to associate myself with the

reasoning and conclusion reached by my respected brother. In my respectful opinion, the statement “**No well-known personality or professional shall be used in alcoholic beverage advertising**” found in Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant, is indubitably discriminatory and same is unconstitutional.

Having said that however, I agree with the analysis and conclusion of my brother in dismissing the objection urged on us by the Learned Attorney-General that, the Court’s jurisdiction had not been properly invoked by the Plaintiff. I am equally of the view that, while Article 17(1) and (2) of the 1992 Constitution poses no interpretative challenge as regards the facts before us, the same having been the subject of various pronouncements by this Court, which should have merely required an application of same to the facts of the case, the Plaintiff is however not prohibited from invoking our jurisdiction to enforce the provisions of the Constitution relative to the aspect of the impugned guideline as championed by the 1st Defendant, a state institution.

Indeed, the wrongfulness of the seeming call on us to interpret Article 17(1) and (2) of the Constitution stems from how the Plaintiff has formulated the declaratory reliefs he seeks from this Court. He invites the Court to interpret the said Article 17(1) and (2) per the commencement of his first two reliefs thus: “*A declaration that on a true and proper interpretation of Article 17(1) and (2).....*”. However, a careful reading of the Statement of Case makes evident that the Plaintiff acknowledges that Article 17(1) and (2) needs no further interpretation as various pronouncements from this Court have clearly settled their scope.

At paragraph 3.13 of the Statement of Case of Plaintiff, Counsel submitted as follows:

*“It is not in dispute that article 17(1) of the Constitution, 1992, received extensive judicial consideration in the case of **NARTEY V GARTI [2010] SCGLR 745**. It is for this reason that the Plaintiff in this suit, invokes the enforcement jurisdiction of the Court to apply provisions of the Article 17(1) and (2) and construe whether the impugned regulation of the 1st Defendant violates Article 17(1) and (2) and strike down the offending provision in*

the public interest. This Honourable Court has had occasion to state that its interpretative and enforcement jurisdictions are separate and independent of each other. In other words, one can approach the Honourable Court solely to enforce the provisions of the Constitution without demonstrating the need for interpretation."

It is thus clear that, properly construed, the Plaintiff's action is more for the enforcement of the relevant provisions of the Constitution and not to replicate the interpretation of Articles 17(1) and (2) of the Constitution. Importantly, Plaintiff is seeking this enforcement not only for his personal interest, but for the good of the wider public.

THE ISSUES

Aside the jurisdictional issue, the two remaining issues filed per the Memoranda of Issues are:

- (a) **Whether or not the Guidelines 3.2.10 issued by the 1st Defendant is inconsistent with or in contravention of Article 17(1) and (2) of the 1992 Constitution and hence void.**
- (b) **Whether or not Guideline 3.2.10 of the Guidelines issued by the 1st Defendant on 1st February 20156 is justifiable under Article 12(1) of the 1992 Constitution.**

Before I delve into the issues, let me state emphatically that, in my opinion, the issue in this matter has nothing to do with whether it is proper or ethical to ban the advertisement of alcoholic beverages all together as has been done in other jurisdictions, or the harmful effects of alcohol, based on studies conducted, as canvassed by the Defendants. The Plaintiff is in this Court to seek its intervention to declare as unconstitutional and strike down Regulation 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016. Plaintiff is relying on the ratio in the case of **New Patriotic Party v Inspector General of Police [1993-94] 2 GLR 459**, where Hayfron-Benjamin JSC held as follows:

"... in other words, the citizen's freedoms may be restricted by law on the grounds stated in the Constitution, 1992 but they cannot be denied. Any such denial will be unconstitutional and void

I have no doubt in my mind that the framers of the Constitution, 1992, intended that the citizens of this country should enjoy the fullest measure of responsible human and civil rights. Therefore, any law which seeks to abridge these freedoms and rights must be struck down as unconstitutional".

The two issues stated above, seek to test the lawfulness of the 1st Defendant's Guideline 3.2.10 within the principles of discrimination as found under our Constitution, 1992. Whilst the Plaintiff argues per his Counsel, that the Guidelines discriminate against "*well-known personalities or professionals*", Defendants argue, that the seeming discrimination is actually justified by the very Constitution the Plaintiff relies on. For the Defendant, the alleged discriminatory conduct is actually excepted from unconstitutionality under the Constitution.

DETERMINATION OF ISSUES

My Lords, constitutionalism is one of the principles and concepts upon which our legal system and nation is founded. This is a concept which advances against limitlessness in the exercise of governmental powers and functions. By its practice, the Government, and indeed its agencies including the 1st Defendant, are placed within constitutional constraints regarding how the powers vested in them by the people are exercised. Contextually, the facts that undergird the present suit call in question both the procedural and substantive limitations on the 1st Defendant in the exercise of its powers under its enabling legislation to make guidelines in furtherance of its objectives.

It cannot be overemphasized that any law, conduct, or activity which is pursued under the authority of a statute will only be valid if it passes the test of constitutionality. That is, to the extent that any such conduct, law, or activity operates inconsistently with the 1992 Constitution, then, same ceases to be valid as same is unconstitutional. It is within this context, that I proceed to examine Guidelines 3.2.10 particularly to ascertain whether it meets the test of constitutionality.

There is no argument regarding the 1st Defendant's authority to issue guidelines in the discharge of its statutory mandate. The Public Health Act, 2012 (Act 851) established the 1st Defendant Authority. Section 81 of Act 851 provides that the object of the 1st Defendant is to *"provide and enforce standards for the sale of food, herbal medicinal products, cosmetics, drugs, medical devices and household chemical substances"*.

Pursuant to its object, Section 148(1) of Act 851 empowers the 1st Defendant to:

"Issue guidelines and codes of practice in connection with food and drugs and any other products or devices regulated by the Authority to persons in the food and drugs industry and the persons shall comply with the guidelines and codes of practice".

It is worth emphasizing that all persons are expected to conform to any such guidelines, else they stand to be penalized. This is evident under Sections 148(4) and (5) of Act 851. Section 148(4) of Act 851 provides as follows:

"A person who fails to comply with subsection (1) and (2) shall pay an administrative penalty of not more than two thousand five hundred penalty units to the Authority".

Section 148(5) further provides:

"A person who fails to pay a penalty imposed under subsection (4) commits an offence and is liable on summary conviction to a term of imprisonment of not more than five years in addition to payment of the penalty imposed".

It is pursuant to its empowerment that 1st Defendant issued the Guidelines for the Advertisement of Foods (see Exhibit "MD2"). The purpose of the Guidelines as detailed in the introductory page are to:

- (a) **Ensure that advertisement of foods will be conducted in a manner which is responsible and does not mislead or deceive the consumer.**

- (b) **Ensure the regulation of advertisements of alcoholic beverages in order to reduce the exposure of minors to such advertisements.**
- (c) **Instill responsible use of Alcoholic Beverages.**
- (d) **Ensure the responsible use of Energy Drinks.**
- (e) **Provide food industry operators with the requirements of the Food and Drugs Authority and the procedures by which food advertisements shall be brought into compliance with the Public Health Act, 2012, Act 851 Part Seven, Sections 100 (2) and 103.**

Regarding alcoholic beverages, it is provided under Regulation 3.2 as follows:

3.2 – Specific Requirements for Alcoholic Beverages

In addition to the general requirements for the advertisement of foods these requirements apply to alcoholic beverages.

3.2.1 The advertisement shall contain Health Warning as follows:

- a) 'Drink Responsibly',***
- b) 'Not for sale to persons under 18 years of age'***
- c) 'Not recommended for pregnant women'***
- d) Any other Health Warning that may be prescribed by the Authority.***

3.2.2 Conventional symbols with the same meaning are allowed for the above.

3.2.3 Health Warnings when shown on Television, Print and social media shall be legible. The minimum specifications for these Health Warnings are as follows:

- a) The Health Warnings must be placed at the bottom of the advertisement and must not be less than thirty percent (30%) of the biggest font size.***
- b) The Health Warnings are to run as crawls for Television and Social media advertisement.***

- c) *The Health Warnings should run for the entire duration of the TV and social media advertisement.*
 - d) *Where Health Warnings are read on TV and Radio media, they shall be clear, audible, and well-paced.*
- 3.2.4 *All Alcoholic Retail outlets shall display Health Warnings on its premises.*
- 3.2.5 *An advertisement shall not promote or depict excessive consumption of alcohol.*
- 3.2.6 *Radio and Television advertisements shall not be aired between the hours of 6.00 am to 8.00 pm.*
- 3.2.7 *An advertisement shall not imply that consumption of alcoholic beverage is required for:*
 - a) *social or professional achievement;*
 - b) *personal success;*
 - c) *any sporting activity;*
 - d) *sexual prowess;*
 - e) *pleasure;*
 - f) *resolution of social, physical, or personal problems;*
 - g) *appetite.*
- 3.2.8 *No advertisement shall enhance or promote vices, general misconduct or be offensive to public policy. Advertising shall not associate consumption to any activity which requires care and skill or elements of physical danger (e.g. sports, recreation, crafts, and hobbies).*
- 3.2.9 *A character in alcoholic beverage advertisement must not be shown to be in control of motorized equipment after consumption.*
- 3.2.10 *No well-known personality or professional shall be used in alcoholic beverage advertising.*

Guideline 3.2.10 provides that: "No well-known personality or professional shall be used in alcoholic beverage advertising". The phrase "Well-known personality" has been defined in the Guideline to include any person who arouses sufficient interest in society.

This may include historical, political, religious, academic, cultural figures, as well as celebrities and sports figures. “*Advertisement*” has also been defined under the Guidelines as “*a public notice, either by print or electronic media, offering or promoting the sale of a food product*”.

Implicit in the above definition, is the recognition that not all “*personalities*” or “*professionals*” are prohibited from engaging in alcoholic beverage advertising. The disqualification, Guideline 3.2.10, is restricted to only those who are “*well-known*”. That is, a person who arouses sufficient interest in society, and such a person may be a historian, politician, religious, academic, cultural figure, celebrity, as well as sports figure. Does this mean that if a historian, politician, religious, academic, celebrity, or cultural figure does not arouse sufficient interest in society, such a person is not disqualified from alcoholic beverages advertisement?

I have laid emphasis on the scope of Guideline 3.2.10 so as to appreciate, as will soon be demonstrated, its inherent discriminatory tenor.

THE CONSTITUTIONAL PROHIBITION AGAINST DISCRIMINATION

From the Plaintiff’s Statement of Case, the crux of his case is the principle of equality before the law and the freedom or right against discrimination on grounds of socio-economic status or occupation.

At this juncture, I find an exposition on the law of discrimination relevant to a proper analysis of the issues posited for trial. This discussion shall, however, be contextualized to suit the peculiar facts of the present suit.

I respectfully disagree with the opinion of my brother Asiedu, JSC (page 37 of his judgment), that the Plaintiff did not establish that the “*well-known personalities or professionals*” who have been prohibited by the 1st Defendant from indulging in the advertisement of alcoholic beverages have been so prohibited by virtue of Article 17 (1)

and (2); that is to say, they do not fall under any of the categories or classes provided thereunder.

In my view, Article 17(1) and (2) creates a generic situation, and so cannot capture every conceivable class/set of people or grouping. Discrimination is discrimination! Article 17(3) provides that:

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

Article 17(4) gives Parliament the authority to enact laws that are necessary to provide for the implementation of policies and programmes aimed at redressing social, economic, or educational imbalance in the Ghanaian society. In the instant case, Parliament has not enacted any law that specifically prohibits any person from advertising alcoholic beverages.

Indeed, the class of people described as "*well-known personalities or professionals*" is not regulated by any law, unlike some professional associations whose membership create restrictions of particular conduct; e.g. membership of legal profession, or the Judiciary. This group of "*well-known personalities or professionals*" is not regulated by any law which prevents them from advertising alcoholic beverages. There is therefore no legal justification for their exclusion. They cannot, therefore, in my view, be prevented from engaging in business that will generate income for them, unless the activity is prohibited by law or Public Policy.

It is conceded that in every responsible democracy and indeed, across constitutional democracies, rights guaranteed under constitutions are not absolute. The enjoyment of, and the entitlement to a particular right, is restricted by factors that advance the interest of the public. These factors may be for the protection of the health of the

public, the safety of the public, the morality of the public as well as even, the protection of the rights and freedoms of others. Thus, whenever there is a challenge on an infringement of a right, there must be a careful introspection of, whether that infringement is lawful in the sense of being justified within the permissible exceptions under law. Our Constitution, 1992, reflects these arrangements of rights as particularly provided for under Articles 12 and 17 thereof. Article 12 provides as follows:

"(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive Legislature, and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution.

(2) 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."

It is quite clear from Article 12(2) that the enjoyment of rights by individuals is subject to the overriding interest of the public. That is, in situations where individual rights conflict with the interest of the state or the public, such that the public stands in serious jeopardy, that right of the individual or group can be sacrificed for the interest of the public. In any claim to rights and its enjoyment therefore, the Court is expected to engage in a balancing duty by proscribing the deliberate displacement of the right of the individual simply on the altar of the public interest, without a justifiable basis recognized and sanctioned by the Constitution. The converse situation is equally supported.

This Court has consistently upheld the exceptions to the urging for absolute or complete entitlement and enjoyment of rights where same is justifiable. In doing so, this Court has guided itself with the excepted factors as found under the 1992 Constitution. See for instance this Court's decision in **Raphael Cubagee v Michael Yeboah & Others, Suit No J6/04/2017 Dated 28th February 2018.**

The question we have at hand, however, is founded on the construction of Article 17 of the 1992 Constitution relative to “*well-known personalities or professionals*” from engaging in advertisement of alcoholic beverages. Is it lawful, constitutional, or justifiable to restrain such persons (whoever they are) from advertising for the sale or purchase of alcoholic beverages?

Article 17 of the 1992 Constitution provided as follows:

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

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

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

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

- For the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society;***
- For matters relating to adoption, marriage, divorce, burial, and devolution of property on death or other matters of personal law;***

- ***For the imposition of land by persons who are not citizens of Ghana or on the political economic activities of such persons for other matters relating to such persons; or***
- ***Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter."***

The test to determine whether a person or group has been discriminated against is to weigh the object of the discriminatory conduct on the determinants recognized under Article 17(2) of the Constitution. Put differently, to assert discrimination is to contend that the person has been or is being mistreated, or has been put under a restriction or disability not required of persons similarly situated, because of his gender, race, colour, ethnic origin, religion, creed or social or economic status.

Clearly therefore, Article 17(3) which professes the meaning of discrimination cannot be read in isolation of Article 17(2) which is the substantive prohibition against discrimination.

As much as the provisions of Article 17(1) and (2) of the Constitution are not intended to be applied in a manner that all persons in the society will be treated in the same way, it has been held that equality before the law anticipates situations where persons in the same circumstances are treated in the same way so that all persons will be treated in the same way before the law.

In the *locus classicus* to engaging a finding on discrimination under Article 17 of the Constitution, the respected Dr. Date-Bah, JSC espoused the law in the following language in **Nartey v Gati [2010] SCGLR 745 @ 754:**

"To our mind, it is clear what article 17 does not mean. It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable. Soldiers, policemen, students, and judges, for instance,

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

His Lordship continued:

"This Indian approach is a useful one that can beneficially inform this Court's own approach to the interpretation of Article 17. The Constitutional prescription in Article 17(1) that all persons shall be equal before the law should not, and does not, disable Parliament from enacting legislation that gives different rights to different classes of people, so long as the differentiation in rights bears a reasonable relationship to the legislative purpose that Parliament is seeking to achieve and Parliament does not fall foul of any of the grounds set out in article 17(2). Of course, one should also add the caveat that the legislative purpose sought to be achieved by Parliament must be constitutional. And, one of the constitutional prescriptions that must be complied with, pursuant to article 17(1), is that a law must operate equally on all persons similarly situated. The constitutional slogan has to be: equals must be treated equally by the law".

The test clearly is the ascertainment of whether there is differential treatment accorded a group of persons against others from the same group. This test, logically, invites an interrogation of the class of persons who engage in advertisement generally, and an ascertainment of whether persons belonging to the class have been proscribed. I believe, but with much deference, that it is a rather simplistic view to make a finding

that well-known persons or professionals have not been discriminated against within the intendment of Article 17(3) in the application of Guideline 3.2.10.

In the case of **Republic v Eugene Baffoe-Bonnie & 4 Ors.**, this Court, speaking through Adinyira JSC quoted with approval the ratio in the case of **Civil and Local Government Staff Association of Ghana (CLOGSAG) v The Attorney-General & 2 Ors. [2017] GHASC 18**, which set out the two-test approach in determining whether or not a statutory limitation of a right provided to a person in the Constitution is lawful or not. This Court held in the **Eugene Baffoe-Bonnie** case (supra) that:

"Prima facie, constitutional rights and freedoms are to be enjoyed fully subject to the limits which the Constitution itself places thereon in terms of Article 12(2) Hence in determining the validity of any statutory or other limitation placed on a constitutional right, the question that need to be determined are:
Is the limitation necessary? In other words, is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?
Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the Constitution?"

I am of the firm conviction that the restriction placed on some persons and professionals merely because of their social or economic status in society for being able to arouse the interest of the society as against other personalities plying like trades or professions, is clearly discriminatory.

It is also my view that, the class of "*well –known personalities and professions*" is so amorphous that it is unclear who falls within the class.

According to the US Supreme Court in **Connally v General Construction Co., 269 US 385 [1926]**, a law is unconstitutionally vague when people of common intelligence must necessarily guess at its meaning: Under this vagueness doctrine, it was held in **Skilling v United States 130 S. Ct. 289 (2010)**, that a statute is also void for vagueness of a legislature's delegation of authority to judge and/or administrators is so extensive that it would lead to arbitrary prosecutions. The doctrine of void-for-vagueness also appears to have its roots deduced from the ancient Roman Law maxim

"Nulla Crimen Sine Lege", which translates in English to mean *"no crime without law"*. This is better captured in the words of famous French Scholar Baron De Montesquieu in his *"Spirit of Laws"* that laws be concise, simple, and devoid of *"vague expressions"*.

The Courts in Ghana have been confronted with arguments on the constitutional concept of vagueness and overbroad legislation or legislation overbreadth in the Ghanaian jurisprudence.

In the case of **Adjei Ampofo v The Attorney-General & President of National House of Chiefs [2011] 2 SCGLR 1104**, the concept of vague and/or overbroad legislation was thoroughly argued by Counsel and decided on by the Court.

Among the issues raised in the plaintiff's Statement of Case was the argument that the statute in question was void for vagueness or void for over-breadth; and that, while these doctrines were not expressly provided for in our Constitution, they were inherent in all democratic constitutions such as the 1992 Constitution.

The Supreme Court of Ghana, acknowledged in **Nana Adjei Ampofo** (supra) that *"doctrines such as those relied upon by the plaintiff (were) admittedly widely accepted tools for the construction of deeds and statutes"*. 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.

In that case, the unconstitutionality of Section 63(d) of the Chieftaincy Act (Act 759) came under scrutiny. More specifically, in that case, Parliament enacted legislation (the Chieftaincy Act) which made it a criminal offence for a person to refuse deliberately to honour a call from a chief to attend to an issue. The plaintiff therein invoked the original jurisdiction of the Supreme Court to challenge the constitutionality of the offence. He argued that the offence was an encroachment on liberty in general and freedom of movement in particular. The plaintiff in his relief, sought to make an argument on that perspective in his writ. The plaintiff contended that the provision is legally vague and overbroad, and accordingly unconstitutional.

The Court, in that case, measured the provision in Section 63(d) of Act 759 against the void-for-vagueness standard in order to determine whether it is constitutional or not. The question was put as to whether Section 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. Otherwise quizzed, does Section 63(d) sufficiently inform law enforcers of the prohibited conduct which they must prosecute?

In the view of the Court, answering these two questions should assist in determining whether Section 63(d) is void for vagueness. The Court went further to juxtapose these two questions against Justice Douglas – Formulation in **Papachristou et al v City of Jacksonville 405 US 156; 92 S. Ct. 893; 81L Ed 110; 1972 US Lexis 84;** and put as follows: *"does the impugned provision fail to give a person for ordinary intelligence fair notice that his contemplated conduct is forbidden by statute or does it encourage arbitrary and erratic interest and convictions?"*.

The Court said that the **Tsatsu Tsikata v The Republic** case (supra) has demonstrated that the void-for-vagueness doctrine is part of our Constitutional Law. The Court further said that 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.

In the view of the Court, Section 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. In the Court's wisdom, the fact that there are credible purposive interpretations alternative to the literal one outlined above demonstrates that the provision is incurably vague, and the argument does not convince the Court. The Supreme Court thus declared that the freedom of movement conferred on Ghanaian citizens in Article 21(1) of the 1992 Constitution could not be justifiably restricted by the provision in Act 759 and same was struck down as unconstitutional.

As aforesaid, the 1st Defendant has authority to issue Guidelines in the discharge of its statutory mandate. In my view, subsidiary legislation like Act 851 cannot go as far as

to prohibit rights ensured in the Constitution, it can only regulate. Therefore, the authority and discretion given to the 1st Defendant must be exercised within the scope provided for in Article 23 of the Constitution. Article 23 provides as follows:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal".

The question that arises is whether the limitation placed on *"well-known professionals and personalities"* by Guideline 3.2.10 issued by the 1st Defendant is reasonable, necessary and/or proportional?

In my view, the said restriction is not necessary. Guidelines 3.2.1-3.2.9 are applicable irrespective of who is advertising the alcoholic products. The said guidelines will essentially ensure that there will be responsible use of alcoholic beverages.

In my opinion, the 1st Defendant has not provided any scientific, empirical, or intellectual basis for restricting *"well-known persons and professionals"* from advertising alcoholic products. If the so-called well-known persons and professionals are allowed to advertise alcoholic beverages within the same Guidelines provided for in Guidelines 3.2.1-3.2.9, will the 1st Defendant not achieve its objectives of ensuring the responsible use of alcoholic beverages?

Furthermore, section 15 of the Liquor License Act, 1970 (Act 331) places the authority of ensuring responsible sale of alcoholic beverages on the person who sells the alcoholic beverage, and not the person who advertises the alcoholic beverage. Therefore, the discrimination against *"well-known personalities and professionals"* provided for in Guideline 2.3.10 is not necessary as other restrictions in Guidelines 3.2.1 to 3.2.9, and Act 331 are enough to achieve the purpose of the Guidelines.

It is also my opinion that, the discrimination imposed by Guidelines 3.2.10 are neither reasonable nor proportional. Article 21(4)(c) of the 1992 Constitution allows 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;"

The Guidelines published by the 1st Defendant define the phrase "*well-known personality*" to include "*any person who arouses sufficient interest in society. This may include historical, political, religious, academic, cultural figures as well as celebrities and sports figures*". There is no definition of either "*sufficient interest*" or "*society*". This leaves the 1st Defendant to determine who arouses "*sufficient interest*" within a "*society*".

Per the provisions of Article 296 of the 1992 Constitution;

"Where in this Constitution or in any other law discretionary power is vested in any person or authority –

- 1. That discretionary power shall be deemed to imply a duty to be fair and candid;*
- 2. The exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law".*

In the absence of well set out criteria for determining how a person arouses sufficient interest and in which society, the likelihood or arbitrariness in the application of this guideline to discriminate against persons from pursuing their economic activities cannot be overestimated.

So, if a person, who hitherto was not deemed to "*arouse sufficient interest in the society*" is allowed to advertise an alcoholic product and the advert gains considerable media coverage, will that person subsequently be prohibited from advertising the same or other alcoholic products? The application of Guideline 3.2.10 may mean that very soon no one may be allowed to advertise alcoholic beverages, contrary to the intention of the framers of the Constitution.

No one uses nonentities for celebrity endorsement, and therefore to make a regulation that excludes so-called "*well-known personalities and professionals*" is to attack the

advertising practice of using recognizable individuals to endorse products. In any case, after a nonentity is used, that person will become well-known and so be unable to secure a renewal of contract.

CONCLUSION

In summation, I do agree with the Plaintiff that these advertisements are pursued by some of these persons for economic living. It is therefore an unconstitutional attempt to cut their economic livelihoods merely because they are able to arouse the interest of the society.

I do not arrive at these conclusions oblivious of this Court being a policy court, and indeed empowered to direct the policy of the State. I must state without equivocation that I subscribe fully to the discourse against the infiltration of our society, and especially motivating our young ones and minors to engage in alcohol and drug abuse. My subscription notwithstanding, I am guided by the constitutional tenets, its letter, and spirit.

As admonished by the Court in the famous **Tufour v Attorney-General (1980) GLR 637**, every conduct must conform to the due process of law. The 1st Defendant must design a mechanism that is consistent with the Constitution to attain the mischief it seeks to cure with the publication of these guidelines, especially Guideline 3.2.10. Presently however, in my view, Guideline 3.2.10 is inconsistent with and in contravention of Article 17(1) and (2) of the 1992 Constitution.

As aforesaid, there are already in place, restrictions provided by the Liquor License Act and Guidelines 3.2.1 to 3.2.9 to ensure the responsible use of alcohol for public safety and health. And if Parliament finds it necessary to exclude any specific and defined group from advertising alcoholic beverages it may so legislate. But for now, the blanket prohibition of persons who are said to be "*well-known within society*" to advertise alcoholic beverage, is discriminatory, arbitrary, and in contravention of the 1992 Constitution and same ought to be declared a nullity.

In conclusion, I am convinced that the Plaintiff has made a compelling case that supports the conclusion that Guideline 3.2.10 which seeks to debar “*well-known personalities and professionals*” from engaging in alcoholic beverages advertisement is discriminatory, and same is unconstitutional. I therefore declare Guideline 3.2.10 of the Guidelines for the Advertisement of Foods published by the 1st Defendant on 1st February 2016 is discriminatory, inconsistent with, and in contravention of Articles 17(1) and (2) of the 1992 Constitution, and thus unconstitutional.

Accordingly, I hereby order the striking down of Guideline 3.2.10 of the said Guidelines as being inconsistent with and in contravention of the letter and spirit of the 1992 Constitution. Finally, the Defendants, their agents, servants, or assigns are perpetually restrained from acting under the said Guideline 3.2.10.

(SGD) B. F. ACKAH-YENSU (MS)
(JUSTICE OF THE SUPREME COURT)

(SGD) PROF. H. J. A. N. MENSA-BONSU (MRS)
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