

CHAPTER FIVE: REVIEW OF CASE LAW ON CONSTITUTIONAL SUPREMACY IN GHANA

1.0 Introduction

Constitutional supremacy lies at the very foundation of Ghana's legal order. It signifies that the **1992 Constitution** stands as the highest law of the land, and that any other law, policy, administrative action, or conduct that conflicts with its provisions is null and void to the extent of that inconsistency. This fundamental doctrine is explicitly codified in **Article 1(2)** of the **1992 Constitution**, which states that "this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

The Supreme Court of Ghana has consistently reaffirmed and enforced this principle through an impressive body of jurisprudence. Through its decisions, the Court has both protected and given life to the Constitution, ensuring that no authority exceeds the boundaries laid down by the supreme law. This chapter reviews the major judicial decisions that have shaped the doctrine of constitutional supremacy in Ghana. It begins by recalling the historical and comparative foundation of judicial review as established in *Marbury v Madison* (1803), before examining landmark Ghanaian cases that have affirmed the supremacy of the Constitution over all other laws and institutions.

2.0 Foundational Case on Constitutional Supremacy: Marbury v Madison (1803)

The doctrine of constitutional supremacy and judicial review was famously articulated in the American case of *Marbury v Madison* (1803), a decision that profoundly influenced constitutional democracies around the world.

In that case, William Marbury had been appointed as a Justice of the Peace by the outgoing President, John Adams. His commission, however, was not delivered before Adams left office. When Thomas Jefferson became President, his Secretary of State, James Madison, refused to deliver the commission. Marbury applied to the Supreme Court of the United States for a writ of mandamus compelling Madison to deliver it. The central issue was whether the Court had original jurisdiction to issue such a writ under **Section 13** of the **Judiciary Act of 1789**.

Chief Justice John Marshall held that while Marbury had a legal right to his commission, the Supreme Court lacked jurisdiction to issue the writ because the Judiciary Act purported to

expand the Court's original jurisdiction beyond what the U.S. Constitution permitted. The Court therefore declared that portion of the Judiciary Act unconstitutional.

This decision established two enduring principles: first, that the Constitution is supreme over all other laws; and second, that the judiciary has the authority and duty to interpret the Constitution and to strike down any law inconsistent with it. As Chief Justice Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v Madison* thus laid the groundwork for the doctrine of constitutional supremacy and judicial review, a doctrine that has since become a cornerstone of constitutional governance in Ghana.

3.0 Ghanaian Jurisprudence on Constitutional Supremacy

3.1 Tuffuor v Attorney-General [1980] GLR 637 (SC)

The first major Ghanaian authority affirming constitutional supremacy was *Tuffuor v Attorney-General*. The transitional provisions of the 1979 Constitution provided that existing judges "shall be deemed to have been appointed" under the new Constitution. Parliament, however, purported to vet and reject the appointment of Justice Apaloo as Chief Justice under this regime. Tuffuor challenged this action, seeking a declaration under **Article 2(1)** that Parliament's conduct was unconstitutional.

The Supreme Court held that the Constitution is not a mere document but a living and organic law that reflects the will of the people. It declared that any act inconsistent with the Constitution is void. The Court also emphasised that every citizen has standing under **Article 2(1)** to challenge unconstitutional actions. Although Parliament enjoys autonomy in its internal proceedings, it remains subject to the Constitution and cannot act beyond its limits. This case firmly established the supremacy of the Constitution over all branches of government.

3.2 New Patriotic Party v Attorney-General [1993–94] 2 GLR 35 (SC)

In this case, the President declared 31st December a date commemorating a military coup as a public holiday to be celebrated with state resources. The New Patriotic Party (NPP) challenged this decision, arguing that it contravened **Articles 3(3) and (4)** of the Constitution, which impose on citizens a duty to defend and uphold the constitutional order.

The Supreme Court held that judicial review under **Articles 2(1) and 130** extends to actions of the President and that even symbolic or commemorative acts must conform to constitutional principles. The Court ruled that the celebration of a coup undermined the spirit of **Article 3** and was therefore unconstitutional. This case reaffirmed that constitutional supremacy applies to all organs and officials of state, including the President.

3.3 Mensima v Attorney-General [1996–97] SCGLR 676

Here, a legislative instrument compelled local gin producers to join a specific association. Mensima refused and challenged the provision as an infringement of his right to freedom of association under **Article 21(1)(e)** of the Constitution.

The Supreme Court held in his favour, striking down the provision as unconstitutional. The Court declared that the constitutional right to freedom of association includes the right not to associate. Any law that forces individuals into membership of an association violates constitutional guarantees. This decision reinforced the principle that statutory provisions inconsistent with constitutional rights are void.

3.4 New Patriotic Party v Inspector-General of Police [1993–94] 2 GLR 459

In this case, the NPP notified the Inspector-General of Police (IGP) of its intention to hold a public demonstration. The IGP refused to grant a permit, and several members of the party were arrested when they proceeded to demonstrate. The NPP challenged the legality of the police permit requirement under the Public Order Act.

The Supreme Court held that requiring a permit before a demonstration was unconstitutional because it curtailed the right to peaceful assembly guaranteed under **Article 21**. The Court clarified that the role of the police is to ensure order and public safety, not to license demonstrations. Where public order concerns arise, the appropriate procedure is to seek a court injunction, not to deny a constitutional right. The Court therefore struck down the offending provisions of the Act.

3.5 J.H. Mensah v Attorney-General [1996–97] SCGLR 320

In this case, ministers appointed during the President's first term of office refused to undergo parliamentary vetting following the President's re-election. The plaintiff argued that **Article 78** required fresh vetting for each new term. The Supreme Court upheld this argument, ruling

that all ministerial appointments made after a new presidential term must be subject to parliamentary approval.

This decision underscored the supremacy of the Constitution in regulating executive appointments and affirmed the Court's authority under **Article 2(1)** to ensure compliance even in matters involving Parliament.

3.6 Professor Stephen Kwaku Asare v Attorney-General (Swearing-in Case) [2003–2004]

This case arose when both the President and Vice-President were outside the country, and the Speaker of Parliament was sworn in as Acting President. The plaintiff contended that being abroad did not render the President and Vice-President incapable of performing their duties.

The Supreme Court adopted a purposive interpretation of **Article 60(11)** and held that when both officeholders are outside the jurisdiction, they are deemed unable to perform their functions, and the Speaker must act as President to preserve constitutional continuity. The case illustrated the Court's commitment to interpreting the Constitution in a manner that upholds its purpose and functionality.

3.7 Opemreh v Electoral Commission and Attorney-General [2010]

In this case, the Electoral Commission laid a Constitutional Instrument (C.I.) before Parliament. Parliament attempted to amend the instrument instead of revoking it. The Supreme Court held that Parliament's conduct was unconstitutional because under **Article 11(7)**, Parliament may annul or revoke subsidiary legislation but cannot amend it. The decision affirmed that constitutional supremacy applies equally to subsidiary legislation, which must conform strictly to constitutional and procedural requirements.

3.8 Awuni v West African Examinations Council [2003–2004] SCGLR 471

The plaintiff, a student, had his examination results cancelled by WAEC for alleged irregularities without being given a hearing. The Supreme Court held that WAEC, as an administrative body, was bound by **Article 23**, which requires all administrative bodies to act fairly, reasonably, and in accordance with the principles of natural justice. The Court declared WAEC's action unconstitutional, emphasizing that constitutional supremacy ensures that administrative discretion is subject to judicial scrutiny.

3.9 Martin Kpebu v Attorney-General (48-hour Rule Case) [2016]

This case concerned the constitutional requirement under **Article 14(3)** that a person arrested must be brought before a court within 48 hours. The police had adopted a practice of excluding weekends and public holidays from the computation of the 48-hour period. The Supreme Court declared this practice unconstitutional, holding that the right to personal liberty is absolute and that no external factor can justify deviation from the 48-hour rule. The decision reinforced the protection of personal liberty as a non-derogable constitutional right.

3.10 Martin Kpebu v Attorney-General (Bail Case) [2016]

In a related case, the Court examined **Section 96(7)** of the *Criminal Procedure Code*, which denied bail for certain offences. The Supreme Court struck down the provision as inconsistent with **Articles 14** and **19**, which guarantee the right to liberty and the presumption of innocence. The Court held that every accused person has the right to apply for bail and that laws imposing an absolute bar on bail violate constitutional rights.

3.11 Sam (No. 2) v Attorney-General [2000]

The plaintiff challenged the constitutionality of a decree made under PNDCL 326. The Attorney-General argued that the plaintiff lacked standing to bring the case. The Supreme Court rejected this argument, holding that under **Article 2(1)**, any citizen may bring an action to enforce the Constitution. The Court thus affirmed a broad interpretation of *locus standi* in constitutional matters and recognised public interest litigation as a legitimate means of upholding constitutional supremacy.

3.12 Adjei Ampofo v Accra Metropolitan Assembly and Attorney-General [2003]

This case involved sanitation workers who were compelled to carry human waste on their heads. The plaintiff contended that the practice violated **Article 15**, which guarantees human dignity. The Supreme Court agreed, holding that the practice was degrading and unconstitutional. The decision reaffirmed that constitutional supremacy protects human dignity and invalidates any practice that demeans human worth.

3.13 Edusei v Attorney-General [1996]

In *Edusei v Attorney-General*, the plaintiff alleged that the State unlawfully withheld his passport, thereby infringing his right to return to Ghana. The Supreme Court declined jurisdiction, noting that the matter should have been brought before the High Court. The case

underscored the importance of procedural propriety in constitutional litigation and clarified that enforcement claims must be appropriately framed within the court's jurisdiction.

3.14 Margaret Banful v Attorney-General [2010]

This case concerned the President's decision to enter into a treaty with the United States for the transfer of prisoners without seeking parliamentary approval. The Supreme Court held that under **Article 75**, all treaties whether executive or legislative must receive parliamentary ratification before taking effect domestically. The Court affirmed that Ghana operates under a dualist system of international law, in which treaties require legislative approval to attain domestic force. This decision reasserted the supremacy of the Constitution over executive discretion in foreign affairs.

3.15 Gbedemah v Awoonor-Williams [1991]

In this case, the plaintiff challenged the qualification of a Member of Parliament who had previously been found guilty of corruption by a Commission of Inquiry. The Supreme Court held that such findings disqualified the individual under **Article 94(2)** of the Constitution. The Court concluded that the constitutional provisions governing eligibility for public office must be strictly enforced and that elections or appointments inconsistent with the Constitution are void.

4.0 Conclusion

The doctrine of constitutional supremacy in Ghana is not a theoretical construct but a living, enforceable principle sustained by judicial authority. The Constitution stands above every individual and institution, including Parliament, the Executive, and administrative bodies. The Supreme Court, as the guardian of the Constitution, has consistently ensured that all exercise of public power conforms to constitutional limits.

From *Tuffuor v Attorney-General* to *Martin Kpebu v Attorney-General*, Ghanaian jurisprudence demonstrates that judicial review under **Article 2(1)** remains the primary mechanism for enforcing constitutional supremacy. Citizens are empowered not only with the right but also with the civic duty to defend the Constitution. The cumulative effect of the case law reviewed affirms that no organ of state is above the Constitution, that every public act must derive its validity from it, and that any law or conduct inconsistent with it is null and void.

Through these decisions, the courts have upheld the rule of law and entrenched Ghana's status as a constitutional democracy grounded in justice, accountability, and respect for fundamental rights.