IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2026

CORAM: AMADU JSC (PRESIDING)
KULENDI JSC
KWOFIE JSC
DZAMEFE JSC
ADJEI JSC
SUURBAAREH JSC
AMALEBOBA JSC

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CONSOLIDATED WRIT
NOS. J1/18/2025 & J1/21/2025

2ND JULY, 2026

VINCENT EKOW ASSAFUAH ..... PLAINTIFF

VRS

THE ATTORNEY-GENERAL ..... DEFENDANT

AND

THEODORE KOFI ATTA-QUARTEY ..... PLAINTIFF

VS.

THE ATTORNEY-GENERAL ..... DEFENDANT

JUDGMENT

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TANKO AMADU JSC:-

INTRODUCTION

1. My Lords, in the exercise of judicial power vested in the Supreme Court pursuant to Article 126(4) of the 1992 Constitution, few duties laid upon the court are graver than that of pronouncing upon the validity or otherwise of the process by which the Republic may remove the very head of its Judiciary. The office of Chief Justice is a constitutional trust, held on behalf of the people of Ghana, and it is independent and immune from executive or parliamentary interference except as otherwise provided by the same Constitution which guarantees the independence of the office.

2. However, the framers of the 1992 Constitution understood that, judicial office being a public trust, where the Chief Justice or any Justice of the Superior Courts has fallen into stated misbehaviour, incompetence, or infirmity, the holder of any such judicial office may, by a process scrupulously prescribed, be removed from office. Articles 127 and 146 of the 1992 Constitution, hold these two imperatives: the security of judicial tenure and the accountability of the judicial office in a single, delicate, yet deliberate balance.

3. The present consolidated actions ask us to make a judicial prouncement with respect to that balance. The Plaintiffs, both suing as concerned citizens under Article 2(1) of the 1992 Constitution, contend that, the steps taken in respect of three petitions seeking the removal of the Chief Justice, Her Ladyship Justice Gertrude Esaaba Sackey Torkornoo, are constitutionally flawed. They assert in substance, that, before a petition for the removal of the Chief Justice may even pass the *prima facie* threshold, the Chief Justice was entitled to be notified of it, furnished with it, and heard upon it.

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4. In **Writ No.J1/21/2025** in particular, the Plaintiff's case in addition is that, the entire mechanism could not lawfully be set in motion at all, until a published Constitutional Instrument had been enacted to regulate the President's discretion, the role of the Council of State, and the proceedings of the Committee of Inquiry appointed by the President pursuant to Article 146(6) of the 1992 Constitution.

5. We would be less than candid, if we did not acknowledge the peculiar solemnity of the occasion, because, this constitutional duty we have been called upon to discharge, is not of our choice but of service to the nation and for which we have by our judicial oaths sworn to uphold without fear, favour, affection or ill will. The petitions in issue concern Her Ladyship Justice Gertrude Esaaba Sackey Torkornoo, a Chief Justice of the Republic and the head of the judiciary at the time this action commencedand under whom the entire bench in this consolidated action have served in judicial and/or adminstrative capacities.

6. The questions provoked in both writs are weighty and the consequences, on either position considerable. We have had the benefit of the industrious satements of case from Learned Counsel for all the parties and have considered them in full. It falls on us to determine whether, upon a true and proper interpretation of the Constitution, the procedural protections the Plaintiffs contend are embedded in Article 146 of the 1992 Constitution should prevail, or whether it would be appropriate for this court to add to what the framers of the Constitution have written.

FACTUAL BACKGROUND

7. The processes before us disclose that in December 2024, a petition for the removal of the Chief Justice had been presented by Professor Stephen Kwaku Asare. That, in accordance with the course this Court had charted in **AGYEI-TWUM VS. ATTORNEY-GENERAL, (2005-2006)SCGLR 732** the President of the day transmitted that petition to the Council of State for the consultation envisaged by

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Article 146(6) of the Constitution before any response was taken from the Chief Justice. That earlier removal attempt forms part of the background against which the present controversy must be understood. The Attorney-General thus relies upon it as evidence of a settled constitutional practice.

8. Now, turning to the events in the matters before us. On 25th March 2025, the Presidency announced, through a public communication of the Minister for Government Communications that, His Excellency the President, John Dramani Mahama, had received three separate petitions praying for the removal of the Chief Justice, Her Ladyship Justice Gertrude Esaaba Sackey Torkornoo, and had forwarded them to the Council of State to commence the consultation mandated by Article 146(6) of the Constitution 1992.

9. On 27th March 2025, the Plaintif in **Writ No.J1/18/2025** issued his writ. On the same day, the Chief Justice, by letter to the President, requested for copies of the three petitions and an opportunity to respond before any decision was taken upon whether they disclosed a *prima facie* case. In that letter, the Chief Justice relied on the *audi alteram partem* principle and the jurisprudence of this Court, contending that, the principles of natural justice entitled her to notice of, and an opportunity to respond to, the petitions before the consultation process was carried further.

10. On 28th March 2025, the Secretary to the President furnished the Chief Justice with copies of the three petitions and invited her preliminary response within ten (10) days, in order to facilitate the consultation between the President and the Council of State, and assured her that she would be afforded a full and fair opportunity to be heard. The Chief Justice duly submitted her responses.

11. On 7th April 2025, the petitions and the Chief Justice's responses were transmitted to the Council of State. On 22nd April 2025, following consultation with the Council of State, the President announced that, he had determined that each

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of the three petitions disclosed a *prima facie* case; that a five-member Committee of Inquiry under Article 146(6) had been constituted and further that, acting on the advice of the Council of State, the then Chief Justice be suspended with immediate effect pending the outcome of the inquiry. It is against this background that the two Plaintiffs commenced these separate actions, which have been contested by the Attorney-General.

THE CASE FOR THE PLAINTIFFS

12. The Plaintiff in **Writ No.J1/18/2025** ***"(whom, for convenience and without intending any of the connotations of seniority that the usual style might carry between parties to a single action, we shall call "the J1/18 Plaintiff"),*** through learned counsel, Mr. Godfred Yeboah Dame, contends that, upon a true and proper interpretation of **Articles 146(1), (2), (4), (6) and (7), 23 and 296 of the Constitution**, the President was required to notify the Chief Justice, and to obtain her comments and responses to the petitions, *before initiating* the consultation with the Council of State. The determination of whether a petition discloses a *prima facie* case is, he contends, a quasi-judicial act, affecting the rights, tenure and reputation of the highest judicial officer of the land, and therefore attracts the *audi alteram partem* rule. Relying upon **AWUNI VS. WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] 1 SCGLR 471, RIDGE VS. BALDWIN [1964] AC 40,** and **KANDA VS. GOVERNMENT OF THE FEDERATION OF MALAYA [1962] AC 322,** he submits that, the Chief Justice must be heard at that antecedent stage, and not merely afterwards before the Committee; and that the President's failure so to notify and give her a hearing, violates the Constitution and renders the consultation, and any steps taken thereafter, null, void and of no effect.

13. Developing the argument, Learned Counsel for the **J1/18** Plaintiff submits that the gravity of the consequences flowing from a *prima facie* determination, the appointment of a committee to inquire into the allegations against the Chief Justice

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and her immediate suspension, marks that determination out as one affecting her rights and reputation in a manner that the law has always regarded as deserving of a hearing. He contends further that, to relegate the hearing to the Committee stage is to permit irreparable injury to be inflicted: the suspension of the Chief Justice, the public announcement that a *prima facie* case has been found against her, and the consequent impairment of the dignity and independence of the office, all occured before she has been heard. He prays in aid the principle, traceable to **RIDGE VS BALDWIN, (1964) AC 40** that the more serious the consequence, the more insistent the requirement of a prior hearing, and submits that Articles 23 and 127, of the 1992 Constitution read with Article 296, supply the constitutional warrant for reading such a hearing into the antecedent stage of Article 146 of the Constitution.

14. The Plaintiff in **Writ No.J1/18/2025** therefore seeks the following reliefs:

(i) ***"a declaration that, upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23, 57(3) and 296 of the Constitution, the President is mandated to notify the Chief Justice and obtain her comments and responses to the petition before referring the petition to the Council of State or commencing the consultation process with the Council of State for the removal of the Chief Justice;***

(ii) ***a declaration that, upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23 and 296 of the Constitution, a failure by the President to notify the Chief Justice and obtain her comments and responses to a petition for her removal before triggering the consultation process with the Council of State constitutes a violation of Article 146(6) as well as the constitutional protection of the security of tenure of the Chief Justice stipulated in Article 146(1);***

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(iii) ***a declaration that, upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23 and 296 of the Constitution, a failure by the President to notify the Chief Justice and obtain her comments and responses to a petition for her removal before triggering the consultation process with the Council of State amounts to an unjustified interference with the independence of the Judiciary enshrined in Article 127(1) and (2) of the Constitution;***

(iv) ***a declaration that the failure by the President to notify the Chief Justice and obtain her comments and responses to a petition for her removal before triggering the consultation processes for the removal of the Chief Justice constitutes a violation of Articles 23 and 296, and renders the consultation processes initiated by the President null, void and of no effect; and***

(v) ***any other order or orders as the Court may seem meet".***

15. The Plaintiff in **Writ No.J1/21/2025** ***("the J1/21 Plaintiff")***, through learned counsel, Alhaji Farouk Seidu, advances a related but distinct case, framed not as a complaint of want of notice but as a complaint of want of regulation. His writ seeks declarations, founded upon Articles 23, 146(6), and 296(b) and (c) of the Constitution, directed at three discrete *loci* in the removal mechanism. First, that, the President's exercise of his discretionary power in determining whether a petition discloses a *prima facie* case ought to be regulated by a published Constitutional Instrument. Secondly, that, the constitutional role of the Council of State both in assisting the President to make that determination and in advising upon the appointment of the Committee of Inquiry under Article 146(6) of the Constitution must equally be subject to transparent regulation by a published Constitutional Instrument. Thirdly, that the proceedings of the Committee of Inquiry must be governed by a published Constitutional Instrument prescribing the procedures, scope and limits of its discretionary powers.

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16. Learned Counsel for the **J1/21/** Plaintiff also submits that, the *prima facie* determination is a quasi-judicial decision of grave constitutional consequence such that, the discretion it entails falls squarely within Article 296(c) of the Constitution. He relies upon the dicta in **RANSFORD FRANCE (NO.3) VS. ELECTORAL COMMISSION (2012)1 SCGLR, 705 AND ELIKPLIM AGBEMAVA VS ATTORNEY-GENERAL,** Writ No.J1/20/2016 and J1/23/2016 dated 21st November 2018 (unreported) to the effect that, where a discretionary power is quasi-judicial, regulations ought to be published to guide its exercise. He further relies on Article 11(7), which clothes a Constitutional Instrument with the force of law; upon the recommendations of the Constitution Review Commission (2011) and the Committee of Experts (1968) urging fuller regulation of the removal process; Learned Counsel further relies on **BILSON VS. ATTORNEY-GENERAL [1981] GLR 24**, for the proposition that a settled practice, however venerable, cannot override or supplant the primacy of the Constitution. He contends further that, the doctrine of political questions has no place in our jurisprudence following the **31ST DECEMBER CASE [1993-94] 2 GLR 35**, and that the matter is therefore fully justiciable.

17. When carefully analysed, the **J1/21** Plaintiff's argument is one of legality through transparency. He submits that a power so grave as that of removing the head of the Judiciary ought not to be exercised under unwritten, ad hoc procedures settled case by case, but should be channelled by published rules knowable in advance.

18. The **JI/21** Plaintiff further contends that, rules prescribing how a *prima facie* case is to be assessed, the role of the Council of State in the process and how the Committee is to conduct itself, including the scope and limits of its powers are all matters that ought to be specifically prescribed in a written instrument regulating the entire removal process. The absence of such rules, he submits leaves the process at large and exposes it to the arbitrariness that Article 296

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prohibits. Therefore, since Article 11(7) makes a Constitutional Instrument a recognised instrument of law, the proper course was for one to be put in place before the power was exercised. He invokes the recommendations of the Constitution Review Commission and the Committee of Experts as confirming that, the need for such regulation has long been recognised.

19. The J1/21 Plaintiff seeks the following reliefs:

(i) ***a declaration that, pursuant to Articles 23, 146(6) and 296(b) and (c) of the Constitution, the exercise of the discretionary power or authority by the President in determining the existence or otherwise of a prima facie case in respect of petitions for the removal of the Chief Justice ought to be regulated by a published Constitutional Instrument;***

(ii) ***a declaration that, pursuant to Articles 23, 146(6) and 296(b) and (c) of the Constitution, the constitutional role of the Council of State in assisting the President to determine the existence of a prima facie case, and to be consulted on the appointment of a Committee of Inquiry under Article 146(6), must equally be subject to transparent regulation by a published Constitutional Instrument;***

(iii) ***a declaration that, in light of Articles 23, 146(6) and (7) and 296(b) and (c) of the Constitution, the proceedings of the Committee of Inquiry established under Article 146(6) to investigate petitions for the removal of the Chief Justice must be governed by a published Constitutional Instrument which shall prescribe the procedures, scope and limits of its discretionary powers;***

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(iv) an order nullifying the entire proceedings arising from and relating to the petitions submitted for the removal of the Chief Justice particularly the determination of the prima facie case by the President with the advice of the Council of State, the suspension of the Chief Justice, and the establishment of the Committee of Inquiry for failing to first satisfy the provisions of Articles 146(6) of the 1992 Constitution and 296(c) and 11(7) of the 1992 Constitution; and

(v) any other order or orders, declaration or declarations, direction or directions, or consequential relief or reliefs as the Court may deem just to protect the institutional independence of the Judiciary.

20. Both Plaintiffs have drawn upon the misgivings expressed by Akuffo JSC, and the concurring opinion of Ocran JSC, in the **AGYEI-TWUM, case (supra)** in respect of the absence of detailed rules of procedure for the removal of a Chief Justice, and urge the Court to seize the present opportunity to instruct codification and to fill the perceived lacuna by interpretation.

THE CASE FOR THE DEFENDANTS

21. The Learned Attorney-General, Dr. Justice Srem-Sai, in a Statement of Case of considerable detail, contested both actions. He begins by conceding, candidly and without reservation, the cardinal principle which the Plaintiffs have urged on us. The Constitution, he concedes, entitles a person to be heard before a decision is taken to remove him or her from office; the rules of natural justice, and in particular the *audi alteram partem* maxim, are so fundamental to our legal system that, they are made implicit in the constitutional provision contained in Article 23. He cites in support of that proposition, the cases of **MARIAN AWUNI VS. WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] 1 SCGLR 471 (KPEGAH**

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JSC), REPUBLIC VS. STATE FISHING CORPORATION COMMISSION OF ENQUIRY (CHAIRMAN); EX-PARTE BANNERMAN [1967] GLR 536 (ADUSEI J), ABOAGYE VS. GHANA COMMERCIAL BANK [2001-2002] SCGLR 797, RIDGE VS. BALDWIN [1964] AC 40, and **KANDA VS. GOVERNMENT OF THE FEDERATION OF MALAYA [1962] AC 322.** According to the Attorney-General, the right of the Chief Justice to be heard is therefore puts beyond dispute.

22. But the concession, he submits, does not carry the Plaintiffs where they propose and have urged on this court. For the Attorney-General, the critical question is not whether the Chief Justice is to be heard, but *when* and at *what* stage. On that question, the Attorney-General advances three propositions, each tied to a distinct stage of the process.

23. The Attorney-General further contends that, the President is not required to take a response from the Chief Justice before the determination whether a petition establishes a *prima facie* case. To locate the structure of the removal mechanism, he sets out, from a careful reading of Article 146 and the relevant case law, the eight distinct steps that the process discloses: ***(1) receipt of the petition by the President; (2) transmission of the petition to the Council of State; (3) determination of a prima facie case by the President and the Council of State; (4) appointment of the Committee of Inquiry; (5) suspension of the Chief Justice; (6) the petition hearing by the Committee; (7) recommendation by the Committee; and (8) removal by the President.*** The right of hearing, he submits, is constitutionally fixed at ***step (6),*** under Article 146(8); of the Constitution. It does not arise at ***step (3).***

24. The Attorney-General develops this structural argument by inviting attention to where, within the eight steps, the Constitution places its various

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safeguards. The substantive protection that, there must be a ground of misbehaviour, incompetence or infirmity operates at ***step (1)*** and conditions the whole. The institutional check of the Council of State operates at ***steps (2) to (5),*** the President being unable to act against the Chief Justice save in consultation with, and ultimately on the advice of, that body. The adjudicative protection, notice of the case, the opportunity to answer, representation by counsel or expert, and the privacy of the proceedings operates at ***step (6).*** Under clause (8), the Constitution is not silent as to the protection of the Chief Justice; it has distributed her protections deliberately across the process, and the hearing is one of them, fixed at the inquiry. To import a further hearing at ***step (3)*** is, he submits, not to fill a gap but to disturb a considered and deliberate design.

25. The *prima facie* stage, he argues, is a protective sieve, inserted into the process by this Court in **AGYEI-TWUM VS. ATTORNEY-GENERAL (supra)** to sift out frivolous and vexatious petitions before they may trouble the office of the Chief Justice. He prays in aid the reasoning of Prof. Date-Bah JSC in *Agyei Twum* to the effect that, a literal reading which required the establishment of a committee upon every petition, however frivolous, could open the floodgates, by exposing a sitting Chief Justice to a perpetual succession of petitions. The petitions will then tie down two Justices of this Court on each, and thereby weakening the efficacy of the top hierarchy of the Judiciary. Therefore to require a full hearing before that protective threshold may be crossed would in his view, defeat the very purpose for which the threshold exists.

26. Relatedly, the Attorney-General contends that, the President is not required to take a response from the Chief Justice before the commencement of the mandatory consultation with the Council of State. Reading the Plaintiff's reliefs closely, and in particular Relief (i), which complains that the petitions were referred to the Council of State before being referred to the Chief Justice he submits that, the Plaintiff's true grievance is one of sequence: that consultation was commenced before the Chief Justice had been heard. But there is, he argues, no provision of

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the Constitution that requires the President to obtain the Chief Justice's response before transmitting the petition to the Council of State for the consultation contemplated by Article 146(6) of the Constitution.

27. In support of this proposition the Attorney-General relies, pointedly, upon practice and convention. Recalling Dicey's teaching that the constitution of a nation comprises not merely its letter but the conventions and practices that attend it, he invites the Court to recall the very sequence of events in **AGYEI-TWUM** itself, and the more recent petition of December 2024 against the Chief Justice (the petition of Prof. Stephen Kwaku Asare), in which the record shows the petition was transmitted to the Council of State before any response was taken from the Chief Justice. The settled practice, the Attorney-General submits, is flatly inconsistent with the Plaintiff's insistence upon a prior hearing, and confirms that, the construction he urges is the one borne out both by the letter and by the convention in giving effect to the Constitution.

28. The Learned Attorney-General confronts head on, the Plaintiffs' reliance upon the decision in **DERY VS. TIGER EYE P.I. (WRIT NO.J1/29/2015, dated 4TH FEBRUARY 2016),** where Benin JSC observed that, under clause (3) of Article 146, a *prima facie* determination requires examination of available evidence, and that, the right to a fair hearing dictates that the Justice under investigation should at least be afforded a response before such determination is made. That statement, he submits, will not bear the weight the Plaintiffs place upon it, for two reasons. First, it was *obiter dictum* as the issue in *Dery* was exclusively the meaning and effect of the words ***"in camera"*** in Article 146, and not the timing of the hearing. Secondly, and more fundamentally, the **Dery case** concerned the removal of an ordinary Justice of the Superior Court, a matter the Attorney-General characterises as judicial or quasi-judicial in nature, whereas the removal of a Chief Justice under Article 146(6) by the President acting in consultation with, and on the advice of the Council of State is a very different

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exercise: one that is essentially political rather than judicial or quasi-judicial, and to which the procedural incidents of an adjudication do not follow in the same way.

29. In **Writ No.J1/21/2025** the Learned Attorney-General answers the case therein advanced with two further propositions, directed respectively at the want of a regulating instrument and at the character of the *prima facie* determination. The first is that, the absence of a Constitutional Instrument to regulate the exercise of the discretionary power under Article 146 of the Constitution does not nullify the exercise of that power. The second is that, the *prima facie* determination, made by the President with the advice of the Council of State, does not require a reasoned judicial decision.

30. Upon the first proposition, the Attorney-General contends that, the substantive aim of Article 296 of the Constitution, is to ensure that discretionary power is not abused, and that the Article achieves this by setting out five standards by which the exercise of such power may be measured: that is, to be fair and candid, and not arbitrary, capricious or biased, but exercised in accordance with due process of law. A claimant who would impugn the exercise of a discretionary power must therefore show, in substance, that it was exercised in breach of at least one of those standards; the mere absence of a Constitutional Instrument does not, of itself, establish any such breach. Article 296(c), he submits, does not invent the criteria for governing discretionary power but merely commands the codification of the mechanism for governing it. The Attorney-General refers to the decision of this Court in **TEMA DEVELOPMENT CORPORATION & MUSAH VS. ATTA BAFFOUR [2005-2006] SCGLR 121**, as was applied earlier in **COUNCIL OF CIVIL SERVICE UNIONS VS. MINISTER FOR THE CIVIL SERVICE [1984] UKHL 9**.

31. Drawing upon **WOLVERHAMPTON NEW WATERWORKS CO. VS. HAWKESFORD (1859) 6 CB (NS) 336** and **REPUBLIC VS. HIGH COURT, ACCRA; EX-PARTE PETER SANGBER-DERY [2017]**, he submits that, the

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requirement that an instrument be published to *"govern"* the exercise of a power does not mean that, the power may not be exercised until the instrument is published. He submits that, the failure to publish a regulatory instrument does not deprive an aggrieved party of an avenue of redress whether by the common law remedy of judicial review or otherwise.

32. Furthermore, the Attorney-General cites and relies on the decision of this court in **RANSFORD FRANCE (NO.3) VS. ATTORNEY-GENERAL (supra)** where Prof. Date-Bah JSC cautioned against a literal interpretation that would breed unimaginable and absurd outcomes, contending that, to treat the absence of an instrument as nullifying the removal power would disable the constitutional machinery and produce precisely an absurd result. The codification of discretionary power, in short, does not nullify the exercise of that power.

33. Upon the second proposition, the Attorney-General contends that, the determination by the President, with the advice of the Council of State that, a petition discloses a *prima facie* case, is not a reasoned judicial decision and does not require one. The substance of such a determination, he submits, is policy-based and is taken in accordance with an established procedure; the Council of State is a policy body comprising elected representatives and persons of distinguished public service as provided for under Article 89(2) of the Constitution, and therefore not a judicial body.

34. According to the Attorney-General, the decisions of the council and of the President in this sphere, are pre-eminently political, rather than adjudicative, and a court will not substitute its own appraisal for the policy decision of such a body. He cites and relies on the cases of **NOTTINGHAMSHIRE COUNTY COUNCIL VS. SECRETARY OF STATE FOR THE ENVIRONMENT [1986] AC 240, R VS. SECRETARY OF STATE FOR THE ENVIRONMENT, EX-PARTE HAMMERSMITH AND FULHAM LBC [1991] AC 521**, and the observation of Lord Bingham in **A VS. SECRETARY OF STATE FOR THE HOME DEPARTMENT**

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[2024] UKHL 58, that the more purely political a question is, the more appropriate it is for resolution by the political branches, and the less aptly it is the subject of adjudication.

35. Therefore since the *prima facie* stage merely opens the way to the inquiry under Article 146(6) and decides no question of right, the Attorney-General submits that the want of reasons does not invalidate it. A decision rendered without detailed reasons therefore, is not a nullity. He distinguishes **DERY VS. TIGER EYE P.I., (supra)** contending that the ordinary meaning of *prima facie* ***"on the face of it"*** requires only an initial examination of whether the petition raises serious issues warranting further inquiry.

36. The Attorney-General further submits that, while reasons ordinarily accompany judicial or quasi-judicial outcomes, there is no known jurisprudence to the effect that, a decision made without detailed reasons is a nullity. The requirement to give reasons in response to the petition arises, if at all, before the committee for which a *prima facie* determination has been made, and not at the screening stage. In support of these submissions The Attorney-General further relies on **R VS. OLDHAM JUSTICES AND ANOTHER, EX-PARTE CAWLEY [1996] 1 All ER 464 AND AXES COMPANY LIMITED VS. KWAME OPOKU AND 2 OTHERS (SUIT NO. J4/23/2008, DATED 19TH JULY 2012).**

37. The Attorney-General contends further that, on the facts, the *prima facie* determination was in this instance backed by a reasoned decision supplied to the persons concerned, such that, the Plaintiff's complaint, even if a reasoned decision were required, is not borne out by the record. The focus of article 296 of the Constitution, he submits, is to ensure fairness in the exercise of a person vested with authority and once that is complied with, a failure to publish regulations guiding the exercise of that authority or power does not nullify the decision. Consequently, since Council of State's compliance in making a political decision is established, the decision is valid, and its content may not be subject to judicial

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review. Upon these propositions, and upon his earlier submissions in **Writ No.J1/18/2025**, the Learned Attorney-General prays that, the Plaintiff's reliefs be refused and the actions accordingly dismissed in their entirety.

SUBSEQUENT EVENTS AND THE LIMITS OF JUDICIAL NOTICE

38. Before turning to the consolidation and the issues settled for determination, we observe certain matters that have occurred since the events directly in issue, and we are careful to state the basis, and the limits, upon which we take account of them. The doctrine of judicial notice, regulated by **Section 9 of the Evidence Act, 1975 (NRCD 323)**, permits a court to act without formal proof upon a fact only where it is either so generally known within the territorial jurisdiction of the court, or so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned that, the fact is not subject to reasonable dispute. The boundaries of the doctrine are not to be overstepped. As the High Court reminded us in **REPUBLIC VS. MENSAH [1979] GLR 523**, even where a matter is in a general sense notorious, the particular incidents flowing from it may not be. In that case, the court held that, although world inflation was notorious, the extent of its effect upon this country was not a fact of which judicial notice could be taken.

39. Applying that test, three matters call for mention. First, it is not in dispute as it appears from the processes already before us that, the President furnished the Chief Justice with copies of the petitions and invited her comments before the matter proceeded to the Committee of Inquiry. This is a matter of record, requiring no resort to judicial notice; and we observe only that, while it shows that a measure of comment was in fact afforded, the affording of it was an act of executive prudence and courtesy and not to be mistaken for a constitutional requirement and prescription.

40. Nothing we say in this judgment should be read as elevating what was done as a matter of grace into a requirement that the Constitution imposes, for the

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question whether the Constitution compels an antecedent hearing falls to be answered by the construction of article 146 of the Constitution to which we come, and not by the contingent course the Executive happened to take. Secondly, it has been suggested that the Chief Justice participated fully in the proceedings, before the Committee. Of the conduct of those proceedings we can take no judicial notice.

41. By virtue of Article 146(8) of the Constitution they are held *in camera*, and what passes within them is, by constitutional design, neither generally known nor capable of determination from sources of indisputable accuracy. We therefore say no more of it than that nothing on the record before us, suggests that the hearing guaranteed by clause (8) of Article 146 was denied her.

42. Thirdly, we are aware, the fact being one of public notoriety, and so within **Section 9(2)(a) of the Evidence Act 1975 (NRCD 323)** that, since the institution of these proceedings, the process under Article 146 of the Constitution has run its course and the Chief Justice has been removed from office. We take notice of the bare fact of removal; we do not, and cannot, take notice of anything concerning the manner in which it was arrived at. Nor does that fact dispose of what is before us.

43. The questions raised in these consolidated actions are questions of the true and proper interpretation or construction of Article 146 of the constitution: whether the Constitution required an antecedent hearing, and whether a regulating Constitutional Instrument was a precondition of the lawful exercise of the removal power. Those questions are of general constitutional importance and are not rendered academic by the completion of the process in this instance as; a pronouncement upon them will govern every future invocation of Article 146 of the Constitution. We therefore determine them notwithstanding the removal of Her Ladyship Justice Gertrude Araba Esaaba Torkornoo from office. Whether the completion of the process during the pendency of this action raises any separate question touching the propriety of so proceeding, is a matter the parties have not

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argued and we have not been called upon to decide. We shall expressly reserve it, and say nothing that should be taken to foreclose it.

PRELIMINARY MATTER: THE APPLICATION FOR LEAVE TO DISCONTINUE

44. Before we come to the consolidation of the actions and the issues set out for determination, we must dispose of a preliminary procedural matter that arose at the very point of judgment. After these consolidated actions had been fully argued and the Court had reserved its judgment, the Plaintiff in **Writ No.J1/18/2025,** by notice of motion filed on 10th June 2026, applied for leave to discontinue his action. The ground of the application, deposed to in the affidavit in support, is that the President, having since removed the Chief Justice from office, the action has been overtaken by events and rendered, in the deponent's word, *moot*. Further that, the question whether the Chief Justice's response ought to have been sought before the petitions were presented has, in consequence, become ***"inconsequential and no longer material."*** We therefore refused the application as we consider the constitutional issues provoked by the reliefs sought as questions of overriding public interest for this court to answer in developing of our jurisprudence.

45. We begin with the nature of the power invoked. The discontinuance of an action is not, at every stage, a matter of right. Once a cause has been set down and heard, and still more once judgment has been reserved, a plaintiff may discontinue only by leave of the court, and the grant or refusal of leave is a matter for the court's discretion. That discretion is not exercised mechanically, nor merely by reference to the convenience or the changed appetite of the party who began the action. It is exercised judicially, having regard to the stage the proceedings have reached, the interests of any other party to the litigation, and in a cause of this character, the public interest in the questions the Court has been invited to decide. A litigant who sets the machinery of the Court in motion, carries a

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constitutional cause through argument to the very door of judgment, and then seeks to withdraw it, cannot expect the Court to treat the application as a formality.

46. This is not a private action brought to vindicate a personal right in which the Plaintiff, being *dominus litis*, may ordinarily abandon what is his own to abandon. It is an action commenced under Articles 2(1) and 130(1) of the Constitution, in which the Plaintiff sued, on his own showing, as a citizen of Ghana concerned to vindicate the letter and spirit of Constitution and our constitutional democracy. The standing of such a plaintiff does not rest upon any personal interest, injury or grievance peculiar to himself. It rests upon his status as a citizen and upon the public interest in constitutional compliance. As this Court has affirmed since **TUFFUOR VS. ATTORNEY-GENERAL [1980] GLR 637**, **SAM (NO.2) VS. ATTORNEY-GENERAL [2000] SCGLR 305 AND IN BILSON VS. ATTORNEY-GENERAL [1981] GLR 24**, any citizen may invoke the original jurisdiction of this Court to enforce or interpret the Constitution, because the interest protected is not his own but of the public. The corollary is important. A cause brought in that public interest is not the plaintiff's personal property to be withdrawn at his pleasure once the public interest in its determination has crystallised.

47. It follows that the very feature on which the application is founded, that the action no longer serves the Plaintiff's personal purpose, the Chief Justice having been removed from office is, in this jurisdiction, beside the point. A constitutional action under Article 2 of the Constitution is not a vehicle for the ventilation of a personal grievance, and its continued vitality does not depend upon the persistence of any advantage to the individual who brought it. The interest that sustains it, is the interest of the Constitution itself in having its meaning authoritatively declared. That interest does not evaporate because the events giving rise to the action have run their course, nor because the citizen who set the matter down has lost appetite for the contest.

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48. To hold otherwise, would be to place the authoritative interpretation of the Constitution at the disposal of the private calculations of individual litigants, and to allow a constitutional question, once seized of by this Court, to be withdrawn from determination whenever its resolution ceased to suit the party who raised it. The Constitution is not so lightly to be deprived of the exposition this Court alone can give it.

49. Neither are we persuaded that the action has become moot in any sense that would justify our declining to deliver our decision. We have already explained, in addressing the fact of the removal, why the questions raised in these consolidated actions are not rendered academic by the completion of the process in this instance. They are in our view, questions of the proper construction of Article 146, of the Constitution as to whether the Constitution requires an antecedent hearing, and/or whether a regulating Constitutional Instrument is a precondition of the lawful exercise of the removal power. A pronouncement upon these alone will govern every future invocation of that article. Questions of that character are of general and recurring constitutional importance. They are eminently capable of repetition; and, in the nature of things, each occasion of their arising may be overtaken by the withdrawal of the very process they call in question before a final adjudication can be made.

50. Were the supervening completion of the process sufficient to defeat the action, the important questions it raises might escape authoritative determination indefinitely. A court will not lightly allow a matter of public importance, fully argued and reserved for judgment, to be spirited away unanswered. The questions having been fully canvassed before us, the public interest is best served by their determination, not by their suppression.

51. There is, in any event, a short and conclusive answer peculiar to the posture of these proceedings. The actions before us have been consolidated. The Plaintiff in **Writ No. J1/21/2025** has not sought to discontinue, and presses his distinct

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case that the removal mechanism could not lawfully be set in motion without a published Constitutional Instrument. The reframed questions which this Court will determine embrace not only the antecedent notification controversy raised by the **J1/18** Plaintiff but also the ***"published instrument"*** controversy raised by the **J1/21** Plaintiff and the question of justiciability common to both. The withdrawal of one of two Plaintiffs in a consolidated cause cannot, therefore, dispose of the consolidated action, nor relieve the Court of the duty to determine the issues that remain live at the instance of the Plaintiff who continues. Even if leave were granted to the **J1/18** Plaintiff and we have refused it, the constitutional questions would survive for decision; and since they would survive, they are in substance the same questions, there is no sound reason to fracture the judgment by releasing one Plaintiff from a cause the Court must in any event decide.

52. For these reasons, we held that, this is not a proper case for the grant of leave to discontinue. That is why the application filed on 10th June 2026 was accordingly refused, and we proceeded to deliver this judgment upon the consolidated actions as argued.

CONSOLIDATION AND THE ADOPTION OF ISSUES

53. By Order dated 28th May 2026, this Court, having regard to the nature of the proposed issues for determination filed by the parties, consolidated **Writ No.J1/18/2025** and **Writ No. J1/21/2025** and adopted as the issues for determination all the issues set out in the Plaintiff's memorandum of issues filed on 12th February 2026 and those set out in the Attorney-General's memoranda of issues filed on 9th and 10th February 2026. It is to those adopted issues that we now turn.

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ISSUES FOR DETERMINATION

54. Pursuant to the order of 28th May 2026, the issues adopted for determination are those filed by the parties under **Rule 50 of the Supreme Court Rules, 1996 (C.I. 16). Rule 50(1)** contemplates, as the ordinary course, that the parties to an action will agree upon, and file, a single memorandum of agreed issues specifying the issues to be tried; and rule 50(2) requires that such a memorandum be signed by the parties. The Rules thus prefer a single, agreed statement of the questions in controversy. But the Rules also make provision for the case in which agreement proves impossible. Pursuant to Rule 50(3), where the parties cannot agree on the issues, each party may file his own memorandum of issues. It is under this latter provision that the memoranda now before us were separately filed, the consolidated actions having generated rival formulations incapable of reduction to a single agreed text. The separateness of the memoranda is therefore not an irregularity but the very course the Rules regulating procedure in the court prescribe where agreement fails.

55. **The issues of the Plaintiff in Writ No. J1/18/2025**

1. ***Whether or not, upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23 and 296 of the Constitution, the President is required to notify the Chief Justice and obtain her comments and responses to a petition for removal before initiating consultation with the Council of State; and***
2. ***Whether or not a failure by the President to notify the Chief Justice and obtain her comments and responses prior to initiating the consultation process with the Council of State violates the Constitution and renders the consultation process, and any steps taken thereafter, null, void and of no effect.***

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56. **The issues of the Plaintiff in Suit No. J1/21/2025**

(a) *Whether or not the President's determination of the existence of a prima facie case under Article 146(6) is mandated, by virtue of Articles 23, 296(b) and (c), and 11(7), to be regulated by a Constitutional Instrument;*

(b) *Whether or not the role of the Council of State in participating in the determination of a prima facie case under Article 146(6) ought to be regulated by a Constitutional Instrument;*

(c) *Whether or not the proceedings and discretionary powers of a Committee of Inquiry established under Article 146(6) for the removal of the Chief Justice must be prescribed and regulated by a Constitutional Instrument; and*

(d) *Whether or not the failure to comply with Articles 296(c) and 11(7) renders the entire removal process of the Chief Justice unconstitutional and void.*

57. **The Defendant's issues**

(i) *Whether a Chief Justice is entitled to be given a hearing before a decision is taken whether to remove him or her from office;*

(ii) *Whether the President is required to take a response from a Chief Justice before the determination whether a petition for the Chief Justice's removal from office establishes a prima facie case; and*

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(iii) ***Whether the President is required to take a response from a Chief Justice on a petition for his or her removal before the commencement of the mandatory consultation process with the Council of State.***

The Defendant's issues (Writ No.J8/109/2025)

(iv) ***Whether the absence of a Constitutional Instrument to regulate the exercise of discretionary power under Article 146 of the 1992 Constitution nullifies the exercise of such power; and***

(v) ***Whether the prima facie determination by the Council of State in respect of the petition for the removal of a person from the office of Chief Justice requires a reasoned judicial decision.***

THE QUESTIONS REFORMULATED BY THIS COURT FOR DETERMINATION

58. When read together, the parties' memoranda overlap considerably, and converge upon a common core. The Defendant's issues (i) to (iii) and the J1/18 Plaintiff's issues 1 and 2 are, in truth, the same controversy approached from opposite sides: the timing of the Chief Justice's right to be heard. The **J1/21** Plaintiff's issues (a) to (d) raise a distinct controversy: the necessity of a regulating Constitutional Instrument. To these the parties' pleadings add the question of justiciability. Reframing the adopted issues accordingly, and avoiding needless repetition, we shall determine the following four questions:

(1) ***Whether the matters raised are justiciable, or are precluded as non-justiciable "political questions";***

(2) ***Whether the President is required, as a matter of constitutional obligation, to notify the Chief Justice of a petition for her removal,***

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and to obtain her comments and responses, before he initiates the consultation with the Council of State and before a prima facie case is determined and, if so, when and at what stage that right of hearing ripens;

(3) Whether the President's discretion at the prima facie stage, the participating role of the Council of State, and the proceedings and discretionary powers of the Committee of Inquiry under Article 146(6) must be regulated by a published Constitutional Instrument, by virtue of Articles 23, 296(b) and (c), and 11(7), as a precondition of the lawful exercise of the removal power;

(4) Whether, in consequence, the President's initiation of the consultation, the prima facie determination, the constitution of the Committee, and the suspension of the Chief Justice are unconstitutional, null and void.

JURISDICTION

59. Mindful of the duty as affirmed in **TSATSU TSIKATA (NO.2) VS. ATTORNEY-GENERAL (NO.2) [2001-2002] SCGLR 620,** that a court must first satisfy itself of its jurisdiction, we observe that both Plaintiffs invoke Articles 2(1) and 130(1) of the Constitution. The test for the engagement of our exclusive original jurisdiction, laid down in **REPUBLIC VS. SPECIAL TRIBUNAL; EX-PARTE AKOSAH [1980] GLR 592** and consistently applied since including **EX-PARTE ELECTORAL COMMISSION (METTLE-NUNOO) [2005-2006] SCGLR 514 AND J. H. MENSAH VS. ATTORNEY-GENERAL [1996-97] SCGLR 320** is satisfied, since the provisions of article 146 governing the antecedent stage of the removal process are not free from ambiguity and have been given genuinely rival constructions by the parties.

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60. The '***Akosah test***' confines our exclusive original jurisdiction under Articles 2(1) and 130(1) of the Constitution to cases of genuine interpretation or enforcement. That is, where a provision is imprecise, unclear or ambiguous, or where rival meanings have been seriously canvassed, or where a person has done or omitted an act in contravention of the Constitution. A case does not become one of interpretation merely because a party invites the Court to interpret; the words in contest must be genuinely open to the rival readings advanced.

61. In the instant actions, we think they are. The parties herein have placed upon Articles 146, 23, 296 and 11(7) constructions or interpretations that are not merely colourable, but substantial and opposed: whether the right of hearing in clause (8) of Article 146 of the Constitution exhausts the Chief Justice's entitlement or is supplemented by an antecedent right; and whether the removal power is self-executing or is suspended pending a regulating instrument. These are quintessentially questions of constitutional construction reserved to this Court, and we are satisfied of our jurisdiction to determine them.

THE APPROACH TO CONSTITUTIONAL INTERPRETATION

62. Both Plaintiffs, rightly commend to us the purposive approach, and we accept it. The locus classicus remains the celebrated dictum of Sowah JSC in **TUFFUOR VS. ATTORNEY-GENERAL [1980] GLR 637 at 647–648**, that the Constitution is a living organism, to be read broadly and liberally in the light of its history, its core values and its spirit, rather than narrowly and literally. That instruction has been carried forward in **AGYEI-TWUM VS. ATTORNEY-GENERAL (supra) ASARE VS. ATTORNEY-GENERAL [2003-2004] SCGLR 823, AND RANSFORD FRANCE (NO.3) VS. ELECTORAL COMMISSION [2012] 1 SCGLR 705.**

63. But the purposive approach is not a licence to reinvent the Constitution. As the ***Tuffuor case*** itself instructs, the letter and the spirit are inseparable

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bedfellows; the written word remains the anchor. Where the framers have spoken, the Court interprets. It does not under colour of interpretation, supply provisions the framers chose to omit. That restraint is the more imperative here, where the relief sought would graft fresh procedural preconditions onto a carefully structured constitutional mechanism. As Dr. A. V. Dicey reminds us in his Introduction to the Study of the Law of the Constitution (Macmillan, 1889), the constitution of a nation is a bundle not only of its letter but of the conventions and practices that have grown around it, a point to which the Learned Attorney-General devoted careful argument, and to which we return below.

64. The purposive approach is, moreover, no longer a creature of the common law alone. Section 10 of the Interpretation Act, 2009 (Act 792) which is an inferior law to the Constitution anyway, rightly in my view, articulates the proper approach to the interpretation of our laws. It enjoins this Court to construe the Constitution and every other law in a manner that promotes the rule of law and the values of good governance, that advances human rights and fundamental freedoms, and that permits the creative development of the provisions of the Constitution but always so as to give effect to, and not to defeat, the purpose and spirit of the Constitution. Creative development is thus licensed; the unmaking of a clear provision is not.

65. The memorandum to Act 792 records the deliberate abandonment of the strict constructionist view in favour of the true purpose of legislation, and the dominant method is now, in the language of **Aharon Barak (Purposive Interpretation in Law (Sari Bashi trans., Princeton University Press, 2005), especially Ch. 15),** adopted by this Court, the search for the subjective purpose of the framers, the objective purpose a hypothetical reasonable author would intend given the values of the legal system, and the ultimate purpose synthesised from the two (See **ASARE VS. ATTORNEY-GENERAL [2003-2004] SCGLR 823, PER DATE-BAH JSC, AND GHANA LOTTO OPERATORS**

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ASSOCIATION VS. NATIONAL LOTTERY AUTHORITY [2008] SCGLR 1088).

66. We bear in mind however, the important sequencing affirmed by Wood CJ in **REPUBLIC VS. HIGH COURT (FAST TRACK DIVISION), ACCRA; EX PARTE YALLEY (GYANE & ATTAH INTERESTED PARTIES) [2007-2008] 1 SCGLR 512** that, where the subjective or literal purpose advances the framers' intent and leaves no ambiguity, absurdity or injustice, it is not proper to resort to the objective purpose to reach a different result. The objective purpose is a useful guide only where, the text having been read as a whole and every known aid faithfully applied, the meaning remains clouded in absurdity, irrationality or injustice. That sequencing has a direct bearing on the present case, for it governs whether the Plaintiffs may invoke the spirit of Article 146 to displace what its letter, in clause (8), plainly provides as to the stage at which the Chief Justice is to be heard.

67. We are conscious that the choice of interpretive method is not value-free, and that this Court has, in **GHANA LOTTO OPERATORS ASSOCIATION VS. NATIONAL LOTTERY AUTHORITY [2008] SCGLR 1088,** cautioned against an exclusively originalist reading, one that looks no further than the framers' intention preferring to see the Constitution as a living organism whose interpretation may evolve as the problems of the nation evolve. We embrace that caution. But the living tree metaphor is not a warrant for judicial amendment. As Aharon Barak insists (op. cit.), the objective purpose operates within the limits of the text, achievable only by the means the language permits. A living constitution grows; it is not rewritten by its interpreters. The distinction matters here because the Plaintiffs, in substance, ask us not to develop the meaning of words the framers used, but to supply procedural requirements the framers did not use at all, an antecedent hearing, and a mandatory regulating instrument. That is the province of the amending power, not of interpretation, however generous. However well

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intended, that approach may result in unconstitutionality as it may usurp what the Constitution itself has reserved for the people in a referendum or the legislature.

THE CONSTITUTIONAL ARCHITECTURE OF JUDICIAL TENURE

68. Before descending to the particular provisions in contest, it is necessary to situate Article 146 of the Constitution within the larger constitutional design of which it forms a part. A provision governing the removal of a Justice of the Superior Court and, most of all, of the Chief Justice cannot be read as a self-contained code of procedure. It is one element in an integrated architecture by which the 1992 Constitution secures the independence of the Judiciary, while preserving the accountability of the judicial office. As this Court noted in **ASARE VS. ATTORNEY-GENERAL, (supra)** no provision of a constitution stands alone; each integrates into the whole, and the whole informs the meaning of each. We therefore read Article 146 in the light of Articles 125, 127 and 144, with which it is in *pari materia.*

69. Article 125(1) of the Constitution declares that justice emanates from the people and is administered in their name by the Judiciary. Article 127(1) guarantees that, in the exercise of judicial power, the Judiciary shall be independent and subject only to the Constitution; while Clause (2) of Article 127 shields judges from liability and direction in the discharge of their judicial functions. Article 144 prescribes the mode of appointment of the Chief Justice and the other Justices of the Superior Courts.

70. It is Article 146 which completes the scheme. It stipulates the exclusive grounds upon which the security of tenure so guaranteed may be displaced on either stated misbehaviour, incompetence, infirmity of body or mind as well as the exclusive process by which that displacement may occur. The independence guaranteed under Article 127 would be illusory if tenure could be ended at will. Conversely, the people's justice administered under Article 125 would be ill-served,

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if a judge who had truly fallen into misbehaviour or incompetence were irremovable. Therefore, Article 146 is the hinge on which these competing imperatives operate.

71. The history of the provision reinforces the point. Our constitutional history includes the era of **IN RE AKOTO [1961] GLR 523**, when the protections of the individual against the State were read narrowly and the courts proved unable to restrain executive power. The progression through the Constitutions of 1969, 1979 and 1992 has been, in the field of judicial tenure, a progression towards greater entrenchment of independence culminating in the elaborate, multi-actor mechanism of Article 146, which deliberately vests the removal of a judge from the unilateral hand of the Executive and distributes it among the President, the Council of State, and an independent Committee of Inquiry. To construe Article 146 is therefore to handle an instrument designed to protect the Judiciary; and any construction urged upon us must be tested against whether it advances or subverts that protective design.

72. Two consequences follow for the present litigation. First, because Article 146 of the Constitution is protective of judicial independence, a construction that would expose the office of Chief Justice to instability, whether by inviting a torrent of unfiltered petitions, or by suspending the operation of the removal power altogether pending legislative action must be approached with the gravest caution. Therefore, the protective purpose cuts in more than one direction. Secondly, because the same article also serves the people's interest in an accountable Judiciary, the Court must be equally vigilant not to erect, in the name of independence, procedural barriers that the framers did not contemplate, and that which would render the accountability mechanism unworkable. The task is one of fidelity to the balance the framers struck, not of re-striking it in favour of either pole or divide.

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73. It is worth pausing to articulate on why the framers entrenched judicial independence so carefully, for the reason illuminates the construction. An independent Judiciary is not a privilege conferred upon judges for their own benefit. On the contrary, it is a guarantee held in trust for the citizen, whose rights against the State are worth only as much as the willingness of the courts to vindicate them without fear or favour. A judge who could be removed for an unpopular decision in the opinion of the appointing authority or upon the unfiltered complaint of a disappointed litigant or a displeased authority, would be a judge under pressure to please rather than to decide; and the citizen who came before such a judge would have no assurance of justice.

74. The security of tenure provided in Articles 127, 144 to 146 of the Constitution exists to dissolve that pressure. But the same public trust that demands independence also demands integrity. The citizen is no better served by a judge who has betrayed the office and cannot be removed than by one who decides under fear. The framers of the Constitution therefore did not make judges irremovable; they made them removable only upon grave grounds and through a process insulated, so far as possible, from the passions of the moment. That double character protective of the judge against improper removal, yet provident of removal where it is truly warranted, must inform every step of our construction.

75. We add that public confidence in the administration of justice is itself a constitutional value, for justice under Article 125 of the Constitution, administered in the name of the people, is urged by both sides of this case. Confidence is undermined if the head of the Judiciary may be removed by a process perceived as hasty or one-sided. It is equally undermined if grave and credible allegations against the office cannot be inquired into because the machinery is said to be unavailable. The construction we adopt must therefore, be one that the reasonable citizen would recognise as fair to the office and faithful to the Constitution and the people in whose name sovereignty resides and on whose behalf justice is administered.

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THE RELEVANT CONSTITUTIONAL PROVISIONS

76. Now, Article 146(1) provides that a Justice of the Superior Court shall not be removed from office save for stated misbehaviour or incompetence, or on the ground of inability to perform the functions of the office arising from infirmity of body or mind. Where the petition concerns the Chief Justice, Article 146(6) provides that the President, acting in consultation with the Council of State, shall appoint a committee, which shall inquire into the petition and recommend to the President whether the Chief Justice ought to be removed. Article 146(7) governs the committee in the case of other Justices. Article 146(8) provides that all proceedings under the Article shall be held ***in camera,*** and that the Justice against whom the petition is made is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice. Article 146(10) requires the President, in the case of the Chief Justice, to act in accordance with the advice of the Council of State.

77. In Complementing these provisions, Article 23 of the Constitution, enjoins administrative bodies and officials to act fairly and reasonably and to comply with the requirements imposed upon them by law while Article 296, requires every discretionary power to be exercised fairly, candidly, and free of arbitrariness, caprice and bias. It is Article 127, which guarantees the independence of the Judiciary in the discharge of its andjudicatory functions while Article 11(7), gives subsidiary legislation, including Constitutional Instruments, the force of law.

78. A close reading of Article 146 discloses a deliberate internal structure, the appreciation of which is decisive of much that divides the parties in this consolidated action. Clauses (1) to (3) establish the substance and the threshold of removal: the grounds (clause 1), the protection of the ordinary judge from removal except in accordance with the Article (clauses 2 and 3), and the route by which a petition reaches the appointing authority. Clauses (4) and (5) govern the

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removal of a Justice other than the Chief Justice, vesting in the Chief Justice the function of receiving the petition and the President, acting on the advice of the Chief Justice and in consultation with the Council of State, the function of appointing the investigating committee.

79. It is Article 146(6) which carves out the distinct case of the Chief Justice. Here, the petition goes to the President, who, acting in consultation with the Council of State, appoints the committee. Clause (7) prescribes the composition and powers of the committee for the puisne Justice while Clause (8) governs all committee proceedings under the article, securing the ***in camera*** character of the inquiry and the right of the impugned Justice to be heard in defence. Clauses (9) and (10) deal with suspension and, in the case of the Chief Justice, bind the President to act in accordance with the advice of the Council of State.

80. Three textual features of this structure merit emphasis. First, the framers drew an express and deliberate distinction between the removal of the Chief Justice in (Clause 6) and the removal of other Justices per (Clauses 4, 5 and 7). Where a constitution distinguishes in terms, the Court must give effect to the distinction. It is not at liberty to assimilate the two regimes. This is of immediate significance to the Plaintiffs' reliance on authorities concerning the removal of puisne Justices.

81. Secondly, the right of hearing is conferred in Clause (8), and is attached to the proceedings. That is, to the inquiry conducted by the committee. The framers of our Constitution carefully located the hearing; they did not leave its stage at large.

82. Thirdly, Article 146 conspicuously silent as to any antecedent hearing, and equally silent as to any requirement of a regulating instrument as a condition of its operation. Both silences are relied upon by the Plaintiffs as gaps to be filled by this Court. Whether they are gaps at all, or deliberate spaces left by a self-

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executing design by the framers of the Constitution, is among the central questions before us.

83. It is also necessary to be exact about what **AGYEI-TWUM VS. ATTORNEY-GENERAL (supra)** added to this text. Article 146, on its face, does not require a *prima facie* determination before the President appoints a committee in the case of the Chief Justice. It was this Court, in ***Agyei-Twum*** *(supra)*, that read in such a determination, deciding through Prof. Date-Bah JSC that, the objective purpose and spirit of the Constitution require that, a Chief Justice be given the benefit of a prior determination in that, a petition must disclose a *prima facie* case before a committee of inquiry is constituted by the President. The avowed object of that judicial gloss was the protection of the office. It inserted a filter against frivolous and vexatious petitions. The provenance of the *prima facie* stage as a shield, is not a forum for the adjudication of rights. As we shall shortly determine, this is central to the proper resolution of the contention of the **J1/18** Plaintiff.

CONSIDERATION AND OPINION OF THE COURT

JUSTICIABILITY AND THE POLITICAL-QUESTION OBJECTION

84. It is now settled that, if the matters raised were not fit for judicial determination; if they were committed by the Constitution to the unreviewable judgment of the political branches, the Court would not reach the construction of Article 146 at all. In our jurisprudence, there is a presumption in favour of justiciability, not against it. In **GHANA LOTTO OPERATORS ASSOCIATION VS. NATIONAL LOTTERY AUTHORITY [2007-2008] 2 SCGLR 1088**, this Court, resolving the conflict between the **31ST DECEMBER Case** and the **CIBA Case** held that, the provisions of the Constitution are presumed justiciable, and that, the presumption is displaced only where the very nature of a particular provision shows that it does not lend itself to enforcement by a court.

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85. The burden, in other words, lies on the party asserting non-justiciability to demonstrate it from the character of the provision in question; it is not to be presumed from the political subject-matter or the political identity of the actors. In our view, the Attorney-General has not discharged, and per Article 146 of the Constitution could not discharge that burden. Article 146 of the Constitution therefore,is not a provision that resists judicial enforcement. It lays down justiciable conditions: stated grounds, a prescribed process, a defined committee, an entitlement to be heard, compliance with which is precisely the kind of question courts including this courts exist to determine.

86. The broader form of the objection that the matter is a ***"political question"*** beyond the reach of the courts fares no better, for the political-question doctrine, as a doctrine of judicial abstention, has been firmly resisted in our jurisprudence. In the **31ST DECEMBER CASE (supra)** this Court declined to treat the characterisation of a matter as ***"political"*** as a reason to abdicate the duty of constitutional review, the doctrine being in large measure an importation from constitutional regimes whose structure and history differ from our own.

87. The principle was put beyond doubt in **J. H. MENSAH VS. ATTORNEY-GENERAL [1996-97] SCGLR 320** where this court held that, whenever the question is, whether a person or authority has acted within or outside the Constitution, the Court has jurisdiction to decide it, and the political quality of the act does not oust that jurisdiction. This flows inexorably from the supremacy clause. By Article 1(2), the Constitution is the supreme law and any act inconsistent with it is void to the extent of the inconsistency; and by Articles 2(1) and 130(1) this Court is the appointed guardian and gate keeper of that supremacy. A doctrine that permitted the political character of an act to place it beyond constitutional scrutiny would, to that extent, impugn, repeal, or contravene Article 1(2) by judicial abstention. This can never be the contemplation of the framers of the Constitution, taking into consideration our constitutional trajectory.

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88. Indeed, as this Court recognised in **ADOFO VS. ATTORNEY-GENERAL [2003-2005] 1 GLR 239**, even an express statutory ouster cannot bar the Court from reviewing the legality of conduct affecting rights that are otherwise justiciable; ***a fortiori*** a merely implied political-question immunity, resting on the character of the actors, cannot do so. The removal of a Chief Justice is an exercise of constitutional power under an Article of the Constitution that prescribes its own limits; to test whether those limits were observed is the very duty of this Court and certainly not a trespass upon the political domain. And we say so without reservation.

89. Let us say however with all deference that, our position on this issue is not to deny nor derogate the Attorney-General's point its due. It is intended to locate it correctly. The political quality of the removal that, it is committed to the President, acting in consultation with and on the advice of the Council of State, rather than to a court is a real feature of Article 146 in action and it has a real consequence. But the consequence goes to the intensity of our review and to the content of the procedural protections, not to the existence of our jurisdiction. That a power is committed to a political actor means the Court will not substitute its own appraisal for the appraisal the Constitution assigns to that actor. The court therefore will not ask whether the petitions ought to have been found to disclose a *prima facie* case but it will always ask whether the power was exercised within its constitutional limits, fairly and without caprice.

90. In our view, it is that distinction between whether a power may be reviewed and how closely the foundation of the principle is associated with Lord Greene's (MR) statement in **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. VS. WEDNESBURY CORPORATION** and with Lord Diplock's pronouncement in the **COUNCIL OF CIVIL SERVICE UNIONS VS. MINISTER FOR THE CIVIL SERVICE [1985] AC 374**, that, the susceptibility of a power to review turns on its subject-matter while the depth of review answers to its character. The Attorney-

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General's ***"essentially political"*** submission is, accordingly, sound as a guide to how searchingly we review, and unsound as a barrier to whether we review at all. We hold the matters raised to be justiciable, and proceed to determine them.

The fair-hearing principle and the peculiarities of the present case

91. Because the arguments on both sides turn, in large measure, upon the right to a fair hearing, we deem it prudent, before answering the remaining questions, to evaluate with care, what that right requires and how its requirements fall to be applied in the unusual setting of this case. The principle, *audi alteram partem*, that no one is to be condemned unheard is among the most ancient and most cherished of the safeguards the law affords. It is not a technicality but a pillar of justice, and this Court has applied it with vigour, most notably in **AWUNI VS. WEST AFRICAN EXAMINATIONS COUNCIL (supra),** where the *audi rule* was held to apply to administrative bodies whose decisions affect the rights of others.

92. We recall the classic expositions in the common law- **RIDGE VS. BALDWIN (supra) AND KANDA VS. GOVERNMENT OF THE FEDERATION OF MALAYA (supra)** which establish that, a person whose rights, office or reputation are in jeopardy must be told the case against him and given a fair opportunity to answer it. With the substance of that principle there can be no quarrel; the **J1/18** Plaintiff is right to insist upon it, and we affirm it without reservation. The contest in this case is not about whether the Chief Justice is entitled to a fair hearing. She is, indisputably, but the crux is about *when,* and in *what form* that, entitlement falls to be satisfied.

93. The answer to those questions is not to be found by treating the fair-hearing rule as a single, invariable formula to be applied identically to every decision touching every person. That is not the law. The content of natural justice is calibrated to its context. The rule is a principle of substance, not a fixed liturgy of procedure. What it demands in a given case depends upon the nature of the power being exercised, the character of the body exercising it, the gravity and the

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immediacy of the effect upon the person concerned, and the place of the impugned step within the larger process of which it forms a part.

94. As Tucker LJ held in **RUSSELL VS. DUKE OF NORFOLK [1949] 1 ALL ER 109, t**here is no rigid or universal standard; and as Lord Bridge of Harwich observed in **LLOYD VS. MCMAHON [1987] AC 625,** the courts have never tied themselves to rigid forms of words, for what fairness demands is shaped by the character of the decision-making body, the kind of decision it must make, and the framework within which it operates. A criminal trial, a dismissal from office, a refusal of a licence, the screening of a complaint, the grant of leave to issue process each attracts fairness, but fairness of a different texture and at a different stage. To ask, in the abstract, ***"is the Chief Justice entitled to be heard?"*** is therefore to ask a question that begs and answers itself and decides nothing. The real and only useful inquiry is: at which point in the elaborate mechanism of the Article 146 architecture does the Constitution fix her hearing, ***and is the content there provided adequate for the protection the principle requires?***

95. Several features of the instant case give that inquiry a complexion not met within the ordinary run of natural-justice disputes. The first peculiarity is the identity of the person protected. We are concerned not with a private citizen aggrieved by an administrative decision, but with the Chief Justice, the head of the very Judiciary whose independence the fair hearing principle, and Article 146 itself, exist to secure. This has a double consequence too easily overlooked. Fairness here runs not in one direction but in two. There is the fairness owed to the office holder, that she not be investigated at all on those petitions, neither suspended nor removed without a full and genuine opportunity to meet the charges. But there is also the fairness owed to the institution and, through it, to the public that the headship of the Judiciary and for that matter under the Article 146 machine any Justice of the Superior Court not be left hostage to a procedure

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so easily set in motion, or so readily prolonged, that the office may be destabilised by the mere lodging of petitions, however unfounded.

96. We think that any Judicial determination through a process of a construction of the hearing right that protected the individual at the cost of exposing the institution would defeat the very value the right is meant to serve. Thus, the peculiarity of the office does not enlarge the antecedent hearing. If anything at all, it counsels against converting same into a contest, for the office is protected as much by the orderly firmness of the process as by the multiplication of hearings within it.

97. The second peculiarity is that, unlike the typical case in which the law must imply a fair-hearing requirement into a statute that is silent, the framers of Article 146 were not silent at all. They addressed the hearing expressly, and they placed it where in their wisdom it belongs. By Clause (8) of Article 146, the Chief Justice against whom the petition is made is entitled to be heard in her defence, by herself or by a lawyer or other expert of her choice, before the Committee of Inquiry. The question, then, is not whether to imply a hearing into a void, but whether to add a second yet preliminary and antecedent hearing to one the Constitution has already expressly provided. That is a materially different exercise, and a more demanding one for the Plaintiffs. They must show not merely that fairness requires that hearing, but that, the text grants it and even further that, fairness requires it *earlier and twice*.

98. The third peculiarity bears directly upon that demand. In the case of the Chief Justice alone, the Constitution interposes the Council of State as a conditional yardstick. By Clauses (6) and (10) of Article 146, the President may act only in consultation with, and ultimately on the advice of, that body. The Council of State is thus a structural safeguard against capricious or politically-motivated screening; a check peculiar to the Chief Justice's case and absent from the removal of any

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other Justice of the Superior Court. Therefore, part of the protective work that, in an unstructured process, a prior hearing might be thought necessary to perform is here performed, instead by the interposition of an independent constitutional organ.

99. The fourth peculiarity concerns the character of the step said to require the antecedent hearing. The *prima facie* determination is not an adjudication of the Chief Justice's rights; it decides nothing about whether she has misconducted herself or is incompetent or infirm. It decides only whether the petitions disclose enough to warrant an inquiry at which those questions will be tried. It opens the gate; it does not pass through it. The fair-hearing principle has never required that the full incidents of a trial attend the decision merely to commence an investigation. This is the fifth peculiarity, and it is the hinge of the matter. The function under attack is investigative and preliminary, not determinative and conclusive.

100. The common law has always graded the demands of fairness according to that distinction. A body deciding whether there is a case to answer acts fairly if it proceeds honestly and without caprice upon material which if unanswered, would justify proceeding further. It need not first conduct in miniature, and in advance, the very hearing that lies ahead. We dare say that, to require the President and the Council of State to afford the Chief Justice a full anticipatory hearing before they may determine whether the petitions even merit inquiry would be to collapse the distinction between investigating a complaint and adjudicating it. Thus, to do so, moreover, in the one case where the Constitution has both expressly provided the adjudicative hearing further on and interposed the Council of State to guard the process, is to usurp the Constitution under the guise of judicial interpretation and or enforcement.

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101. From the foregoing, it is correct to posit that, the fair-hearing principle applies to the removal of the Chief Justice with full force but it applies, as it always does, according to the nature and stage of the function in question. Its full adjudicative content, notice of the case, the opportunity to answer, representation, and the testing of evidence is fixed by Clause (8) of Article 146 at the Committee stage, where only the substantive questions are determined. Where the only question is whether an inquiry should be held at all, fairness requires that the President and the Council of State act honestly, without bias, and upon a genuine consideration of the petitions, but it does not require the importation of a second, anticipatory hearing the Constitution has not provided for and the structure for such exercise does not exist.

102. On the basis of the foregoing, we accordingly hold that, the right to a fair hearing is not denied but fulfilled by Article 146. It is located where the framers placed it, supplemented to by the check of the Council of State, and calibrated, as the principle has always been, to the investigative character of the screening and the adjudicative character of the inquiry. It is in the light of this understanding that we turn to the four questions.

(i) The antecedent-notification contention

103. We first take the contention of the **J1/18 Plaintiff** that the President was bound to notify the Chief Justice, and to obtain her comments and responses, before initiating the consultation with the Council of State which, in the context of his case, necessarily precedes any *prima facie* determination. The expression *prima facie* case is well settled in our law. As Ayebi JA put it in **REPUBLIC VS. IDDRISU IDDI ALIAS MBADUGU (THE YA-NAA CASE),(unreported) Suit No. BO1/14/2010 dated 29th March 2011** "***it means simply "that there is a ground for proceeding";*** it denotes such evidence which if unanswered, would justify the matter proceeding further. A *prima facie* determination does not

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determine rights; it determines only whether there is enough to warrant the inquiry at which rights will be determined.

104. The point is fortified by the settled understanding of a *prima facie* case in our law of evidence, from which the constitutional usage in *Agyei-Twum* borrows. In the criminal process, a *prima facie* case is that quantum of evidence which, if uncontradicted and believed, would be sufficient to call upon the accused to answer. It is, as our courts have repeatedly held, no more than ***"a ground for proceeding",*** and it is only after such a case has been established that the accused is called upon to give his side of the story. The establishment of a *prima facie* merely defines the evidential burden of the complainant or prosecution in a criminal case as comprising such material worthy of a rebuttal burden of going forward and never the ultimate which remains throughout upon the party who bore it at the outset.

105. The analogy is instructive. The *prima facie* determination under Article 146 of the Constitution performs the same utility. It asks only whether the petition, taken at its highest, would warrant an inquiry; it neither finds misbehaviour nor pronounces upon the merits. The Chief Justice's answer, her defence on the merits is given, before the Committee, exactly as the accused's answer is given at his trial and not at the committal. To require that, the full answer be given at the *prima facie* stage is to confuse the question whether there is a case to inquire into with the question whether the case is made out.

106. It is worth pausing on the criminal standard, for it has recently received careful attention and repays close study. The governing statement is that of this Court in **TSATSU TSIKATA VS. THE REPUBLIC [2003-2004] SCGLR 1068,** where, upon a submission of no case to answer, the Court held that the judge's function is not to decide guilt but to determine whether there is a genuine case for trial. That is, whether the evidence raises genuine factual issues fit to be

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resolved by the tribunal of fact because they might reasonably be resolved in favour of either side and that the standard at that stage is a *prima facie* case, in contradistinction to proof beyond reasonable doubt, because the defence has not yet had the opportunity to test the prosecution's case.

107. The foundations of the principle lie in the classic authorities of **STATE VS. ALI KASSENA [1962] 1 GLR 144** and **APALOO VS. THE REPUBLIC [1975] 1 GLR 156,** and it was restated by this Court in **ASAMOAH VS. THE REPUBLIC (CRIMINAL APPEAL NO. J3/4/2017, 26 JULY 2017**), where the grounds upon which a submission of no case may be upheld were collected and affirmed. A *prima facie* case, on this settled understanding, is established where the prosecution has led evidence on each essential ingredient of the offence such that, if the evidence is believed and remains uncontradicted, a reasonable tribunal could convict. It is decidedly not a finding that the tribunal *will* convict, still less that, it *has* convicted.

108. To hold that there is a case to answer is to decide nothing about ultimate culpability; the accused who is called to his defence is neither convicted nor presumed guilty, and may yet be acquitted in full. The ruling determines only that, the matter must proceed to the stage at which guilt or innocence will be tried, and at which the accused will, for the first time, put forward his answer.

109. In terms of Article 146 of the Constitution, the President's determination, in consultation with the Council of State that, a petition discloses a *prima facie* case is the exact analogue of a ruling that there is a case to answer. It asks only whether the petition, taken at its highest and assumed true, would warrant putting the matter to the Committee. It decides nothing about whether the Chief Justice has in fact misconducted herself or is in fact incompetent or infirm.

110. Just as in the criminal case where the accused makes his defence at his trial and not at the antecedent screening, so the Chief Justice makes her defence

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before the Committee under Clause (8) of Article 146 and not at the *prima facie* determination stage. And just as it would be a misconception to demand that, the accused be afforded a full trial before it may be decided whether he has a case to answer, so it is a misconception to demand that the Chief Justice be afforded the full Clause (8) hearing before it may be decided whether her case warrants an inquiry. To accept the submissions of the Plaintiff in **J1/18** would be to require, in effect that, the determinative hearing precede the very determination whether a determinative hearing is needed, an inversion the criminal law has never tolerated and the Constitution does not require.

111. We accept without hesitation, and so does the Learned Attorney-General that, the rules of natural justice pervade our constitutional order through Article 23 of the Constitution, as affirmed in **AWUNI VS. WAEC (supra)**. But, as we have explained in above, the content of natural justice is calibrated to its context, and the *audi rule* is a safeguard of substance rather than a rigid liturgy of procedure. The question, therefore, is not whether the Chief Justice is to be heard. Certainly she is, but the question is when? And on that question, we are satisfied that, the Attorney-General has the better of the argument.

112. The Constitution itself answers the interrogatory in Article 146(8) that, she is entitled to be heard in her defence before the Committee. The right is not denied; it is located. Applying the sequencing affirmed in *Ex-parte Yalley,* the letter of Clause (8) of Article 146 fixes the stage of the hearing without ambiguity, absurdity or injustice. There is therefore no occasion to call in the objective purpose to read into the Article an additional, antecedent hearing the framers did not provide. To do so, would not be to construe the spirit of Article 146 but to rewrite its letter.

113. The decisive authority is *Agyei-Twum.* It was that case which read into Article 146, the requirement of a prior *prima facie* determination, and it

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did so for one reason only: to protect the office of Chief Justice by sieving out frivolous and vexatious petitions. To convert that protective threshold into a forensic contest requiring full notice, disclosure and response before it may be crossed would be self-defeating. It would not strengthen the office; it would expose the office and indeed the constitutional procedure to the very contestation it was designed to avoid. As Prof. Date-Bah JSC foresaw, it would risk paralysing the top echelon of the Judiciary in satellite litigation over the procedure itself. The **J1/18** Plaintiff's construction would require a hearing before every *prima facie* determination, however plainly frivolous the petition, and would thereby defeat the protective purpose of the step. We respectfully reject it, and in doing so we accept the first of the Attorney-General's propositions.

114. We proceed now to evaluate the authorities marshalled by the **J1/18** Plaintiff, for they are the foundations of the natural justice tradition and we would not be thought to undervalue them. In **RIDGE VS. BALDWIN (supra)** the House of Lords restored to its proper amplitude the principle that, a man is not to be deprived of office or livelihood without being told the case against him and given the opportunity to answer it. That decision swept away the artificial confinement of natural justice to bodies labelled ***"judicial".***

115. In **KANDA VS. GOVERNMENT OF THE FEDERATION OF MALAYA (supra)** the Privy Council held that a tribunal acting judicially must give the person accused a fair opportunity to correct or contradict any relevant statement prejudicial to him. And in **REPUBLIC VS. STATE FISHING CORPORATION COMMISSION OF ENQUIRY (CHAIRMAN); EX-PARTE BANNERMAN [1967] GLR 536,** Adusei J. anchored these principles in our own constitutional context. None of this do we doubt. The principle that the Chief Justice must be heard is not in contest; the Attorney-General concedes it, and we affirm it.

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116. What these authorities do not establish is the proposition the **J1/18** Plaintiff needs, namely that the hearing must occur before the *prima facie* filter rather than at the inquiry. Natural justice is not a fixed quantum applied uniformly at every stage of every process; its content is shaped by the function being performed. The law has long distinguished between a decision that determines rights and a decision that merely sets in motion the process by which rights will later be determined.

117. Therefore, a committal, an indictment, a decision to prosecute, a grant of leave to bring proceedings each affects the person concerned, sometimes gravely, yet none attracts the full panoply of a hearing because the determinative hearing lies ahead. The distinction was drawn with characteristic clarity by Lord Denning, a celebrated distinguished Justice of the common law tradition, **MR in SELVARAJAN VS. RACE RELATIONS BOARD [1976] 1 ALL ER 12**, where he held that a body charged with making a preliminary investigation, or with determining whether there is a case to answer, need not hold a hearing of the full and formal kind that attends the final determination. It must act fairly, but the demands of fairness at the preliminary stages are of a lesser order than those that attach when rights are finally decided.

118. Thus, the *prima facie* determination under Article 146 of the Constitution is of this character. It opens, but does not close; it accuses, but does not condemn. The fair hearing it heralds is held, in full measure, before the Committee under Clause (8), where the Chief Justice may appear by herself or by counsel or other expert, test the evidence, and make her defence.

119. The taxonomy of judicial, *quasi-judicial, administrative and political functions,* on which the Attorney-General laid weight, must be handled with the caution our own jurisprudence enjoins. It is now settled through precedents such as **EX-PARTE ELECTORAL COMMISSION (METTLE-NUNOO) [2005-2006]**

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SCGLR 514 AND REPUBLIC VS. NATIONAL HOUSE OF CHIEFS; EX-PARTE AKROFA KRUKOKO II [2007-2008] SCGLR 173 that, the duty to act fairly is no longer confined to functions classified as judicial or quasi-judicial, but extends to administrative decisions affecting rights, by force of the common law and preserved in Article 126(2) of the Constitution, and Article 23 itself.

120. We shall not, therefore, rest our conclusion on a bare classification of the President's act as ***"political"*** and hence beyond the reach of fairness. The duty to act fairly attends the exercise of the removal power throughout. The point, rather, is the one already made: the duty of fairness, present at every stage, is discharged by a hearing located where the Constitution places it at the inquiry, and is not breached by the absence of an earlier, anticipatory hearing at the sieve. Nor are we able to accede to the **J1/18** Plaintiff's reliance upon the obiter observation in **DERY VS. TIGER EYE.**

121. We accept the Attorney-General's submission that the passage was not part of the *ratio* of that case, the issue there being the meaning of ***"in camera"*** and not the timing of any hearing. We accept, with the qualification we express below, that there is force in the distinction between the removal of Justice of the Superior Court and the removal of a Chief Justice, the latter being committed by the Constitution to the President acting in consultation with, and on the advice of, the Council of State.

122. We need not, for the disposition of this case, decide whether the *prima facie* determination in respect of a Chief Justice is wholly ***"political",*** for even on the footing most favourable to the Plaintiffs that, the determination carries a quasi-judicial colour, the content of the hearing it attracts is satisfied, on the authority of *Agyei-Twum*, at the Committee stage and not before it.

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123. There is a further reason why the **Dery case** does not apply. As we observed in construing the text, the framers drew an express distinction between the removal of other Justices of the Superior Courts (Clauses 4, 5 and 7) and the removal of the Chief Justice (Clause 6). The Dery case concerned the former. Whatever procedural incidents may attach to the receipt and screening of a petition against other Justices of the Superior Court, a matter on which we express no concluded view, the removal of the Chief Justice is committed by Clause (6) to the President acting in consultation with the Council of State, and by clause (10) to the President acting on that body's advice. The presence of the Council of State as a constitutional check is itself a structural safeguard against arbitrariness, peculiar to the case of the Chief Justice, and supplies part of the answer to the anxiety that the threshold might be crossed capriciously. The **J1/18** Plaintiff's attempt to carry the reasoning in the **Dery** case across the deliberate textual divide between clause (7) and clause (6) cannot, with respect, succeed.

124. We come, then, to the grievance disclosed by the **J1/18** Plaintiff's Relief (i): that the President referred the petitions to the Council of State before referring them to, or obtaining the comments of, the Chief Justice, that is, a complaint as to the sequence of the steps. The short answer is that, the Constitution prescribes no such sequence. Clause (6) requires the President to act ***"in consultation with the Council of State";*** it does not require him first to obtain the response of the Chief Justice before initiating that consultation.

125. To imply such a requirement therefore, would be to add a step the framers did not provide.The text is neither ambiguous nor productive of absurdity. The Attorney-General's reliance on settled practice, the sequence followed in the ***Agyei-Twum*** case itself, and in the December 2024 petition of Prof. Asare fortifies, rather than founds, this conclusion. It shows that, the construction we reach by the text is the construction that the practice of the Constitution, in Dicey's

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sense, has consistently borne. We are careful, however, to rest our decision on the text and structure of Article 146. The practice confirms, but does not create the law.

126. We add finally that, on the facts of this very case, the apprehension of unfairness is substantially attenuated. The Chief Justice was in fact furnished with copies of the three petitions, and was invited to submit, and did submit, preliminary responses, which were placed before the Council of State before the determination was made. Whatever the strict legal position as to entitlement, the suggestion that the Chief Justice was condemned unheard is not borne out by what actually occurred.

127. We have not overlooked the **J1/18** Plaintiff's most forceful point that the suspension of the Chief Justice, and the public announcement of a *prima facie* finding, inflict injury at the preliminary stage and before the full hearing. The point has weight, and we do not minimise it, nor underestimated the effect on a Chief Justice who by due process may be exonerated to return to her office. But two answers, taken together makes it misplace. First, the suspension is expressly authorised by Article 146(10), which empowers the President, acting on the advice of the Council of State, to suspend the Chief Justice. Thus, an injury that the Constitution itself sanctions, as an incident of the very process it ordains, cannot be the foundation for reading additional protections into the process.

128. The framers contemplated suspension pending inquiry and provided for it; that legislative choice however examined, is not for us to undo. Secondly, any reputational consequence of the announcement of a *prima facie* case is the consequence of a preliminary finding, not of a determination of guilt, and is repaired if the petition fails by the very inquiry that follows. The law tolerates the provisional disadvantage of being put to one's defence, in this as in every

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accusatorial process, because the determinative vindication lies ahead. The remedy for the **J1/18** Plaintiff's anxiety is a fair and expeditious inquiry under clause (8), not an anticipatory hearing that the Constitution does not provide.

(ii) The "published instrument" contention

129. The **J1/21** Plaintiff's distinctive contention is that, the removal power may not lawfully be exercised at all until a published Constitutional Instrument, enacted under Articles 296(c) and 11(7), regulates the President's *prima facie* discretion, the role of the Council of State, and the Committee of Inquiry; and that, for want of such an instrument, the entire process is a nullity. We are unable to accept this contention for three reasons.

130. First, Article 146 of the Constitution is self-executing. It confers the power; it identifies the actors (the President, the Council of State, and the Committee); it prescribes the composition of the Committee in the case of the Chief Justice (the President, acting in consultation with the Council of State, appoints a committee of two Justices of the Supreme Court, one of whom is chairman, and three other persons who are neither members of Parliament nor lawyers); and it guarantees both the right of hearing (Clause 8) and the ***in camera*** character of the proceedings. A power conferred and structured by the Constitution itself does not lie dormant for want of subsidiary legislation. To hold otherwise would be to allow the mere absence of a Constitutional Instrument to suspend a provision of the Constitution; a proposition irreconcilable with Article 1(2) of the very Constitution the Plaintiffs seek to protect.

131. Secondly, the authorities upon Article 296(c) do not bear the weight the **J1/21** Plaintiff places upon them. In the ***RANSFORD FRANCE (NO 3) and ELIKPLIM AGBEMAVA*** line of cases, this Court drew a careful distinction: where a discretionary power is quasi-judicial, regulations should ordinarily be published to guide it; but the want of such regulations is not fatal to the exercise of a discretion otherwise lawfully conferred. To read Article 296(c) as the J1/21 Plaintiff

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would have us read it as imposing a precondition of validity whose breach visits nullity upon every unregulated exercise of discretion would, as has been observed, produce a melt-down of governmental action that the framers could not have intended. The provision states a salutary counsel of good administration; it does not erect a condition precedent to constitutional validity. Nor does Article 11(7) assist the J1/21 Plaintiff. That provision gives a Constitutional Instrument, once made, the force of law; it does not command that one be made, still less that the absence of one shall paralyse a power the Constitution has itself conferred.

132. We take the J1/21 Plaintiff's three *loci* in turn. As to the President's discretion at the *prima facie* stage, that discretion is conferred, structured and confined by Article 146 itself and by the gloss in *Agyei-Twum*; it is to be exercised, as Article 296 requires of every discretion, fairly and without caprice, and it is reviewable by this Court for conformity with those requirements. A Constitutional Instrument might usefully channel it; its absence does not unmake it. As to the role of the Council of State, that role is conferred and defined by Article 146(6) and (10) themselves.

133. The Council is to be consulted, and in the case of the Chief Justice its advice binds the President. The Council's participation is thus not a discretion crying out for regulation but a constitutional function with its own textual contours; it stands in no greater need of an enabling instrument than the President's own. As to the Committee of Inquiry, its composition is prescribed by clause (6), and the essential incidents of its procedure that it sit in camera, and that it accord the Chief Justice a hearing by herself or by counsel or expert of her choice are guaranteed by clause (8). The Committee is, in addition, subject to the supervisory jurisdiction of the courts and to the duty of fairness imposed by Article 23, so that any departure from fairness in its actual proceedings may be corrected when and if it occurs. The contention that the Committee cannot lawfully sit until its procedure has been

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codified confuses the desirability of fuller rules with the legality of proceeding under the rules the Constitution already supplies.

134. Thirdly, the recommendations of the Constitution Review Commission and the Committee of Experts, however weighty as matters of policy, are exactly the recommendations addressed to the amending power and to Parliament. That reform ought to be undertaken is a matter *de lege ferenda* for the framers and the legislature; it is no warrant for this Court to mandate, by judicial fiat, the enactment of an instrument that the Constitution does not require as a condition of the power's exercise. We are conscious of, and we share, the misgivings expressed by Akuffo and Ocran JJSC in the ***Agyei-Twum*** case as to the sketchiness of the procedural provisions, and we express the hope that the process may in time be more fully regulated. But the remedy for a perceived gap lies in amendment or legislation, not in this Court holding a self-executing constitutional power to be inoperative.

135. It is worth dwelling on what acceptance of the **J1/21** Plaintiff's contention would entail, for the consequences expose its untenability. If a provision of the Constitution conferring a power could not be exercised until the legislature or the executive had enacted a regulating instrument, then the operation of the Constitution would be held hostage to the inaction of another branch. The removal mechanism in Article 146, a mechanism the framers entrenched to be available would lie dormant, indefinitely, at the pleasure of those who decline to legislate.

136. It is a dangerous prescription by the **J1/21** Plaintiff that, a Chief Justice who had demonstrably fallen into grave misbehaviour could not be removed, however compelling the case, until and unless an instrument were made. That cannot be the law. A self-executing constitutional provision carries within itself the authority for its own exercise; the doctrine that constitutional grants of power are presumed to be self-executing unless the contrary plainly appears is not a

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technicality but a bulwark of constitutional government. For, it denies to any branch a veto, by mere omission, over the operation of the supreme law. Article 146 provides the actors, the grounds, the composition of the Committee, the right of hearing, and the character of the proceedings; it wants nothing for its operation.

137. That, this is so is not a matter of theory only; it is the settled practice of this Court, which has more than once given effect to a constitutional provision without waiting for the enabling legislation the Constitution contemplated. The clearest illustration is the line of authority upon Article 22. Article 22(2) enjoins Parliament to enact legislation regulating the property rights of spouses, and Article 22(3) prescribes the principles such legislation must embody; yet that legislation is yet to actualize. This Court did not, on that account, hold the constitutional guarantee to be inoperative. In **MENSAH VS. MENSAH [2012] 1 SCGLR 391,** and again in **QUARTSON VS. QUARTSON [2012] 2 SCGLR 1077,** the Court gave direct effect to Article 22 by constitutional interpretation, declining to await the legislature.

138. As this Court put it in *Quartson,* it would defy common sense for the court to wait for Parliament to awaken from its slumber and pass the contemplated law. There, this court made a benign advance that a country's democratic development and the realization of the rights of its citizens cannot be stunted by the inaction of Parliament, and a litigant should not be made to bear the brunt of Parliament's failure to legislate. The principle was restated in **ARTHUR VS. ARTHUR [2013-2014] 1 SCGLR 543,** where the Court, observing that it was precisely in the absence of Parliament's implementation of the principles embodied in Article 22(3) that it had sought to implement them through constitutional interpretation. Thus where a positive constitutional injunction to legislate does not, when unfulfilled, suspend the operation of the right it secures, then *a fortiori* the absence of a merely facultative Constitutional Instrument cannot suspend the operation of the

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removal power in Article 146. The **J1/21** Plaintiff's contention therefore runs directly counter to a course this Court has deliberately and repeatedly taken.

139. We are conscious that the Article 22 line has been understood as an application of what is sometimes called the political process theory of constitutional interpretation, the view indeed that, this Court itself named in **PETER ADJEI VS. MARGARET ADJEI (SUIT NO.J4/6/2021) dated** 21st 2021, when it explained that, in the absence of a promulgated law, it had adopted that theory by directing a formula in the hope of influencing the policy of the State. The theory holds that the courts may, in a proper case, give effect to constitutional values where the ordinary political process has failed to do so. It lends further support to the proposition that the operation of a constitutional provision should never be at the mercy of legislative inaction.

140. But we are careful not to press the theory beyond its proper sphere, and in particular, we do not accept that, it assists the **J1/21** Plaintiff's larger submission that we should ourselves supply, by judicial fiat, the regulating instrument the framers did not require. The theory is, in its origin and its temper, a doctrine for the protection of the vulnerable and the unrepresented; those whose interests the majoritarian process is structurally liable to neglect. Neither the Chief Justice nor any Justice of the Superior Court nor the Executive is such a party, and the regulation of the removal process is not the vindication of a marginalized group's constitutional entitlement.

141. Therefore, to invoke the theory as a warrant for the Court to write the procedural code that Article 146 omits would be to convert a shield for the powerless into an instrument of judicial amendment. The lesson of the Article 22 line, properly drawn, is that, this Court gives effect to what the Constitution has provided without awaiting the legislature, not that it supplies what the Constitution

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has left unprovided. That lesson tells against suspending the removal power, and not at all in favour of conditioning it upon an instrument the Constitution does not demand.

142. The **J1/21** Plaintiff's reliance upon **BILSON VS. ATTORNEY-GENERAL [1981] GLR 24** is, with respect, misplaced, and indeed tells against him. The **BILSON Case** establishes that a settled practice, however long, cannot prevail against the clear command of the Constitution. That is an accurate position of the law. It did not mean what the **J1/21/** Plaintiff urges on us. It means that practice cannot defeat the Constitution. It does not mean that the Constitution requires a practice, or an instrument, that its text does not ordain. The **J1/21** Plaintiff invokes *Bilson* to strike down an exercise of power that conforms to the constitutional text on the ground that an instrument the text does not require was absent. That is to turn *Bilson* on its head. Where the Constitution itself is the source and measure of the power, conformity with the Constitution is the beginning and the end of the inquiry into validity. Nothing more, nothing less.

143. By the order of precedence under Article 11 of the Constitution itself, decisions of the court however exalted, cannot take precedence over statutory provisions let alone constitutional provision. Underlying all three of the **J1/21** Plaintiff's limbs is an invitation to this Court to legislate. To declare that the removal power must be regulated by a published instrument. To suggest that, it is suspended until one exists, would be to arrogate to the Judiciary a function the Constitution assigns to the framers or to Parliament (through amendment) or the executive (through subsidiary legislation).

144. The separation of powers, which is itself a structural principle of the Constitution, forbids it. Our function is to say what the Constitution requires, not to supplement it with the requirements we might think prudent. We are the more astute to observe this limit in a case of the present gravity, where the temptation

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to improve the machinery of so momentous a process is correspondingly strong. The wisdom of fuller regulation is not for us; its absence is not unconstitutionality.

(iii) Justiciability

145. We have already answered this question at the outset of our consideration. For the reasons there given, the matters raised are justiciable: the presumption of justiciability recognised in the ***Ghana Lotto Authority*** Case case is not displaced; the political-question doctrine does not oust our jurisdiction to test the exercise of the removal power against the Constitution; and the Attorney-General's characterisation of the removal as ***"political"*** goes to the intensity of our review, not to its availability.

146. We need only add, in the context of Question (3) as the parties framed it that, having examined the exercise of the power we are satisfied that it was exercised within the four corners of Article 146 of the Constitution the political quality of the actors conditions how closely we scrutinise, but it does not place their conduct beyond scrutiny.

The consequence

147. It follows from all that we have said that, neither the absence of an antecedent hearing at the *prima facie* stage nor the absence of a published regulating instrument vitiates the *prima facie* determination and the constitution of the Committee nor the suspension of the Chief Justice. There being no breach of the Constitution, there is nothing to declare null and void.

148. We should add that, even if we had found some procedural irregularity which we have not, it would not follow, as a matter of course that, the entire process is a nullity. Our law does not treat every departure from procedure as automatically void; the consequence of an irregularity falls to be assessed against its nature and effect, and nullity is reserved for defects that go to the root. The **J1/21** Plaintiff's prayer proceeds on the opposite assumption: that the want of an instrument, or of an anticipatory hearing, *ipso facto* annuls all that followed,

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including the suspension and the constitution of the Committee. Even on its own premise the prayer would be too broad; but as we have held that, there was no breach at all, the question of consequence does not arise, and the steps taken under Article 146 of the Constitution stand as validly performed.

CONCLUSION

149. We conclude by stating that, Her Ladyship Justice Gertrude Araba Esaaba Torkornoo, any Chief Justice, indeed any Justice of the Superior Court or some constitutional office holders as prescribed by the Constitution, are entitled to be heard upon the petitions for removal from office. That entitlement is not and shall never be in doubt and we affirm it without qualification. However, the Constitution itself locates that hearing at the inquiry conducted by the Committee under Article 146(8) of the Constitution, and does not confer an additional, antecedent right to be heard before the President initiates the consultation with the Council of State or before a *prima facie* case is determined.

150. In fact the *prima facie* stage is a protective threshold, not an adjudication of rights, and to convert it into a forensic contest would defeat the protective purpose for which this Court devised it in the *Agyei-Twum* case. Moreover, Article 146 of the Constitution is self-executing. Its operation is not suspended for want of a Constitutional Instrument under Articles 296(c) and 11(7), and the absence of such an instrument, though a proper subject for reform, is not a ground of nullity. The questions raised are justiciable, and we have determined them; but, on examination, the steps taken by the Constitutional duty bearers under Article 146 of the Constitution were taken in conformity with the Constitution. It follows that the consolidated action fails and is accordingly dismissed.

(SGD.) **I. O. TANKO AMADU**
(JUSTICE OF THE SUPREME COURT)

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(SGD.) **E. YONNY KULENDI**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **H. KWOFIE**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **S. DZAMEFE**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **H. AMALEBOBA**
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINIONS

ADJEI JSC:

The Plaintiff in the first suit filed a writ against the Attorney-General seeking the following reliefs;

> *"a. A declaration that upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23, 57(3) and 296 of the Constitution, the President is mandated to notify the Chief Justice about a petition for the removal of the Chief Justice and obtain his or her comments and responses to the content of such petition before*

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referring the petition to the Council of State or commencing the consultation processes with the Council of State for the removal of the Chief Justice;

b. *A declaration that upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23 and 296 of the Constitution, a failure by the President to notify the Chief Justice and obtain his or her comments and responses to a petition for the removal of the Chief Justice before triggering the consultation process with the Council of State constitutes a violation of Article 146(6) as well as the constitutional protection of the security of tenure of the Chief Justice who is a Justice of the Superior Court of Judicature stipulated in Article 146(1) of the Constitution.*

c. *A declaration that upon a true and proper interpretation of Articles 146(1), (2), (4), (6) and (7), 23,57(3) and 296 of the Constitution, a failure by the President to notify the Chief Justice and obtain his or her comments and responses to a petition for the removal of the Chief Justice before triggering the consultation process with the Council of State amounts to an unjustified interference with the independence of the Judiciary enshrined in Article 127(1) and (2) of the Constitution.*

d. *A declaration that the failure by the President to notify the Chief Justice and obtain her comments and responses to a petition for the removal of the Chief Justice before triggering the process for her removal, constitutes a violation of the fundamental right to a fair hearing contained in Articles 23 and 296, and renders the consultation processes for the removal of the Chief Justice initiated by the President null, void and of no effect.*

e. *Any other order(s) as to this Honourable Court may seem meet".*

The facts of the Plaintiff's claim are that the President of the Republic of Ghana received three petitions for the removal of Chief Justice Gertrude Araba Esaaba Sackey Torkonoo

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from office, after which the President consulted the Council of State in the discharge of his constitutional obligation. The President, after consulting the Council of State, made a prima facie determination and, under Article 146(6) of the Constitution of Ghana, 1992, appointed a committee to inquire into the petitions and recommend to the President whether the Chief Justice ought to be removed from office. The Plaintiff's position is that the President must have published a Constitutional Instrument to determine the *prima facie* case against the Chief Justice, and a published Constitutional Instrument must also regulate the appointment of the committee, and the President's failure to publish Constitutional Instruments for both instances renders the proceedings void. The Plaintiff therefore filed the instant writ to nullify the entire proceedings arising and relating to the three petitions submitted to the President upon which he made prima facie determination in consultation with the Council of State, the suspension of the Chief Justice, and the appointment of the Committee of inquiry under Article 146(6) of the Constitution, for failing to satisfy the provisions of Articles 296(C) and 11(7) of the Constitution of Ghana. The parties filed their respective statements of case, after which issues were raised to regulate the determination of the action.

The Plaintiff in the second suit also filed a writ against the Attorney-General for the following reliefs;

i. ***A declaration that pursuant to Articles 23, 146(6), and 296(b) and (c) of the 1992 Constitution, the exercise of discretionary power or authority by the President in determining the existence or otherwise of a prima facie case in respect of petitions for the removal of the Chief Justice ought to be regulated by a published Constitutional Instrument.***

ii. ***A declaration that pursuant to Articles 23, 146(6), and 296(b) and (c) of the 1992 Constitution, the constitutional role of the Council of State in assisting the President to determine the existence of a prima facie case and to be consulted on the appointment of a Committee of Inquiry under Article 146(6), must equally be***

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subject to transpare it regulation by a published Constitutional Instrument.

iii. ***A declaration that in light of Articles 23, 146(6) and (7), and 296(b) and (c) of the 1992 Constitution, the proceeding: of the Committee of Inquiry established under Article 146(6) to invest gate petitions for the removal of the Chief Justice must be governed by a published Constitutional Instrument which shall prescribe the procedures, scope, and limits of its discretionary powers.***

iv. ***An order nullifying the entire proceedings arising from and relating to the petitions submitted for the removal of the Chief Justice particularly, the determination of the prima facie case by the President with the advice of the Council of State, the suspension of the (Chief Justice, and the establishment of the Committee of Inquiry under Article 146(6) of the 1992 Constitution, for failing to first satisfy the provisions of Articles 296(c) and 11(7) of the 1992 Constitution.***

v. ***Any other orders), declarations), direction(s), or consequential reliefs) as this Honourable Court may deem just to protect the institutional independence of the Judiciary".***

The facts of the case are that the President received three petitions from three Ghanaians for the removal of Chief Justice Gertrude Araba Esaaba Torkornoo, after which the President consulted the Council of State and made a *prima facie* determination. According to the Plaintiff, the President proceeded to appoint a five-member committee under the Constitution to inquire into the petition and recommend to the President whether the Chief Justice ought to be removed from office. The Plaintiff contends that the true and proper interpretation of articles 146(1), (2), (4), (6) and (7), 23, 57(3), and 296 of the Constitution require the President to notify the Chief Justice about the petitions for her comments before consulting with the Council of State for her removal, and failing to comply with the relevant constitutional provisions amounts to unjustified interference

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with the independence of the Judiciary provided under Article 127 of the Constitution and renders the proceedings void.

The parties filed their respective written submissions, after which the Attorney-General filed a proposed memorandum of issues, which the Court adopted.

The issues filed in the first case are as follows:

"(a) ***Whether a Chief Justice is entitled to be given a hearing before a decision is taken whether to remove him or her from office.***

(b) ***Whether the President is required to take a response from a Chief Justice before the determination of whether a petition for the Chief Justice's removal from office establishes a prima facie case.***

(c) ***Whether the President is required to take a response from a Chief Justice on a petition for his or her removal before the commencement of the mandatory consultation process with the Council of State, and***

(d) ***Any other issue(s) that the Honourable Court may deem necessary".***

The issues filed in the second case are as follows;

"(a) ***Whether or not the President's determination of the existence of a prima facie case under Article 146(6) of the 1992 Constitution is mandated by virtue of Articles 23, 296(b) and (C), and 11(7), to be regulated by a Constitutional Instrument?***

(b) ***Whether or not the role of the Council of State in participating in the determination of a prima facie case under Article 146(6) of the 1992 Constitution ought to be regulated by a Constitutional Instrument?***

(c) ***Whether or not the proceedings and discretionary powers of a Committee of Inquiry established under Article 146(6) for the removal of the Chief Justice must be prescribed and regulated by a Constitutional Instrument?***

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(d) Whether or not the failure to comply with Articles 296(c) and 11(7) of the 1992 Constitution renders the entire removal process of the Chief Justice unconstitutional and void?"

This Court, on 28th May, 2026, consolidated both suits and adjourned the suits to 2nd July, 2026, for judgment.

The Plaintiff is a Ghanaian and qualifies under Article 2(1) of the Constitution of Ghana to seek either enforcement or interpretation of the Constitution without demonstrating a right. In the case of ***Bimpong Buta v General Legal Council [2003-2004] 2 SCGLR 1200,*** the Supreme Court, following its established jurisprudence in cases including ***Tuffour v Attorney-General [1980] GLR 637, New Patriotic Party v Attorney - General (CIBA Case) [1996-97] SCGLR 637, and Edusei v Attorney-General & Anor [1996-97] SCGLR 1,*** held that only a citizen of Ghana, either natural or physical, can invoke either the enforcement or interpretation jurisdiction of the Supreme Court.

The case of ***Republic v Special Tribunal, Ex Parte Akosah [1980] GLR 592*** laid down the four parameters within which the Supreme Court's interpretative jurisdiction may be invoked. The Court, under its jurisdiction under Article 118(1) (a) of the repealed Constitution of Ghana, 1979, which has been reproduced verbatim in Article 130 of the Constitution of Ghana, 1992, speaking through Anin JA, held at page 605, thus:

> ***"Summary of the Case Law on Enforcement or Interpretation. From the foregoing dicta, 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, 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 otherwise mean something different from or more than they say;***

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(b) where rival meanings have been placed by the litigants on 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, 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...he should certainly not invoke the Supreme Court's original jurisdiction under article 118."

The Plaintiff in the first case has raised three issues concerning the interpretation of several constitutional provisions, and the Court is bound to interpret them, as the Supreme Court's interpretative jurisdiction has been properly invoked.

The issues (a), (b), and (c) of the first Plaintiff suit are intrinsically related and concern the interpretation of Article 146 of the Constitution. The Court shall address them to provide an interpretation of the President's role from the date he receives a petition to remove the Chief Justice until he makes a prima facie determination and appoints a committee to inquire into the petition and make a recommendation.

The experts who drafted the Constitution of Ghana proposed, at page 132, paragraph 286(C), that the power to determine a prima facie case be vested in a Judicial Committee of the Council of State, consisting of five Justices of the Superior Court of Judicature. This proposal, however, was rejected by the Consultative Assembly. Instead, the Assembly proposed that the determination of a prima facie case should be exercised by the President, in order to preserve and protect the independence of the Judiciary from Executive control. It further provided that the duty of inquiry into the petition should be

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assigned to a Committee made up of neutral persons, including two Supreme Court Justices, one of whom is appointed as Chairman.

The Committee of Experts' proposal was intended to make the *prima facie* determination quasi-judicial in nature. However, the Consultative Assembly, which represented the various constituencies in Ghana as well as representatives of identifiable groups, rejected this approach and instead vested the power to determine whether a prima facie case exists in the President.

The legal inference that may be drawn from the Consultative Assembly's position, approved by Ghanaians through a referendum, concerns the role of the Chief Justice in petitions for the removal of Superior Court Judges and Chairmen of the Regional Tribunals. In considering a petition for the removal of the Chief Justice, the President is required, on a prima facie basis, that is, at first glance, to determine whether the facts contained in the petition disclose a case worthy of investigation. This is contrary to the Committee of Experts' proposal, which envisaged a quasi-judicial inquiry preceding any full investigation by the Committee appointed for that purpose.

To maintain the independence of the Judiciary, the President, acting in consultation with the Council of State, is required to perform a gatekeeping or preliminary function by reviewing the petition and determining whether a prima facie case has been made out. The President would, however, be exercising the Committee's exclusive mandate to inquire into and hear the petition if he were to require the Chief Justice to submit a response and then examine both the petition and the response before forming a view on whether a prima facie case exists.

The Plaintiff's position seeks to adopt an interpretation that would confer quasi-judicial power on the President in petitions involving the removal of the Chief Justice. Such an approach would empower the President to encroach upon matters affecting the Judiciary, thereby undermining its independence, which is protected as one of the entrenched provisions under Article 127 of the Constitution.

The purposive interpretation of Article 127 of the Constitution is that the Judiciary is insulated from Executive interference. The President does not have the authority to exercise quasi-judicial functions in the process of removing the Chief Justice from office.

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Any interpretation to the contrary would defeat the constitutional purpose and improperly confer quasi-judicial power on the President in matters concerning the removal of the Chief Justice.

The doctrine of separation of powers would be violated if the President were to consider both the petition and the response from the Chief Justice. In doing so, he would effectively assume the role of a judge by evaluating both documents and making findings based on them before referring the matter to the committee, which is exclusively vested with the mandate to hear and inquire into the petition.

The prima facie determination entrusted to the President is entirely different from the prima facie determination exercised by judges. For instance, in criminal jurisprudence, a prima facie determination is made by a judge in the exercise of judicial functions, after hearing the prosecution's witnesses and the accused's cross-examination, and being satisfied that all the ingredients of the offence have been established. Section 173(1) of the Criminal and Other Offences Procedure Act, 1960 (Act 30), which empowers the court to determine whether a prima facie case has been made out, provides as follows:

> "At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make the defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally or to make a statement."

The requirements for establishing a prima facie case are judicial in nature in criminal law and require reasons to be given. This has been well articulated in **Tsatsu Tsikata v The Republic [2003-2004] SCGLR 1068**.

Similarly, in interlocutory injunction proceedings, a judge considers the application, the affidavit in opposition, and the parties' written submissions before determining whether a *prima facie* case has been made out. The judge is required to consider all processes filed and conclude whether the applicant has a legal or equitable right deserving of protection, whether the case is not frivolous or vexatious, and whether the circumstances justify the grant of interlocutory relief. In **Vanderpuye v Nartey [1977] 1 GLR 428**, the Court of Appeal, speaking through Amissah JA, held that:

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"The requirement that an applicant for interlocutory relief should show a prima facie case is apparently a recent development in the English courts as a method of disposing of certain types of claim in Chancery."

The determination of a prima facie case in interlocutory injunction applications is thus a judicial function, undertaken upon consideration of all filed processes and accompanied by reasons.

By contrast, the duty imposed on the President to make a *prima facie* determination is primarily an executive function and a constitutional safeguard. It does not require the exercise of judicial or quasi-judicial power in a manner that would render the constitutionally mandated committee's work redundant. Nor does it permit the President to prejudge the merits of the matter.

In my opinion, the Plaintiff's argument conflates the President's preliminary filtering role with the adjudicatory function reserved for the committee, thereby undermining the constitutional separation between the Executive and the Judiciary. If the President were to evaluate evidence beyond the petition itself, he would effectively be prejudging matters that fall within the committee's exclusive competence.

The President's prima facie determination is therefore based on a threshold inquiry, not a merits-based assessment, the latter of which is reserved for the committee. Acting in consultation with the Council of State, the President makes a unilateral determination based solely on the petition and, upon being satisfied that a prima facie case has been established, appoints a committee.

All matters relating to the inquiry--including the service of the petition on the Chief Justice, the invitation for a response, and the observance of *audi alteram partem* through the taking of evidence from parties and witnesses- fall exclusively within the committee's mandate.

In **Johannesburg City Council v Knoetze [1969] SA 148(A),** the then-apex court of South Africa held that where a statute empowers a body to investigate a person, the appointment itself is merely preparatory. At that stage, the *audi alteram partem* rule does not apply, as no hearing is conducted and no rights are finally determined. However, where notice is given to the person under investigation to respond or make

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representations for the purpose of determining a prima facie case based on both the petition and the response, the process assumes a quasi-hearing character and ceases to be purely preliminary.

There are three essential elements of hearing in a broader sense, according to the committee. The first stage is when the notice of the petition's contents is delivered to the Chief Justice under investigation. Secondly, upon receipt of the petition, the Chief Justice shall be permitted to respond and participate in the hearing through the normal hearing process. Finally, the committee is required to render an unbiased decision based on the evidence before it.

The Plaintiff's position that the President, on receipt of the response from the Chief Justice, shall examine the petition and the response thereof, changes the determination of a *prima facie* case imposed on the President to the exercise of a judicial function, which is an affront to the spirit of the Constitution and fails to protect the judiciary from executive interference. The Plaintiff seeks to equate the President's housekeeping functions with judicial functions exercised by the judiciary. In ***Ridge v Baldwin A.C. 40 (H.L.) [1964***], Lord Reid discussed matters that affect rights or liabilities, not a housekeeping role to observe the rules of natural justice, whether judicial or administrative. At pages 79-80 of the report, he stated thus:

> ***"I had thought that it was a well-established that the principles of natural applied to the determination of all civil rights and liberties.***
> ***It may be that I was wrong, but I do not think that it was ever supposed that those principles applied only to proceedings before the courts."***

The President's filter role shall become a judicial function if he demands a response from the Chief Justice and establishes a *prima facie* case upon examining the petition and its response. The interpretation of the Constitution shall take into account the spirit behind the text to prevent the rendering of any decision that shall give the Executive the power to encroach upon the independence of the judiciary to violate Article 127 of the Constitution, which guarantees the independence of the Judiciary. Article 127 is an entrenched provision which prevents any attempt by the Executive to amend it without involving the entire citizenry of Ghana of voting age and having registered as voters.

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The Constitution provides for three stages, beginning with the President's *prima facie* determination. At this first stage, the President exercises a structured discretion, limited to determining whether, on the face of the petition, the allegations, if true or proved, are capable of amounting to stated misbehaviour, incompetence, or an inability to perform the functions of the office arising from infirmity of body or mind. Alternatively, the President may determine that the petition is groundless or unmeritorious, in which case it does not disclose a prima facie case warranting the appointment of a committee to inquire into it.

The second stage is the committee's inquiry, during which the principles of *audi alteram partem* are strictly observed. Following the hearing, the committee reaches a decision and makes its recommendation to the President.

The third stage is the President's constitutional duty to act on the committee's findings. At this stage, the President has no discretion to exercise; the duty is mandatory, and the President must give effect to the recommendation made by the committee established under the Constitution.

The exercise of structured discretion at the prima facie determination is limited in power, and there is a choice between whether a *prima facie* case has been determined or not. The law puts a fence around the structured discretion. It cannot be said to have been exercised capriciously, arbitrarily, or in a biased manner, whether by resentment, prejudice, or personal dislike, as envisaged by Article 296 of the Constitution. The regulation of the exercise of discretionary power provided by the Constitution, to be supported by a constitutional instrument, is not the type of structured discretion exercised to establish only a *prima facie* case in question, which is neither judicial nor quasi-judicial.

Based on the above analysis, all three issues have been resolved against the Plaintiff, rendering his entire case unmeritorious. The writ is accordingly dismissed as without merit.

All four issues raised in the second case are equally intertwined with the regulation of the President's appointment of a committee after the *prima facie* determination has been made.

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The Plaintiff's position is that any commission of enquiry that is appointed by a person who does not exercise a judicial function shall be regulated by a constitutional instrument to prevent a decision that will be capricious, arbitrary or biased. I will reproduce the two constitutional provisions and discuss their similarities and differences to satisfy myself as to whether the President is mandated to publish a constitutional instrument whenever he makes a *prima facie* determination and appoints a committee to investigate the Chief Justice.

Article 296 of the Constitution provides thus:

> ***"296. Where in this Constitution or any other law, discretionary power is vested in any person or authority—***
>
> ***(a) that discretionary power shall be deemed to imply a duty to be fair and candid;***
>
> ***(b) 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; and***
>
> ***(c) Where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power".***

Article 146 (6) of the Constitution provides thus:

> ***"(6) Where the petition is for the removal of the Chief Justice, the President shall, acting in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President, and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers."***

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Article 146 is specifically about the appointment of a committee. It provides its own procedure, which does not mention the publication of a constitutional instrument as a condition precedent for the appointment.

The *expressio unius expressio alterius* provides that the express mention of one excludes the other. Under Article 146, the Constitution does not mention the publication of a constitutional instrument, unlike Article 297, where publication is a *sine qua non* for the exercise of discretionary power under the Constitution, and each is independent. One cannot use provisions of Article 296 to apply to the exercise of discretionary power under Article 146, in my opinion.

The trite position of law is that where a law prescribes a particular procedure to use, it is that procedure alone that shall be used. In the appointment of a Commission of inquiry, the Constitution makes the publication of a constitutional instrument mandatory. Still, under Article 146 of the Constitution, the preliminary function of the Constitution does not require a constitutional instrument to regulate the Committee whose composition is provided for in the Constitution. In the case of ***Boyefio v NTHC Properties Ltd [1996-97] SCGLR 531*** at page 546, where it quoted ***Tularley v Abaidoo [1962] 1 GLR 411, SC,*** this court held thus:

> ***"For the law is clear that where an enactment has prescribed a special procedure by which something is to be done, it is that procedure alone that is to be followed."***

As discussed above, the President's determination of a *prima facie* case is an exercise of structured discretion that does not require reasons, and the constitutional instrument is not applicable, as canvassed by the Plaintiff. I hold that the Plaintiff's claims that a constitutional instrument is a condition precedent to the President's determination of a *prima facie* case; that a constitutional instrument is required to regulate the President's consultation with the Council of State; that the constitutional instrument prescribed for commissions of enquiry should also apply to the committee established by the President under Article 146(6); and that the President's failure to exercise his powers under Article 146 of the Constitution pursuant to a constitutional instrument renders the entire process void, are without legal basis. This is because a committee established under Article 146

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is a special constitutional committee for which the Constitution itself prescribes the applicable procedure.

Article 146 is a special provision that regulates the removal of Judges of the Superior Courts and Chairmen of the Regional Tribunals. Petitions shall be presented to the President for the removal of the judge concerned, alleging any one or more of three grounds, namely: stated misbehaviour, incompetence, or inability to perform the functions of office arising from infirmity of body or mind. The President, upon receipt of the petition, determines based exclusively on the petition and in consultation with the Council of State, whether there is a *prima facie* case. In the case of another Superior Court Judge or the Chairman of a Regional Tribunal, he refers the matter to the Chief Justice to determine whether there is a *prima facie* case.

The Article further provides for the composition and qualifications of the members of the committee that would investigate the inquiry. The proceedings of the committee are held *in camera*, primarily to safeguard the independence of the judiciary, protect innocent judges from having their reputations dented until official wrongdoing is proved, maintain and protect public confidence in the entire justice system, and empower persons, including witnesses, to share sensitive information in the absence of the media and the public. The committee conducts its independent inquiry into the petition and makes recommendations that are binding on the President upon receipt thereof.

Article 146 is a special provision, whereas the provisions under Articles 23, 296(b), and 296(c) are general; the law is settled in that regard. All four issues considered are without merit, and the meanings the Plaintiffs sought to ascribe to the constitutional provisions for interpretation are far-fetched and lack legal basis.

The Latin maxim les *specialis derogat legi generali* provides that a special law, such as Article 146 of the Constitution, prevails over Articles 23 and 296 of the Constitution. The application of the Latin *Maxim generalia specialibus non derogant* also provides that general laws, such as Articles 23 and 296 of the Constitution, do not derogate from Article 146 of the Constitution.

The purpose of Article 146 of the Constitution is special and should be interpreted purposively to distinguish it from other committees and commissions of enquiry

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established under the Constitution. The dominant purposive interpretation requires constitutional provisions to be read as a whole, taking into account the words in the Constitution according to their ordinary meaning and the context in which they are used, to make it a living instrument capable of adapting to changes occasioned by time and circumstances, and to keep pace with the advancement of social conditions in the country. In purposive interpretation, reliance is not placed solely on the linguistic context; consideration is given to the subject matter, scope, purpose, and, to some extent, the background.

The Plaintiff's interpretation failed to take into consideration the subject matter of interpretation, which is the removal of judges on three stated grounds; the scope of the law, which relates to Justices of the Superior Court and Chairmen of the Regional Tribunals; the purpose, which is to ensure confidentiality to protect judicial independence and safeguard judges to maintain public trust in the judiciary; and the background, which concerns the turbulent conditions judges have endured since independence and particularly during military regimes prior to the coming into force of the Constitution, necessitating protection of their security and tenure. The Plaintiff sought to treat these special provisions alongside all other provisions of the Constitution, giving them a literal meaning, which is unacceptable in constitutional interpretation. Article 146 was enacted as an entrenched provision to distinguish it from executive manipulation. It should therefore be respected and treated differently from other committees and commissions established under the Constitution, which are not entrenched.

Lord Davey, in the case of ***Canada Sugar Refining Co v R [1898] AC 735 at 741,*** on the need to construe a statute as a whole statutory to make it consistent with the other provisions of the law, held thus:

> ***"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make consistent enactment of the whole statute or series of statutes relating to the subject matter."***

Where in the eighteenth century statutory interpretation took into consideration context, subject-matter, and scope, in this era, where the 1992 Constitution has been held to be

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a living instrument capable of growth and embodies the soul of the people of Ghana in the sense that Acts of Parliament cannot achieve, it should be construed as *sui generis* to convey its organic nature. Any interpretation of the Constitution that uses technicalities to defeat its purpose should be disregarded.

Flowing from the analysis made above, the Plaintiff's claim is dismissed as unmeritorious, as the purported interpretations sought are liberal and fanciful.

(SGD.) D. ADJEI
(JUSTICE OF THE SUPREME COURT)

SUURBAAREH JSC:

I have had the privilege of reading the lead judgment of my learned brother, and president of the panel, as well as the supporting opinions of other colleagues, and I agree with the reasoning and conclusions especially that of the president in his lead judgment.

The consolidated suits invoke the interpretative and enforcement jurisdiction of this Court under articles 2(1) and 130(1)(a) of the Constitution 1992. The original jurisdiction of the Supreme Court under articles 2(1) and 130(1) of the Constitution is a special jurisdiction which can be invoked by any citizen of Ghana, human and artificial. See the definition of a "person" in article 2(1) of the constitution in the following cases: **Bimpong Buta v General Legal Council and Another [2003-2004] SCGLR 1200; Agyei-Twum v Attorney-General and Another [2005—2006] SCGLR 732,** and **New Patriotic Party v Attorney General [CIBA case) 1996-97] SCGLR 727**. The authorities also show that a person invoking the special jurisdiction of this Court under articles 2(1) and 130(1), need not show any special interest in the matter, but is only to show that he is a citizen of Ghana, and that the relief(s) being sought are in the public interest. The plaintiffs in both cases have capacity to invoke this Court's original jurisdiction, and from

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their reliefs, have equally demonstrated that the declarations they are seeking are in the public interest.

I will next consider whether the plaintiffs have met the test for the invocation of the special jurisdiction of this Court, as laid down in several cases, including **Republic v Special Tribunal; Ex parte Akosah [1980] GLR 592; J.H. Mensah v Attorney General [1996-97] SCGLR 320; Republic v High Court (Fast Track Div.) Accra; Ex parte Electoral Commission (Mentile Nunoo and Others – Interested Parties) [2005-2006] SCGLR 514;** and, **Tsatsu Tsikata (No. 2) v Attorney General (No. 2) [2001-2002] SCGLR 620**.

From articles 2(1) and 130(1)(a), invoking the interpretative or enforcement jurisdiction of the court, plaintiff must show the existence of a genuine question of interpretation or enforcement. Thus in **Adwomoa II v Adu Twum [2000] SCGLR 165 at 167**, Acquah JSC said:

> "The original jurisdiction vested in the Supreme Court under articles 2 and 130(1) of the 1992 Constitution to interpret and enforce the provisions of the constitution is a special jurisdiction meant to be invoked in suits raising genuine or real issues of interpretation of the Constitution; or a question of whether an enactment was made ultra vires Parliament or any other authority or person by law or under the Constitution ... "

In the locus classicus case of **Republic v Special Tribunal; Ex parte Akorsah [1980] GLR 592 at 605**, the Court of Appeal, sitting as the Supreme Court, held that in interpreting of the provision of article 118(1) of the 1979, which is in *pari materia* with article 130(1) of the 1992 Constitution, laid down the following four grounds as basis for seeking interpretation:

> *"(a) where the words of the provisions were imprecise or ambiguous, put another way, it would arise if one party invites the court to declare that the*

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words of the article had a double meaning or were obscure or else meant something different or more than they were said;

(b) where the litigants had placed rival meaning on the words of any provision of the Constitution;

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

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

In **Edusei (No. 2) v Attorney General [1998-99] SCGLR 753 at 771 to 772,** Kpegah JSC said that in determining the scope and extend of the original jurisdiction, articles 2(1) and 130(1) must be read together, and that in so doing, the exclusive original jurisdiction of the Court can be said to be in the following situations:

(a) the enforcement of all provisions of the Constitution, except those provisions contained in chapter five dealing with Fundamental Human Rights; or

(b) the interpretation of any provision of the Constitution; or

(c) the issue whether an enactment is inconsistent with any provisions of the Constitution.

Speaking on the purpose of the jurisdiction conferred on the Supreme Court by articles 2(1) and 130(1) of the Constitution, Gbadegbe JSC (of blessed memory) said in **Biebiel (No. 1) v Dramani and Another [2011] 1 SCGLR 132 at 145 to 146:**

"In our opinion, the jurisdiction conferred on the Court in making declarations under article 130(1) complied with the ancillary power conferred under article 2(2) to 'make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to, be given, to the declaration so made' is an effective tool in ensuring and/or compelling observance of the constitution. These provisions require the Court to measure acts of the legislative and executive

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branches against the constitution and where there is a violation, to declare such acts unconstitutional provided that the act in question does not fall within the designation of a political question".

From the reliefs being sought in both actions as well as the memoranda of issues and the legal submissions, the plaintiffs have properly invoked the jurisdiction of this Court and we are satisfied that a genuine question of interpretation and enforcement has been raised in both suits.

Irrespective of the approach used, the purpose of interpretation should promote the rule of law; values of good governance; and the advancement and protection of fundamental human rights and freedoms, for the development of the people.

As stated by Sowah JSC in **Tuffour v Attorney General [1980] GLR 637**, a written Constitution like ours, is not an ordinary Act of Parliament, as it embodies the will of the people and mirrors their history, aspirations and hope and should be considered as having both its letter as well as its spirit; and as such, its language should be considered as a living organism capable of growth and development, and thus requires that a broad and liberal spirit be adopted in its interpretation. Also see **Adjei-Twum v Attorney General (supra), and Ransford France (No. 3) v Electoral Commission [2012] 1 SCGLR 705**.

Although the purposive approach of interpretation is now in vogue, we should never loose sight of the caution given by Wood CJ in **Republic v High Court (Fast Track Division) Accra; Ex parte Valley (Gyane & Attah – Interested Parties) [2007-2008] 1 SCGLR 512** that where the subjective or literal purpose advances the framers' intention and leaves no ambiguity, absurdity or injustice, it is not proper to resort to the objective purpose approach to reach a different result and that the objective purpose approach is useful only where, upon reading the provision as a whole, and applying every known aid

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to interpretation, the meaning of the provision remains clouded in absurdity, irrationality or injustice.

In exercising its special jurisdiction to interpret provision of any law or the Constitution, this court should be wary not to extend its interpretative authority into the realm of law making or amendment of provision of any law or the Constitution.

Bearing the above principles in mind, I shall now deal with some of the issues that arise in the consolidated suits. Beginning with whether the prima facie determination under article 146 requires a judicially reasoned opinion, a cursory look at the meaning of the latin maxim *prima facie* will show that it is a decision made on the face of the material after an initial examination. This Court in **Dery v Tiger Eye P.I. & Ors. (Suit No. J1/29/2015) of 4th February 2016,** explained the words in the following terms:

> *"... the expression prima facie signifies that upon an initial examination of a case there is sufficient evidence to warrant further detailed inquiry. It may also mean that on the available evidence it is sufficient to prove a fact unless it is rebutted. Under clause (3) of article 146 prima facie is used in the first sense. In the context of impeachment proceedings, it means the petition raises serious issues bordering on misconduct, misbehavior or incompetence or physical infirmity; and notwithstanding whatever response the respondent has to offer, the Chief Justice believes the petition deserves further investigation".*

This is a stage where on the face of petition and the documents available to the President and the Council of State, the question is asked, "does the person against whom the petition is submitted have a question to answer". The President and the Council of State at this stage does not determine the guilt or otherwise of the person. It merely examines the petition and the attachment and decisions whether there is a need for further investigation. Such a decision does not require reasons, being a preliminary assessment of the petition.

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In the Kenyan case of **Chetembwe v Tribunal Appointed to Investigate into the Conduct of Hon. Justice Said Juma Chetembwe (Petition E001 of 2023) [2023] KESC 114 (KLR) of 28th December 2023,** where the appellant argued that the Judicial Service Commission (JSC) that established the prima facie case and referred the case to the President with recommendation that a Tribunal be set up by the President for the removal of the appellant, did not conclusively determine the validity of the allegation before such recommendation, the Supreme Court in holdings (4) and (5) said:

> *"4. The standard to be attained before the petition was sent to the President was entirely subjective, depending on the material placed before the JSC. Whether the petition was filed by a person or whether the JSC was in possession of some information, regardless of the source, pointing to a questionable conduct of the judge, it had to consider the petition or information and satisfy itself that the complaint disclosed facts constituting grounds for the judge's removal. The JSC was expected to evaluate the facts and only if it was satisfied that a ground or grounds for removal had been disclosed will recommend to the President to constitute a Tribunal. The JSC was not simply a conduit pipe by which complaints were channeled to the President. It must be convinced that the complaint disclosed prima facie evidence against the judge and that the complaint was serious ..... to warrant a representation to the President.*
>
> *5. In considering whether a ground of removal had been disclosed, and being concerned only with prima facie evidence, the JSC was not required or expected to make definitive conclusion whether the allegations against the judge had been proved. It was expected to act in good faith, to accord the judge the opportunity to understand the accusations and to be guided by the provisions of article 47 of the Constitution on the fair administrative action. It could not be the JSC mandate to conduct a full-fledged inquiry with witness being cross-examined. That was the preserve of the Tribunal where the actual hearing took place"*

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Per article 89(1) of the Constitution, the Council of State is to advise the President in the performance of his functions. It does not therefore play any legislative or judicial role, and eventhough it advises the President on bills to be laid before Parliament and on appointments under the Constitution, it does not also play the role of the executive branch of Government. In its determination of a prima facie case in respect of a petition under article 146, it does not play a quasi-judicial role, but only an advisory role, and is therefore not required to give judicious reasons for its decision on a prima facie case. This Court on 28th May 2025, speaking through Tanko JSC, in the case of **Her Ladyship Justice Gertrude Araba Esaaba Sackey Torkornoo v Attorney-General & 5 Others, Suit No. J1/22/2025**, even said that whilst it would be in the interest of justice that reasons accompany judicial or quasi-judicial outcomes, that there was no known jurisprudence that a decision rendered without detail reasons is thereby a nullity. Having regard to the role of the Council of State, as an advisory body, it was not required to give reasons for its decision on a prima facie case.

In my opinion, the primary purpose of the prima facie assessment by the Council of State is to determine if the allegations are serious, non-frivolous and supported by facts warranting further and full interrogation by the committee of inquiry. It is during investigations, by the Committee that the Chief Justice would be accorded the right to defend herself or by counsel or any expert of her choice, and also to call witnesses, that a judicially reasoned decision would be given.

As to whether the suspension of the Chief Justice in the performance of her duties during the period of investigations by the Committee set up under article 146(6) constitutes an interference with the independence of the judiciary under article 125(1) of the Constitution, the power to suspend lies with the President, acting in accordance with the advise of Council of State vide article 146(10)(a). Although the permissive word "may" is used, the framers of the Constitution nevertheless provided for suspension during investigations, conscious of the provision in article 125(1).

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The framers of the Constitution distributed power among the three arms of government and also went on to provide checks and balances so that power would not be concentrated in one branch. Article 146 places the power to remove a Chief Justice in the hands of the executive, for stated misbehaviour, incompetence or infirmity of mind or body, and once the law which sets out the removal process is followed, and, on grounds which are not frivolous or in bad faith or capricious, this cannot be said to constitute an interference with the independence of the judiciary.

Having regard to the position of the Chief Justice as the head of the Judiciary, with power to transfer and empanel judges, one can well imagine the situation where a Chief Justice who is under investigation by a Committee set up under article 146(10) of the Constitution will still be in office performing her full judicial and administrative duties.

I will also deal with the issue of whether the finding of a prima facie case by the President, acting in consultation with the Council of State under article 146(6); and, whether the Committee of Inquiry established under article 146(6) of the Constitution must be governed by a published constitutional instruments as mandated by articles 23 and 296(b) and (c) of the Constitution? Suffice it to say that article 146(6) is a mandatory provision. The President in the exercise of his duty under article 146(6) does not exercise a discretion, he is bound to appoint the committee once a prima facie case has been found. Article 296 does not therefore apply to article 146 duty of the President.

On whether there should be published constitutional instruments guiding the finding of a prima facie case under article 146(6) or the proceedings of the committee of inquiry set up thereunder, apart from the fact that the constitution does not make any such provision, a call on this Court to read into the meaning of article 146(6), such a condition precedent, will be a call on this Court to amend the constitutional provision, and not to interpret it. In any case, article 146 is self-executing, and the absence of enabling legislation will not invalidate actions taken under it.

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Under the 1992 Constitution of Ghana, there are several constitutional directives, worded in mandatory language for Parliament to pass law to provide for this or that. Eventhough in most instances but which have not this has not been done, it has in no way affected the operations of those provisions and the institutions involved, or the operation of the law. Constitutional effectiveness requires that constitutional provisions be interpreted in a way as to make them workable, and to avoid the situation of constitutional paralysis. Article 22 of the Constitution for instance provides in mandatory terms that Parliament should enact a law on matrimonial property sharing. This has not been done, yet the courts have continued to make orders on the distribution of matrimonial properties upon divorce, without those orders being invalidated. There are many such dormant directives, e.g. article 71(5) on the appointment of an independent emolument body; article 201 on the law for the effective operation of the Electoral Commission; and, article 240(2) on a law to ensure the devolution and delegation of power and functions from the central government to the District Assemblies.

Ghanaian case law has shown that failure by Parliament to legislate in breach of its duties, should not stop the constitutional provision from operating. It was thus held in **New Patriotic Party v Attorney-General [1993-94] 2 GLR 35,** where the Constitution creates a right or institution, lack of enabling legislation does not kill it. In any case, article 11(6) of the Constitution provides that the existing law must be construed with such modification, adaptations and qualification to give effect to it.

The last issue I want to touch on is the one about whether the Chief Justice, or for that matter a justice of the Superior Court or Chairman of a Regional Tribunal, who is under investigations by a Committee of Inquiry set up under article 146 can choose to waive his/her right to an in camera hearing? Article 146(8) provides as follows:

> *"(8) All proceedings under this article shall be held in camera and the Justice or Chairman against whom the petition is made is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice".*

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The provision as couched, is mandatory and to accede to a call by the person under investigation to waive his/her right to the in camera hearing is a call on the court to breach the constitution, which the judges by their oaths of office, have sworn to uphold, preserve, protect and defend.

In any case, this Court in all cases under article 146 have emphasized the need to protect the integrity of the judiciary as an institution, and the reputation of the judge during the investigations, as well as the witnesses appearing before the Committee; hence the need for such hearing to be held in camera. See **G.B.A. v Attorney-General [1995-96] 1 GLR 598 at 660; Adjei-Twum v Attorney General** (supra), as well as **Dery v Tiger Eye PI** (supra).

(SGD.) G. S. SUURBAAREH
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