IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: AMEGATCHER JSC (PRESIDING)

PROF. KOTEY JSC

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

TORKORNOO (MRS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

WRIT NO.

J1/01/2021

31ST MAY, 2023

1. **GHANA CENTER FOR DEMOCRATIC DEVELOPMENT**
2. **GHANA INTEGRITY INITIATIVE**
3. **CITIZEN GHANA MOVEMENT**
4. **AFRICA CENTER FOR ENERGY POLICY**
5. **PARLIAMENTARY NETWORK AFRICA** — **PLAINTIFFS**
6. **PENPLUSBYTES**
7. **MEDIA FOUNDATION FOR WEST AFRICA**
8. **SEND GHANA**
9. **ONE GHANA MOVEMENT**

VS

ATTORNEY-GENERAL ……. DEFENDANT

JUDGMENT

AMEGATCHER JSC:-

INTRODUCTION

The plaintiffs are civil society organisations (CSOs) respectively incorporated under the laws of Ghana. The plaintiffs issued the present writ on the 26th day of October 2020, invoking the exclusive original jurisdiction of the Supreme Court under articles 2 (1) and 130 (1) of the Constitution for the interpretation and enforcement of articles 70 (1) (b) and 71(1), 187 (3), (5), (7) (a), (8), (12), and (13) and Article 297(a) of the Constitution 1992, of Ghana. The writ, in effect, questions the constitutionality of a directive issued from the office of the Presidency, requesting the Auditor-General to proceed on his accumulated leave with immediate effect and subsequent appointment or designation of Johnson Akuamoah Aseidu as Acting Auditor-General.

The plaintiffs are seeking the following reliefs per their writ:

a) A Declaration that on a true and proper interpretation of Articles 70(1)(b), 71(1), 187(3), (5), (7)(a), (8), (12) and 297(a) of the 1992 Constitution, the directive issued by or on behalf of the President on or between 29th June 2020 and 3rd July, 2020 instructing the Auditor-General to proceed on "accumulated" leave with effect from 1st July, 2020 for a prescribed number of days determined by the President, are void and of no legal effect, because the said directives are inconsistent with the letter and spirit of the aforementioned provisions of the Constitution as they improperly interfere with the independence and functions of the Auditor-General.

b) A Declaration that the purported appointment or designation by or on behalf of the President on 30th June 2020 of one Mr Johnson Akuamoah Aseidu as "Acting Auditor-General" is void and of no legal effect, as the said appointment stands

contrary to Articles 70(1)(b), 187(3) and (7) of the 1992 Constitution as well as the Second Schedule to the Constitution.

c) A Declaration that on a true and proper interpretation of Articles 70(1)(b), 187(3) of the Constitution, the power to appoint, authorize or designate a person or persons to exercise a power or perform a function constitutionally assigned to the Auditor-General is vested solely in the Auditor-General; therefore, the purported appointment of a person as 'Acting Auditor-General' and subsequent performance of the functions of the Auditor-General violated the letter and spirit of the aforementioned provisions of the Constitution and are void and without any legal effect whatsoever.

d) A Declaration that on a true and proper interpretation of 71(1), 187(12) and 297(a) of the Constitution, the leave entitlement of the Auditor-General is like his salary, a right associated with his office as an independent constitutional officeholder and does not constitute or give rise to an obligation which the Auditor-General is duty-bound to assume or else, be compelled so to do at the instance and insistence of the President.

e) An Order of perpetual injunction to restrain the President or his agents from issuing or seeking to enforce on the Auditor-General any directive that has the purpose or effect of commanding the Auditor-General to take his leave or to surrender any of his powers or functions to another person.

f) An Order of perpetual injunction to restrain the President or his agents from designating or appointing any person as "Acting Auditor-General" to exercise a constitutional power or perform a constitutional function of the Auditor-General without authorization from the sole duly appointed Auditor-General; and

g) Any other consequential orders that this Honourable Court may deem appropriate under the circumstances.

SUMMARY OF FACTS

On 29th June 2020, a letter from the Office of the President signed by his Secretary, Nana Bediatuo Asante, and a press release issued by the Director of Communications at the Office of the President, Eugene Arhin, directed Mr Daniel Domelovo, the Auditor-General to take his accumulated annual leave of 123 working days effective 1st July 2020. The letter also directed the Auditor-General to hand over all matters relating to his office to one Mr Johnson Akuamoah Asiedu, a Deputy Auditor-General in the Audit Service, to act as the Auditor-General until Mr Domelovo resumes his leave. Two reasons were given in the first instance for the directive. The first was that the directive was made pursuant to sections 20 (1) and 31 of the Labour Act, 2003 (Act 651). The second was that the President took into account a precedent in 2009 by a former President of the 4th Republic, President John Evans Atta Mills, where a similar directive was issued requesting a former Auditor-General, Mr. Edward Dua Agyeman to proceed on his accumulated annual leave.

The Auditor-General proceeded on the leave as directed and, in a letter dated 3rd July 2020, wrote to the President to reconsider his decision due to the wide implications of the decision on the independence of the office of the Auditor-General and the legality of the concept of accumulated annual leave in the light of the existing the laws of the land. In response to the Auditor-General's letter, the secretary to the President wrote to direct him to take his annual leave for 2020 in addition to the accumulated leave to bring the total number of leave days to 167. Further, the 3rd July letter gave a third reason for the President's directives, i.e., that per Article 297 of the Constitution, 1992, the President, as the appointing authority, has the power to exercise disciplinary control over the Auditor-General to ensure he complies with the terms of his appointment (taking his leave from 2017 to 2019 which he has failed to take). It was stated that the enforcement of the leave

did not affect the independence of the Auditor-General, under the Constitution, 1992. Following these events, the English-speaking section of the African Organisation of Supreme Audit Institutions (AFROSAI-E) petitioned the President to reconsider his decision, followed by a similar statement from the International Organisation of Supreme Audit Institutions (INTOSAI), but none yielded any positive results, leading to the present action.

CASE OF THE PLAINTIFFS

The plaintiffs argue that the Constitution of Ghana, 1992, is organized and structured in accordance with the doctrine and principles of Separation of Powers, Checks and Balances. Thus, the Constitution establishes not only the traditional three branches of government but also provides for the establishment of special purpose office or institutions charged with specialized constitutional functions and mandates to be carried out and administered independently of external control or directions. These institutions or Independent Constitutional Offices (ICO) the plaintiffs state includes the Electoral Commission (EC), the Commission on Human Rights and Administrative of Justice (CHRAJ), National Media Commission (NMC), National Commission for Civic Education (NCCE) and the Auditor-General.

The plaintiffs further argue that the Constitution, 1992 of Ghana guarantees the independence of ICO's in four ways. Firstly, these institutions do not form part of the three branches of government. Secondly, the ICO's are granted some financial autonomy and operational sustainability by charging, their administrative expenses, salaries, allowances, and pensions directly to the consolidated fund. Thirdly, the heads of these institutions are granted security of tenure in that their retirement age is specifically provided for by the constitution as well as the process by which they are removed from office. Lastly the Constitution provides that in the performance of their functions, they shall not be subject to the direction or control of any person or authority.

In a further submission, the plaintiffs assert that, the framers of the Constitution understood and intended the audit function of the country to be performed by one person, the Auditor-General, and the Audit Service was established to serve and support the functions of the Auditor-General but not to supplant the Auditor-General.

The plaintiffs contend that the directives issued by the President, commanding the Auditor-General to proceed on accumulated leave and appointing an Acting Auditor-General, constitute a violation of the provisions stipulated in the Constitution, 1992. According to the plaintiffs, the constitutional provisions pertaining to the office of the Auditor-General unambiguously affirm the independence of the office. They argue that the President's directive, or those of the President's agents, mandating the Auditor-General to take accumulated leave, amounts to interference in the office's affairs by the President, thereby impeding the constitutionally guaranteed independence of the office.

The plaintiffs maintain that the framers of the Constitution intentionally safeguarded the Auditor-General's office from direct or indirect control by external authorities, except for the regular jurisdiction of the courts. They contend that the Auditor-General's office is constitutionally designated as independent, and any form of interference by any authority, through directives or otherwise, would undermine constitutional principles, obstruct anti-corruption efforts, and subvert the irreplaceable independence of the Auditor-General. The plaintiffs assert that although the Auditor-General is subject to appropriate checks and balances, such accountability mechanisms do not place the office under the administrative supervision of the President.

The plaintiffs also contend that the position of Deputy-Auditor General in the Audit Service does not make them deputies to the office of the Auditor-General in a constitutional sense. The plaintiffs hinge this contention on the appointment process, condition of service which is different from that of the Auditor-General and the fact that they do not subscribe to the Auditor's oath. Therefore, the presence of the Deputy Auditor-General does not transform the constitutional architecture of the Auditor-General from a unipersonal into a multi-member or collegial body like CHRAJ or the

Electoral Commission. The plaintiffs submit that, it is untenable for the President or his agent to appoint another person to act as Auditor-General in the temporal absence of the Auditor-General, having regard to the Auditor-General's power per article 187 (3) without his express authorisation or direction. The plaintiffs further submit that where the Constitution intended that the function or duty entrusted to a particular office be performed by another person, during a temporal absence or unavailability of the substantive office holder, it expressly provided for that. The plaintiffs refer to article, 60 (8) 128 (3) in support.

CASE OF THE ATTORNEY GENERAL

The learned Attorney General argues that the plaintiffs have improperly invoked the Original Jurisdiction of the Supreme Court, but nonetheless proceed to argue the case on its merits. The Attorney General contends that the Constitution, 1992 provides varying degrees of independence to different institutions. Thus, while certain provisions of the Constitution grant independence to specific institutions through the language it employs, other provisions of the Constitution mandates certain institutions to act as constitutional checks on their management and operation.

The Attorney-General also maintains that independence can take various forms or degrees, including individual, institutional, and administrative independence. Thus, an institution may possess functional independence, allowing it to conduct its operations and fulfill its entrusted functions and duties, without necessarily having individual or institutional independence. Referring to the intent of the 1968 constitutional proposals, the Attorney-General argues that the independence granted to the Auditor-General by the Constitution, 1992 is functional rather than complete institutional, administrative, and managerial autonomy.

The Attorney-General further contends that although the law may not grant an institution complete institutional autonomy, it can explicitly and implicitly regulate the discharge of functions of a specific office and grant independence to that institution in terms of its functions. Thus, the Attorney-General submits that administrative independence relates

to the freedom or liberty in managing an institution's affairs and that when an institution is granted administrative independence, it has the absolute discretion to administer and manage its affairs without influence from other state institutions. The Attorney-General contends that the Auditor-General's independence is only evident in Article 187(7), particularly in relation to the functions outlined by the constitutional provision.

The Attorney-General once again submits that Article 24 of the Constitution as well as sections 20 (1) of the Labour Act guarantees the right of every employee for annual leave and creates an obligation on the employee to enjoy this right. It further imposed on the employer an obligation to enforce the leave. Hence the directive by President dated 29th June, 2020, did not violate the functional independence of the Auditor-General, as administration of leave is not part of the functions of the Auditor-General. According to the Attorney-General, the directive to proceed on leave was necessitated by the deteriorated relationship between the Auditor-General and the Audit Service Board and the failure of the Auditor-General to recognize the administrative function of the board, entrusted by the Constitution, including the regulation and management of leave for employees of the service. Moreover, the President as head of government, and repository of executive power for enforcing laws of Ghana, has the power to enforce the accumulated leave of the Auditor-General. According to the Attorney-General, the fact that the Auditor-General plays a watchdog function does not change the nature or character of the office; the Auditor-General is not only part of the public service but also part of the executive or government just like the Attorney-General who also play a watchdog function and is also part of government. And the role of the Auditor-General is more of an internal auditor rather than external auditor as contended by the plaintiffs. The Attorney-General also submits that the office of the ICOs and the judiciary are not regular public offices like the Auditor-General's office, which the President can exercise control over.

Lastly, the Attorney-General argues that the office of the Auditor-General should be viewed separately from the person who occupies it. The Attorney-General argues that should the plaintiffs' argument prevail, suggesting that the constitution does not provide

for an acting Auditor-General, it would mean that the President cannot appoint an acting Auditor-General when the substantive officeholder is on leave. According to the plaintiffs, this is because the office is considered personal to the officeholder.

DELAY BY PARTIES TO FILE PROCESSES PENDING BEFORE THE COURT

It is regrettable that an action of this nature should take three years for determination before this Court. The plaintiff filed their writ and statement of case together on 26th October 2020. Even though the rules provide a time limit of 14 days from the date of service to file a response, it took the office of the Attorney-General eight months to file its statement of case in response on 23rd June 2021. It appears the plaintiffs went to sleep and took no steps to have the matter heard or compel the Attorney-General to file his response. After this date, the Memorandum of agreed issues, which was required by rule 50 of C.I. 16 to be filed to enable the Registrar to list the case for hearing for the court to give further directions under rules 51 and 53 of C.I. 16, was also delayed by the parties for another year until 23rd June 2022. The Registrar fixed the case for hearing on 18th January 2023 and 29th March 2023, but the panel was not duly constituted until 17th May 2023. On that day, the Court adopted the memorandum of agreed issues as the issues for determination subject; however, to our right to sift through the issues and deal only with issues germane to resolving the claim before it. The Court then adjourned the writ to 31st May 2023 for judgment.

In the case of **Buckman v Ankomayi [2013-2014] 2 SCGLR 1372,** this Court held per Vida Akoto-Bamfo JSC at 1379 that:

"**Rules of Court are not ornamental pieces. They are meant to be complied with**."

Again, in **Oppong v Attorney-General [2000] SCGLR 275** where the plaintiff, after filing his writ, failed to comply with the rules of the Supreme Court by filing a statement of case within the time prescribed by the rules and the defendant took no steps to have the

writ struck out under the rules, Bamford-Addo JSC commented on the purpose of the rules of court in the following words at 279:

"Many a time, litigants and their Counsel have taken the rules of procedure lightly and ignored them altogether as if those rules were made in vain and without any purpose. Rules of procedure setting time limits are important in the proper administration of justice, they are meant to prevent delay by keeping the wheels of justice rolling smoothly. If this were not so parties would initiate action in court and thereafter go to sleep only to wake up at their own appointed time to continue with such litigation at their pleasure. If this were allowed litigation would grind to a halt, a sure recipe for confusion and inordinate delay in the due administer of justice."

Apart from the failure of the parties to comply with the rules, scanning through the rules, it appears that certain provisions had defects that encouraged such laxity in their compliance and enforcement. We discovered that after the parties had filed their respective statements of case, no time limit existed within which to file the Memorandum of agreed issues, and no sanctions existed for default with those provisions that have set timelines. We call on the Rules of Court Committee to take a second look at the Supreme Court Rules to provide timelines for every activity and sanctions for default in complying with the rules.

ISSUES FOR DETERMINATION

As stated above, the parties filed a joint memorandum of issues on 23rd June 2022, comprising the following:

"

1. Whether or not the instant action is moot on account of the retirement of Mr. Daniel Yaw Domelovo, judicial notice of which the Supreme Court can take.
2. Whether or not the instant action properly invokes the original jurisdiction of the Honourable Court under article 2 (1) and 130 of the Constitution, 1992.

3. Whether or not the Auditor-General has functional independence, as opposed to individual, institutional, administrative and managerial independence, as asserted by the plaintiffs?
4. Whether or not the Auditor-General is a unipersonal office as asserted by the plaintiff, not subject to the Audit Service Board?
5. Whether or not the appointment of an acting Auditor-General when the Auditor-General is on leave violated the Constitution?
6. Whether or not the directive of the President dated 29th June, 2020, violates the functional independence of the Auditor–General?
7. Whether other than as provided for in the removal provisions of article 146 of the Constitution, 1992 the President of the Republic of Ghana may exercise control or "discipline" directly or indirectly over acts or omission of the Auditor-General pursuant to article 297 (a), despite the provision of the Constitution–article 187 (7) guaranteeing the independence of the Auditor–General?
8. Whether the President may, as and when he deems fit, lawfully instruct or direct by a fiat the Auditor–General to take the leave entitlement guaranteed to him as of right under the Constitution, 1992?
9. Whether under the Constitution, 1992, the President or his agent may lawfully appoint or designate any other person to act as Auditor-General or to exercise the powers and perform the functions of the Auditor-General without the express authorization of the Auditor-General while the office of the Auditor-General has not been vacated? "

Having carefully considered the joint memorandum of issues filed by both parties, the Court has identified the following essential and pertinent issues as germane to resolving this matter.

1) Whether or not the instant action is moot on account of the retirement of Mr. Daniel Yaw Dormelovo, judicial notice of which the Supreme Court can take?

2) Whether or not the instant action properly invokes the original jurisdiction of this Court under Articles 2(1) and 130 of the Constitution, 1992?

3) Whether or not the directive of the President dated 29th June 2020 violates the functional independence of the Auditor-General?

4) Whether, other than as provided for in the removal provisions of Article 146 of the Constitution 1992, the President of the Republic of Ghana may exercise control or "discipline" directly or indirectly over the acts or omissions of the Auditor-General pursuant to Article 297(a), despite the provisions of the Constitution, Article 187(7) guaranteeing the independence of the Auditor-General?

5) Whether under the Constitution 1992, the President or his agents may lawfully appoint or designate any other persons to act as Auditor-General or to exercise the powers and perform the functions of the Auditor-General without the express authorization of the Auditor-General while the position of the Auditor-General has not been vacated?

MOOTNESS OF THIS WRIT

The learned Attorney-General has raised a preliminary issue regarding the potential mootness of this matter following the retirement of the Auditor-General, Mr Daniel Yaw Dormelovo. The doctrine of mootness applies when, during a lawsuit or claim proceedings, an event or changed circumstances transpire that render the continued hearing or determination of the claim pointless or unnecessary. See **DR. BIMPONG-BUTA, THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF CONSTITUTIONAL LAW IN GHANA, PAGE 136.**

This is no novelty about the question of mootness. This court has dealt with it on some occasions. In the case of **J.H. Mensah v Attorney-General [1996-97] SCGLR 320**, the Attorney General lodged a preliminary objection against the hearing of the claim. The

objection was based, among other things, on the contention that the plaintiff's claim had become moot and that there was no longer any live question requiring determination. This was because, subsequent to the issuance of the writ, the government had presented the names of the ministers in question to the newly constituted Parliament for approval. The Supreme Court, in a unanimous decision, rejected the preliminary objection based on the doctrine of mootness. The court stated as follows:

> "*The principle guiding the court in refusing to decide moot questions was quite settled. If the question, though moot, was certainly not likely to recur, the courts would not waste their time to determine questions and issues which were dead. Thus, for a court to decline deciding a moot question, it had to be established that subsequent events made it absolutely clear that the allegedly wrong behaviour could not reasonably be expected to recur. Since no such proof had been established in the instant case, and the court could not be certain that the issue might not recur, the court would go into the question to forestall multiplicity of suits and for the guidance of future governments and Parliaments*."

In a subsequent decision, the Supreme Court meticulously examined the principles of granting or denying an action based on the mootness doctrine. This occurred in the case of **Amidu v Kufuor and Ors [2001-2002] SCGLR 86**, where the court provided detailed insights. The relevant excerpts from the judgment per Kpegah JSC at 163-164 are as follows:

> *"To read the doctrine of mootness into article 2 of the Constitution, 1992 will be a dangerous step to take. A breach of the Constitution, 1992 cannot be countenanced under any circumstances; nor can any plea of extenuating circumstances be allowed to prevail. A Constitution cannot be operated and defended by such considerations, lest we put expediency above constitutionalism.* ***The mootness doctrine can easily expose the Constitution, 1992 to frequent breaches resulting in subsequent loss of sanctity.*** *A Constitution must be a sacrosanct document and must remain so in all situations or circumstances. And it cannot remain inviolate as a sacred document if certain alleged infringements are denied judicial attention because there are extenuating or special circumstances justifying such a breach.* ***There cannot be any plea of justification when***

a breach of the Constitution is alleged; otherwise, this court could be accused of casting an indulgent judicial eye on certain breaches, by certain persons, of the fundamental law." [Emphasis is Mine]

The above decisions provide valuable guidance on applying the mootness doctrine to the effect that if a question, despite being moot, were not likely to arise again in the future, the court would decline to address it, invoking the mootness doctrine. However, before refusing to decide a question on mootness grounds, it was necessary to establish that subsequent events had unequivocally demonstrated that the alleged wrongful conduct would not reasonably occur again. In cases where such a clear establishment was lacking (as was the main issue under consideration), the court would examine the question to prevent the proliferation of multiple lawsuits. It is pertinent to note that actions that have the capacity for repetition or possess the potential to undermine the rule of law ought to undergo constitutional examination. This is evident in American Jurisprudence, where the doctrine of mootness is firmly based in Article III, Section 2, Clause 1 of the United States Constitution. Despite this foundation, the United States Supreme Court has established various exceptions to the general mootness principles. These exceptions are found to recognise the necessity to address cases likely to recur or carry significant implications for upholding the Rule of Law.

Consequently, this Court must recognise a significant part of the facts culminating in the commencement of this matter. EXHIBIT AUD-GEN A, which is the Press Release, mentioned a purported precedent in 2009, where the then President John Evans Atta Mills allegedly instructed the former Auditor-General, Mr Edward Dua Agyeman, to utilise his accrued annual leave of approximately two hundred and sixty-four (264) working days. The press release titled "PRESIDENT AKUFO-ADDO DIRECTS AUDITOR-GENERAL TO TAKE HIS ACCUMULATED ANNUAL LEAVE" states in paragraphs 4 and 5 as follows:

"*Recalling the events of 9th April 2009, during the tenure of the late Prof. Evans Atta Mills as the 3rd President of the 4th Republic, it is noted that he directed Mr Edward Dua*

Agyeman, the then Auditor-General, to take his accumulated annual leave of approximately two hundred and sixty-four (264) working days.

President Akufo-Addo considered this historical precedent when instructing the Auditor-General to utilize his accrued annual leave of one hundred and twenty-three (123) working days."

Considering these factors, it is incumbent upon this Court to recognise that in cases where allegedly unconstitutional behaviour has the potential to establish future executive precedents, it cannot be dismissed on the grounds of mootness. Actions that are capable of repetition or have the potential to undermine the Rule of Law should be subjected to constitutional scrutiny. Based on the principles enunciated above by this Court, we consider reliefs a and b as matters which may recur as they happened in 2009 and 2020.

However, relief 'e' seeks our order to perpetually restrain the President or his agents from commanding the Auditor-General to take his leave or surrender any of his powers or functions to another person. We take judicial notice of the fact that after the directive given to the Auditor General to proceed on leave, the Auditor General had, in the course of the leave, attained the compulsory retirement age of 60 years and is, therefore, constitutionally barred from continuing in office. Based on this Court's decision in **Appiah Ofori v Attorney-General [2010] SCGLR 484** that the compulsory retirement age of the Auditor General is 60 years or such other extension that he may be given up to a maximum of five years, any such order requested from us, if made, would be brutum fulmen. Accordingly, relief 'e' is moot and is hereby dismissed.

In the case of relief 'f', we are requested to restrain the President or his agents from appointing any person as "Acting Auditor-General" without authorization from the sole duly appointed Auditor-General. Again, we take judicial notice that a substantive Auditor-General has been appointed to fill the vacancy after the retirement of the then-office holder. The order requested from us is moot and, accordingly, dismissed.

Relief 'g' requests us to make other consequential orders that we may deem appropriate in the circumstances. One such order this Court could make in the event of concluding

that the act of the President in directing the Auditor-General to proceed on leave was unconstitutional would be to ask him to return from leave and continue his functions in his office. The Auditor-General's retirement would make it impossible to make such an order. This relief is also moot and is dismissed.

PROPER INVOCATION OF THE ORIGINAL JURISDICTION OF THIS COURT UNDER ARTICLES 2(1) AND 130 OF THE CONSTITUTION, 1992?

The Attorney General submits that the plaintiffs' action fails to properly invoke the jurisdiction of the Court in accordance with Articles 2(1) and 130(1) of the Constitution. The Attorney General argues that for a matter to come under the original jurisdiction of the Supreme Court, it must relate to one of the three specific matters delineated in Articles 2(1) and 130(1) of the constitution, namely enforcement, interpretation, or allegations of excess powers of Parliament. According to the Attorney General, the plaintiffs' writ and the reliefs sought do not fall under any of the three matters envisaged by Articles 2(1) and 130(1) of the Constitution, 1992.

It is firmly established that the Supreme Court holds exclusive original jurisdiction over all matters pertaining to the enforcement or interpretation of the Constitution, 1992. Consequently, individuals have the right to seek from the court a declaration that a specific enactment, an action conducted under the authority of an enactment, or any act or omission by an individual is inconsistent with or contravenes a provision of the Constitution. Furthermore, it has been consistently emphasised that the court's jurisdiction, as delineated in Articles 2(1) and 130(1) of the Constitution, encompasses both enforcement and interpretative dimensions.

In the words of **Acquah JSC (as he then was)** in **Amidu v Kufuor (supra)** at **100**:

"There is no doubt that the 1992 constitution prescribes a government consisting of three branches: the legislature, executive and the judiciary, each playing a distinct role. Apart from these three branches of government, the constitution also establishes a number of offices, bodies and institutions. Now each of these branches of government, offices, bodies and institutions is, of course, subject to the Constitution and is therefore required to operate within the powers and

limits conferred on it by the Constitution. And in order to maintain the Supremacy of the Constitution and to ensure that every individual organ, body or institution of state operates within the provisions of the Constitution, authority is given in article 2 thereof, to any person who alleges that the conduct or omission of anybody or institution is in violation of a provision of the Constitution to seek a declaration to that effect in the Supreme Court... It follows therefore that no individual or creature of the Constitution is exempted from the enforcement provision of article 2 thereof. No one is above the law. And no action of any individual or institution under the Constitution is immune from judicial scrutiny if the constitutionality of such an action is challenged…"

See also the cases of **Sumaila Bielbiel v. Dramani [2011] 1 SCGLR 132, Kor v. Attorney-General & Justice Duose (2015-2016) 1 SCGLR 114, Kan II & Ors v. Attorney-General & Ors (2015-2016) 1 SCGLR 691, AND Dr Isaac Annan & Anor v. Attorney-General (Writ No. LL/14/2019, Dated 31ST March 2022).**

However, when a party, specifically the plaintiff, seeks to enforce the provisions of the Constitution, it is necessary to first interpret those provisions before addressing the issue of their enforceability. This principle is explicitly stated in the case of **Osei Boateng v National Media Commission & Appenteng [2012] 2 SCGLR 1038** at holding (2):

> *"The requirement of an ambiguity/imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for exclusive original interpretation jurisdiction under Articles 2(1) and 130 of the 1992 Constitution…"*

When seeking to invoke the exclusive original jurisdiction of the court for interpretation and enforcement, plaintiffs must demonstrate, through their writ and the reliefs sought, that their case raises a genuine and substantial issue requiring interpretation or enforcement. This requirement is particularly significant because, while the four principles enumerated by Anin JA in **Republic v. Special Tribunal; Ex Parte Akosah [1980] GLR 592** hold importance, Anin JA emphasised that there is no need for a case of "enforcement or interpretation" when the language of the Constitution article in question

is clear, precise, and unambiguous. Therefore, to invoke the court's jurisdiction for interpretation and enforcement, the plaintiffs must establish that their case presents an issue that necessitates interpretation or enforcement beyond what is already clear and unambiguous in the Constitution. Thus, in **Ghana Bar Association v Attorney-General & Anor (Abban Case) [1995-96] 1 GLR 598 Bamford Addo stated at 615 that:**

> **"***In deciding the issue of jurisdiction, matters to take into consideration include the statute which invests jurisdiction as well as the true nature of the claim having regard to the pleadings, issues and reliefs sought or the actual effect of the reliefs, regardless of words used or the manner in which the claims and reliefs are couched."*

The Attorney-General submits that the reliefs sought by the plaintiffs do not raise any issue in the legitimate invocation of this Court's original jurisdiction. For that matter, there is no cause of action by examining the reliefs sought by the plaintiffs. He submits that carefully considering the reliefs sought will disclose that the plaintiffs' writ is devoid of a cause of action. However, considering the authorities above and closely examining the plaintiffs' reliefs (a) and (b), it is evident that an enforcement issue arises. The reliefs in question are as follows:

The reliefs claimed by the plaintiff are as follows:

a) A Declaration that on a true and proper interpretation of Articles 70(1)(b), 71(1), 187(3), (5), (7)(a), (8), (12) and 297(a) of the 1992 Constitution, the directive issued by or on behalf of the President on or between 29th June 2020 and 3rd July, 2020 instructing the Auditor-General to proceed on "accumulated" leave with effect from 1st July, 2020 for a prescribed number of days determined by the President, are void and of no legal effect, because the said directives are inconsistent with the letter and spirit of the aforementioned provisions of the constitution as they improperly interfere with the independence and functions of the Auditor-General.

b) A Declaration that the purported appointment or designation by or on behalf of the President on 30th June 2020 of one Mr. Johnson Akuamoah Aseidu as "Acting

Auditor-General" is void and of no legal effect, as the said appointment stands contrary to Articles 70(1)(b), 187(3) and (7) of the 1992 Constitution as well as the Second Schedule to the Constitution.

Upon careful examination of the plaintiffs' reliefs (c) and (d) in isolation, one would arrive at the same conclusion as the Attorney General, namely that there is no genuine issue of interpretation or enforcement. The Attorney General places considerable weight on the plaintiffs' relief (c), which he argues supports its position that the plaintiffs only attempt to force a constitutional issue out of the facts before the court through their strained interpretation of certain constitutional issues mentioned in their writ. However, when considering the entirety of the reliefs, it is incumbent upon the court to determine whether a genuine breach of the constitution or a lack of clarity in any of the provisions has been sufficiently raised to warrant action under Articles 2(1) and 130(1) of the Constitution.

Thus, the legality or constitutionality of the directive requesting the Auditor-General to proceed on leave needs to be ascertained, especially against Articles 187 (7), (12) and (13) as well as the other constitutional provisions in issue. We disagree with the Attorney-General's submission that the plaintiffs have no cause of action on this score. The plaintiffs' writ properly evokes the exclusive original jurisdiction of this Court.

CONSTITUTIONALITY OF THE DIRECTIVE OF THE PRESIDENT DATED 29TH JUNE 2020

Articles 70 and **71** of the **Constitution, 1992** reads as follows:

"***ARTICLE 70 - APPOINTMENTS BY PRESIDENT***

(1) The President shall, acting in consultation with the Council of State, appoint—

(a) The Commissioner for Human Rights and Administrative Justice and his Deputies;

(b) ***The Auditor-General;***

(c) The District Assemblies Common Fund Administrator;

(d) The Chairmen and other members of—

(i) The Public Services Commission;

(ii) The Lands Commission;

(iii) The governing bodies of public corporations;

(iv) A National Council for Higher Education howsoever described; and

(e) The holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution"

*"**ARTICLE - 71 DETERMINATION OF CERTAIN EMOLUMENTS***

(1) The salaries and allowances payable, and the facilities and privileges available, to—

(a) The Speaker and Deputy Speakers and members of Parliament;

(b) The Chief Justice and the other Justices of the Superior Court of Judicature;

(c) The Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and his Deputies and the District Assemblies Common Fund Administrator;

(d) The Chairman, Vice-Chairman, and the other members of—

(i) A National Council for Higher Education howsoever described;

(ii) The Public Services Commission;

(iii) The National Media Commission;

(iv) The Lands Commission; and

(v) The National Commission for Civic Education;

Being expenditure charged on the Consolidated Fund, shall be determined by the President on the recommendations of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State".

The cases of **Appiah-Ofori vs Attorney-General [2010] SCGLR 484** and **Ayine vs Attorney-General Writ No JI/05/2018 dated 13th May 2020** (unreported) have established the unique category of public offices to which the Auditor-General belongs under Article 70 of the Constitution. Although there are differences in the interpretation of this class of public officers, it is essential to note that they are distinct from other public officers created either by the Constitution, 1992 or the authority of Parliament under Article 190 (1) (d) of the Constitution.

The decisions in these cases highlight that the Constitution has created a special class of public offices with specific procedures for appointment and removal, which differ from those applicable to other public officers. In the case of Ayine vs Attorney-General [Supra], the Court emphasised that the officeholders under Article 70 play critical constitutional roles essential for maintaining and progressing our democracy. The court concluded that these officeholders constitute a distinct class separate from those envisaged in Article 190 of the Constitution.

According to Article 187(13) of the Constitution, 1992, the Auditor-General, a public officer belonging to a special class, can only be removed from office in a manner analogous to that of a Superior Court Judge. This provision establishes a distinctive procedure for removing the Auditor-General, highlighting the importance and independence of the office. The specific wording of Article 187(13) is as follows:

"***ARTICLE 187 (13)***

The provisions of article 146 of this Constitution relating to the removal of a Justice of the Superior Court of Judicature from office shall apply to the Auditor-General."

Article 146(1) of the Constitution, 1992, on the Removal of Justices of Superior Courts and Chairmen of Regional Tribunals states that:

> **"***A Justice of the Superior Court or a Chairman of a Regional Tribunal shall not be removed from office except for stated misbehaviour or incompetence or on ground of inability to perform the functions of his office arising from infirmity of Body or mind.***"**

It is evident that the Constitution, 1992 guarantees the security of tenure for the Auditor-General, similar to that of a Superior Court Judge. The Constitution explicitly outlines the circumstances under which a Superior Court Judge (and, by extension, the Auditor-General) can be removed from office. This clear and unambiguous specification ensures that the Auditor-General can only be removed from office in accordance with the prescribed procedures. However, it should be noted that the retirement age of the Auditor-General has been judicially interpreted in the case of **Appiah-Ofori v Attorney-General [Supra]**, where the issue before the court was whether the Auditor-General should retire at the age of sixty years as stated in section 10 (4) of the Audit Service Act, 2000 (Act 584) or seventy years which is the retirement ages for the other Article 70 office holders. By a majority of 6-3, the Court determined that the Auditor-General is to retire at sixty years, except in cases of specific exceptions provided by the law. Quoting from the words of Dotse JSC in that case**:**

> "*In a country where there is a prevalent belief, among party foot soldiers and even well-educated individuals, that every public office holder must be swept clean from office with the advent of a new government, regardless of their security of tenure,* ***it becomes necessary to protect the office holders under Article 70, either through specific constitutional provisions or in line with the spirit and intent of the Constitution***" [Emphasis added]

Again, Date-Bah JSC in **Agyei Twum & Anor v. Attorney-General [Supra]** stated as follows:

> "*The fact that a country had a written constitution did not mean that only its letter might be interpreted.* ***The courts had the responsibility for distilling the spirit of the Constitution from its underlying philosophy, core values, basic structure, the history, and nature of the country's legal and political systems****, etc. in order to*

determine what implicit provisions in the written constitution would flow inexorably from that spirit." [Emphasis is mine]

To comprehend the spirit of the Constitution, it is crucial to delve into the historical antecedents of the office of the Auditor-General. The plaintiffs have undertaken a commendable task in shedding light on this matter. By examining the historical context, we can gain valuable insights into the intended role and significance of the Auditor-General's office as envisioned by the framers of the Constitution. First, the **REPORT OF THE COMMITTEE OF EXPERTS (CONSTITUTION) ON the PROPOSAL FOR A DRAFT CONSTITUTION OF GHANA (1991)** provides valuable insights into the subject. On pages 2-3 of the report, the following revelations are made:

"***2. APPROACH TO OUR WORK***

As required by Law 252, the Committee took into account the following documents:

1. *The Constitutions of 1957, 1960, 1969, and 1979*
2. *The above-mentioned NCD Report*
3. *The Constitutions of other countries*
4. *Several memoranda submitted to us from the public."*

During the process of establishing the Constitution 1992, significant consideration was given to the constitutional practices and experiences of the 1st, 2nd, and 3rd Republics, as well as the lessons learned from the governments of the National Redemption Council (NRC), the Supreme Military Council (SMC), and the Armed Forces Revolutionary Council (AFRC). The developments that had taken place in the preceding ten years were also considered. As stated in the report:

"3. The Committee operated on the cardinal principle that we should not re-invent the wheel. Accordingly, wherever we found previous constitutional arrangements appropriate, we built on them. In this connection, with appropriate modifications, we relied substantially on some of the provisions of the 1969 and 1979 Constitutions of Ghana to the

extent that they are relevant to the general constitutional structure proposed in this report."

The Proposals of the Constitutional Commission for a Constitution for Ghana (1968), (AKUFO-ADDO REPORT) highlighted the significance of security of tenure for the Office of the Auditor-General. In paragraph 601 on page 161 of the report, it stated:

> "*These proposals make the Auditor-General, as he should be, an important link in the chain of financial control in this country. He should therefore be a person who should have freedom of mind and the tenure of office normally granted to a judge, that is, he can only be removed from office like a judge of a superior court of record. We also propose that the salary and allowances of the Auditor General should be a charge upon the consolidated fund, so also would be the salary and allowances payable to members of his administrative staff, including the gratuities and pensions. Finally, we propose that the accounts of the Auditor-General himself should be audited and reported upon by an auditor appointed by the National Assembly.*"

The Report emphasises the importance of granting the Auditor-General security of tenure comparable to that of a judge of a superior court of record. It also suggests that the Auditor-General's salary and allowances and those of their administrative staff should be funded from the consolidated fund. Additionally, the report proposes that the accounts of the Auditor-General should be audited by an auditor appointed by the National Assembly. Thus, without any arguments, it is apparent that the Auditor-General fulfils a substantial role, which requires safeguarding their tenure and precludes any disruption in their work, such as being directed to proceed on work leave. The significant role that the Auditor-General plays is the reason why his tenure has been secured and cannot be disrupted by directives from any authority, such as the Presidency or the Audit Service Board, to proceed on work leave. Though the Auditor-General is a necessary member of the Audit Service Board, which in his absence cannot meet and transact any business, he is not subject to the direction or control of the board whose role is limited to corporate

governance, the overall performance and discipline of the Audit Service staff excluding the Auditor-General.

According to Wood CJ in **Brown v Attorney-General [2010] SCGLR 183:**

> *"True, external auditing remains one of the critical building blocks of good governance in any democratic system of government. It constitutes a key oversight accountability mechanism in public financial management in respect of or in relation to persons and institutions entrusted with state resources, hence the extensive provisions covering the office of the Auditor–General and the Audit Service, the constitutional oversight body mandated, under the direction of the Auditor-General, to carry out this important function. The constitutional provisions under reference underpin and secure their independence- political, administrative, and financial- and insulate the service against all forms of external pressures. But I do think that the independence relates more to political and administrative operations, whilst the financial independence, is in a way limited."*

Further, the **AKUFO-ADDO REPORT** of 1968 provided at paragraphs 599 and 601 as follows:

> *"599. We think that the draw-back suffered by the Auditor-General in not being able to deal effectively with people having management of public funds should be done away with and that his hands should be strengthened for purposes of audit. We therefore propose that the Auditor General should not be subject to the control or direction of any person or authority, and the only, interference that we consider legitimate will be a power for the President, acting in accordance with law and on the advice of the Prime Minister to request the Auditor-General, in the public interest, to audit at any particular time the accounts of any person or Organisation to which we have already referred."*

Subsequently, in 1978, the **MENSAH CONSTITUTIONAL COMMISSION** wholeheartedly endorsed the reenactment of most of the provisions enshrined in the 1969 Constitution. A pivotal excerpt from paragraph 210 vividly underscores the paramount significance of ensuring effective financial control and systemic accountability:

"210. The need to ensure effective financial control and systemic accountability, can be taken care of by the provisions which buttress the independence of the Auditor-General and the Audit Service not only from the Executive and the Legislature themselves, but also from the bureaucratic control of the Government Ministries and Departments. This independence, which we consider to be vital for the effective discharge of the important functions of the Audit Service is provided for by the provisions establishing the Service as a separate 'public service' under the Audit Service Board."

The preceding statements elucidate the critical nature of functional independence as articulated in Article 187(7)(a), which serves as a fundamental prerequisite for achieving institutional efficacy. Indeed, functional independence is an indispensable condition for the Auditor-General's effective performance, as the absence would only give rise to the perception of government manipulation akin to a master puppeteer controlling a puppet. Undoubtedly, the sensitivities inherent in the Auditor-General's functions were eloquently captured again by Dotse JSC in the case of **Appiah-Ofori v Attorney-General [Supra]**, below:

"*It should further be noted that the office of the Auditor-General is a very important position which should not be toyed with whatsoever. It is thus a dangerous precedent to have made the continued stay in office of the Auditor-General after 60 years at the sufferance of the President. It should be noted that in view of the very important watchdog role that the Auditor-General plays or is supposed to superintend in the transparent use and accountability of the public purse, any attempt to prejudice and or compromise his position by linking it to the pleasure of a sitting President is untenable. This is because the President is the head of the Executive Branch of Government whose use of monies entrusted to them the Auditor-General is constitutionally mandated to Audit."*

The case of **Janet Naakarley Amegatcher (No 1) v Attorney-General & Ors [2012] 1 SCGLR 679** exemplifies and re-echoes the autonomy of the Independent Constitutional Bodies as discussed above and the need to preserve their constitutional independence. The court took the view that a plain meaning of Article 88 (5), which vest the power for

initiating all civil proceedings on behalf of the government, in the Attorney-General runs counter to the principles of separation of powers and checks and balances embedded in the constitution. Date-Bah JSC reechoed at 686-687:

> *"Thus, a literal reading of article 88 (5) cannot be allowed to stand in the way of the aspiration of the people, expressed in an acknowledged core value of the Constitution. If the plain meaning of a constitutional text runs counter to a core value of the Constitution, it calls for reflection and a purposive interpretation to reconcile the particular core value or aspiration of the people with the language employed in the text with a view to extracting a meaning by a process of interpretation that expresses the spirit of the Constitution.*
>
> *One of the fundamental principles of the 1992 Constitution is that of separation of powers between the Executive, the Legislature and the Judiciary. Although the separation is not absolute, it is one of the cornerstones of the Constitution.* ***Another fundamental principle is that of checks and balances, according to which certain bodies created by the Constitution are given relative autonomy to enable them to maintain oversight responsibility over other organs of State. It follows that the Constitution should be so construed as to preserve and not undermine these fundamental principles.*** *…*
>
> *The plain meaning of article 88 (5) is given effect through the interpretation that the presumptive rule is that the Attorney-General is to be the defendant in all civil proceedings against the State. However, there are exceptions to this presumptive rule, necessitated by the core values of the Constitution and the overriding constitutional need to avoid conflicts of interest.* ***The exceptions are meant to buttress the autonomy of the independent organs of the State.*** *There has in fact been the practice of allowing the legal persons referred to popularly as the "constitutional bodies" to be sued in their own name. Thus there are judicial precedents showing that the Commission on Human Rights and Administrative Justice, the Electoral Commission and the National Media Commission may be*

sued in their own name and not through the Attorney-General. This practice is endorsed and affirmed as being in consonance with the position taken by this Court today…."

Judging from the essence and sensitivities surrounding the responsibilities bestowed upon the Auditor-General by the Constitution, it becomes evident that functional independence is an indispensable prerequisite for the proficient execution of their duties. It will be impossible for the nation to achieve or sustain the independence of these constitutional bodies if the constitution is interpreted to whittle down the concept of separation of powers and the equally salutary principle of checks and balances envisaged by the framers of the Constitution.

Independence Of Constitutional Bodies in Some Commonwealth Jurisdictions

As a general rule, decisions of Constitutional and other Superior Courts interpreting their countries' constitutions are not binding on the Supreme Court of Ghana because our Constitution is sui generis. At best, such decisions have a persuasive effect on our courts, and, in the past, we did rely on some of these decisions whose ratio we found relevant to the issues before us. However, the principles of separation of powers and checks and balances have had such a global impact on the Constitutions of many jurisdictions that provisions regarding the autonomy of independent constitutional bodies have taken a universal dimension. This is reflected in the judgments in two of these jurisdictions, Kenya and South Africa, which we now turn to demonstrate the universality of the independent role of the Auditor-General.

In the case of **In *Re The Matter Of The Independent Electoral and Boundaries Commission Of Kenya [2011] EKLR*** cited by the plaintiffs, the Supreme Court of Kenya stated as follows of independent constitutional bodies:

[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other

persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences".

Then in **Transparency International (TI KENYA) vs Attorney-General [2018] EKLR,** also cited by the plaintiffs, the constitutional and human rights division of the Kenyan High Court per Mwita J commenting on the independence of the Auditor-General, held as follows:

"113. The independence includes excluding the independent office's staff from the government. In the case of ***Thomas v Attorney General of Trinidad and Tobago*** *[1982] AC 113, 124 Lord Diplock observed with regard to independence of commissions that the whole purpose was to insulate members from political influence exercised directly upon them by the government of the day. He stated that the means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, and that although these autonomous commissions are public authorities, they are excluded from forming part of the service of the Crown.*

114. The above principle applies to the Auditor General's position. When the Constitution uses the word ***"independent office"*** *it means that office works independent of all other state organs in the discharge of its duties and performance of its functions. The Constitution is articulate in Article 249(2) that the Auditor General, as holder of an independent office, is not under* ***direction or control of any person or authority.*** *The Auditor general was designed to work without external interference or pressure in order to fulfill the constitutional demands of financial probity in state organs and public bodies as demanded by Articles 10 and 201 of the Constitution on integrity, transparency, and accountability in public financial expenditure.*

115. An independent Auditor General was therefore deemed critical in establishing an office that would deal with public finance administration matters given that management of public funds represents a trust bestowed on state organs and public bodies by the people of Kenya to use those funds and resources in promoting an equitable society. In that regard, the Auditor General in carrying out audit is required to reveal any failures on the part of state organs and public bodies to comply with the public finance regulations which he cannot do if his independence is curtailed. Independence guarantees the holder of the office at any one-time, sufficient safeguards and protection in the performance of his duties without fear of repercussions."

From Kenya to South Africa, mention could be made of the case of **Ex Parte Chairperson Of The Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa, [1996] ZACC 26.** The Constitutional Court held as follows about the independence of the Auditor-General:

[164] Like the Public Protector, the Auditor-General is to be a watchdog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper management and use of public money. To that end, NT 188 provides that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations as well as municipalities. The reports of the Auditor-General must be made public and they must also be submitted to any legislature that has a direct interest in the audit. NT 181(2) provides that the office of Auditor-General should be independent and that the powers and functions of the office should be exercised without fear, favour or prejudice. NT 189 provides that the tenure of the Auditor-General must be for a fixed, non-renewable term of between five and ten years. Appointment and removal provisions are the same as those that apply to the Public Protector.

[165] Against the background of the purpose of the office, it is our view that the dismissal provisions, which are identical to those that apply to the office of Public Protector, are not sufficient to meet the requirements of CP XXIX. The function of the Auditor-General is central to ensuring that there is openness, accountability and propriety in the use of public funds. Such a role requires a high level of independence and impartiality, as is recognised by CP XXIX. In the circumstances, it is our view that for the reasons we have given concerning the Public Protector, the prescripts of CP XXIX have not been achieved in the NT.

Consequently, the Auditor-General should not be equated to an ordinary public officer. Nevertheless, it is worth noting that the presidential directive in question has purportedly derived its authority and support from three reasons that we referred to earlier. We next turn to these three reasons in our analysis of this case.

1. **Leave under sections 20 (1) and 31 of the Labour Act**:

The **Labour Act, 2003 (Act 651)** states at Sections 20 and 31 as follows:

"20. Leave entitlement.

(1) In an undertaking every worker is entitled to not less than fifteen working days leave with full pay in a calendar year of continuous service.

(2) The expression ***"full pay"*** *means the worker's normal remuneration, without overtime payment, including the cash equivalent of remuneration in kind.*

31. Agreement to forgo leave to be void

An agreement to relinquish the entitlement to annual leave or to forgo the leave is void".

Leave is a constitutional right provided in Article 24 (2), which states that:

"(2) Every worker shall be assured of rest, leisure and reasonable limitation of working hours and periods of holidays with pay, as well as remuneration for public holidays."

This has been given statutory recognition in sections 20 and 31 of the Labour Act. But rest, leisure and holidays are rights which do not carry any obligation on the person entitled to be compelled to proceed on the rest. Any person with that kind of right could compromise it and lose the right to embark on the rest at the end of the leave year unless deferred by an agreement with the management of his establishment. See **HUMAN RESOURCE MANAGEMENT POLICY FRAMEWORK AND MANUAL FOR THE GHANA PUBLIC SERVICES (2015). It states** at 4.25.1.2 as follows:

"***Guidelines for the management of Annual Leave***

G. Leave granted but not utilized is forfeited, unless it is rescheduled or deferred with the written approval of Management."

Thus, there is no such thing as accumulated leave except in certain exceptional circumstances mentioned in the Act, including but not limited to equitable considerations. In the same way, the provision made in section 31 of the Labour Act was

designed to cure mischief in the past, which entitled workers to sell their annual leave for cash payable by their employers. After the passage of Act 651, any such agreement would be void, and no benefits would accrue to the advantage of the employer or worker. Section 31, therefore, could not be interpreted in any other way to compel a worker to take his earned Leave. In our opinion, no one can be compelled to enjoy a right or benefit unless it forms an obligation, the non-performance of which fundamentally affects another.

Again, the duration of leave days a worker is entitled to, the period, timing, manner, and circumstances of enjoying the right are matters that are subject to agreement between the worker and his employer and, in these circumstances, are purely a Human Relations function handled within an organisation, particularly, under the provisions of a Collective Bargaining Agreement, Conditions of Service or a Public Service Human Relations Manual. Thus, the framers of the Constitution 1992, could not have intended to create a simple employer-employee relationship between the appointing President and the Auditor-General, thereby making the President a Human Resource Manager, administering the leave schedule of heads of Independent Governance Institutions.

The current issues of accumulated leave affecting ICOs are novel even for the Ghanaian legal system. Indeed, a search through many common law realms has disclosed little to no persuasive findings to assist this, Court. Almost coincidentally and by a somewhat fictional turn of events, the High Court of Malawi, with original jurisdiction to enforce provisions of the 1994 Constitution (as amended in 2017), was faced with a similar constitutional issue within this same period of the occurrence of the events culminating in this writ. Between the two jurisdictions, therefore and by no marathon of any means, the Republic of Malawi has first finally determined the constitutional issue. Thus, the Court's judgment would be considered by this Court but only persuasively in dealing with the constitutional issues within this case.

In the court case of **The State (on the application of the Human Rights Defenders Coalition), Association Of Magistrates In Malawi and Malawi Law Society vs The**

President Of The Republic Of Malawi, Secretary To The Cabinet (also styled as) Chief Secretary To The Government and Women Lawyers Association (Judicial Review Case Number 33 of 2020) the High Court of Malawi nullified the 21st May 2019 Presidential elections. On appeal to the Supreme Court of Appeal presided over by the Chief Justice, the nullification was upheld, and a fresh election was ordered within 150 days. The reaction of the President of Malawi was to issue a directive for Chief Justice Hon. Andrew K.C. Nyirenda and another Judge, Hon. Edward Twea, to proceed on their accumulated leave pending their respective retirements. The most senior Supreme Court of Appeal judge was then directed to act as Chief Justice. The plaintiffs challenged the directives of the President in the judicial review court because the two judges had not voluntarily elected to take their leave. Mkandawire J stated as follows at paragraphs 73 and 74:

"*From the totality of the submissions that came before me, it is very clear that each of these branches or arms of Government regulate their own administrative arrangements. The issue of leave administration is a purely internal matter for the judiciary and is regulated by Regulation 12 of the Judicial Service Conditions of Service Regulations. According to the communication that was sent to the 2nd Respondent by Honourable Justice of Appeal Edward Twea SC, dated 14th June 2020, in accordance with Regulation 12(2) of the Judiciary Conditions of service for Judicial Officers, the issue of leave days had been already agreed upon.*

"*The Respondents had no constitutional or legal basis upon which to compel the Chief Justice and Honourable Justice Edward Twea SC to go on leave pending retirement. Issues of judicial administration and human resources management remain the preserve of the judiciary and do not require the intervention of the President, Cabinet and Secretary to the cabinet. The judiciary has its own Responsible Officers the Registrar who is mandated to deal with matters of this nature. If need arises, such matters can also be handled by the Judicial Service Commission.*"

In this case, the presidency failed to consider that the Auditor-General's office as head of the Audit Service forms part of the Independent Constitutional Bodies. Hence, the Auditor-General cannot be compelled to proceed on leave by any authority, especially where the effect of the directive was to interfere with the performance of his constitutional

mandate. As the Malawian case, supra noted, "***The issue of leave administration is purely an internal matter….***"

Consequently, it is our opinion that the issue of leave of the Auditor-General is an administrative matter within the purview of the Auditor-General and his Management. The directive of the President requesting the Auditor-General to proceed on leave under sections 20 and 31 of the Labour Act 651 violated the functional and institutional independence of the Auditor-General.

2. 'Proceed On Leave' Mantra-Precedent by President John Evans Atta Mills in 2009

The directive from the Presidency to the Auditor-General cited as one of its justifications, a precedent in 2009 by President John Evans Atta Mills directing the then Auditor-General to take his accumulated leave of approximately 264 working days. We have no hesitation in stating that if that directive were given by the then President to an Auditor-General who was lawfully in office and had not retired under section 10 (4) of the Audit Service Act 2000 (Act 584), that directive would be unconstitutional. Any President following that directive as precedence to request an Auditor-General to proceed on Leave would also be acting unconstitutionally. In our constitutional jurisprudence, it is settled that an unconstitutional act in the past which is not challenged and repeated several times will not mature into legality, nor will estoppel operate against it to give it validity.

In the case of **Bilson v Apaloo [1981] GLR 24 at 69-70, Adade JSC,** in his dissenting opinion commenting on a breach of the Constitution which had been perpetuated in the past, remarked:

"But it is said that the Court of Appeal has been sitting five all the time, and no one has raised a finger. That does not mean that a finger can never be raised. It has been raised now, and we cannot force it down. If, in my reckoning, an error was committed

then, there is no reason why that error should be perpetuated simply because it has been done with impunity in the past."

Again, in **Republic v High Court (Fast Track Division) Accra Ex Parte Commission On Human Rights And Administrative Justice (Richard Anane Interested Party) [2007-2008] SCGLR 213**, Georgina Wood CJ opined at 236 as follows:

"No unconstitutional or unlawful act, no matter the number of times it has been perpetrated without question or challenge, can ripen into constitutional or lawful practice, procedure or precedent. As I observed in *Attorney-General v Faroe Atlantic Co Ltd [2005-2006] SCGLR 271,* unconstitutional acts cannot be validated by the estoppel doctrine of *res judicata*. Equally, acts violating either the Constitution or other statute cannot be validated on the grounds of practice, precedent, custom or usage."

It is beyond doubt from our jurisprudence that reliance on an unconstitutional conduct by a predecessor, even if perpetrated several times without any challenge, would not validate the conduct and stop this court from enforcing the constitutionality of the act. The directive to proceed on accumulated leave does not align with the fundamental principles enshrined in the Constitution. The President, therefore, erred in relying on President John Evans Atta Mills unconstitutional precedent.

As a policy court, we are not unmindful of the practice which has developed in this country over the years, especially whenever there was a transition from one government to another to write and direct public service officials to 'proceed on leave.' Being a constitutional right, it was not within the contemplation of the framers of the Constitution that leave should be used as a form of punishment to get rid of unwanted workers and public service officials from their positions. We direct that the mantra 'proceed on leave' should, from today, be a thing of the past in this jurisdiction. Appointment letters, Collective Bargaining Agreements, Conditions of service, Regulations and Human Resource Policy Framework Manuals which provide for severance in relationships between employers and employees or mode for disciplinary action against employees should be the preferred reference document and resorted to in all cases of such severance

and whenever the conduct of a worker warrants his interdiction, termination or summary dismissal.

3. **Disciplinary Power of the President under Article 297(a) of the Constitution**:

Article 297 (a) of the Constitution states as follows:

"*In this Constitution and in any other law –*

> *(a) The power to appoint a person to hold or to act in an office in the public service shall include the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove the persons from office*."

According to the constitutional provision in question, the President possesses the authority to exercise disciplinary control over his appointed officials within the public office. At first glance, this provision does not appear to create any exceptions for specific categories of public officers, whether established by the Constitution or statute. However, it is crucial to note that the absence of explicit exceptions within the provision does not automatically imply that the President possesses ancillary powers to exercise disciplinary control over the Auditor-General and other ICOs solely based on their appointment. Interpreting the constitutional provision in such a literal manner would lead to a manifest absurdity. The unique nature of the Auditor-General's role and responsibilities requires a more nuanced understanding of their functional independence and the safeguards put in place to ensure their autonomy. Construing the provision as conferring disciplinary control over the Auditor-General by appointment would undermine the intended purpose of establishing an independent and effective Auditor-General's office.

Indeed, a strictly literal interpretation of Article 297(a) would grant the President the power to exercise disciplinary control over all public office appointments, including crucial positions such as the Chief Justice, the Electoral Commissioner, the Auditor General, and other Article 70 appointments. However, such an interpretation could undermine these appointees' functional independence and dilute their respective offices' integrity. If we were to adopt this interpretation, it would mean that the President could

direct the Chief Justice, the Commissioners of the Electoral Commission, and the Commissioners of the Commission for Human Rights and Administrative Justice (CHRAJ) to go on leave at any time, even during critical periods, solely at the President's discretion. How would Ghanaians welcome the news if the President directs the Electoral Commissioner to proceed on an accumulated leave in the twilight of an election?

This would disregard the demands and necessities of the given circumstances, as the President holds sole authority over their appointments. Such an outcome would be absurd and encroach upon these important institutions' independence. Consequently, it is imperative to interpret Article 297(a) in a manner that respects the functional independence of these offices and preserves their ability to carry out their duties without undue interference. The intention behind establishing these institutions with specified tenures and safeguards is to ensure their autonomy and the proper functioning of democratic systems.

Considering the potential consequences of such an interpretation, it would be necessary for this Court, endowed with its constitutional powers, to avert a manifest absurdity by looking beyond the law's literal wording and giving due regard to the spirit of the Constitution. The spirit of the Constitution serves as a valuable instrument for judicial interpretation, as emphasised by Sowah JSC (as he then was) in **Tuffour v Attorney-General (1980) G.L.R 637**. In addition to that, Date-Bah JSC, in the case of **Agyei v Twum v Attorney-General [supra],** articulated the following viewpoint:

"The fact that a country had a written constitution did not mean that only its letter might be interpreted. ***The courts had the responsibility for distilling the spirit of the Constitution from its underlying philosophy, core values, basic structure, the history and nature of the country's legal and political systems****, etc. in order to determine what implicit provisions in the written constitution would flow inexorably from that spirit."* [Emphasis is mine]

The nature of the 1992 Constitution necessitates adopting a broad approach in its construction and interpretation. The above cases have expressed that interpretations leading to absurd outcomes should be avoided. In cases where a particular interpretation

yields two inconsistent results, the spirit of the Constitution compels the preference for the more reasonable outcome. It is essential to consider the Constitution as a whole; therefore, when a literal interpretation would result in an absurdity, it becomes the duty of the Supreme Court to avert that absurdity by championing an interpretation that aligns with the spirit of the Constitution. This longstanding jurisprudence has guided the court's approach in such matters. See cases such as **New Patriotic Party v Attorney-General (31ST December Case) [1993-94] 2 GLR 35**, **Ayine v Attorney-General (supra)**, **Ransford France (No. 3) v Electoral Commission & Attorney-General [2012] 1 SCGLR 705**, **Agyei Twum v Attorney-General & Anor (supra)**, **Asare v Attorney-General [2003-2004] SCGLR 823**, **Republic v High Court; Ex Parte Yalley (Gyane & Attor Interested Parties) [2007-2008] SCGLR 513**

The irresistible conclusion from the analysis made is that a strictly literal interpretation of Article 297(a), extending its application to Article 70 appointments, would lead to an absurd outcome that contradicts both the letter and spirit of the 1992 Constitution. This is particularly evident considering the significance of independence in the functioning and operations of these ICOs. Given that the removal of the Auditor-General is addressed explicitly in Article 146, it follows that the President's ancillary power under Article 297(a) cannot be applied to the removal of the Auditor-General and other Article 70 office holders. By extension, the President's ancillary power to exercise disciplinary control cannot be invoked in this context, as it would undermine the intended safeguards and independence of the Auditor-General's office. Thus, to align with the constitutional framework, it is reasonable to interpret that the President's disciplinary control does not extend to the Auditor-General or other similar appointments, as any disciplinary action is subject to specific provisions outlined in the Constitution, i.e., Article 146. The directive to proceed on accumulated leave, albeit temporal, interfered with the day-to-day functions of the Auditor-General. Since it did not comply with Article 146, the directive constitutes a constructive removal and, therefore, unconstitutional.

Consequently, we have no hesitation in agreeing with the plaintiffs' submission that the President's implied power of "disciplinary control" under Article 297(a), as it pertains to

holders of Independent Constitutional Offices, is ineffective and outside the framework established for their removal under Article 146 of the Constitution. All in all, it is our opinion that the President's directive conflicts with the functional independence of the Auditor-General and, thus, violates both Article 146 and Article 187(7)(a) of the Constitution, 1992.

CONSTITUTIONALITY OF THE APPOINTMENT OF AN ACTING AUDITOR-GENERAL

Ensuring the uninterrupted performance of the Auditor-General's functions is imperative in every situation. While the Constitution, 1992 does not explicitly provide for instances where the Auditor-General may be unable to carry out their prescribed duties as outlined in Article 187, it unequivocally mandates the establishment of an Auditor-General's Office as a public office-(Article) 187(1). This signifies the constitutional recognition of the indispensability of the Auditor-General's role and underscores the need to ensure the continuity of their functions.

It is reasonable to anticipate that there may be circumstances in which the Auditor-General is temporarily unable to fulfil the duties of their office, such as during periods of illness. Unless the framers of the Constitution envisioned an Auditor-General immune to the challenges and ailments of human existence, it would be unreasonable to disregard the possibility of a temporary inability to perform their functions and duties. Recognising the Auditor-General as a human being susceptible to various circumstances is essential for practical considerations. It ensures that appropriate provisions are in place to address temporary absences or incapacities, guaranteeing the Auditor-General's office's continued effectiveness and functionality. While the Constitution may not explicitly outline such situations, the principles of reasonableness and practicality necessitate the acknowledgement of the potential for temporary inability to carry out the duties of the office.

However, Article 187 (12) and Section 10(7)(f) of the **Audit Service Act, 2000 (Act 584)** provide some guidance on this matter as follows:

"The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, retiring award or retiring age shall not be varied to his disadvantage during his tenure of office."

This provision establishes safeguards to protect the Auditor-General's salary, allowances, and entitlements regarding leave of absence, retirement benefits, and retirement age. It ensures that any changes in these aspects during the tenure of the Auditor-General cannot be made to their disadvantage. Although this provision primarily focuses on the financial and contractual aspects, it indirectly implies that appropriate measures should be in place to address the Auditor-General's absence or inability to carry out their functions.

The plaintiffs submit that the President cannot appoint an Acting Auditor-General while the Auditor-General is in office. According to the plaintiffs, appointing persons as "Acting Auditor General" is not new in the country's constitutional history. However, the constitutionality or otherwise of an act or practice does not turn on how old or common that practice is or has become; it turns on and must turn on whether the practice, however old or common, squares with the letter and spirit of the constitution. The plaintiffs, therefore, argue that the Constitution appropriately grants the Auditor-General the discretion or prerogative to delegate another person or other persons to perform or assist him in performing the duties entrusted to him under Article 187(2). The plaintiffs continue however, that Article 187(3) is clear that only such person or persons as have been "authorised or appointed for the purpose by the Auditor-General shall have access to all books, records, returns, and other documents relating or relevant to those accounts". The plaintiffs further argue that the position of "deputy auditor general" indeed exists statutorily within the administrative hierarchy of the Audit Service and that those Deputy Auditors-General, who are officers of the Audit Service, are, however, not Deputy Auditors-General or Deputies to the Auditor-General in the constitutional sense, as indeed they cannot take the "Oath of the Auditor-General" prescribed for the Auditor-General."

Article 187(3) provides as follows:

ARTICLE 187 THE AUDITOR-GENERAL

(3) *For the purposes of clause (2) of this article,* ***the Auditor-General or any person authorised or appointed for the purpose by the Auditor-General shall have access to all books,*** *records, returns, and other documents relating or relevant to those accounts.*

Upon carefully examining the constitutional provisions, it is evident that Article 187(2) confers upon the Auditor General the explicit power and duty to conduct audits and report on public accounts. In conjunction with this, Article 187(3) establishes a clear and unambiguous requirement that only authorised or appointed individuals by the Auditor-General shall have access to the relevant books, records, returns, and other documents about those accounts.

Considering these provisions, we find merit in the plaintiffs' argument that the concept of an "Acting Auditor-General," a person designated or appointed not by the Auditor-General but by the President or an agent of the President, to assume and exercise the powers of the Auditor-General in the office holder's temporary absence, is constitutionally untenable.

Consequently, it is our opinion that unless the incumbent occupying the office of the Auditor-General, duly appointed by Article 70(1)(b) and sworn into office as prescribed in the 2nd schedule of the Constitution, 1992, has vacated the position through resignation, retirement, death, or removal by Article 146, any action taken by the President or any person purporting to act on behalf of the President to designate another individual as "Acting Auditor General" or in a similar capacity would be in contravention of the Constitution and null and void.

We find merit in the plaintiff's reliefs 'a', 'b', 'c' and 'd' and grant those reliefs. As explained earlier in this opinion, reliefs 'e', 'f' and 'g' are moot and, accordingly, dismissed.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

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

(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

COUNSEL

MARTIN L. KPEBU ESQ. FOR THE PLAINTIFFS.

JONATHAN ACQUAH (PRINCIPAL STATE ATTORNEY) FOR THE DEFENDANT WITH DIANA ASONABA DAPAAH (DEPUTY ATTORNEY-GENERAL), ANITA OSEI (ASSISTANT STATE ATTORNEY), NICOLA AKU SHIKA ALLOTEY (ASSISTANT STATE ATTORNEY) LED BY GODFRED YEBOAH DAME (ATTORNEY-GENERAL).