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Determination of Certain Emoluments

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

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- (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.

(2) The salaries and allowances payable, and the facilities available, to the President, the Vice-President, the chairman and the other members of the Council of State; Ministers of State and Deputy Ministers, being expenditure charged on the Consolidated Fund, shall be determined by Parliament on the recommendations of the committee referred to in clause (1) of this article.

(3) For the purposes of this article, and except as otherwise provided in this Constitution, "salaries" includes allowances, facilities and privileges and retiring benefits or awards.

From the above, the process of determining the salaries, allowances, privileges and available facilities (emoluments) due to the public office holders specified in article 71 begins with the appointment of a committee of not more than five persons by the President, acting in accordance with the advice of the Council of State (hereafter referred to as the PCE or Presidential Committee on Emoluments). The PCE then executes the constitutional obligation of recommending the emoluments to be given the named public office holders under article 71.

In the case of the first group identified under article 71 (1) (a), the recommendations of the committee are made to the President, who *'shall determine'* what emoluments should be paid to the identified public office holders.

Under article 71 (2), the recommendations of the committee on what the President, the Vice-President, the chairman and members of the Council of State; Ministers of State and Deputy Ministers are to be paid, are presented to Parliament, which shall determine the emoluments of this second group.

Background to the present litigation

According to the facts presented by the plaintiff, on 18th June 2019, the President appointed a PCE chaired by Prof Ntiamoa Baidu (hereafter referred to as the NBC) to recommend the emoluments of the office holders spelt out under article 71 of the 1992 Constitution (hereafter referred to as article 71 public office holders) over the period January 2017 to December 2020.

The terms of reference of the Prof. Ntiamoah-Baidu Committee were:

"To make recommendations in respect of emoluments and other privileges for Article 71 Office Holders as specified under the Constitution and;

To examine any other relevant matter which the Committee considers appropriate to its work"

As part of their Report tendered before this court as exhibit AG1, the NBC considered the constitutional and legislative basis for support of spouses of sitting and former Presidents and Vice Presidents in these words found on page 51

'The Committee notes that neither Article 71 nor any other provisions of the Constitution bestows benefits on spouses of Presidents and Vice Presidents. Similarly, no legislation mentions what the State should provide for spouses of Presidents and Vice Presidents'

The NBC then went on to recommend as PCE/2020-Rec.18 that *'Spouses of sitting and former Presidents and Vice Presidents should be catered for by the State as part of privileges extended to the Presidents/Vice President'*.

The explanation for this was set out thereunder in the following words:

'The administration of President Kufuor introduced the extension of courtesies, including the payment of monthly allowances, to spouses of former Heads of State/Presidents/Vice Presidents. Subsequent administrations have continued the gesture and even extended them to incumbent First and Second Ladies. The gesture remains purely humanitarian, to support, and in some cases, rehabilitate former First Ladies who were evidently struggling to subsist. However, there is no legal basis for this support. Thus, the Committee recommends that the support extended to spouses of Presidents/ former Presidents/ Vice Presidents/ former Vice Presidents be regularized and included in the privileges of Presidents/ former Presidents / Vice Presidents/ former Vice Presidents. We have, accordingly, included these allowances at the same level as currently pertains, in Table 7.3 (A & B) on privileges, benefits and facilities for the President/ Vice President.'

Approval of recommendations

According to the plaintiff, the recommendations of the NBC regarding the public office holders identified in article 71 (2) were approved, determined and passed by Parliament on 6th January 2020. Included in the recommended emoluments that were approved and determined by Parliament were the payment of salaries and allowances to spouses of the President and Vice President of the Republic. It is this act of approval of the recommendations by Parliament and the determination of the privileges of the President

and Vice President to include salaries to their spouses from the Consolidated Fund that has provoked the current suit.

The plaintiff has invoked the jurisdiction of this court pursuant to articles 2(1) and 130 (1) which read:

Enforcement of the Constitution

2(1) *a person who alleges that –*

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this constitution, may bring an action in the Supreme Court for a declaration to that effect..

Original Jurisdiction of the Supreme Court

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

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

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

Contentions of Plaintiff

The contentions raised by the plaintiff are three fold.

Contentions against the NBC

The first is that the NBC was primarily established to '*make recommendations in respect of emoluments and other privileges for article 71 office holders, as specified under the Constitution*' and so the act of making recommendations for payment of emoluments to

persons outside of the list of article 71 office holders constitutes an act in excess of the powers conferred on the NBC by article 71 (1). The NBC had no authority for making the impugned recommendations, and the jurisdiction of this court under articles 2(1) and 130 (1) ought to be invoked to strike the recommendations down.

Contentions Against Parliament

The second contention of the Plaintiff is against Parliament. He urges that the approval by Parliament of the recommendations to make salary payments to the spouses of the President and Vice President as part of the privileges of the President and Vice President is inconsistent with, and in contravention of article 71 (2) of the Constitution. This is because the positions of the spouses do not fall under the category of public office holders.

According to the plaintiff, to the extent that the spouses of the President and Vice President are not captured among article 71 office holders, there is no legal or constitutional basis for the payment of salaries to them from the Consolidated Fund. He points to the note of the NBC on page 51 of its Report which recognized this legal and constitutional position.

He urges that with that correct recognition that there is no constitutional or legislative foundation for bestowing benefits on the spouses of the President and Vice President, the act of approving the said payments to them is not only inconsistent with, and in contravention of article 71, but parliament had also elevated the spouses to the status of article 71 office holders, which said act is also inconsistent with, and in contravention of article 71. And this is especially so when the salaries recommended have been benchmarked against the salaries of other article 71 public office holders such as Ministers and Members of Parliament.

Plaintiff points out that article 71 is an entrenched clause in the 1992 Constitution and nothing short of a referendum pursuant to article 290 can be used to amend or vary article 71. The approval of salaries benchmarked to article 71 office holders to the spouses of, and as part of the privileges of the President and Vice President constitutes an attempt by the PCE and parliament to unconstitutionally enlarge and broaden the

scope of article 71 office holders, by turning the spouses of the President and Vice President into public office holders.

Citing **Tommy Thompson Books Ltd v The Republic [1995-96] 1 GLR 227** the plaintiff points out that this court recognized in that case that the First Lady of Ghana is not a public officer. He submitted that the office of both first and second lady are ceremonial and do not operate under the higher transparency, accountability and responsibility required of the article 71 public office holders.

Contentions in respect of article 108 and article 178

The third contention of the plaintiff is that pursuant to articles 108 and 178, Parliament cannot on its own, initiate or approve payment of any emoluments, which would be from public funds, specifically, the Consolidated Fund; without a bill to that effect emanating from and introduced by the Government and duly passed into law.

He urged that it is in a bill that Parliament can make a case for such emoluments, and thereby allow public participation in the legislative debate on the matter in issue. The culmination of that due process would be the assenting by the President for the bill to crystalize into an Act. Before monies can be withdrawn from the Consolidated Fund, there should be an Act of Parliament authorizing same.

The failure of Parliament to adhere to the mandatory constitutional directions of articles 108 and 178 rendered the approval of the contested recommendations on 6th January 2021 null, void and unconstitutional.

The plaintiff is seeking the following reliefs:

Declaration that, the approval by Parliament to pay salaries to the First and Second ladies is inconsistent with ARTICLE 71 CLAUSES 1 AND 2 of the 1992 Constitution of the Republic of Ghana and consequently be declared null, void and unenforceable.

Declaration that, per Article 71 (1) and (2); the positions of the first and second ladies of Ghana do not fall under the category of Public Office holders.

Declaration that, per Article 71 of the 1992 Constitution of the Republic of Ghana; the Emolument Committee is limited to recommending the salaries and other benefits and privileges of only public office holders

Declaration that, per Articles 108 and 178 of the 1992 Constitution of the Republic of Ghana; parliament cannot, on its own accord, initiate or approve payment of any such emoluments; which would necessarily be paid from public funds; without a bill to that effect emanating from and introduced by the Government and duly passed into law.

The defendant's responses

Recommendations of NBC

The Attorney General first submits that the plaintiff has no cause of action against the recommendations of the NBC because they are mere recommendations. He pointed to the reasoning of this court in **Ghana Bar Association, Amegatcher, Amenuvor & Beecham v Attorney-General and Judicial Council; Sky v Attorney-General; Danso-Acheampong v Attorney-General (Consolidated) [2015-2016] 2 SCGLR 872** that as much as the constitutional mandate to make recommendations have a restraining effect on the appointing authority (in that case, the President), recommendations are not binding. The Plaintiff is therefore devoid of a cause of action when it comes to the recommendations of the NBC.

Determinations of Parliament

On the facts of the matter in issue, the Attorney General admits that Parliament accepted the recommendations complained of, and on 6th January 2021, approved for payment, salaries for the 1st lady and 2nd lady that were bench marked to the salaries of Ministers and Deputy Ministers.

While admitting that it is Parliament which determined what salaries, allowance and privileges were to be paid to the President and Vice President pursuant to the reports of PCEs, and in this case, the NBC report, he urged that no salaries are being paid to the 1st and 2nd ladies in personal capacities as public office holders recognized under article

71, because the determination of Parliament was for the said salaries to be designated as part of the privileges afforded to the President and Vice President.

The defendant therefore disputed the alleged violation of Articles 71, 108 and 178 by either the NBC or Parliament.

Alleged contravention of article 71

Regarding the specific matter of the setting of salaries, the Attorney General pointed out that the full components of salaries and allowances payable to article 71 office holders are not spelt out in the Constitution or in any law.

He urged that the 1992 Constitution has deliberately left it to be set out in the recommendations of the PCEs and ultimately for Parliament to determine it for the President and Vice President, Ministers, Deputy Ministers and members of Council of State under article 71 (2), and for the rest of identified public officers holders under article 71 (1), the 1992 Constitution had left it to be determined by the President.

The Attorney General pointed out that from records available, various PCEs have made differing recommendations over the years including a recommendation in 2008 by the Chinery-Hesse committee that inter alia, upon the demise of a sitting president, the spouse should be paid a pension equivalent to the salary of a Minister, while the spouse of a deceased Vice-President was to be paid a salary equivalent to that of a Deputy Minister. Thus the recommendations by the NBC were not new.

The Attorney General submitted therefore that the Plaintiff's proposition that there is no legal or constitutional basis for the payment of salaries to the spouses of sitting and former Presidents and Vice Presidents from the consolidated fund and that doing so is an attempt to '*sneak them into the article 71 office holder group*' constitutes a narrow interpretation of article 71 of the Constitution.

Referring to the acclaimed decision of this court in Tuffuor v Attorney General [1980] GLR 637, he reminded the court of the jurisprudence that has firmly decried a narrow and doctrinaire approach to interpreting the provisions of the Constitution, and submitted that account must be taken of the spirit and principles standing out of the relevant provisions of the Constitution and bring the interpretation

sought into conformity with the needs of time. Again in **New Patriotic Party v Attorney- General [1993-1994] 2 GLR 35**, this court per Hayfron Benjamin JSC had intoned that there is no benefit in applying a strict interpretation to modern democratic Constitutions. Because it must not be forgotten that Constitutions are made by men for the governance of men.

Citing **Kuenyehia v Archer 1993 – 1994] 2 GLR 525**, the defendant pointed out the established position in our jurisprudence that when construing provisions of a national Constitution such as ours, the Constitution must be given a benevolent, broad, liberal and purposive construction so as to promote the apparent policy intention of its framers, and in order to achieve its enlightened objectives. Thus a lot of flexibility is called for.

He urged that the modern approach would be to see the Constitution as a living organism, such that at a later point in history, the objective purpose of the Constitution can be accepted as requiring an interpretation different from that of its original framers, as stated by this court per Date-Bah JSC in **Ghana Lotto Operators Association and 6 Others v National Lottery Authority {2007-2008} 2 SCGLR 1088**.

He also posited that the **Interpretation Act 2009, Act 792 section 10 (4) (a), (c), and (d)** recommends that when interpreting a constitutional provision, a court should do so in a manner that promotes the rule of law and the values of good governance, and not adopt an interpretation that defeats the purpose and spirit of the Constitution and of the laws of Ghana.

Without prejudice to any other provision of this section, a Court shall construe or interpret a provision of the Constitution or any other law in a manner

- (a) that promotes the rule of law and the values of good governance,
- (b) that advances human rights and fundamental freedoms,
- (c) that permits the creative development of the provisions of the Constitution and the laws of Ghana, and
- (d) that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana.

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Privileges

The Attorney General urged that when this appropriate purposive construction and interpretative model is utilized, a true, proper and purposive interpretation of article 71 of the 1992 Constitution should be that a committee like the PCE should be able to make the recommendations it did, and Parliament should be able to approve them as part of the privileges of Presidents and Vice Presidents. Such payments ought to be treated as entitlements that are formally included in the privileges of the Executive.

In the opinion of the Attorney General, there are several persons whose role is to assist article 71 public office holders, and who are approved to be paid salaries as compensation for that assistance. The recommendation made for salaries to the 1st and 2nd Ladies therefore fall within the privilege given to the President and Vice President to engage other persons to assist them. And this is especially so because of the social roles played by the first and second ladies to support the work of the President and Vice President.

He submitted that it was also clear that the privileges of the President and Vice President include facilities and benefits extended to their spouses and children under 18 years old. He urged that it would be absurd to urge that these privileges made the dependents of the article 71 office holders another category of article 71 office holders.

His conclusion is that since the recommendations of the NBC were not unconstitutional, parliament's approval of same cannot be faulted.

Alleged contravention of articles 108 and 178

It was the position of the Attorney General that there is nothing in the provisions of article 108 and article 178 that require that the recommendations of a PCE ought to be presented to Parliament only in the form of a bill to be passed into law before the emoluments of the article 71 office holders could receive parliamentary approval.

He pointed out that article 178 poses no interpretative challenge. A plain reading of it shows that there are two broad ways in which moneys can be withdrawn from the Consolidated Fund and this constitutional edict had been illuminated in the case of **Brown v Attorney General (Audit Service Case) [2010] SCGLR 183**.

The first was through an expenditure charged on the Consolidated Fund by the Constitution itself, and the second is by an Act of Parliament. To the extent that Parliament determined the salaries and allowances payable and facilities available to the President and Vice President on the recommendations of the Committee in accordance with article 71 (2), it is misleading to suggest that expenditure charged under article 71 would only be lawful when it is approved through a bill laid before Parliament. The privileges of the President and Vice President are constitutionally charged on the

Consolidated Fund, and such expenditure did not need a separate Act of Parliament for Parliament to make such a determination lawfully. Further, to the extent that Parliament had acted by virtue of the powers conferred upon it by the provisions of article 71 (2), its actions were a closed book and could not be questioned by any court.

Joint Memorandum of Issues

The parties filed the following joint issues for resolution by the court:

1. Whether or not the plaintiff has a cause of action in respect of the recommendations of the Ntiamoah-Baidu Committee?

2. Whether or not upon a true and proper interpretation of Article 71 of the 1992 Constitution, the Prof. Ntiamoah-Baidu Committee exceeded its injunction, mandate and authority when it made recommendations in respect of privileges, facilities, salaries and allowances payable to the President and Vice President to include salaries to be paid to the 1st and 2nd Ladies of the Republic of Ghana as part of privileges, benefits and facilities of the President and Vice President respectively?

3. Whether or not upon a true and proper interpretation of Articles 71, 108 and 178 of the 1992 Constitution of Ghana, Parliament on its own accord can initiate or approve payment of salaries of the 1st and 2nd Ladies of the Republic of Ghana which said salaries or emoluments will necessarily be paid from public funds without a bill to that effect emanating from and introduced by the Government and duly passed into law?

Consideration and Analysis

Before touching on the issues placed before us for resolution, we must note that the work of the NBC that has been brought to this court had relevance for the period January 2017 and December 2020. Thus for practical purposes, the issues raised in relation to the NBC would be moot now.

However, article 71 is an entrenched provision of the fundamental law of the land, the 1992 Constitution, pursuant to article 290. It also moderates an activity that will be potentially cyclical as long as Ghana remains a nation, unless changed by the processes outlined in article 290 for amendment of entrenched provisions of the Constitution. Its weight and import for good governance are therefore such that this court must address the issues raised by the litigation, because they may arise again.

We refer to the articulation of this principle in **JH Mensah v Attorney General [1996-97] SCGLR 320** at 359 in the following words by Acquah JSC

'the principle guiding the court in refusing to decide moot questions was quite settled. If the question, though moot, is certainly not likely to re-occur, the courts will not waste their time to determine questions and issues which are dead and buried forever. But where it is not so established, the courts would go into the questions to forestall a multiplicity of suit. Thus for a court to decline deciding a moot question, it must be established and shown that:

'subsequent events made it absolutely clear that the alleged wrong behavior could not reasonably be expected to recur. See US v Concentrated Phosphate Exp Assn 393 US 201; and US v W T Grant Co 345 US 629'

Again, in **Amidu v President Kuffuor & Others [2001-2002] SCGLR 86** at 106, Acquah JSC as he then was stipulated

'an action is generally considered moot when it no longer presents a justiciable controversy because issues involved have become academic or dead. This may happen when the matter in dispute has either been resolved already and hence there is no need for judicial intervention, or events happening thereafter have rendered the issue no longer live. In either situation, unless the issue is a recurring one and likely to be raised again between the parties, the courts would not entertain such a dead issue.'

Cause of Action against the Ntiemoah Baidu Committee

While plaintiff asserts a cause of action in relation to the said recommendations by articulating his relief (c) for a *'declaration that, per Article 71 of the 1992 Constitution of the Republic of Ghana; the Emolument Committee is limited to recommending the*

salaries and other benefits and privileges of only public office holders', the defendant asserts in essence, that there can be no cause of action in relation to recommendations of a PCE, because there is no question of real or genuine interpretation of article 71 when it comes to the scope of recommendations that can be made by a PCE or the enforceability of recommendations made by a PCE. Recommendations do not lead to enforceable rights. In support of this position they cited the authority of ***Asare-Baah III & Others v. Attorney-General & Electoral Commission*** [2010] SCGLR 463 in which this court asserted that a court's duty is to determine the real matters in controversy between parties effectually.

We agree that the said recommendations do not have force of law, as settled in ***Kor v Attorney-General & Justice Duose [2015-2016] 1 SCGLR 114***, when this court construed the wording of article 71 (1) to include the recommendations by the PEC placing a factor of restraint on the President when determining the designated emoluments, but not a binding fetter in his determination. We also draw attention to the determinations of this court concerning the authority of recommendations as held in ***GBA and Others v Attorney General*** (Consolidated suit) cited supra. In the ***GBA v Attorney General (Consolidated suit)***, the matter in dispute was whether on a true and proper interpretation of article 144 (2), the President was bound by the recommendations of the Judicial Council and advice of the Council of State in the appointment of Supreme Court Justices or their recommendations and advice had no binding bite. This court was clear that though recommendations and advice do not have the binding force of law, the constitutional edict requiring the President to act on the recommendations of the Judicial Council compelled a restraint on the President from acting without a consideration of that recommendation.

This compels the cautionary note from the above-cited cases, that to the extent that the Constitution has provided for a constitutional mandate to be discharged on the recommendations of a body set up by the Constitution to provide advice or recommendations, those recommendations cannot and must not be ignored by the determining authority.

The settled position therefore is that notwithstanding the necessity of respecting the constitutional mandates of advisory bodies such as the Judicial Council (as determined in **GBA v Attorney General**) and the PCE under article 71 (as determined in **Kor v Attorney General**), their advice and recommendations cannot attain the elevated status of enforceable edicts. For this reason, we are satisfied that there is no genuine issue for determination regarding the constitutionality or otherwise of the recommendations of the NBC.

All parties before this court must be mindful of the consistent reminder of this court from cases such as **Adumoah Twum II v. Adu Twum II** [2000] SCGLR 165 distilled in its first holding that *"the original jurisdiction vested in the Supreme Court under Articles 2(1) and 130(1) to interpret and enforce the provisions of the Constitution is a special jurisdiction to be invoked in suits raising genuine or real issues of interpretation of a provision of the Constitution ; or enforcement of a provision of the Constitution ;or a question whether an enactment was made ultra vires Parliament or any other authority or person by law or under the Constitution"*.

The decisions of this court in **Edusei v Attorney-General & Anor** [1996-97] SCGLR, and a long line of their ilk, this court has made it clear ad nauseam, that notwithstanding whatever garb an alleged inconsistency with the Constitution is dressed up, if there is no genuine issue of interpretation and enforcement, the court will resist the bait to embark on an interpretative and enforcement excursion.

To the extent that the recommendations of the NBC were submitted to the President and Parliament and article 71 is clear that it is these two institutions who hold the power to determine the emoluments of the listed public office holders, and the Plaintiff should have been properly advised regarding raising an issue against the recommendations of the NBC. It is extant and clear that there is no cause of action in respect of the recommendations of the NBC. The first issue presented by the parties for resolution is resolved against the plaintiff. On the second issue, the facts show that the contested recommendations were presented for consideration as part of the recommended privileges of the President and Vice President themselves, and it is Parliament that determined their enforceability by accepting the recommendations. To

that extent, although the NBC exceeded its constitutional mandate to make recommendations for the emoluments of the recognized article 71 public office holders, it did not exceed any jurisdiction or authority because it had neither jurisdiction nor authority beyond the making of recommendations. The second issue is also resolved against the plaintiff.

Was Parliament's approval for salaries to be paid to the spouses of the President and Vice President inconsistent with article 71?

We appreciate this issue to be the real matter in controversy, because as admitted by the parties, Parliament determined that salaries should be paid to the spouses of the President and Vice President. The Attorney General submits that on a liberal and purposive interpretation of article 71, we should find this determination to be consistent with the intentions of the provision.

In **Federation of Youth Association of Ghana (FEDYAG) v Public Universities of Ghana- J1/5/2009 27th July 2010**, this court succinctly captured the essence of the jurisprudence on the correct approach to construing constitutional provisions in an articulation by Adinyira JSC, quoting from earlier decisions of the court.

'The correct approach to the construction of constitutional provision has been amply expounded on in the case of Ahumah Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney-General & Electoral Commission 7 (Consolidated); 2010 [SCGLR] 575 by our eminent lady Chief Justice Georgina Wood. She said at page 597 of the report as follows: "The correct approach to interpreting Constitutions generally and fundamental human rights provisions in particular, is clearly so well settled: it does not admit of any controversy. The jurisprudence of this court does show that these must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from it. This court has clearly moved away from the doctrinaire approach adopted years ago in the case of In re Akoto [1961]2GLR 523 SC. The famed words of Sowah JSC as he then was in the celebrated case of Tuffuor v Attorney General [1980] GLR 637 at 647-

648, are very much still relevant for our purposes; not to mention the tall list of case law that was cited in one of the most recent decisions of this court given on 3 February 2010- to be reported as *Brown v Attorney –General (Audit Service case)* [2010] SCGLR 183. Two of the older decisions of this court are *Mensima v Attorney- General* [1996-7] SCGLR 676 at p. 714, and *New Patriotic Party v Inspector –General of Police* [1993-94] 459 at 482. In the latter case, Bamford –Addo JSC as she then was observed that: "... fundamental human rights are inalienable and can neither be derogated from or taken away by anyone or authority whatsoever. ...This court is therefore not permitted to give an interpretation which seeks to tamper in any way with the 8 fundamental human rights but rather to see that they are respected and enforced." The learned Chief Justice Georgina Wood observed further that: "In *Minister of Home Affairs v Fisher* [1980] A C 319, Lord Wilberforce in delivering the judgment of the Privy Council stated at page 329 as follows: "A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language...and to be guided by the principle of giving full effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

What history, aspirations, core values, and principles can be extrapolated from a consideration of the provisions in article 71 under consideration? Can the intentions of the framers of article 71 be determined from the plain words of article 71, or do the plain words activate a weakness or absurdity requiring its operators to expand its requirement in order to achieve its purpose? Is there a discernible goal that the framers of the Constitution intended to achieve in the framing of article 71?

Asare v Attorney General [2003-2004] 2 SCGLR 823 greatly assists in this excursus for the purposive interpretation of a provision of the Constitution by pointing to the need to look for the subjective intent of the author and the objective purpose of the provision.

As reiterated **Republic v High Court Accra: Ex Parte Yalley (Gyane and Another Interested Parties)** [2007-2008] 512 at 520, quoting from **Asare v Attorney General** cited supra

'the subject purpose of a constitution or statute is the actual intent that the authors of it, namely, the framers of the constitution, or the legislature, respectively, had at the time of the making of the constitution or the statute. On the other hand, the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values etc of the society for which he is making law'.

These two approaches have served the Supreme Court of Ghana well to guide the proper construction of the Constitution, as directed by article 2 and article 130 (1). The reasoning and evaluative processes found in **CHRAJ v Attorney-General [1998-1999] SCGLR 871**, **Ransford France (No 3) v Electoral Commission and Attorney General [2012] 1 SCGLR 705**, and **Adofo and Others v Attorney-General and Another [2005-2006] SCGLR 24** elucidate this point.

Section 10(4) of the **Interpretation Act, 2009 Act 792** also provides legislative assistance for the construction of the Constitution. It reads:

(4) Without prejudice to any other provision of this section, a court shall construe or interpret a provision of the Constitution or any other law in a manner

a. that promotes the rule of law and the values of good governance

b. that advances human rights and fundamental freedoms

c. that permits the creative development of the provisions of the Constitution and the laws of Ghana, and

d. that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana

The Plain Words, Meaning and Purpose of Article 71

In **Kor v Attorney General & Another** cited supra, this court observed that article 71(1) does not lend itself to obvious distillation of intent when it comes to a determination of the purpose of the roles of the various bodies required to act together and lead to the setting of the salaries of the Chief Justice and superior court Judges. Within that context, we are satisfied that from both the plain meaning of article 71, and the purposive deductions from its history, when it comes to the application of article 71,

the framers of the Constitution intended for its scope to be kept narrowly focused on only the public office holders identified in the provision. There should be no room for a liberal expansion of the named and designated officers, and the model of setting emoluments within article 71, because it presents a sui generis and peculiar situation that has been actuated by the peculiar need to protect the tenets of the democracy operated by the Republic.

On the very face of article 71, the provision is very clear as to the intention the framers of the Constitution to place the determination of the emoluments of distinctly identified groups of public officials directly in the hands of Parliament and the President. The public officials are a mix of elected and career officials who are required to work with utmost fidelity to conscience, independent of influence and pressure and whose work is vital to the very sustenance of the country's democratic governance, rule of law, stability, prosperity and good governance. They also occupy constitutionally recognized offices which are either independent bodies or 'politically termed' with limits on the terms of office.

Article 71 is a two-layered provision with the first part dealing with the Speaker and Deputy Speakers of Parliament, the Chief Justice, and officers of Independent Constitutional Bodies. The salaries of these public office holders are determinable by the President. The second set of provisions cater for officers of the Executive and Council of State, whose terms of office run with cycles of elections, and whose salaries and conditions of office are determinable by Parliament.

The tight, precise listing of the identified public officers shows that the framers of the Constitution intended to leave no doubt about the persons and entities covered, and the fact that non-listed persons cannot be included or roped in to the model of emolument setting by simple extrapolative reasoning.

Again, the provisions of **article 71** reflect a fundamental but deliberately *discriminatory* character by the manner in which it isolates the named officers for different treatment regarding how their emoluments are set. It shows an express exception to the non-discrimination or equal protection provisions contained in **article 17** of the Constitution.

To get a sense of what is meant, **sub-clauses (1), (2), and (3) of Article 17** are set out hereunder:

Equality and Freedom from Discrimination

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

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

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

Why would the salaries and facilities of members of Parliament, Ministers, and the Auditor-General for example, be set by a special committee when the rest of public office holders have their salaries set by a public body? Again, why would the framers of the Constitution do this when the Constitution does not in any other place, provide for the setting of the emoluments of the many offices identified and created by it?

Quiet review reveals the purposive intent behind the framing of article 71 structures. All the covered officers occupy positions that are sensitive and can become amenable to political and external manipulations in the absence of a constitutional framework determining their salaries and conditions of service from time to time, as well as the protection of their remuneration. The use of the constitutional checks and balances found in the structures set in article 71, and the historically crafted provisions, ensures that the said public officers are able to occupy apex positions, without determining their salaries themselves, and they are able to function well within the constitutional requirements on separation of powers and avoidance of conflict of interest.

Further, removing the determination of these public officers' salaries from their own hands also ensures that their emoluments are determined from fair and adequate considerations. A failure to set up an appropriate machinery to cover the determination of their compensation and entitlements may expose them to the whims of the executive apparatus, or public service operatives, and through this, subject them to manipulation and other pressures that can and ultimately undermine the independence with which they must work.

Indeed, under **article 286 of the 1992 Constitution**, a system is created to track the fidelity of most of article 71 public office holders by compelling them to periodically submit to the office of the Auditor-General, a written declaration of all assets and properties owned by them, and liabilities owed by them, either directly or indirectly. The Auditor-General in turn submits a written declaration of all assets and properties owned, and liabilities owed, to the President.

Article 71 therefore reveals a deliberate effort of the framers of the Constitution to ring-fence the independence and fidelity of identified public offices. Article 71, and related provisions such as **article 286(5)** reveal a *sui generis* character within the broader Constitution and body politic, that is designed to cater to the *peculiar* responsibilities and level of independence needed by the designated officers.

It is this clear reflection of an intention to set up a peculiar regime for the emoluments of the public officials listed in article 71 that reveals the purposive direction of article 71 as deliberately exclusionary. Because of this exclusionary nature, we are of the opinion that article 71 cannot be expanded in the absence of an express constitutional amendment permitting the importation of other beneficiaries. The circumstances of the provisions show that neither statutory nor administrative acts can expand the list of covered persons or officers covered under article 71 without falling into inconsistency with the constitutional intention.

Historical review of the content of article 71

A historical review of the structure and content of article 71 reflects past provisions on the emolument setting of identified public officers in the 1960, 1969, and 1979 constitutions with only slight variations. These parallel provisions also reveal the sustained intent of the framers of our Republic to ring-fence the determination of the emoluments of the officers identified in article 71 with a deliberate objective of achieving a separation from their well being, of any power that may be devolved from the setting of emoluments. Constructing a constitutionally protected model for determining their salaries and conditions of office clearly forms a critical means by which these officers are protected from external pressures affecting their work.

Without intending to burden this judgment, the analogous provisions will be set out here, for the purpose of appreciating the intention of the framers of the Constitutions in our constitutional history.

The 1979 Constitution

Article 58

58. (1) *The salaries and allowances payable, and the facilities and privileges available, to*

(a) the Speaker, the 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 Electoral Commissioner and the ad hoc Electoral Commissioners, and the Ombudsman;

(d) the chairman, vice-chairman and the other members of,

(i) the 'Council for Higher Education;

(ii) the Public Services Commission; (iii) the Press Commission; ,

(iv) the Lands Commission; and

(v) the Local Government Grants Commission,

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

The salaries and allowances payable, and the facilities available, to the President, the Vice-President, the chairman and the other members of the Council of State, Ministers of State and Deputy Ministers, being expenditure charged upon the Consolidated Fund shall be determined by Parliament on the recommendations of the committee referred to in clause (1) of this article.

(3) For the purposes of this article, and except as otherwise provided in this Constitution, the expression "salaries" includes retiring benefits or awards.

The 1969 Constitution had these various provisions:

Article 30

30(8). *The administrative expenses of the Electoral Commission including all salaries, allowances and pensions payable to, or in respect of, persons serving with the Commission shall be a charge upon the Consolidated Fund*

Article 36

36(3). *The President shall receive such salary and allowances, and on retirement such pension, gratuity or other allowances, as may be prescribed by Parliament, in respect of all of which he shall be exempt from direct taxation.*

36(4). *The salary and allowances payable to the President and any pension or gratuity payable to him on retirement shall be a charge upon the Consolidated Fund.*

36(5). *The salary, allowances and privileges of the President shall not be varied to his disadvantage while he holds office.*

Article 52

52(1). *The salaries of the Judges of the Superior Court of Judicature, of the Auditor-General, the Electoral Commissioner, the members of the Public Services Commission*

and of the Ombudsman, being salaries charged upon the Consolidated Fund, shall be determined by the President acting in consultation with the Council of State on the recommendations of a committee appointed in that behalf by the President acting in consultation with the Council of State.

52(2). *For the purposes of this article, the expression "salaries" includes pension and gratuity and other allowances payable*

Article 72

72(6). *The Speaker shall receive such salary and allowances and on retirement such retiring awards as the President, acting in consultation with the Council of State, may prescribe.*

72(7). *The salary and allowances payable to the Speaker and any retiring awards payable to him on retirement shall be a charge upon the Consolidated Fund.*

72(8). *The salary and other allowances payable to the Speaker shall not be varied to his disadvantage during the tenure of his office.*

Article 90

90.(1) *The office of a member of the National Assembly shall not be a paid office.*

(2) Subject to the provisions of the preceding clause, members of the National Assembly shall be paid such basic, sitting, traveling and rent allowances and other such allowances as may be determined by the President acting in consultation with the Council of State.

(3) A Minister of State and a Ministerial Secretary shall be paid such salaries and other allowances as may be determined by the President, acting in consultation with the Council of State.

(4) Any person who shall have served as a member of the National Assembly for a period of not less than five years shall be eligible, on retirement or death, for the payment of such gratuity to him or his personal representatives, as the case may be, as shall be determined by the President, acting in consultation with the Council of State.

(5) For the purposes of the immediately preceding clause, the period of five years specified therein shall be interpreted to mean five continuous years, and accordingly any period when the member is out of office, otherwise than by dissolution of the National Assembly as such, shall not be taken into account.

Article 117

117. (1) The salaries, allowances, gratuities and pension of the Judges of the Superior Court of Judicature shall be a charge upon the Consolidated Fund.

(2) A Judge of the Superior Court of Judicature, other than one who retires from public service pursuant to the provisions of clause (4) of this article, on retiring from office as such Judge,

(a) shall, in addition to any gratuity payable to him, be paid a pension which is equivalent to the salary he was entitled to immediately before retiring in any case in which any such Judge shall have served as such Judge for a period of ten years or more; and

(b) shall not hold any private office of profit or emolument either directly or indirectly.

(3) The salary, allowances and privileges, his rights in respect of leave of absence, gratuity or pension and other conditions of service of a Judge of the Superior Court of Judicature shall not be varied to his disadvantage.

(4) Notwithstanding the preceding provisions of this article a Judge of the Superior Court of Judicature may,

(a) at any time on the completion of twenty years' service in the public service at least ten continuous years of which are in respect of service as such Judge, and

(b) before attaining the age of sixty years, retire from office ; and shall be entitled on such retirement to a gratuity and pension for the time being applicable to the public service.

Article 123

123. Any fees, fines or other moneys taken by the Courts shall form part of the Consolidated Fund.

Article 135

135(10). *The salary and allowances payable to the Auditor- General shall be a charge upon the Consolidated Fund.*

135(11). *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 after his appointment.*

135(14). *The administrative expenses of the office of the Auditor-General including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Audit Service shall be a charge upon the Consolidated Fund.*

1960 Constitution had the following provisions:

Article 19 of the 1960 Constitution

The President shall receive such salary and allowances and on retirement such pension, gratuity and other allowance, as may be determined by the National Assembly.

The salaries and allowances of the President shall not be reduced during his period of office.

Salaries and allowances payable under this article are hereby charged on the Consolidated fund.

Article 38

The salary of the Auditor General shall be determined by the National Assembly, is hereby charged on the Consolidated fund and shall not be diminished during his term of office.

Article 46

(a) *The salary of a judge of a superior court shall be determined by the National Assembly and shall not be diminished while he remains in office.*

(b) All salaries and allowances paid under this article and all pensions and other retiring allowances paid in respect of service as Chief Justice or other judge of a superior court are hereby charged on the Consolidated Fund.

Article 52

All pensions, gratuities and other allowances payable on retirement to members of the Civil Service, the Judicial Service and the Police Service are hereby charged on the consolidated fund

From the above, it is noteworthy that the capturing of the designated list of public officials for a focused structure on how their emoluments are set began in 1979. Article 58, which is the article 71 analogous provision contained under the 1979 Constitution, was very much cast in similar terms to article 71 in the 1992 Constitution. The notable difference is an expansion of the list of public officers within article 71 of the 1992 Constitution.

Again, in 1960, there is an exclusion of emoluments of members of the National Assembly, and this was provided for as our constitutional history developed. It is therefore clear that the liberty to determine those whose salaries are set by article 71 must remain with the designers of the Republic, through the precise list given in the Constitution

Other Inconsistencies between article 71 and the salary payments under consideration

We also see other inconsistencies between the act of Parliament complained of, and the constitutional and statutory framework of the nation that must be highlighted. We start with the fundamental position that while being in the exalted position of the primary law of the land to which all laws must succumb, the Constitution must be construed to harmonize with the basic structure of the legal systems in this country. This is the principle of legal certainty which implies that the boundaries of law and decision making ought to be defined with substantial precision and clarity. See **Abotsi on Constitutional Law of Ghana: Texts, Cases, & Commentary 2017, at page 45.**

Interpretation of the Constitution must be done with the basic premise that it will not lead to absurdity. This principle must function in tandem with the principle of predictability which requires that there is an avoidance of negative surprises in the making and enforcement of law.

The salary payments to the spouses in issue were first, not recommended to be paid out of the salaries of the President and Vice President, but directly to the recipients as salary earners by reason of their relationship to the article 71 office holders. The payments therefore would be a direct charge on the Consolidated Fund though the recipients are not themselves part of either the Public Services, or any office that allows them access to salaries from the Consolidated Fund. The submission that the salary payments constituted part of the emoluments of the public office holders is therefore not tenable.

Further, the direct salary payments cannot form part of the privilege of the article 71 public office holders, because the recipients of the salaries are neither employees nor support staff required to work for the article 71 public office holder. They are independent family members who can choose to be of service to the nation or choose not to be of service to the nation. In fact, they can even choose to live separately from the article 71 holder, because marriage is a legal state and does not compel community.

In essence, the presence of a particular workforce made available to support the functions of the President and Vice President does not lay the legal basis for paying their spouses in the expectation that they will engage in work that highlights the role of the article 71 public office holder.

An observation that must necessarily be made is that everyone employed and salaried to support the work of the President, Vice President, and all article 71 public office holders are employed in their own right for the functions that they perform. They are engaged for their qualifications, and so their work obligations and rights at work, including their salaries, entitlements, and privileges while assisting the article 71 public office holder, are an outcome of their personal employment contract.

To this end, the **Labour Act 2003, Act 651** reflects the requirement that every employment must be made subject to the oversight of relevant statutes and regulatory

principles, and particularly states in **section 12 (1)** that contracts of employment, beyond six months or more for a number of working days equivalent to six months or more within a year, shall be secured by a written contract of employment which expresses in clear terms, the rights and obligations of the parties. The principle that this practical, legal and regulatory architecture of the workspace establishes is that every salaried person is paid their individual emoluments on the basis of their individual engagement as part of an identified workforce, and regulated as per the terms of their engagement.

This is not the situation with the spouses of article 71 public office holders. Thus should the State choose to make any settlement on first and second spouses, including any spouses of other article 71 public office holders, whether during the life time or beyond the life time of the spouses who are compensated in accordance with the constitutional provision, that settlement cannot fall into the category of a salary that is benchmarked with other article 71 holders.

With this broad frame of reasons, it is our firm opinion that the act of Parliament approving the recommendation to directly pay the spouses of the President and Vice President salaries that were benchmarked to the salaries of Ministers and Members of Parliament, as part of the emoluments of the President and Vice President, is an act that is violently inconsistent with the clear directions, intentions and purposes of article 71. It also contravenes the spirit and letter of article 71 of the Constitution.

The plaintiff's relief (a) for a declaration that, the approval by Parliament to pay salaries to the First and Second ladies is inconsistent with article 71 (1) and (2) of the 1992 Constitution of the Republic of Ghana and consequently should be declared null, void and unenforceable is granted. Equally, the plaintiff's relief (b) for a declaration that, per Article 71 (1) and (2); the positions of the first and second ladies of Ghana do not fall under the category of Public Office holders is also granted.

Compliance with articles 108 and 178 of the 1992 Constitution

The difficulty with the plaintiff's claims around these provisions is the lack of evidence before this court regarding the mode and manner in which the parliament's determination to pay salaries to the spouses of the President and Vice President was operationalized.

Article 108 provides that:

"Parliament shall not, unless the bill is introduced or the motion is introduced by or on behalf of, the President –

a) Proceed upon a bill including an amendment to a bill, that, in the opinion of the person presiding, makes provision for any of the following –

- i. the imposition of taxation or the alteration of taxation otherwise than by reduction; or*
- ii. the imposition of a charge on the Consolidated Fund or other public funds of Ghana or the alteration of any charge otherwise than by reduction; or*
- iii. the payment, issue or withdrawal from the Consolidated Fund and other public funds of Ghana of any moneys not charged on the Consolidated Fund or any increase in the amount of that payment, issue or withdrawal; or*
- iv. the composition or remission of any debt due to the Government of Ghana"*

Article 178 also provides:

"(1) No moneys shall be withdrawn from the Consolidated Fund except

a) to meet expenditure that is charged on that Fund by this Constitution or by an Act of Parliament; or

b) where the issue of those moneys has been authorized-

- i. by an appropriation Act; or*
- ii. by a supplementary estimate approved by resolution of Parliament passed for the purpose; or*

- iii. *by an Act of Parliament enacted under article 179 of this Constitution; or*
- iv. *by rules or regulations made under an Act of Parliament in respect of trust moneys paid into the Consolidated Fund.*

(2) No moneys shall be withdrawn from any public fund, other than the Consolidated Fund and the Contingency Fund, unless the issue of those moneys has been authorized by or under the authority of an Act of Parliament.”

The above provisions show a buffet of modes by which moneys can be authorized for payment out of the Consolidated Fund. An absolutely relevant question to be asked is the appropriation model directed by Parliament for the alleged payment of salaries, and how it was operationalized. The profuse submissions from both parties before this court provided no such information. In the circumstances, this court finds no need to exercise ourselves in answering issue (3) in what can only be an academic exercise. The Plaintiff's relief (d) is refused on that count.

Conclusion

We conclude by declaring as claimed by the plaintiff that the approval by Parliament to pay salaries to the First and Second ladies is inconsistent with article 71 (1) and (2) of the 1992 Constitution of the Republic of Ghana and consequently are declared null, void and unenforceable. Second, we declare that, the positions of the first and second ladies of Ghana do not fall under the category of Public Office holders enumerated in Article 71 (1) and (2);

The claim seeking a declaration that, per Articles 108 and 178 of the 1992 Constitution of the Republic of Ghana; parliament cannot, on its own accord, initiate or approve payment of any such emoluments; which would necessarily be paid from public funds; without a bill to that effect emanating from and introduced by the Government and duly passed into law is dismissed as unsubstantiated from the facts of the case before us.

Closing Observation and Recommendation

We must close this judgment with a sober observation and recommendation. The observation is the practice of benchmarking the emoluments, including retirement benefits of other public officers with article 71 public office holders.

In our nascent democracy, it is important to keep a clear long term view of the sustainability of any practice and the continuing development of the strength of the Republic when contemplating such practices so that there is not a weakening of the very structures set up to uphold the growth of democracy. We would therefore humbly recommend to all stakeholders to take the ongoing debates around article 71 with a sober contemplation of its purposes, intents and opportunities for national growth.

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