IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT ACCRA, GHANA

AD 2016

CORAM: ANSAH, JSC (PRESIDING)

ANIN YEBOAH, JSC

BAFFOE BONNIE, JSC

BENIN, JSC

AKAMBA, JSC

WRIT

NO. J1/29/2015

4TH FEBRUARY,2016

HIS LORDSHIP JUSTICE PAUL UUTER DERY. - -- PLAINTIFF

VRS

1. **TIGER EYE P. I . - - - 1ST DEFENDANT**
2. **THE HONOURABLE CHIEF JUSTICE OF THE REPUBLIC OF GHANA - - - 2ND DEFENDANT**
3. **THE ATTORNEY GENERAL - - - 3RD DEFENDANT**

JUDGMENT

BENIN, JSC:-

My Lords, in this case we would have to answer a very important question listed as relief (4) on the writ and also set down by the Plaintiff herein as issue (4) in the memorandum of issues. The question is this: if Article 146(8) of the Constitution is violated in terms of public disclosure of the contents of a petition, does it render the original process, being a petition to the President, null, void and of no effect? This question has been posed because in the case of Ghana Bar Association v. Attorney-General and Another (1995-96) 1GLR 598, hereafter called the GBA case, as well as in the case of Agyei-Twum v. Attorney-General and Akwetey (2005-2006) SCGLR 732, hereafter called the Agyei-Twum case, this question was not addressed and answered even though this constitutional provision featured in both cases. In the Agyei-Twum case the court concluded that since the petition was published to persons other than the President, it was done in violation of Article 146(8) of the Constitution and consequently the publication was declared an unconstitutional act. The court did not, however, proceed to say the petition was as a result rendered void. It might be because the plaintiff in that case did not seek any such relief. On the other hand, as suggested by Counsel for the Plaintiff herein at paragraph 8.9 of the statement of case, no consequential order was made under Article 2(2) of the Constitution, 1992 because "*there was no conclusive evidence on record that the 2nd Defendant was responsible for the publication in the media of his Petition*", quoting from the decision.

Both the GBA and Agyei-Twum cases asserted the fact that Article 146(8) should be complied with, in proceedings leading to the removal from office of a superior court Judge in the sense that it should be conducted in private. We would thus not belabour that point. And as we shall show, the resolution of this case will come down to the answer that will be given to the question we have posed above.

Nonetheless, we would address the issue whether we should depart from the decision in the Agyei-Twum case referred to above as has been strenuously urged upon us by Counsel for the 2nd and 3rd Defendants.

This matter has been brought by the Plaintiff herein relying on Article 146(8) of the 1992 Constitution. The entire Article 146 of which clause (8) forms a part deals with the removal from office of persons in the category of superior court judges, including the Chief Justice. It is necessary to set out the entire Article 146 here in order to appreciate and understand what clause (8) really means. It reads:

(1) A Justice of the Superior Court or a Chairman of the 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.

(2) A Justice of the Superior Court of Judicature or a Chairman of the Regional Tribunal may only be removed in accordance with the procedure specified in this article.

(3) If the President receives a petition for the removal of a Justice of the Superior Court other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal, he shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case.

(4) Where the Chief Justice decides that there is a *prima facie* case, he shall set up a committee consisting of three Justices of the Superior Courts or Chairmen of the Regional Tribunals or both, appointed by the Judicial Council and two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers, and who shall be appointed by the Chief Justice on the advice of the Council of State.

(5) The committee appointed under clause (4) of this article shall investigate the complaint and shall make its recommendations to the Chief Justice who shall forward it to the President.

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

(7) The committee appointed under clause (6) of this article shall inquire into the petition and recommend to the President whether the Chief Justice ought to be removed from office.

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

(9) The President shall, in each case, act in accordance with the recommendations of the committee.

(10) Where a petition has been referred to a committee under this article, the President may-

(a) in the case of the Chief Justice, acting in accordance with the advice of the Council of State, by warrant signed by him, suspend the Chief Justice;

(b) in the case of any other Justice of a Superior Court or a Chairman of a Regional Tribunal, acting in accordance with the advice of the Judicial Council, suspend that Justice or that Chairman of a Regional Tribunal.

(11) The President may, at any time, revoke a suspension under this article.

The Plaintiff is a judge of the High Court of the Republic of Ghana, and brings this action under Articles 2(1)(b) and 130(1)(a) of the Constitution, 1992. The Plaintiff's case is that he received a notification from the Honourable Lady Chief Justice, 2nd Defendant herein, that a petition for his removal from office had been referred to her by His Excellency the President of the Republic of Ghana. The said notification requested the Plaintiff to answer to the allegations contained in the petition, prior to the Chief Justice's decision

whether a prima *facie case* was made out or not. However, before the appointed time for him to respond had expired, the Honourable Chief Justice caused a publication to be made in the media disclosing the names of judicial officers, including him (the Plaintiff), who were alleged to have been involved in various acts of bribery and corruption as exposed by Tiger Eye PI, 1st Defendant herein. In the meantime the 1st defendant had taken steps to give wide publicity to the said allegations by public viewing of the video, and through social network as well as newspaper publications. The long and short of all these is that the Plaintiff complains that the actions of the 1st and 2nd Defendants are in violation of Article 146(8) of the Constitution which he believes restricts publication of a petition under Article 146 to only the President. Any publication beyond the President violates the Constitution and therefore renders the petition null and void. Consequently, the Plaintiff seeks these ten reliefs from this court:

(1) A declaration that the 1st Defendant's publication of its petition to the President in the media contravened Article 146(8) of the 1992 Constitution and therefore unconstitutional.

(2) A declaration that the conduct of the 1st Defendant acting through its Chief Executive Officer and Acting Editor of the Crusading Guide newspaper, Anas Aremeyaw Anas in releasing the contents of the petition, through publications in the Crusading Guide newspaper, his personal Facebook page, public screening of the audio visual recordings in support of the petition at the Accra International Conference Centre on the 22nd September, 2015, containing the evidence in support of the petition, is in violation of Article 146(8) of the 1992 Constitution and therefore unconstitutional.

(3) A declaration that the 2nd Defendant acting through the Judicial Secretary's Press Release dated 11th September 2015, naming the Plaintiff as one of the twelve (12) High Court Judges involved in the 'Bribery Scandal' is in contravention of Article 146(8) of the 1992 Constitution and therefore unconstitutional.

(4) A declaration that the petition presented to the President by the 1st Defendant is null and void on account of the 1st Defendant's contravention of Article 146(8) of the 1992 Constitution.
(5) A declaration that all proceedings however and whatsoever described arising out of the contents of the petition be declared null and void.
(6) A perpetual injunction against any adjudicating body however and whatsoever described from determining any issues arising out of the contents of the petition.
(7) A perpetual injunction restraining the Defendants, their agents, assigns, servants, from any further publishing, printing, reporting, broadcasting, advertising, publicizing, distributing and disseminating the contents of the petition.
(8) A perpetual injunction restraining the 2nd Defendant, her agents, assigns, servants and successors from any further impeachment proceedings against the Plaintiff.
(9) An order restraining any adjudicating body howsoever described from determining any issues arising out of the content of the said petition filed by the 1st Defendant during the pendency of the instant suit before the Supreme Court.
(10) Any other orders that this Honourable Court may deem fit.

The 1st Defendant, in a nutshell, did not deny the matters attributed to them by the Plaintiff. However, in their view their actions were justified as the public have a right to know of such matters of bribery and corruption. It is thus a matter of public interest that they as journalists need to broadcast in expression of free speech. The 1st Defendant also sought to draw a distinction between the publication of the petition itself and what they termed in paragraph 3.3 of their statement of case was the publication of ".....the results of the first defendant's investigation into the conduct of named judges...." The 1st Defendant also described the position taken by the Plaintiff as equating a petition under Article 146 of the Constitution to a State secret, which it is not. In the view of the 1st Defendant the remedy lies in personal law remedies like defamation if the allegations against

the judge are found to be untrue. To quote them, per paragraph 3.20 of the statement of case: "The remedy does not lie in voiding petitions because of the publication of their content. The answer lies in the application of common law remedies designed to ensure that frivolous and unfounded allegations of misconduct against judges become very costly."

For their part, the 2nd and 3rd Defendants urged the court not to follow the Agyei-Twum decision as it did not take into account several important factors including public interest, freedom of speech guaranteed by the Constitution, and the fact that mere publication of the contents of a petition to the press does not nullify the petition itself. All the material arguments will be addressed in detail as we move along.

The plaintiff set down four issues for consideration of the court whilst the 2nd and 3rd defendants set down two issues. The 1st defendant was, however, content with the issues set down by the other parties. The four (4) issues set down by the Plaintiff are the following:

1. **Whether or not the 1st Defendant's publication of its petition to the President in the media contravened Article 146(8) of the 1992 Constitution and therefore unconstitutional.**
2. **Whether or not the conduct of the 1st Defendant acting through its Chief Executive Officer and Acting Editor of the Crusading Guide Newspaper, his personal Facebook page, public screening of the audio visual recordings in support of the Petition at the Accra International Conference Centre on the 22nd and 23rd of September 2015, containing the evidence in support of the Petition, is in violation of Article 146(8) of the 1992 Constitution and therefore unconstitutional.**
3. **Whether or not the 2nd Defendant acting through the Judicial Secretary's Press Release dated 11th September, 2015, naming the Plaintiff as one of the twelve (12) High Court Judges**

involved in the "Bribery Scandal" is in contravention of Article 146(8) of the 1992 Constitution and therefore unconstitutional.

4. **Whether or not the 1st Defendant's petition to the President is null and void on account of the 1st Defendant's contravention of Article 146(8) of the 1992 Constitution.**

The two issues set down by the 2nd and 3rd Defendants are:

a. **Whether or not a breach of Article 146(8) of the 1992 Constitution in publishing some evidence touching on the contents of a petition to the general public violates the Plaintiff's right to procedural fairness in the consideration of the 1st Defendant's petition before the Chief Justice and/or the 5-member Committee under Article 146(2) and (3) thereof.**
b. **Whether or not a balanced assessment of the competing public interests in Article 21(1)(a) of the 1992 Constitution (guaranteeing freedom of speech and expression to the 1st Defendant) and Article 146(8) of the 1992 Constitution (guaranteeing confidentiality in impeachment proceedings to the Plaintiff) ought to be resolved in favour of the 1st Defendant or the Plaintiff having regard to all the circumstances of the instant case.**

The court adopted all the six issues set out above for hearing. Apart from issue (4) set out by the Plaintiff which will be considered on its own, we will discuss all the other issues together.

We would attempt to define the scope of Article 146(8) of the Constitution, in the light of the GBA and Agyei-Twum cases. Article 146(8) is repeated here for emphasis and it reads:

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

It seems the operative expression herein is 'All proceedings under this article shall be held in camera……' It is necessary to find out what this expression means in order to determine whether it is restricted to the proceedings before the committee set up to investigate the petition, as stated by Adjabeng JSC in his opinion in the GBA case or it extends to the President upon receipt of the petition as held in the Agyei-Twum case. In his opinion in the majority decision in the GBA case, this is what Adjabeng JSC said at page 660 of the report:

"It is important to note that article 146(8) of the Constitution, 1992 provides that the proceedings of the committee appointed to deal with any such petition 'shall be held in camera'. It is mandatory that such proceedings be held in private, not in public or open court as has unfortunately been done in this case. The reason for this important provision is obvious. It is to preserve, protect and safeguard the authority, dignity and independence of the judiciary."

All the other judges who spoke for the majority in that case took the position that an open forum was not the appropriate place to proceed against a judge in impeachment proceedings. The focus was on an open court and for that matter a judicial setting wherein the privacy in Article 146(8) could be guaranteed. On the contrary in the Agyei-Twum case the court took a position that could mean the privacy extends even to the moment the petition is presented to the President and is referred to the Chief Justice. In the words of Date-Bah JSC*:*

"The constitutional requirement that the impeachment proceedings be held in camera would be defeated if the petitioner were allowed to publish his or her petition to anyone other than the President. This is likely to lead to the petitioner's allegations being aired in public while the judge's response can only be considered in private. This would lead to grave adverse public relations consequences for the judiciary. The institution of the judiciary could be undermined without any justification. Accordingly, in my view, a petitioner under

article 146 may not disclose the contents of his or her petition to the media nor indeed to any person other than the President."

What is the true intent and purpose of this provision? Is it limited in its terms? What is the extent of the limitation, if any? The true intent is not in dispute, it is to protect the integrity of the judiciary, the personal reputation of the judge under investigation, and it also aims at protecting potential witnesses from some form of recrimination. The reasons for confidentiality could be endless, but integrity of the administration of justice is at the centre.

Is the provision limited, if so to what extent? Let us address this as a twin question. To begin with, we should carefully examine the expression 'all proceedings….shall be held in camera…' We first have to define the expression 'in camera'. It is a Latin expression which literally means 'in chamber.' There is no doubt this involves privacy. But the further question is: in whose chamber? Black's Law Dictionary, 9th edition at page 832 answers this question by saying it is '1. In the judge's private chambers. 2. In the courtroom with all spectators excluded. 3. (Of a judicial action) taken when court is not in session.'

What then is the legal meaning of the expression, 'in camera proceedings'? The same Black's Law Dictionary at page 1324 defines it to mean 'a proceeding held in a judge's chambers or other private place.' Both 'in camera' and 'in camera proceedings' entail some privacy in a judicial or quasi-judicial setting, in which the adjudicating person or tribunal conducts the hearing behind closed doors, to the exclusion of the public.

All the foregoing discussions weigh in favour of the GBA case. However, there are compelling reasons why we think the Agyei-Twum case presents a much more acceptable interpretation of Article 146(8) of the Constitution. Indeed there are good reasons that motivate us to go beyond the literal, narrow technical legal meaning

of 'in camera proceedings' in order to discover the true intent and purpose of the framers of the Constitution. These are:

i. **By clause (3) of Article 146, the Chief Justice is required to make a *prima facie* decision upon receipt of the petition from the President. The expression *prima facie* signifies that upon an initial examination of a case there is sufficient evidence to warrant further detailed inquiry. It may also mean that on the available evidence it is sufficient to prove a fact unless it is rebutted. Under clause (3) of Article 146 *prima facie* is used in the first sense. In the context of impeachment proceedings, it means the petition raises serious issues bordering on misconduct, misbehaviour or incompetence or physical infirmity; and that notwithstanding whatever response the respondent has to offer, the Chief Justice believes the petition deserves further investigations. There are no hard and fast rules in place but the rules of natural justice and the right to fair hearing will just dictate that the Chief Justice should at least seek a response to the petition from a named respondent before making a *prima facie* determination under this provision. The fact that it involves examination of available evidence in order to make that determination whether or not a *prima facie* case exists, it is a quasi-judicial decision-making. Thus even if the technical legal meaning of 'in camera proceedings' is to be adopted, it means it will cover the *prima facie* decision by the Chief Justice as well. It would follow then that the GBA case failed to take this important provision into account when it restricted 'in camera' to only the proceedings before the committee. This would be enough reason to depart from the reasoning by Adjabeng JSC in the GBA case quoted above.**

ii. **In a legal sense, proceedings include the originating process; and in the context of Article 146 the originating process is the petition that is presented to the President. Without a petition no impeachment proceedings could exist**

under this article. Thus when Article 146(8) talks of 'all proceedings' it will include the originating process, the petition. For that reason the provision extends to the President, as Agyei-Twum decided.

iii. **Article 146(8) uses the expression 'all proceedings under this article' which means the entire article 146. If it was restricted to clause (8) they would have said 'this clause' instead of 'this article'. And from the ongoing discourse, one cannot say the use of 'article' instead of 'clause' was inserted by mistake or through inadvertence. Every word used in the provision is significant; therefore it means every proceeding in the entire article 146, without exception.**

iv. **In our view, rather than the narrow technical legal meaning of *in camera proceedings,* what the framers of the Constitution really intended was that confidentiality and privacy should apply to impeachment proceedings under this article. It would indeed be meaningless to make provision for confidentiality if the entire process is allowed to be placed in the public domain even before the respondent has been heard. Commonsense could even be brought to bear on this interpretation that the framers of the Constitution could not have intended that even before *prima facie* determination has been made, or before the committee has concluded its investigations and submitted its report, the whole world should be told of the contents of the petition. That would clearly be defeating the purpose of the confidentiality and privacy that is required to attend to such proceedings.**

This position accords with the principles adopted by the United Nations in 1985 in respect of the judiciary. The UN Basic Principles on the Independence of the Judiciary, adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and

40/146 of 13 December 1985 has this relevant provision in paragraph 17:

A charge or complaint made against a judge in his/her judicial or professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at the initial stage shall be kept confidential, unless otherwise requested by the judge. **(our emphasis)**

In as much as the GBA case did not directly deal with the question whether 'in camera proceedings' applied to the petition presented to the President and whether it extended to the Chief Justice's *prima facie* determination, it is not a relevant case to consider in a determination of the issues raised herein. And as pointed out earlier in so far as it restricted the in camera proceedings to the committee's work we would depart from it. Be that as it may, the GBA decision was considered in the Agyei-Twum case before the latter decided that the 'in camera proceedings' provision extended to the petition presented to the President, thus refusing to follow the restrictive interpretation in the GBA case, supra. Consequently, our view is that a disclosure of the contents of the petition to persons who are not entitled to receive them, that is persons besides the President, the Chief Justice and members of the committee that is set up to investigate the complaint, will be contrary to Article 146(8) of the Constitution. Once the Committee's work is concluded and it has submitted its report the Constitutional injunction no longer applies, as we shall shortly explain. It suffices to say at this stage that there would be no proceedings pending as to be protected by the Constitution after the committee has concluded its work and its report has reached the President.

It is not disputed on the record that the 1st and 2nd Defendants at various times disclosed the contents of the petition to unauthorized persons. The 2nd Defendant caused a Press Release in which it published the names of the affected Judges and Magistrates and the

fact that they were going to be investigated for what the release described as a 'bribery scandal'. The 1st Defendant caused an extensive publication of the contents of their own petition to the public at large. As at the time of these publications, the decision in the Agyei-Twum case had been published and was therefore binding on all the actors in this case. Clearly therefore, there was unconstitutional disclosure of the petition to the public. As decided in the Agyei-Twum case, the right of the public to know did not detract from this provision which was specifically designed to achieve a certain effect. That was why the court decided in Agyei-Twum case that the right to know was curtailed in favour of the right to confidentiality. But the curtailment of free speech is not a permanent act. The public is not completely denied the right to know, but certainly not before a *prima facie* case has been made by the Chief Justice or the committee has completed its work and submitted its report, whichever of these terminates the proceedings. The rights of the people were merely postponed for a time lest the purpose of Article 146(8) should be defeated. We would emphasize that these clear constitutional provisions must be respected if the intent and purpose are not to be rendered nugatory, which is to keep the proceedings private and confidential.

We now turn to the question we posed in the introductory part of this decision: what consequences flow from the violation of Article 146(8)? To begin with, this Court, relying on a number of relevant authorities, held in the case of In Re Presidential Election Petition; Akufo-Addo, Bawumia & Obetsebi-Lamptey (No. 4) v. Mahama, Electoral Commission & National Democratic Congress (2013) SCGLR (Special Edition) 73, called the Election Petition case, that it is not every violation of a constitutional provision which results in the annulment of the action. It depends on a number of factors which the various majority judgments read in that case outlined. Apart from legal considerations, there are also public policy considerations that support that general principle of law. It does not follow that a declaration that an action or inaction is unconstitutional has the

effect of nullifying the action in question. The court must say it does have such an effect having regard to an express or implied provision of the Constitution or that it should have such effect in the spirit of a particular constitutional provision, and proceed to give directions or make the appropriate consequential orders under Article 2(2) of the Constitution, 1992.

As we have held earlier, Article 146(8) is violated when the proceedings are published to unauthorized persons, before the termination of the proceedings. The Constitution does not provide any penalty for unconstitutional disclosure and does not also afford any remedies that are available to a party affected by the disclosure. Unlike other countries where, outside the Constitution, there is legislation in place that prescribes what the consequences will be for violating the in camera proceedings provisions, Ghana has no such legislation. We may thus have to draw from the experiences of other jurisdictions in the light of the spirit of our Constitutional provisions.

We have identified five different modes of expressing disapproval with breach of the in camera provisions. These are: i. Treat the breach as contempt of the High Court. ii. Impose criminal sanctions if there is such legislation. iii. Award damages as for a constitutional infraction, where appropriate. iv. Treat it as breach of an injunction. v. The person who is injuriously affected may sue in tort for defamation. We would explain each of these briefly whilst expressing a view on those that are available or applicable in this country. But before then we must state that in none of these five situations are the proceedings annulled, which go to confirm the view expressed in the Election Petition case, supra.

In India, the Contempt of Court Act of 1971 makes a person who violates a law prescribing proceedings in camera liable in contempt of court punishable by a jail term of six months or a fine of 2000 rupees or both. It is reasonable to say that a committee set up under Article 146 of the Constitution, 1992 may refer a person violating this

provision to the High Court to commit for contempt if it is believed that the publication creates a substantial or real risk that the course of justice in the proceedings will be seriously impeded or prejudiced. At common law it is contempt, with intent to impede or prejudice the administration of justice, to publish material calculated to prejudice the fair trial of a pending or imminent cause. Common law is part of our laws, per Article 11(1)(e) of the Constitution, 1992. Thus in the absence of legislation, this common law remedy is available.

The Marriage Laws Amendment Act, 1976 of India, introduced section 22(1) in the Hindu Marriage Act of 1955 that '*Every proceeding under this Act shall be conducted In Camera.....*' A violation of this provision attracts a fine under section 22(2) thereof. In India again under section 327(2) of the Criminal Procedure Code of 1973 it is mandatory that inquiries into, and trial of, rape should be conducted in camera. Subsection (3) makes a violation punishable by a jail term. There is no analogous provision in our laws. We know that penal laws must be legislated by Parliament. But these references have been made to show that breach of in camera proceedings provision does not affect the validity of the proceedings per se; it may attract other forms of sanctions.

We shall next consider damages. The US Supreme Court took the view in the case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, U.S. 388 (1971) that money damages were an appropriate remedy for a violation of the right to privacy conferred by the 4th Amendment. Indeed it was the first time such a decision was rendered by the court that money damages would be an adequate remedy for constitutional violation of a right conferred by the Constitution. This case is cited for its persuasive value only, that in appropriate cases the court could award damages for violation of a constitutional right without necessarily annulling the act in question if that would be an appropriate remedy.

In an article titled 'IN-CAMERA-PROCEEDINGS' Azizur Rahman, Additional Judge, Farrakhabad, published in J.T.R.I. Journal-First

Year, Issue 2-April-June, 1995, wrote this relevant passage that "…..where the enactment itself makes it mandatory to proceed in camera, it required no order…(of a court)….The said provision shall have the force of an injunction in itself." This is a true representation of such provision. It prohibits publication of the proceedings to outsiders, thus inherently it is an injunction that is placed on disclosing the proceedings to unauthorized persons. Consequently, an unlawful disclosure should be treated as though a court injunction has been violated. Whatever a violation of an injunction entails could then be effected by a court, which in our jurisdiction includes contempt proceedings. To our mind that is the extent that the committee appointed under Article 146 can treat a violation of the confidentiality of its proceedings. That remedy is available to the committee.

Counsel for the 1st Defendant took the view that in the event of a violation of the confidentiality rule the party affected may take action in defamation. It is a view we share. That is a right open to a party to pursue independent of, or in conjunction with, other remedies available for the violation.

Having dealt with various remedies available to the committee as well as a party affected by an unconstitutional disclosure, we proceed to address the question we posed at the start of this decision, whether annulment of the petition is also a remedy available to a respondent to the petition. Let us briefly state the views of all the lawyers for the parties on this issue at this stage. We have earlier referred to the position of Counsel for the Plaintiff that no consequential order was made in the Agyei-Twum case because the court found the publication was not caused by the petitioner, the 2nd defendant in that case. It should be pointed out that the court did not address that question at all, let alone to give any reason why it did not draw any such conclusion to annul the petition. The reference to the 2nd defendant in that case was actually addressing a factual issue whether or not he was responsible for the publication of

his petition to other persons. In the instant case Counsel for the Plaintiff gave reasons why their relief 4 should be granted, that is annulment of the impeachment proceedings. These are:

6.37 '……the 1st Defendant's conduct has created grave adverse public relations consequences for the judiciary which is being undermined by the 1st Defendant without any justification.'

6.40 'The 1st Defendant was only concerned in prejudging his Petition in the public, a conduct calculated to bring the authority and administration of the law into disrespect, disregard and to interfere with the course of justice.'

6.41 'The 1st Defendant's conduct is in bad faith, is malicious and is prejudicial to the determination of any impeachment proceedings against the Plaintiff.'

7.5 'The finding of a prima facie case against the Superior Court Judges being an administrative or quasi-judicial function, the 2nd Defendant is bound by the provisions of Article 296 of the 1992 Constitution.'

7.9 'The Plaintiff further contends that the disclosure of his identity and the identity of the other judges against whom the 1st Defendant filed the Petition discloses an unfair bias and prejudices his right to a fair hearing and is not in accordance with due process of law.'

Counsel for the 1st Defendant said this in his statement of case at paragraphs 3.31 through 3.35 that "*…..*even if this court were to affirm its Agyei-Twum stance, that position does not affect the constitutionality and validity of the first defendant's petition for the removal of the plaintiff as a superior court judge-and that the petition remains valid and of full effect……..the Agyei-Twum case…merely declared the publication of the petition to persons other than the President as unconstitutional. The petition itself and its validity were untouched…….The question as to whether the publication of the petition and its contents and the publication by the Judicial

Secretary were proper or otherwise should be totally separate from the legal effect and validity of the first defendant's petition……It cannot be said……that the petition has been tainted with procedural unfairness. This is because the plaintiff will be afforded procedural fairness at the enquiry as to the veracity of the petition. There is a world of difference between a procedural fairness in hearing the merits of a petition and the publicity of a petition. The latter does not encroach upon or encumber the former since the veracity of the petition will not be decided by a jury, that is to say, the publications do not contaminate the petition qua petition. We submit that publicity of the existence of the petition and its contents alone cannot vitiate the consequential proceedings for removal unless it is shown that the publications influenced the body set up to enquire into the merits of the petition……."

In paragraph 44 of the statement of case for the 2nd and 3rd Defendants, counsel wrote that *"……*the position taken by the Plaintiff that any publication of any aspect of a petition alleging a misconduct against a judge is a violation of the judge's right to confidentiality as to vitiate the entire proceedings will lead to great mischief and absurdity……." Counsel gave reasons for the position she took, and these reasons are addressed in the ensuing discussions.

Let us briefly dispose of the question concerning Article 296 of the Constitution which is about how to exercise discretionary power. We took note of the submissions by Counsel for the Plaintiff on what he perceived to be an unfair exercise of discretionary power by the 2nd Defendant in releasing the names of the affected Judges to the media. It is observed that there is no relief sought in respect of the alleged breach of Article 296. Hence we considered these submissions as part of the Plaintiff's relief (3) that the 2nd Defendant violated Article 146(8) of the Constitution.

We should first consider the authorities cited by Counsel for the 2nd and 3rd Defendants on how other jurisdictions have dealt with similar

issues, which we consider relevant in support of the present discussion, even though she cited them to persuade us to depart from the decision in Agyei-Twum case. A case decided by the South Africa High Court (Witwatersfand Local Division) which was cited by Counsel for the 2nd and 3rd Defendants is apt; that is the case of Hlophe v. Constitutional Court of South Africa & Others (2008) ZAGPHC 289, herein called the Hlophe case. In this case the applicant was a sitting judge against whom the judges of the South African Constitutional Court lodged a complaint to the Judicial Services Commission (JSC) which was the body constitutionally mandated to receive that complaint. But like the facts in the Agyei-Twum case, the complaint was copied to several other bodies. And even more than that, a copy was released to the Press. The applicant went to the High Court complaining about violation of his constitutional rights by the publication of the complaint to other persons, like the Agyei-Twum case, and by the publication to the media, like the complaint herein. And just like the Agyei-Twum case, the court upheld some declaratory reliefs that his rights were violated. What is relevant for our purposes is what the court said of the effect of the violation of his constitutional rights. At paragraph (53) of the judgment the learned judge P. M. Mojapelo, Deputy Judge Presiding whose judgment was concurred in by two other Justices on the 5-man panel namely Moshidi, J. and Mathopo J., said this:

"*The finding that the applicant was treated unfairly and his rights violated in the manner in which the lodging of the complaint and the decision to publish the complaint was handled is totally separate from the question whether the applicant is guilty of the complaint lodged against him. That complaint stands to be and will be adjudicated upon by the JSC. It can also not be said, as the applicant submits, that the complaint is tainted by the procedural unfairness in lodging it, because the applicant will be afforded procedural fairness in the consideration of the complaint by the JSC when it deals with that complaint.....There is a difference between procedural fairness in lodging the complaint and publishing same prior to the*

JSC dealing therewith, on one hand, and procedural fairness before the JSC when the complaint is dealt with, on the other."

After a detailed examination of the case and his decision, the learned judge concluded the point concerning the effect of his decision on the pending complaint against the learned judge in the following words, at paragraph (103) of his judgment:

"*I also do not share the applicant's view that a declaratory order in his favour may have the effect of vitiating or tainting the process before the JSC, particularly the complaint against the applicant, remains totally uncontaminated and will be determined on a different basis from the issues decided in this judgment. It is in fact in the interest of public policy, justice and the judiciary as a whole that the complaint be fully investigated by the JSC. Nothing in this judgment and the proceedings before this Court prevents that and nothing should be construed as preventing that from happening."*

It is significant to note that the other two justices on the panel namely Marais J. and Gildenhuys J. who did not grant any of the declaratory reliefs sought by the applicant for violation of his rights, nevertheless agreed with the majority and dismissed the claim to annul the complaint for alleged misconduct.

The court's decision quoted above stemmed from the argument of counsel for the applicant referred to by Justice Mojalepo at paragraph (108) of his judgment that "*once the applicant's constitutional rights are violated the court has no discretion, but is obliged to declare the lodging of the complaint to be invalid."* The court roundly dismissed this argument as not justified, for violation of the applicant's constitutional rights had no effect on the validity of the complaint, in Ghana called a petition.

Next we will consider this case of Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) decided by the US Supreme Court, hereinafter called the Landmark case. In that case The Pilot newspaper had reported that Judge H. Warrington Sharp, who sat

on the Juvenile and Domestic Relations Court, was under an investigation by a judicial fitness panel. They were deciding whether or not to begin disciplinary proceedings against Judge Sharp. Under a Virginia statute, each complaint against a judge was to be reviewed in secret, it would be announced only if deemed serious enough to require a public hearing. The trial court found the publisher guilty and imposed a penalty on him , as prescribed by existing legislation. He appealed against the conviction to the Supreme Court of Virginia, but the appellate court affirmed the lower court's decision. By a majority of 6 to 1 the court held that in view of the purpose the confidentiality rule was intended to serve, a violation was punishable as an offence. The court set out the three purposes as follows: (i) protection of the judge's reputation; (ii) protection of public confidence in the judicial system; (iii) protection of complainants and witnesses from possible recriminations. This protectionist stance did not impress the US Supreme Court when it upheld the appeal and reversed the lower court's conviction of the publisher for illegal disclosure of confidential proceedings before the Judicial Inquiry and Review Commission about Judge Sharp's alleged misconduct. Counsel for the 2nd and 3rd Defendants quoted this relevant passage from the judgment of the court which was read by Chief Justice Burger:

"*……neither the Commonwealth's interest in protecting the reputation of the judges nor the interest in maintaining the institutional integrity of the courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do, in fact, enhance the guarantee of confidentiality. Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free',* New York Times Co. v. Sullivan, 376 U.S (1964)*. …….The remaining interest sought to*

be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales……..”

The relevance of this decision for our purposes is that in spite of the violation of the confidentiality disclosure law, the court believed it should not have precedence over free speech guaranteed by the Constitution; both rights were entitled to respect. For that reason the impeachment proceeding against Judge Sharp was not nullified as a result of the public disclosure of the impeachment proceedings. The court did acknowledge the problem caused by the premature disclosure, but yet allowed proceedings to continue. In the concluding part of the decision in the Landmark case, this is what Berger CJ said:

“*It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure….”* yet it concluded it posed no danger to the administration of justice. It reversed the lower court’s decision and ordered “*the case remanded for further proceedings…….”*

Indeed the underlying reason for the position taken by the court in the Landmark case, supra, was derived from an earlier case decided by the same court. That is the case of Bridges v. California, 314 U.S. 252 (1941) per Justice Black at pages 270-271: “*The assumption that respect for the Judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion…….an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment and contempt much more than it would enhance respect.”* At pages 291-292 of the same case and speaking in the same vein, Justice Frankfurter, though dissenting, agreed that speech cannot be punished when the purpose was simply *“to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the*

criticism to which in a democracy, other public servants are exposed"

Finally, the case involving the then Deputy Chief Justice of Kenya which was cited by Counsel for the 2nd and 3rd Defendants is also relevant to the ongoing discussion. That is the case of Nancy Makokha Baraza v. Judicial Service Commission & 9 others (2012) eKLR, herein called the Baraza case. The whole case started when the petitioner, the serving Deputy Chief Justice had a confrontation with a security personnel at a shopping centre. The security guard made a report to the police against the Deputy Chief Justice complaining of assault, intimidation and threat. Police began their investigations into the complaint. Somehow the press picked up the story and it became the subject of extensive discussion in both the print and electronic media. This naturally generated a lot of elaborate and sensational public debate as regards the conduct of public officers. Whilst police inquiries continued, the Judicial Service Commission (JSC) which under the Kenya constitution has responsibility to make initial investigations into the conduct of judicial officers before deciding whether to recommend to the President to set up a tribunal to investigate a complaint, decided to conduct the initial investigations. To cut a long story short, the JSC decided to make a recommendation to the President to set up a tribunal to hold the final inquiry into the conduct of the petitioner, the Deputy Chief Justice. She considered that having regard to her status and position, her constitutional rights had been violated by the entire process, from the publicity given to the whole affair up to the decision to recommend to the President to set up a tribunal to inquire into the affair. She therefore brought a petition before the Supreme Court seeking several reliefs one of which, relief (a), was for a declaration that the acts of the JSC were unconstitutional and thus null and void and another relief (i) sought for an order of prohibition restraining the JSC from taking any further step in the matter. The court set down several issues for determination. Among them was one numbered (6) 'whether the level of publicity generated

by the incident can be such as to render a fair trial of the issues impossible and improbable.'

The issue of publicity is relevant for this case. At paragraph 104 of its judgment, the court had this to say:

"*The Petitioner has extensively dwelt on the media coverage that was generated by the incident, as having influenced the decision of the Commission and therefore lending credence to the fact that the decision may have been based on irrelevant factors, more so taking into account the fact that one of the publications namely the Nairobi Law Monthly, which covered the episode, is published by a Commissioner. We must acknowledge the fact that the incident was given an exceptionally wide media coverage. The Petitioner, it is undisputed, is not an ordinary person taking into account her position both in Kenyan Judiciary and in the society. An incident surrounding her would, not unexpectedly, attract more than average media coverage. In Abuse of process and fairness in court proceedings by David Corker and David Young it is stated that* 'modern media is able to create and orchestrate, an unprecedented level of hostility towards a particular defendant which has attracted substantial, predominantly hostile media publicity.' *However, publicity alone does not vitiate proceedings unless it is shown that the coverage was such that the Commission is likely to have been influenced or affected by the media reports provoked by the incident."*

The court at paragraph 105 of the judgment made reference to the English case of R. v. Horsham Justices; Ex Parte Farquharson (1982) All ER 269; (1982) QB 762 at page 794 where Lord Denning held that the risk must be substantial since the sole consideration is the risk to the administration of justice and whoever has to consider it should remember that at trial, judges are not influenced by what they may have read in the newspapers.

The underlying reasons in the Landmark case from the USA, the Hlophe case from South Africa and the Baraza case from Kenya quoted above are sound in law and we do adopt same. However, we would proceed further to show that there are provisions in the Constitution, 1992, that would justify such a conclusion.

The entire Article 146 is devoted to proceedings leading to the removal of a superior court judge from office, thus it must be read as a whole and not in isolated bits. The process begins with the receipt of a petition by the President for the removal of a superior court judge from office on account of misbehaviour, incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind. From the moment the President accepts the petition, the process of impeachment has commenced. And that process cannot be truncated except in terms as clearly expressed in Article 146. And there are only two situations in which this can occur, firstly where the Chief Justice decides that there is no *prima facie* case under clause (3) and secondly, after the committee set up to investigate the complaint has submitted its report. Apart from these two modes of terminating proceedings commenced under Article 146 which are expressly provided for, it is impermissible to import any other mode into the Article to truncate the process. On this ground alone relief 4 of the Plaintiff's action cannot stand. But we will proceed further.

Next we believe that the attempt made by the Plaintiff herein to abort the process because of the violation of clause (8) of Article 146 by the public disclosure of the petition and its contents brings it in direct conflict with the very constitutional provisions which say the process cannot be truncated except in the two situations mentioned already. The petition that commences the impeachment proceedings derives its validity from the Constitution; and thus unless clear intention is expressed, that validity cannot be taken away only because there is a procedural infringement. The duty imposed on the Chief Justice to make a *prima facie* determination is derived from the

validity of the petition. And that duty, by the terms of the Constitution, prevails until the Chief Justice has performed it. There is nothing in the Constitution that prevents the Chief Justice from performing that constitutionally imposed duty once the President has referred the petition to her. Any attempt to stop that process will be subverting the Constitution. It goes to confirm that the substantive process commenced by the petition is divorceable from the procedural steps that are, or may be put in place, to resolve the petition; the procedural steps cannot override the validity of the originating process.

Finally the attempt to abort the proceedings also brings it in conflict with the provisions of Articles 128(4), 136(3) and 139(4) of the Constitution which require that only persons of higher moral character and proven integrity shall be appointed to the various branches of the superior court bench, read side by side with Article 146(1) which requires, inter alia, that when a judge is alleged to have fallen short of the qualities for which he was appointed he should be investigated. It is also a matter of public policy that allegations of misconduct or misbehaviour against a public official, including a judge, should not be swept under the carpet. Indeed the very integrity of the Judiciary is at stake if such allegations are unexamined and found to be false. In the words of Berger CJ in the Landmark case "*The operations of the courts and the judicial conduct of judges are matters of utmost public concern.*" Thus we are faced with these competing rights under the Constitution, that is, the requirement to investigate the alleged misconduct against the Plaintiff and the protection of his personal reputation as well as the integrity of the judiciary itself. It would be appropriate to apply what the Irish Supreme Court called the doctrine of harmonious interpretation. This doctrine requires that where two constitutional rights come into conflict, for example the right to privacy and the freedom of the press, the conflict should be resolved in the manner which least restricts both rights. That was in the case of Attorney-General v. X and others (1992) ILRM 401. In short the court was

saying that effect should be given to both rights. The plaintiff is entitled to private and confidential process which has been breached by the public disclosure of the petition and its contents; at the same time the State has a constitutional right to investigate the allegations contained in the petition as a matter of express constitutional provisions, and also on account of public policy which requires that such allegations should be investigated. The plaintiff has other remedies available to him as mentioned earlier when we identified the five possible consequences for such violations some of which are available under our laws. But the State and for that matter the people from whom justice emanates as per Article 125(1) of the Constitution, 1992, will lose it all if the proceedings are truncated without investigations. The State and the people of Ghana have cause to demand that, like Caesar's wife, judges should live above suspicion. More importantly, the Plaintiff's right to a fair hearing cannot be said to have been violated. The Chief Justice has given him the chance to be heard before a decision is made whether or not a *prima facie* case exists. The committee is yet to be set up to go into the petition. There is thus no cause to complain at this stage about any unfairness in procedure or prejudice to his cause. For these reasons too the plaintiff's request cannot fly.

It may be seen that we have shied away from dealing with the question of publication since it was the subject of the decision in the Agyei-Twum case. Publication is at the heart of Article 146(8) and since we have taken the view that the privacy of the proceedings covers the entire gamut of the article we would consider that the decision in the Agyei-Twum case should stand. But the breach notwithstanding, we believe the process should continue for reasons explained herein. Indeed it is unconscionable to void the petition because its contents have been divulged to others, knowing full well that neither the Chief Justice nor the panel is going to rely on the public opinion but on what is contained in the petition and the responses that will be provided by the Plaintiff. As Lord Denning

pointed out in the case of R V. Horsham Justices, supra, courts are not influenced in their decisions by what is published in newspapers.

We fully appreciate and share the fear expressed by Counsel for the 2nd and 3rd Defendants that any person who wants to favour a judge can instigate the public disclosure of the contents of a petition under Article 146 and then the judge gets away with it, thereby rendering otiose the entire provisions of Article 146. Indeed the framers of the Constitution could not have intended that if for some reason the confidentiality principle is breached the impeachment process should be terminated, in view of the meticulous provisions requiring that only persons with unblemished character and integrity be appointed to serve and continue to serve on the superior court bench. The invitation to us to nullify the proceedings is thus absurd and subversive of the constitutional order. This is sufficient to dispose of issue (4) set down by the Plaintiff and for that matter the question we posed at the start of this decision.

We proceed to consider other ancillary matters arising in this case. Counsel for the 2nd and 3rd Defendants was quite equivocal in her views on the outcome of the Agyei-Twum case. In one breadth she thought it did not void the petition, in another she thought it did. That led her to all that lengthy submission urging us to depart from that decision. We think that apart from granting the declaratory relief that the unlawful disclosure violated the provisions of Article 146(8), the Agyei-Twum case did not go on to conclude that the petition was void. We have to say that we discountenance any view that the Agyei-Twum case decided that a petition was rendered void as a result of illegal disclosure of the contents of the petition, and we would disaffirm any such decision if it did.

The Plaintiff's complaint contained in paragraph 7.9 of the statement of case, supra, does not hold. He was afforded the opportunity by the Chief Justice to respond to the petition to assist her to make a *prima facie* decision. And from the practice that has so far been in vogue in as far as impeachment proceedings under Article 146 have been

conducted, the respondents have been given full opportunity to defend the petition in accordance with law, including the *prima facie* decision by the Chief Justice. We believe it will be no different on this occasion as no facts have been disclosed to make us think otherwise. Article 146(8) even guarantees due process. The Plaintiff can only complain if, at some step in the proceedings, due process is not followed. Until then he has no cause to complain.

Lastly, there is the issue of perpetual injunction sought against the Defendants from any further publication of the petition or its contents. We understand this to be a permanent gagging order that is being sought, or an injunction order in perpetuity. That throws up the question whether the confidentiality rule applies in perpetuity including even after the committee has submitted its report. For that is the effect of a perpetual injunction: it operates even after the court has delivered its judgment and upheld the claim. Article 146(8) clearly protects the proceedings so long as something remains to be done. Thus the injunction we spoke of earlier is an interlocutory one pending a determination of the petition. A perpetual injunction will stifle the free speech guaranteed by Article 21(1)(a) of the Constitution. We would even venture to say that it would amount to judicial censorship of press freedom also guaranteed by the Constitution, under Article 162(2) thereof. In the absence of express words to that effect, the prohibition contained in Article 146(8) could not reasonably be extended beyond the proceedings to which it relates.

A relevant case in point is the English House of Lords case of Scott v. Scott (1913) UKHL 2; (1913) AC 417. It was a divorce case in which the trial judge ordered in camera hearing. After the conclusion of the proceedings, one of the parties sent the transcript of the recorded proceedings to third parties. Contempt proceedings were taken against him. The matter travelled all the way to the House of Lords which held that the order could not enjoin perpetual silence on all persons with regard to what took place at the hearing and therefore

the publisher was not guilty of contempt. In the words of the Earl of Halsbury, "....*as to injunction of perpetual secrecy, there is not a judgment or authority to justify it.....*" Earl Lorebun expressed it this way:

"***In nullity and divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publications can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power, the jurisdiction must surely be limited to willful and malicious publication going beyond the necessity."***

While concurring in this view, Lord Atkinson went further to say that a party affected by such publication was entitled to some remedies including damages for defamation.

In the Indian case of Naresh and Others v. State of Maharashtra and Anor, 1967 AIR 1, the Supreme Court upheld the reasoning in Scott v. Scott, supra, that publication cannot be permanently injuncted. They were considering a case that bordered in part on freedom of expression as that would be in violation of Article 19(1)(a) of the India Constitution, which like Article 21(1)(a) of our Constitution, 1992, guarantees free speech. The court said that:

"******.....*the order.....imposing suppression of the reporting of deposition....was illegal and without jurisdiction. It was not in his power to make such an order.....because the order either purports to impose a perpetual ban or leave the matter in doubt, thus placing those concerned with the publication of the report under a virtual sword of Damocles, the order cannot be sustained."***

In R v. Horsham Justices, supra, a blanket ban on publication of the entire proceedings was ruled to be too wide, after the evidence had

been led; that the reporting of only that part which was necessary, in the interest of justice, to suppress for the time being should have been postponed.

The UN Principles on the Independence of the Judiciary, paragraph 17 of which was quoted above, duly acknowledges that a freeze on free speech during investigations against a judge can only be applied as a temporary measure, hence the restriction of the confidentiality principle to only the 'initial' stage of the investigation.

To conclude this question, it is our view that free speech guaranteed by the Constitution cannot be permanently injuncted without violating the Constitution itself. As earlier explained free speech is only suspended temporarily whilst impeachment proceedings under Article 146 are ongoing. A harmonious interpretation thus enables effect to be given to all the competing constitutional rights at play in this case. We accordingly decline such an invitation that seeks a permanent injunction.

For reasons advanced in the preceding analysis of the case, we are able to grant reliefs numbered (1), (2) and (3). All the other reliefs numbered (4), (5), (6), (7), (8) and (9) are dismissed. In the result, for the avoidance of any doubt, we affirm the continued validity of the petition against the Plaintiff, and we do state that nothing said herein is a bar to the proceedings in respect of the 1st Defendant's petition against the Plaintiff.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) ANIN - YEBOAH
JUSTICE OF THE SUPREME COURT

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