

BY ACCOUNTANTS AND VIGILANTES: THE ROLE OF INDIVIDUAL ACTIONS IN THE GHANAIAN SUPREME COURT

Kenneth NO Ghartey

Abstract

It cannot now be denied that individual action is crucial to entrenching democratic principles, upholding the rule of law and promoting good governance. Towards these ideals, the citizens of Ghana agreed to adopt through the 1992 Constitution of the Republic of Ghana, a framework for government that will secure for themselves and posterity, liberty, equality of opportunity and prosperity and the protection of fundamental human rights and freedoms. To kindle popular involvement in the democratic process, article 2 of the 1992 Constitution gives a right to any person to challenge the constitutionality of an act or omission of any person, an enactment and things done under the power of an enactment. In the period following January 1993, many citizens have taken advantage of this duty to protect Ghana's young democracy. These individual actions have often had wider implications for the country's constitutional jurisprudence including (1) the role of Parliament and the Executive in Constitutional amendments, (2) the scope of the presidential immunity from suit and the personality of the Attorney-General, (3) The Connections between human dignity and exclusion from political office and (4) the scheme for the Parliamentary approval of international business and economic transactions. Using these lenses, this chapter argues that the conferment of a direct enforcement right on persons, natural and legal, has been fundamental to the success of the Fourth Republican Constitution of Ghana. It concludes that without this express power in the ordinary citizen; Ghana's entire constitutional architecture could not have stood the test of the last two odd decades.

1 Introduction

One of the yearning hopes of Ghanaians after the coming into force of the Constitution of the Republic of Ghana, 1992 ('the 1992 Constitution') was that the so-called 'culture of silence'¹ entrenched by Ghana's long and chequered history with military dictatorships and revolutions, will be broken by empowering citizens to use legitimate judicial means to help create a country of laws.

1 Coined by the then pro-opposition press as a description for the years of military rule immediately preceding 1993 which were characterised by a stifling of individual and press freedom of speech.

Towards this end, the Constituent Assembly repeated a long-standing feature of previous Constitutions² in article 2(1) of the 1992 Constitution. Within it, a person who alleges that 'an enactment or anything contained in or done, under the authority of that or any other enactment' or 'any act or omission of any person' 'is inconsistent with, or is in contravention of a provision of [the] Constitution' may bring an action in the Supreme Court for a declaration to that effect.'

The relative position of this constitutional provision points clearly to the importance that the framers attached to this personal right of natural and legal persons to protect the Constitution and to give effect to our national collective commitment to '[t]he Rule of Law' and to '[t]he Principle that all powers of Government spring from the Sovereign Will of the People.'³ It comes only after article 1 which declares the supremacy of the Constitution. It is the exercise of this right that we shall call 'individual actions' throughout this chapter.

The contention in this chapter, by exploring these four lenses, is that the conferment of a direct enforcement right on persons, natural and legal, has been fundamental to the success of Fourth Republican Constitution. Indeed, one may go as far as to legitimately assert that without this express power in the ordinary citizen, our entire constitutional architecture could not have stood the test of the last two decades. Particularly, the focus of this chapter will be on two prime crusaders, Professor Stephen Kwaku Asare, a US-based Ghanaian Professor of Accounting who is also an attorney and Mr Martin Alamisi Burns Kaiser Amidu, at various times, Deputy Attorney-General and Minister of Justice, Vice-Presidential Candidate of the National Democratic Congress, Attorney-General of the Republic and more recently anti-corruption crusader who has acquired the moniker 'Citizen Vigilante', presumably on his willingness to take on the structures of power. Their activities reveal that a portion of the citizenry, though very small indeed, has taken this constitutional watchdog role, very seriously.⁴

These individual actions have contributed to our constitutional jurisprudence in at least four areas, namely (1) the role of Parliament and the Executive in Constitutional amendments; (2) the scope of the presidential immunity from suit and the personality of the Attorney-General; (3) the connections between human dignity and exclusion from

2 Art 2, Constitution of the Republic of Ghana 1969 and art 2, Constitution of the Republic of Ghana 1979.

3 Preamble, Constitution of the Republic of Ghana 1992.

4 This phenomenon is not limited to Ghana. There are examples in England include Mr Raymond Blackburn who lends his name to the famous line of 'Blackburn cases' e.g. *Blackburn v Attorney-General* [1971] 1 WLR 1037 and *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 and Mr Ross McWhirter who was murdered for his support for the rule of law. See Lord Denning's *The Discipline of Law* (1979).

political office; and (4) the scheme for the Parliamentary approval of international business and economic transactions. This chapter therefore considers aspects of a few cases decided by the Supreme Court and highlights what changes to the constitutional viewpoint have been occasioned by the decisions in these areas of focus.

2 The role of parliament and the executive in constitutional amendments

After more than a decade and half of the Fourth Republic, questions about the continued integrity and reliability of some of the Constitution's provisions in the light of the developments since 1993 became more and more prevalent. In the 2008 election cycle, then Candidate John Mills (later elected President) put forward a holistic review of the 1992 Constitution as one of his campaign promises. In 2010, President Mills in accordance with article 289 of the 1992 Constitution, set up a ten member Constitution Review Commission (CRC) with a mandate to collate views of the general public on the strength and weaknesses of the Constitution and to make recommendations to Government for amendments.

Following the completion of the CRC's work, the government, in June 2012, issued a white paper largely accepting the commission's recommendations. In October 2012, the Government set up yet another body, a five member Constitution Review and Implementation Committee (CRIC) to implement the recommendations in strict compliance with chapter 25 of the Constitution. The CRIC in accordance with this mandate set out to draft amendments bills for the consideration of Parliament.

Professor Stephen Kwaku Asare, questioning the constitutionality of the Executive's actions and arguing that Parliament and not the President has the sole constitutional authority to consider, recommend and take all actions relating to constitutional amendments brought an action⁵ before the Supreme Court for, among other declarations, a declaration that Parliament's power to amend the Constitution as stipulated in article 289(1) is plenary and exclusive and that this power cannot be delegated to or usurped by the President.

By a five to two majority, the Supreme Court held that the President had power under the Constitution to appoint a commission of inquiry into any matter which was in the public interest. In line with that, constitutional amendments are within the scope of what may be considered to be in the public interest especially since the proper functioning of the Constitution, which the President was mandated by the Constitution to maintain and protect, was a matter of grave public interest. The Court concluded that the

5 *Professor Stephen Kwaku Asare v Attorney-General*, Suit No J1/15/2015, 14 October 2015.

President's appointment of the CRC was not unconstitutional and that the attempt to solicit citizen input towards the amendment process went to rather strengthen the democratic process.

Of prime relevance is the plaintiff's main argument that the President's sole role in the 'carefully designed amendment architecture'⁶ provided for under chapter 25 of the Constitution was his ministerial power of assent at the very end of the process. The argument being that beyond the mandatory obligation to assent to a bill passed by Parliament to amend the Constitution the President has no further constitutional role in the process. The plaintiff strenuously sought to distinguish between the process of consultation and review (termed 'front-end' legislative processes), the actual exercise of legislative authority in the passing of the amendment bill into law and the purely ministerial process of assent (termed 'back-end' process by the plaintiff). Arguing therefore, that Parliament's power to amend the Constitution was plenary and exclusive, the plaintiff contended that it was unconstitutional for the President to use the power to appoint commissions of enquiry⁷ to engage in the 'front end' legislative processes that eventually culminated in the amendment bills that were submitted to Parliament.

According to the plaintiff since the framers of the 1992 Constitution vested sole legislative authority in Parliament, it must be also be implied that all the relevant powers necessary to give effect to Parliament's legislative authority was also thereby solely vested in Parliament. This was particularly more so in the context of issues of grave importance such as constitutional amendments. Related to this contention, is the predicate-act canon of interpretation which asserts that where a general power is conferred, all related power necessary for the exercise of that power is also thus conferred. It was therefore to be understood that all steps both necessary and incidental to the constitution amendment process (particularly the 'front end' processes) were all thus exclusively vested in Parliament.

When encountered for the first time, the plaintiff's contentions appear to be a simple affirmation of the concept of separation of powers until the general powers of the President in both the ordinary legislative process and the constitutional amendment architecture is considered as a whole under the 1992 Constitution. The Court by its decision showed that whilst there was good evidence of separation of the powers of the branches under the Constitution, there were also several instances in which the constitutional architecture requires collaboration between the branches for effective governance. The President as head of the Executive plays an important role in the initiation and recommendation of legislation to Parliament.

6 *Asare* (n 5 above) 9.

7 Under art 278, Constitution of the Republic of Ghana 1992.

Indeed, legislation that imposes a charge on public funds or a tax can only be introduced in Parliament by or on behalf of the President.⁸ The Court could not therefore, accept Plaintiff's literalist contentions that the 'front end' activities set in motion by the President under the auspices of the CRC and subsequently, the CRIC amounted to usurpation of the Parliament's legislative authority.

This Supreme Court, in the continued tradition of earlier ones before it, has not been particularly fond of a strict or literalist interpretation of the constitutional text.⁹ The Court in the period following the 1992 Constitution has advocated a 'purposively broad, liberal and benevolent interpretation of the Constitution as a whole'.¹⁰ In the context of this case, the strict interpretation advocated by the Plaintiffs would exclude all other individuals and bodies from engaging in any 'front end' or pre-legislative activities. The Court refused to accept the assertion that this challenges Parliament's legislative authority under the Constitution. This is because it is only Parliament's eventual acceptance of the preparatory work by CRC/CRIC and its subsequent deployment of its legislative powers that 'marks the real beginning of its crucial exclusive legislative role in the actual amendment process.'¹¹

The current political atmosphere and the provisions of the 1992 Ghanaian Constitution as a whole justifies this position. Post-1992, the Executive has generally allowed Parliament a free hand in the exercise of its legislative authority although the Government and its agencies are often heavily involved in the 'front-end' legislative processes. In spite of that reality, it is an equally serious question if the President's power to appoint commissions of inquiry will literally extend to all matters which in the President's opinion are in the public interest. Following, the Supreme Court's purposive approach,¹² it stands to reason that there must certainly be situations where the President's power to appoint commissions of inquiry may well cross the boundaries of the province particularly allocated to the other branches of government by the Constitution. The particular instances in which these boundaries may be crossed are however, hard to readily formulate. In those circumstances, the Supreme Court should feel bound to intervene. The conclusion therefore is that

8 Art 108, Constitution of the Republic of Ghana 1992.

9 *Asare* (n 5 above) 23. This was also asserted in *William Brown v Attorney-General and Others*, Suit No: J1/1/2009, 3 February, 2009 where a long line of cases were cited in confirmation of the Supreme Court's purposive approach to interpretation: '*NPP v Attorney-General* (CIBA case) [1997-98] GLR 378, *Sam No 2 v Attorney-General* [2000] SCGLR 305; *Apaloo v Electoral Commission* [2001-2002] SCGLR 1, *Republic v Yebbi & Avalufo* [2000] SCGLR 149, *Ampofo v CHRAJ* [2005-2006] SCGLR 227, *Omaboe III v Attorney-General & Lands Commission* [2005-2006] SCGLR 579; *Ghana Lotto Operators v National Lottery Authority* [2007-2008] SCGLR 1088; *Mettle-Nunoo v Electoral Commission* [2007-2008] SCGLR 1250 ...' among others.

10 Chief Justice Wood in *Asare* (n 5 above) 23.

11 *As above*, 37.

12 More recently reinforced by the Memorandum to the Interpretation Act, 2009 (Act 792).

while the appropriateness of the President's use of a commission of inquiry in the collation of citizen's views on the Constitution towards amendment could be questioned politically, the process is not unconstitutional.

Respect for the separate powers of each branch of government should have led the Executive to have handed over the preparatory work of the CRC to Parliament for Parliament to have decided what to do with it. The further step taken in the appointment of the CRIC, the formulation of the amendment bills and the subsequent submissions of those bills to Parliament may have gone a step too far in meddling in what is properly the legislative province.¹³

3 Presidential immunity from suit and the personality of the Attorney-General

Shortly after Mr John Agyekum Kufuor assumed office as President of Ghana on 7 January, 2001, the media carried reports that three persons had been appointed Chief of Staff, Presidential Affairs Adviser on Public Affairs and National Security Adviser. Mr Martin Amidu, the plaintiff, claiming that the appointments were unconstitutional brought an action¹⁴ before the Supreme Court under article 2 of the 1992 Constitution, against President Kufuor as first defendant, the Attorney-General as second defendant and the three persons as third, fourth and fifth defendants on the grounds that under articles 58(1) and (2) and 295(8) of the Constitution and sections 2 to 4 of the Presidential Office Act, 1993 (Act 463), those three persons could not have been properly appointed as staff of the Office of the President without consultation with the Council of State as required by article 91(1) of the Constitution. At the time the suit was brought, the position of Attorney-General was vacant.

When the matter came to be heard, the newly appointed Attorney-General raised a preliminary objection to the propriety of the suit against the President personally on the ground that under article 57(4) the President had immunity from legal proceedings while in office. Secondly, that since those three persons had thereafter been nominated by the President as Ministers of State and had been approved by Parliament; the plaintiff's action had become moot.

For our immediate purposes, the following questions from the hearing on the preliminary objection are most relevant:

13 Except e.g. where the proposed amendments will have financial implications in terms of art 108 for which some sort of collaboration between the Executive and Parliament in formulating the text of the amendment bills will be recommended.

14 *Amidu v President Kufuor and Others* [2001-2002] 2 GLR 510.

- (1) What is the precise scope of the President's immunity from suit during the currency of his term and shortly thereafter?
- (2) Is the office of Attorney-General personal to the holder of the time being of that office so that there could be no civil suit against the Executive if the position was vacant?

The attempt by Mr Amidu to sue a sitting President personally is not novel. The question on whether or not the President may be personally sued in the exercise of his or her executive functions under the Constitution is also not new. This was firmly decided in the very early days of the Constitution in 1993 in personal actions brought against then President Rawlings.¹⁵ The Supreme Court there held that President could not be sued in a personal capacity especially since article 88(5) specifies that '... all civil proceedings against the State shall be instituted against the Attorney-General as defendant'. Beyond shielding the President from undue distraction in the exercise of his or her executive actions, the grant of the immunity was also to protect the dignity of that high office. The framers of the 1992 Constitution therefore, continued in the tradition of the 1969 and 1979 Constitutions to grant the President immunity from suit to cover both civil and criminal action during the pendency of the President's term and thereafter for three years after the end of the term.¹⁶

There is an obvious tension between making one person seemingly above the law in the discharge of that person's functions and the basic principle that all citizens be subject to the law in a modern democratic society. It has however, been determined that the President's immunity to suit granted under article 57(4) is not absolute since it is subject to article 2 and the prerogative writs.¹⁷ The Attorney-General is however, at all times the proper person to sue with respect to the contested executive actions of the President. This statement presents an interesting twist to the question whether or not the position of Attorney-General is personal to the holder, for the time being, of that office. In other words, is it important in the defence of government in a suit who is or whether there is an Attorney-General at any point in time?

In arguments before the Court in support of the preliminary objection to the plaintiff's suit, the then newly appointed Attorney-General, Nana Akufo-Addo had argued that at the time when plaintiff filed his suit, there was no substantive holder of the office of Attorney-General and therefore there was no proper party to answer the suit against the government. This argument was both ingenious and mischievous. Nana Akufo-Addo had himself in 1997¹⁸ challenged the legality of a similar contention made by

15 *Bilson v Rawlings & Another* [1993-94] 2 GLR 41 and *New Patriotic Party v Rawlings & Another* [1993-94] 2 GLR 193.

16 Constitution of Ghana 1992, art 57(5), 57(6).

17 *Amidu* (n 14 above) 530.

18 *JH Mensah v Attorney-General* [1997-98] 1 GLR 227.

the government legal team in a suit he brought on behalf of Mr JH Mensah, a notable national politician. The plaintiff in the case being considered, Martin Amidu, by a strange twist of fate had been Deputy Attorney-General on the side of the government at that time. In January 2001 however, these two personalities were on different sides of the argument. A part of the court, led by the Acting Chief Justice, seemed to favour the worrying position that since there was no substantive Attorney-General the plaintiff's action had been against a 'non-existing personality'.¹⁹

It is true that the wording article 88(1) will seem to favour the view that the office of Attorney-General is personal to any holder of the office, for the time being. Article 88(1) provides that the Attorney-General 'shall be a Minister of State and principal legal adviser to the government'. Under article 88(5), '... all civil proceedings against the State shall be instituted against the Attorney-General as defendant'. Are actions against the State to be received by the Attorney-General in a personal capacity or as holder of a public office? We should be very weary to accept the position that the Attorney-General acts for all purposes in a personal capacity as some members of the Court did. This position creates a dangerous opportunity for the Executive to effectively truncate all proceedings against the State by merely removing the substantive Attorney-General from office or leaving the office vacant for as long as possible.

A consideration of article 88(1) alone without more reveals only a skewed view of the nature of the Attorney-General's office. The responsibilities of the Attorney-General under the Constitution itself suggest that the Attorney-General's functions cannot, in all circumstances, be personal. If a President refuses to appoint an Attorney-General can he be compelled by court action to appoint one? And if as was suggested by some Justices of the Supreme Court there can be no suit against the State without a substantive Attorney-General who then is to receive the court processes on behalf of the State? The Legal Service created under the Constitution oversees the great majority of criminal and civil proceedings instituted by or brought against the State. The evidence of practice shows that an Attorney-General typically takes a personal interest in only the cases of the highest consequence. There is no real trouble created by the acceptance of and answer to a suit against the State by the members of the Legal Service whether or not there is a substantive Attorney-General. Indeed, in the conduct of government cases, there is no formal substitution of Attorney-General when the previous office holder leaves office as is the case in other civil suits. The 'haste with which the plaintiff issued out his writ' when he 'knew well that there was no Attorney-General at post'²⁰ should have been wholly irrelevant to outcome of the preliminary objection.

19 Edward Wiredu Ag CJ in *Amidu* (n 14 above) 519.

20 As above.

Since the Court was prepared to take judicial notice of the social realities surrounding the appointments, it should have been prepared to hold that the Attorney-General was only often a nominal defendant except in the most important cases and therefore, there is often no need for a substantive Attorney-General for the State to be adequately defended. It is noteworthy that the Solicitor-General whose office is not in the nature of a political appointee had first answered the processes in the main suit before the Attorney-General assumed office on 9 February 2001. In any case, were the President anxious to only allow an Attorney-General and no one else to defend the government, he had power to immediately submit his nominee for Attorney-General to Parliament for approval as was actually done in this case. On the whole, the Supreme Court did not give much importance to the question of the nature of the Attorney-General's office in deciding on the preliminary objection. A more definitive pronouncement on the question would have put to rest the seasonal gimmicks of suits against the President soon after a swearing in.

It is respectfully submitted in that regard that the individual personality of the office holder of Attorney-General should not be paramount in considering whether or not there is someone to defend actions against the State. The individual personality of the Attorney-General is probably only relevant in the Attorney-General's ministerial duties defined under particular legislation together with the role of the principal adviser to government.

4 The connections between human dignity and exclusion from political office

In December 1996, The Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) was passed to amend the 1992 Constitution by repealing and replacing the whole of article 8; the provision on dual citizenship. The original provision had prohibited dual citizenship except to a very limited degree. The new article 8 inserted by Act 527 however, declared that a Ghanaian citizen may hold the 'citizenship of any other country in addition to the citizenship of Ghana'. An additional clause in the new article 8 however, prohibited dual citizens from being appointed holders of six specified offices including Ambassador or Inspector-General of Police. In addition, the amendment permitted further additions to the list of excluded public offices to be made by an Act of Parliament.

Pursuant to the amended article 8, Parliament enacted the Citizenship Act, 2000 (Act 591). This Act extended the list of offices prohibited to dual citizens from six to twelve to include the positions of Chief Justice and Chief of Defence Staff among others. The Minister was also given power to add to this list by Statutory Instrument. Professor Stephen Kwaku Asare

filed a writ²¹ against the Attorney-General alleging that the prohibitions were discriminatory and violated the dignity of dual citizens²² and the principle of equal citizenship²³ under the Constitution.

The declaratory reliefs sought by the plaintiff were unanimously dismissed by the Supreme Court. The Court was of the opinion that in matters of constitutional amendment, it is the expressed popular will that is determinative. If the right amendment procedure is followed, the courts' sole task is to interpret the amendments such as to minimize their impact on other fundamental principles of the Constitution. However, the Court re-emphasised that it had jurisdiction to declare a constitutional amendment a nullity although all the procedural requirements have been fulfilled. This is more so when such an amendment conflicted with an entrenched provision of the Constitution. In coming to its conclusion, it took the position that the original article 8 which totally barred, with minor exceptions, dual citizenship was a worse inequality than the impugned amended article 8(2). It was the court's view that the new article increased rather than diminished the rights of the Ghanaian who had voluntarily acquired the citizenship of another country. Significantly, the Court held that unequal treatment of dual citizens was constitutionally justifiable since the State has power to adopt measures to secure the loyalty of its citizens.

This case explored interesting legal questions beyond the constitutionality of the exclusion of dual citizens from certain public offices. These include a consideration of whether or not the exclusion from public office can be considered as eroding the constitutional right to equality and dignity and whether or not the right to political participation in government guaranteed under article 21(3) of the 1992 Constitution is absolute. Particularly compelling was the plaintiff's assertion that constitutional amendments cannot operate to diminish or water down previously conferred rights and that the only aim and purpose, whether direct or indirect, of latter amendments should be to strengthen or widen already guaranteed rights. Finally, there seems to be, although not openly declared, a second rate status granted to constitutional amendments effected through Acts of Parliament in Ghana.

The case presented the Court an opportunity to analyse the scope of the right to human dignity under article 15²⁴ of the 1992 Constitution. It was the plaintiff's case that a dual citizen's exclusion from certain types of

21 *Professor Stephen Kwaku Asare v Attorney-General*, Writ No J1/6/2011, 22 May 2012.

22 Constitution of Ghana 1992, art 15.

23 Inferred from art 17(4)(c), Constitution of Ghana 1992.

24 Constitution of Ghana 1992, art 15: '(1)The dignity of all persons shall be inviolable. (2) No person shall, whether or not he is arrested, restricted or retained, be subjected to – (a) torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being ...'

public office operated to erode that dual citizen's dignity under the Constitution. The Supreme Court in its judgment was prepared to concede that issues of human dignity are often intertwined with prescriptions of equality under the law. The Court however, seemed to doubt whether a limited denial of participation in government is a question properly considered within the ambit of human dignity. Drawing inspiration from article 5 of the African Charter on Human and Peoples' Rights, the Court was of the opinion that actions which would qualify as an infringement of the right to dignity all lay at 'severe end of the continuum of degrading treatment'²⁵ such as slavery, slave trade, torture, and cruelty. Article 15 could not therefore, be expansively interpreted to regard the limiting of the right to political participation of dual citizens as infringing their right to human dignity. It is submitted that his reasoning accords with text of article 15. That provision speaks of being subjected to 'torture or other cruel, inhuman or degrading treatment or punishment' none of which are properly related to exercise of political rights or the assumption of public office. Very importantly, this interpretation also accords with the African Charter on Human and Peoples' Rights (ACHPR) since article 5 thereof also admits of this limited view of the concept of human dignity.²⁶

The plaintiff also asserted that the unequal treatment of dual citizens violated article 17; the equality clause of the Constitution. Relying on its judgment in a previous matter, the Court held that the 'concept of equality embodied in article 17 is by no means self-evident'²⁷ and that a differentiation of rights can be justifiable. This is ably demonstrated by article 17(4) of the Constitution which allows different treatment of Ghanaian citizens to address, for example, social and economic imbalances in the society.

One wonders if the Supreme Court's views on the extension of the constitutional rights to dignity and of equality to the holding of public office could have been swayed if the Court's attention had been drawn to article 13²⁸ of the ACHPR, clause 2 of which provides that '[e]very citizen shall have the right of equal access to the public service of the country.' It is not however clear whether a 'right of equal access to public service' is

25 *Asare* (n 21 above) 56.

26 African Charter on Human and Peoples' Rights, art 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

27 *Nartey v Gati* [2010] SCGLR 745,754: 'To our mind, it is clear what article 17 does not mean. It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable.'

28 Art 13, ACHPR: '1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of the country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

absolute and necessarily negatives a constitutional differentiation in access to public service on grounds of say, loyalty or national security.

One of the real points of interest was the plaintiff's case that standards of constitutionalism and human rights in modern constitutions are such that they cannot be easily or effectively diluted. It was asserted that a grant of fundamental rights was almost irreversible; that subsequent changes could only validly increase and not diminish the previously enjoyed rights. This radical argument was not accepted by the Court since it was the Court's view that this conflicted with another principle of democracy that the will of the people should prevail.

The rejection was however, done with caution because there is judicial recognition that Constitutions deserve a hallowed status and swift changes to it that remove the rights of citizens whether or not facilitated by the representatives of the people should be wearily considered. In that state of affairs, it is suggested the courts should use their interpretative role to retain many of the original rights as far as the text would allow. Towards that end, it should be possible in certain narrow circumstances to declare unconstitutional an attempt to water down human rights in a manner at odds with the basic structure of the Constitution taken as a whole. The bench must however, be slow to usurp the popular will expressed through Parliament or via a referendum.

It was easier for the Supreme Court to reject this claim by the plaintiff because in this case, the amendment the plaintiff sought to impugn was in reality granting dual citizenship to persons who previously had no such right. The only true complaint was therefore that they were then subsequently excluded from certain public offices. It was the court's view that a State should have power to use fair means to ensure the loyalty of its citizens. In the context of today's international affairs and security, this is both reasonable and prudent. Owing allegiance to two states with the power to be appointed to sensitive positions in both countries could create situations of conflict when citizen's duties in one state could amount to an illegality or treason in another.

Once an amendment is incorporated it becomes for all purposes a part of the Constitution. Some members of the Supreme Court therefore, expressed an initial 'difficulty with the notion that one part of the Constitution could be declared unconstitutional because it was inconsistent with another part of the Constitution.'²⁹ The Court was however, more open to arguments challenging the constitutionality of an amendment law which contained provisions considered inconsistent with existing provisions of the Constitution. The plaintiff was allowed to file a Supplementary Statement of Case to address this legal issue. It was the

29 *Asare* (n 21 above) 34.

plaintiff's position that a provision that is lawfully inserted into the Constitution cannot be said to be unconstitutional. He contended however, that if the amendment were procured by unlawful means or even one that was at odds with the 'basic structure of the Constitution' then it ought to be declared a nullity.

This is not however, a situation of one part of the Constitution being unconstitutional for being at variance with another part of it. It is respectfully submitted that Dr Date-Bah JSC framed the issue properly when he asked the following question: 'Was the constitutional amendment valid at the point of enactment?'. 'If it was invalid at the point of enactment, then it never became a part of the Constitution'³⁰ in the first place and did not therefore present the legal quagmire of declaring one part of the Constitution, unconstitutional.

Whilst this seems like a practical way to dispense with this matter, it presents a peculiar jurisprudential problem of its own i.e. the question of the real status of constitutional amendments effected through Acts of Parliament. In the exercise of the Supreme Courts' constitutional interpretative function under article 2(1), it has always maintained a position of considering the Constitution as a 'living document' and to consider all of its provisions 'as a whole'. There has not been a situation in the past where the constitutionality of any part of the original constitution as promulgated in 1992 has been challenged for the reason that it conflicts with another part of the constitution. Where there have been difficulties in reconciling seeming differences between two original provisions, the Supreme Court has strived to consider the purpose of the framers in formulating the said provisions and then to reconcile them by considering their utility in context on a case by case basis.³¹

However, it is clear that an Act of Parliament passed to amend the Constitution can still be declared unconstitutional at a later point for being inconsistent with another original provision. This somewhat creates a separate status for new provisions that are introduced into the Constitution via the amendment process. They become second rate because they remain valid additions to the Constitution for as long as they are not declared unconstitutional. The original provisions do not suffer a similar uncertainty. For the amended parts of the Constitution, no real effort needs to be made to always forcefully reconcile the new provisions with the structure of the older text. It is inconceivable that an original action can be legitimately brought before the Supreme Court to strike down any part of the original text for itself being unconstitutional. What will the yardstick be for measuring the constitutionality of an original provision beyond the

30 Dr Date-Bah JSC in *Asare* (n 21 above) 34.

31 See for example the seeming conflict sec 4 of Schedule I and art 156 of the 1992 Constitution considered in *Kuenyehia and Others v Archer and Others* [1993-94] 2 GLR 525. See also *Agvei Twum v Attorney-General and Another* [2005-2006] SCGLR 732.

fact of its incorporation in the original text? Importantly, if an original provision is declared unconstitutional, can Parliament be compelled to re-enact a new provision which is in consonance with the 'basic structure' of the Constitution as it exists? To avoid the obviously absurd outcome of declaring an original provision unconstitutional with nothing to fall back on, the Supreme Court should altogether decline an invitation to consider such request in whatever form it is disguised.

5 The scheme for the parliamentary approval of international business and economic transactions

A better understanding for the constitutional scheme for the parliamentary approval of international business and economic transactions was occasioned by a case brought before the Supreme Court by Mr Amidu against the Attorney-General and Isofoton SA, Madrid, Spain and a third defendant.³²

In August, 2005, the Republic of Ghana and the Kingdom of Spain concluded a loan agreement for an amount of Sixty-Five million Euros (€65,000,000) – the main Financial Protocol- for the implementation of various projects in Ghana. This loan agreement was approved by Parliament. Subsequently, Isofoton SA, a foreign registered company entered into contracts with two Ghanaian ministries to undertake solar electrification projects. These contracts were ostensibly breached by the government and a suit was brought on behalf of Isofoton SA by the third defendant who had been granted a power of attorney to do so. In the course of hearing Isofoton's suit against the Attorney-General, proposals for negotiation were offered and a consent judgment based on those negotiations was sanctioned by the High Court. A judgment debt of over a million dollars was agreed and part of it was thereafter paid. Mr Amidu brought an action before the Supreme Court essentially to reverse the judgment debt payments. The case however, provided a further elaboration on the meaning of an 'international business or economic transaction' under article 181(5) of the Constitution.

Mr Amidu asserted that the agreements between Isofoton, a foreign registered company and the Ministries of Food and Agriculture and Energy were international business or economic transactions within the meaning of article 181(5) of the Constitution³³ and never became operative since those agreements were not approved by Parliament. The plaintiff's claim was mainly that the approval of the main Financial Protocol by Parliament did not negate a need for the two specific agreements to be

32 *Martin Alamisi Amidu v Attorney-General, Isofoton SA & Another*, Writ No J1/23/2012, 21 June 2013.

33 Original provisions contained in the 1969 and 1979 Constitutions, art 144 and expanded under the Constitution.

subject to particular parliamentary approval. In contrast, the second defendant asserted that the two contracts were ‘merely project implementation contracts’ which did not require separate Parliamentary approval.³⁴ It was the second defendant’s case ‘that only major and autonomous international agreements which financially commit the State are required are to be submitted to Parliament for approval’ and that an expansive interpretation will ‘impose a needlessly burdensome duty of sheer formality on Parliament that is clearly bound to increase and extend Parliamentary business to gargantuan proportions.’³⁵

The above represents the conflicting interpretations that formed the basis of the legal question of interest in this case. The Supreme Court speaking through Dr Date-Bah refused to agree with the second defendant’s ‘needless burdensome duty’ argument. It was the Court’s view that the considerations that Parliament needs to take in respect of the Financial Protocol or ‘mother’ loan agreement will often be different from those that are relevant in examining the implementation projects. Parliament must therefore also approve the so-called ‘project implementation contracts’ under the ‘mother’ loan or financial protocol. This provides a new analysis that expands the existing judicial recognition of the fundamental importance of the Parliamentary scrutiny of international business or economic transactions confirmed in *Attorney General v Faroe Atlantic Co Ltd*³⁶ and *Attorney-General v Balkan Energy & 2 Others*.³⁷

The constitutional significance of this interpretation of article 181(5) is that it places a greater responsibility on Parliament. This is not at odds with the expectations connected to modern governance. Issues surrounding Ghana’s growing public debt and the so-called judgement debt scandals of recent years make it even more relevant that beyond the stand-alone international transactions, specific implementation contracts should be separately approved by Parliament.

A note of caution must however be sounded. It is no secret that any legislature, in the complexities of modern governance, often has more to consider than it can properly do. Where the ‘implementation contracts’ are so closely representative of the main foundation international business or economic transaction, it is recommended that the courts should be prepared to hold that the ‘implementation contracts’ will not require additional or separate Parliamentary approval. It is suggested that a proper yardstick for determining if a contract is ‘merely an implementation contract’ is whether its purpose is essentially coterminous with that of the

34 Relying on the authority of *Attorney-General v Faroe Atlantic Co Ltd* [2005-2006] SCGLR 271 and *Attorney-General v Balkan Energy Ghana Ltd & 2 Others*, Writ No J6/1/2012, 16 May 2012.

35 *Amidu* (n 33 above) 11.

36 *Faroe Atlantic* (n 35 above).

37 *Balkan Energy* (n 35 above).

‘mother’ transaction. There must be in a very real sense, a unity of purposes between the main and the ancillary agreements. A helpful indicator should often, but not always, be whether or not the sums approved under the ‘mother’ transaction is close to the total sum under the implementation contract. Government agencies may also save scarce Parliamentary time by incorporating ‘implementation’ details into the broader ‘mother’ agreements. The one value, if there is nothing else, to be taken away from Mr Amidu’s action is that it reinforces the oft-neglected constitutional role of Parliament to safeguard the nation’s purse.

6 Conclusion

Dr Date-Bah JSC in concluding the lead opinion in the *Isofoton* case had this to say: ‘... it is sweet and honourable to die for one’s country. Whilst we are not suggesting that the plaintiff has died in his efforts to safeguard the public purse, there is no doubt that he has sacrificed to achieve that objective. It is only right that we should once again put on record ... this Court’s appreciation of his public-spiritedness which has led to the examination of the important legal and policy issues that have been settled in this case. He has served the public interest well by securing the clarification of the law embodied in this judgment as well as the orders made’.³⁸

This is a validation of this chapter’s assertions that individual actions have been fundamental to the protection of human rights, the rule of law and good governance. Similar praise goes to Professor Stephen Asare and many other well-meaning Ghanaians³⁹ who will continue to contribute to strengthening our young democracy. If our constitutional order will secure for us and posterity, the blessings of liberty, equality of opportunity and prosperity and the protection of fundamental human rights and freedoms, it is evident that this will be a shared responsibility of all Ghanaian citizens.

38 *Amidu* (n 33 above) 19-20.

39 Of noteworthy mention is the public interest action by Nana Adjei Ampofo in *Adjei-Ampofo (No1) v Accra Metropolitan Assembly & Another* (No 1) [2007-2008] SCGLR611 on the enforcement of the human dignity provisions of the Constitution for which the Supreme Court through Sophia Akuffo JSC (as she then was) felt compelled to congratulate the plaintiff.