

**JUDICIAL REVIEW AND THE ENFORCEMENT OF HUMAN RIGHTS:  
THE RED AND BLUE LIGHTS OF THE JUDICIARY OF GHANA**

By

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## **ABSTRACT**

Constitutional democracy requires a constitutionalisation of Human Rights and the empowerment of judiciaries to enforce and protect such rights. In Ghana, these requirements have been put in place by the 1992 Constitution. Human Rights have been constitutionalised and the courts granted specific powers of Judicial Review to enforce the values of these rights by policing the actions of the legislature and the executive branches of Government. In response, the Judiciary has done a great deal through the power of Judicial Review to protect Human Rights in the country. It has developed a corpus of Human Rights jurisprudence which individuals and institutions can rely on for rights claims and protection. However, its role is not without blemish. This work seeks to discover the successes as well as the failures of the Judiciary of Ghana in enforcing Human Rights. As a theoretical prelude to the entire work, I claim that the main juridical basis to legitimate Judicial Review lies in the courts duty to enforce a higher body of law grounded in rights. On the basis of this claim, the work argues that while the Judiciary did play a constructive role in the promotion, enforcement and sustenance of Fundamental Human Rights and Freedoms in the country, it has not adopted a consistent approach in giving all Human Rights equal weight. A generous reception has been given to Civil and Political Rights, while Social-Economic Rights have not been sympathetically considered. This has generated a gap in Ghana's Human Rights jurisprudence, and negated the values upheld by the postwar global Human Rights constituency - of which Ghana is a member. To avert the creation of Judicial determinism which will hold back the realisation of Socio-Economic Rights in Ghana, this work urges the Judiciary to accord equal respect to all Rights by adopting a purposive approach in deciding all rights claims.

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## CHAPTER ONE

We are in an era of rights. The postwar global Human Rights constituency is so strong that no state and no developed political entity can afford to eschew at least its language or its values. The world now abounds with countries that have sufficient constitutional Human Rights guarantees. Liberty, equality and respect for human dignity have thus gained prominence. States' primary concern currently is not about how to justify rights and other constitutional norms, but how to protect them. A demonstrably good reason for constitutional Human Rights guarantees warrants effective mechanisms to protect and enforce them. A reliable enforcement scheme may prevent the Human Rights provisions from lapsing into an empty political rhetoric. In effect, the people can reap the full benefits of the constitutional protection of Human Rights.

This work focuses on Judicial Review within the context of a written constitution as an institutional device by which Human Rights can be enforced and protected. In large part, the work pays attention to the place of Individual Rights within the constitutional system of a State. In particular, the work explores the exercise of the power of Judicial Review by the courts in Ghana as a mechanism in enforcing Human Rights under a written constitution. Judicial Review in this form is undertaken by determining the compatibility and validity of an Act of Parliament or Executive act in relation to the written Constitution. In Ghana like in the United States, statutes or executive actions are scrutinized for their conformity to Individual Rights as set out in the Constitution. This rights-oriented Judicial Review is part of general constitutional review, and the courts are required to strike down statutes or any executive instruments that violate Individual Rights.

Under this model of review, the Constitution - not Parliament- is in principle, the supreme source of law. The constitution is also largely entrenched. Limits for the validity of all

legislative and executive acts are set by the Constitution. Thus no other law or executive action is to derogate from the Constitution unjustifiably. The operative presumption created by this form of review is that there are certain values such as the Rule of Law, Human Rights and Constitutionalism which cannot be impugned by a primary legislation or an executive act. Besides, it creates a hierarchy of norms or laws, with the Constitution and its norms at the apex. No law or political value external to the Constitution carries enough weight to prevail against the Constitution in the event of a conflict between the two.

The general rationale for this type of review is rooted in four separate but logically related propositions:

- That the will of the people is sovereign
- That Constitution is the expression of the will of the people
- That the written Constitution is the supreme source of law of the State and
- That it is the duty of the judiciary to say what the law is.

What these propositions imply is that the written Constitution is the founding legal text made morally legitimate by virtue of an original act of consent by the people's sovereign will. Accordingly, all legitimate governmental powers in the State own their existence, scope and normative force to the sovereign will of the people as expressed in the written Constitution. The written constitution thus becomes the supreme law of the state, which the courts must uphold against all inconsistent governmental actions.

Since 1992, the Republic of Ghana has enacted and adopted for itself one of the most liberal constitutions in the world. It contained sufficient guarantees for Human Rights. Besides, the Constitution declared itself the supreme source of law and invested in the Judiciary the full powers of Judicial Review. As a result of their conferment with these powers the Judiciary of Ghana has since the year 1992 done a great deal to protect Human Rights in the country. It constantly reviews the actions of other organs of government relative to the provisions of the

Constitution. It facilitates the evolution of Human Rights jurisprudence which individuals and institutions can rely on for rights claims and protection.

This thesis principally argues that the Judiciary of Ghana did play a constructive role in the promotion, enforcement and sustenance of Fundamental Human Rights and Freedoms in the country. However, such an argument is qualified, in that the Judiciary has not adopted a consistent approach in giving equal weight to all Human Rights provisions in the Constitution. While Civil and Political Rights have received a generous reception, the courts lack consistency and a voice of unanimity in enforcing the Socio-Economic Rights as provided for in the Constitution.

Accordingly, there is a gap in Ghana's Human Rights jurisprudence and a marked negation of the values upheld by the postwar global Human Rights constituency - of which Ghana is a member. In contributing to the literature on the development of Human Rights law in Ghana, this research engages current theoretical debates in Judicial Review and the promotion and protection of Human Rights in Ghana. The work urges the Judiciary to accord equal respect to all rights by adopting prudential and purposive approaches in deciding rights claims. The relevance of this is to avert the creation of a judicial determinism which will stultify the realization of the Socio-Economic Rights in Ghana.

Chapter 1 deals with the place of the courts and the Judiciary in Ghana's constitutional structure. The Chapter examines the courts' structure relative to their jurisdiction and composition, and the concept of judicial independence in Ghana. This is an important prelude to understanding the contribution of the Judiciary of Ghana towards the protection and promotion of Human Rights in the country. Courts cannot deal with the complex issues of rights enforcement if they have no organized structures and well mapped out jurisdiction or powers. It is also necessary

that the Judiciary is sufficiently protected from undue influences. In short, it must be independent. Such independence, as will be shown in this chapter, is measured by a number of indicators. These include individual and institutional autonomy, security of tenure, well regulated appointment and dismissal procedures and fiscal freedom. The Constitution of Ghana as we shall see, provides for these features relative to the institution of the Judiciary.

Chapter 2 provides a brief descriptive background and outline of the Human Rights regime in Ghana. It lays bare the anatomy of Human Rights within Ghana's Constitution. As will be shown in the chapter, an independent Judiciary can do better, in the contemporary normative sense, for Human Rights protection if such rights are guaranteed under the Constitution. In principle, this chapter will show the relevance of the constitutionalisation of Human Rights values in Ghana.

Chapter 3 distinguishes the traditional *Ultra Vires* notion of Judicial Review from Judicial Review in the context of a Written Constitution context. Further, the chapter briefly sets out the constitutional foundation of Judicial Review in the 1992 Constitution of Ghana. In large respect, it addresses the question of the legitimacy of the exercise of Judicial Review in a democratic context, with a particular focus on the enforcement of Human Rights in Ghana. It makes the argument that the legitimacy of Judicial Review lies (though not exclusively) in the courts duty to enforce a higher body of law grounded in rights. Accordingly, the protection of Individual Rights should serve also as the main juridical basis to legitimate Judicial Review. This rests on the presupposition that the objective of public law (the Constitution) is to protect Human Rights or foster the enjoyment of constitutional entitlements such as rights. It thus entitles the courts to use their judicial power either in the process of declaring or interpreting the law to preserve such a value of public law.

Chapter 4 demonstrates how useful the courts have been in protecting Human Rights in Ghana. The chapter will flesh out, and then analyze decided cases to showcase the role of the Judiciary in enforcing the Human Rights provisions of the Constitution. The chapter is divided into two parts. Part one is titled the “Blue Light Province” and deals with decided court cases on *some* Civil and Political Rights. The second part bears the heading the “Red Light Province” and examines the courts’ performance relative to Socio-Economic Rights.

Chapter 5 is an overall review of the thesis; and makes some recommendations towards the attainment of judicial consistency in the enforcement of all Human Rights provisions found in the Ghanaian Constitution.

## CHAPTER TWO

### *INDEPENDENCE OF THE JUDICIARY IN GHANA*

#### *Introduction*

The benefits of justice and the utility of the concept of the rule of law to a country are in large part determined by the integrity and viability of its Judiciary. If the Judiciary lacks a coherent structure and independence, it makes no sense to expect justice and the enforcement of constitutional norms.<sup>1</sup> If its jurisdiction, its appointment and dismissal procedures, and its composition are not subject to robust constitutional protection, then judicial impartiality and independence would be an illusion.<sup>2</sup> In any case, a comprehensively organised and constitutionally protected Judiciary guarantees democratic polities<sup>3</sup> of the benefits of good governance, rule of law and justice.<sup>4</sup>

This chapter deals with the place of the courts and the Judiciary in Ghana's constitutional structure. It addresses the courts' structure relative to their jurisdiction and composition, and the concept of judicial independence in Ghana. This is an important prelude to understanding the contribution of Ghana's Judiciary towards the protection and promotion of Human Rights in the country.

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<sup>1</sup> Alexander Hamilton, writing in *The Federalist* No. 78, stated that "[l]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." *The Federalist* No. 78 (Alexander Hamilton). Also, the Massachusetts Constitution of 1780 stated that "[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. *Massachusetts Constitution* pt. 1, art. XXI(1780)

<sup>2</sup> See Friedman, Barry, "Things forgotten" in the debate over judicial independence (Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary) (1998) 14 *Georgia State University Law Review* 737

<sup>3</sup> Robert, E. Hirshon, "A few Thoughts on the Importance of an Independent Judiciary" (2002) 4 *Journal of Appellate Practice and Process* 331. Robert argues that an independent judiciary goes to the core value of democracy and rule of law.

<sup>4</sup> Michael, Traynor, "Judicial Independence: A Cornerstone of Liberty"(2007) 37 *Golden Gate University Law Review* 487 at 489 "[t]he point of insulating judges from the winds of politics is ultimately to protect individual rights from potential tyranny by the majority."

## ***I. The Superior Courts: Structure, Composition and Jurisdiction***

Under the current *Fourth Republican Constitution, 1992*, the judicial power of Ghana is vested in and exercised exclusively by the Judiciary.<sup>5</sup> As an institution, the Judiciary is made up of the Superior Courts of Judicature and such lower courts or tribunals as Parliament may by law establish.<sup>6</sup> A remarkable constitutional feature of the Superior Courts is that they are sanctioned by Article 126(2) of the Constitution as the superior courts of record and have the power to commit any person for contempt to themselves. In fact, this class of courts have been grouped by the Constitution into a three-tier structure comprising, the Supreme Court, the Court of Appeal and the High Court and Regional Tribunals.

At the apex of the entire court system in Ghana is the Supreme Court.<sup>7</sup> It consists of not less than nine Justices,<sup>8</sup> and is duly constituted for its work by not less than five Supreme Court Justices except as otherwise provided in Article 133 of the Constitution.<sup>9</sup> Article 130(1) of the Constitution invests in the Supreme Court exclusive original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution and powers of Judicial Review on the actions of Parliament or any other authority or person by law or under the Constitution. This is further anchored by the combined force of Articles 1(2) and 2, which grant the Supreme Court the power to make a declaration on the constitutionality or otherwise of any act or enactment and pronounce them void if found to be inconsistent with the Constitution. Besides, it has an appellate jurisdiction to the exclusion of the Court of Appeal to determine matters relating to high treason.

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<sup>5</sup> Articles 125(3) and 127 (1). But note that the exercise of the prerogative powers of pardon by the president could be viewed as the judiciary having its appendix in the Executive arm of government. However, this may be better placed under checks and balances when discussing the relevant constitutional question of separation of powers within the context of a constitutional democracy.

<sup>6</sup> Article 126 (1)(a)and(b)

<sup>7</sup> Article 129 recognises the Supreme Court as “the final Court of appeal”

<sup>8</sup> Article 128(1). Currently, the Supreme Court is made up of thirteen Justices, including the Chief Justice.

<sup>9</sup> Article 133 states: (1) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of the court.(2) The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court.

Above all, it exercises supervisory jurisdiction<sup>10</sup> over all courts in Ghana including the Judicial Committee of the National House of Chiefs.<sup>11</sup> As a body with the final judicial power of the state, the decisions of the Supreme Court on questions of law are, undoubtedly, binding on all courts.<sup>12</sup> Nevertheless, it is at liberty to depart from its previous decisions when it appears to it right to do so.<sup>13</sup> This flexibility is vital as it permits the Court to be an instrument and conduit for positive constitutional engineering and change.<sup>14</sup>

The intermediate level of the Superior Courts structure is occupied by the Court of Appeal. It has no original jurisdiction and entertains only appeals from all courts below it except the Judicial Committee of the National House of Chiefs and matters relating to high treason. It is composed of the Chief Justice and not less than ten Justices of the Court and any other Justices of the Superior Court of Judicature as the Chief Justice may by writing request to sit for the determination of a particular matter.<sup>15</sup> Unlike the Supreme Court, the Court of Appeal is properly constituted by three Justices, presided over by the most senior of the three.<sup>16</sup>

At the base of the Superior Courts' structure are two parallel courts: the High Court and the Regional Tribunals. Both Courts have original jurisdiction on criminal and civil matters except cases on high treason.<sup>17</sup> Besides, they are appellate adjudicative bodies to all lower courts or tribunals. Article 33 of the Constitution empowers the High Court to enforce Fundamental

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<sup>10</sup> Article 132

<sup>11</sup> This is a Judicial Committee of the House with an appellate jurisdiction to cases arising from Regional Houses over paramount Skins or Stools, relating to selections or elections, installation and des-stoolment of chiefs.

<sup>12</sup> Article 129 (3)

<sup>13</sup> Article 129 (2) and (3)

<sup>14</sup> See Bobbitt, Philip, *Constitutional Fate: Theory of the Constitution*, (Oxford: Oxford University Press, 1982) at pp.188. This creates room for the Court to be able to develop the law that would better serve the people. The fidelity of the law embedded in the spirit of the constitution is best utilised if there is a window for the court to depart from its own decision on demonstrated grounds of correcting an injustice.

<sup>15</sup> Article 136.1(a),( b) and (c)

<sup>16</sup> Article 136.2(1)

<sup>17</sup> In addition to the provisions of the *Criminal Code of Ghana*, (1960) Act 29, Article 3 of the Constitution, 1992 defines high treason as follows: Any person who - (a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or (b) aids and abets in any manner any person referred to in paragraph (a) of this clause; commits the offence of high treason and shall, upon conviction, be sentenced to suffer death.

Human Rights and Freedoms in the Constitution. It is comprised of the Chief Justice, not less than twenty Justices of the High Court and such other Justices of the Superior Courts of Judicature that the Chief Justice may request to sit for a specified period.<sup>18</sup> On the other hand, a Regional Tribunal is composed of the Chief Justice, one Chairman and such members who may or may not be lawyers, designated by the Chief Justice.

The Chief Justice is the only Justice who is a member of all the courts in the Superior Courts of Judicature. He is not only a substantive Judge of the final court of appeal but also the Administrative Head of the entire Judiciary.<sup>19</sup> His omnipresence in all the courts is not by reason of a direct or specific appointment to any of them but by virtue of his status as the Head of the Judiciary, that one Superior Court of Judicature.<sup>20</sup> Besides, it is only the Supreme Court which is clothed with the sole judicial power and jurisdiction to interpret the Constitution relative to the actions of Parliament or any other authority or person by law or under the Constitution. Simply put, the only court with jurisdiction to constitutional review in Ghana is the Supreme Court.<sup>21</sup>

Article 33 of the Constitution (as noted above) gives the High Court the legal duty to enforce the Fundamental Rights and Freedoms as enshrined in Chapter five of the constitution. This makes these two Courts very relevant to this thesis. Any vulnerability in these courts could interfere with the desired enforcement of rights by the High Court and frustrate the application of the power of Judicial Review by the Supreme Court in determining the constitutionality of actions

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<sup>18</sup> Article 139.1(a),(b) and (c)

<sup>19</sup> By implication, it is possible for the Chief Justice to be dismissed from office as a Chief Justice without necessarily losing his position as a substantive Justice of the Supreme Court. This is in consonance with the constitutional history and case law of Ghana. For instance in *Akufo-Addo & Others v. Quarshie Idun & Others*, [1968] GLR 667, it was held by the Supreme Court of Ghana that the positions of the Chief Justice as a justice of the Court and as an administrative head of the entire judiciary are distinct. Therefore, the Chief Justice could not be deemed to have breached the rules of natural justice when he empanelled the court to hear a case to which he was a party. He was held to be performing only administrative functions.

<sup>20</sup> *Tuffour v. Attorney-General*, [1980] G.L.R. 637 at pp.659

<sup>21</sup> Article 2 of the Constitution, 1992 provides that (1) A person who alleges that - (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, *may bring an action in the Supreme Court for a declaration to that effect*[my emphasis].

by Parliament, the Executive and any authority or person exercising an authority under the Constitution.<sup>22</sup>

## ***II. Lower or Inferior Courts***

The lower courts in Ghana include the Circuit Courts, Tribunals, District Courts, the Judicial Committees of Traditional Councils, Regional House of Chiefs and National House of Chiefs, the Juvenile Courts and any other Court or Tribunal that Parliament may by law establish.<sup>23</sup> The criminal jurisdiction of the Circuit Courts is limited to all criminal matters other than treason, offences tried on indictment and offences punishable by death. Their civil jurisdiction covers claims not more than 100 million cedis in personal actions arising under tort or contract. They also have jurisdiction over land cases and child custody.

The District Courts replaced the old Community Tribunals. An amendment in 2002 of *The Courts Act* (1993) officially expunged the Community Tribunals.<sup>24</sup> The District Courts are manned by Magistrates and their jurisdiction is limited to claims not exceeding 50 million cedis. They also have a summary jurisdiction over offences punishable by a fine not exceeding 500 units or for a term not more two years. It must be noted that the *Children's Act of 1998 (Act 560)* empowers the District Court to sit as a family tribunal and to determine such claims arising under the Act, as parentage, access, custody and maintenance of children.<sup>25</sup>

Under the *Juvenile Justice Act of 2003 (Act 653)* the Chief Justice of the Republic has the power to designate any of the District Courts as a Juvenile Court.<sup>26</sup> Such a Court shall be

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<sup>22</sup> This is not to say that the Court of Appeal is of no use within the context of this thesis. Such a claim admittedly would be a lame one, as it entertains all appeals, except in cases of constitutional judicial review and matters relating to high treason, from the High Court.

<sup>23</sup> See Article 126(b)

<sup>24</sup> See AfriMap *et al*, *Ghana: Justice Sector and the Rule of Law* (Open Society Initiative for West Africa, 2007)

<sup>25</sup> Children's Act of 1998 (Act 560)

<sup>26</sup> Juvenile Justice Act of 2003 (Act 653)

composed of a Magistrate and two other persons one of whom shall be a social welfare officer. It will have jurisdiction over civil and criminal cases in which a person below the age of 18 is involved.<sup>27</sup> Also, both the Constitution and the *Chieftaincy Act of 1971 (Act 370)* provides for the establishment of Judicial Committees in all Traditional Councils, Regional House of Chiefs and the National House of Chiefs.<sup>28</sup> These committees largely perform judicial functions in matters relating to the enskinment or enstoolment of chiefs or their removal from office. A complete amalgamation of these committees into the Judiciary was achieved by the *Amendment of the Courts Act of 2002 (Act 620)*. Accordingly, appeals from the National House of Chiefs shall lie to the Supreme Court.<sup>29</sup>

### ***III. Judicial Independence: A General Postulation***

There have been prolific academic writings on the nature and scope of the concept of judicial independence. But, these writings do not reach unanimous conclusions, since the concept has proven to be complex<sup>30</sup> and defies a single definition accepted by all scholars.<sup>31</sup> One fundamental rationale can be advanced for this state of complexity. In reality, what constitutes independence of the Judiciary is largely the principal function of a country's history,

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<sup>27</sup> Ibid

<sup>28</sup> See Chapter 22 of the Constitution and the Chieftaincy Act of 1971 (Act 370)

<sup>29</sup> Be this as it may, neither an appeal on a Chieftaincy matter shall lie to the High Court nor the Court of Appeal. This is not to suggest that these two courts are, in any way, parallel in judicial authority to the Judicial Committee of the National House of Chiefs. It is more of adjudicative process than ranking or creating a hierarchy.

<sup>30</sup> Stephen B. Burbank, Barry Friedman, & Deborah Goldberg, "Reconsidering Judicial Independence: Introduction" in *Judicial Independence at the Crossroads: an interdisciplinary approach*, Stephen B. Burbank and Barry Friedman, eds. (Thousand Oaks, CA: Sage Publications, 2002) at p.5; Stephen B. Burbank and Barry Friedman, "Is Judicial Independence a Useful Concept," in *Judicial Independence at the Crossroads: an interdisciplinary approach*, Stephen B. Burbank and Barry Friedman, eds. (Thousand Oaks, CA: Sage Publications, 2002) at pp. 1-54 and Peter H. Russell, "Toward a General Theory of Judicial Independence," in *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Peter Russell & David O'Brien, eds., (Charlottesville: University Press of Virginia, 2001) at p. 1.

<sup>31</sup> See for example Rosenn, Keith, "The Protection of Judicial Independence in Latin America" (1987) University of Miami Inter-American Law Review 1; and Theodore Becker, *Comparative Judicial Politics: The Political Functionings of Courts*, (Chicago: Rand McNally, 1970).

constitutional structure, traditions, convention and experience.<sup>32</sup> Nonetheless, its identity is established in many polities around the world by a number of commonly held elements. These include security of tenure,<sup>33</sup> financial freedom<sup>34</sup> and decisional and institutional independence. These are for the most part, used to gauge the extent to which a particular Judiciary can be deemed independent. Besides, its central value to the court system is beyond doubt.<sup>35</sup> In part, it fosters the objectivity and impartiality of the judicial process. Its functional viability assures litigants of high quality of justice and the development of coherent and sound rules of law in the legal system.<sup>36</sup> It guarantees, in our contemporary political settings, the protection and efficient enforcement of constitutional norms and Fundamental Human Rights and Freedoms, and insures the citizens against general misrule. This part of the chapter addresses the question of independence of the Ghanaian Judiciary. The focus is on the constitutional protection of judicial independence. But before then, it is imperative to take a look at the general literature on the components of judicial independence.

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<sup>32</sup> See Shimon, Shetreet, & J. Deschênes, eds. *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985)

<sup>33</sup> It has been held as the central component of independence. According to Donald Kommers security of tenure includes, but is not limited to, the constitutional and statutory protection of judges against arbitrary removal from office, transfer or retirement for any reason having to do with the legitimate performance of their functions - Donald P. Kommers, "Autonomy Versus Accountability: the German Judiciary," in *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Peter H. Russell and David O'Brien, eds. (Charlottesville: University Press of Virginia, 2001) at pp. 131-154. For Robert Stevens, judges must hold office during good behaviour and terminate at retirement age. Indeed, this cannot be done without the appropriate legislation sufficiently detailing the relevant terms - Stevens, Robert B. "Judicial Independence in England: a loss of innocence" in *Judicial Independence in the Age of Democracy*. In this vein, John M. Williams advocates an express codification and entrenchment of provisions relative to security of tenure in order to guarantee the independence of judges - John M. Williams, "Judicial Independence in Australia," in *Judicial Independence in the Age of Democracy*, at pp.173-193. The wisdom in this contention is to shield individual judges from undue influence.

<sup>34</sup> This is an indispensable element of judicial independence which focuses on adequate and non-diminishing remuneration and compensation for judges - Henry J. Abraham, "The Pillars and Politics of Judicial Independence in the United States," in *Judicial Independence in the Age of Democracy*, supra note 30 at 25. In this case, judges' salaries, allowances and pensions as well as administrative expenses must be sufficient and readily made available to them.

<sup>35</sup> Shimon, Shetreet, & J. Deschênes, eds. *Judicial Independence: The Contemporary Debate* supra note 26 at 591. Also, Professor Lederman has said "Historical evidence suggests that judicial independence is a distinct governmental virtue of great importance worthy of cultivation in its own right" [Lederman W. R., "The Independence of the Judiciary" (1956), 34 Canadian Bar Review 769.]

<sup>36</sup> Shimon, Shetreet, & J. Deschênes, eds. *Judicial Independence: The Contemporary Debate* supra note 26

Writing on the independence of the German Judiciary, Donald P. Kommers<sup>37</sup> observes that apart from fixed and adequate income, guaranteed life tenure is a central element of independence. He argues that independence is guaranteed when a judge cannot be removed from office, transferred or retired for any reason having to do with his or her legitimate performance as judge.<sup>38</sup> Hugh Corder<sup>39</sup> adds that there must be immunity against prosecution. In addition, there must be reasonable grounds prescribed by law to warrant a dismissal. Such grounds must be duly established by a competent court of law or committee of inquiry, whereupon the accused person is offered a reasonable opportunity to stage a case of defence. Besides, the terms of tenure should be clearly spelled out, and retirement or resignation must not be procured by any person or authority without regard to fair process and application of the appropriate law. Robert Stevens<sup>40</sup> concedes to the relevance of the preceding scholarly observations, but persuasively adds that once appointed, judges should not be removed from office without address to parliament. In reality, these requirements appear to have value in their specific procedural context. They are not substantive prescriptions which may be taken in all cases. The cure for this lies elsewhere in the relevant literature.

Commenting on the independence of the Australian Judiciary, John Williams,<sup>41</sup> with the concurrence of Christopher Larkins,<sup>42</sup> advocates an express codification of these provisions in order to guarantee security of tenure. Peter Russell<sup>43</sup> in agreement contends that the substance as

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<sup>37</sup> Donald P. Kommers, "Autonomy Versus Accountability: the German Judiciary," in *Judicial Independence in the Age of Democracy*, supra note 30 at pp. 131-154.

<sup>38</sup> *Ibid.*

<sup>39</sup> Hugh Corder, "Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa" and Robert Stevens, "Judicial Independence in England: A loss of Innocence" in *Judicial Independence in the Age of Democracy* supra note 30.

<sup>40</sup> *Ibid.*

<sup>41</sup> John M. Williams, "Judicial Independence in Australia," supra note 33 at pp.173-193.

<sup>42</sup> See Christopher Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," (1996) 44 *American Journal of Comparative Law* 605.

<sup>43</sup> Russell Peter, "Toward a General Theory of Judicial Independence," in *Judicial Independence in the Age of Democracy* supra note 30 at pp. 6-15.

well as the nature and scope of the codification must be sufficient in order to insulate the Judiciary from undue influence. It is also to avert the discharge of responsibilities being tainted with the fear - and whims of the appointing authority. Though these views are clothed with some substantive value to balance the lamed procedural prescriptions for judicial independence, they are not without conceptual difficulties. They nourish a presumption that mere codification of provisions on security of tenure suffices as a substantive argument on the point. In addition, they seem to discount the possibility of guaranteeing independence with conventions and established traditions, as in the case of Britain.<sup>44</sup> Experience suggests that it is possible (although rare) for a particular jurisdiction to experience some amount of judicial independence without written, entrenched constitutional provisions.<sup>45</sup> Thus, I recognise that the mere existence of constitutional provisions do not guarantee judicial independence.

However, this usually requires a deeper analysis of independence that takes into account the actual behaviour and mind sets of judges when deciding cases, which is beyond the scope of this thesis. Constitutionally entrenched protections, as opposed to mere statutory provisions are an excellent mechanism for safeguarding the Judiciary against undue external influence.<sup>46</sup> First, entrenched constitutional protection constitutes a reliable legal defensive device for the Judiciary in case of disagreement with other branches of government. It also underscores the readiness of most political actors to play by the rules and to recognise the relevance of judicial independence

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<sup>44</sup> See *Reference re Remuneration of judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of judges of the Provincial court of Prince Edward Island; R. v. Campbell; R. v. Wickman; Manitoba Provincial Judges Ass. V. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3. Lamer C.J. at paras. 82-109 traced the roots of judicial independence to traditions, norms and unwritten constitutional principle. On the contrary, Russia exemplifies a country which has better constitutional protection of the judiciary yet judges constantly feel the weight of political manipulations and interference

<sup>45</sup> Ibid

<sup>46</sup> See McGinnis, John O. & Michael B. Rappaport. "Symmetric Entrenchment: A Constitutional and Normative Theory." (2003) 89 Virginia Law Review 385

in consolidating the Rule of Law, Democracy and Human Rights.<sup>47</sup> Entrenched protection gives the Judiciary such formal constitutional protection<sup>48</sup> that prevents arbitrary variation of their powers by the executive. At best, it encourages judges to demonstrate strong will in deciding cases. Demonstrably sufficient procedural law for the dismissal or retirement process could embolden individual judges' independence and prevent the frustration of institutional independence.<sup>49</sup>

Henry Abraham recognises independence as an imperative element for democratic dispensation.<sup>50</sup> He underscores the relevance of adequate and nondiminishing compensation and remuneration for judges in meeting the requirements of an independent Judiciary. Judges salaries, allowances, and pensions as well as administrative expenses must not be insufficient, controlled and erratically varied to their detriment. Miserable salaries for individual judges and abysmally inadequate budgets threaten the financial independence of both the judges and the Judiciary as an institution. The most dependable means by which this could be done is express legislation and constitutional protection.<sup>51</sup> Justice Le Dain in the *Valente* case stated that the essence of financial security is for the right to salary and pensions to be *established by law* and not subject to arbitrary interference by the executive in a manner that could threaten independence.<sup>52</sup>

In support of financial autonomy, Martin Shapiro posits that “in the most basic and usually the least important sense, independence would mean that the judge had not been bribed or was

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<sup>47</sup> See Epp, Charles R., *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, (Chicago: University of Chicago Press, 1999).

<sup>48</sup> See Linda Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection” (2000) 1 *Harvard Human Rights Journal* 5; and Anne Smith, “The Unique Position of National Human Rights Institutions: A mixed blessing?” (2006) 28 *Human Rights Quarterly* 904

<sup>49</sup> See Larkins, “Judicial Independence and Democratization.” *Supra* note 42 at 617

<sup>50</sup> Henry J. Abraham, “The Pillars and Politics of Judicial Independence in the United States,” in *Judicial Independence in the Age of Democracy*, *supra* note 30 at p. 25.

<sup>51</sup> See s.100 of Canadian *Constitution Act, 1867*

<sup>52</sup> See *Valente v. The Queen*, [1985] 2 S.C.R. 673

not in some other way a dependent of one of the parties.”<sup>53</sup> A reasoned argument for adequate funding is to enable the Judiciary access to the required resources to be able to carry out its duties effectively. Without this, its priorities such as the protection of Human Rights are likely to be unattainable, and laudable plans may be frustrated. Consequently, it may be open to external influences. That is, judges may resort to unethical conduct such as taking bribes from parties to disputes.<sup>54</sup> Such conduct could significantly influence the outcome of decisions or findings. This may not only undermine their independence but also diminish the efficiency and decisional legitimacy of the rulings or findings and credibility of their output to the public.

It has further been suggested that not only should the Judiciary participate in the drawing of its budget but also its source of funds must be guaranteed. It is necessary so as to extricate it from possible bureaucratic and executive controls. This point receives an illuminating consideration by Robert Stevens.<sup>55</sup> He argues that financial freedom is guaranteed when salaries and other financial benefits are charged directly from the Consolidated Fund.<sup>56</sup> While this shifts the focus of the debate from adequate funds to the location or source of the funds, it does not gloss over the necessity of adequate funding. For if the funds must be adequate, their source should be reliable. There is more reliability on the Consolidated Fund (payment from government direct revenues) than self-fundraising or donations for the general fiscal administration of the Judiciary.

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<sup>53</sup> Shapiro, Martin. *Courts: A Comparative and Political Analysis*, ( Chicago: University of Chicago Press, 1981) at p. 19.

<sup>54</sup> *Valente* supra note 52. In this case financial security in the form of adequate, guaranteed and nondiminishing salaries is recognised as one of the pillars of judicial independence.

<sup>55</sup> Stevens Robert, “Judicial independence in England” supra note 33 at 314

<sup>56</sup> *Ibid.*

Fawcett states that “independence is primarily freedom from control by, or subordination, to the executive power in the state.”<sup>57</sup> Thus, an independent tribunal must not be vulnerable to the whims of the executive or controlled by it. Interestingly, this author downplays the potential of the legislative branch or the Judiciary itself to constrain or undermine the independence of the Judiciary. In many jurisdictions,<sup>58</sup> the proposed budget of the Judiciary drafted in consultation with or without it, must receive the blessing of the legislature.<sup>59</sup> Such a procedural requirement should not be overlooked in any comprehensive consideration of the concept of independence.

Shetreet<sup>60</sup> went beyond freedom from the executive and legislative branches of government to include freedom from certain powerful non-governmental interests as part of the scope of the necessary status of independence. He observes,

“in modern times, with steady growth of corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured...independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglement likely to affect, or rather to be seen to affect him in the exercise of his judicial functions.”<sup>61</sup>

This opinion has received judicial support. Justice Gonthier has observed that “the pressure or interference with independence could come from any quarter or any person... for example,

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<sup>57</sup> Commenting on the requirement of an independent and impartial tribunal established by the law in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, (Oxford: Clarendon Press, 1969) at p. 156.

<sup>58</sup> Including Canada, Ghana, Britain, South Africa, Nigeria, and United States of America

<sup>59</sup> Ernest A. Finney, Jr., “Interbranch Accountability in State Governments and the Constitutional Requirement of Judicial Independence: Comment,” (1998) 61 *Law and Contemporary Problems* 55. In this article the author showed how a seemingly invidious parliament can hold a court’s budget hostage. Ernest demonstrated this using the legislature of South Carolina, when Legislators threatened to hold the budget of the judiciary hostage if the latter did not expeditiously rule on the issue of video poker. The Legislators considered video poker as part of the general welfare of the people, which needed urgent treatment. See also Rosenberg, Gerald, “Judicial Independence and the Reality of Political Power” (1992) 54 *The Review of Politics* 369. The article impeccably demonstrated that legislatures hostility to the decisions of courts or reports of commissions could render judges subservient.

<sup>60</sup> See Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (Amsterdam: North-Holland Publishing, 1976) pp. 17-18. “Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function.” This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 (*The Rule of Law in a Free Society*, 11, the Report was prepared by N.S. Marsh) and arises from the fact that historically the independence of the judiciary was endangered by parliaments and monarchs.

<sup>61</sup> *Ibid.*

private parties or corporate giants”.<sup>62</sup> But Justice Le Dain in *Valente* stated that this is more an issue of impartiality, and the focus should be on the relationship with the state when referring to independence. Nonetheless, as Western corporate bodies<sup>63</sup> trooped to Africa at an increasing rate, Shetreet’s observation remained crucial for the independence of courts; that is, to guard against financial inducements from such bodies or threats of legal suits, which would compromise their decisional and institutional independence. This is of utmost importance for the realisation of independence relating to adjudication.<sup>64</sup> Judges ought to be neutral third parties, - with no interest in the issues, and no partiality toward either party so as to enhance the protection of rights against intrusion by others.<sup>65</sup>

In a different, though equally thoughtful fashion, Sir Guy Green<sup>66</sup> adds to the discussion on the concept of independence by stating that the freedom from interference must either be actual or apparent. He observes as follows:

I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent

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<sup>62</sup> See *R. v. Lippé*, [1991] 2 S.C.R. 114.

<sup>63</sup> These are mining and oil companies from the west, who flatly refused to adhere to their social responsibilities in their operations. Undoubtedly, the native population suffers serious setbacks in the form of egregious violation of constitutionally guaranteed human rights. For example, with state connivance in Nigeria, Shell has polluted both the land and water bodies in the Niger Delta State. Frequent complaints, civil demonstrations and presentation of petitions to both Shell and the then Gen. Sanni Abacha-led Military Government in 1995 by the Ogoni people fell on deaf ears. In the face of this, Abacha had Ken Saro-wiwa, an environmental activist and journalist, hanged in 1995 in relation to half-baked treason charges arising from such demonstrations. For profound expositions on both legal principles and facts in relation to corporate violations of human rights in Africa see *Constitutional Rights Project and another v. Nigeria* (2000) AHRLR 180 (ACHPR 1995), *Social and economic rights action centre (SERAC) and another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001), and *International Pen and Others v. Nigeria* (2000) AHRLR 212 (ACHRPR 1998). Also in Ghana Western mining companies frequently trampled on peoples rights as their lands are increasingly polluted as result of the use of unconventional mining methods. This resulted in a number of court cases for the affected rights to be respected. See generally, Graham, R. *The Aluminium Industry and the third World: Multinational Corporations and Underdevelopment* (Zed Press London, 1982); J. Songsoore, P.W.K Yankson and G.K. Tsikata, *Mining and the Environmental: Towards a Win-Win Strategy (A study of the Tarkwa – Aboso – Nsuta Mining Complex in Ghana)* (1994) and Thomas Akabzaa & Abdulai Darimani, *Impact of Mining Sector Investment in Ghana: A Study of the Tarkwa Mining Region* (A Draft Report for SAPRI, 2001). Independent judiciary is thus necessary for an efficient and legitimate outcome of legal disputes.

<sup>64</sup> See Larkins, “Judicial Independence and Democratization” supra note 42.

<sup>65</sup> *Ibid.* See also, Irving Kaufman, “Chilling Judicial Independence” (1979) 88 Yale Law Journal 681.

<sup>66</sup> Sir Guy Green, “The Rationale and Some Aspects of Judicial Independence,” (1985) 59 Australian Law Journal 135

dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.<sup>67</sup>

This means that interference with freedom may be apparent, actual or both. It is actual when there is conspicuous interference; and apparent when it can be reasonably inferred that a person or institution is not free from undue influence. This does not tell us much about whether the interference will be external or internal and places independence somewhat at the mercy of constitutional designs.<sup>68</sup> The expression 'To the extent that it is constitutionally possible' in Green's statement suggests that constitutional provisions could curtail such leverage and desired freedom.<sup>69</sup> Potentially, this could be either negative or positive, but it has an astute utility to the independence project. In fact, it is an ambitious proposition with a wide ambit to fend off interferences from within the Judiciary, and other political branches. It substantively promises constitutional or statutory protection of independence and excludes any possibility of interference, from within and without, capable of holding down performance or influencing decisions in a particular way or undermining the legitimacy of rulings.

Peter Russell saw judicial independence in two dimensions: the institutional autonomy of judges and the actual judicial behaviour.<sup>70</sup> The first includes the collective as well as the individual autonomy of judges. The latter represents an assertive behaviour of individual judges in their relation to other political institutions within the political system. The dichotomy drawn here introduces the concept of impartiality into the discussion of independence. There have been

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<sup>67</sup> *Ibid.*

<sup>68</sup> For a better discussion of this see Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions," (2000) 25 *Law & Social Inquiry* 91.

<sup>69</sup> I am not suggesting here that independence is something dropped from the skies. Judges are subject to laws of their legal jurisdiction. Nonetheless, they are not to be pulled and pushed around by politicians or executive officials without due regard to an established law that respects their autonomy. For information on this see Kim Lane Sheppele, "Declaration of Independence: Judicial Reactions to Political Pressure," in *Judicial Independence at the Crossroads: an interdisciplinary approach*, Stephen B. Burbank and Barry Friedman, eds. (Thousand Oaks, CA: Sage Publications, 2002) at pp. 227-279.

<sup>70</sup> Russell Peter, "Toward a General Theory of Judicial Independence," *supra* note 30 at p. 6.

some contentions as to whether the two are inseparable. Justice Le Dain boldly drew a distinction between the two. He opined that “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in particular” and independence “connotes not merely a state of mind or attitude in actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees”.<sup>71</sup> However, Justice Le Dain would agree that the two are closely connected: judicial independence is the institutional precondition for impartiality. Simply put, independence refers to institutional protections, impartiality refers to a state of mind; the former helps guarantee the latter.

Interestingly, this distinction met profound objections from some academics and judges. Lamer C.J. in the *Lippé*<sup>72</sup> case argued that the two are inseparable as independence is critical to the public perception of impartiality. Martin Friedland argued that reasonable apprehension of a lack of independence surely leads to a reasonable apprehension of a lack of impartiality.<sup>73</sup> Russell’s comment on this is trenchant. He argues that we are concerned not only with the actual impartiality of a judge, but the perceived impartiality.<sup>74</sup> In the traditional judicial parlance, justice must not only be done, but be seen to be done. The quintessence of this lies in Martin Shapiro’s observation that the root of independence is to establish the neutrality of the judge and to destroy the feelings of bias in parties.<sup>75</sup> Agreeably, it has been observed that a comprehensive discourse on the two shall encompass legal, operational and financial independence.<sup>76</sup> This speaks to

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<sup>71</sup> See *R. v. Valente*, [1985] 2 S.C.R. 673

<sup>72</sup> See *R. v. Lippé*, [1991] 2 S.C.R. 114.

<sup>73</sup> See Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa: Canadian Judicial Council, 1995).

<sup>74</sup> Russell, “Toward a General Theory of Judicial Independence” supra note 30 at 7

<sup>75</sup> Shapiro, *Courts* supra note 53 at 15-19

<sup>76</sup> While appointment, tenure and fixed salaries are generally considered pivotal to individual independence, the judicial distinction in existence and function as well as involvement in the administration of the courts is particularly imperative to the collective independence. For a classical discussion on this see S. Shetreet, “The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montréal Declaration” in *Judicial Independence: the*

whether or not there are sufficient constitutional guarantees for the judiciary to function without undue hindrance.<sup>77</sup> Justice Le Dain saw this as indispensable for the institutional guarantees of impartiality.<sup>78</sup> The premise for this is laid on the claim that it sets the courts free from political manipulations and undue influence by other institutions or individual executive officials within the political setting.<sup>79</sup> In this vein, Donald Kommers reasoned that judges should not “be beholden to their political superiors”.<sup>80</sup>

Inextricably connected to this component of judicial independence are internal threats to individual judges’ autonomy. We should not focus on how the Judiciary relates to the other arms of government to the neglect of the internal dynamics of the Judiciary.<sup>81</sup> This is a revision of the traditional understanding that independence is only affected by external constraints. In fact, it can also be insured or stifled from within the Judiciary. This happens when judges on the bench exert influence on others regarding decision- making on legally disputed cases.<sup>82</sup> This is particularly the case when judges are unable to express their own views by filing separate opinions, or when Chief Judges exercise significant influence over discipline or administration (such as case, courtroom, or committee assignments). Typically, conformity becomes a necessary ingredient for

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*Contemporary Debate*, S. Shetreet and J. Deschênes, eds., (Dordrecht: Martinus Nijhoff, 1985) at 393, and Diana Ginn, “Recent Developments in Impartiality and Independence,” (1998) 11 Canadian Journal of Administrative Law and Practice 25.

<sup>77</sup> This is not to argue that countries without written constitutions like Britain did not experience some amount of judicial independence. In some liberal democracies such as Britain which does not have entrenched constitutional provisions for the independence of the judiciary, there is an established tradition of respect and independence of the judiciary. However, the post-Communist countries and South Africa actually provided for this in their constitutions, where there has not been a strong tradition of judicial independence. For a discussion on this see Stevens, “The Independence of the Judiciary” supra note 33.

<sup>78</sup> See *R v. Valente* [1985] 2 S.C.R. 673.

<sup>79</sup> There is volume of relevant information on political pressures and machinations against judges who take anti-government position in their rulings. This typically affects their promotions. For useful discussions on this see, E. Salzberger, and P. Fenn, “Judicial Independence: Some Evidence from the English Court of Appeals”(1999) 42 Journal of Law and Economics 831 and J.M. Ramseyer “The Puzzling (In)dependence of Courts: A Comparative Approach”(1994) 23 Journal of Legal Studies 721.

<sup>80</sup> Kommers, “Autonomy Versus Accountability.” supra note 25.

<sup>81</sup> David O’Brien and Yashu Ohkoshi, “Stifling Judicial Independence from Within: the Japanese judiciary,” in *Judicial Independence in the Age of Democracy*, supra note 30 p. 37.

<sup>82</sup> *Ibid*, and see Russell, “Toward a General Theory of Judicial Independence” supra note 30 at p.8.

promotion, and appointment may be skewed in favour of agents and favourites of the Chief Justice.<sup>83</sup>

Within this context, independence and impartiality would be compromised. Indeed, impartiality—which largely depends on actual or presumed freedom of thought—would be constrained. Fear of punishment for nonconformity and recourse to superiors before rendering a decision is nothing but a sheer destruction of impartiality. It is not sufficient to achieve institutional independence in the form of complete separation from other institutions and financial autonomy. A necessary element to the issue of independence is a respected level of individual independence from within.<sup>84</sup> This makes Howard’s observation (on post-Communist Central and Eastern Europe) truly deficient as it merely advocates the separation of powers as an appropriate juridical environment for an independent Judiciary.<sup>85</sup>

Another facet of independence considered by scholars, apart from institutional freedom, is political pluralism of the appointment process.<sup>86</sup> Hugh Corder<sup>87</sup> avers that the creation of an independent pluralistic Judicial Service Commission (JSC) in South Africa is the surest means for this. Appointment of judges in South Africa is done by the President in consultation with the JSC and leaders of political parties.<sup>88</sup> Carlo Guarnieri<sup>89</sup> asserts that the pluralistic nature of the appointment process is premised on sufficient checks and balances so as to prevent biased

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<sup>83</sup> As occurs in Germany where this method of decision-making exists, *Ibid*. In other jurisdictions, Chief Justices can unduly influence judges through administrative control over their assignments. For more information on this see David Marshall, *Judicial Conduct and Accountability* (Toronto: Carswell, 1995).

<sup>84</sup> See O’Brien and Ohkoshi, “Stifling Judicial Independence from Within” supra note 30

<sup>85</sup> A.E. Dick Howard, “Judicial independence in Post-Communist Central and Eastern Europe,” in *Judicial Independence in the Age of Democracy*, supra 30 p. 93.

<sup>86</sup> See Kommers, “Autonomy Versus Accountability.” In Germany, “a vacant judgeship on the Federal Supreme Court would be filled by a committee made up of the sixteen state justice ministers and an equal number of parliamentary representatives, whose partisan coloring would be proportionate to the numerical strength of each political party in the Bundestag.”

<sup>87</sup> Hugh Corder, “Seeking Social Justice?” supra note 39

<sup>88</sup> *Ibid*.

<sup>89</sup> Carlo Guarnieri, “Judicial Independence in Latin Countries of Western Europe” in *Judicial Independence in the Age of Democracy* supra note 30

consideration of nominees.<sup>90</sup> In the words of Shapiro, these are “roadblocks” necessary to prevent unfairness.<sup>91</sup> This has the immediate advantage of preventing “court packing” which might be detrimental to an objective consideration of cases that involved sensitive political questions as in the case of USA. However, despite its compelling advantage as illustrated above, the appointment process does not command universal acceptance as a necessary component of independence. It has been seen instead by some as the one way to ensure that judges share the wider political culture – a reasonable expectation in a democracy.

Nonetheless, regulatory mechanisms in the appointment process are arguably crucial to guarantee the independence of a court. The process of appointment requires freedom from the executive, and at best, transparency.<sup>92</sup> This is premised on the necessity to ensure the independence of the appointees as well as the institution. It is argued that appointment procedures can be described as “a confidence-building exercise for the government, citizens, and organs of civil society in the integrity, independence and competence of the Judiciary as an institution.”<sup>93</sup> This underscores the need for minimal executive influence over the process. Thus the process should not be characterized by the typical hand-picking exercise associated with military juntas at least in Africa<sup>94</sup> - an exercise devoid of established rules which are certain and predictable. It is understood from the relevant literature that to achieve this, the appointment process must be conducted with the involvement of the legislature and civil society. An open consultation with the legislature and civil society gives institutional legitimacy to the process and helps guarantee that

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<sup>90</sup> The nine members of the French Constitutional Council are appointed in the same proportions by the President of the Republic, the Head of the Senate and the President of the National Assembly.

<sup>91</sup> See Shapiro, *Courts* supra 53 at p. 32.

<sup>92</sup> See Kate Malleson and Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006).

<sup>93</sup> J. Hatchard, “A New Breed of Institutions: the development of human rights commissions in Commonwealth Africa with particular reference to the Ugandan Human Rights Commission,” (1999) 32 *Comparative and International Law Journal of Southern Africa* 28.

<sup>94</sup> Usually after successful coup d'états, military rulers either coerced people to take up appointments or appointed their friends or relatives to positions in which they have no qualification.

qualified people are appointed. This has been stressed by Kommers, who argued that independence can be guaranteed if there is a public open hearing on judicial nominees.<sup>95</sup> Such open hearings prevent judges from becoming ardent defendants of political ideologies. It reinforces their role as Human Rights defenders who have astute legal brains to dissect complex legal facts and render objective decisions on questions of law with the view to protecting constitutional norms. If this exercise or process is shrouded in secrecy, it could lead to awkward political compromises in parliament between the major parties, which have the potential to discount the relevance of experience and principle as imperative considerations for appointment.<sup>96</sup> Though these views in context cannot escape criticism, it does not mean that such positions are irrelevant to explaining independence.

From the above expositions, it is possible to identify the fundamental indices of judicial independence. These include formal constitutional guarantees of freedom from interference from other political institutions, adequate, nondiminishing and guaranteed salaries, allowances and pensions<sup>97</sup>, security of tenure of office<sup>98</sup>, established adequate checks and balances in the processes of appointment, retirement and removal, immunity from prosecution, and decisional<sup>99</sup> and institutional autonomy<sup>100</sup>. It must be stated here that the use of the phrase “constitutional guarantees” does not take the usual narrow definition of a constitution. It encompasses the

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<sup>95</sup> Kommers, “Autonomy Versus Accountability” supra note 37 at 302

<sup>96</sup> This might occasion some fears as constitutional law scholars strongly argued that politicians and economically powerful elites allied themselves with the judiciary to constitutionalise rights in order to preserve their increasingly threatened interests by the vicissitudes of democracy. Secret appointments might add substance to this claim. For insightful arguments on this see Hirschl, Ran. *Towards Juristocracy: the origins and consequences of the new constitutionalism*, (Harvard: Harvard University Press, 2004).

<sup>97</sup> The salaries, allowances pensions and immunities of judges must be guaranteed by law which should prohibit any variation of such benefits to their detriment.

<sup>98</sup> That is, there must be an established procedure with adequate checks and balances for appointment, retirement and removal of judges which preclude capricious or quirky action by one arm or connivance of two arms of government. This fosters decisional independence. See Harold See, “Comment: Judicial Selection and Decisional Independence” (1998) 61 *Law and Contemporary Problems* 141 and *The Federalist No.78* p.465.

<sup>99</sup> The constitutional power to decide cases fairly in accordance with law can be exercised effectively only if the deliberative process of the courts is free from undue interference by the executive or legislature. See Irving R. Kaufman, “The Essence of Judicial Independence” (1980) 80 *Canadian Law Review* 671.

<sup>100</sup> See for example, Lederman W.R. “The Independence of the Judiciary” in *The Canadian Judiciary*, ed. A.M. Linden, (Toronto, Osgoode Hall Law School, York University, 1976.)

broader view, which encapsulates conventions and established traditions, as in the case of Britain, although formal constitutional protections are preferred in this work for reasons advanced above. It is therefore possible to measure independence either by reference to formal constitutional provisions or demonstrably practical observation of it. This is not to complicate matters. It is to avoid the problem of narrow conception of judicial independence which makes it synonymous with mere existence of constitutional provisions. This general literature thus provides the basis to examine the independence of the Ghanaian Judiciary.

#### ***IV. Judicial Independence in Ghana: A Constitutional Offer***

The Constitution of Ghana sanctions the institutional independence of the Judiciary. A general and robust protection lies in Article 125(1) which provides that ‘justice emanates from the people and shall be administered in the name of the Republic by the judiciary which shall be independent and subject only to this Constitution.’ In addition, Article 127(2) of the Constitution puts the institutional independence of the Judiciary beyond doubt. Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with judges in the exercise of their judicial functions.<sup>101</sup> Other state organs have a constitutional directive not to interfere with, but accord the courts such assistance reasonably necessary to protect their independence, dignity and effectiveness.<sup>102</sup> Thus in the exercise of the power both judicially and administratively, the Constitution provides that the Judiciary shall not be subject to the control or direction of any person or authority except the Constitution.<sup>103</sup> With these express constitutional provisions, it is fair to say that the institutional independence of the Ghanaian Judiciary is guaranteed in text. Its institutional and functional

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<sup>101</sup> Article 127(2)

<sup>102</sup> Ibid

<sup>103</sup> Article 127(1)

distinction from the Executive and Parliament is established. However, a closer look at these provisions presents one analytical problem. That is, the provisions have only sought to deal with a perceptible external evil – curb potential interference from other political institutions. Such a conceptual framework discounts internal threats to independence.

Article 144 of the Constitution provides for the appointment of judges.<sup>104</sup> In the case of the Supreme Court, especially the Chief Justice, he or she shall be appointed by the President acting in consultation with the Council of State and with Parliamentary approval.<sup>105</sup> The other Justices of the Supreme Court shall be appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with Parliamentary approval.<sup>106</sup> Justices of the Court of Appeal, High Court and Chairmen of Regional Tribunals shall be appointed by the President acting on the advice of the Judicial Council.<sup>107</sup> Only the involvement of Parliament in the appointment process holds the prospects of enhancing the credibility and the independence of the judges.

However, this is only true when the President's Party does not command Parliamentary majority, as approval of appointments only requires a simple majority.<sup>108</sup> The Council of State<sup>109</sup> and the Judicial Council<sup>110</sup> have lame stakes in the appointment of judges. In reality, the advice of the Council of State does not have any legal binding effect on the President nor does the consultation of the Judicial Council. This apparent structural weakness in the appointment

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<sup>104</sup> Only Justices of the Superior Courts

<sup>105</sup> Article 144(1)

<sup>106</sup> Article 144(2)

<sup>107</sup> Article 144(3)

<sup>108</sup> The shameless practice of party discipline in Ghana makes approval of the Presidents nominees a mere formality.

<sup>109</sup> The Council of State is an advisory body to the President and has a membership of 25 elderly statesmen and women. The President appoints majority of the members.

<sup>110</sup> Article 153 of the Constitution established the Judicial Council. It is composed of 19 members, including the Chief Justice (CJ), the Attorney-General (A-G), one justice each from the Supreme Court, Court of Appeal and High Court, two representatives of the Ghana Bar Association, and other members of the legal profession, as well as four non-lawyers appointed by the President. Its role in the judicial appointments is nothing but give an unspecified 'advice' to the president; and in relation to the appointment of the CJ it has no role at all.

process was exemplified by the *Justice Abban case*.<sup>111</sup> In this case, the Ghana Bar Association (GBA) challenged Justice Isaac Kobina Abban's appointment as Chief Justice in court. The Association argued that he was not a person of 'high moral character and proven integrity' as required under the Constitution.<sup>112</sup> However, the Supreme Court declined jurisdiction. The Court argued that the Constitution specifically reserved questions relative to the appointment of the Chief Justice to the President, the Council of State and Parliament. It is therefore not the province of the Supreme Court to determine the moral character of the appointee. Such a position is problematic. Characterising the determination of the moral character of a judge as a political question seals the President's dominance in the appointment process.<sup>113</sup> It exacerbates the problem of the peculiarly functionally weak position of the Council of State in the appointment process. Worst of all, the decision sterilizes a legitimate institutional checks in the appointment procedures.

Security of tenure for the judges, particularly Justices of the Superior Courts is also guaranteed under the constitution. In the words of Article 146(1), unless judges attain the mandatory retirement age, they cannot be suspended or be removed from office except for 'stated misbehaviour or incompetence, or on grounds of inability to perform the functions of their office, arising from infirmity of body or mind.' The mandatory retirement ages for judges are 70 for Justices of the Supreme Court or Court of Appeal, and 65 for a High Court judge or chair of a Regional Tribunal. Article 127(3) grants judges' immunity from prosecution or legal suit for any act or omission in the exercise of their judicial power. In addition, the constitution installs an elaborate dismissal and removal procedure for judges.

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<sup>111</sup> *GBA v. A-G & Justice Abban*, [1995-6] 1 GLR 598

<sup>112</sup> Article 128(4) (a person shall not be qualified for appointment as Justice of the Supreme Court unless he is of high moral character and proven integrity and is of not less than fifteen years' standing as a lawyer)

<sup>113</sup> This is exacerbated by the fact that the Judicial Council and the Council of State are powerless in the appointment process.

According to Article 146, the President, upon receipt of a petition for the removal of a Justice of a Superior Court other than the Chief Justice, or for the removal of the chair of a Regional Tribunal, shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case.<sup>114</sup> Where a *prima facie* case has been established against the respondent, a committee empanelled by the Chief Justice and the Judicial Council, shall inquire into the matter and make recommendations to the President.<sup>115</sup> In contrast, where the petition is for the removal of the Chief Justice, the President, in consultation with the Council of State, shall appoint a committee of five persons<sup>116</sup> to inquire into the petition and make recommendations to the President. The President is obliged to follow the recommendations of the committee in each case.<sup>117</sup> Indeed, all proceedings in relation to removal of judges in this way must be held in camera, and the respondent is entitled to be heard in his defence by himself or by a lawyer of his choice.<sup>118</sup> With this, it is legitimate to assert that a crucial element of independence is met. The Constitution guarantees the judges certainty and predictability regarding security of tenure. They merely cannot be removed from office because of an unfounded allegation. The investigative process installed by the Constitution ensures the application of due process of law in removing a judge from office. Indeed, the Constitution clearly shelves and frowns upon self motivated dismissals of judges.

The financial autonomy of the Judiciary is provided for in Article 127 (4) - (7) of the Constitution. The administrative expenses of the Judiciary, including salaries, allowances, gratuities and pensions of judges are to be charged on the Consolidated Fund.<sup>119</sup> These shall not

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<sup>114</sup> Article 146(3)

<sup>115</sup> Article 146 (5)

<sup>116</sup> Article 146(6). The committee consists of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President, and three other persons who are neither members of the Council of State nor members of Parliament nor lawyers.

<sup>117</sup> Article 146(9)

<sup>118</sup> Article 146(8)

<sup>119</sup> Article 127(4)

be varied to their detriment.<sup>120</sup> The ambit of this financial freedom covers the operation of banking facilities by the Judiciary without the interference of any person or authority, other than for purposes of audit by the Auditor-General, of the funds and defraying the expenses of the Judiciary.<sup>121</sup> A legitimate comment with respect to these provisions is that there is positive constitutional promise for financial independence of the Judiciary. They guarantee salaries and allowances of judges. This is imperative in order to check government against punishing, threatening, and enticing judges through financial inducements. Nevertheless, they are not without a conceptual hitch. In reality, financial guarantee is not necessarily a case for adequate funding. Besides, the relative fragile nature of the economy poses a significant threat to any conception of adequate and prompt release of funds. Adequate funding largely depends on the ability of the government to raise revenue and the viability of the economy. Nonetheless, this should not be construed to mean that formal constitutional protection of the financial autonomy of the Judiciary is patently deficient. The observation is only to underscore the dichotomy between the formal constitutional protection of the Judiciary's financial and fiscal autonomy, and the practical realities of the Ghanaian economy.

On the whole, the Judiciary in Ghana though unitary in character, is organised as a two layer structure: the superior courts and the lower courts. Judicial Review power to the courts is a constitutional given, its roots in the Common Law notwithstanding. This power is entrenched and the courts are expected to use it to enforce and protect the Constitution and Fundamental Human Rights. In theory, judges should be able to perform their constitutional functions devoid of inappropriate interference. This conclusion is reached against the background that it is not possible - at least - in practice - to achieve absolute independence. The three branches of government may interrelate in the interest of responsive and responsible governance, as

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<sup>120</sup> Article 127(5)

<sup>121</sup> Article 127 (7)

meaningful independence does not require the hermetic sealing off of one institution from the other.<sup>122</sup> Courts function under laws enacted and executed by other branches and often entertain questions or investigate claims framed by other branches. Independence then, does not require the courts to be removed from the world around them.<sup>123</sup> To a significant extent, it does require that their decisions be unaffected by the strength of partisan positions among members of the other branches.<sup>124</sup>

Moreover, given the important role of courts in building a culture of rights, an independent Judiciary is crucial for Human Rights and democracy.<sup>125</sup> It becomes a protector of constitutional entitlements and rights, and a true institutional bulwark of the citizenry against serious invasions of Fundamental Rights and Freedoms. Independence offers the courts the capacity to meaningfully insert themselves between citizens and the government and to stand up against intimidations of all “outsiders”.<sup>126</sup> This makes independence a means to an end and not an end in itself.<sup>127</sup> Indeed, Independence is fundamental in accomplishing justice in particular cases as well as fostering individual and public confidence in its administration.<sup>128</sup> Without such confidence the system cannot command the public respect and acceptance that are essential to its effective operation. In addition, independence allows the courts to avoid the harmful prejudice and short-sightedness to which elected officials sometimes succumb.<sup>129</sup> It emboldens judges to

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<sup>122</sup> See Anne Smith, “The Unique Position of National Human Rights Institutions: A Mixed Blessing?” (2006) 28 Human Rights Quarterly 904

<sup>123</sup> *Ibid*

<sup>124</sup> *Ibid*

<sup>125</sup> See Charles M. Cameron, “Judicial Independence: How Can You Tell It When You See It? And, Who Cares?” in *Judicial independence at the crossroads: An interdisciplinary approach*, Stephen B. Burbank & Barry Friedman, eds., (Sage Publications, 2002) at pp. 134-144. This position is strongly supported by D. S. Yamanishi, “Rule of Law, Property rights: an empirical study of the effects (and non-effects) of legal institutions.” A paper presented at the annual meeting of the American Political Science Association, Washington D.C., 2000.

<sup>126</sup> See *Beauregard v. Canada* [1986] 2 S.C.R. 56, para. 21 (per Dickson C.J.).

<sup>127</sup> See Patricia F. Hughes, “Judicial Independence: Contemporary Pressures and Appropriate Responses” (2001) 80 The Canadian Bar Review p. 182.

<sup>128</sup> See *Valente v. The Queen*, [1985] 2 S.C.R. 673.

<sup>129</sup> Gerald N. Rosenberg, “Judicial Independence and the Reality of Political Power,” (1992) 54 The Review of Politics 370.

uphold rights where democratic majorities are paralysed by prejudice or other more compelling political considerations.

### ***Conclusion***

Courts cannot deal with the complex issues of rights enforcement if they have no organised structures and such is the necessity for well mapped out jurisdiction or powers of the courts. In Ghana, the Judiciary is well structured and given clear powers to enforce Human Rights. However, it is often necessary that the Judiciary is sufficiently protected from undue influences. In short, it must be independent. Such independence is measured by a number of indicators. These include individual and institutional autonomy, security of tenure, well regulated appointment and dismissal procedures and fiscal freedom. The Constitution of Ghana provides for these features with regard to the institution of the Judiciary. In theory, the courts in Ghana are thus free to do their work. It gives some hope that the rights of the individuals will be enforced.

# **CHAPTER THREE**

## ***HUMAN RIGHTS PROVISIONS IN THE GHANAIAN CONSTITUTION***

### ***Introduction***

In the preceding chapter, the argument is made that there are constitutional guarantees for an independent Judiciary in Ghana. The primary purpose of this argument is to demonstrate the extent to which the Judiciary, as an institution, is constitutionally insulated from undue political interference in discharging its responsibility. An independent Judiciary generates a legitimate expectation for all-out enforcement of the Constitution, especially its guarantees of Fundamental Human Rights and Freedoms. This chapter provides a brief descriptive background and outline of Ghana's Human Rights regime. By discussing Ghana's constitutional provisions on Human Rights, there will perhaps, be the benefit of developing the argument that an independent Judiciary can do better, in the contemporary normative sense, for Human Rights protection.

However, I should not be understood here as necessarily suggesting that a Judiciary can do nothing to protect rights if the claimed rights are not provided for by a *written* constitution. Such a position would quite plainly ignore some important roots of rights – the common law and the natural law.<sup>130</sup> It also will not factor in the contemporary occurrences of judicial failure in protecting Human Rights provided for under written constitutions.<sup>131</sup> But such a potential

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<sup>130</sup> See Brett, A., *Liberty, Right and Nature*, (Cambridge: Cambridge University Press, 1997), Dworkin, Ronald, M., *Taking Rights Seriously* (London: Duckworth, 1977), Raz, Joseph, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) chapter III and Finnis J., *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980)

<sup>131</sup> See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004). Hirschl argues that there is yawning gap between the realities and the existence of constitutional rights provisions in Canada, Israel, New Zealand and South Africa. Again, Russia is said to have the most comprehensive constitutional human rights provisions in the world, yet the judiciary in this country has done little to protect such rights from flagrant violation by the state and multinational oil corporate organisations. See Herman, Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) at

conceptual problem could be averted if the term “constitution” as used here is broadly conceived to encapsulate conventions, traditions and socio-political practices of a people. The curative power in such a conception is the elimination of potential substantive theoretical arguments over the categorisation of protections of rights – written constitutional protection and unwritten constitutional protection. That is, whether or not the enforcement of rights by the courts should depend on rights as provided for in a written constitution or those rights recognised by the common law. While an interesting area of academic discourse, it falls outside the purview of this work.

### ***I. Human Rights: A Contextual Position***

Within nations and the international scene, the reputation of Human Rights is high.<sup>132</sup> In politics, law and morality, the discourse of Human Rights has been pervasive.<sup>133</sup> There is rarely any position, claim, criticism or aspiration relating to social and political life that is not expressed in the language of rights.<sup>134</sup> Their recognition and enforcement has engaged the attention of individuals, groups, corporate entities, states and inter-governmental organisations. Yet there remain some burning normative questions such as what are Human Rights and what explains their pervasive popularity in recent decades. The former in particular is a contentious question. A satisfactory answer is imperative in order to lay the premise of a legitimate claim by the potential

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pp. 109-162. In contrast, countries without written constitutions or Bill of Rights such as Britain (until 2000), have had strong and relatively consistent judicial interventions in protecting human rights.

<sup>132</sup> This is confirmed by insightful academic opinions that we are in the age of rights. See Bobbio, N., *The Age of Rights* (Cambridge: Polity, 1996); Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80 *The Canadian Bar Review* 699 and Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998.)

<sup>133</sup> Douzinas convincingly writes, “A new idea has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developed world and the liberals of Hampstead and Manhattan. Human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents” Douzinas, C., *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000) at pp.1.

<sup>134</sup> Tom Campbell, *Rights: A Critical Introduction* (Routledge:NY, 2006) at pp.3

rights holders and source of obligation for those whose responsibility it is to enforce the rights. Sheer speculation on this will not suffice. Likewise extreme abstraction would likely confuse the issues. At its best, it might engender ignorance among potential rights claimants and blur the nature and scope of obligations in respect of protecting these rights.

A number of theories of rights ranging from natural law and legal positivism, to cultural relativism have tried, in their limited perspectives, to tell us what Human Rights are.<sup>135</sup> But there is no unanimity in their conclusions. However, it is useful to make some fundamental propositions regarding the nature and form of Human Rights. Such propositions will act as the operative guidelines in this work and form the basic premise upon which the entire thesis shall rest. Human Rights in the broadest sense should be understood in this work to mean entitlements or claims, which people can demand of their states (or governments) by virtue of the fact that they are human beings.<sup>136</sup> From a more restricted perspective, Human Rights are claims or entitlements due people, to which the courts shall enforce.<sup>137</sup> A neat distinction between these two views is that the former is universal in character and potentially includes both moral and legal rights, whereas, the latter is limited to legal rights and is founded on the principle of justiciability.<sup>138</sup> It is the latter view, though not exclusively, that will engage our attention here. It connects rights to remedies and gives rights holders, power, confidence and self-respect. Rights that matter are rights which are protected and for which, if violated, there is some remedy which brings compensation or restoration to the rights holders and censure, liability or punishment to the

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<sup>135</sup> For a classic treatment on these philosophical schools on rights see Fuller, L.L., *The Morality of Law*, (New Haven: Yale University Press, 1969), Hart, H.L.R., *The Concept of Law*, (Oxford: Oxford University Press, 1961), Hart, H.L.R., "The Separation of Law and Morals" (1957-58) 71 *Harvard Law Review* 593, ), Dworkin, Ronald, M., *Taking Rights Seriously*, (London: Duckworth, 1977), Raz, Joseph, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) chapter III and Finnis J., *Natural Law and Natural Rights*,(Oxford: Oxford University Press, 1980)

<sup>136</sup> Jack Donnelly, *Universal Human Rights: In Theory and Practice*,( Cornell University Press, 2003) at 1-19, and see as well Orend, Brian, *Human Rights: Concept and Context*, (Peterborough: Broadview Press, 2002), Maurice, Cranston, *What are Human Rights*, (New York: Taplinger Publishing, 1973) and Freeman, Michael, "The Philosophical Foundations of Human Rights" (1994) 16 *Human Rights Quarterly* 491

<sup>137</sup> *Ibid*

<sup>138</sup> Freeman, S., *Human Rights* (Cambridge: Polity, 2000) and see Steiner, P., *An Essay on Rights* (Oxford: Blackwell, 1994)

right-breaker.<sup>139</sup> The remedy not only compensates for the violation but plays a part in preventing it by both affirming the significance of the protected interest and providing incentives to the people not to violate the rights in question.<sup>140</sup> The legal enforcement of Human Rights largely, but not entirely, depend on the enactment of specific rules laying down the duties of citizens and governments to respect such rights.<sup>141</sup> Where such rules clearly identify who has the correlative duties, establish remedies for violations of these duties and backed up by a cultural commitment to a right-based approach to politics, then we have the best institutional basis for the realisation of Human Rights that are available to us.<sup>142</sup> Above all, it gives the courts the ultimate authority over the content and application of rights.<sup>143</sup>

Thus, in democratic systems, Human Rights are taken seriously as a mechanism to engender a system of decision-making and social control that serves the general interest. By the general interest is meant the legitimate interests of all members of society as identified by criteria such as wellbeing, autonomy, justice and equality. Indeed, Human Rights have a vital role here in giving clear and forceful expression to those fundamental interests that are recognised as basic to a decent and truly human existence. They provide check lists against which we can measure the reality of our democracy, the justice of our laws, the fairness of our economic and social system and the appropriateness of our conduct towards other people.<sup>144</sup> Moreover, they serve to identify the priority goals of all legitimate governments. They are, at the very least, affirmation of universal value of human dignity.<sup>145</sup>

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<sup>139</sup> Wellman, C., *Real Rights* (Oxford: Oxford University Press, 1995). See also Steiner H.J. & Alston, P., *International Human Rights in Context* (Oxford: Oxford University Press, 1996)

<sup>140</sup> Tom Campbell, *Rights: A Critical Introduction* supra note 134 at 89-97

<sup>141</sup> Ibid

<sup>142</sup> ibid

<sup>143</sup> Ibid

<sup>144</sup> Ibid at 95

<sup>145</sup> See Jack, Donnelly, "Human Rights: A New Standard of Civilisation?" (1998) 74 *International Affairs* 1

## ***II. Human Rights Discourse in Ghana: An Historical Context***

Human Rights discourse in Ghana dates back to the days of colonialism<sup>146</sup> – the imposition of foreign political power over natives, and the Trans-Atlantic Slave trade.<sup>147</sup> These two events depict the brute aspect of humans.<sup>148</sup> The forces of colonialism required that political authority albeit foreign - was never to be questioned. Its aim: to create an atmosphere that was conducive for economic exploitation of the colonies. The slave trade on the other hand commodified human beings. Accordingly, people were exported to plantation farms in the New World to be used as labour force.<sup>149</sup> Today, the “Gates of No Return” in Cape Coast Castle, the first center of political power of colonial Ghana, provide a crude illustration and bitter memories of the sad exit of many young men and women to the New World. They exemplify the possible death of human conscience. One cannot escape a sharp spark of mental pain upon a visit to this site. If there was ever an injustice to mankind, colonialism and the slave trade aptly epitomize its breadth. They represent indignity and injustice, and engender righteous anger in the victims.<sup>150</sup>

While the slave trade was formally abolished in the late 19<sup>th</sup> Century,<sup>151</sup> the struggle to end colonialism lingered on until the second half of the 20th Century. It was the latter that heightened the concerns for Human Rights in Ghana. The natives legitimately agitated for the respect of human dignity and recognition, values that colonialism had failed to hold as

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<sup>146</sup> Inglorious, yet some have argued in favor of colonialism that it was for the good of Africa. To them, colonialism has had positive effects for the continent and Ghana for that matter. For instance see L.H. Gann and P. Duignan, *Burden of Empire: An Appraisal of Western Colonialism in Africa South of the Sahara* (London: Pall Mall, 1968); and, David K. Fieldhouse, “The Economic Exploitation of Africa: Some British and French Comparisons,” in P. Gifford and W. Lewis, eds., *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, Conn.: Yale University Press, 1971) 593.

<sup>147</sup> For insightful academic commentary on this see Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L’Ouverture Publications, 1978); and J.D. Anderson, *West and East Africa in the Nineteenth Century* (London: Heinemann, 1972).

<sup>148</sup> See Timothy, Fernyhough, “Human Rights and Pre-colonial Africa” in *Human Rights and Governance in Africa* (edt.) Jan Berting et al. (Westport, Conn.: Meckler, 1993)

<sup>149</sup> Walter Rodney, *How Europe Underdeveloped Africa*, at pp.534.

<sup>150</sup> *ibid*

<sup>151</sup> See Suzanne, Miers, *Slavery in the Twentieth Century: The Evolution of a Global Pattern*, (Walnut Creek, CA: AltaMira Press, 2003)

sacrosanct.<sup>152</sup> They sought a complete political independence from the colonialists.<sup>153</sup> The contest was not easy. It was partly civil and partly violent. This produced varied results.<sup>154</sup> Destruction of property and lives was inevitable. But the most celebrated one was the attainment of independence. It became a source of hope and joy to the natives.<sup>155</sup> Hopefully, it signals the end of indignity, political subjugation and economic exploitation.

Ghana, as a modern state in the Westphalian<sup>156</sup> sense, achieved independence from British colonial rule on the 6<sup>th</sup> of March, 1957 under the government of Dr. Kwame Nkrumah. Nonetheless, this was not a complete political freedom as expected. The 1957 Independence constitution provided that Ghana remained a part of the British Empire.<sup>157</sup> By that the laws and government of Ghana were still formally subject to the British Crown. In fact, Ghana's final court of appeal until July 1, 1960 was the Judicial Committee of the British Privy Council. It could functionally invalidate any Ghanaian law that contradicted British law. Interpretations of the Judicial Committee, even of Ghanaian law, were final and authoritative.<sup>158</sup> This legal institutional linkage was conceived as half victory. It allowed the shadow of colonialism to loiter around. To some it was a deception with the view to cool down tempers. Others thought it a big betrayal by the political leaders.<sup>159</sup>

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<sup>152</sup> See Peter Duignan, et. al *Colonialism in Africa 1870-1960: Volume 5, A Bibliographic Guide to Colonialism in Sub-Saharan Africa* (Cambridge University Press, 1974) and Lewis Gann & Peter Duignan, *The Burden of Empire: An Appraisal of Western Colonialism in Africa South of the Sahara* (Hoover Inst Pr, 1967)

<sup>153</sup> Ibid

<sup>154</sup> Kwame, Nkrumah, *Towards Colonial Freedom: Africa in the Struggle Against World Imperialism* (Heinemann, 1962)

<sup>155</sup> Ibid

<sup>156</sup> The Treaty of Westphalia was signed in 1648, which brought to an end the Eighty Years' War between Spain and the Dutch and the German phase of the Thirty Years' War. It also marks the birth of Modern State (sovereign and independent state)

<sup>157</sup> See Bennion, F.A.R., *The Constitutional Law of Ghana*, (London: Butterworths, 1962) and Rubin, Leslie, *The Constitution and Government of Ghana*, (London: Sweet & Maxwell Ltd., 1961)

<sup>158</sup> Ibid

<sup>159</sup> For a better opposing arguments on these charges see Toyin, Falola, (edt.), *The Dark Webs: Perspectives on Colonialism in Africa*, (Durham, N.C. : Carolina Academic Press, 2005)

It could however be argued for the political leaders that half a loaf was better than none. Regardless of the force in this argument, the anti-colonialists nonetheless deserved sympathy. Complete independence was the desirable end.<sup>160</sup> These apprehensions ignited a renewed determination in the political leaders for constitutional reforms. Their principal demand - at this time, was a Republican Status. This was granted by the British government on the 1<sup>st</sup> of July, 1960 with a new constitution. At the most basic level, the 1960 First Republican Constitution, marked Ghana's final step to independence from Great Britain and rejection of parliamentary sovereignty. It provided the official exit for the graceful departure of Lord Listwell, then Governor-General who represented the Queen of Britain as Head of State.

Nevertheless, the immediate post-independence political situation in Ghana was not better. Apart from the immediate political benefits of self-governance, the citizens did not get the open political space as promised.<sup>161</sup> Political opponents of the new post-independence regime were thrown into jail.<sup>162</sup> The most draconian laws were enacted to keep the opposition at bay.<sup>163</sup> Worst of all, by a Parliamentary resolution and backed by a referendum, Ghana went back to a de jure one party state. Lamentably, this first precious chapter of multi-party constitutional democracy was closed. General helplessness and unquestioned misgovernance ensued. Salvation seemed very far from the people.<sup>164</sup> The One party state made it so. This background occasioned the intervention of the military on the 24<sup>th</sup> February, 1966. This ended the life of the First

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<sup>160</sup> It was better to see off the evil of colonialism than to pretend to do so.

<sup>161</sup> Issa Shivji, observes, "For by definition, the neo-colonial state has tended, for its own reproduction, to usurp and obliterate the autonomy of civil society and therefore the very foundation of democracy. It is within this formation that rights struggles, like other democratic struggles, have to be waged." Issa Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) at pp.5.

<sup>162</sup> Prominent opposition politicians even died in detention cells. For example, Obetsebi- Lamptey and Dr. J.B. Danquah died in Nsawam Prison in 1963 and 1965 respectively

<sup>163</sup> The famous one being the *Preventive Detention Act, 1958* which was passed within 24 hours and gave the President the power to cause to be detained without trial any person within the territory of Ghana whom he has reasonable grounds to believe that such a person is causing or likely to cause public disorder. Again, in 1964, there were two major constitutional changes that finally strangled the opposition: A referendum which only allows the introduction of a de jure one-party state and gives the president the power to dismiss any judge on his own reasons.

<sup>164</sup> See Afrifa, Amankwa A. *The Ghana Coup*, (London: Frank Cass, 1966).

Republic and the 1960 Constitution. The 1969 and 1979 Constitutions of the Second and Third Republics respectively, ended on a similar note - military take over.

The longest of these military governments was the eleven-year reign of the Provisional National Defence Council (PNDC).<sup>165</sup> This regime is crucial to our discussion in many respects. First, it shamefully overthrew the legitimate constitutional government of the Third Republic.<sup>166</sup> Secondly, it suspended the 1979 Constitution, declared Parliament unlawful to operate and dismissed all ministers from office. Indeed, the government in power prior to the military takeover was effectively disbanded. The regime then ruled with an iron fist and gained notoriety for Human Rights abuses.<sup>167</sup> There were countless tortures, harassments, extra-judicial killings, abductions and disappearances of mostly actual and imagined opponents of the regime.<sup>168</sup> All this happened within the context of economic decadence and social suffering.<sup>169</sup> In 1992, the PNDC government bowed to a combined force of domestic and international pressures to return the country to a democracy. The regime initiated, guided and supervised the drafting and adoption of *Ghana's Fourth Republican Constitution, 1992*. It must be noted that though this Constitution is a direct product of PNDC military politics, it is said to have contained the most elaborate Human Rights provisions since independence.

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<sup>165</sup> The PNDC government came to power on 31 December 1981, overthrowing the constitutionally-elected government of Hilla Limann, and ruled the country until January 1992.

<sup>166</sup> Though unconvincing, the coup makers cited corruption, economic mismanagement among others as the justification for the overthrow of the government.

<sup>167</sup> Among the methods employed by the regime as a mechanism of control were torture, solitary confinement, detention in very dark cells, application of cigarettes to the male organs, mock executions, denial of medical facilities, assault and battery, stripping and denial of legal representation and visits from family. *Amnesty International Report on Ghana 20*(18 December, 1991) at pp. 20. But note that some writers seem to suggest that human rights violation under Rawling's PNDC was justified. For instance, Jeff Haynes appears to suggest that the violations were necessary in order to protect "collective rights" as opposed to the individual rights advanced by the opponents of the regime. Jeff Haynes, "Human Rights and Democracy in Ghana: The Records of the Rawlings Regime" (1991) 90 *African Affairs* 407.

<sup>168</sup> Mike, Oquaye, "Human Rights and the Transition to Democracy Under the PNDC in Ghana" (1995) 17 *Human Rights Quarterly* 556 at p.559

<sup>169</sup> See John, Loxley, *Ghana: Economic Crisis and the Long Road to Recovery* (Ottawa, Canada: North-South Institute, 1988) and Donald, Rothchild, et al., *Ghana: the Political Economy of Recovery*, (Rienner Publishers, 1991). However, it could be said that the regime was not the worse in Ghana's history in terms of economic woes. Towards the end of the 1980s and early 1990s the regime had been able to sustain a relatively thriving economy through IMF-World Bank backed Structural Adjustment Programme. See John Rapley, *Understanding Development: Theory and Practice in the Third World* (3<sup>rd</sup>. Ed) (Lynne Rienner Publishers, 2007)

### ***III. Human Rights and the Constitution of Ghana, 1992***

From colonialism, slave trade to military dictatorship, the framers of the 1992 4<sup>th</sup>. Republican Constitution were very much aware of the significance of Human Rights protection. History was a useful guide to them. It was inevitable that this background would influence their deliberations on the nature and future of Human Rights in Ghana. The preamble of the constitution provides a clear illustration of their vision. In part it states:

We the People of Ghana, in exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity,...and in solemn declaration and affirmation of our commitment to;...the protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our nation; enact and give to ourselves this constitution”<sup>170</sup>

Embedded in these words are the values underpinning Human Rights. Liberty, equality and prosperity represent their concerns for human dignity and the wellbeing of the people. Most importantly, they are anchored by an explicit mention of Fundamental Human Rights and Freedoms. These shall be the priority goals of governments. It should be observed that the preamble provides a double intent. Thus, these interests or values must be protected for those present and for posterity.

However, as the words of the preamble carry little weight in constitutional interpretation, the framers of the Constitution backed them up with elaborate but entrenched provisions on Human Rights. It is these provisions that will provide the general context for the subsequent chapters of this work. With the exception of the 1960 Constitution (which does not contain any open and independent human rights provisions) the current constitutional provisions on Human Rights are a reproduction of those contained in both the 1969 and 1979 Constitutions. The important difference is that in the current Constitution there are remarkable additions of such

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<sup>170</sup> The Preamble, the 1992 Constitution of the Republic of Ghana

provisions as on Women, Children, Disability and Socio-Economic Rights. Thus, this work will not go over the 1969 and 1979 Constitutions, but will discuss the Human Rights provisions in the 1992 Constitution of Ghana.

### ***a) Civil and Political Rights***

The 1992 Constitution in its Chapter 5, generously replicates the provisions of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

The Right to Life is undoubtedly the most fundamental of all rights. It has been referred to as “the supreme right from which no derogation is permitted even in time of Public emergency.”<sup>171</sup> Indeed, all other rights add quality to the life in question and depend on the pre-existence of life itself for their utility.<sup>172</sup> The Right to Life is also accorded the highest position by those arguing in favour of a hierarchy of rights. Even those who do not submit to the hierarchy of rights argument but who argue for a universal fundamentality still consider the right to life one of pre-eminence to which violations can never be remedied.<sup>173</sup> Article 13 of the 1992 Constitution states:

“No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.”<sup>174</sup>

However, like other liberal constitutions around the world, a person shall not be held to have deprived another person of his or her life in contravention of this Article if that other person dies as a result of a lawful act of war or if that other person dies as a result of the use of force to such an extent as is reasonably justifiable in particular circumstances as- (a) for the defence of

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<sup>171</sup> UN Human Rights Committee General Comment 6

<sup>172</sup> Smith Rhona K.M., *Textbook on International Human Rights*, (Oxford University Press, 2007) at pp.194

<sup>173</sup> Ibid at pp.194

<sup>174</sup> Article 13(1)

any person from violence or for the defence of property; or (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) for the purposes of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission of a crime by that person.<sup>175</sup> A general comment warranted by this provision is that while it seeks to protect life and implicitly invests in the state the constitutional obligation to prosecute all those responsible for unlawful deprivation of life, it does not outlaw the death penalty. The courts still have the authority to impose the death penalty as the ultimate punishment for the severest crimes such as high treason. While this has the utility of potentially deterring people from committing such crimes, it remains a question as to how that squares up with the provisions on human dignity and general applicable international Human Rights law.<sup>176</sup>

Closely connected to the Right to Life is personal liberty. This is provided for under Article 14(1). Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in some cases and in accordance with procedure permitted by law. For instance, the right to personal liberty can be limited in an execution of a sentence or order of a court made for a purpose to which the court has jurisdiction.<sup>177</sup> It should be noted that apart from its direct association with the legitimate international concern for the protection of the liberty of persons, this provision is in direct response to past incidents of arbitrary arrest and detentions in the military regimes of Ghana. Properly defined however, the personal liberty

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<sup>175</sup> Article 13(2)

<sup>176</sup> The International Covenant on Civil and Political Rights in its Article 6 indicates its abhorrence to the death penalty. Even the Second Optional Protocol to the International Covenant on Civil and Political Rights in its Article 1 requires all State parties to take the necessary measures to abolish the death penalty.

<sup>177</sup> Article 14 (1). These instances include (a) in execution of an order of a court punishing him for contempt of court; or (b) for the purpose of bringing him before a court in execution of an order of a court; or (c) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or (d) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or (e) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or (f) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana

provision's value does not lie in the prohibition of deprivation of liberty, but instead, in the establishment of procedural guarantees and minimum standards for those deprived of their liberty.<sup>178</sup> Article 14(2)-(7) further amplify the personal liberty right with some procedural rights in criminal cases. It can be said that personal security rights help operationalise the right to liberty. They require that a person who is arrested, restricted or detained has the benefit of being informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.<sup>179</sup> Where a person who is arrested, restricted or detained - (a) for the purpose of bringing him before a court in execution of an order of a court; or (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, he/she shall be brought before a court within forty-eight hours after the arrest, restriction or detention.<sup>180</sup>

If a person is arrested, restricted or detained under this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions. These include in particular conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.<sup>181</sup> But where a person is unlawfully arrested, restricted or detained by any other person, s/he shall be entitled to compensation from that other person.<sup>182</sup> Generally, these are checklists against unjustifiable arrests and detentions. They provide criminal suspects of, inter alia, the true benefits of being told of the nature of their crime and a justification for the restriction on their liberty. This has the relevance of cementing the element of predictability in the legal system in relation to criminal justice.

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<sup>178</sup> Smith Rhona Supra note 172 at 226

<sup>179</sup> Article 14(2)

<sup>180</sup> Article 14(3) a&b

<sup>181</sup> Article 14(4)

<sup>182</sup> Article 14(5)

Article 15 provides for Human Dignity as of Right. The dignity of all persons shall be inviolable.<sup>183</sup> Under no circumstance shall a person, whether or not he is arrested, restricted or retained, be subjected to - (a) torture<sup>184</sup> 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.<sup>185</sup> People who have not been convicted of a criminal offence shall not be treated as convicted persons and shall be kept separately from convicted persons.<sup>186</sup> Juvenile offenders who are kept in lawful custody or detention shall be kept separately from adult offenders.<sup>187</sup> Interestingly, Article 16 of the Constitution extends the breadth of Article 15 on the right of the human dignity. It outlaws slavery or servitude.<sup>188</sup> It also frowns upon forced labour except as required by law and endorsed by a court.<sup>189</sup> Obviously, the overall legal bearing of this provision is the affirmation of the sanctity element of the human person. This is because it is inextricably linked to the humanity of the right-bearer; and the concept of inalienable rights of human beings finds a constitutional anchor in the recognition that it is *not a privilege granted by the state*.<sup>190</sup> Thus acts that seek to undermine or violate the physical and mental integrity such as torture and other degrading treatments of the person are proscribed. Such constitutional jurisprudence reinforces the intrinsic value of the person and affirms the significance of the

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<sup>183</sup> Article 15(1)

<sup>184</sup> Though both the courts in Ghana and the Constitution have not defined the term torture, it is expected or likely that the courts would follow the definition given by UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on the person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (Article 1 United Nations Convention Against Torture 1984)

<sup>185</sup> Article 15(2) a & b

<sup>186</sup> Article 15(3)

<sup>187</sup> Article 15(4)

<sup>188</sup> Article 16(1)

<sup>189</sup> Article 16(2)

<sup>190</sup> [*Emphasis added*] Halton, Cheadle *et.al.*(ed.), *South Africa Constitutional Law: The Bill of Rights*, (Durban: Butterworths, 2002) at 129.

Kantian injunction to treat every human being as an end and not a means.<sup>191</sup> Understandably, individuals are to be seen and appreciated in their concrete reality, respected for what they represent in a society and not to be merely treated as instruments of the will of others.<sup>192</sup>

Equality Rights are contained in Article 17. This Article provides for equality before the law and outlaws discrimination against all persons on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.<sup>193</sup> However, the provision prima facie permits Parliament to enact laws aimed among others, at redressing social, economic or educational imbalance in the Ghanaian society.<sup>194</sup> It is noted that the concept of equality is rooted in philosophical debates<sup>195</sup>, a detailed analysis of which is outside the scope of this thesis. However, the Human Rights jurisprudence of democratic states has long concerned itself with inequalities. Not only is equality as of right accepted as a cornerstone of democratic states but also the prohibition of discrimination is premised on the assertion that all people are born free and equal in dignity and rights.<sup>196</sup> This demands the recognition of all persons as having equal rights with the aim of according them equal opportunities for free and full development.<sup>197</sup> Thus constitutional rights on the elimination of discrimination do not seek to treat people as if they

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<sup>191</sup> Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 1997 at 313

<sup>192</sup> Schackter, Oscar, "Human Dignity as a Normative Concept" (1983) 77 AJIL 848 cited in Chaskalson, Arthur, "The Third Bram Fischer Lecture" (2000) 16 South Africa Journal of Human Rights 193 at 198 fn 25

<sup>193</sup> Article 17(1) &(2). But note that Clause 3 of Article 17 expands the list of grounds of discrimination. It states as follows: For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description. This perhaps is comparable to some international human rights instruments such as: International Covenant on Civil and Political Rights (1976)(ICCPR), [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Article 2(1)]; International Covenant on Economic, Social and Cultural Rights (1976) (ICESCR), [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Article 2(2)]; Universal Declaration of Human Rights (1948) (UNDHR), [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Article 2) and Article of Africa Charter on Human and Peoples Rights.

<sup>194</sup> Article 17(4)

<sup>195</sup> Smith Rhona supra note 172 at pp.191

<sup>196</sup> Article 1 of UNDHR

<sup>197</sup> Smith Rhona, supra note 172 at pp.192

were equal but to redress factual inequalities in the enjoyment of Human Rights.<sup>198</sup> Equality before the law gives to all persons in Ghana equal access to the courts and to be viewed in law in a non-discriminatory manner, especially with respect to the judicial determination of their rights and freedoms under the Constitution, 1992.<sup>199</sup> Nevertheless, the central force of this right is dependant upon the existence of other rights. That is, it could be a sheer empty political gesture to constitutionalize this right if other rights are denied. One can only claim the right not to be discriminated against only if one has a right to what is claimed.<sup>200</sup>

The most comprehensive provision for due process rights in criminal justice are contained in Article 19. This Article codifies all the natural justice rules of fair trial whereby a criminal suspect must be given a fair hearing within a reasonable time by a court.<sup>201</sup> In addition, any person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty<sup>202</sup> and be informed immediately in a language that he understands, and in detail; of the nature of the offence charged.<sup>203</sup> In the words of Article 19, such a person would be deemed to have been given a fair hearing and trial if given adequate time and facilities for the preparation of his or her defence<sup>204</sup> and permitted to defend himself or herself before the court in person or by a lawyer of his choice.<sup>205</sup> Accused persons are to be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as

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<sup>198</sup> Ibid

<sup>199</sup> See Stavros, S., *The Guarantees for the Accused Person Under Article 6 of the European Convention on Human Rights – An Analysis of the Application of the Convention and a Comparison with other Instruments*, (The Hague: Kluwer, 1993) and Weissbrodt, D., *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights – Background, Development and Interpretation*, (The Hague: Kluwer, 2001)

<sup>200</sup> Stanley Corbett, *Canadian Human Rights Law and Commentary*, (LexisNexis Canada Inc. 2007) at pp.25

<sup>201</sup> Article 19(1)

<sup>202</sup> Article 19(1)c

<sup>203</sup> Article 19(1)d

<sup>204</sup> Article 19(1)e

<sup>205</sup> Article 19(1)f

those applicable to witnesses called by the prosecution.<sup>206</sup> In repudiating retroactive criminal punishment, Article 19 further provides that no person shall be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.<sup>207</sup>

In my opinion, this provision necessitates three short comments.

First of all, a bastion of the Rule of Law itself is the notion of a fair trial. This requires certainty and predictability of legal rules. In that case, the constitutional prohibition on retroactive penal legislation seeks to give meaning to the legal principle that a person cannot be punished for something which was not a crime at the time it was committed – *nullum crimen sine lege and nulla poena sine lege*.

Besides, adequate time and facilities accorded to accused persons fosters fairness in the trial process and prevents trial by surprise.

Lastly, the presumption of innocence of an accused is an open but fair invitation to the courts to commence the trial proceedings with an open mind and no preconceived notion of guilt. This makes the right of a defence constitutionally meaningful.

Articles 23 and 296 further ground the codification of the natural justice rules in the Constitution. These provisions extend the scope and applicability of the natural justice rules of fair trial in criminal justice to administrative matters. Indeed, their primary end is administrative justice. Administrative bodies and administrative officials are obliged to act fairly and reasonably; and to comply with the requirements imposed on them by law. Persons aggrieved by

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<sup>206</sup> Article 19(1)g

<sup>207</sup> Article 19(5)

the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.<sup>208</sup> Where discretionary power is vested in any person or authority, it is deemed to imply a duty to be fair and candid and the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.<sup>209</sup>

These articles are not bereft of constitutional relevance, particularly to the Human Rights project in Ghana. Clearly, on the one hand, they seek to respect the constitutional doctrine of separation of powers by allowing administrators the latitude to perform their legitimate functions. On the other hand, they throw in a caution that the administrative discretion is not absolute so as to allow corrupt and despotic administrators to wreak injustice.<sup>210</sup> The requirement of reasonability or rationality in the merit or outcome of the administrative decision must be met. Therefore, it can be argued that the Constitution seeks to give full expression to its fundamental values of accountability, probity, justice and openness.<sup>211</sup>

Article 21 of the Constitution contains the general fundamental freedoms. These include the freedoms of speech, expression, press and media, thought, conscience and belief, academic freedom, religion, assembly, association, information and movement.<sup>212</sup> Meanwhile, these freedoms are supported by property and privacy rights lumped together in Article 18 of the Constitution. However, limitations on these freedoms are permitted on such grounds as are reasonably required in the interest of defence, public safety, public health or the running of essential services and laws as are necessary in a democratic society.<sup>213</sup> While these freedoms will be commented upon in chapter four of this work, however, it should be noted that the inclusion of

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<sup>208</sup> Article 23

<sup>209</sup> Article 296 (a) & (b)

<sup>210</sup> Halton, Cheadle *et.al.* (ed.), *South Africa Constitutional Law: The Bill of Rights*, at pp.611-12

<sup>211</sup> Preamble, *The Constitution of the Republic of Ghana*, 1992.

<sup>212</sup> Article 21(1) a, b, c, d, e, f, &g

<sup>213</sup> Article 21(4)

the “running of essential services” in the limitation clause on these freedoms is worrisome. It is unclear what a politically zealous Judiciary would do with it in the enforcement of constitutional rights. Such a provision is potentially a source of gratuitous judicial speculation on the nature and scope of limitations of Fundamental Freedoms guaranteed in democratic regimes.

Finally, democratic participatory rights to citizens are guaranteed under Article 42 of the Constitution. It entitles citizens who are eighteen years of age or above, and of sound mind, the right to vote in all public elections and referenda.<sup>214</sup> This reinforces Article 1 of the Constitution which vests the sovereignty of Ghana in the people. This major right - though limited- allows the people to exercise this sovereign power by participating in crucial public decisions that go to the future, and governance of the nation. It is a clear rejection of rule by the barrel of the gun, and an affirmation of the commitment of the people to a civil process of governance in the hope of reaping the blessings of liberty, justice and prosperity.

### ***b) Economic, Social and Cultural Rights***

For the first time in the constitutional history of Ghana, the 1992 Constitution has provided for justiciable Socio- Economic Rights. While these are not as detailed as expected, the provisions in the Constitution appear to be a replica of those of the International Covenant on Social, Economic and Cultural Rights. A number of reasoned justifications could be advanced for their inclusion in the Constitution. In part, the framers show a concern to identify the provisions of the Constitution with the prevailing international Human Rights regime. Besides, taking these rights seriously implies a commitment to social integration, solidarity and equality, including tackling the question of income distribution<sup>215</sup> in the larger Ghanaian society. Economic, Social and Cultural rights ineluctably illustrate a major concern for the protection of vulnerable groups,

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<sup>214</sup> Article 42

<sup>215</sup> Asbjorn Eide et al ed., *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers,2001)

such as the poor and the handicapped.<sup>216</sup> Fundamental needs as these rights seek to provide and protect, should not be at the mercy of changing governmental policies and programmes, but should be defined as constitutional entitlements.<sup>217</sup>

An explicit Human Right to receive education with a corresponding duty of the state to provide for this education is guaranteed under Article 25 of the Constitution, 1992. All persons shall have the right to equal educational opportunities and facilities.<sup>218</sup> For the full realisation of this right, basic education shall be free, compulsory and available to all.<sup>219</sup> Of particular importance is the fact that the obligation on the state to ensure a basic education is not qualified by reference to progressive realisation or resource constraints. In addition, it does preclude a system which permits the charging of school fees at the basic level. Conversely, secondary education in its different forms, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education.<sup>220</sup> It is further provided that higher education like university education shall be made equally accessible to all, on the basis of capacity, by every appropriate means.<sup>221</sup>

Also, the state is constitutionally bound to respect Individual Rights to establish at their own expense private schools subject to the laws of the state.<sup>222</sup> Moreover, given the high level of illiteracy rate in Ghana - particularly in the rural communities - the provision in question attempts a solution by providing that functional literacy shall be encouraged or intensified as far as possible. It could be said that the provision for the right to education is in accord with the growing international consensus that education is imperative to enable the individual to freely

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<sup>216</sup> *ibid* at pp.5

<sup>217</sup> *Ibid* at 6

<sup>218</sup> Article 25(1)

<sup>219</sup> Article 25(1)a

<sup>220</sup> Article 25(1)b

<sup>221</sup> Article 25(1)c

<sup>222</sup> Article 25(2)

develop his or her talent, personality and dignity, to actively participate in a free society and to contribute to the tolerance and respect for Human Rights.<sup>223</sup>

Article 24 provides for the rights to work under satisfactory, safe and healthy conditions.<sup>224</sup> Workers are also entitled to equal pay for equal work without distinction of any kind.<sup>225</sup> Additionally, every worker is entitled to rest, leisure and reasonable limitation of working hours and periods of holidays with pay, as well as remuneration for public holidays.<sup>226</sup> People within working environments are entitled to form or join a trade union of their choice for the promotion and protection of their economic and social interests.<sup>227</sup> However, such rights may be restricted by law and on grounds as are reasonably necessary in the interest of national security or public order, or for the protection of the rights and freedoms of others.<sup>228</sup> Regardless of these limitations, the provision symbolises a constitutional jurisprudence that stresses interdependence between labour conditions and social justice. It enhances the concept of labour as humane value, social need and a means for the self-realisation and development of human personality. But the insufficient character of this Article should be acknowledged. Indeed, it does not in any way entitle any one a right to be provided with work by the state. It merely provides for rights in work.

Cultural rights are explicitly guaranteed under Article 26. Under this Article every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.<sup>229</sup> Perhaps a persuasive reason for such a provision is the need to respect the cultural values of groups and individuals by others who may not share these values. But the provision excluded from its ambit and protection all customary

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<sup>223</sup> See Mialaret, G., "What Kind of Education?", in G. Mialaret (ed.), *The Child's Right to Education*, 1979, at pp.47-53.

<sup>224</sup> Article 24(1)

<sup>225</sup> Ibid

<sup>226</sup> Article 24(2)

<sup>227</sup> Article 24(3)

<sup>228</sup> Article 24(4)

<sup>229</sup> Article 26(1)

practices which dehumanise or are injurious to the physical and mental well-being of a person.<sup>230</sup>

Within the cultural context of Ghana, it is fair to say that this provision has in its contemplation obsolete cultural practices like widowhood rites, trial by ordeal, female genital mutilation, witches camps, and host of others. These practices are dehumanising. The victims are always left with lasting mental and physical injuries. Thus the provision seeks to cure the defects of such cultural practices by excluding them from constitutional protection as they fell below the benchmark of human dignity.

### ***c) Women and Children's Rights***

One key feature that distinguishes the *Fourth Republican Constitution*, 1992 from the Second and Third Republican Constitutions of 1969 and 1979 respectively, is the provisions on women and children's rights. Article 27(1) provides that special care shall be accorded to mothers during a reasonable period before and after child-birth and during those periods, working mothers shall be accorded paid leave. Also, facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care for children, realise their full potential.<sup>231</sup> The provision ends with an explicit guarantee for equal training and promotion rights to women without any impediments from any person.<sup>232</sup> Women's rights as captured here, in part, represent a legitimate force in the Ghanaian society to address serious gender related issues brought about by a long period of negative sociological construction. An arbitrary societal consignment of women to the roles of house keeping, child care or baby sitting weakens women's ability to work during such periods as before and after child-birth. By implication, their economic and social vulnerability in society is exacerbated. At best, it cripples any progressive move by

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<sup>230</sup> Article 26(2)

<sup>231</sup> Article 27(2)

<sup>232</sup> Article 27(3)

women to realise their potentials during such periods. It is argued here that Article 27 of the Constitution, in theory, drowns this culturally imposed inequity in the larger Ghanaian society and generates an optimistic feeling in the people that that culturally contemptuous treatment of women is over.

Under Article 28(1) Parliament has a mandatory constitutional duty to enact such laws as are necessary to ensure the realisation of the rights of Children. This provision defines a child as a person below eighteen years of age.<sup>233</sup> Children are entitled under the Constitution to special care, assistance and maintenance as is necessary for their development from their natural parents.<sup>234</sup> This right can only be limited in circumstances where parents have effectively surrendered their rights and responsibilities in respect of a child in accordance with law.<sup>235</sup> Moreover, children are entitled to a reasonable provision out of the estate of their parents whether or not born in wedlock.<sup>236</sup> The interest of the child shall be paramount in all activities relating to its maintenance and upbringing.<sup>237</sup> In that case, children and young persons shall receive special protection against exposure to physical and moral hazards<sup>238</sup> and be protected from engaging in work that constitutes a threat to their health, education or development.<sup>239</sup> The Constitution prohibits all acts that subject children to torture or other cruel, inhuman or degrading treatment or punishment.<sup>240</sup> Above all, no child shall be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs.<sup>241</sup> Apart from the fact that this appears to be an incorporation of some provisions of the Convention

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<sup>233</sup> Article 28(5)

<sup>234</sup> Article 28(1)a

<sup>235</sup> Ibid

<sup>236</sup> Article 28(1)b

<sup>237</sup> Article 28(1)c

<sup>238</sup> Article 28(1)d

<sup>239</sup> Article 28(2)

<sup>240</sup> Article 28 (3)

<sup>241</sup> Article 28(4)

on the Rights of Child (CRC), it has a peculiar Constitutional relevance to Ghana with regard to the pervasive problems of child labour and child neglect. Children need protection from callous parents and general societal neglect. This provision signifies hope for children who are often denied the benefits of care by outdated customs. It also saves children from the possible engagement in hazardous works that turns to be injurious to their health or mental and physical wellbeing.

*d) Rights of Disabled and Sick Persons*

Like the women and children rights earlier identified in the preceding pages, the rights of the disabled and sick persons are a peculiar feature of the *Fourth Republican Constitution, 1992*. Perhaps they came as a direct response to increased national and international concerns for the protection of the disabled and the sick in society. Article 29(1) accorded disabled persons the right to live with their families or with foster parents and to participate in social, creative or recreational activities. They are not to be subjected to differential treatment in respect of their residence other than that required by their condition or by the improvement which they may derive from the treatment.<sup>242</sup> Additionally, disabled persons shall be protected against all exploitation, regulations and treatment of a discriminatory, abusive or degrading nature.<sup>243</sup> In fact, in any judicial proceedings in which a disabled person is a party, the legal procedure applied shall take his or her physical and mental condition into account.<sup>244</sup> Likewise, as far as practicable, every place with public access should have appropriate facilities for disabled persons.<sup>245</sup> In terms of their direct participation in the economic sphere of the country, disabled persons who are

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<sup>242</sup> Article 29(2)

<sup>243</sup> Article (4)

<sup>244</sup> Article 29(5)

<sup>245</sup> Article 29(6)

engaged in business or employed in business organisations are entitled to special incentives.<sup>246</sup> However, Parliament has the institutional burden to enact the laws necessary to ensure the enforcement of these provisions.<sup>247</sup>

Article 30 contains the special rights of the sick. It provides that a person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs.<sup>248</sup> This will potentially save the sick from certain religious practices which tend to deny the sick certain medical benefits.

However, the rights discussed in this Chapter are not exhaustive. Article 33(5) states: “The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.” More extensive provisions in relation to socio-economic rights are listed under Chapter 6. These are known as the directive principles, and have been held by the Supreme Court<sup>249</sup> to be justiciable under the appropriate circumstances. That is, where they link up with particular rights which are recognised under Chapter 5. Accordingly, potential rights claimants can still rely on these provisions for the enforcement of such rights as inherent in a democracy and which intends to secure the freedom and dignity of man.

#### ***IV. The Operative International Human Rights Regime in Ghana***

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<sup>246</sup> Article 29(7)

<sup>247</sup> Article 29(8)

<sup>248</sup> Article 30

<sup>249</sup> *New Patriotic Party v. Attorney General* (8 march 1994, 31 Dec. Case)

Besides the attractive Human Rights provisions in Ghana's Constitution, the country has incurred some international legal obligations with respect to the protection and promotion of Human Rights. Since the return of the country to constitutional rule in 1992, Ghana has signed and/or ratified the major international and regional Human Rights treaties. At the same time, the government has taken steps to review, repeal, amend relevant parts of certain statutes and enact new ones to conform to the country's Constitution or its international commitments. At the international level, Ghana has signed and ratified the following instruments:

- The UN Convention relating to the Status of Refugees
- Universal Declaration of Human Rights
- The Convention on the Prevention and Punishment of the Crime of Genocide
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Convention on the Eradication of Racial Discrimination (CERD)
- The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- The Rome Statute on the International Criminal Court (ICC)
- The Convention on the Rights of the Child (CRC)
- The Convention Against Torture (CAT) and
- The Convention for Migrant Workers (CMW)

At the continental level, Ghana has incurred additional legal commitment to the project of Human Rights by ratifying the following treaties:

- The African Charter on Human and Peoples' Rights (ACHPR), and its Protocol establishing a Human Rights Court
- The African Charter on the Rights and Welfare of the Child (ACRWC) and
- The OAU Convention Regarding Specific Aspects of Refugee Problems in Africa.<sup>250</sup>
- The Constitutive Act of AU

It must be pointed out that Ghana is a dualist state which requires positive legislative action to incorporate ratified international treaties into local law before they are applicable within the domestic legal system. Article 75 of the Constitution directs that the execution of treaties,

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<sup>250</sup> Ghana ratified the treaty on 19 June 1975.

agreements or conventions in the name of Ghana by the President is subject to an explicit ratification by an Act of Parliament; or a resolution of Parliament.<sup>251</sup> Not surprisingly however, only a few of these treaties ratified by Ghana have been domesticated. These include the CRC,<sup>252</sup> and the African and UN Refugee conventions.<sup>253</sup> However, this does not necessarily imply that the other instruments are not legally enforceable in Ghana. Both Articles 40<sup>254</sup> and 73<sup>255</sup> of the Constitution entreat the government to fulfil its international legal obligations even in the absence of domestication. This view has received the support of the Supreme Court in *New Patriotic Party v Attorney-General*<sup>256</sup> where it was held that the court would not decline an invitation to apply international Human Rights instruments in the enforcement of the provisions of the Constitution merely on the grounds that such instruments are not incorporated into domestic law. Justice Atuguba stated that “The principles of international instruments relating to fundamental human rights are enforceable to the extent that they fit into the provision set out in Article 33(5).” Article 33(5) provides that “The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter<sup>257</sup> shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.” Thus, inaction on the part of

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<sup>251</sup> The process of ratification is initiated by the Ministry of Foreign Affairs (MFA) in conjunction with Ghana’s diplomatic missions abroad. The MFA subsequently informs the relevant sector Ministry or Department which, after study will submit a memo to cabinet. After cabinet deliberation, the memo finally finds its way to Parliament for ratification, subject to presidential assent.

<sup>252</sup> Reflected in Children’s Act, 1998 (Act 560) and the Juvenile Justice Act, 2003 (Act 653), which complements the former.

<sup>253</sup> The OAU Convention Regarding Specific Aspects of Refugee Problems in Africa and the UN Convention Relating to the Status of Refugees (1951), and the UN Protocol Relating to the Status of Refugees (1967). The local law is The Refugee Law, 1993 (PNDCL 305).

<sup>254</sup> Article 40 in the relevant part states that “In its dealings with other nations, the Government shall (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means; (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of- i) the Charter of the United Nations; ii) the Charter of the Organisation of African Unity; iii) the Commonwealth; iv) the Treaty of the Economic Community of West African States; and v) any other international organisation of which Ghana is a member.

<sup>255</sup> Article 73 provides that “The Government of Ghana shall conduct its international affairs in consonance with the consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana.”

<sup>256</sup> [1993-94] 2 GLR 459.

<sup>257</sup> Chapter five of the Constitution, 1992.

Parliament to domesticate ratified international Human Rights treaties does not deny the domestic legal regime of their applicability.

## ***Conclusion***

Constitutionalisation of Rights gives better hope for Human Rights projects in democratic states like Ghana. This chapter has shown that the Constitution of Ghana, 1992 contains generous enforceable Human Rights provisions. These are grouped under four headings: Civil and Political Rights, Economic, Social and Cultural Rights, Women and Children's Rights and the Disabled and the Sick Rights. It has also shown that beyond this constitution, the state has ratified a number of international Human Rights treaties giving it an obligation to respect and protect the rights of citizens. How the courts have responded to this institutionalised Human Rights framework is the subject matter of the subsequent chapters.

## CHAPTER FOUR

### *LEGITIMACY, RIGHTS AND JUDICIAL REVIEW*

#### *Introduction*

In our current rights-conscious century,<sup>258</sup> one cannot adequately deal with the protection of individual rights under written constitutions without paying attention to the mechanism of Judicial Review.<sup>259</sup> In Ghana, as shown in the preceding chapter, Fundamental Human Rights and Freedoms are firmly constitutionalised. Their enforcement, in a restricted sense, is the legitimate expectation of those in Ghana.<sup>260</sup> All governmental actions must be measured in terms of this expectation in respecting the rights of the citizens. Anything that falls short of this expectation constitutes a potential violation of the Constitution and of Human Rights by extension. Thus, in circumstances where a compelling state interest or a value of high national interest demands derogation from the Constitution, the government owes the people on whom these rights are conferred, a legal obligation to justify it before the law courts.<sup>261</sup>

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<sup>258</sup> See Lorraine, Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80 *The Canadian Bar Review* 699; Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Bobbio N., *The Age of Rights* (Cambridge: Polity Press, 1996) and Boutros-Boutros, Ghali, "The Common Language of Humanity" in *United Nations World Conference on Human Rights: The Vienna Declaration and the Programme of Action* (New York: The United Nations, 1993)

<sup>259</sup> Francis X. Beytagh, "Individual Rights, Judicial Review and Written Constitutions" in James, O'Reilly, ed. *Human Rights and Constitutional Law*, (The Round Hall Press, 1992) at 157

<sup>260</sup> See Benjamin Kunbor, "Epistolary Jurisdiction of the India Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons" (2001) 2 *Law, Social Justice and Global Development* (located at <http://elj.warwick.ac.uk/global/issue/2001-2/kunbor.html>)

<sup>261</sup> The Constitution of Ghana, 1992 recognises among others, public morality, public health, national emergency and national security the values which the government can justifiably derogate from the human rights and freedoms set out in the Constitution. This must be done before a law court.

This legal duty is even sharper given the fact that the Constitution declares itself as the supreme law of the land.<sup>262</sup> Its central value conceivably is to moderate the actions and laws of the executive and the legislature respectively. The rationale is to promote good administration in part, and protect Individual Rights and Freedoms. The courts are given the power to do this. That is partly the stake of the courts in enforcing the Constitution. It is also a function of the people's legitimate desire to establish the fidelity of law. This is in accord with common law constitutionalists' belief that one of the effective ways by which the courts aid in the enforcement of Fundamental Rights and higher order of law is through Judicial Review.<sup>263</sup> Judicial Review is thus to be oriented principally towards the rule of law and rights protection. A "Right", on this account, 'is a metaphorical trump card, held by an individual that can prevent the government or society at large from doing a certain thing'<sup>264</sup> that offends the rationale or value for which such a right exist. In that case, courts reviewing the acts or decisions of public bodies or officials are to perform rights based justice: vindicate rights held by individuals against such acts that threaten to infringe or seek to threaten the realisation of such rights.<sup>265</sup>

In this chapter, the question of the legitimacy of the exercise of Judicial Review in a democratic context, with a particular focus on the enforcement of Human Rights in Ghana is examined. The constitutional foundation of Judicial Review within the constitutional structure of Ghana is also briefly set out. The principal argument here is that the legitimacy of Judicial Review lies (but not exclusively) in the court's duty to enforce a higher body of law grounded in rights. Accordingly, Individual Rights protection should serve as the main juridical basis to

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<sup>262</sup> Article 1(2) provides "[T]his Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

<sup>263</sup> See Sir J. Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights"(1993) 59 Public Law 69, Thomas Poole, "Legitimacy, Rights and Judicial Review"(2005) 25 Oxford Journal of Legal Studies 697 and T. R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, (Oxford: Oxford University Press, 2001)

<sup>264</sup> R. A. Primus, *The American Language of Rights*,(Cambridge: Cambridge University Press, 1999) at pp. 11

<sup>265</sup> Thomas Poole, "Legitimacy, Rights and Judicial Review" (2005) 25 Oxford Journal of Legal Studies 697 at 699-700

legitimate Judicial Review. Such a claim rests on the presumption that the objective of public law is to protect Human Rights and other constitutional values. It thus entitles the courts to use their judicial power either in the process of declaring or interpreting the law to preserve such a value of public law.

## ***I. The Concept of Judicial Review***

Judicial Review is widely practiced in many modern constitutional democracies, including Ghana. Its role in the enforcement of rights and the rule of law has been incisive.<sup>266</sup> It helps in shaping legislation and keeping governments within their constitutional boundaries. Yet the legal jurisprudence on Judicial Review, especially as to its legitimacy, is far from being settled. There are widespread disagreements among scholars of public law over the true nature and scope of Judicial Review.<sup>267</sup> Some doubts have even been raised about its enduring propriety.<sup>268</sup> Some think that it is not a useful mechanism in modern majoritarian democracies.<sup>269</sup> The debate even extends to the true meaning of Judicial Review: Is this concept capable of a single meaning? These doubts, debates or questions are not dry in value. They are productive and have yielded a reasonable mass of healthy responses. We can rely on such responses to make a point. Such a point can be old or original. If it is old, then its value might be reinforced in society.

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<sup>266</sup> See Robert J. Share et al. *The Charter of Rights and Freedoms* (2<sup>nd</sup> ed.) (Irwin Law Inc., 2002) and Christopher Forsyth, *Judicial Review and the Constitution* ed.(Oxford-Portland: Hart Publishing, 2000)

<sup>267</sup> See P.P. Craig, "Competing Models of Judicial Review" in C.F. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000)

<sup>268</sup> See John Ely, *Democracy and Distrust: The Theory of Judicial Review* (Harvard University Press, 1980); Michael, Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982); Jeremy Waldron, *Law and Disagreement* (Oxford :Oxford University Press, 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2<sup>nd</sup> ed.(New Haven: Yale University Press, 1986) and Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy* 451

<sup>269</sup> See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2<sup>nd</sup> ed.(New Haven: Yale University Press, 1986)

If it is original, perhaps we can make a mark in the debate. From these debates, an attempt will be made to explain Judicial Review in order to make a point.

Judicial Review in the relevant general literature can be understood in two overlapping but distinguishable models: reviewing an administrative action by interpreting primary legislation, or alternatively and determining the compatibility and validity of an Act of Parliament or Executive action in relation to a written Constitution. The first brand is traditionally associated with the *ultra vires* rule.<sup>270</sup> It is mostly, but not exclusively, observed in countries with the political tradition of parliamentary supremacy, which accords primacy to laws enacted by the elected legislature.<sup>271</sup> The second model, in principle, recognises the supremacy of a written constitution which legitimates the higher courts to review primary legislation in order to test its conformity or compatibility with a written constitution.<sup>272</sup> It is also an avenue for the courts to say what the law is. This can either be by interpretation or declaration or both. Its value partly rests on the desire to keep to the Constitution in all governmental actions.

The focus of this thesis will be on the latter model of Judicial Review. The rationale for this is in three parts.

First, the proper scope of this thesis extends beyond Administrative Law, a field of study where the *ultra vires* rule mostly applies.<sup>273</sup> This thesis is grounded within the disciplines of Human Rights, Constitutional and Administrative Law.

The second reason rests on the constitutional nature of the Ghanaian State. This speaks to the absence of the principle of Parliamentary sovereignty, and the presence of written constitutional supremacy.

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<sup>270</sup> See P.P. Craig, "Ultra Vires and the Foundation of Judicial Review" (1998) 57 Cambridge Law Journal 63

<sup>271</sup> See T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge Law Journal 111 and C. F. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge Law Journal 122

<sup>272</sup> It permits the courts to review the primary legislation not only by interpreting that legislation where possible in conformity with the constitution, but also make a declaration of incompatibility to the constitution.

<sup>273</sup> See J.J. Spigelman, "The Foundations of Administrative Law" (the 1998 Spann Oration, Sidney, Australia, 7 September 1998) and H.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 Law Quarterly Review 198

The third rationale defines the locus of this thesis: it rests on the enforcement of constitutionalised rights, which by definition sees the written constitution as the ultimate gauge of validity for all legislative and executive acts. Review should thus be understood here as an exercise of matching up legislative and executive acts with the written Constitution.

A brief explanation of each model of Judicial Review is required. It will help explain the distinction between the two. Also, it helps to clarify the rationale for the preference of one to the other. More importantly, it provides a good basis for the evaluative exercise of justifying the legitimacy of Judicial Review in the enforcement of Human Rights in Ghana.

### ***a) The Traditional Ultra Vires Notion of Judicial Review***

According to this model, review traditionally seeks to control the exercise of administrative powers granted by legislation. Two related meanings have been canvassed for it. First, a public or even private body that has been granted powers, whether by statute, bye-laws or some other instrument, must not exceed the powers so granted. According to Prof. Dawn Oliver, the body will be taken to have exceeded its powers if either of two conditions is satisfied. First, that it has done or decided to do an act that it does not have the legal capacity to do. Put differently, if the body has exceeded its jurisdiction.<sup>274</sup> Note that jurisdiction as used here connotes the express and implied legal power so granted, and sought to link the exercise of this power to the presumed intent of the legislature.

The second limb is rooted in the two English cases of *Association Provincial Picture Houses v. Wednesbury Corporation*<sup>275</sup> and *Ridge v. Baldwin*<sup>276</sup>. It means as Dawn Oliver put it,

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<sup>274</sup> Dawn, Oliver & Jowell, J, (eds.), *New Directions in Judicial Review* (London: Stevens, 1988) at 45. See also Sir John Laws, "Illegality: The Problem of Jurisdiction" in M Supperstone and J Goudie (ed.), *Judicial Review* (London: Butterworths, 1997)

<sup>275</sup> [1948] 1 KB 223. In this case, the plaintiffs, who were proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, on the grant of licence for Sunday performances in that cinema was ultra vires. Under the Cinematograph Act 1909, the defendants are given the power to allow a licensed place to be open and used on Sundays, "subject to such conditions as the authority think fit to impose". By this, the defendants granted to the plaintiffs leave for Sunday performances subject to the condition that no

“an authority will be regarded as acting *ultra vires* if in the course of doing or deciding to do something that is *intra vires* in the strict or narrow sense, it acts improperly or “unreasonably” in various ways” such as disregarding the rules of natural justice, bad faith, ignoring relevant considerations, interfering with the free exercise of individual liberties, and so on.<sup>277</sup> The central focus of this second limb of the *ultra vires* rule rests on the interpretation of the enactment granting the power. It nourishes the presumption that Parliament as the grantor of such a power intended that it be used for a good purpose. Parliament cannot be understood to have granted the power for an improper purpose. Holders or recipients of Parliamentary power are thus deemed to have the obligation to act in such a manner as not to unreasonably or improperly burden individuals with their decisions. To do otherwise is to frustrate the presumed good and proper intent of the power grantor – Parliament.

Be this as it may, both the first and the second limbs of the *ultra vires* rule understandably point to the same ideal. Judicial Review must function to enforce the express and implied limits that Parliament attaches to legislation. It requires those on whom parliament confers powers to act reasonably in respect of the application of such powers and to stay within the stipulated boundaries of the given powers. Lord Greene M.R. persuasively reasoned in the case of *Wednesbury Corporation* that the power of the court to interfere in each case is not as an appellate authority to necessarily override decisions of local authority. On the contrary, the court is a judicial authority which is concerned, to see whether the local authority have contravened the law by ‘*acting in excess of the powers which Parliament has confided in them.*’<sup>278</sup> This

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children under fifteen years of age should be admitted to Sunday performances with or without adult. It was held that the defendants had not acted unreasonably or *ultra vires* in imposing the condition.

<sup>276</sup> [1964] AC 40. In this case, a police constable was dismissed from his post by a Watch Committee purporting to be acting under the powers of Police Discipline Regulations. The appellant was not told of the charges preferred or alleged against him nor given any opportunity to be heard in his defence. The House of Lords reversed the appellant dismissal on grounds that the decision sins against the rules of natural justice.

<sup>277</sup> Dawn, Oliver & Jowell, J, (eds.), *New Directions in Judicial Review* supra note 274 at 47

<sup>278</sup> *Wednesbury Corporation* supra note 275 at pp.234 [emphasis added]

pronouncement depicts one central value of the *ultra vires* rule to hold officials to stated precincts of their powers. To step outside the scope of their powers is to derail Parliamentary intent, an end which the *ultra vires* rule frowns upon. This might in turn have adverse consequences for social and political policies expressed in legislation.

In a relatively substantive respect, as forcefully argued by De Smith, the *ultra vires* rule defines and articulates three principal grounds of Judicial Review known as procedural propriety, reasonableness and legality.<sup>279</sup> Indeed, these generate and place upon decision-makers standards that are inherent in a democracy. In part, there is a strong appeal that people should not be denied the benefits of the democratic process by unfair decision-making procedures. Thus the concept of fair procedures *prima facie* imposes on all administrators an obligation to act fairly. It is particularly the case when legitimate protected interests or rights of people are stake. To disregard fair procedures in decision-making processes is to simply promote arbitrariness.<sup>280</sup>

While the legality element aims at ensuring the congruency of the decision with the legitimate purpose of the legislation, reasonableness largely promises accuracy of decisions and potentially prohibits excessive burdens being placed on individuals. However, it is important to recognise that review under the element of reasonableness tends to present conceptual difficulties for judges. In exercising their powers of Judicial Review, they ought not to imagine themselves as being in the position of the competent authority when the decision was taken.<sup>281</sup> They are precluded from testing the reasonableness of the decision as against the decision they would have taken.<sup>282</sup> To do so would involve the courts reconsidering the merits of the decision and acting as if they were themselves the recipients of the power.<sup>283</sup> Such a judicial venture largely derogates

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<sup>279</sup> De Smith *et. al*, *Principles of Judicial Review*,(Sweet & Maxwell Ltd., 1999) at 16

<sup>280</sup> Note however, that the content of fair procedures is infinitely flexible.

<sup>281</sup> De Smith *supra* note 279 at 451

<sup>282</sup> *Ibid*

<sup>283</sup> *Ibid*

from the chief purpose of the process of Judicial Review.<sup>284</sup> Judges are merely expected, among other considerations, to ensure that there is a rational and logical connection between the evidence and the ostensible reasons for the decision. Perhaps, this is to prevent judges from second-guessing administrators who are entitled to a margin of appreciation of the facts or merits of a case.<sup>285</sup>

It should however, be observed that in the recent past, the *ultra vires* rule as a model to explaining the doctrine of Judicial Review has been criticised on a number of grounds. For instance, it has been criticised for its inability to justify the entirety of Judicial Review.<sup>286</sup> The charge is that common law or non-statutory review cannot be rationalised through the logic of the *ultra vires* rule<sup>287</sup> which is dependent upon an articulated intention of parliament. That is, it fails to explain Judicial Review of laws not directly made by parliament. The common law is not codified. It exists in practice, traditions, conventions and principles recognised by the courts.<sup>288</sup> It is obvious that in such circumstances the responsibility of the courts is not to decode Parliamentary intent relative to an administrative action. Nor are the courts confronted with the business of interpreting an existing legislation. This conceptual gap in the scope of the *ultra vires* rule begs the question whether the justifications for the reviews of statutory and non-statutory powers are utterly distinct.

Perhaps a limited cure to this theoretical deficiency lies in the contention that the courts can apply the same grounds of review to all forms of power (statutory and non-statutory powers)

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<sup>284</sup> Ibid

<sup>285</sup> Ibid

<sup>286</sup> Sir William Wade saw this as expansion in judicial review as he aptly states “the dynamism of judicial review is such that it has burst through its logical boundaries,” H.W.R. Wade, “Judicial Review of Ministerial Guidance” (1986) 102 *Law Quarterly Review* 173 at 175

<sup>287</sup> Mark, Elliott, *The Constitutional Foundations of Judicial Review*, (Oxford-Portland: Hart Publishing, 2001) at pp.127 and P.P. Craig, “Ultra Vires and the Foundations of Judicial Review” (1998) 57 *Cambridge Law Journal* 63 at 70

<sup>288</sup> See Mark Walters, “Common Law, Reason, and Sovereign Will” (2003) 53 *University of Toronto Law Journal* 65

that have been held amenable to their judicial supervision.<sup>289</sup> Thus, since the supervisory jurisdiction of the courts under which Judicial Review is being exercised covers both statutory and non-statutory powers, the distinction as to the source of power would not be of pragmatic relevance for the intending applicant for Judicial Review.<sup>290</sup> Although this argument is forceful, it is still conceptually vulnerable to challenges. It has a limited satisfaction. In fact, it remains, as pointed out by Mark Elliott a difficult case to be made out as to why completely dissimilar juridical foundations should yield to identical supervisory regimes.<sup>291</sup> Besides, it is not self-evident that the application of the same grounds of Judicial Review to these two divergent notions closes the debate over the theoretical distinction between them. Professor Forsyth's suggestion that both are unified and homogenized by the same compelling constitutional principles: promote fairness in administrative decision making and advance the ideals of the Rule of Law, Constitutionalism and Human Rights in a democratic state seems to be a sound and viable viewpoint.<sup>292</sup> In our particular case, these are necessary constraints on the exercise of administrative power in order to guarantee Individual Rights and Freedoms.

### ***b) Judicial Review in a Written Constitution Context***

Judicial Review in a written constitution context is the focus of this thesis. It is carried out by determining the compatibility and validity character of an Act of Parliament or Executive action to a written Constitution. It pays attention to the place of Individual Rights in the

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<sup>289</sup> Mark, Elliott, *The Constitutional Foundations of Judicial Review* at pp.128. Also in the English case of *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 374 at 411 Lord Diplock held that the grounds of review based on illegality and procedural impropriety apply to both statutory and non-statutory powers.

<sup>290</sup> Mark, Elliott, *The Constitutional Foundations of Judicial Review* at pp.174

<sup>291</sup> *Ibid*

<sup>292</sup> C. F. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge Law Journal 122

constitutional system of a State.<sup>293</sup> In Ghana, as in the United States, statutes or executive actions are scrutinised for their conformity to the Individual Rights as set out in the Constitution.<sup>294</sup> This rights-oriented Judicial Review is part of general constitutional review, and the courts are required to strike down statutes or any executive instrument for violations of Individual Rights.<sup>295</sup>

Under this model of review, the Constitution, not Parliament is in principle the supreme source of law. The constitution is also largely entrenched.<sup>296</sup> As a general rule, it is the Constitution that sets the limits for the validity of all legislative and executive acts. Thus, no other law is to unjustifiably derogate from the Constitution. Accordingly, unless justified within the provisions of the Constitution, any Act of Parliament or Executive action which does not fall within the purview of the letter and spirit of the Constitution will be declared invalid, unconstitutional or inoperative.<sup>297</sup> The operative presumption created by this form of review is that there are certain political values such as the Rule of Law, Human Rights and Constitutionalism whose inviolability bearing cannot be impugned by a primary legislation or an executive act.<sup>298</sup> Besides, it creates a hierarchy of norms or laws, with the Constitution and its norms at the apex. No law or political value external to the Constitution carries enough weight to prevail against the Constitution in the event of a conflict between the two.

Nonetheless, this form of Judicial Review does not have an identity that is universal in nature, scope and content. While in some jurisdictions such as Ghana and United States only

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<sup>293</sup> Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *The Yale Law Journal* 1346 at pp.1357

<sup>294</sup> *Ibid*

<sup>295</sup> *Ibid*

<sup>296</sup> This usually entails difficult amendment procedures to the human rights provisions of the constitution. For instance, amendment cannot be done by a simple majority in Parliament. It requires super parliamentary majority or a national referendum voting on a clearly framed, specific question on that.

<sup>297</sup> See Davis et al, *The Fundamental Rights in the Constitution: Comments & Cases*, (Juta & Co Ltd, Kenwyn, South Africa, 1997); Saras Jagwanth, "The South African Experience of Judicial Rights Discourse: A Critical Appraisal" Campbell, Tom, K. D. Ewing and Adam Tomkins eds., *Sceptical Essays on Human Rights* Oxford: Oxford University Press, 2001); and Frederick, Schauer, "Constitutional Invocations" (1997) 65 *Fordham Law Review* 1295

<sup>298</sup> See Wojciech Sadurski, "Rights-Based Constitutional Review in Central and Eastern Europe" in Campbell, Tom, K. D. Ewing and Adam Tomkins eds., *Sceptical Essays on Human Rights* Oxford: Oxford University Press, 2001)

concrete cases can be used to invoke the jurisdiction of the Supreme Court to exercise this form of Judicial Review, it is not the rule in some democratic countries. For instance Canada<sup>299</sup> and other continental European countries<sup>300</sup> can exercise this model of Judicial Review under both concrete and hypothetical cases. The former is referred to as *a posteriori* review, which takes place in the context of particular real legal proceedings, sometimes long after a statute has been enacted.<sup>301</sup> In that case, the courts only respond to particular claims brought by particular litigants with issues in the context of binary, adversarial presentation.<sup>302</sup> In the latter case, the review may in addition to taking the character of the former include review of legislation by a Constitutional Court specifically set up to conduct an abstract assessment of a bill in the final stages of its enactment.<sup>303</sup> It has been referred to in the relevant literature as the *a priori* review or preventive review.<sup>304</sup> It addresses the constitutionality of the legislative act before it achieves the status of a law. It allows courts to bring concerns about respecting rights to the attention of governments who might otherwise be inclined to ignore them or not be candid about constitutional limits placed on them.<sup>305</sup>

In spite of the differences in practice of Judicial Review in a written constitution context, it is rooted in three separate but logically related propositions: the will of the people is sovereign, the written Constitution is the supreme source of law of the State and it is the duty of the Judiciary to say what the law is.<sup>306</sup> These have often been articulated as derivative theses of

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<sup>299</sup> The Supreme Court of Canada can perform an abstract review using its reference powers.

<sup>300</sup> These include the Constitutional Courts in Germany, Italy and Spain. Note however that these constitutional Courts are outside the normal Courts structure of the Countries in question. See Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*(Chicago: University of Chicago Press,2000)

<sup>301</sup> Jeremy Waldron, "The Core of the Case Against Judicial Review" at pp. 1358-9

<sup>302</sup> Ibid at pp.1363

<sup>303</sup> Ibid at pp.1359

<sup>304</sup> See Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* supra note 31

<sup>305</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at pp.13

<sup>306</sup> Luc Tremblay B., "Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice" (2004) 36 *George Wash. Int'l Law Review* 516.

*Marbury v. Madison*,<sup>307</sup> where the Supreme Court of America claimed that it was “the province and duty of the judicial” branch to declare the law.<sup>308</sup> In brief, what they imply is that the written Constitution is the founding legal text made morally legitimate by virtue of an original act of consent by the people’s sovereign will.<sup>309</sup> Accordingly, all legitimate governmental powers in the State owe their existence, scope and normative force to the sovereign will of the people as expressed in the written Constitution.<sup>310</sup> In that case, the written Constitution becomes the supreme law of the state, which the courts must uphold against all inconsistent governmental actions.<sup>311</sup>

In a limited respect, the bearing of these propositions, it would seem, lies in the idea of constitutionally limited government.<sup>312</sup> The controlling objective here is to create and nurture the culture of liberty by promoting the observances of Human Rights, the Rule of Law and Constitutionalism in the State. Besides, it is a legitimate attempt to underscore the agency character of governmental power - all governmental powers, on a strong presumption, ought to be

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<sup>307</sup> (1803) 1 Cranch 137, 177; 5 US 87, 111 (Marshall CJ). The relevant passages are: “Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitutions is void. This theory is essentially attached to the written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject....it is emphatically the province and duty of the judicial department to say what the law is.... if two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply...” *ibid* at 176-78

<sup>308</sup> See for various theoretical analysis on the evolution and application of judicial review, William Nelson E., *Marbury v. Madison, The Origins and Legacy of Judicial Review* (Lawrence, Kans.: University Press of Kansas, 2000), Chapter 8 entitled “The Worldwide Spread of Judicial Review;” Robert Lowry, *Marbury v. Madison and Judicial Review* (1989); Sylvia Snowiss, *Judicial Review and the Law of the Constitution*(1990) and Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-made Law* (1986)

<sup>309</sup> See David, Deener, “Judicial Review in Modern Constitutional Systems” (1952) 46 *American Political Science Review* 1079

<sup>310</sup> Luc Tremblay B., “*Marbury v. Madison* and Canadian Constitutionalism: Rhetoric and Practice *supra* note 19 at 519

<sup>311</sup> *Ibid*

<sup>312</sup> See John, Samples, *James Madison and the future of limited government*, ed. (Washington, DC: Cato Institute, 2002) chpt. 11; Edward, Harpham, *John Locke’s Two Treatises of Government: New Interpretations*, ed. (Lawrence: University Press of Kansas, 1992) and Wojciech, Sadurski, *Constitutional theory*, ed. (Aldershot: Dartmouth, 2005) chpt. 1.

held in trust for the people. It shows the *locus* of power in a modern democratic Constitution and how it should be exercised. It also concerns itself with values and principles that are *a priori* commitments upon which the whole edifice of democratic government is premised.<sup>313</sup> It constitutes in principle the very means, by virtue of which the courts may verify whether an alleged piece of legislation is legal and legitimate, so as to be entitled to judicial enforcement.<sup>314</sup> Where it is not, the court shall declare it unconstitutional or inoperative.

It is therefore not surprising that Supreme or Constitutional Courts around the world engage in this kind of Judicial Review by policing the actions of governments in order to protect individual constitutionalised Rights and Freedoms.<sup>315</sup> Perhaps, it signals our desire to move away from a bad past or to keep to our future as expressed in the Constitution. The underlying objective is to protect Human Rights and Fundamental Freedoms. Rights and Freedoms are accepted values of modern society which must be protected. They articulate the fundamental ideals that must generally animate all government actions and particularly constitute the defining limits of legislative freedom.<sup>316</sup> Thus any primary legislation or executive act bereft in content and scope of these values shall on this account, without a compelling justification in the Constitution, be held invalid by the courts. Such institutional protection is necessary in order to keep governments to their constitutional objectives and limits. This is what the Constitution of Ghana promises.<sup>317</sup> It is also the major aim of modern constitutional democratic governance. This has nothing to do with which branch of government is the most powerful. It has everything to do with how to keep faith with our constitutional ideals such as Human Rights and the Rule of Law. Moreover, it is

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<sup>313</sup> Cheadle M.H., et al., *South African Constitutional Law: The Bill of Rights* (Durban: Botterworths Publishers, 2002) at pp.1-2

<sup>314</sup> Luc Tremblay B., "General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law" (2003) 23 Oxford Journal of Legal Studies 525 at pp.540

<sup>315</sup> For instance in United States, racial segregation in schools has been declared unconstitutional in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); and in South Africa, the Constitutional Court held that there are enforceable constitutional rights to basic shelter and health facilities. *South African v Grootboom* [2000] 11 BCLR 1169 and *Minister of Health and Others v Treatment Action Campaign and Others*, CCT 08/02

<sup>316</sup> *ibid*

<sup>317</sup> *Ibid* at pp.2

about protecting the sanctity of the Constitution and preventing political commitments – Human Rights, from lapsing into mere political rhetoric.

## ***II. Legitimacy of Judicial Review Determined***

The enduring propriety of Judicial Review in promoting and protecting the ideals of the Rule of Law,<sup>318</sup> Constitutionalism<sup>319</sup> and Human Rights<sup>320</sup> does not prevent people from questioning its democratic legitimacy.<sup>321</sup> Some scholars argue that the practice of Judicial Review suffers from a democratic deficit. Alexander Bickel characterises this as “the counter-majoritarian difficulty”.<sup>322</sup> In the apt words of Jeremy Waldron it privileges “majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”<sup>323</sup> Simply put, it is politically illegitimate, as far as democratic values are concerned. On this account, the unelected judges do not personify the citizenry, which majoritarian democratic forces sought to do. This is grounded in democratic theory. This theory

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<sup>318</sup> T.R.S. Allan, “The Rule of Law as the Foundation of Judicial Review” in Forsyth, ed. *Judicial Review and the Constitution*, (Oxford, 2000).

<sup>319</sup> See T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford, 1992) Chpt. 11

<sup>320</sup> See Sir John Laws, “The Constitution: Morals and Rights” (1996) Public Law 622

<sup>321</sup> Thomas Jefferson held judicial review as “a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy”-Letter to William Jarvis, in P.L. Ford, ed., *The Writings of Thomas Jefferson*, vol.10, pp.160-61 and Sidney Hook articulated a similar view as “those who defend the theory of judicial supremacy cannot easily square their position with any reasonable interpretation of the theory of democracy”-Sidney Hook, *The Paradox of Freedom*(Berkeley: University of California Press, 1962) at pp.95

<sup>322</sup> Alexander Bickel, *The Least Dangerous Branch* 16-17 (2d ed. 1986) ( [J]udicial review is a counter-majoritarian force in our system....[W]hen the Supreme Court declares unconstitutional a legislative act... it thwarts the will of the representatives of the actual people of the here and now...”). Jesse Choper eloquently puts the objection in this way: “[W]hen courts exercise the power of judicial review to declare unconstitutional legislative, executive, and administrative action – federal, state or local – they reject the product of the popular will by denying policies formulated by the majority’s elected representatives or their appointees.... Not merely antimajoritarian, judicial review appears to cut directly against the grain of traditional democratic theory.” Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980) at pp.6

<sup>323</sup> Jeremy Waldron, “The Core of the Case Against Judicial Review” at pp.1353. Also, for similar comments see Luc Tremblay B., “General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law” (2003) 23 *Oxford Journal of Legal Studies* 525; Jeremy Waldron, “Judicial Review and the Conditions of Democracy”(1998) 6 *Journal of Political Philosophy* 335; Jeremy Waldron, “Judicial Power and Popular Sovereignty” in *Marbury Versus Madison: Documents and Commentary 181*(Mark A. Graber & Michael Perhac eds., 2002) and Jeremy Waldron, “A Rights-Based Critique of Constitutional Rights” (1993) 13 *Oxford Journal of Legal Studies* 18.

requires that for Judicial Review to be legitimate in a particular State, its practice must be reconcilable with the underlying assumptions of democratic governance. It must also be shown that Judicial Review has been authorised by some positive legitimating fact.<sup>324</sup> Absent these requirements, Judicial Review is undemocratic.

An illustration of the thrust of this argument premised on a simple general context will help matters. It goes like this: Representative democracy principally requires that the elected body of the people takes the responsibility of law making for the general welfare of the citizenry. The process by which laws are made has a better and higher pedigree by virtue of its deliberative character. This partly but in significant respect, allows for well considered outcomes. It is an institutional insurance against uncritical or ill-considered decisions. In the event of disagreements over the general value of a pending law to the people, the legislative body reaches a decision by a majority vote. It is supposed to reflect the dominant view in the society. This process best exemplifies the political virtues of representation and accountability as the elected representatives are, unlike the judges, regularly directly answerable to the electorates.

From this brief account, it is morally wrong and politically illegitimate to allow a few unelected judges to decide as ultimate arbiters what the supreme law of the land means by either affirming or setting aside a piece of legislation enacted through the majoritarian democratic process.<sup>325</sup> If the wisdom of the majority elected representatives is to be doubted on the overall value of a piece of legislation or executive action, it is less likely that the few unelected judges would have it right.

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<sup>324</sup> Luc Tremblay terms this as specific legitimacy argument which must be positively authorised by the existing legal rules in the state. See for in-depth analysis Tremblay "General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law" *supra* note 34 above

<sup>325</sup> John Ely puts it this way: "[T]he central problem of judicial review is: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like." J. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at pp.4-5

At the core of this objection are certain fundamental presumptions. First, it presupposes that parliament is in a reasonably good order and would at all times seek the interest of the people. It further presumes that political legitimacy of decisions in a state inherently lies in the majoritarian democratic decision-making process. Additionally, it seeks to suggest that there is a constant connection between the legitimate interests of the people and the elected representatives. I submit that it is not obvious that these presumptions carry the absolute truth. Democracy is not a notion that is exhaustible in procedural terms. It seems as obvious that this objection does not sufficiently connect the alleged benefits of the democratic process by which decisions are made and the real substance of the decisions to the people.<sup>326</sup> Thus majority decisions on the account of this objection are not justified in terms of the ends they promote, but the procedures by which they are made.<sup>327</sup> It is an unhelpful myth that there is a reliable formula or theory in majority rule that produces right answers to all questions or ensures that decisions are always consistent with the people's interest.<sup>328</sup>

It is more problematic to characterise majoritarian rule as the source of legitimacy to all State legal decisions. Such characterisation amounts to a misconception of the value of the Judiciary in a democratic state. It seeks to pit the judicial branch against other arms of government and to necessarily deride the former in matters of governance. On the strength of this, it is insensitive to the ways in which Judicial Review might provide a legitimate avenue of political activity for those seeking to rectify historic injustice.<sup>329</sup> In addition, it is even oblivious

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<sup>326</sup> It does not argue that the judiciary per se, is incompetent as a matter of substance, in protecting rights through judicial review, but merely seek to suggest that it is not, as a matter of process, the appropriate place for such issues.

<sup>327</sup> Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990-1991) 9 *Law and Philosophy* 327 at pp.354

<sup>328</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at pp.12

<sup>329</sup> This in part is connected to its ability to promote political equality and participation even in democracies with a just and hardworking legislature. See Lever Annabelle, "Is Judicial Review Undemocratic" (2007) *Public Law* 280 at pp.281. see also Rostow, E V., "The Democratic Character of Judicial Review" (1952) 66 *Harvard Law Review* 193 [refutes the idea that judicial review of cases concerned with the Constitution is undemocratic; with special reference to civil rights cases] and Charles, Black, L Jr., *The People and the Court: Judicial Review in a Democracy* (Macmillan

of the majoritarian tyranny malaise which can be as repressive as one can imagine to Minority and Individual Rights, and all that responsive and responsible governance stood for. In fact, there is no assurance that majority rule will not be used, as it so often has, to subvert the public interest in justice and deprive classes of individuals of the true values of democracy.<sup>330</sup> Crediting the democratic majority with a good intent represents one side of the equation and holding it to this presumption is another. On this account, Judicial Review provides the positive counter force to a possible majoritarian tyranny. It checks the majority from treating with contempt the rights of the Minority. It shields Human Rights in general against negative politics of majority rule. This is necessary in order to hold the State together.

It is not even the case that democracy requires that all officials who hold and exercise state political power be elected. There are a good number of individuals, including judges, in the state with significant amount of political power, but who do not submit to regular electoral accountability. It is enough that the power so held is particularly derivative of the electoral system or generally a part of the institutional arrangement as established by the constitution. I submit that Judicial Review should be understood as part of a democratic institutional arrangement with the view to foster the culture of rights and responsible governance. This is consonant with the conception of constitutional democracy. The Constitution which is the true act of explicit consent of the people is accepted as the fundamental law and thus authorises the distribution of all state power. It also sanctions various systemic checks and balances. One of these checks is the power of Judicial Review invested in the judicial branch to police the actions of the legislature and the executive. This is an institutional arrangement specifically, like in the Ghanaian case, authorised by the Constitution to regulate the use of political power in the general interest of the people.

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Company, 1960). [defends the Supreme Court of America as the arbiter of constitutionality of legislative and executive acts in order to protect human rights of the citizens]

<sup>330</sup> Lever Annabelle, "Is Judicial Review Undemocratic" at pp.355

Otherwise the risk is too great that the legislature or the executive will overstep its legal boundaries and tyrannise the people.<sup>331</sup>

This might however be seen as question begging. The fact that Judicial Review is preauthorised by the Constitution only settles the question of legality but not legitimacy, which is in large part dependent upon lack of public accountability of judges. Mere constitutional authorisation does not necessarily discount the force of the counter-majoritarian argument. Judges remain unelected yet they control an essential power to set aside legislation considered by the elected representatives. Although this is a reasonable concern, it lacks merits in many respects. First, it is difficult in the context of democracy to separate legitimacy from legality, though the reverse is possible. If the constitution as a legal document is accepted as legitimate, it makes no sense to declare as illegitimate the proper exercise of a power granted by it. Unless the grounds for which the Constitution was made are successfully impeached, the reasonable exercise of the power of Judicial Review is thus defensible. Besides, judges are accountable to the people through their elected representatives, especially in the appointment and disciplinary procedures.<sup>332</sup> This has been supported by the practice of courts publicly justifying their decisions by issuing reasoned opinions. This requires that courts publicly demonstrate that laws are not unduly coercive but are in consonant with democratic constitutional freedom.<sup>333</sup> In this way, Judicial Review can be seen as an attempt to establish a public reading of the constitution and its moral foundations.<sup>334</sup>

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<sup>331</sup> Andrew Altman, *Arguing About the Law: An Introduction to Legal Philosophy* (Belmont: Wadworth Publishing Co., 1996) at pp.67-74. See also Ackerman, Bruce, *We The People* (Harvard University Press, 1991); John, Agresto, *The Supreme Court and Democratic Government* (Cornell University Press, 1984); Raoul, Berger, *Government by judiciary* (Harvard University Press 1977); Alexander Bickel, *The Morality of Consent* (Yale University Press, 1986) and Tribe, Laurence & Michael Dorf, *On Reading the Constitution* (Harvard University Press, 1991)

<sup>332</sup> Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" at pp.365. See also Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker" (1957) 6 *Journal of Public Law* 279

<sup>333</sup> Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" at 366

<sup>334</sup> *Ibid*

Additionally, one may concede that the Judiciary is not permeated with the ethos of elections, representation<sup>335</sup> and electoral accountability in the way that the legislature is.<sup>336</sup> However, this is not enough to strip it of legitimacy and a purpose in protecting Human Rights through the mechanism of Judicial Review. I agree with, and adopt Dworkin's view, that the Judiciary, particularly the higher courts are the appropriate forums of principle to deal with issues of rights protection.<sup>337</sup> The courts can avoid harmful prejudice and short-sightedness to which the elected majority sometimes succumb.<sup>338</sup> They are as well not paralysed by the vicissitudes of democratic politics by virtue of their independence.<sup>339</sup> In effect, courts can deliberate on issues of principle undistracted by popular pressures and with negligible public anger.<sup>340</sup> Judicial Review thus becomes a useful mechanism at the disposal of the courts to protect and insulate from possible hostile political decisions the Fundamental Rights and values guaranteed in the Constitution.<sup>341</sup>

A constitutional democracy such as Ghana needs a democratic institutional regime that can protect the people from possible deficiencies of politics. Judicial Review promises this. It provides an institutional framework by which the courts are able to scrutinise legislative and executive actions with the view to giving meaning to the constitutional commitment to Fundamental Human Rights and Freedoms. A review of their acts potentially brings them within the "four corners" of the general values and rights as guaranteed in the Constitution. As noted in Chapter Two of this work, rights become a metaphorical trump card, held by the people that can

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<sup>335</sup> F.L. Morton & R. Knopff argued that judicial review erodes "the habits and temperament of representative democracy". F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* ( Peterborough, ON: Broadview Press, 2000) at pp.149

<sup>336</sup> Jeremy Waldron, "The Core of the Case Against Judicial Review" at pp.1363

<sup>337</sup> Ronald Dworkin, *A Matter of Principle* (1985) at pp. 33, 69-71

<sup>338</sup> Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," (1992) 53 *The Review of Politics* p. 370.

<sup>339</sup> See Hirschl, Ran. *Towards Juristocracy: the origins and consequences of the new constitutionalism* (Harvard: Harvard University Press, 2004)

<sup>340</sup> Jeremy Waldron, "The Core of the Case Against Judicial Review" at pp.1363

<sup>341</sup> Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal &Kingston: McGill-Queen's University Press, 1996) at pp.94

prevent the legislative and executive from doing a certain thing<sup>342</sup> that offends the rationale or value for which such a right exist. Indeed, they are characteristically seen as a “higher order of law” that trumps unhealthy acts of other democratic institutions. Judicial Review arguably is thus the best institutional design to protect these rights from harmful political actions.<sup>343</sup>

Lorraine Weinrib strongly endorses this view in the following words:

*“[T]his model welcomes judicial protection of individual rights and their value structure to continuously correct for the perceived inadequacies of majoritarian politics. Underlying this model is respect for the dignity, equality and autonomy of each member of the community. The individual must be able to espouse, follow and modify his or her own conception of the good. Whatever the sources and trajectories of these commitments, the aim of collective political life is to create and preserve a structure in which each of us, to an equal extent, may pursue and act upon these commitments, either alone or given or chosen community.”<sup>344</sup>*

From these words it would seem that Judicial Review may be interpreted as a scheme for protecting the rights of the citizens in public law.<sup>345</sup> It provides “both a legal standard against which the decisions of public bodies may be judged and also a normative basis from which the exercise of judicial power can be justified.”<sup>346</sup> Judicial Review therefore does not contradict democracy but rather promotes and sustains it. It guards and insures against the destruction of the most central values of democracy – Human Rights. It preserves the quintessence of constitutionalised Rights and Freedoms. Rights should thus be seen as the central juridical values for the legitimacy of Judicial Review in constitutional democracy. An exclusive argument framed on bare majority rule at best is bereft of this value and at worst defective.

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<sup>342</sup> R. A. Primus, *The American Language of Rights*, (Cambridge: Cambridge University Press, 1999) at pp. 11

<sup>343</sup> Thomas Poole, “Legitimacy, Rights and Judicial Review” at pp.699

<sup>344</sup> Lorraine Weinrib, “Limitations on Rights in a Constitutional Democracy” (1996) *Caribbean Law Review* 428 at 439

<sup>345</sup> T.R.S. Allan, “Dworkin and Dicey: The Rule of Law as Integrity” (1988) 8 *Oxford Journal Legal Studies* 266 at pp.273

<sup>346</sup> Thomas Poole, “Legitimacy, Rights and Judicial Review” at pp. 698

### ***III. Constitutional Foundation of Judicial Review in Ghana***

#### ***a) Colonial Legal Institutional Setting***

Judicial Review in Ghana dates back to the institutional intercourse between the Judiciary in Colonial Ghana and the Judicial Committee of the Privy Council in England. The courts in Ghana prior to independence and attainment of a Republican status in 1957 and 1960 respectively, submitted to the supervisory jurisdiction of the Privy Council. The rationale for this lies in three distinct but interrelated reasons. First, the colonial government in Ghana was considered an appendage of the British Empire. By implication, its laws and actions were subject to scrutiny by a unitary court system in Britain. Secondly, it was necessary to preserve the sovereign and supreme will of British Parliament. The third reason as suggested by Kofi Kumado is that the operative hierarchy of norms within the colonial empire recognises the laws of England as supreme, which must not be derogated from by the colonial government.<sup>347</sup> The combined force of these reasons laid the foundational stone for the practice of Judicial Review in Ghana. Besides the limited territorial jurisdiction of the colonial legislature, it was precluded from making laws with some semblance of conflict with the laws of England. It was thus sufficient that in *Numo v. Kofi*,<sup>348</sup> a provision of the West African Court of Appeal Ordinance was declared invalid due to its inconsistency with a rule of court made under an Order-in-Council. The rules of court which were incorporated into the Order-in-Council were considered superior in status over the provisions of the Ordinance.<sup>349</sup>

In effect, all laws so enacted regardless of their peculiar viability to the colonial people but in excess of the jurisdiction of the local legislative council or in conflict with a British law or which were inherently repugnant to the values of imperial Britain would not stand judicial

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<sup>347</sup> Kofi Kumado C.E., "Judicial Review in Ghana since Independence" (1980) 12 Review of Ghana Law 67 at pp.70

<sup>348</sup> [1951] 2 G.&G. 72

<sup>349</sup> See Kofi Kumado supra note 347 at pp.71

scrutiny. Thus, not only was unconditional consistency with British law required in all formulated laws by the colonial legislative body but also conformity with the established values of England. One logical conclusion may be that the British sought to justify their legislative superiority over the Colonial people by reducing laws made in the Colonial Parliament to inferior status. Similarly, Judicial Review was seen as a means of “civilising” the laws of the Colonial people. The effect of this latter view was twofold. It standardised legislation in colonial Ghana, and ineluctably imposed British values on the indigenes. The former was a function of the colonialists’ desire to eliminate certain harmful customary practices and the latter was grounded in an objective to homogenise the values of the colonised with those of Great Britain.

### ***b) Post-Independence Approach***

Judicial Review, however, took a different route at independence. A review by the courts, especially the Supreme Court was for the purpose of determining the constitutionality of laws.<sup>350</sup> In fact, all post independence constitutions expressly provided for the power of Judicial Review.<sup>351</sup> Nonetheless, since this thesis is about the current 1992 Constitution of Ghana, it makes sense to briefly deal with the constitutional foundations of Judicial Review under it.

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<sup>350</sup> For instance in *Lardan v. Attorney- General (No.2)*, [1957] 2 G&G. 98 the jurisdiction of the Supreme Court was ceased with a question to determine the constitutional validity of the *Deportation (Othman Lardan and Amadu Baba) Act, 1957*. It was argued on behalf of the plaintiff that the said Act contravened Article 32(2) of the 1957 Constitution, which prohibits discrimination. Mr. Lardan, who was subject of deportation by this Act, asserted that he was being discriminated against within the terms of the Article 32(2). The Court however, rejected this contention on the understanding that Article 32(2) of the Constitutional prohibits discrimination only on racial grounds. In effect, the Act was held not to have contravened the 1957 Constitution. See also *Re Akoto*, [1961] 2 G.L.R. 523, *Awoonor-Williams v. Gbedemah*, (1969) 2G&G. 438, *Captan v. Minister of Home Affairs*, (1970) 2 G&G. 457; *Sallah v. Attorney-General*, (1970) 2 G &G. 493; *Shalabi v. The Attorney-General*, [1972] 1 G.L.R. 259; *Republic v. State Fishing Corporation Commission of Inquiry (Chairman); Ex Parte Bannerman*, (1967) G.L.R. 536 and *Tuffour v. Attorney-General*, [1980] G.L.R. 637

<sup>351</sup> Article 31(5) of the *1957 Constitution*; Article 42(2) of the *1960 Constitution*; Articles 1(2), 102(1) and (3), 106 and 126(5) of the *1969 Constitution*; Article 2 of the *1979 Constitution* and Articles 1(2), 2, 23, 130(1) and (2) and 296 of the *1992 Constitution* (all of Ghana )

The starting point is Article 1(2) which states that “[T]his Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.”<sup>352</sup> That is the constitutional criteria by which all acts were to be tested and their validity or otherwise established. Article 2 (1)<sup>353</sup> provides the operative machine for Judicial Review. It is the enforcement provision which empowers the Supreme Court to determine questions of constitutionality of any enactment, act or omission done under the Constitution. A direct support for this provision lies in Article 130(1) which conferred original jurisdiction in the Supreme Court on “all matters relating to the enforcement of this constitution”<sup>354</sup> and “all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution.”<sup>355</sup> On the strength of Articles 2(1) and 130(1), the Supreme Court has the sole power and authority to settle all questions relative to the interpretation of the constitution. They also provide the constitutional foundation for Judicial Review in Ghana - an institutional framework for the determination of the constitutionality of legislative and executive acts. The Constitution is declared supreme law of the land, and the Supreme Court shall determine the consistency and legality of all governmental actions to it.

Additionally, the natural justice rules are in large respect codified by both Articles 23 and 296 of the Constitution. They provide grounds for review of administrative actions. Their primary end is to establish administrative justice as a fundamental right. Article 23 obliges administrative bodies and officials to act fairly and reasonably and comply with the requirements imposed on them by law. Persons aggrieved by such acts and decisions shall have the right to seek redress

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<sup>352</sup> Article 1(2)

<sup>353</sup> Article 2(1): A person who alleges that - (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

<sup>354</sup> Article 130(1)a

<sup>355</sup> Article 130(1)b

before a court or other tribunal.<sup>356</sup> Article 296 stipulates that where discretionary power is vested in any person or authority, it is deemed to imply a duty to be fair and candid. The exercise of such power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.<sup>357</sup> Perhaps their constitutional relevance, particularly to the Human Rights project in Ghana, is to insulate individuals from arbitrary administrative actions. They orient review towards the classical principles of ensuring fairness and sound reasoning in the decision-making process.<sup>358</sup> Thus the review power to the courts is a caution that the administrative discretion is not absolute so as to allow corrupt and despotic administrators to wreak injustice.<sup>359</sup>

Besides this general review power of administrative actions, the High Court is specifically given the power to enforce the fundamental rights and freedoms as contained in chapter five of the constitutions. Article 33(1) stated that: “[W]here a person alleges that a provision of this Constitution on the Fundamental Human Rights and Freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.” In the absence of Article 130 (2),<sup>360</sup> it is possible to argue that the High Court in the enforcement of these guaranteed Human Rights and Freedoms could invalidate legislation found to have the potential of infringing such Rights and Freedoms. Article 33 as stated above presents the possibility of individuals trooping to the court in an event where Parliament might by its actions infringe upon their rights.

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<sup>356</sup> Article 23

<sup>357</sup> Article 296 (a) & (b)

<sup>358</sup> See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford-Portland: Hart Publishing, 2001), Chapter 6 entitled “Judicial Review and Human Rights”

<sup>359</sup> Halton, Cheadle *et.al.*(ed.), *South Africa Constitutional Law: The Bill of Rights*, supra note 36 at 611-12

<sup>360</sup> Article 130(2) states: “[W]here an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question, of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.”

However, this is not a viable possibility. Article 130(2) casts doubt on it, as it seeks to relieve the High Court of such a constitutional function. It seems to suggest that the High Court in protecting the rights so provided for under chapter five of this Constitution is precluded from dealing with issues on the enforcement or interpretation of the constitution or whether an enactment was made in excess of the powers conferred on Parliament or any other person by law. Where such issues crop up in any proceedings of the High Court pursuant to Article 33, the court shall stay the proceedings and refer the question to the Supreme Court for determination. Although this confirms the dominance of the Supreme Court in the exercise of Judicial Review in the constitutional structure of Ghana, it is fair to say that Articles 33, 23 and 296 provide the window though restrictive, for other courts to exercise the power of Judicial Review.

### ***Conclusion***

This chapter demonstrates that the exercise of Judicial Review is legitimate. Its exercise forms part of a democratic institutional arrangement to protect rights. It is a useful systemic check against abuse of power and violation of rights. In the particular case of Ghana, Judicial Review is explicitly sanctioned by the Constitution. Such an authorisation constitutes a positive legitimating fact.

It is also the core argument of this chapter that the counter-majoritarian point on the legitimacy of Judicial Review is grossly overstated. It raises a number of presumptions which are difficult to sustain. Its strength rests on the process by which decisions are reached than the substance and value of such decisions. On the whole, the compelling value of Human Rights to the modern democratic State should be the key factor in the exercise of Judicial Review by the courts. The next chapter considers the extent to which the Judiciary in Ghana uses Judicial Review to protect constitutionalised rights.

## **CHAPTER FIVE**

### ***JUDICIAL ENFORCEMENT OF HUMAN RIGHTS IN GHANA***

#### ***Introduction***

In the 21<sup>st</sup> Century, we need strong courts as part of our constitutional arrangements to protect Human Rights from failed governments. Courts must be independent from undue influences or interferences in the discharge of their constitutional obligations. Sufficient constitutional protection of the Judiciary is the only viable option. Perhaps this can foster institutional efficiency and allow the courts to command some modicum of public trust and confidence. However, the story does not end there. Strong courts without constitutional guarantees for Human Rights are nothing but a sham. Serious Human Rights concerns demand that rights be constitutionalised. Entrenching them is also appropriate. This makes careless or ill-conceived constitutional amendments procedurally expensive for governments. By this the probability of respecting such rights will be high. Nonetheless, this may still be an empty political gesture if the courts are not specifically given the power to enforce such rights by policing the actions of the executive and the legislature.

These important questions have been addressed in the preceding chapters. It is a fact that the Judiciary in Ghana enjoys sufficient constitutional protection to be independent from undue interferences. Rights have been generously constitutionalised. And the courts are granted specific powers of Judicial Review by the Constitution -the objective being to get the courts to enforce the values of these rights. It is also to put into reality the rights constitutionalised. However, some

sceptics might say this looks more like rhetoric of justification than the demonstration of the reality. This doubt leads us to series of questions.

- How do Ghanaians square (reconcile) what is provided in the Constitution with the real experiences about respect and protection of rights? (formal versus substantive)
- Can the citizens realistically justify the Human Rights provisions by pointing to concrete courts decisions?
- Or has the Judiciary joined hands with other relatively failed organs of government to deny the citizenry these rights?
- To what extent does the Judiciary in Ghana contradict or confirm the expectation of the people on the enforcement of the constitutionalised rights?

This chapter aims at addressing these questions. It demonstrates the extent of the courts' usefulness in protecting Human Rights in Ghana. To do this, the chapter is divided into two parts. Part one is titled the "Blue Light Province" and deals with decided cases on *some* Civil and Political Rights. The second phase bears the heading the "Red Light Province" and concerns the courts performance relative to Socio-Economic Rights. The metaphors used here to describe the two divisions of the chapter are meant to explain the core of the thesis. This thesis, simply defined is:

The courts in Ghana have given a generous reception to the rights grouped under the Blue Light Province, whereas those in the Red Light Province have not been sympathetically considered. This has created a lacuna in the Human Rights jurisprudence of Ghana. It also marks a negation of the values upheld by the postwar global Human Rights constituency to which Ghana is a member. On this account, the Judiciary is urged to accord equal weight to all rights by adopting prudential and purposive approaches in deciding all rights claims. This may avert the creation of a judicial determinism which will stultify the realization of Socio-Economic Rights in

Ghana. Further, the Judiciary may rid itself of a charge of under-enforcement of Human Rights and other constitutional norms.

## ***I. The Blue Light Province – Civil and Political Rights***

### ***a) Freedom of Speech and Expression***

Article 21(1) (a) of the 1992 Constitution, provides for freedom of expression in Ghana. Basically, the Constitution confers this right on every person. This has been augmented by press and independent media freedoms guaranteed under Article 162 (1)-(4). Before turning to what the Courts in Ghana have done with these constitutional guarantees, it is essential to briefly consider the rationale for expressive freedom in general Human Rights jurisprudence. Freedom of speech and expression is widely acknowledged as Fundamental Right in a liberal, democratic society.<sup>361</sup> It has the pedigree of the most prized constitutional ideal.

Courts in many democratic systems have never lost the sight, zeal and desire to clearly articulate the values upon which this freedom is premised. In Canada for example, several judicial opinions exist to illustrate this. In *RWDSU v. Dolphin Delivery Ltd.*,<sup>362</sup> the Supreme Court of Canada held that freedom of expression is “an essential feature of Canadian parliamentary democracy<sup>363</sup> and that it is “one of the fundamental concepts that have formed the basis for the historical development of the political, social and educational institutions of the Western

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<sup>361</sup> See Davis Howard, *Human Rights Law: Directions* (Oxford: Oxford University Press, 2007) at pp.332

<sup>362</sup> [1986] 2 S.C.R. 573

<sup>363</sup> *Ibid* at 584. In the U.S., the Courts likewise held that freedom of expression is fundamental to the preservation of an open, democratic society, since a restriction on its exercise inhibits the debate by which society’s values are set and its laws reformed to reflect prevailing opinion. See *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970)

society.”<sup>364</sup> In *Ford v. Quebec (Attorney General)*,<sup>365</sup> it was considered as the means by which the “individual expresses his or her personal identity and sense of individuality.”<sup>366</sup> *Irwin Toy Ltd v. Quebec (Attorney General)*,<sup>367</sup> epitomises the view that free expression is a vital means for “seeking and attaining truth.”<sup>368</sup> In the face of all these opinions, Dickson CJ in *R v. Keegstra*<sup>369</sup> demonstrably concedes their validity and aptly adds that “diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated and tolerated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.”<sup>370</sup>

Similar views are echoed in the United States Supreme Court. Justice Frankfurter declares that

The “[W]inds of doctrine should freely blow for the promotion of good and correction of evil...because freedom of public expression alone assures the unfolding truth; it is indispensable to the democratic process.”<sup>371</sup>

Justices Black and Douglas saw freedom of speech and expression as the means for “the pursuit of truth”<sup>372</sup>, for which the First Amendment was designed. Similarly, in *Red Lion Broadcasting Co v. F.C.C.*<sup>373</sup>, the U.S. Supreme Court stated that freedom of expression as provided for by the First Amendment aims at preserving “an uninhibited marketplace of ideas in which truth will ultimately prevail...”<sup>374</sup> From this limited survey of judicial pronouncements, the rationale for freedom of expression can be established in three fold. First, it is necessary for the discovery of

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<sup>364</sup> Ibid at 583

<sup>365</sup> [1988] 2 S.C.R. 712

<sup>366</sup> Ibid at 749

<sup>367</sup> [1989] 1 S.C.R. 927

<sup>368</sup> Ibid at 976

<sup>369</sup> [1990] 3 S.C.R. 695. In this case, *Keegstra* was convicted under Section 319 (2) for communicating hatred against Jewish people while teaching at Eckville High School, Alberta.

<sup>370</sup> Ibid at 728

<sup>371</sup> *Bridges v. California*, 314 U.S. 252, at 291, 293 (1941)

<sup>372</sup> Douglas, J., joined by Black, J. dissenting, *Adler v. Board of Education*, 342 U.S. 485, 511 (1951)

<sup>373</sup> *Red Lion Broadcasting Co v. F.C.C* 395 U.S. 367, (1969)

<sup>374</sup> Ibid at 390

the truth. Second, it aids the growth of democracy. Third, it is useful for individual self-fulfilment.<sup>375</sup> Constitutional protection of expressive freedom is thus well-founded. In short, expressive freedom aims at strengthening democracy and fostering the discovery of truth, individual liberty, tolerance and unity in diversity.<sup>376</sup>

Truth is essential in all spectra of societal activities. It engenders trust and fosters mutual respect among citizens, and between government and the governed. However, truth must come through open and healthy debates among citizens over public issues. In *New York Times v. Sullivan*, the Supreme Court of the United States declared in support of freedom of expression that “debate on public issues should be uninhibited, robust, and wide-open...”<sup>377</sup> This view of the US Court has its foundation in J.S. Mill’s argument that truth is likely to come up if many and varied views are permitted to be aired for the public to choose from.<sup>378</sup> Perhaps the aim is to weed out prejudiced views, inaccurate information and unsound reasoning.<sup>379</sup> Such an objective cannot be achieved through suppression of speech and expression. Testing varied opinions through open debates or unfettered public discussion is the best option.<sup>380</sup> Thus the “truth attainment” argument

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<sup>375</sup> Though each of these values as accepted by the courts can be contested regarding the extent of their general application and validity, it must be said that the role of adjudication is not to look for perfect values or infallible legal logic to justify this freedom. Such a venture will necessarily be hopeless and unachievable. What is important is that at least the courts have contextually considered what, on average and balance, is relevant for the society. At the core of this is the interplay of interests between the individual and the larger society, for which one must not be disdained and interfered with without a reasonable justification.

<sup>376</sup> In *R v. Oakes* [1986] 1 S.C.R. 103, Dickson CJ effectively connects the general purpose of Section 1 of the Charter to these values. At page 136, he states “the court must be guided by the values and principles essential to a free and democratic society which i believe embody, to name but a few, a respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown despite its effects, to be reasonable and demonstrably justified.”

<sup>377</sup> 376 U.S. 254, 270

<sup>378</sup> See J.S. Mill, *On Liberty* (1982 [1859 (Penguin Classics, 1982)

<sup>379</sup> *Ibid.* Also, Richard Moon, observes that “members of the community are more likely to recognise what is true and what is false, at least over the long run, if freedom of expression is protected.” see Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University Toronto Press, 2000) pp.10.

<sup>380</sup> For insightful academic discussion on freedom of expression see Richard Moon, “Justified limits on free expression: the collapse of the general approach to limits on Charter rights” (2002) 40 *Osgoode Hall Law Journal* 337; Feasby, Colin, “Freedom of Expression and the Law of the Democratic Process” (2005) 29 *Supreme Court Law Review*

rests on the presumption that human opinion is fallible. Truth can only be obtained when there is an open forum for discussions on people's views. Open discussion in the interest truth seeking thus calls for tolerance. If unreasonable restrictions on speech and expression are tolerated, society prevents the ascertainment and publication of facts and valuable opinion.<sup>381</sup> However, the inherent flaw here is the presupposition that open discussion routinely leads to an objective truth.<sup>382</sup> The truth seeking argument also presumes that truth is a coherent and discoverable concept and can be justified.<sup>383</sup> Conversely, such presumptions are not always the case. In fact, what is truth can be a function of culture.<sup>384</sup> Also, economic power sometimes helps mould public opinion as to what constitutes the "truth."<sup>385</sup> For instance, public opinion on a particular subject matter can be moulded via sustained media propaganda.

What does the democratic argument have to offer? Richard Moon argues that expressive freedom is the true ideal for democratic governance.<sup>386</sup> It is imperative for the proper consideration and balancing of the public good. Democracy realises its objective when people take informed decisions on public issues as an outcome of open discussions.<sup>387</sup> However, the democratic value of free speech is sometimes unnecessarily skewed in favour of political expression.<sup>388</sup> This is not the only relevant means by which citizens can properly and sufficiently express themselves on public issues. There is a whole gamut of avenues such as artistic or

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(Canada) 237; Roach, Kent & Schneiderman, David, "Freedom of Expression in Canada" (2005) 28 Supreme Court Law Review (Canada) 153 and Ross, June, "The Protection of Freedom of Expression by the Supreme Court of Canada"(2003) 19 Supreme Court Law Review (Canada) 81.

<sup>381</sup> Barendt E., *Freedom of Speech*, (Clarendon Press, Oxford, 2005) pp.7

<sup>382</sup> See T Campbell, Rationales for Freedom of Communication, in T. Campbell & W. Sadurski, *Freedom of Communication* (Dartmouth, Aldershot, 1994) and Barendt E., *Freedom of Speech*, (Clarendon Press, Oxford, 2005)

<sup>383</sup> Barendt, supra note 381 at pp.7.

<sup>384</sup> Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, (Hart Publishing, 2002) pp.9. he denied that the application rational force to open debates is the only means by which we can discover the truth.

<sup>385</sup> T Campbell, supra note 382

<sup>386</sup> Richard Moon, supra note 379.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid

symbolic expression, which time and again, have been used to express political opinions.<sup>389</sup> These forms of expression might not take the pluralistic character of the usual robust public political expression. Nevertheless, democracy, whether parliamentary or presidential, operates best within the context of free speech. Perhaps society can assure itself of stability from dissidents and benefit largely from the interplay of multiplicity of individual opinions and ideas. It might also rid itself of the dangers of bigotry and uninformed public decisions with the effects of paralysing the whole state apparatus.

This brings us to individual autonomy as a rationale for constitutional protection of expressive freedom. It bears directly on individual self-fulfilment and free conscience. Socrates exemplified this when he said in Plato's *Apology* that "I shall never alter my ways, not even if I have to die many times."<sup>390</sup> The explanation to this view lays in Scanlon's assertion that "[A]n autonomous person cannot accept without independent consideration the judgement of others as to what he should believe or what he should do."<sup>391</sup> This expresses the need for individuals to be free to express themselves and governments to recognise the intrinsic value of the individual. Perhaps the individual as argued by Richard Moon "realises his capacity for thought and judgement by expressing his ideas or listening to and, reflecting upon, the ideas of others."<sup>392</sup> On the whole, governments should not pre-select information or ideas and direct the thought process of individuals.<sup>393</sup>

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<sup>389</sup> Ibid

<sup>390</sup> Plato, *The Apology of Plato*, (Oxford: Oxford University Press, 1877) at pp.9-10

<sup>391</sup> Thomas, Scanlon, "A Theory of Freedom of Expression"(1972) 2 *Philosophy and Public Affairs*, 204 at pp.212

<sup>392</sup> Richard Moon, *The Constitutional Protection of Freedom of Expression*(Toronto: University of Toronto Press, 2000) at pp.9

<sup>393</sup> Frederick, Schauer, *Free Speech: A Philosophical Enquiry*( Cambridge: Cambridge University Press, 1982) at pp.69 and See Alexander, Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948). It follows Meiklejohn's injunction that the government cannot pre-select information available to people

However, this rationale like the other two is not without a problem. An open range system without reasonable regulation can lead to chaos. Some charlatans may cause social disharmony by casting aspersions at people with the heat sufficient enough to generate conflict, derision and hatred.<sup>394</sup> Perhaps we can deal with this through a reasonable regulation of the form, not content, in which we express ourselves. This entails denying constitutional protection to violent expressions and other forms of expression that clearly advocate hatred against individuals or identifiable group of individuals.<sup>395</sup> The multi-ethnic and multi-cultural nature of Ghana necessitates this type of regulation to be able to maintain social cohesion. The prices of insecurity, instability and social disharmony are so high that we cannot pay. These are not the views of an alarmist but a reasonably articulated concern on the need to keep a multi-cultural nation together.

There is a need to articulate a meaning and scope of this freedom as understood from the rationales above. It is necessary to be able to distinguish questions of scope from questions of limitation. It drives home the point that the right is not absolute. It will as well settle issues relating to form and content of expression. The Canadian courts are by far the most helpful on this. *Irwin Toy* is useful in this regard. It was suggested in this case that while content relates to the meaning or message intended by the actor, writer or speaker, form represents the manner or means by which this message or meaning is conveyed to the audience or listener(s). In that case, freedom of expression should be understood as an act, words, or ideas communicated in the form

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<sup>394</sup> See *R v. Keegstra*, [1990] 3 S.C.R. 695.

<sup>395</sup> The Canadian Supreme Court in *Irwin Toy Ltd.* best articulated my concern. It noted that government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. Elaborating upon how one must view the fact situation to make this determination Dickson C.J. stated at p.974, "If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression"

of writing, oral speech, pictures or physical gestures with the intention to convey a message.<sup>396</sup> In many jurisdictions, the acts contemplated include advertising, picketing, and pornography.<sup>397</sup> This is a generous position taken for the content. However, this does not apply to the form. Any violent act with the intention to convey a message is not covered. Perhaps this is necessary to preserve peace, unity, civility and other relevant public values<sup>398</sup> Violence form of expression has the potential to prevent the public from reaping the benefits of these values.<sup>399</sup>

### ***b) Freedom of Speech and Expression and the Ghanaian Courts***

In 1993, the Supreme Court of Ghana had the opportunity to hear a case on the constitutional protection of freedom of expression.<sup>400</sup> This was the case of *New Patriotic Party v. Ghana*

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<sup>396</sup> Lamer J. in the *Reference re ss. 193 and 195.1(1) (c) of the Criminal Code (Canada)*, [1990] 1 S.R.C. 1123 at 1181 states that Section 2(b) of the *Canadian Charter of Rights and Freedoms* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed. This is in accord with Kerans J.A. opinion of the Alberta Court of Appeal in *R v. Keegstra* [1988] 43 C.C.C. (3d) 150 at 164 when he invoked John Stuart Mill's "marketplace of ideas" to note that Section 2(b) should be understood as protecting both innocent error and impudence speech. Dickson C.J. endorsed this proposition when *Keegstra* got the Supreme Court by stating that "the content of expression is irrelevant in determining the scope of this *Charter* provision." see *R v. Keegstra* [1990] 3 S.C.R. 695 at 732

<sup>397</sup> *Richard Moon* supra at pp.36

<sup>398</sup> *Keegstra* as per McLachlin J. at 697, "[F]reedom of expression must in certain circumstances give way to countervailing considerations. The question is always one of balance. Freedom of expression protects certain values which we consider fundamental – democracy, a vital, vibrant and creative culture, the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression".

<sup>399</sup> Nonetheless, in the relevant literature, this is not the only acknowledged exception to the scope and content of freedom of expression In fact, a government's law or action could be held legitimate, constitutional and applicable by the courts, even if such an action or law sought to limit expressive freedom provided the said government action could be brought under the constitution. Thus, unless the restriction unreasonably sought to discount the values of free speech and cannot be justified under the Constitution, the courts will be prepared to uphold such actions constitutional. Such exceptions are thus important highlights as to the non absoluteness character of freedom of expression. See Richard Moon, "Justified limits on free expression: the collapse of the general approach to limits on Charter rights" (2002) 40 *Osgoode Hall Law Journal* 337 and Raphael, Cohen-Almagor, *Speech, media, and ethics: the limits of free expression: critical studies on freedom of expression, freedom of the press, and the public's right to know* (New York: Palgrave, 2001)

<sup>400</sup> For judicial views on the relevance of expressive freedom from Britain, a jurisdiction Ghana regularly refers to see *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 2 ALL ER 202, [1992] 1 WLR 1289, *R v. Independent Television plc* [1994] 3 ALL ER 641, *Re X (a minor) (wardship: restriction on publication)* [1975] 1 ALL ER 697, *Re X (a minor) (wardship: jurisdiction)* [1975] Fam 47, *Wheeler v. Leicester City Council* [1985] AC 1054, *Harman v.*

*Broadcasting Corporation*<sup>401</sup>. The plaintiff, a registered Political Party, was then the main opposition party in Ghana. The defendant, a statutory public body, was responsible for radio and television broadcasting under Ghana Broadcasting Corporation Decree, 1968 (NLCD 226). In 1993 when the Budget Statement of the Government of Ghana was read, it provoked several criticisms from the public. This included the plaintiff. In response the Minister of Finance at the behest of the government appeared on radio and television for a period of two hours, twice in succession<sup>402</sup> to defend the budget. A similar desire by the plaintiff to be heard on the Budget resulted in an application to the defendant for a similar air time. This was refused. The plaintiff then sued at the Supreme Court for a declaration that the conduct of the defendant was in violation of the Constitution, particularly articles 55(11)<sup>403</sup> and 163<sup>404</sup>. It further contended that its right to freely express itself as contemplated by the Constitution was breached by the defendant refusal to grant it air time.

The Court unanimously held that the defendant's conduct was indefensible under the Constitution. Of particular relevance is the Court's holding that the defendant's conduct was an unnecessary fetter on the plaintiff's freedom of expression and the people's right to information. It amounts to institutional pre-selection of information to the public. In language similar to that used by the Canadian and American Courts to rationalise the protection of free speech, Justice Francois stated on page 368 that "a denial of opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is only one step removed from a one-party government." A

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*Secretary of State for the Home Department* [1983] 1 AC 280 and *Brind v. Secretary of State for the Home Department* [1991] 1 ALL ER 720

<sup>401</sup> [1993-94] 2 GLR 354

<sup>402</sup> This happened on 23 and 24 January 1993.

<sup>403</sup> Article 55(11) "[T]he state shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media."

<sup>404</sup> Article 163 "[A]ll state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions"

democratic society like Ghana should be characterised by pluralism, tolerance and broadmindedness.<sup>405</sup>

Justice Francois singular passion for multi-party democratic growth was ably balanced by Justice Amua-Sekyi's stress for the truth and liberty. Justice Amua-Sekyi persuasively observed that "[T]he temptation to ride roughshod over the opinions of others must be resisted; for it is only the free flow of ideas and discussion that error is exposed, truth vindicated and liberty preserved."<sup>406</sup> Justice Aikins came close to giving what might be termed Ghana's historical constitutional position on freedom of expression. He noted that "[T]he Constitutions of this country dating as far back as 1969 contain provisions to ensure freedom of expression of the individual, i.e. [the] freedom to hold and to receive and impart ideas and information without interference, and [the] freedom from interference with his correspondence."<sup>407</sup>

It is reasonable to suppose that these Judicial opinions were within the contemplation of the Constitution. The public cannot be denied of the opportunity to hear from opposing groups. Nor was it right for the plaintiff to be divested of the means and opportunity to air its views. The preferred constitutional ideal is Equality of opportunity and protection. Denial of this does not only amount to blatant censorship, but is a complete neglect of the values of free speech. If the Court had validated the decision of the corporation, a platform for unfettered institutional discretion would have been encouraged and created. It would have on this account narrowed the scope of the constitutional protection of free speech. However this decision seems to be of little value as far as a clear definition of expressive freedom is concerned. One can only pick up such a definition after piecing together the Court rationale for constitutional protection of freedom of speech.

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<sup>405</sup> See Davis Howard, *Human Rights Law: Directions* at pp.333

<sup>406</sup> *Patriotic Party v. Ghana Broadcasting Corporation* at pp.373

<sup>407</sup> *Ibid* at 376

Nevertheless, it is equally reasonable to suppose that such a failure was not deliberate. Perhaps the nature of the constitutional question presented by the case dictates such an outcome. It is my view that if the question were framed specifically on Article 21(1) (a), of the Constitution, it would have generated a legitimate expectation for a clear definition on freedom of expression. Nevertheless, this is not to suggest that the entire judgment is of no use. It represents a progressive move in the Court's jurisprudence to enforce free speech since the promulgation of the Constitution, 1992. It is a vindication of the rationales for the protection of expressive freedom in Ghana. Open participation in public debates over national issues is necessary for the plaintiff to contribute to the growth of democracy. Also, the probability of attaining the truth is enhanced with free public discussion. The evil of ignorance may be curtailed. Perhaps better and informed decisions will be taken by the citizens as they are exposed to varied views on public issues.<sup>408</sup> This enhances the quality of civic citizenship, individual liberty and national development. If institutions like GBC are given an unfettered discretion to determine who gets to say what on national issues, Ghana will be well advanced towards one-way political indoctrination by the government,<sup>409</sup> a position that can only serve to exacerbate the problem of political intolerance.

The Court nonetheless held in *Republic v. Independent Media Corporation of Ghana (Radio Eye Case)*<sup>410</sup> that the fortunes of *New Patriotic Party v. Ghana Broadcasting Corporation* are not absolute. It scorned the idea that the Constitution envisages an absolute freedom of expression. In this instance, *Radio Eye*, the plaintiff went to Court to challenge the

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<sup>408</sup> *R v. Home Secretary, Ex p. Simms (H.L.(E.))*[200] 2 AC 115 Lord Steyn "Free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of a country" *ibid* at pp.126

<sup>409</sup> That will be to create monopoly as to access. In *Retrofit (Pte) Ltd v. Posts and Telecommunications Corpn (A-G intervening)* 1995 (9) BCLR (Z) Zim SC, it was held that prima facie a state monopoly on the telecommunications could offend the constitutional protection of free expression. See also *Government of the Republic of South Africa v Sunday Times Newspaper* [1995] 1 LRC 168, SA SC (Transvaal Division); *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 Witwatersrand Local Division.

<sup>410</sup> [1996-97] SCGLR 258

constitutionality of Section 15(b) of *Supreme Military Council Decree, 71* on which it was being prosecuted for establishing and operating a private radio without a license. The plaintiff contended that the requirement to be licensed constitutes a priori restraint on expressive freedom and a violation of article 162(3)<sup>411</sup> of the Constitution *simpliciter*. The Court however held in favour of Article 164<sup>412</sup>, which required the Court to carefully balance the implicated right with the public interest. Justice Acquah was of the view that “some form of regulatory measures and limitations” are “essential to ensure sane and healthy establishment and operation of broadcasting services.”<sup>413</sup> Justice Kpegah embraced the idea that non-regulation will amount to a resignation to the “philosophy of the fittest with its accompanying anarchy.”<sup>414</sup>

Indeed, the decision was predicated on the notion that air waves are a limited national resource, the regulation of which is necessary for the preservation of national interest. Perhaps there will be disorder on the air waves if not regulated. Absent some form of regulation, a breach of public order, morality and rights of others looks apparent. In view of Article 164 of the Constitution and the peculiar nature of broadcasting, a requirement to be licensed was thus justified. The judicial deference here also articulates the well-founded desire of the Court to

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<sup>411</sup> Article 162(3) “[T]here shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.”

<sup>412</sup> Article 164 “[T]he provisions of articles 162 and 163 of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

<sup>413</sup> *Republic v. Independent Media Corporation of Ghana (Radio Eye Case)* at pp.283

<sup>414</sup> *Ibid* at 280. Decisions like *Republic v Tommy Thompson Books Ltd (No 2) & Ors*; [1996-97] can be invoked as a justification for limitation on expressive freedom. In this case, the accused persons were arraigned before a circuit court on a charge of criminal libel, contrary to Section 112(2) of the Criminal Code, 1960 (Act 29), in respect of a newspaper publication made against Nana Konadu Agyemang Rawlings, the wife of the then President of Ghana. Though the old laws (Section 112(2) of the Criminal Code, among others) placed limitations on the exercise of press freedom (as provided under article 21(1)(a) and 162(1) and (4) of the Constitution), they were upheld as reasonably justified in a democratic society under article 164 of the Constitution. Adjabeng JSC in his opinion said at pp.868 “I think one very serious mistake that people in this country make is to think and behave as if constitutional rule or democracy and/or freedom of speech or expression of the press mean freedom to do whatever one likes”. However, this case may now be regarded as a dead law by virtue of the repeal of the Criminal and Seditious laws by the *Criminal Code (Repeal of the Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602)*. It may nonetheless be suggested that the courts can rely on other values of the community to reintroduce the principles laid down in these cases.

balance rights of individuals with the rights of others and other socio-economic competing interests. It is thus reasonable to understand the decision as not suggesting that prior restraint is not a limitation on freedom of expression. On the contrary, prior restraint like licence, as on the facts of the case, was an affront to the right of the plaintiff.

However, the limitation was justified because of the high probability of an inefficient use of a limited national resource – air waves. Again, the chaos that will ensue in such circumstances will violate the rights of those who had already secured licences to operate radios in Ghana. Certainty and predictability as elements of the rule of law in the media industry would have been ignored. Besides, in the event of such highly probable disorder on the air waves, information dissemination (in which the nation has an interest) will be severely affected. Such potential negative effects of unregulated air waves validated the Court's balancing test. It frees the nation from a potential limbo with regard to radio operation. It is also a reminder to potential rights claimants that the mere finding of a right violation is not sufficient for a legal remedy. An account of the rights of others, and other competing interests of the nation would be justifiably considered. Likewise, the decision enunciates the rule that government will have the onus of proof to show the reasonable and rational basis grounded in the Constitution of its actions. It serves as a signal to the government that there are legal hurdles to cross in real or contemplated action to limit people's rights or freedoms entrenched in the Constitution.

On a whole, both *New Patriotic Party v. Ghana Broadcasting Corporation* and *Republic v. Independent Media Corporation of Ghana (Radio Eye Case)* symbolize a strong position for expressive freedom in Ghana. While the former case represents a liberal, purposive take on the right, the latter case reflects a legitimate limitation within the confines of the Constitution. They collectively demonstrate a purposive judicial reasoning on expressive freedom that respects context and the Constitution.

### ***c) Administrative Justice as a Fundamental Human Right***

Articles 23, 19 and 296 of the Ghanaian Constitution codify, in large respect, the natural justice<sup>415</sup> rules. They provide grounds for the review of administrative actions.<sup>416</sup> Their primary end is to establish administrative justice as a Fundamental Right. Article 23 obliges administrative bodies and officials to act fairly and reasonably, and to comply with the requirements imposed on them by law. Article 19, among others, requires an adjudicating authority to give fair hearing, reasonable notice and time to a prospective defendant. Article 296 stipulates that where discretionary power is vested in any person or authority, it is deemed to imply a duty to be fair and candid. The exercise of such power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.<sup>417</sup> Collectively, they represent a move toward the classical principles of ensuring fairness and sound reasoning in the decision-making process.<sup>418</sup>

The Supreme Court has had the opportunity to read life into Articles 19 and 23<sup>419</sup> in the cases of *Awuni v. West Africa Examination Council*<sup>420</sup> and *Aboagye v. Ghana Commercial Bank*

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<sup>415</sup> Natural justice is defined in *Osborn's Concise Law Dictionary* as “[T]he Courts in the interest of fairness impose certain obligations upon those with power to take decisions affecting other people. These obligations arise from the rules of natural justice which although ‘sadly lacking in precision have generally been subsumed under two heads, the audi alteram partem and the nemo iudex in sua rule.’ By virtue of these rules decision makers must act fairly, in good faith and without bias and must afford each party the opportunity to adequately state his case”

<sup>416</sup> Lord Denning said of administrative bodies in the case of *Abbot v. Sullivan* [1952] 1 KB 189: “[T]hese bodies, however, which exercise a monopoly in the important sphere of human activity with the power of depriving a man of his livelihood must act in accordance with elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence and any agreement or practices to the contrary would be invalid.”

<sup>417</sup> Article 296 (a) & (b)

<sup>418</sup> See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford-Portland: Hart Publishing, 2001), Chapter 6 entitled “Judicial Review and Human Rights”

<sup>419</sup> In 1990-1, before the promulgation of the 1992 Constitution, the Court of Appeal held in *L'air Liquide Ghana Ltd v. Anin* [1991] 1GLR 460 as stated in the head note that “Whenever people were given power by law to consider facts and to arrive at conclusions affecting the fate of human beings, they were performing a quasi-judicial function and if the body violated the rules of natural justice the courts had the power to declare the procedure invalid, as well as the conclusions therefrom.”

<sup>420</sup> [2003-2004] SCGLR 471

*Ltd*<sup>421</sup>, The facts of *Aboagye* are as follows: The plaintiff was a senior manager of the defendant bank. Following some routine checks by the inspection/audit division of the bank, the plaintiff was given two queries relating to two separate sums of money paid into the bank accounts of two customers of the bank. In response, the plaintiff admitted that he had authorised the payments in the course of his statutory duties. The bank nonetheless considered the said authorisation fraudulent, and accordingly suspended the plaintiff. In the meantime, the disciplinary committee of the bank initiated disciplinary action against the plaintiff. In the course of the proceedings, the plaintiff was neither served with notice nor the charges of the proceedings. Yet the committee recommended to the executive committee of the bank that the plaintiff be warned for negligence of duty and his salary be reduced by one notch. Upon further consideration, the executive committee increased the punishment of the plaintiff without giving him a hearing. Instead of one notch of salary reduction, the executive committee recommended four notches to the board of the bank, the disciplinary authority. The worst happened when the board ignored the previous recommendations and dismissed the plaintiff on grounds of “gross misconduct.” This was done without notice or a hearing to the plaintiff. The plaintiff whose petition against the dismissal was turned down, went to the High Court for a relief against unlawful dismissal. This was upheld but reversed by the Court of Appeal.

On further appeal to the Supreme Court, it was unanimously held that fair hearing and notice of disciplinary charges and proceedings are constitutional requirements for adjudicating authorities and administrative bodies. Justice Bamford-Addo explained this to mean that the plaintiff “should in the course of fair trial have been served with proper disciplinary charges and given adequate notice of the date of the hearings as well as be given the opportunity to be

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<sup>421</sup> [2001-2002] SCGLR 797

heard.”<sup>422</sup> A ‘proper notice to the plaintiff is a *sine qua non* to fair hearing of the case against him.’<sup>423</sup> The Court was of the opinion that giving queries to the plaintiff does not exonerate the defendant from applying natural justice rules of fair hearing or the bank’s disciplinary rules. Justice Adjabeng articulated the Court’s position on this as “[I]t is clear from rule 4.1 of the defendant bank staff rules that the plaintiff was entitled not only to a hearing, but a personal hearing. Giving him a query would not, by any stretch of imagination, be the same as giving him a personal hearing.”<sup>424</sup>

Procedural safeguards rest on the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of the decision-makers. A decision to dismiss the plaintiff without notice of hearing and charges is thus nothing but violence to Article 19. It was as well unfair within the contemplation of Article 23. How can the Committees and the Board have reasonably reached a fair decision against the plaintiff without availing him the opportunity to respond to the disciplinary charges?<sup>425</sup> It is necessary before attempting to reach such a decision, that the defendant inform the plaintiff of the grounds on which it proposes to act, and give him a fair opportunity of being heard in his own

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<sup>422</sup> *Aboagye v. Ghana Commercial Bank Ltd* at pp.805

<sup>423</sup> *Ibid* as per Bamford-Addo JSC at pp.805

<sup>424</sup> *Ibid* as per Adjabeng JSC at pp.816. similarly, In *R v. Smith* [1844] 5 Q.B. 614 where a Parish Clerk was dismissed, Lord Denman held that even personal knowledge of the offence was no substitute for hearing the officer

<sup>425</sup> See *Kanda v Government of Malaya* [1962] AC 322 at 337 Lord Denning stated that “if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know that case which is made against him. He must know what evidence has been given and what statements have been made affecting him: then he must be given a fair opportunity to correct or contradict them”; *Ridge v Baldwin* [1964] AC 40 at 113-114 Lord Morris stated that “it is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet...My Lords, here is something which is basic to our system: the importance of upholding it transcends the significance of any particular case”; *O’Reilly v Mackman* [1983] 2 AC 237 at 279 Lord Diplock: “a reasonable opportunity of learning what is alleged against him and putting forward his own case in answer to it” and *In re D(Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 at 603-604 Lord Mustill observed “My Lords, it is the first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is against him (or her), for what he does not know he cannot answer.”

defence.<sup>426</sup> It is neither fair nor reasonable for the defendant to have unilaterally assumed or acted on the notion that the result is obvious from its own evidence. Nor is it conclusive that the defendant's decision has merit in its singular attempt to ensure institutional efficiency. Insisting on procedural fairness even when it will make no difference is a price that must be paid if due respect is to be accorded to the status of the individual.<sup>427</sup> Due process of law as laid down in Article 296 requires fair procedures in all administrative bodies' decision. To ignore this is to disregard administrative justice as a Fundamental Right.

Even at common law the *audi alteram partem* rule requires that parties be given the opportunity to offer proofs and arguments in support of their claims. If a position is being taken by the defendant from the relevant facts of the case, the plaintiff ought to have a chance to disprove that position. In *R v. Deputy Industrial Injuries Commissioner*<sup>428</sup>, Lord Diplock observes that an opportunity to make an argument in a case is a necessary element of procedural fairness. In *Mayer v. Mayer*<sup>429</sup>, a decision was quashed for violating the rules of natural justice when the plaintiff was not accorded the opportunity by the defendant to address it on the facts and law of the case. Of course, this is not to suggest that the common law is so rigid as to require a particular form of context for the exercise of this right. It is flexible. Oral hearing or written submissions

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<sup>426</sup> Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "Validity and moral authority of a conclusion largely depend on the mode by which it was reached..... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generation the feeling, so important to a popular government, that justice has been done". *Joint Anti-fascist refugee Committee v. Mc Grath*, 341, U.S. 123, 171- 172 (1951).

<sup>427</sup> Beatson, Matthews & Elliott's, *Administrative Law: Text and Materials* (Oxford: Oxford University Press, 2005) at pp.361

<sup>428</sup> [1965] 1Q.B. 456 (C.A.)

<sup>429</sup> [1971] 1 W.L.R. 679

will suffice.<sup>430</sup> The overall import is to insist that the person whose interest is adversely affected by the decision be given the opportunity to disprove the facts or law on which the decision rests.

In all seriousness however, it is not to be discarded that at common law the nature of the decision as well as the relationship between the individual and the decision maker would also be considered. That was the majority opinion in the Canadian case of *Knight v. Indian Head School Division No. 19*<sup>431</sup> when Justice L'Heureux-Dube attempted to determine when natural justice and fairness apply. It is not expected that in a master-servant relationship there will be strict adherence to the rules of natural justice.<sup>432</sup> Nor will it be a serious case to make for all out and strict enforcement of such rules in the context of "at pleasure employment."<sup>433</sup> Be this as it may, the position of the Constitution will prevail over the common law if following the latter will lead to some bizarre results that could trample upon individuals fundamental administrative right. That is, the common law can only be relied upon in this circumstance as a supplementary mechanism in enforcing administrative rights. It cannot in our context, unlike the Constitution, be employed as the major source of the right.

In *Awuni v. West Africa Examination Council* the Supreme Court upheld the appellant's contention that the defendant had not complied with the rules of natural justice in cancelling his examination results. The defendant took the decision to cancel the results of the appellant and twelve others after a preliminary investigation established that they were involved in examination malpractices. The defendant contended that the decision was necessary to protect the sanctity of the institution. It was also of the view that the findings of the investigation were apparent and

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<sup>430</sup> Robert Macaulay & James Sprague, *Hearing Before Administrative Tribunals* (Thomson Canada Ltd., 2002) at pp.163

<sup>431</sup> [1990] 1 S.C.R. 653.

<sup>432</sup> See Lord Reid in *Ridge v Baldwin*

<sup>433</sup> Note however that if by the past conduct of any decision making body, it creates a legitimate expectation in the plaintiff that rules of such nature will apply in taking a decision; such body cannot rely on the nature of the employment to set itself free. It shall be deemed by the past conduct or practice to imply that the rules of natural justice will apply.

thus, they did not need to invite the appellants for any hearing. These contentions were rejected by the Court in favour of the principles of administrative justice as established in Article 23. Justice Kpegah noted “I cannot contemplate how a person could be said to have acted fairly and reasonably if he did not give either notice or hearing to another who was entitled to such notice or hearing before taking a decision which adversely affects his rights...”<sup>434</sup> For Justice Sophia Akuffo, Article 23 established administrative justice as a Fundamental Right, which requires the observance of due process and the application of the principles of natural justice.<sup>435</sup> She further stated “[W]here a body or officer has an administrative function to perform, the activity must be conducted with, and reflect qualities of fairness, reasonableness and legal compliance.”<sup>436</sup>

In these two cases, the Court took the position that hearing, notice and the requirements of reasonability and fairness are necessary components of administrative justice. It also accepted the view that Article 23 envisages administrative justice as a Fundamental Right. The generous view of the Constitution in protecting the rights of the people was thus enforced. There is no place for absolute administrative discretion or unreasonable decisions. Optimistically, decisions of administrative bodies and officials will be carefully weighed to ascertain the extent of their compliance to administrative justice as a right. Clear evidence in support of disciplinary action against any body as shown in both *Aboagye* and *Awuni* will not be conclusive in setting aside the requirement of fair hearing as envisaged by the Constitution. Due process and fair procedures are thus not to be swept under the carpet for mere administrative expedience. Their value must be preserved. This depicts judicial optimism and willingness in enforcing administrative justice as a Fundamental Right in Ghana.

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<sup>434</sup> *Awuni v. West Africa Examination Council* at pp.489

<sup>435</sup> *Ibid* at 514

<sup>436</sup> *Ibid*

The Court however, was clear that Article 23 could not be held to be applicable at the stage of preliminary investigation. Normally, in such stages administrative bodies and officials are only running after facts or evidence which will potentially form the basis of their final decisions. It is thus logical to suppose that since no decision is taken at that stage, Article 23 will not apply. Yet, that will not be the rule if the findings of the preliminary investigation in themselves will constitute a binding final decision. In such a case, the affected person must be accorded all the benefits of a fair hearing. Understandably, administrative justice as contemplated by Article 23 implies that there is a duty to be fair and reasonable where an administrative body or official decides on the bases of findings of a preliminary investigation to take a decision with adverse consequences on an individual. Likewise, fair hearing should be given to an individual in the course of a preliminary investigation if the findings of that exercise will constitute a final binding decision.

It is discernable in both *Aboagye* and *Awuni* that neither of the affected plaintiffs was involved at the stage where the binding decision was supposedly taken against them. At least a fair hearing or a reasonable opportunity to respond to the charges may have served as a mitigating factor in the decisions. Perhaps the Council and the Bank in the respective cases simply proceeded on the notion that granting hearing to the plaintiffs would not make a difference in the decisions. More weight was thus accorded to evidence and merit of the decision than procedure. The *audi alteren partem* rule that one must be heard before being condemned was simply sacrificed and so were the vested interests of the plaintiffs. That is not what Article 23 envisages. Its vision is to establish a constitutional insurance for individual's vested interests against such administrative sloppiness. At its core, as acknowledged by the Court, is a constitutional guarantee

of administrative justice as a Fundamental Right.<sup>437</sup> Such a value as expressed in the Constitution had not lightly been arrived at and cannot be lightly discarded. It cannot also be left at the mercy of the ordinary institutions of government.<sup>438</sup> The Court's intervention was thus appropriate.

#### ***d) Freedom of Association***

Outside the courts, the significance of the right to freedom of association is ably articulated by Alexis de Tocqueville. The 'art of associating' is a necessary condition for "civilisation"<sup>439</sup>, he observes. In his opinion,

"[T]he most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."<sup>440</sup>

The wisdom in these words has been constitutionalised in Ghana as a fundamental right. Article 21 (1) (e) provides for associational right to all persons, which includes freedom to form or join trade unions or other associations be they national or international. Article 37 (2) (a) then requires the state to take positive steps by enacting the appropriate laws for the realisation of this right. In enforcing this right, the courts in Ghana have been positive and at best progressive.

In *Mensima & Others v. Attorney-General*<sup>441</sup>, the plaintiff challenged, inter alia, the constitutionality of regulation 3(1) of the *Manufacture and Sale of Spirits Regulations, 1962*(LI 239). The regulation required the plaintiffs as a pre-condition to distilling *akpeteshie* (*Local Gin*) to belong to a registered distillers co-operative society. The fulfilment of such a condition was

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<sup>437</sup> That is not achieved by a complete disregard to the principles of natural justice in administrative decisions.

<sup>438</sup> Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (4<sup>th</sup>. Ed.) (Oxford: Oxford University Press, 2006) at pp.15

<sup>439</sup> De Tocqueville *Democracy in America* (1954) at 196

<sup>440</sup> De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (1989) at 235

<sup>441</sup> [1996-97] SCGLR 676

also necessary for the plaintiffs to be able to obtain a licence for the *akpeteshie (local Gin)* distillation. They therefore contended that the regulation was a fetter on their constitutional right of association as they were being compelled to belong to a co-operative. The defendant however contended that the regulation - though restrictive -- was a reasonable limitation within the meaning of the Constitution in order to protect public interest and health. In a 3 to 2 majority decision, the Supreme Court ruled that the regulation unjustifiably negated the plaintiffs' right of association.

In the opinion of Justice Acquah, "the essence of freedom of association is the liberty or lack of compulsion on the individual to form or join an association."<sup>442</sup> This implies that the 'right to associate invariably includes the right not to associate with people with whom one does not wish to associate.'<sup>443</sup> It frowns upon coercion of membership. Justice Acquah thus observed "[O]n the face of regulation 3(1), therefore, it cannot be doubted that in so far as it compulsorily directs an applicant to belong to this registered distillers co-operatives, that regulation infringes the applicant's right to join an association of his choice."<sup>444</sup> On his part, Justice Atuguba maintained that "the requirement of membership of a distiller's co-operative as prerequisite for a distillers licence, render the right of the applicant for a distiller's licence, freedom of association illusory."<sup>445</sup> In concurring, Justice Ampiah declared that there is no "necessity for requiring an individual or association to join another before it could obtain a licence to carry out its trade..."<sup>446</sup> On the strength of these opinions, the regulation was declared unconstitutional.

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<sup>442</sup> Ibid as per Aquah JSC at pp.715

<sup>443</sup> Ibid

<sup>444</sup> Ibid at pp.717

<sup>445</sup> Ibid as per Atuguba JSC at pp.728

<sup>446</sup> Ibid as per Ampiah JSC at pp.709. this bore some semblance to McIntyre J. opinion on the purpose of Section 2(d) of the *Canadian Charter of Rights and Freedoms* in the case of *In Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313, "The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is

The jurisprudence of the Court in protecting associational right as far as the peculiar facts of this case are concerned, rests on two separate grounds. First, where governmental power operates to force an individual into membership in an organisation, or some other form of participation in its activities, the associational right of such an individual is infringed. This operates on the presumption that the liberty of the individual depends on his ability to exercise his choice. It thus depends upon the value of self-expression. If the individual has the right to freely associate with any group, the government has a negative obligation not to interfere. Accordingly, we are left with a clear position as to the necessity of the elements of choice and voluntariness in defining the constitutional right of association. Where a legislative provision compels an individual in disregard of his or her choice to associate with a group, the constitutional right of freedom of association would have been violated. It is not enough that a mere common purpose is identified. There must be congruence between choice, voluntariness and common purpose. A requirement of forced membership as in the case of regulation 3(1) of the *Manufacture and Sale of Spirits Regulations, 1962(LI 239)* was thus nothing but utter neglect of the element of choice.<sup>447</sup>

The second ground for the decision relates to the nature of the force exerted by the government. In this case, it was a compulsory membership in an organization as a precondition to obtain a *licence* to practice a trade or engage in a business venture. This defeats the free exercise of choice to join or form associations. It is obvious that individuals who are in dire need of a licence to engage in business ventures of that nature would involuntarily join the prescribed

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suppressed, and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association” *ibid* at pp.216

<sup>447</sup> It is to be inferred from this position that where an individual voluntarily joins an association with the objective of furthering a common purpose, such an individual can opt out of the group if it(the group) turns out to advocate ideas or positions which he detests.

associations. I submit that even if the government intends to regulate the activities of such businesses, compulsory membership as the basis for a licence is not a determinate mechanism. It is not guaranteed, as in regulation 3(1) of the *Manufacture and Sale of Spirits Regulations, 1962(LI 239)*, that the government could effectively check unwholesome *akpeteshie* in the market by forced associations. Quality control in the interest of public health, as urged by the Attorney-General, should be done in a less intrusive means than through forced association. There are laws and institutions for the registration of businesses, certification and monitoring of the contents of products like *akpeteshie*.

The conceptualisation here bears on the fact that the right of association is to be distinguished from the activities and purpose of an association. While the constitutional right of association is to be freely exercised, the activities and purpose of any association can be reasonably regulated. This seeks to suggest that not only will the common interest of the association be lawful, but also all it does to advance its interest. Lawful common objectives must square up with lawful activities. No association can have a constitutional protection if it engages in any unlawful activity in order to advance its goals. For example, an association that indulges in armed robbery in order to further its objectives will not have the benefits Article 21 of the Constitution nor will an association that has the purpose of overthrowing a democratically elected government through armed conflicts. In that case, the position of the Court should not be conceived as suggesting that associations can not be regulated. The Court merely seeks to establish that Government has no business compelling people to belong to associations as a regulatory mechanism. A success story in that venture will considerably reduce the weight of the constitutionalised right of association.

Most significant and closely connected to the preceding point is the opinion of Justice Acquah<sup>448</sup> on the scope of freedom of association concurred in by Justices Ampiah and Atuguba. Freedom of association is taken to include freedom to dissociate. If one cannot be compelled to associate with a group, invariably one is entitled to dissociate from a group joined voluntarily. To dictate otherwise is to seek to operationalise certain “cultic” rules as constitutional norms that once in as a member you cannot get out. The consequence is to “imprison” individuals in groups or associations without the opportunity to get out. Freedom of association would have thus been held to be coterminous with cultism. Such a position will constitute a narrow definition of the scope of freedom of association, and by extension its violent death.

The decision has political significance as well. It seeks to promote multi-party constitutional democracy. The Constitution as can be discerned from the Court’s opinion does not contemplate a situation where the State can deny the citizens the right to associate in varied political groupings. Nor does the constitution envisage a one-party state. If forced association in the social and economic spectra as was the aim of regulation 3(1) of the *Manufacture and Sale of Spirits Regulations, 1962(LI 239)* was allowed, then it presents the possibility for citizens to be compelled to belong to political groups such as Political Parties. The capacity of the citizen to campaign for positive change through varied political groups will have been considerably reduced. A march toward one-party State would have been apparent. The benefits of multi-party constitutional democracy would have been thrown to the wild wind of the Sahara desert. Most importantly, the free democratic State envisaged by the drafters of the Constitution would have been nothing but a journey back to its pre-constitutional democratic era of chronic dictatorship.

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<sup>448</sup> Ibid as per Aquah JSC at pp.715 (“right to associate invariably includes the right not to associate with people with whom one does not wish to associate”).

In *New Patriotic Party v. Attorney-General (CIBA Case)*<sup>449</sup> the Court reiterated its desire to protect the right of freedom of association. In this case the plaintiff challenged the constitutionality of the *Council of Indigenous Business Association Law, 1993 (PNDCL 312)*. This law requires certain associations specified in its Schedule to be compulsorily registered with the Council. It was also observed that the said Council was to be controlled by a Minister of State. The Court has to answer the question whether or not the compulsory registration with Council and the ministerial control violate the associations' right to form or join an association of their choice. This was answered in the affirmative by the majority of the Court.

Justice Bamford-Addo wrote “[F]reedom of association means freedom of the people to voluntarily join together to form associations for the protection of their interests free from state interference. This freedom is effectively taken away in this case by the compulsion of the stated organisations to join CIBA....”<sup>450</sup> Indeed, the coercive element in the law negates voluntariness and the individual choice. Justice Sophia Akuffo saw this as an attempt to establish “a state-sponsored exclusive club for a chosen few.”<sup>451</sup> Such exclusivity was wrong in her opinion, as “[I]n the spirit of the Constitution, it ought to be open to any association of any indigenous business sector to seek membership, and without the prior approval of the minister.”<sup>452</sup> The wisdom commanded by this decision - as in the first case - is the resistance to compel membership contrary to the terms of the Constitution. It also seeks to impeach the arbitrary decision to prevent other similar associations within the indigenous business sector from joining CIBA. Pre-determination and coercion of membership clearly negates personal choice accorded by freedom of association.

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<sup>449</sup> [1996-97] SCGLR 929

<sup>450</sup> Ibid as per Bamford-Addo at pp.751

<sup>451</sup> Ibid as per Sophia Akuffo JSC at pp.801

<sup>452</sup> Ibid

Peculiar to this case is the issue of State interference. This was made possible by the fact that a Minister of State controls CIBA. If associations are to be free from direct governmental control, then a requirement that a Minister exercises some direct controlling powers over members of an association is problematic. A Minister is nothing but an appendix of the government. Such a person becomes a conduit through which the government exerts its influence over members of the association. Potentially, such individuals will become passive passengers in the association executing the biased wishes of the government. Justice Sophia Akuffo correctly stated on page 801 that “sections 4 and 6 of the Law do more than regulate; they create such extensive ministerial control as to render the council and, by extension, the member associations thereof, a mere rubber stamp of ministerial decisions.” It is thus reasonable to suppose that the independence and objective character of the association will be lost. This will be a mockery of the right to be free from governmental interference. It is this potential evil that the Constitution seeks to correct and to allow associations such independence to work for the realisation of their objectivities and the development of the general society.

The point however is not to be construed as that “free from interference means free from lawful governmental regulation.” The Minister was not there to regulate though. Even if he was, it does not necessarily warrant his presence in CIBA. It is perfectly possible to regulate the activities of CIBA without the direct presence in and control of CIBA by the Minister. For instance, general regulations framed with the full account of the terms of the Constitution could have been issued by the Minister and requiring CIBA to comply with them. This could then be backed up by monitoring structures to ensure compliance. This represents a simple and less intrusive structural mechanism by which CIBA could plausibly be regulated. The Minister’s direct presence in CIBA reduces Article 21 (on the right to freedom of association) to a toothless

claw-back provision. At best, it dilutes its content and force, and does not represent a reasonable limitation as contemplated by the Constitution. It denies CIBA its institutional independence.

### ***e) Freedom of Assembly and the Right to Demonstrate***

The freedom to freely assemble and engage in demonstrations is accepted as a Fundamental Freedom. It forms part of the language of Civil and Political Rights necessary for competitive multi-party democracy. This has been guaranteed under Article 21(1) (d) of the 1992 Constitution. It provides for the free exercise of the right to assembly and to take part in demonstrations and possessions. However, this can be limited by a law allowing a court to make an order reasonably required in the public interest.<sup>453</sup> This includes defence, public order, public safety, public health and the running of essential services.<sup>454</sup> How have the courts in Ghana responded to this provision on freedom of assembly?

In *New Patriotic Party v. Inspector General of Police*<sup>455</sup> the Supreme Court went to the rescue of the constitutional provision on free assembly and the right to demonstrate. The plaintiff sought a declaration in court that Sections 7, 8, 12(c) and 13 of the *Public Order Decree, 1972 (NRCD 68)* were unconstitutional. These Sections of NRCD 68 required a prior police permit before holding any public meeting and it was an offence to hold such meetings without police permission. In the face of this, the plaintiff contended that the Sections in question were inconsistent with the constitutionally guaranteed right of assembly and demonstration. According to the plaintiff, these Sections invested an unfettered discretion in the police that the Constitution does not contemplate. To accept them as law will render the freedom of assembly illusory. The

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<sup>453</sup> See Article 21(4) (a) and (c) of the Constitution, 1992

<sup>454</sup> *Ibid*

<sup>455</sup> [1993-94] 2 GLR 459. In this case, plaintiff (members) as the main opposition party staged a demonstration in Accra against the Government Budget of 1993. In the course of the demonstration, the Police suddenly appeared and dispersed the crowd and arrested some people for prosecution. The charge was that they had demonstrated or publicly met without Police permission.

defendant countered that the said provisions were a reasonable limitation on the right of assembly as envisaged by Article 21(4) of the Constitution.<sup>456</sup>

The Supreme Court in a unanimous decision held that Sections 7, 8 and 13 of NRCD 68 violate the right of assembly on the account of their requirement for a prior permit. Justice Amua-Sekyi grounded his opinion in his distaste for a prior permit. He contended that “[W]hoever has power to grant a permit or licence has power to refuse it...Based as they are on a requirement that permission be sought of the executive or one of its agencies before the right of freedom of assembly is exercised, Sections 7, 8, (12(a) and 13 of NRCD 68 are clearly inconsistent with article 21(1) (d) of the Constitution, 1992.<sup>457</sup>” This was not different from Justice Aikins’s attack that “any law that extends to give authority to any person or persons to prohibit or grant a permit to other persons to take part in processions and demonstrations curtails the freedom of such persons and cannot be said to be justifiable in terms of the spirit of the Constitution, 1992”<sup>458</sup>

This position was generous and apt. It is more than a fetter on this right for the police to have such open discretion to determine whether or not a right holder can exercise his or her right to assembly. If the enjoyment of the right to meetings, processions and demonstrations require the prior sanction of the police then there is no need to constitutionalize such a right. Holding in favour of the police in this case will mean an erosion of this right. Justice Hayfron-Benjamin observed that “an unfettered discretion is to place those who assert their constitutional rights of assembly, procession and the demonstration at the mercy of the police.”<sup>459</sup> Relying further on the framers intent, Justice Hayfron-Benjamin held that the Constitution was “intended that the

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<sup>456</sup> Article 21(4) generally accepts restrictions on peoples’ rights and freedoms, as are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons.

<sup>457</sup> Ibid as per Amua-Sekyi JSC at pp.473

<sup>458</sup> Ibid as per Aikins at pp.476

<sup>459</sup> Ibid as per Hayfron-Benjamin at pp.503

citizens of this country should enjoy the fullest measure of responsible Human and Civil Rights. Therefore any law which seeks to abridge these Rights and Freedoms must be struck down as unconstitutional. The requirement of a permit or licence is one of such abridgement of the constitutional right.”<sup>460</sup>

The decision aptly suggests that in a constitutional democracy prior permits unjustifiably limit the right to free assembly. Permits as required by NRC 68 take away the constitutional relevance of the Human Rights guarantees. What value will this right have if at the stroke of a police officer or Minister’s pen it can be as good as it never was provided for? Indeed, the general effect of NRC 68 is to reduce this right to mere executive policy enforceable by the police. By implication the Police, not the Constitution, become the source of rights guarantees and protection. This is an invitation to and endorsement of a “Police State.”<sup>461</sup> If the Constitution means anything to the citizens, such a possibility must be resisted.

In serious political matters, the right to demonstrate allows the citizens - in the words of Justice Hayfron-Benjamin - “either to petition for the redress of grievances or express support for or opposition to a cause.”<sup>462</sup> The glaring existence of the requirement to obtain a police permit with an unfettered discretion to deny such permit renders such vital civil exercises illusory. This is a clear recipe for intolerance, and perhaps a possibility to degenerate into political irresponsibility. Besides, permits are a colonial legacy, where suppression was necessary to keep

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<sup>460</sup> Ibid at pp.505-506

<sup>461</sup> See E.K. Quashiqah, “The constitutional Right to Freedom of Assembly and Procession in the Light of the Decision in the Public Order Case and the Public Order Act (1996-1999) XX University of Ghana Law Journal 1

<sup>462</sup> *New Patriotic Party v. Inspector General of Police* as per Hayfron-Benjamin JSC at pp. 500. See also *Hubbard v. Pitt* [1976] Q.B. 142 at pp. 178 as per Lord Denning MR (dissenting) (an application for an interlocutory injunction to restrain defendants from demonstrating): “Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority... [the courts] should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they should interfere with the right to free speech.” Similarly, in *Verrall v. Great Yarmouth Borough Council* [1981] 1 Q.B. 202 at pp. 217-218 as per Lord Denning, “[F]reedom of assembly is another of our precious freedoms. Everyone is entitled to meet and assemble with his fellows to discuss their affairs and to promote their views”

the status quo. Justice Edward Wiredu denied their usefulness in our contemporary constitutional democracy when he observed: “[T]he police permit is the brainchild of the colonial era and ought not to remain in our statute books.”<sup>463</sup> Their existence in the current constitutional setting will constitute an instrument of arbitrary suppression of free expression through processions and demonstration in the streets and public places. The Court decision liberates potential lawful demonstrators and processors from being arbitrarily restricted by the police.

Throughout the struggles for Africa’s liberation from European imperialism, public protests and demonstrations have been largely utilised.<sup>464</sup> These public forms of expression were used by ex-service men to demand better living standards after World War II.<sup>465</sup> Market women peacefully lined up in the streets of Accra, Kumasi and Cape Coast to register their concerns about unfair trade practices in the late 1930s.<sup>466</sup> Nationalist leaders like Kwame Nkrumah have also used peaceful demonstrations as their vehicle in pressing for constitutional reforms. In all of such instances, the natives have prevailed in the face of fierce resistance from the colonial master. It is understandable that the colonial government which did not want to brook any opposition would enact such laws as to require a prior permit. After all, the form of government at the time can best be described as “conquered people under the absolute control of the conqueror.” There is no place for democracy. This makes the rationalisation of the court on the police permit accurate. A government that originates from the explicit consent of the people must be open to listen to others. A government that depends on the Constitution for all its lawful acts must eschew all tendencies to be intolerant. To stifle the right of assemble and demonstration is to potentially initiate a monologue. That is not good for positive change and certainly is not for democracy.

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<sup>463</sup> Ibid as per Edward Wiredu JSC, at pp.478

<sup>464</sup> See generally Albert Adu Boahen, *Africa Under Colonial Domination, 1880-1935* (UNESCO 1990); *Topics in West African History* (Longman, 1971); *Ghana: Evolution and Change in the Nineteenth and Twentieth Centuries* (Longman, 1975) and *African Perspectives on Colonialism* (The Johns Hopkins University Press, 1987)

<sup>465</sup> Ibid

<sup>466</sup> Ibid

Yet the Court in *New Patriotic Party v. Inspector General of Police* was careful not to lay down an open-ended rule in its bid to enforce the constitutional right of assembly. A limited view was taken with regard to the peculiar evil posed by the requirement of a prior police permit. The court's opinion does not extend to the lawful duty of the police to break up any lawful assembly that degenerate into violence. It also does not support such meetings at public places that degenerate into public disorder and significantly choke up the running of essential services to the public. The decision is not a permanent judicial injunction on the police to fold their arms and helplessly watch individuals under the color of right of assembly to breach public peace and order. The police will still exercise such powers as reasonably necessary to maintain public peace and order. The caveat however in such circumstances, is that the police must be reasonably satisfied that convincing grounds exist for the exercise of such powers.

### ***f) Conclusion***

Every nation has good cause to protect the liberties of its individuals. Liberal constitutions and strong courts are needed for this. In Ghana as illustrated above, the fundamental rights of free speech, assembly, administrative justice and free association have been well received by the courts. Their recognition and enforcement form the basis of a true open democracy. We can do better to uphold the basic tenets of justice and our Constitution if people are free to debate and discuss public issues. It is also important for the growth of our nascent democracy that individuals and groups are availed of the benefits of administrative justice. People ought to - be free to associate and assemble for any good cause. Any unreasonable limitation on these rights will signal possible difficulties in attaining the blessings of liberty and justice. From a military dictatorship to constitutional democracy, the Courts of Ghana deserve praise for their generous pronouncements on these rights. However, the journey into the future looks distant. Hopefully, the courts will continue to uphold this noble cause for the protection of Human Rights. Any

negative or retrogressive slip could spell doom not only for these Civil and Political Rights but also the entire agenda of a multi-party constitutional democracy. The people deserve better treatment, and so does the political image of the nation.

## ***II. The Red Light Province - Socio-Economic Rights***

There has been a long-standing debate over the appropriateness of making Socio-Economic Rights justiciable.<sup>467</sup> Some critics argue that the moral and political foundations to address the needs of people do not necessarily lie in justiciable<sup>468</sup> Socio-Economic Rights. Vierdag asserts that “the implementation of these claims is a political matter, not a matter of the law and hence not a matter of rights.”<sup>469</sup> This has been supported by Christian Starch, who argues that making Socio-Economic Rights justiciable amounts to a necessary breach of the principle of separation of powers.<sup>470</sup> Their enforcement by the courts leads to an intrusion into the legislative domain. However, we can regard these criticisms with some suspicion. Vierdag’s position obviously fails to take account of how dangerous it is to cede the entire currency of rights to the arena of politics

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<sup>467</sup> In the discourse of human rights, there is a marked schism between civil/political rights and socio-economic rights. The fundamental cause of this is justiciability. Even advanced democracies like Canada and the United States did not give them any constitutional protection. In some African countries like Botswana, Tunisia, Zimbabwe and Zambia, such rights are not provided for. Yet in other African countries they are explicitly provided for as justiciable rights. Ghana and South Africa are apt examples. Comparatively however, the socio-economic rights in Ghana are not as exhaustive as those in the South African Constitution. For instance they do not include an explicit provision on the right to health.

<sup>468</sup> The concept *justiciability* has defined by Lorne Sossin as “a set of judge made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court.” Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Thomson Canada Limited, 1999) at pp.2

<sup>469</sup> Vierdag, E W, “The Legal Nature of the Rights Granted by International Covenant of Economic, Social and Cultural Rights” in *The Netherlands Year Book of International Law* (1978) at pp.103

<sup>470</sup> Christian Starch, “Europe’s Fundamental Rights in their Newest Garb” (1982) *Human Rights Law Journal* 116. See also David M. Beatty, “The Last Generation: When Rights Lose the Meaning” in *Human Rights and Judicial Review: A Comparative Perspective* (David M. Beatty ed., 1994)

with the potential of an indefinite postponement of their realisation.<sup>471</sup> Christian Starch as well, is oblivious of the structural relevance of the doctrine of checks and balances and how the Judiciary can systemically prevent the abuse of rights.

Nevertheless, the most compelling objection is that the courts lack the institutional competence to enforce these rights.<sup>472</sup> Useful decisions on these rights demands expertise in complex policy issues which the courts do not have. Nor can social science evidence provide a clear basis for the courts to decide on these rights. Further, Socio-Economic Rights have wider policy implications which cannot be sufficiently evaluated by courts. By implication judicial pronouncement on them is likely to be reactionary, which can undermine the ability of legislatures to systematically deal with issues of social justice.<sup>473</sup> The range of charges has been pushed further to suggest that Socio-Economic Rights are not only indeterminate, but are “positive” rights whose enforcement depends on availability of resources.<sup>474</sup> Lack of a conceptual clarity on these rights presents an insurmountable task for the courts. It would thus be better for such matters to be left to legislatures to deal with through careful policy studies and structural economic and social programmes.

However, some governments have defied the logic of these objections and provided for such rights in their constitutions.<sup>475</sup> Perhaps the rationale in part, is to demonstrate a commitment to social integration, solidarity and equality, including tackling the question of income

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<sup>471</sup> Michelman, F I, “The Constitution, Social Rights and Liberal Political Justification”(2003) 1 International Journal of Constitutional Law 13 at pp.16

<sup>472</sup> Craig Scott & and Patrick Macklem, “Constitutional Ropes of the Sand or Judicial Guarantees? Social Rights in a New South Africa Constitution” (1992) 141 University of Pennsylvania Law Review 1 at pp.15

<sup>473</sup> See Paul Breast, “The Fundamental Controversy: The Essential Contradictions of the Normative Constitutional Scholarship” (1981) 90 Yale Law Journal 1063

<sup>474</sup> See Michael Dennis & David Steward, “Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?” (2004) 98 American Journal of International Law 462(This rationale is grounded in the conception that these rights are positive in nature requiring governments to spend significant amount of resources for their realisation)

<sup>475</sup> For instance, South Africa, Ghana, Uganda, Ethiopia and The Gambia

distribution<sup>476</sup> in the larger society. It also illustrates a major concern for the protection of vulnerable groups, such as the poor and the handicapped.<sup>477</sup> These are human needs which should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.<sup>478</sup> For Amartya Sen, the correct conception of these rights should properly relate to a purpose as to how a person can function or exist as a human being.<sup>479</sup> Such rights should thus be conceived as components of a commitment to individual wellbeing and freedom.<sup>480</sup>

It is highly inconceivable that a person can turn his mind to the right to vote or fair trial if denied access to food, water, housing and medical care. In situations where poverty has eaten people up and the gulf between the rich and the poor is extremely wide, it makes no sense to talk about the right to vote or fair trial. Therefore, any attempt to remove these rights from the hierarchy of enforceable rights is to potentially negate the benefits accorded to individuals by the Civil and Political Rights. For a best and just form of democracy, Civil and Political Rights must irrevocably be interconnected with Socio-Economic Rights.<sup>481</sup> To separate these sets of rights, and attach differential remedial content labels is to court a dubious structural imbalance in our conception of rights.<sup>482</sup> We must aim at a comprehensive Human Rights regime that values life and the dignity of persons. Socio-Economic Rights are a prior commitment to such a regime and

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<sup>476</sup> Asbjorn Eide et al ed., *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers,2001)

<sup>477</sup> *ibid* at pp.5

<sup>478</sup> *Ibid* at 6

<sup>479</sup> Amartya, Sen, "Well-Being, Agency and Freedoms: The Dewey Lectures 1984" (1985) *The Journal of Philosophy* 169

<sup>480</sup> David Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> ed., 2002) at pp. 113

<sup>481</sup> See Kooijman, "Human Rights – Universal Panacea? – Some Reflections on the So-called Human Rights of the Third Generation" (1990) *Netherlands International Law Review* 320( he saw the relevance of these set of rights[socio-economic rights and civil and political rights] in equal proportions and advocated mutuality in their conception and enforcement)

<sup>482</sup> See Ellen Wille, "Aspirational Principles or Enforceable Rights: The Future for Socio-Economic Rights in National Law (2006-2007) 22 *American University International Law Review* 35

a foundation to the wellbeing of individuals. Civil and Political Rights are presumably lame without enforceable Socio-Economic Rights.<sup>483</sup>

It is a sweeping and highly doubtful claim to state that Civil and Political Rights do not require resources in their enforcement. For instance, democratic rights require governments to spend significant amount of resources to enable citizens participate in the democratic process. *In Re: Certification of the Constitution of the Republic of South Africa*,<sup>484</sup> the Constitutional Court of South Africa stated:

“Many of the civil and political rights entrenched...will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion....”<sup>485</sup>

Such was also the opinion of the same Court in *August v Electoral Commission*<sup>486</sup> when it held that the state has an obligation to take reasonable steps to enable prisoners to vote in an election. Such steps involve providing for a voter register and extending to the prisoners the opportunity to register and to cast their votes. This cannot be done without resources.

The realisation of the right to a fair trial also demands resource commitments on the part of governments. In *Airey v. Ireland*<sup>487</sup> it was suggested that a right to fair trial extends to legal aid funding and maintaining the court system. It is simplistic to suggest that only Socio-Economic Rights demand governments to spend resources. Perhaps in a case-by-case basis such assertion may have some credence: otherwise, it is in danger of being over generalised. Even in such

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<sup>483</sup> See Michael K. Addo, “Justiciability Re-examined” in *Economic, Social and Cultural Rights: Progress and Achievement* (Ralph Beddard & Dilys M. Hill ed., 1992)

<sup>484</sup> [1996] 10 BCLR 1253

<sup>485</sup> Ibid at para. 78

<sup>486</sup> (1999) 3 SA 1 (CC)

<sup>487</sup> *European Human Rights Reports* 305 (1979)

circumstances we might be careful to reasonably examine what we regard as “resources.” Otherwise we risk the fallacy of bigotry in our conceptions and conclusions.

The entire concept of humanity requires us to live beyond mere linguistic categorisations and save people from socio-economic wretch, disease, malnutrition and neglect. In the face of these preventable misfortunes governments must accept and take the responsibility. Setting governments free through simplistic generalisations as suggested above is to make an unfortunate apocalyptic conclusion on the fate of the poor, vulnerable and the suffering. There is nothing to be gained by hiding behind concepts to consign a cross section of the population to a perpetual damnation. This view is best illustrated by Scott and Macklem:

A failure to entrench social rights is an act of institutional normatisation that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretative horizon fails to recognise the realities of life for certain members of the society who cannot see themselves in the construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted<sup>488</sup>

The institutional competency argument is also problematic, as is the assertion that Socio-Economic Rights are indeterminate. First, there is a patent failure in the institutional argument to understand that judges deal with real specific cases. They thus have the capacity to test more effectively the particular implications of abstract principles and discover problems that the legislation could not forecast.<sup>489</sup> Besides, there is the presumption that the judicial process is an unorganised exercise. On the contrary, it is an organised, rational and deliberative process tailored

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<sup>488</sup> Craig Scott & and Patrick Macklem, “Constitutional Ropes of the Sand or Judicial Guarantees? Social Rights in a New South Africa Constitution” at pp.35-36

<sup>489</sup> H. Spector “Judicial Review, Rights and Democracy” (2002) 22 Law and Philosophy 285; Barber, N W, “Prelude to the Separation of Powers” (2002) 60 Cambridge Law Journal 59; J. McMillan, “Judicial Restraint and Activism in Administrative Law” (2002) 30 Federal Law Review 335; J. Ferejohn “Judicialising Politics, Politicising Law” (2002) 65 Law & Contemporary Problems 41; and G. Hogan “Judicial Review and Socio-economic Rights” in *Human Rights, the Citizen and the State: South African and Irish Perspective* (J Sarkin & W Binchy ed., 2001)

towards producing fair and well-reasoned results.<sup>490</sup> It only requires sufficient evidence to be made available to the courts in the course of adjudication.

The indeterminate argument fails on its face for underestimating the role of judicial interpretation. Interpretation partly targets the discovery and preservation of community values which goes to the survival of the people. Socio-Economic Rights are nothing but the constitutionalisation of such values. In that case, judges can enquire into the reasonableness of governments' policies or programmes to ascertain the extent to which they reasonably intend to realise these values. Such a duty does not present any problem of indeterminacy. Be that as it may, there is no insurmountable problem with the force to absolutely preclude the Judiciary from enforcing Socio-Economic Rights.

### **a) *The Courts of Ghana and Socio-Economic Rights***

As noted in Chapter Two, Socio-Economic Rights are entrenched in Ghana's 1992 Constitution. This was and remains a noble idea. However, these rights in the Constitution are limited. They include: the right to education, property rights, rights of workers in employment, and property rights of spouses. The rights to health care, water, food, and adequate housing have not been explicitly provided for. The only provision that bears on health is the right of the child not to be deprived of medical treatment by reason only of religious or other beliefs.<sup>491</sup> Perhaps the enforcement of such rights can rely on other rights such as the right to life and human dignity.

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<sup>490</sup> John Stuart Mill said "[A] Court of Justice as such . . . does not declare the law *eo nomine* and in the abstract, but waits until a case between man and man is brought before it judicially involving the point in dispute: from which arises the happy effect that its declarations are not made in a very early stage of the controversy; . . . that the Court decides after hearing the point fully argued on both sides by lawyers of reputation; decides only on as much of the question at a time as is required by the case before it, and its decision . . . is drawn from it by the duty which it cannot refuse to fulfil, of dispensing justice impartially between adverse litigants." J.S. Mill, *Considerations on Representative Government* (1861), reprinted in J.S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, (H.B. Acton, ed., 1972) at pp.403

<sup>491</sup> Article 28(4)

This may depend on the temperament of the courts in Ghana. It may also depend on how the courts productively engage Human Rights and constitutional jurisprudence of foreign sources.

At best, little attention has been given to the enforcement of these rights by the Supreme Court. In fact, there has been a paucity of cases on these rights before the Court. Of course, if people rarely come forward with claims on these rights, little can be expected of the Supreme Court. The justification for this state of affairs lies partly, in the unwillingness on the part of Human Rights Non-Governmental Organisations (NGOs) to take cases of such nature to the Court. Further, willing individuals have been kept away from the Courts by abject poverty. Besides, the legal profession largely fails to be pro-active on such cases. There has been an over concentration on Civil/Political Rights. However, the courts have on a few occasions to a very limited extent shown some positive lights on the future of Socio-Economic Rights in Ghana.

### ***b) The Right to Education***

Apart from the administrative justice issue decided in *Awuni v. West Africa Examination Council*, (discussed in PART I of this work) the Supreme Court went to the aid of citizens' right to education. In that case not only were the affected students denied the benefits of procedural fairness, but they had their entire examination results cancelled. They were also barred for a period of three years from writing any exams conducted by the Council. In effect, during the currency of the ban, the students were neither given their school certificates nor allowed to take exams under the authority of the Council. The loss of the educational opportunities occasioned by these punitive sanctions thus formed an essential element in the Court's award of general damages against the Council.

Counsel for the Appellant in response to the Court's invitation to identify factors to be taken into account in a possible award of damages argued that:

“Further, because of the virtual monopoly the respondent has in the conduct of Senior Secondary School Certificate Examinations (SSSCE), the unlawful ban on the appellants from sitting any examinations conducted by the respondent literally halted any educational progression the appellants could have made during the period of the ban. They can never regain the invaluable educational time they have lost”

This position was endorsed by the Court. Justice Date-Bah stated on page 579: “[I]t seems to me legitimate to take the injury sketched out above into determining the quantum of general damages to be awarded against the respondent....” Similarly, Justice Kpegah predicated his reasons for the award of damages on the fact that “the appellants have been frustrated in planning their future in the *academic field*...not only as result of the unlawful suspension of *their entire results* but also their illegal barring from taking any examinations under the auspices of the council for three years.”<sup>492</sup> One fundamental question should quickly be addressed in order to establish the connection here. Why would the Supreme Court be interested in taking the loss of educational opportunities into account in calculating damages against the Council? Two reasons can be advanced in response to this question.

First, Article 25 of the Constitution guarantees the right to equal educational opportunities and facilities to all persons in Ghana. It is thus a reasonable supposition that in the enforcement of such a right, the appellants in this case would, like their colleague students, be given their school certificates. The said certificates are a precondition to progress to a higher education, a right which is guaranteed under Article 25(1) (c) of the Constitution. There is no meaningful definition of the content of the right to higher education as provided for in the Constitution if WAEC has the absolute power to deny students of their school certificates. The Supreme Court can therefore be understood as enforcing the rights to education. The injury caused by the Council’s utter disregard to the rules of administrative justice hinges directly on the students right to a higher education. It was impossible for the students to have applied to the

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<sup>492</sup> *Awuni v. West Africa Examination Council* at pp.503

university without their secondary school certificates. That was the fate which the students suffered due to an unlawful institutional determination of the content and scope of their right to educational opportunities.

The second rationale lies in the content and force of article 12(1) of the Constitution. It provides as follows:

“[T]he fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislative and Judiciary and *all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, [my emphasis]* and be enforceable by the Courts as provided for in this Constitution.”

By virtue of this provision all institutions and persons (regardless of being natural or legal) are enjoined to respect the Rights and Freedoms enshrined in the Constitution. The Council (WAEC) is a legal person set up by a multilateral convention, of which Ghana is a signatory. Ghana being a dualist country, the Convention is given the force of law in Ghana by the *West African Examinations Council Law, 19991 (PNDCL 255)*. Accordingly, WAEC becomes a legal creature in Ghana and functions subject to the 1992 Constitution. It is thus plausible and legitimate within the context of Article 12 to expect WAEC to respect and uphold all the Rights and Freedoms guaranteed in the Constitution. The Supreme Court therefore has a valid reason to award general damages against WAEC for unlawful frustration of the appellants in enjoying their right to education.

Perhaps in Human Rights jurisprudence, the Court decision can properly be understood as a rationalisation of the relevance of education. In *Brown v. Board of Education of Topeka*,<sup>493</sup> it was convincingly stated on page 493 “[T]oday, education is perhaps the most important function of state and local governments.... it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later

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<sup>493</sup> 347 U.S. 483 (1954) [an American case which sought to end racial segregation in schools]

professional training, and in helping him to adjust normally to his environment.” Justice La Forest of the Supreme Court of Canada agreed with this view when he stated in *R v. Jones*<sup>494</sup> at page 296 that “[W]hether one views it from an economic, social, cultural or civic point of view, the education to the young is critically important in our society.” Though these cases were decided in different jurisdictions the principles laid down in them are as well applicable to Ghana. Article 25 of the Constitution can reasonably be deemed to have the objective of preparing good citizens through education. Economic, social and cultural life of a nation demands some enlightenment on the part of its people. Ignorance does not give any positive benefit to society. Education does. It is a necessary part of the art of successful governance. It is also important for a self-sustaining life of the individual. In its essential nature and peculiar value, governments and all of its organs have the obligation to provide for educational opportunities and facilities to all persons. Collectively, they are to refrain from any conduct that can frustrate individuals from taking advantage of the educational opportunities. The conduct of the Council can thus be appropriately interpreted as not only infringing the appellants right to education but also inimical to the values of education. In Justice Kpegah’s words it frustrated them ‘in planning their future in the *academic field*.’

***c) The Directive Principles of State Policy (DPSP) and Socio-Economic Rights***

The prevailing jurisprudence in some African countries is that Socio-Economic Rights are not justiciable when they are included as Directive Principles of State Policy. They are to serve as a source of guidance to the three arms of government in the discharge of their respective constitutional obligations. For instance in Nigeria, the Lagos State High Court held in *Morebishe*

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<sup>494</sup> [1986] 2 S.C.R. 284

*v Lagos State House of Assembly*<sup>495</sup> that the DPSP in the Federal Constitution are not justiciable. Similarly in Lesotho, the Court of Appeal held in *Khathang Tema Baitsooli and Another v Maseru City Council and Others*<sup>496</sup> that the DPSP cannot be enforced through the right to life as the former is not justiciable. It could be said that the position in these cases is that DPSP are declarations that cannot be independently enforced in a court of law as rights. Governments will view them as mere aspirational goals. The courts are required to use them as interpretive aids in the course of constitutional adjudication, and the people can measure the achievements of their government using them as mere guidelines.

However, the Supreme Court of Ghana took a different position with regard to the DPSP and Socio-Economic Rights in the Constitution. As noted earlier, the DPSP are provided for in Chapter Six of the Ghanaian Constitution.<sup>497</sup> They contain more elaborate provisions on Socio-Economic Rights than those provided for in Chapter 5. Unlike other African courts, the Supreme Court of Ghana provided some positive lights as to the justiciability of such provisions. In *New Patriotic Party v. Attorney-General (CIBA Case)*, Justice Bamford-Addo observed that while the DPSP cannot be enforceable in themselves, they are justiciable when read and applied in

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<sup>495</sup> [2000] 3 WRN 134

<sup>496</sup> [2004] AHRLR 195(LeCA 2004)

<sup>497</sup> The relevant parts include **Article 34(2)** The President shall report to Parliament at least once a year all the steps taken to ensure the realization of the policy objectives contained in this Chapter and, in particular, the realization of *basic human rights, a healthy economy, the right to work, the right to good health care and the right to education*. **Article 36(1)** The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy. (6) The State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana. (10) The State shall safeguard the health, safety and welfare of all persons in employment, and shall establish the basis for the full deployment of the creative potential of all Ghanaians. (11) The State shall encourage the participation of workers in the decision-making process at the work place.

**Article 37(1)** The State shall endeavour to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law. (b) the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes. **Article 38 (1)** The State shall provide educational facilities at all levels and in all the Regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to all citizens.

conjunction with any substantive guaranteed Human Rights and Freedoms set out in Chapter 5.<sup>498</sup> Her opinion was concurred to by the other Justices. From this, the Court seems to take the position that, in general, while the Directive Principles in the Constitution are not in and of themselves legally enforceable by any court, there are particular instances where some of these provisions form an integral part of some of the enforceable rights in the Constitution. In such instances, they are justiciable of themselves because either they qualify the enforceable rights or can be held to be rights in themselves. Where, therefore, in Justice Bamford-Addo's words: "[the] provisions under Chapter 6 are made independent rights either by specific words or by necessary implication, they become of themselves justiciable rights."<sup>499</sup>

Though the Court did not sufficiently outline clear cut instances in which these principles can be held unarguably enforceable, its position is a marked departure from the "complete no" in other African countries. It contains some hope, though limited, on the justiciability of the Directive Principles. Perhaps a creative and purposive reading of such principles in conjunction with the enforceable rights will help avail the people with their constitutional benefits. It was thus right when the Court in *New Patriotic Party v. Attorney-General (CIBA Case)* declared indirectly justiciable Article 37(2) as a necessary adjunct of Article 21(1)(e). Both articles vest in the people the right to form or join associations free from state interference. It is therefore expected that the detailed Socio Economic Rights included in the Directive Principles will have a full life when tied with rights such as the right to life and human dignity contained in Articles 13(1) and 15(1)

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<sup>498</sup> *New Patriotic Party v. Attorney-General (CIBA Case)* supra note 449 at pp.743-44

<sup>499</sup> Ibid at pp.745. I think this is a moderate position as opposed to Justice Adade's radical *obiter* in *New Patriotic Party v. Attorney-General (31 December Case)*. He declared at page 66 "[I] do not subscribe to the view that chapter 6 of the Constitution, 1992 is not justiciable: it is. First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable. The evidence to establish the non-justiciability must be internal to the Constitution, 1992, not otherwise, for the simple reason that if the proffered proof is external to the Constitution, 1992, it must of necessity conflict with it, and be void and inadmissible: we cannot add words to the Constitution, 1992 in order to change its meaning."

respectively. Nevertheless, if the Supreme Court deserves praise on the enforcement of Socio-Economic Rights in Ghana, then, it is only limited to the two cases mentioned above. At least, the right to education was vindicated and there is positive jurisprudence to the effect that the Directive Principles *may* be justiciable. At least for now, they provide a clear body of law for potential Human Rights litigants to rely on.

#### ***d) The Cold Waters of the High Court***

The gains of the Supreme Court are significantly diluted by the High Court. In the single case on Socio-Economic Rights that went before the High Court, the matter was not in the least sympathetically considered. The conclusion reached denied the rights claimants the constitutional benefits of the Socio-Economic Rights. In metaphorical terms, the High Court poured cold water onto the limited gains of the Supreme Court. Given the fact that the two Courts belong to one cohesive judicial structure, it is thus difficult to suggest that the entire Judiciary has performed creditably well in the enforcement of the Socio-Economic Rights like their counterpart Civil/Political Rights. The situation is lamentable because in *Abel Edusie v Attorney-General & Director of Bureau of National Investigations (BNI)*<sup>500</sup>, the Supreme Court in a 3-2 majority decision held that it is only the High Court that has the sole original jurisdiction in the enforcement of the Fundamental Human Rights and Freedoms in Ghana. That means that the Supreme Court does not have a concurrent original jurisdiction with the High Court in matters of enforcing the Rights and Freedoms enshrined in the Constitution. This is an awkward position given the fact that many rights claimants are indigent and cannot bear the financial cost to sustain a legal battle through to the Supreme Court. This is exacerbated by a Bar, which is largely unwilling Bar to take up cases of that nature.

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<sup>500</sup> [22/04/1998] C.M. NO. 21/96.

Before advancing the reasons for the failures of the High Court, the case in question must be considered. In *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor*<sup>501</sup>, the plaintiffs had been squatters, traders and residents at “Sodom and Gomorrah” - a suburb of the City of Accra. They had been on this piece of land uninterrupted for close to 20 years. The Defendant was the City Authority. Some time in the year 1999, the government of Ghana through the defendant initiated a project referred to as the “Korle Lagoon Ecological Restoration Project”, which geographically covers the plaintiffs’ area of commercial activities and residence. The chief purpose of this project is to check flooding in some parts of Accra during the rainy season.

The execution of the project thus required that plaintiffs be evicted from their squalid shelters. They were not being offered alternative accommodation and relocation to different markets for their trading purposes. Acting under the apprehension that there is no legal duty to resettle and relocate plaintiffs, since they were nothing but squatters, the defendant served a two week eviction notice on them to vacate the place, else face forced eviction. Considering the potential enormity of economic and social consequences to arise from the eviction, the plaintiffs went to the High Court to seek an injunction against the defendant. Through their counsel, the plaintiffs argued that the pending eviction would, among other things, violate their rights to life, livelihood, housing, and dignity as set out in Articles 13, 15(1) 33(5) and 36(2) (e) of the Constitution. For the plaintiffs, these rights could only be taken away or abridged by a procedure established by law, which had to be fair and reasonable. In that case, they also sought an order that the defendant should relocate and resettle them. One presumption here is that the right to life and the right to work are integrated and interdependent. Therefore, if a person is deprived of his job as a result of his eviction from the land in question, his very right to life is put in jeopardy.

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<sup>501</sup> The Case was listed as SUI No. MISC 1203/2002 and was heard by Justice Yaw Appau in the High Court, Accra.

This is squared up with the contention that the State and its organs are under an obligation to provide the citizens the basic necessities of life.

The High Court rejected all these claims in answering the question whether the implicated rights will be violated by the eviction. Justice Appau predicated his decision in part on the legal status of the plaintiffs on the said land. Once it was established that the plaintiffs were merely squatters and did not have any legal right or interest in the land, the defendant was deemed justified with the eviction. At page 14 of the unreported decision, Justice Appau illustrated the court's position: it is erroneous to suggest that "these rights be achieved through lawlessness." By this view Justice Appau sought to imply that once the plaintiffs did not have any legal document to prove any proprietary interest or legal right in the land, their claims could not be sustained by the court. He made this position clearer by declaring that "[T]he mere eviction of plaintiffs who are trespassers, from the land they have trespassed onto, does not in anyway amount to an infringement on their rights as human beings."<sup>502</sup> The court further held that absent a binding contract between the parties, the defendant did not owe the plaintiffs any obligation to resettle them.

With these pronouncements, the defendant was empowered to evict thousands of people from the said land. Structures at Sodom and Gomorrah were within the next couple of days reduced to the ground. People's homes and belongings were gone. Within a twinkle of an eye, their source of income disappeared. They were faced with great social and economic uncertainties. Amidst this predicament were the threatened lives of hundreds of children and the elderly. In my view, this decision was wrong. In support of this view, I shall advance three independent reasons:

- i) asking and addressing the wrong questions

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<sup>502</sup> Page 15 of the unreported decision

- ii) failure to undertake a comprehensive and purposive reading of the Constitution and
- iii) Poor engagement with comparative jurisprudence.

### *e) Asking and Addressing the Wrong Questions*

This reason is simple. The plaintiffs went to court through a public law route – to protect their Constitutional rights to life, housing, dignity and livelihood. The Court could reasonably have determined: (i) the extent to which such rights are guaranteed by the Constitution (ii) whether the eviction would infringe these rights and (iii) whether the defendant has the constitutional obligation to respect such rights. Perhaps a determination of these questions could have then led the court to the issue of justification. These are legal questions framed on the provisions of the Constitution. Regrettably, the High Court ignored the relevance of this route and reduced the whole exercise to a private law question. In effect, two private law questions were addressed, ignoring the public law questions posed by counsel for the plaintiffs. These questions were (i) whether there was an enforceable contract between the two parties warranting resettlement of the plaintiffs by the defendant and (ii) whether the plaintiffs had legal rights in the affected land.

At a very basic level, it was of no use for the court to be talking about legal rights of the plaintiffs in the land when there was an admission on the facts that they were squatters. A squatter by definition would lack the necessary legal documents to make a successful case in court. This divests the question on the existence of an enforceable contract of its value. If plaintiffs do not have a prima facie legal right to the land, one wonders what the basis would be for an enforceable contract between the two parties before the court. It is thus surprising for the court to hold that the plaintiffs did not have any legal right to the land yet seems to suggest that there can be an enforceable contract between the parties. On what basis would the plaintiffs have entered into an enforceable contract with the defendant? The court was probably expecting a void contract.

However, even if the private law questions were rightly asked, the court seems to have ignored the fact that almost 20 years of uninterrupted effective occupation of a piece of land yields some interest in the land to the plaintiffs.<sup>503</sup> This does not necessarily require proof by legal documents as the court sought to do. Besides, by asking and addressing legal questions which were not the settled issues between the parties before the court amounts to a crude judicial abdication of duty. It is unfortunate that constitutional rights litigation ends up being addressed by the court as a contract and property case. Even supposing that both in law and in fact, the plaintiffs did not have legal rights in the land in question, it was premature for the court to have ended the proceedings the way it did. The court could have probed further to know whether under the Constitution the defendant as a public authority had an obligation not to unreasonably deprive plaintiffs of their shelter and means of livelihood. After all the said land is a public property.

## ***ii) Failure to Undertake a Comprehensive and Purposive Reading of the Constitution***

The High Court was not only wrong in addressing irrelevant questions but also failed to undertake a comprehensive and purposive reading of the Constitution. Article 33(1) of the Constitution invests in the High Court the authority to uphold the Fundamental Rights and Freedoms of all persons. It reads:

“[W]here a person alleges that a provision of the Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.”<sup>504</sup>

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<sup>503</sup> In Ghana, the doctrine of adverse possession is recognised as a legal rule and any one who has been in an interrupted effective occupation of a piece of land for a period of 12 years or more can claim title to the land. If the court thinks that the proper issue for determination hinges on ownership of the land, it is right that it considers in scope and context the how the title of the original owner of the land could have been extinguished by the plaintiffs nearly 50 years of occupation.

<sup>504</sup> Article 33(1) of the 1992 Constitution

By this, the Constitution contemplates both committed acts and those acts yet to be committed, but with the possibility of violating the Rights and Freedoms of persons. There is no need to wait for the act to be committed before the jurisdiction of the court can be seized. Once there is a reasonable apprehension that the intended act will contravene the guaranteed rights of the applicant, s/he is justified to apply to the High Court for a redress.

In this case the plaintiffs' claim was based on the contemplated eviction exercise by the defendant. This begs the question whether the contemplated act complained of will infringe upon any of the plaintiffs guaranteed constitutional rights. It forms the basis of a legitimate invitation for the plaintiffs to demonstrate which of their rights will be implicated by the eviction. The plaintiffs relied on Articles 13, 15(1), 33(5) and 36(2) (e) of the Constitution to suggest to the court that their rights to life, housing, dignity and livelihood would be violated by the intended eviction.

Article 13(1) No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.

Article 15(1) the dignity of all persons shall be inviolable.

Article 36 (1) The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to **provide adequate means of livelihood and suitable employment and public assistance to the needy** [my emphasis]. (2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include -(e) the recognition that the most secure democracy is the one **that assures the basic necessities of life for its people as a fundamental duty**/my emphasis].

It is obvious from these provisions that the plaintiffs are entitled to the right to life. But this, as in the contemplation of the Constitution, can be derogated from in a criminal conviction by a competent court of law. They also have the right to dignity. Lastly, the State has a constitutional obligation to provide adequate means of livelihood and the basic necessities of life. A combined purposive reading of these Articles would have suggested to the court that an eviction as carried

out by the defendant would result in a clear deprivation of the right to life, dignity, and livelihood of the plaintiffs.

First, what dignity does a person have if he or she has no home? What dignity do the plaintiffs have if they live in the streets with their wives and children without shelter? The eviction and the subsequent demolition of the plaintiffs' squalid shelters presumably deprived them of their dignity. They were rendered homeless. They were thrown into a state of wandering. Their children became street children. Hope for a better future faded into thin air. The value of parental control and guidance was banished from the uncertain lives of the children. In the face of all this, the weight of possible hunger and malnutrition perilously hangs over their much troubled heads. Worst of all, they shall confront the unrelenting attack by dangerous mosquitoes in the unfriendly open air in the night.

If the Constitution and the predicament of the plaintiffs thus justify an argument for the right to dignity, so will a contention for the right to housing. Though the latter right is not explicitly provided for in the Constitution, it is well within its contemplation. Article 33(5) speaks for this. It stipulates as follows:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

This means that the right to housing cannot be said to have been excluded from the Constitution. The only test for the court is to investigate whether or not the right to housing is one of such rights inherent in a democracy and is intended to secure the freedom and dignity of man. The court will not be required to identify such a right in a particular democracy. It is enough that the right is inherent in *a* democracy. It is irrelevant that some democracies have rejected the right in question. The Constitution only mentions the concept democracy. It does not compel the court to

adopt a particular conception of democracy. Nevertheless, the will of the Constitution would at least be enforced if the court adopts a conception that respects the dignity and freedoms of man. A denial of shelter to the plaintiffs that reduces their dignity to nought would have been avoided.

Yet, the plaintiffs were more concerned with the rights to life and economic livelihood. It was contended that an eviction would deprive them of their means of livelihood. On the face of the facts, the plaintiffs were not on the said piece of land as criminals nor were they there to commit any crime. They were there as victims of the seductions of urban economic opportunities and their determination to live. If the right to life means anything as provided for in the Constitution, one must have a means of livelihood. It is thus legitimate for the plaintiffs to contend that the right to live and the right to work are integrated and interdependent. If a person is deprived of his job as a result of his eviction from the land in question, his very right to life is put in jeopardy. It is doubtful how the State could live to its constitutional injunction to provide for the means of livelihood and basic necessities of life if the plaintiffs can be evicted from their place of commercial activities without resettling them. The crude message conveyed by the eviction to the plaintiffs was that “everybody for him/herself, God for us all.” Perhaps the evicted people were told to go and die. How does that help establish a just form of democracy?

However, it is not established by mere reference to these provisions that the defendant was constitutionally obliged to take reasonable steps to resettle and relocate the plaintiffs. Thus even if the High Court had purposively read these provisions so as to clothe the plaintiffs with any enforceable Socio-Economic Right, the legitimate test would still have been how was the defendant responsible. Such a test would have invited the court to consider Article 12 (1) of the Constitution. It reads as:

“[T]he fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislative and Judiciary and *all other organs of government and its agencies and, where applicable to them, by*

*all natural and legal persons in Ghana, [my emphasis] and be enforceable by the Courts as provided for in this Constitution.”*

The provision as stated, enjoins the State to respect the rights of all persons through the government. All organs and agencies of government are thus required to uphold this constitutional injunction. With the comprehensive political decentralisation<sup>505</sup> policy being practiced in Ghana, the defendant, Accra Metropolitan Assembly, is an agency of government. If the government of Ghana is expected to take reasonable steps to ensure the realisation of the rights of the people, none of its organs and agencies can distance themselves from such obligation. They are expected to conduct themselves within the confines of the constitutional obligation of the government. Accordingly, it is erroneous for the High Court to expect an enforceable contract between the agency of government and the plaintiffs before the reasonable steps of resettlement and relocation be deemed legitimate. Such an expectation as suggested by the court betrays a clear understanding and purposive reading of the Constitution.

It was not suggested anywhere in the course of litigation by the plaintiffs that the defendants did not have a compelling interest in the proposed project. What was painfully ignored was whether the defendant ought to have taken reasonable steps to resettle the plaintiffs following their eviction. It is my view that if the court had comprehensively but purposively read the Constitution, the inevitable conclusion would have been that the defendant does have a constitutional obligation to resettle the evicted plaintiffs.

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<sup>505</sup> This is Chapter 20 of the 1992 Constitution (Articles 240-256)

### *iii) Poor Engagement with Comparative Jurisprudence*

In the recent past, comparative constitutional jurisprudence has gained increased attention.<sup>506</sup> Its role in constitutional justice<sup>507</sup> has been insightful. Thus, there is a growing acceptance in constitutional adjudication,<sup>508</sup> particularly in Human Rights, of the influence of foreign courts. Depending upon the constitutional character of the polity, national courts may cite foreign decisions either to fill gaps in their domestic law, clarify a legal position, or attempt homogenising<sup>509</sup> constitutional ideals.<sup>510</sup> It is no doubt true that comparative constitutionalism exhibits some positive influence on judicial institutions world wide.

According to Ruti Teital, comparative jurisprudence is an ambitious enterprise with a broad aim to canvass enduring answers to common constitutional questions.<sup>511</sup> It is, particularly in transnational regimes like Ghana, at the centre of serious judicial inquiries.<sup>512</sup> Some even claim it is a vehicle to legal truth.<sup>513</sup> At best, it nourishes a presumption that ‘there is a significant

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<sup>506</sup> See generally V. Jackson & M. Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999); N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (Thomson/West St. Paul, MN, 2003); Sujit Choudhry *etd.*, *The Migration of Constitutional Ideas* (Cambridge University Press, 2006); Mitchel Lasser, *Judicial Deliberations: A comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004); Sujit Choudhry, “Globalisation in Search of Justification: Toward a Theory of Comparative Interpretation” (1998) 74 *Indiana Law Journal* 820; R. Ginsburg, “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication” (2002) 22 *Yale Law and Policy Review* 329; Bruce Ackerman, “The Rise of the World Constitutionalism” (1997) 83 *Va. Law Review* 771; *Comparative Constitutional Federalism: Europe and America* (Mark Tushnet ed. 1990); Mark Tushnet, “The Possibilities of Comparative Constitutional Law” (1999) 108 *Yale Law Journal* 1225 and Foreword, (1997) *Utah Law Review* 25. There is even a devoted journal for comparative legal scholarship besides these excellent individual works: *International Journal of Constitutional Law*.

<sup>507</sup> See T.R.S. Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (OUP, Oxford, 2001)

<sup>508</sup> Reference to foreign courts decisions has familiar practice in many courts around the world. There are plethora of cases in the Supreme Courts of America, Canada, Ghana, Zimbabwe and the Constitutional Court of South Africa citing foreign decisions as persuasive tools to constitutional adjudication.

<sup>509</sup> See Jeffery Goldsworthy, “Homogenizing Constitutions” (2003) 23 *Oxford Journal of Legal Studies* 483

<sup>510</sup> Note that this not an exhaustive list of the relevance of comparative legal studies generally. In fact, it said be essential for Parliamentarians interested in law reforms. See Jonathan Hill, “Comparative, Law Reform and Legal Theory” (1989) 9 *Oxford Journal of Legal Studies* 101

<sup>511</sup> Ruti Teital, “Comparative Constitutional Law in a Global Age” (2004) 117 *Harvard Law Review* 2570 at 2573.

<sup>512</sup> Norman Dorsen, Michael R., *et al (etd)*, *Comparative Constitutionalism: Cases and Materials* (Thomson/West St. Paul, MN, 2003) at p.1

<sup>513</sup> Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* (Tony Weir trans., Oxford University Press, 3d ed. 1998) (1977) - “comparative law offers the only way by which law can become international and consequently a science. Comparative law has started to put an end to the narrow-mindedness. The primary aim of comparative law as all sciences is knowledge.” *Ibid* at pp.15.

degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies.’<sup>514</sup> In other words, there are universal constitutional ideals that lay beyond the limited legal jurisdiction of a particular country. National courts are thus encouraged to engage constitutional jurisprudence of foreign courts in the course of judicial settlement of constitutional questions. Perhaps such an exhortation is not bereft of adjudicative relevance. In part, it facilitates the homogenization of such common constitutional ideals and yields a coherent jurisprudence for the legal regimes. It also affords judicial institutions the opportunity to understand and appreciate constitutional provisions in the courses legal disputes.

Nonetheless, it does not inevitably seek to shelve the objective of establishing an indigenous constitution, including a set of Human Rights protections.<sup>515</sup> Anne-Marie Slaughter argues that its aim is less to borrow than to seek the benefits of comparative deliberations.<sup>516</sup> This has been supported by Justice Claire L’Heureux-Dube. As she observes, “judges are not into passive reception of foreign decisions, but in active and ongoing dialogue.”<sup>517</sup> Of importance in these observations is the point that comparative constitutional jurisprudence is useful. Judges are to be cautious not to abandon domestic constitutional values in the course of “borrowing” from abroad. In effect, understanding the Constitution of a particular country must not only be inward. It can also be outward - referencing foreign decisions in an attempt to understand, interpret, explain and evaluate the values of your constitution. This does not necessarily warrant commonality of textual provisions, history, culture and social values.

If that is the case, it pays that the High Court in deciding the fate of the plaintiffs, should have engaged foreign decisions on similar facts. Perhaps had the court done so, the outcome may

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<sup>514</sup> *Ibid* at pp. 8

<sup>515</sup> Frederick Schauer, “The politics and Incentives of Legal Transformation” in *Governance in a Globalising World* (Joseph S. Nye & John D. Donahue ed., 2000) at pp.253-54

<sup>516</sup> Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44 *Harvard International Law Journal* 191 at 197

<sup>517</sup> Claire L’Heureux-Dube, “The Importance of Dialogue: Globalisation and International Impact of the Rehnquist Court” (1998) 34 *Tulsa Law Journal* 15 at pp.16

have been different. The point here is not about mere engagement with these decisions but reasonable engagement that seeks to understand the Constitution in protecting Human Rights in the country. The law in Ghana cannot develop if the courts deliberately choose to stay within the limited confines of the Ghanaian legal system. In fact, two important cases were suggested by Plaintiff's Counsel to the court. However, for the reason that the court had asked the wrong questions<sup>518</sup>, those cases were quickly dismissed as inapplicable. Had these suggested cases been properly considered, the defendant may have been deemed liable to resettle the plaintiffs.

First, in *Olga Tellis & Ors v. Bombay Municipal Corporation & Ors*<sup>519</sup> the Indian Supreme Court was confronted with similar facts arising from the fate of squatters and slum dwellers in the heart of the City of Bombay. The plaintiffs in this case, like their counterparts in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor*, faced the threat of an imminent eviction from the City Authority for erecting their hutments on pavements. They also depended on their slums to make a living by engaging in all kinds of menial economic jobs. One of the fundamental questions for the determination of the Court was whether the eviction would deprive them of their means of livelihood and consequently right to life. In answering this question in the affirmative, Chandrachud CJ for the court, stated:

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to

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<sup>518</sup> The court did not address the constitutional rights questions posed by both the facts of the case and Counsel for the Appellants.

<sup>519</sup> [1985] INSC 155 (10 July 1985)

livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life.<sup>520</sup>

The Court by this pronouncement, recognised livelihood as a necessary adjunct of the right to life. On the basis of this the City of Bombay was asked by the Court to resettle the slum dwellers and take all reasonable steps to avoid the deprivation of the squatters' means of livelihood. The court did not waste time and energy to consider the self- set-issues considered by the Ghanaian High Court. The existence of an enforceable contract was of no use. Nor was it relevant to consider whether the slum dwellers, who were there close to 20 years, have any legal right in the land. It was also not denied that clearing the pavements of the squatters was necessary to curb heavy vehicular traffic.

Given the similarity of facts in the two cases, a proper engagement with the reasoning of the Indian case would have helped the High Court. Of course, this depended on the assumption that the right questions would have been asked by the court. The court needs to have read the right to life together with right to livelihood. In the alternative, the court could have considered whether a deprivation of the means of livelihood may constitute a threat to right to life. The Constitution could have contemplated a right to livelihood as a component of the right to life. No doubt, the jurisprudence of the Indian court in this case would have been helpful. The wrong path that the High Court adopted closed all possibilities of utilising this useful jurisprudence.

In *South Africa v Grootboom*<sup>521</sup> the Constitutional Court of South Africa addressed similar issues arising from a similar set of facts. In this case squatters were evicted from their informal homes situated on a piece of land earmarked for formal low-cost housing. The question for the court was whether at the point of the eviction; the government was constitutionally

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<sup>520</sup> Ibid at pp.79-80

<sup>521</sup> [2000] 11 BCLR 1169

obliged to have taken reasonable steps to provide them with basic shelter until they obtained permanent accommodation. This also led the court to consider the question on the reasonableness of government measures in realising the squatter's right to housing. In a unanimous court, it was held that the eviction was in violation of the squatters' constitutional right to housing. Besides, the government has a positive constitutional obligation to provide adequate basic shelter to the plaintiffs after the eviction. The court discovered that after the eviction the squatters were abandoned to their fate. They were homeless yet the government talked about measures underway to get them homes. It was not clear when these homes would become available to them. On this account, the court ruled that the government policy on housing to the squatters was unreasonable.

The significance of this case to the Ghanaian High Court in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* lies in the pronouncement that the evicted persons must be given adequate basic shelter until they obtained permanent accommodation. It is thus reasonable for the High Court to have made an order before the eviction requesting the defendant to at least resettle and relocate the plaintiffs in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor*. This was an opportunity for the court to prevent a potential violation of the plaintiffs' right to housing. Even in *Grootboom*, the government demonstrated that it had a policy in place to satisfy squatters' right to housing. This was only rejected by the court on the grounds that it fails the standard of reasonableness. In the Ghanaian case, nothing of that sort was asked of the defendant. The High Court took a conclusive presumption that the right to housing was not implicated by the eviction.

The relationship of these two cases to *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* is obvious. The constitutions of the three countries either explicitly provide for or contemplate the rights to life, housing, and livelihood. The plaintiffs in the three cases are squatters without any legal right to their lands. The defendants are the government or government

agents. In all of them, the plaintiffs have been evicted for a just cause. Their respective lands were earmarked for projects with significant public interest. Yet the Courts in India and South Africa arrived at similar conclusions, differing significantly from the High Court in Ghana. If the High Court in Ghana failed the plaintiffs in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* it is because it poorly engaged these two cases.<sup>522</sup> At least a reasonable engagement with these decisions presumably, would have helped. The plaintiffs would not have been left dry. There is a persuasive moral force in them that would have tilted the judicial scales of justice in favour of the plaintiffs.

## ***Conclusion***

Very limited Socio-Economic Rights litigation in Ghana has led to a limited enforcement of such rights. However, the Supreme Court has done well to salvage the right to education as provided for in the Constitution. It also enunciates positive jurisprudence on the status of the Directive Principles in Chapter 6 of the Constitution. These modest achievements may reassure us that the Supreme Court will better its efforts to enforce Ghana's Socio-Economic Rights. However, the High Court has diluted these gains. In fact, it has missed the golden opportunity to enforce the rights to housing and economic livelihood. The vision of the Constitution to deal with poverty is crudely ignored. The decision in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* exacerbates the plight of the vulnerable and the poor. Unlike the Civil and Political Rights, this case illustrates the fact that the Judiciary in Ghana lacks one voice on the enforcement of Socio-Economic Rights. It thus makes it difficult to conclude that the courts are not without a serious blemish in the enforcement of Human Rights in Ghana. Unless the

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<sup>522</sup> By this, I meant the Court did not properly appreciate the judicial principles enunciated in these cases. Moreover, the Court failed to properly situate and utilise the reasoning of the India and South Africa Courts in the case of *Issa Iddi Abass & others v Accra Metropolitan Assembly and Anor*.

weaknesses left by this case are addressed, it is fair to say that the Ghanaian Judiciary to some extent betrays the Constitution.

## **CHAPTER SIX**

### ***CONCLUSION***

In our current century, serious thought has been given to an effective regime of Human Rights protection. Many countries have promulgated Constitutions with sufficient guarantees for Human Rights. Courts around the world have also been strengthened as part of the legitimate plan to enforce constitutionalised rights. Civil society organisations have engaged in enormous positive campaigns for governments to respect rights. In general, the level of Human Rights consciousness among the public has been high. Accordingly, people in both developed and developing countries entertain genuine hopes for Human Rights protection and enforcement.

Nevertheless, the results as to the adequacy of enforcement of these rights, especially by courts, in many countries vary. Some courts have relinquished their responsibilities leading to egregious violations of rights by irresponsible governments. Others have simply under performed, while some have credibly live to their constitutional task by enforcing the constitutionalised rights. If these varied outcomes are anything to go by, then it pays to begin to look at individual countries' performances. Perhaps we can record the successes and expose the failures. Such a venture becomes at least an empirical basis to encourage the good works and draw the attention of the appropriate institutions to redress the failures.

In this work, we have looked at the Human Rights situation in Ghana by considering the role of the Judiciary. After reading this work, it does become apparent that the Judiciary in Ghana's constitutional design is in a position to help advance the course of Human Rights in the country. It has a comprehensive institutional structure and a well mapped out jurisdiction. Besides, the Constitution explicitly guarantees its independence. Individual and institutional

autonomy, security of tenure, well regulated appointment and dismissal procedures and fiscal freedom are among the features of constitutional protection of the Judiciary. Given the important role of courts in building a culture of rights, an independent Judiciary is crucial for Human Rights and democracy. It becomes a protector of constitutional entitlements - Rights, and institutional safeguard of the citizenry against serious invasions of Fundamental Rights and Freedoms. Independence allows the courts to avoid the harmful prejudice and short-sightedness to which elected officials sometimes succumb. It emboldens judges to uphold Rights where democratic majorities are paralysed by prejudice or other more compelling political considerations.

However, independence of the Judiciary will mean nothing if the Constitution does not have adequate guarantees for Human Rights. In Chapter Two, a brief descriptive background was provided and outline of Human Rights regime in Ghana: the anatomy of the Ghanaian constitutional provisions on Human Rights. In principle, Human Rights have been constitutionalised in Ghana. Perhaps constitutionalisation of Rights exemplifies a better hope for Human Rights projects in democratic states, like Ghana. The 1992 Constitution of Ghana contains generous enforceable Human Rights provisions. These include Civil and Political Rights, Economic, Social and Cultural Rights, Women and Children's Rights and the Disabled and the Sick Rights. Beyond the Constitution, Ghana has ratified a number of International Human Rights Treaties which augmented the scope of the State's obligation to respect and protect the Rights of Citizens.

Yet these constitutional guarantees do not in themselves amount to an effective Human Rights regime. We need the power of Judicial Review as part of our constitutional arrangements to protect Human Rights from failed governments. Thus we cannot adequately deal with the protection of individual Rights under written constitutions without some attention to the mechanism of Judicial Review. In Ghana, Judicial Review is explicitly sanctioned by the

Constitution. The Constitution is declared supreme law of the land and the Courts are clothed with the power to determine the consistency and legality of all governmental actions to it. In the language of the Constitution, any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void. That is the constitutional criterion by which all acts could be tested and their validity or otherwise established.

Article 2 (1) provided the operative machinery for Judicial Review. It is the enforcement provision which empowered the Supreme Court to determine questions of constitutionality of any enactment, act or omission done under the constitution. A direct support for this provision laid in Article 130(1) which conferred original jurisdiction in the Supreme Court on “all matters relating to the enforcement of this Constitution” and “all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution.”

On the strength of Articles 2(1) and 130(1), the Supreme Court has the sole power and authority to settle all questions relative to the interpretation of the Constitution. They also provided the constitutional foundation for Judicial Review in Ghana - an institutional framework for the determination of the constitutionality of legislative and executive acts. However, Chapter Three also showed that pursuant to Article 33 of the Constitution, the High Court had a limited Judicial Review power as far as the enforcement of the Fundamental Rights and Freedoms is concerned. The High Court has the sole original jurisdiction in the enforcement of the Human Rights provisions in the Constitution. It is thus possible for the Court to invalidate actions of the Government if found to be inconsistent with the ends of the provisions on Human Rights.

Judicial Review nevertheless, has been attacked as illegitimate exercise of political power by the courts. The attack is rooted in the counter-majoritarian argument which suggested that the

exercise of the power of Judicial Review is undemocratic. Thus it is politically illegitimate to allow unelected few judges to decide as ultimate arbiters what the supreme law of the land means by either affirming or setting aside an Executive action or a piece of legislation enacted through the majoritarian democratic process. In response, it was contended that such an argument is grossly overstated. It is based on a number of presumptions which are difficult to sustain. Its strength rested on the process by which decisions are reached than the substance and value of such decisions. Indeed, the compelling value of Human Rights to the modern democratic State should be the key factor in the exercise of Judicial Review by the courts.

It was argued further that the exercise of Judicial Review in the enforcement of Rights, especially in a written constitution context is legitimate as it affords courts the power to enforce a higher body of law grounded in Rights. Thus Judicial Review is part of democratic institutional arrangement to protect Rights and a useful systemic check against abuse of power and violation of Rights. It fulfils an essential objective of public law (the Constitution) in protecting Human Rights or fostering the enjoyment of constitutional entitlements such as Rights. It thus entitles the courts to use their judicial power either in the process of declaring or interpreting the law to preserve such a value of public law.

A constitutional democracy such as Ghana needs a democratic institutional regime that can protect the people from possible deficiencies of politics. Judicial Review provided such an institutional framework by which the courts are able to scrutinise legislative and executive actions with the view to giving meaning to the constitutional commitment to Fundamental Human Rights and Freedoms. A review of government's actions potentially brings them within the "four corners" of the general values and Rights as guaranteed in the Constitution. As shown in both Chapters Two and Three, Rights are a metaphorical trump card, held by the people that can

prevent the Legislative and Executive from offending the rationale or value for which such Rights exist. Moreover, Rights are characteristically a “higher order of law” that trumps unhealthy acts of other democratic institutions. Judicial Review is therefore a reliable institutional design to protect Human Rights from harmful political actions.

With the power of Judicial Review, the Judiciary in Ghana has demonstrated both its successes and failures in enforcing Human Rights in the country. The Judiciary has been largely successful in enforcing the Civil and Political Rights in cases such as

- *New Patriotic Party v. Ghana Broadcasting Corporation,*
- *Republic v. Independent Media Corporation of Ghana (Radio Eye Case),*
- *Awuni v. West Africa Examination Council,*
- *Aboagye v. Ghana Commercial Bank Ltd,*
- *Mensima & Others v. Attorney-General,*
- *New Patriotic Party v. Attorney-General (CIBA Case),* and
- *New Patriotic Party v. Inspector General of Police.*

In particular, we have seen with relative contentment in these cases, a generous reception given to the Rights of Free Association, Expressive Freedom, Administrative Justice and Free Assembly. Judicial recognition and enforcement of such Rights formed the basis of a true open democracy and effective Human Rights regime. The Judiciary in Ghana can do better in upholding the basic tenets of justice and the Constitution if the people are free to debate and discuss public issues. It is also central for the growth of the Ghanaian fledging democracy that individuals and groups are availed of the benefits of administrative justice. People should be free to associate and assemble for any lawful course. Any unreasonable limitation on these Rights will signal possible difficulties in attaining the blessings of liberty and justice.

In Chapter Four, it was recognised with regret that very limited Socio-Economic Rights litigation in Ghana has led to a limited enforcement of such Rights. However, the Supreme Court

has done well in *Awuni v. WEAC* to protect the Right to Education as provided for in the Constitution. The Court also enunciated positive jurisprudence in *New Patriotic Party v. Attorney-General (CIBA Case)*, on the status of the Directive Principles in Chapter 6 of the Constitution. In fact, the Court ruled that the Directive Principles may be enforceable if read together with the Rights provided for in Chapter 5 of the Constitution. We are thus fortified by such pronouncement and limited achievements to conclude that the Supreme Court may rise to its constitutional task to enhance the enforcement of Socio-Economic Rights in the country.

Nevertheless, these limited gains have been diluted by the High Court. The High Court in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* failed to enforce the Rights to Housing and Economic Livelihood. The vision of the Constitution to deal with poverty was therefore disingenuously ignored. The decision at best exacerbated the plight of the vulnerable and the poor. On this account, we argued that unlike the Civil and Political Rights, the High Court decision in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor* illustrated the fact that the Judiciary in Ghana lacked a voice of unanimity on the enforcement of Socio-Economic Rights. The decision has established a serious blemish on the Judiciary in the enforcement of Human Rights in Ghana. Until the weaknesses left within the Ghanaian Human Rights constituency by this case are addressed, the Ghanaian Judiciary has betrayed the Constitution.

A necessary step to guaranteeing a better future for constitutionalised rights in Ghana is for the Judiciary to take the route of comprehensive purposive approach to Human Rights adjudication. The discovery and enforcement of the true purpose of the Constitution is imperative for the people of Ghana. A purposive approach to Rights adjudication will help unearth the fundamental assumptions that the Constitution sought to enforce. The Judiciary must go beyond mere reading of single provisions of the Constitution on Fundamental Rights and Freedoms. The

fundamental assumptions of the Constitution in enforcing the values underlying Human Rights cannot be unearthed and enforced if the Judiciary adopts a narrow and literal interpretive approach to adjudication. This is especially the case for the High Court which ignored an all-inclusive and purposive reading of the Constitution in *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor*. In that case, a blatant travesty of the Constitution's vision to deal with poverty and vulnerability in the country occurred. It was a sordid end of the determinations of a group of citizens to have their Rights to housing and economic livelihood recognised and enforced.

Perhaps a possible constitutional rationale for the High Court's narrow approach to Human Rights adjudication is the fear not to engage in constitutional interpretation, a power it does not have. Under the 1992 Constitution, only the Supreme Court has the power to interpret the Constitution. Be this as it may, a restrictive conception of such a power so as to discount the potential of the High Court ever interpreting the Constitution is misplaced. The power of Judicial Review through which this interpretative duty of the Judiciary is exercised is a shared one. It is not absolutely centralised. The High Court has a limited power of Judicial Review pursuant to Article 33 in enforcing the Fundamental Rights and Freedoms guaranteed under the Constitution. This implies that government actions that trampled upon such rights can be set aside by the High Court. Such a responsibility cannot be carried out without the High Court ever determining the constitutional character of the impugned action. The profound challenges of constitutional and Human Rights transformation facing Ghana will not wither away if the Judiciary bogs itself down with a centralised conception of Judicial Review power.

It will be anathema to a progressive and effective Human Rights regime in Ghana if the Judiciary remains insular in its conception of the values underlying the Human Rights provisions

in the Constitution. Comparative jurisprudence provides enormous insights to understanding and clarifying our constitutional assumptions, both factual and normative, which lay at the core of the Human Rights provisions. It is essential that the courts take into account, the decisions of foreign courts and Human Rights institutions in adjudicating rights cases in Ghana. Such a step will enable the courts to maximally utilise certain constitutional and judicial affinities and principles from other jurisdictions in enforcing guaranteed rights in our Constitution. This can be done through a dialogical interpretative approach that interrogates the reasoning of comparative constitutional jurisprudence in order not to blindly universalise our constitutional culture.

In all, the “Blue Light Province” of the Judiciary, as discussed in this work, left Ghanaians with hope in enforcing Human Rights in the country. Nonetheless, Ghanaians’ must endeavour to establish a strong Rights support structure that will take the gains of our constitutional democracy further. Ghanaians need to steer up their Human Rights consciousness by taking effective steps to knowing what the Constitution provided for them as Fundamental Rights and Freedoms. The Government must intensify civic education in the country in respect of its constitutional obligation. Moreover, Human Rights NGOs in the country must devote some time and resources to court cases on Human Rights especially the Socio-Economic Rights. Likewise, the Ghanaian bar should also demonstrate more zeal and will to cases on the Socio-Economic Rights as provided for in the Constitution. Lastly, judges should be encouraged to attend judicial conferences around the world with the view to exposing them to the relevance of comparative constitutional and Human Rights jurisprudence. Armed by this Rights support structure, we may be able to effectively deal with the dangers and defects of the “Red Light Province” of the Judiciary. Ghana’s fate as a nation lies in the fundamental assumptions of the Constitution: and everything possible must be done to uphold and enforce these.

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