

## ANALYSEN UND BERICHTE

### The Limits of Human Rights: Some Aspects of the Ghanaian Fourth Republican Constitution<sup>1</sup> in Perspective

By *Kofi O. Kufuor*

#### Introduction

The Fundamental Human Rights and Freedoms of all persons resident in Ghana are protected in Chapter 5 Articles 13-30<sup>2</sup> and Article 162.<sup>3</sup> These provisions are part of the entrenched provisions of the Constitution.<sup>4</sup> The effect of entrenching the human rights and freedoms in the constitution is to provide added protection from encroachment by the state by subjecting them to rigorous amendment procedures.

The human rights provisions can only be amended, in the final analysis, not by a sole act of Parliament after due consideration of a bill for that purpose, but by a referendum in which a minimum of forty percent of eligible voters shall vote and seventy-five percent of those voting shall vote in favour of a bill to amend any or all of the provisions relating to human rights.

- 1 The text of the Constitution is reprinted in the "Peoples Daily Graphic Supplement" (no date) 1992, parts 1-3 (hereinafter "Daily Graphic Supplement"). In a referendum held on 28th April 1992, more than 90 % of those who voted approved of the Constitution. See "Constitutional Referendum", 29 Africa Research Bulletin, Political, Social and Cultural Series, No. 4, April 1st-30th, 1992, pp. 10535-10536. Ghana obtained its independence from Britain in 1957 and since then has had three Republican Constitutions that have all been usurped, suspended and later abrogated in 1966, 1972 and 1981.
- 2 *Ibid.*, Daily Graphic Supplement, *supra* note 1, part 1, pp. 2-3.
- 3 *Ibid.*, Daily Graphic Supplement, *supra* note 1, part 1, pp. 5-6.
- 4 The "Entrenched provisions", "non-entrenched provisions" and the procedure for the amendment of both are set out in Chapter 25, Articles 290, 291 and 292; Daily Graphic Supplement part 3, p.4.

The Constitution also provides for the protection of the rights of certain classes of persons who were not accorded special protection under the Constitution of the Third Republic.<sup>5</sup> For example, the rights of surviving spouses have been developed further to give them not only the right to a reasonable provision out of the estate of a deceased spouse whether that spouse died intestate,<sup>6</sup> but also they have the right of equal access to property jointly acquired during marriage as well as the equitable distribution of jointly acquired property upon dissolution of a marriage.<sup>7</sup>

Furthermore, a comparative examination of the Third Republican Constitution leads to the conclusion that very few economic, social and cultural rights were given constitutional protection.<sup>8</sup> The Fourth Republican Constitution specifically declares that the right to work, rest, leisure and holidays with pay, education and culture are rights that the citizen is entitled to.<sup>9</sup> Additional protection is accorded to sick persons under Article 30 wherein a person who is sick cannot, in the event of his inability to give his consent, be denied medical care, education or any other social or economic benefit by reason only of economic or religious belief.<sup>10</sup>

The above constitute circumstances where the drafters of the Constitution sought to develop a constitutional regime protecting human rights to a greater extent than under the previous constitution. In spite of this, the pith of this article is to determine the full extent of the protection of civil and political rights as well as economic and social rights under the Constitution.

## 1. The Right to Life

There is no absolute right to life under the Constitution. It does not abolish, or entreat Parliament to abolish, the death penalty. All that the Constitution does in respect of the right to

<sup>5</sup> The Constitution of the Third Republic of Ghana came into force on the 24th of September 1979. See, Constitution of the Third Republic of Ghana (Promulgation) Decree, 1979, Armed Forces Revolutionary Decree 24, 1979. The Constitution was suspended as a result of a *coup d'etat* staged on the 31st of December 1981.

<sup>6</sup> Under the Third Republican Constitution, the rights of spouses were limited to the provision of reasonable part of the estate of the other spouse notwithstanding his or her dying intestate. See Third Republican Constitution, *supra* note 5, Article 32 (3).

<sup>7</sup> *Ibid.*, Daily Graphic Supplement, *supra* note 1, Article 22 part 1, p. 3.

<sup>8</sup> The Third Republican Constitution, as far as economic rights were concerned, only protected the right to associate freely. This, however, was not expressly described as an economic right but was placed in the realm of civil and political rights. See Third Republican Constitution, *supra* note 5, Article 29 (1)-(3) at pp. 30-31.

<sup>9</sup> *Ibid.*, Daily Graphic Supplement, *supra* note 1, Article 24 part 1, p. 3.

<sup>10</sup> *Ibid.*

by subjecting them to rigorous amendment procedures.

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### 3. The Civil and Political Rights of Lawfully Resident Aliens

Aliens lawfully resident in Ghana have no protection of their right to remain in Ghana.<sup>15</sup> Prevention from possible expulsion could have been placed within the context of lawfully

<sup>11</sup> *Ibid.*, Article 13 (1), p. 1.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, derogations from the right to personal liberty are set out in paragraphs (a)-(g).

<sup>14</sup> *Ibid.*

<sup>15</sup> All foreign nationals without residence permits were expelled from Ghana in 1969. The expulsion order was aimed at giving Ghanaians control over the country's retail trade which was virtually the monopoly of non-nationals (mainly Nigerians). See *N. Chazan, An Anatomy of Ghanaian Politics: Managing Political Recession*, Boulder (1983), pp. 159-160. The expulsion decision was questioned on the grounds that a considerable number of supposedly "illegal" aliens had resided in

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resident aliens being expelled only in pursuance of a decision that is taken lawfully and provision could have been made for each alien who is the subject of an expulsion order to appeal against a decision taken to expel him and to be represented for the purpose before a competent court or tribunal.

#### 4. Duties of the Citizen

Article 41 (a)-(k)<sup>16</sup> imposes duties on the individual and expressly states that the exercise and enjoyment of rights and freedoms is inseparable from the performance of the citizens duties and obligations. The duties of the individual are both civil and political on the one hand, and economic, social and cultural on the other. An important question in this regard is what effect do these duties have on the enjoyment of individual rights under the Constitution? For example, if the citizen fails to carry out the obligations imposed upon him under paragraph (a) "to promote the prestige and good name of Ghana and respect the symbols of the nation"<sup>17</sup>, does this imply that he loses his right to protection from slavery and forced labour guaranteed under Article 16 (1)-(3)?<sup>18</sup>

Two widely differing meanings can be given to the provisions of Article 41 and their relationship with the enjoyment of human rights under the Ghanaian Constitution. Interpreted *stricto sensu*, the wording of Article 41, coupled with the provision in the preamble to the Constitution that affirms the commitment of Ghanaians to "probity and accountability" (in public life)<sup>19</sup>, could be construed to mean that if the individual fails to carry out his obligations to his fellow citizens, his exercise of his fundamental rights and freedoms could be curtailed.

On the other hand, a permissive interpretation could be submitted, rendering the duties in Article 41 more morally persuasive statements that have no juridical effect whatsoever. First of all Article 41 is not an entrenched provision of the Constitution. It should be noted here that unlike the provisions on human rights and fundamental freedoms, Article 41 can be amended by a two-third majority of the members of Parliament voting at the time after taking into account, but not being bound by, the advice of the Council of State.<sup>20</sup> There is no requirement that the bill be submitted to the electorate for approval by a referendum, and

Ghana for up to sixty years or, had been born in Ghana and knew of no other country apart from Ghana.

16 *Ibid.*, Daily Graphic Supplement, *supra* note 1, part 1, p. 5. Apart from this, see also comments at pp. 15-17 *infra*.

17 *Ibid.*

18 *Ibid.*, p. 2.

19 *Ibid.*, Preamble to the Constitution, p. 1.

20 See Article 291, *ibid.*, part 3, p. 4.

the time period for consideration of the bill is only two months as compared to the amendment of an entrenched position where the bill can be introduced into Parliament only 6 months after it has been published in the *Gazette*.

Although this cannot be construed to be conclusive proof of the fact that the enjoyment of the fundamental rights under the Constitution cannot be restricted should the individual fail to fulfil his duties under Article 41, it can be submitted that the drafters of the Constitution intended, at the very least, to attach greater legal significance to the protection of civil and political rights and economic and social rights and, as such, this is supportive, to a considerable extent, of any argument that seeks to make the rights of the individual independent of the performance of his duties. In the final analysis, however, the question as to whether the individual can have his rights restricted for failing to carry out his duties under the Article 41 and the issue of the legal enforceability of the duties under the said Article will be a matter of interpretation by the courts.

##### **5. Article 34 of the First Schedule - Transitional Provisions of the Constitution and its Implications for Human Rights**

The protection of human rights in Ghana does not begin with the coming into force of the Constitution. Human Rights are sacred at all times and the opportunity to redress any injustice done to a person or group of persons should always be within the competence of the national courts or parliament. The Constitution fails to take this into account in conferring powers on the judiciary. From a reading of the relevant sections of the transitional provisions, the Constitution purports to oust the jurisdiction of the courts over certain issues and the effect could be the denial of justice to individuals whose rights have been violated. Article 34 (3)<sup>21</sup> provides us with the main bone of contention. It states that

"For the avoidance of doubt, it is declared that no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defence Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defence Council or the Armed Forces Revolutionary Council or by any person appointed by the Provisional National Defence Council or the Armed Forces Revolu-

21 *Ibid.* The transitional provisions are set out in part 3, pp. 7-9. Article 34 is at p. 8. Article 34 indemnifies the persons for acts they committed in pursuance of an unconstitutional change of government. The Provisional National Defence Council (1981-) and the Armed Forces Revolutionary Council (1979 June-September) are the only two military juntas that are indemnified not only for the act of overthrowing the government but also for all acts taken by them or in their name for the duration of their respective regimes. Sections 34 and 35 (*infra*) of the transitional provisions cannot be amended, see section 37, p. 8. Additionally the transitional provisions are to have effect notwithstanding anything to the contrary in the constitution. See Article 299, part 3, p. 6.

tionary Council in the name of either the Provisional National Defence Council or the Armed Forces Revolutionary Council shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act".

The legal interpretation of this paragraph is that any violation of individual rights during the two periods of military rule in question cannot be redressed by parliament or the courts. The provision fails to take into account the probability of the continuing violation of the rights of the individual arising out of a decision or act of the members or on behalf of the members of the two military juntas.

Furthermore, Article 35 (1)<sup>22</sup> maintains that any confiscation of any property and any other penalties imposed by or under the authority of the Armed Forces Revolutionary Council or the Provisional National Defence Council shall be irreversible by any authority under the constitution subject to the exceptions contained in paragraph (2).<sup>23</sup> The probable (but possibly not desired) effect of these provisions is to place significant limits on the rights of persons resident in Ghana.

## 6. Economic and Social Rights

Economic, social (and cultural) rights are aimed at the improving the life of the individual in society. They are set out in Articles 6-15 of the ICESCR.<sup>24</sup> The critical question that arises for determination in respect of economic and social rights in the Ghanaian Constitution is whether they amount to enforceable human rights at all.

The view held by one school of thought is that second generation rights can be given the same value and weight as civil and political rights. This position on the nature of second generation rights is given conceptual backing by some scholars. Donnelly stresses that both categories of rights are interdependent and indivisible and thus it is unrealistic to try and draw a demarcation line<sup>25</sup>, whilst Van Hoof<sup>26</sup> opines that there is the need for an alter-

<sup>22</sup> *Ibid.*

<sup>23</sup> Article 35 (2) provides for extenuating circumstances. It allows for the restoration of property seized if it is established by the Commissioner for Human Rights and Administrative Justice that the property was acquired lawfully.

<sup>24</sup> Articles 20 (1), 22, 23, 24, 25, 26, 27. See International Covenant on Economic, Social and Cultural Rights. Text is reprinted in *M. Hamalengwa / C. Flinterman / E.V.O. Dankwa* (eds.), *The International Law of Human Rights in Africa*, Dordrecht (1988), pp. 168-174.

<sup>25</sup> *J. Donnelly*, *Universal Human Rights in Theory and Practice*, Ithaca (1989), pp. 28-45. See also *A. Pollis*, *Liberal Socialist and Third World Perspectives of Human Rights*, in *P. Schwab / A. Pollis* (eds.), *Towards a Human Rights Framework*, New York (1982), pp. 1-26. In this paper, she analy-

native conceptual framework on the legal nature of economic and social rights which would reflect changes in society such as the increase in the frequency of relations in society as a result of developments in science and technology in the post second world war period, the growing dependence of people on one another and upon the state, and the far-reaching demands that the individual makes and continues to make on the modern state.

On the contrary, a rebuttal to this broad interpretation of the concept of human rights is afforded by the school of thought that articulates the view that economic and social rights are in a distinctly separate grouping and cannot be enforced in the courts in the same way as civil and political rights.<sup>27</sup> Economic and social rights are also seen as unreasonable rights. They are open-ended and it is difficult to envisage the state being able to provide adequate medical care or education or work for all its needy inhabitants.<sup>28</sup> Moreover economic and social rights, as a list of demands, tend to multiply for no clear standard informs them and no great reflection produced them. They are merely positions that the citizens desire and they wish that either the state or the wealthy nations of the world could bestow these wants upon them.<sup>29</sup>

The Fourth Republican Constitution marks a shift in the recognition of economic and social rights as rights that can be incorporated into the constitution. But despite this constitutional acknowledgement, it still remains to be seen (within the framework of the above conceptual analysis) of all the economic and social rights can be endowed with the element of justiciability that civil and political rights have and thus, legally, rank *pari passu* with the former. The evaluation of their enforceability will depend on the wording of the relevant provisions concerning economic, social and cultural rights.

ses the ideological underpinnings of the rationale behind granting economic, social and cultural rights the same legal effects as civil and political rights.

26 *G.J.H. Van Hoof*, The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views, in *P. Alston / K. Tomasevski* (eds.), *The Right to Food*, Boston (1984), pp. 97-110, at pp. 105-106.

27 See for example *E.W. Vierdag*, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, 9 *Netherlands Yearbook of International Law*, 1978, pp. 69-105, where, at p. 105, he describes the rights in the ICESCR as "legally negligible". Henkin also argues forcefully that "second generation" rights are not rights that are in the same category as civil and political rights. See *L. Hankin*, Economic-Social Rights as "Rights". A United States Perspective, 2 *Human Rights Law Journal*, 1981, (Nos. 3-4), pp. 223-236. His contention in this paper is that the state is under no constitutional obligation to protect the less fortunate in society from economic deprivation, neither is it compelled to take measures to ensure the right to work or to uphold any other economic and social rights.

28 *C. Orwin / T. Pangle*, The Philosophical Foundations of Human Rights, in *M.F. Plattner* (ed.), *Human Rights in our Time*, Boulder (1984), pp. 1-21, at p. 15.

29 *Ibid.*

The Ghanaian Constitution recognizes economic, social (and cultural) rights as the right to work, the right to just and favourable conditions of work, the right of the individual to form and join trade unions, the right to an adequate standard of living, the right to health, the right to education and the right to take part in the cultural life of one's country.<sup>30</sup> The stress placed on economic and social rights can be said to be a consequence of the commitment of the ruling military junta, the Provisional National Defence Council (PNDC), to create a new democracy in Ghana. In its initial set of policy guidelines<sup>31</sup> the PNDC emphasized the need to rethink the meaning of democracy in Ghana so as to highlight "the creation of the material basis for ensuring a democratic and popular participation (in government) as well as health schemes, housing, food and transportation to ensure the physical, spiritual, moral and cultural quality of life of our people".

### *The Right to Work*

The right to work<sup>32</sup> is an absolute right under the Constitution. Its enjoyment or enforceability is not subject to any possible derogations by the state. Additionally it receives extra *de jure* force when juxtaposed with Article 15 (2) (b)<sup>33</sup> which states that no person shall be subjected to a condition that is likely to detract from his dignity and worth as a human being. A liberal interpretation of the right to work could be understood to mean that not only does the right to work have constitutional protection, but also all working conditions should be humane and dignified and should thus conform to the provisions of Article 15 (2) (b).

### *The Right to Leisure*

Paragraph 2 of Article 24<sup>34</sup> assures the individual or rest, leisure and the reasonable limitation of working hours. This provision is however not a right but an "assurance". Although it is not limited by any derogation clauses, its justiciability would have been greatly enhanced if it had been expressly declared to be a "right". The use of the word "assurance" could be taken to connote that the rights set out in paragraph 2 amount to a moral goal or objective that should be striven for and not a right that can be executed.

30 *Ibid.*, Daily Graphic Supplement, *supra* note 1, Article 24-26, part 1, p. 3.

31 Preamble to the "Policy Guidelines of the Provisional National Defence Council", produced by Ghana Information Services Department, May 1982, p. 8.

32 *Ibid.*, Daily Graphic Supplement, *supra* note 1, part 1, p. 3.

33 *Ibid.*, p. 2.

34 *Ibid.*, p. 3.

### *The Right to Join or Form Trade Unions*

The right to join or form trade unions is enshrined in paragraph (3) of Article 24<sup>35</sup> and in Article 21 (1) (e).<sup>36</sup> Trade union rights are, subject to the conditions of the law, rights that the individual can enforce. In spite of this protection of the right to join a trade union, the Constitution is silent on the right to strike. The provisions of Articles 21 (1) (e) and 24 (3) merely declare that the right to join or form a trade union is in order for the individual to promote and protect his interest. The absence of constitutional guarantees of the right to strike (a powerful weapon for the protection of the right to form trade unions and a ramification of the right to associate freely) renders the efficacy of the provisions under consideration highly debatable.

### **7. The State and the Enforcement of Economic and Social Rights**

Of considerable importance in construing economic and social rights as rights that are legally enforceable is the extent to which the state can be compelled to institute measures geared towards the realization of these rights. Economic and social rights are rights that exist in the main to protect the weaker and less fortunate sections of society. Illiteracy, ignorance and disease normally prevent the subjects of these rights from enjoying them. It is therefore incumbent upon the state to work towards the realization of these rights on behalf of the disadvantaged and dispossessed of the community.

In consideration of the above, it remains to be seen if the constitution delineates measures binding upon the state for the realization of the economic and social rights. To analyze this, we must establish if the right to compel or coerce the state into taking the necessary steps for the realization of these rights exists under the Constitution.

Article 12 (1)<sup>37</sup> asserts that the fundamental human rights and freedoms are to be respected and upheld by the Executive, Legislative and Judiciary as well as all other organs of government and its agencies and, furthermore, that these rights are to be enforceable in the Courts. Article 12 (1) makes no distinction between the two categories of rights with respect to their legal enforceability.

Extra measures designed to establish the juridical nature of economic and social rights under the Constitution are provided for by way of the special consideration given to

<sup>35</sup> *Ibid.*, p. 3.

<sup>36</sup> *Ibid.*, p. 3.

<sup>37</sup> *Ibid.*, p. 2.

children under Article 28. Article 28<sup>38</sup> enjoins Parliament to enact laws that will ensure the right of children to reasonable provision out of the estate of their parents whether they were born out of wedlock or not, to protect children from engaging in work that constitutes a threat to their health, education and development, and for the protection and advancement of the family as the unit of society in order to safeguard the rights of children.

The protection of both categories of rights is further enhanced by Article 33. Under this Article, where a person alleges that his rights have been violated or are likely to be violated, he may apply to the High Court for redress<sup>39</sup> and the High Court may, in securing the protection of the individuals rights, issue such orders or writs in the nature of *habeas corpus*, *certiorari*, *mandamus*, *prohibition* and *quo warranto*.<sup>40</sup>

Despite the above constitutional provisions, the question that remains to be answered (given the constraints on the economy of a third world country like Ghana) is how the right to work can be enforced in the courts, or how the individual can bring a suit against the state on the grounds that as a result of government policy his right to health has not been upheld. The view of the present writer is that the test of their justiciability will be determined in the event of an aggrieved person bringing an action before the courts claiming that the State had failed to uphold his economic or social rights.

## Conclusion

The protection of human rights under the Constitution is a bold step in the direction of guaranteeing the liberty of the individual. There is, however, scope for extra measures to be taken to provide greater safeguard of the rights of the individual. Such measures would be in the form of

- Parliament passing bills designed to supplement the rights guaranteed under the Constitution;
- the Supreme Court, in the exercise of the powers conferred upon it under Article 130<sup>41</sup>, providing a liberal interpretation of the fundamental human rights and freedoms guaranteed by the Constitution.

<sup>38</sup> *Ibid.*, p. 3.

<sup>39</sup> *Ibid.*, p. 4.

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

<sup>41</sup> *Ibid.*, part 2, pp. 2-3.

## ABSTRACTS

### **The Limits of Human Rights: Some Aspects of the Ghanaian Fourth Republican Constitution in Perspective**

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This paper examines some of the provisions relating to human rights under Ghana's Fourth Republican Constitution. The underlying theme of this analysis is a critical look at civil and political rights, and economic and social rights. The objective in this respect is to discuss the extent of the individuals' rights guaranteed under the Constitution.

Although this paper does not have as its specific methodology a comparison between the constitutional provisions on the one hand and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on the other, both Covenants have served as "yardsticks" in the appraisal of the human rights provisions of the Ghanaian Constitution.

### **The Evolution of Cooperative Legislation in Cameroon**

By *Godfred A. E. Penn and Wawa A. Ngenge*

On the background of the current difficulties of Cameroon's economic development process, the Government of Cameroon decided to strengthen the role, among others, of cooperative societies representing private economic effort. A respective Government Policy Declaration of early 1991 was followed by the elaboration of a new legislation on cooperatives and common initiative groups which finally entered into force in 1992. The article reviews the historical roots of the law of cooperatives in both former parts of Cameroon and critically assesses the new legislation against this background. The authors conclude that, despite some shortcomings in contents and language, the new law constitutes a more liberal approach towards such private groups than its predecessors and thus represents a sign of hope in today's economic situation.