



11TH JURISTS' CONFAB, AT SCHOOL OF GRADUATE STUDIES AUDITORIUM, UNIVERSITY OF CAPE COAST. DATE: FRIDAY, 28TH JUNE, 2024

A paper delivered by Commissioner for Human Rights and Administrative Justice (CHRAJ), Dr. Joseph Whittal on the Theme: "Human Rights Under The 1992 Fourth Republican Constitution: Threats and Triumphs"

1.0 Introduction

The Preamble to the Universal Declaration of Human Rights (UDHR) stipulates that ***"it is essential, if a man is not to be compelled to have a recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"***. The place of human rights in securing good governance is beyond question. For the purpose of government is to establish a framework for the protection of the personal liberties and the improvement of the socio-economic wellbeing of citizens. Anything short of that would pass for Kelsen's description of government as a band of "armed robbers". Unquestionably, the idea of government invokes a

certain modicum of respect for human rights and dignity and any government that rejects this ideal is likely to suffer a crisis of legitimacy.

Events leading to the promulgation of the 1992 Constitution and the very foundation of the fourth Republic hinged on the essence of Human Rights. Human Rights are the foundational ethos on which the 1992 Constitution was built, as can be seen for instance in the preamble to the Constitution, chapter 5 and to some extent the Directive Principles of State Policy in chapter 6 which prescribes the general philosophical approach against which governance should be tailored. A national survey undertaken by the National Commission for Democracy demonstrated a very strong desire by the people of Ghana for a system of government that would not only respect, but also deepen the culture of respect for human rights. The 1992 Constitution thus became the product of the expressed desire for the establishment of a liberal state to champion the cause of human rights and jettison the military regimes which had significantly ruled the country for two decades.

The preamble to the 1992 Constitution proclaims the people as the source of authority; that the people derive their authority from God who grants them their natural and inalienable rights. It further stipulates that the people in the exercise of that God given authority, have given to themselves the present Constitution which among its pristine commitments is the protection and preservation of fundamental human rights and freedoms. In keeping with this commitment, the 1992 Constitution makes provision for a plethora of guaranteed fundamental human rights and freedoms and also makes provision for their protection and preservation by the courts and a national human rights body, the Commission on Human Rights and Administrative Justice (CHRAJ).

2.0 Human Rights Prior to the 1992 Fourth Republican Constitution

History they say is a guide to the present and the future. It would be useful to give a historical context to the evolution of human rights in Ghana.

Like all other former British colonies Ghana, with the exception of India and Nigeria was ushered into independence without an elaborate provision for the protection of human rights in its first post independence Constitution. Until the start of the millennium the classical doctrine of parliamentary supremacy was the dominant discourse with the consequent presumption that constitutional guarantees of principles of civil liberties was an exercise in futility. Dicey, one Scholar who shared similar views had contended that the protection of human rights through the common

law afforded greater protection than the constitutional instruments because according to Dicey while the former focuses on the availability of remedies, the latter emphasizes the existence of mere rights. Hence Dicey's view that the *Habeas Corpus Acts* declared no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberties. It was believed that in view of the concept of parliamentary supremacy, parliament would be capable to defend human rights and freedoms. This worldview thus influenced the court's decision where Lord Wright in the case of *Liversidge v Anderson* held that the '*safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has evolved.*

This of course influenced the nature of the first post independence constitutions in the former British colonies with no elaborate provision for the protection of fundamental human rights. The 1960 Constitution was therefore put to test in the infamous case of *Re: Akoto & 7 Others* where the constitutionality of the Preventive Detention Act was questioned in relation to the Constitution. Unfortunately, the Supreme Court affirmed the constitutionality of the Preventive Detention Act. The seeming judicial deference to the executive action paved way for the wanton violation of the rights of citizens both high and low who were incarcerated without fair trial.

These developments certainly influenced the drafting of the 1969 Constitution which entrenched fundamental human rights to demonstrate a departure from the human rights violations which were experienced during the first Republic. Even though the 1969 Constitution was overthrown in 1972, when the opportunity presented itself once more, the 1979 Constitution also entrenched the fundamental human rights and freedoms. As fate would have it, the 1979 Constitution also suffered a military overthrow until the restoration of constitutional rule in 1993.

3.0 Human Rights Under the 1992 Fourth Republic Constitution

Chapter 5 of the 1992 Constitution is dedicated to the protection of fundamental human rights within the context of the current neo-liberal state. According to article 12(2) the applicability of the fundamental human rights can be both vertical and horizontal. This means that that they can be enforced against both the government, and against individuals and private enterprises.

The nature of the rights guaranteed are a reflection of a liberal democratic order which has found expression in various democratic Constitutions since 1969. Consequently, the basic liberal democratic features of the protection of the right to life (article

13), protection of personal liberty (article 14), respect for human dignity (article 15), protection from slavery and forced labour (article 16), equality and freedom from discrimination (article 17), protection of privacy from home and other property (article 18), the right to a fair trial (article 19), protection from deprivation of property (article 20), right to freedom of speech and expression including freedom of the press, freedom of thought, conscience and belief including academic freedom, freedom to practice any religion, freedom of assembly and demonstration, freedom of association, right to information and freedom of movement (article 21) have found expression in the 1992 Constitution. Additionally, there are equally progressive rights such as the guarantee of the property rights of spouses (article 22), administrative justice (article 23), economic rights (article 24). It further guarantees educational rights (article 25), cultural rights and practices (article 26) women's rights (article 26), children's rights (article 28), rights of disabled persons (article 29), rights of the sick (article 30).

Redress for breach or any potential breaches of these rights can be sought before the high courts vested with the authority to issue orders and directions in the nature of *habeas corpus*, *certiorari*, *mandamus*, *prohibition*, and *quo warranto*. Besides chapter 5, other provisions guarantee certain specific rights and one such is chapter 12 safeguarding the freedom of the media, while article 42 guarantees the right every Ghanaian eighteen (18) years and of sound mind to vote. Then, article 33(5) which acts as interlinkage between the constitutionally guaranteed rights and other rights which are considered inherent in a democracy, and intended to secure the freedom and dignity of man. In other words, this provision establishes the linkage between chapter 5 rights to the ever-growing rights at both regional and international levels thereby giving room for a progressive court or tribunal to adopt an interpretative attitude that would protect other rights not specifically articulated under the 1992 Constitution.

4.0 Triumphs

The Fourth Republic has been the most stable republic as far as Ghana's political history is concerned. It has lasted for over three (3) decades since its inception in 1993. It has witnessed the change of political power on three (3) different occasions therefore qualifying it as a democracy which is consolidated at least according to Huntington's *two turn over test theory*. So, in the light of this stability, the Commission shall seek to explore what might have informed, or in themselves

considered as “triumphs” relating to human rights from the perspective of 1992 Fourth Republican Constitution.

4.1 Judicial Decisions

It is not in doubt that the successes chalked in relation to human rights can be attributed to the strong fidelity by the courts to the principles of constitutionalism, human rights and the rule of law. Articles 2, 33 and 130 vests the enforcement of the fundamental human rights in both the high and the supreme courts. This unique mandate has empowered the Ghanaian courts to declare what would become the standard setting in the protection of the rights and dignity of economically marginalized Ghanaians who by virtue of their circumstances had to undertake the job of carrying human excreta in pans as an affront to their dignity. The case of *Nana Agyei Ampofo, a private legal practitioner writ of summons against the AMA and the Attorney General* popularly referred to as the *latrine boys case* comes to mind. The decision of the court did not only protect the dignity of the carriers but brought to an end an old age sanitation practice that was detrimental to health, the environment and well-being of members of the public. The relative improvement in the sanitary condition within Accra metropolis and beyond can be attributed to this landmark judgement. The case of *Coffie v Heman* where the court was confronted with a situation where the police, in order to compel the appearance of a man arrested and detained his son. This practice was widespread during the era of the military regimes. The court took advantage of the opportunity to bring an end to the practice thereby safeguarding the liberty of close relatives of suspects.

Another important decision of the courts which expanded the frontiers of the fundamental human rights was the decision in the *NPP v Inspector General of Police (the public order case)* in which provisions of the public order decree which required a permit for holding demonstrations was declared unconstitutional and an affront to the new constitutional dispensation. The court further ordered that the decision was posted at all police stations throughout the country for the information and guidance of its personnel. The singular decision has significantly shaped police-protestors relations in the sense that it has clarified what the police is required to do under the law to give effect to the right to demonstrate. *Mensah v Mensah* where the court established the principle for the distribution of matrimonial property in an equitable manner between spouses in line with the article 22(2) of the 1992 Constitution. Gender advocates have praised the decision as transformational for the advancement of women’s rights.

Furthermore, the consolidated suits of *Ahumah Ocansey & Centre for Human Rights and Civil Liberties v Electoral Commission & Another* challenged the refusal of the Electoral Commission to allow remand detainees who have been in custody for more than six months to vote in public elections and referenda. Upon successful mounting of this constitutional challenge, it paved way for the registration and voting of prisoners for the first time in presidential and parliamentary elections in 2016. These above cited cases and others have established the precedents for the protection of the rights of marginalized groups such as prisoners, women, protestors, economically disadvantaged persons.

4.2 Legislative Initiatives

Following a number of legislative measures a number of rights have been expanded and guaranteed for the enjoyment by citizens and all other persons living in Ghana. Of particular mention is the over-cited repeal of the criminal libel provisions in sections 112-119, sections 182A, 183, 183A and 185 of the Criminal Code through the criminal code (Repeal of Criminal Libel and Seditious Laws) Amendment Act, 2001(Act 602). This singular legislative step was considered significant towards the liberalization of media freedom. Other legislative steps including the passage of the Children's Act, 1998 (Act 560) Labour Act, 2003 (Act 651) setting out the rights of a worker, right to information Act, 2019 (Act 989) giving effect to the article 21(1)(f), the Domestic Violence Act, 2007(Act 732) sanctioning acts of violence within domestic settings, the Lands Act, 2020 (Act 1036) fostering non-discrimination and the right to equality of women in land matters just to mention a few. Furthermore, through the efforts of NGOs and CHRAJ, *trokosi*, a cultural practice whereby young girls under the age of 10 or less were given to fetish shrines as sexual/domestic slaves or wives was criminalized through the amendment of the Criminal Offences Act, 1960 (Act 29) have all collectively strengthened the human rights regime.

4.3 The Establishment of CHRAJ

Aside the courts, CHRAJ is charged with the protection of human rights under the 1992 Constitution. CHRAJ's establishment is mandated by article 216 of the Constitution. In keeping with this obligation, Act 456 was passed to establish CHRAJ to:

investigate complaints of violations of fundamental human rights and freedoms, injustice and corruption; abuse of power and unfair treatment of persons by public officers in the exercise of their duties, with power to seek remedy in respect of such acts or omissions and to provide for other related purposes.

It is worth mentioning that access to the services of CHRAJ is free of charge. The significance of this to justice delivery is that it facilitates access to justice to especially economically disadvantaged persons who are unable to afford the services of a lawyer to vindicate their rights in a court of law. Over its 30-year existence, CHRAJ has investigated over 300,000 cases within its mandate areas and addressed thousands of human rights violations reported to its office across the country. Although the Commission is not a court, it has contributed to developing human rights jurisprudence which can serve as a guide for interpretation of human rights provisions of the constitution. For instance, in the case of *Morgan and Another v Ghana International School (No.1) CHRAJ 1994-2000*. CHRAJ seized the opportunity to expound on the constitutional provisions relating to equality and freedom from discrimination. In addition, the Commission has taken decisive actions against members of the Armed forces and other security for acts of torture against citizens.

4.4 Ratification of Human Rights Instruments

As a country whose Constitution envisions an environment which upholds human rights, Ghana has ratified all nine UN (9) core human rights treaties as well as the AU and the ECOWAS. This decision is obviously underpinned by the constitutional dictates of the preamble to the Constitution, article 12(1), articles 34(2) & 35(4), article 37(3) and article 40(c) & (d). Owing to these international obligations, the Ghanaian state under the fourth republican Constitution has to a large extent discharged its human rights obligations quite creditably by upholding human rights domestically, reporting to treaty bodies, and subjecting itself periodically to Universal Periodic Review. By ratification of these instruments, Ghana has submitted herself to complaint procedures of treaty bodies empowering its citizens and sister nations to treaty bodies for redress. The cases of *Dexter Johnson v Ghana* (death penalty case before the Human Rights Committee), *Tsatsu Tsikata v Ghana* (fair trial case before the African Commission on Human and Peoples' Rights) are just some examples. These steps have in varied ways contributed to Ghana's recent election to the Human Rights Council.

5.0 Threats

In spite of the constitutional guarantees of human rights and gains, there are developments that if they remain unchecked can seriously undermine the progress made. Notable ones are discussed in the subsequent paragraphs.

5.1 Mistrust of State Institutions

Institutions matter, argues Douglass North (1990), an American economist in his examination of “Institutions, Institutional Change and Economic Performance”. North asserts that “*some economies develop institutions that produce growth and development while others produce stagnation*”. On the part of Oakerson (1995) he describes institutions “*as the various kinds of disciplinary techniques that constrain behavior in governing.*” Whilst institutions can be cumbersome sometimes, Oakerson argues that the purpose of institutions is never to cripple the process of governance but to *discipline* it so that it can serve its essential purpose.

Institutions are not so much about the physical building or organizations mandated to play certain roles in a democratic space. More critically analysed, institutions refer to the rules of the democratic game. In other words, who does what, when and how, and how the rules influence choices and behavior that engender positive outcomes. Institutions also play important role such as mediating and resolving conflicts where the choices of competing actors clash. While institutions such as the court, remains critical for protection of human rights trust in them cannot be overlooked. Afrobarometer surveys conducted over the years indicate that on the average trust in some critical institutions of state stands as follows the Army (41%), Courts of Law (25%), and Police (22%). [see Osae-Kwapong J (2023) ‘5 Presidents 8 Elections 30 years; How Ghanaians See their Democracy’ pp 41& 148]. The verdict of the Afro barometer is an indication of the lack of satisfaction in the institutions of state. The effect is that citizens would resort to unconventional means such as self-help in resolving their differences or defending themselves against human rights violations.

5.2 Police Weaponization of the Public Order Act,1994 (Act 471)

The Public Order Act, 1994 (Act 491) requires persons who intend to hold a special event such as demonstrations to notify the Police not less than five (5) days before the event. As a practice, the Police and organisers meet to discuss issues concerning the demonstration such as possible routes to use for the exercise so as to ensure public order. Where the Police disagrees with the organisers on some issues, the Police would approach the court sometimes on the eve of the demonstration with an *ex-parte* application to injunct the protest. In almost all cases, these *ex-parte* applications are granted by the courts and this is quite problematic. Without sounding repetitive it is important to emphasise that demonstration is a constitutionally guaranteed right, and of historical significance which must be jealously guarded. This is not to suggest that human rights cannot be restricted.

However, it is the considered view of the CHRAJ that a constitutional right of this nature should not be curtailed through an *ex-parte* application by the court. Rather the court must give parties the opportunity to argue the merits of any injunction. That way, the court gets the opportunity to hear both sides and come to a conclusion that carefully balances competing interests. Furthermore, while injunctions may be considered as a normal practice of the court, it has the tendency to undermine such an important civil and political right available to citizens to hold power accountable. As a Commission, we respectfully urge courts to hasten slowly in granting such *ex-parte* applications to restrict the right to demonstrate. Where such restrictions become necessary it is recommended that they meet the threshold of necessity, legitimacy and proportionality as established under human rights law.

5.3 Arrest and Prosecution of Journalists

Another spectacle which threatens human rights is the assault and arrest of journalists even after the repeal of the criminal libel provisions. The constant assault of journalists by citizens, law enforcement officers and other public officials is well documented by civil society organisations such as the Media Foundation for West Africa (MFWA). Sadly, the Police often carry these arrests and prosecution under some ambiguous offences of “breach of the peace”, “causing fear and panic”, “publication of false news” under Act 29 which is extremely disturbing. While reckless journalism is not condoned, arrest and prosecution of journalists have the potential to water down the effectiveness of the media’s watchdog role in the society. The murder of Ahmed Suale still haunts Ghana’s press freedom credentials. These

happenings have culminated in Ghana's recent poor showing on the World Press Freedom Index.

A wayward media practitioner/journalist should by all means be held accountable either by reporting such conduct to the National Media Commission or resorting to the civil courts for defamation suits. That is the surest way of striking good balance between safeguarding media freedom and holding journalists accountable for any unprofessional conduct.

5.4 Conflict Between Human Rights and Culture

Culture remains integral to the lives of the many Africans including Ghanaians. According to Bennet (2004) it embodies the *people's store of knowledge, beliefs, arts, morals, laws and customs*. Whilst culture can be positive, it can equally be negative. The constant clash between human rights and culture may stem from what may be termed as "clash of civilisations". This is because on one hand, culture is considered indigenous, on the other hand, human rights are still perceived by many as foreign ideas. Even in the era of constitutionalism safeguarding human rights, dehumanising cultural manifestations such as witchcraft accusation of vulnerable women and its attendant egregious human rights violations continue to be on the ascendency. The murder of the 90-year-old Akua Dente in 2020 is a recent example. Thankfully, two (2) persons have been incarcerated. A recent field visit by CHRAJ to the North East Region to raise awareness on the anti-witchcraft bill further showed a strong attachment of local communities to their culture and belief systems where some participants cared less about human rights violations in the name of defending their culture.

In addition, the recent incident of a 15-year-old girl who was betrothed to the *Wulome* is an example of this clash of civilisation. While the incident attracted public opprobrium, the traditional authority appeared to justify the action. It is observed that the language of culture is always invoked to justify human rights violations against vulnerable groups even in the full glare of constitutional prohibitions. Allowing such justifications would engender a culture of impunity relative to the protection of the rights of vulnerable groups in society-women, children, persons with disability and other vulnerable groups. The effect is that it would entrench discriminatory protection of human rights.

5.5 “Galamsey” and Its Impact on the Environment & Human Rights

The devastating impact of unregulated mining popularly referred to as *galamsey* on the environment is a threat beyond debate. The wanton destruction of water bodies, interruption of the biodiversity, unmeasured use of mercury, destruction of cocoa farms is well documented. As humans our existence is heavily dependent on the environment and as such the destruction of the environment certainly poses an existential threat to our survival. In the midst of this destruction, one may ask does the 1992 Constitution guarantee the right to clean and safe environment? Yes, to a very great extent. Article 41 indicates that the rights is inseparable from the performance of duties one of which includes the duty to protect and safeguard the environment [article 41(k)]. The State is further mandated under article 36(9) to “*take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek co-operation with other states and bodies for purposes of protecting the wider international environment for mankind*”. The African Charter on Human and People’s Rights to which Ghana is a state party in article 24 stipulates that “*all people shall have the rights to a generally satisfactory environment favourable to their development*”. The indivisibility and interrelatedness nature of human rights shows that the destruction of the environment can have serious implication for other protected rights such as right to food, water, health, livelihood, dignity, family, development among others. Recent media reports indicate the emergence of serious deformities in newborns in some *galamsey* communities. Against this backdrop, if nothing is done to address *galamsey* menace and other environmentally destructive activities, the cascading effects on economic, social rights would be devastating beyond measure.

5.6 “Criminalisation” & Mistreatment of Vulnerable Groups

As a nation, we pride ourselves as a human rights compliant country. However, the Commission observes that treatment of members of vulnerable groups leaves much to be desired notwithstanding non-discriminatory provisions of the Constitution. A society that is intolerant towards, and shies away from appreciating the struggle of vulnerable groups leaves much to be desired. Under the 1992 Constitution equal treatment before the law dictates equal rights to be enjoined by all. Doing otherwise, would make mockery of us as a people who fought against oppression in all its forms against colonial rule. While the Commission welcomes debates on human rights, in the midst of these conversations, the question which should inform all actors is, whose rights is deserving of protection, and whose rights are not? As the

Commission, it is our position that human rights are not the preserve of the people we like. Singling out a minority group and subjecting them to further criminalisation undermines the constitutional ideals of equality before the law and of course the SDGs overall goal of *leaving no one behind*.

6.0 Concluding Remarks & Recommendations

In light of the forgoing analysis, it is safe to conclude that human rights protection under the Fourth Republican Constitution has been quite satisfactory. The activism of the courts has deprecated historically degrading and oppressive practices, legislative initiatives taken have given effect to human rights provisions, ratification of human rights instruments by Parliament has strengthened human rights domestically and so on. These triumphs notwithstanding, there are existing threats which if they remained unchecked have the potential to erode the gains made thus far. The low trust in critical state institutions, Police weaponization of the Public Order Act, *galamsey*, constant tension between human rights and culture are imminent threats to the furthering of human rights under the fourth republic. To mitigate the impact of the prevailing threats, the Commission proposes the following modest interventions:

- First, the Constitutional and institutional reforms project must be seriously revisited to address some of the structural issues such as appointments by the President of High Public Officials under the Constitution under Article 70 and the procedures of such appointments, corruption, bureaucracy accounting for the mistrust of state institutions.
- Second, a critical look at the Public Order Act against the decision in *NPP v Inspector General of Police*, the constitutional provisions and the role of the court as the bastion of human rights is necessary for building an environment that is favorable for the exercise of article 21(1)(d) rights.
- Third, neo-liberal policies such as IMF programmes and other government flagship programmes must be benchmarked against human rights to mitigate any possible impact on the rights and livelihoods of the people especially the poor and vulnerable. Additionally, unfavorable macroeconomic indicators notably high inflation, interest rates and exchange rate volatility exacerbate preexisting vulnerabilities of individuals and undermines their capacity to enjoy their rights therefore requiring urgent attention from government.
- Fourth, in addition to the law enforcement strategies a national *anti-galamsey* plan/strategy be developed (where non-exist) to effectively confront the scourge of *galamsey* to prevent further destruction of the environment.

- Fifth, develop a critical mass of public interest activists, lawyers, judges to push the frontiers of social and economic rights against growing indices on poverty, marginalization, homelessness, and underdevelopment through strategic litigation.
- Sixth, establish platforms for open and honest dialogue between human rights advocates and cultural/traditional opinion leaders and shapers to foster mutual understanding and respect to manage tensions between human rights and culture.
- Last but not the least, as a state party to several human rights instruments and currently a member of the Human Rights Council, a strong fidelity to human rights is *sine qua non* to fostering equality. To this end, the rights of marginalized and vulnerable groups must at the minimum be upheld.

**DATED ON FRIDAY 28TH JUNE, 2024 AT OLD PARLIAMENT HOUSE,
ACCRA**