

# **EMERGENCY POWERS IN EMERGING DEMOCRACIES: THE CASE OF GHANA**

**BY**

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## **Introduction**

Constitutionalism in emerging democracies is vital. This implies that the powers of organs of the State, and in particular the Executive, are limited and there are effective mechanisms for ensuring that they stay within those limits. However, from time to time, States encounter extraordinary circumstances which require the use of extraordinary powers. It is crucial for all democracies and, in particular, emerging democracies, that in such circumstances care is taken to ensure that the use of such extraordinary powers does not compromise the democratic process and democratic rights and obligations<sup>1</sup>. The public interest in the preservation of democracy has to be balanced against the need to provide security in times of crises. That balance should be struck in a manner that does not impair, at least in the medium term, the constitutional arrangements that have been put in place to ensure that the democratic rights of the people prevail.

I will in this presentation outline Ghana's constitutional provisions on emergency powers and assess to what extent they conform to this prescription of not compromising democratic governance and processes. Ghana is here being treated as a microcosm of emerging democracies. I will leave it to you to judge whether it is typical or atypical of such democracies. Unfortunately, from the point of view of data on precedents, but fortunately, from the point of view of residents in Ghana, the constitutional provisions on Emergency Powers have never been invoked since the coming into force of the 1992 Constitution.

Article 31 of the 1992 Constitution of Ghana makes provision for Emergency Powers. It comes immediately after the Bill of Rights provisions in the Constitution and is clearly a derogation from them. However, before discussing Article 31, it is necessary to set its context and outline Ghana's credentials as an emerging democracy.

## **Ghana as an Emergent Democracy**

Ghana's emergence as a democratic State has taken quite a while. During the Fourth Republic (which commenced on 7<sup>th</sup> January 1993), there have been three peaceful changes of government from an incumbent government to the opposition. Prior to the Fourth Republic, changes in government had been by coups d'état. The Fourth Republic has had a vigorous judiciary which has endeavoured to protect the rule of law and human rights. Competitive multiparty politics is now firmly ensconced in the Ghanaian body politic. Civil society groups such as think tanks and religious groups have manifested their commitment to the evolving democratic system. The mass media have found their voice and vigorously use it. The law of criminal libel has been abolished and there are specific provisions in the 1992 Constitution aimed at protecting the freedom and independence of the media.<sup>2</sup>

Ghana has operated its current 1992 Constitution for over a quarter of a century. It is a Constitution that has been described as a hybrid, combining elements of the United States constitutional model with the Westminster model. It was adopted in 1992 after an initial draft of it was put together by a Committee of Experts appointed by the country's last military Government, the Provisional National Defence Council,. The Report of the Committee of Experts was put before a Consultative Assembly which formulated a draft Constitution based on it. This was in turn put before the people in a national referendum. After it was approved by the referendum, the Constitution entered into force on 7<sup>th</sup> January 1993.

A prominent feature of the report of the Committee of Experts was a commitment in it to preserve tried and tested constitutional provisions that had worked during previous periods of constitutional rule in Ghana. The Committee of Experts mined the previous Republican Constitutions for relevant provisions. The Committee said in its Report<sup>3</sup> that:

“The Committee operated on the cardinal principle that we should not re-invent the wheel. Accordingly wherever we found previous constitutional arrangements appropriate, we built on them. In this connection, with appropriate modifications, we relied substantially on some of the provisions of the 1969 and 1979 Constitutions of Ghana to the extent that they are relevant to the general constitutional structure proposed In this report.”

Thus, though Ghana's emergence as a democracy had been interrupted by military interventions, the Committee drew on the periods of constitutional rule to establish the foundation for the current period of constitutional rule, including the provisions on emergency powers.

### **Emergency Powers under the 1992 Constitution of Ghana**

Article 31(1) of the 1992 Constitution of Ghana provides that the President of Ghana may, acting in accordance with the advice of the Council of State, by Proclamation published in the *Gazette* declare that a state of emergency exists in Ghana or in any part of it for the purposes of the provisions of the Constitution. Accordingly, although the declaration of the state of emergency is by the President, he has to do so on the advice of the Council of State. The phrase "on the advice of" is commonly understood to mean that without that advice the state of emergency cannot be declared. The Council of State is, under the 1992 Constitution, an advisory body to the President, which is distinct from Cabinet. It was first introduced into Ghanaian constitutional law by the 1969 Constitution of the Second Republic, where its function was stated as "to aid and counsel the President". The President under that 1969 Constitution was a ceremonial one, with the head of government being the Prime Minister. The institution of the Council of State was retained, with a different membership, in the next two Constitutions of Ghana which however had executive Presidents. Article 89(1) of the 1992 Constitution provides that: "There shall be a Council of State to counsel the President in the performance of his functions." The current Council of State consists partly of elected representatives of the regions of Ghana and appointees of the President. Its role, in the view of this speaker, is to give advice to the President which is more detached (that is, less partisan) than what would come from his Cabinet.

When a state of emergency has been declared by the President, on the advice of the Council of State, he is obliged by Article 31(2) of the Constitution to place immediately before Parliament the facts and circumstances leading to the declaration of the state of emergency. Parliament then has a duty to decide within 72 hours whether the Proclamation should remain in force or it should be revoked. The President is bound by the decision of Parliament. If the proclamation of the state of emergency is approved by Parliament, then

it shall continue in force for three months or until an earlier date specified in Parliament's resolution. Subsequently, Parliament may by a resolution passed by a majority of its members extend its approval of the declaration of the state of emergency for periods not exceeding one month at a time. Parliament may also by a resolution of a majority of its members revoke the state of emergency.

The 1992 Constitution expressly specifies that among the circumstances justifying the declaration of a state of emergency are<sup>4</sup>:

- a natural disaster;
- a situation in which action has been taken or threatened to be taken by anyone which is calculated or likely to deprive the community of the essentials of life;
- a situation in which action has been taken or threatened to be taken by anyone which renders necessary the taking of measures necessary to secure the public safety, the defence of Ghana and the maintenance of public order and of supplies and services essential to the life of the community.

The permitted derogation from the normal rule of law that a state of emergency allows is contained in the following language from the 1992 Constitution<sup>5</sup>:

“Nothing in, or done under the authority of an Act of Parliament shall be held to be inconsistent with, or in contravention of, articles 12 to 30 of the Constitution to the extent that the Act in question authorises the taking, during any period when a state of emergency is in force of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.”

(Articles 12 to 30 of the Constitution contain the Bill of Rights.) This provision means that any derogation from the Bill of Rights has to be by legislation. The mere fact of the declaration of a state of emergency does not automatically authorise conduct in breach of the Bill of Rights. The state of emergency, rather, authorises Parliament to enact or the Executive to apply legislation containing measures reasonably justifiable for the purposes of dealing with the situation which has resulted in the state of emergency, even if such measures are inconsistent with, or in contravention of, the Bill of Rights provisions in the 1992 Constitution.

It is in the light of this that Parliament has enacted the Emergency Powers Act, 1994.<sup>6</sup> This Act sets out the consequential powers of the President, following the declaration of a state of emergency. During a state of emergency, the President may order<sup>7</sup>:

- The detention of persons or the restriction of the movement of persons
- The deportation and expulsion from Ghana of a person who is not a citizen
- The taking, possession or control of a property on behalf of the Republic
- The acquisition of property
- The searching of premises without a warrant
- The payment of compensation to a person affected by an action taken under the emergency
- The arrest, trial and punishment of a person for breach of an instrument, order or a declaration related to the state of emergency;
- The suspension of operation of a law
- The removal of a person from the emergency area, where the emergency relates only to a part of the Republic.

Article 32 of the 1992 Constitution deals with the rights of persons detained under a state of emergency. It provides that where a person is restricted or detained “by virtue of a law made pursuant to a declaration of a state of emergency”, he is to be furnished no later than 24 hours after commencement of his restriction or detention with a written statement of the grounds on which he has been restricted or detained. The spouse, parent, child or other available next of kin are to be informed within 24 hours of the commencement of the restriction or detention. Not more than 10 days after the commencement of a person’s restriction or detention, there shall be published a notice in the *Gazette* and in the media stating that he or she has been restricted or detained and giving particulars of the provision of law under which his restriction or detention is authorised and the grounds for it. Furthermore, not more than ten days after the commencement of the restriction or detention, the case of the restricted or detained person shall be reviewed by a tribunal composed of not less than three Justices of the Superior Court of Judicature, appointed by the Chief Justice. After this initial review, there shall be regular reviews at intervals of not more than three months of the case. The same tribunal is prohibited from reviewing a case

more than once. The restricted or detained person is entitled to consult a lawyer of his or her choice and to be represented at the hearing by a lawyer of his or her choice.

However, there has never been a declaration of a state of emergency under the 1992 Constitution. Rather, the special powers that have been deployed periodically by the Government have been under relevant public order legislation.

### **The Public Order Act, 1994<sup>8</sup>**

The Public Order Act's effect does not depend upon the declaration of a state of emergency. Nonetheless, a particular provision in it has been deployed repeatedly by the Ghanaian Government in its effort to control situations of local emergency which fall short of the need to declare a state of emergency. It is the power to impose a curfew. The Act provides that<sup>9</sup> where the Minister of the Interior considers that it is reasonably required in the interest of public defence, public safety, public health, the running of essential services or the protection of the rights and freedoms of any other person, he or she may impose a curfew in a part of Ghana. The Act however does not give authority to impose a curfew on the whole of Ghana.

Ministers of Interior have exercised this power on many occasions to help quell the outbreak of civil disorder in particular localities. Although the exercise of the power is a derogation from the freedom of movement entrenched under the 1992 Constitution, it probably comes within the public interest exception to the enforcement of the fundamental human rights contained in the Bill of Rights (Chapter 5 of the 1992 Constitution). Article 12(2) provides as follows:

“Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.”

This provision has been interpreted by the Ghanaian Supreme Court as placing limitations that are reasonably required for the protection of the rights of other persons and in the public interest on the fundamental freedoms in the Bill of Rights<sup>10</sup>.

### **Conclusion**

Because of an undesirable experience with preventive detention under our Independence Constitution and the First Republican Constitution, it is obvious that the framers of the 1992 Constitution did not want to confer unbridled power on the executive and the legislature even in a state of emergency. Thus, those detained and restricted in a state of emergency are given the rights outlined earlier. The declaration and maintenance of a state of emergency are also not left to the whims of the executive alone. No Ghanaian Government has yet found it necessary to declare a state of emergency under the 1992 Constitution. Nevertheless, provisions do exist under the Constitution to declare a state of emergency under appropriate circumstances. Those provisions reflect Ghana's history. The Ghanaian provisions thus endeavour to strike a balance between security and democratic rights. The current situation may be contrasted with the consequences of the failure of the Supreme Court of Ghana to assert itself in the infamous case of *Re Akoto*,<sup>11</sup> where the court upheld a statute<sup>12</sup> which allowed the Government, without a declaration of a state of emergency, to determine, subjectively, that particular people were acting in a manner prejudicial to the security of the State and could thus be preventively detained.

I hope that the circumstances requiring the exercise of emergency powers stay away from Ghana for a long time, if not for ever. I am confident that you will indulge this hope, since there is no legal proscription of wishful thinking in any of the jurisdictions from which we come!

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<sup>1</sup> On the need to ensure that emergency powers do not compromise democracies, see Bryan A Rooney, Emergency Powers in Democratic States and the Outbreak of Conflict, Ph.D dissertation submitted to the Graduate School of Vanderbilt University, Nashville, Tennessee, 2017

<sup>2</sup> See Chapter 12 of the 1992 Constitution.

<sup>3</sup> Committee of Experts, Proposals for a Draft Constitution of Ghana, Accra, 1992. Para. 3

<sup>4</sup> Article 31(9)

<sup>5</sup> Article 31(10)

<sup>66</sup> Act 472

<sup>7</sup> See s. 5 of the Act.

<sup>8</sup> Act 491

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<sup>9</sup> See s. 4

<sup>10</sup> *Republic v Tommy Thompson Books Ltd, Quarcoo & Coomson* [1996-97] SCGLR 804.

<sup>11</sup> [1961] GLR 523

<sup>12</sup> The Preventive Detention Act, 1958 (No 17 of 1958)