IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE AG. CJ (PRESIDING)

AMEGATCHER JSC

PROF. KOTEY JSC

LOVELACE-JOHNSON (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

WRIT NO.

J1/14/2022

31ST MAY, 2023

PROF. KWADWO APPIAGYEI-ATUA ……. 1ST PLAINTIFF

& 7 OTHERS PLAINTIFFS

VS

THE ATTORNEY-GENERAL ……. DEFENDANT

JUDGMENT

AMEGATCHER JSC:-

INTRODUCTION

In 1991, a Committee of Experts convened to discuss proposals for creating a draft constitution for Ghana. They released a detailed report which included their views on fundamental human rights and freedoms. Their opinion on the topic was as follows:

"128. The National Commission for Democracy Report leaves no doubt that Ghanaians attach great importance to human rights. Human rights are universally regarded as inalienable and constitute the birthright of the individual as a human being. Therefore, no person may be deprived of his or her human rights."

Ghana's unwavering dedication to protecting fundamental human rights and freedoms can be attributed to several factors, including our history of human rights abuses and the courts' jurisprudence during these periods. One of the most significant cases contributing to the regime of human rights protections subsisting under our current constitutional dispensation is **In Re Akoto & 7 Others [1961] 2 GLR 523, SC**. This decision has been in the headlines since and, to this day, is widely discussed by law students, the legal profession, academia and constitutional scholars. It is beyond dispute that the influence exerted was substantial in compelling the inclusion of entrenched human rights provisions within the Constitutions of both 1969 and 1979.

Similarly, Chapter 5 of the 1992 Constitution incorporates provisions on fundamental human rights and freedoms that are entrenched. These antecedents serve as an eternal aide-memoire that fundamental rights and freedoms were and are rights enforceable by the Courts and do not in any way represent moral obligations.

With these preliminary statements, we proceed with the consideration of this writ.

SUMMARY OF FACTS

The agreed facts are that on 21st March 2020, the President of the Republic of Ghana assented to the Imposition of Restrictions Act, 2020 (Act 1012) to provide for powers that would enable him to impose restrictions on persons to give effect to paragraphs (c), (d) and (e) of clause (4) of Article 21 of the Constitution in the event or imminence of an emergency, disaster or similar circumstance to ensure public safety, public health and protection.

This enactment was a consequence of the deadly corona virus (COVID-19) pandemic that took the entire world by surprise. After the virus was detected in the country, a public health emergency was declared pursuant to the Declaration of Public Health Emergency (Corona Virus Disease (COVID-19)) Pandemic Instrument, 2020 (E.I. 61), in accordance with Section 169 of the Public Health Act, 2012 (Act 851). After that, the President directed the defendant to submit before Parliament an emergency legislation in accordance with Article 21(4) (c), (d) and (e) of the 1992 Constitution.

The draft legislation was laid before parliament within five days of the President's directive. A voice vote passed the Bill and, within 24 hours, was assented to by the President. Act 1012 was published in the Gazette and entered into force on March 21, 2020.

The plaintiffs have lodged this suit as citizens of Ghana, seeking the following reliefs:

1) **A Declaration that upon a true and proper interpretation of Articles 21, 31, 32, 5, 93(2) and 125(3) of the 1992 Constitution, Article 21(4)(c) or (e) of the 1992 Constitution may not be applied to suspend a fundamental human right or freedom during a public emergency.**

2) **A Declaration that the Imposition of Restrictions Act, 2020 (Act 1012) contravenes or is inconsistent with Articles 21, 31, 32, 58, 93(2) and 125(3) of the 1992 Constitution to the extent that Act 1012:**

   (a) Empowers the President to unilaterally suspend fundamental human rights and freedoms in the whole or a part of Ghana.
   (b) Excludes the special role of the Chief Justice and the Superior Court of Judicature in managing or regulating the suspension of fundamental rights and freedoms in the whole or a part of Ghana; and
   (c) Excludes the role of Parliament in managing or regulating the suspension of fundamental human rights and freedoms in the whole or a part of Ghana.

3) **An order to strike down the Imposition of Restrictions Act, 2020 (Act 1012) as void; and**

4) **Any other order(s) or relief(s) that the honorable court may deem fit.**

THE CASE OF THE PLAINTIFFS

The plaintiffs argue that Act 1012 empowers the President to unilaterally make orders to suspend human rights wherever, whenever and however the President deems fit. In line with this, the President has made and continues to make Executive Instruments (EI) unilaterally (without recourse to parliamentary oversight) suspend fundamental human rights across the country. Based on Act 1012, the President has imposed restrictions on almost all basic human rights, including those outside article 21.

The crux of the plaintiffs' argument is that Act 1012 has created a dictatorial power alternative to the power regime that the 1992 Constitution has established for managing public emergencies in that it circumvents the procedure under articles 31 and 32 by which human rights may be suspended. This, the plaintiffs, therefore, contend, makes otiose the procedure under articles 31 and 32, which regulate the institution and maintenance of public emergencies.

Further, the plaintiffs contend that comparing the object and scope of Articles 31 and 32 to Act 1012, it is clear that Act 1012 performs the same functions that article 31 is meant to serve. Again, Act 1012 derives its power from Articles 21 (4) (c) (d) and (e) and section 1 of the act that reads "**in the event or imminence of an emergency disaster or similar circumstances."** However, article 21 (4) does not mention public emergencies, but Act 1012, enacted under Article 21(4), extends to public emergencies, disasters and similar circumstances. Additionally, Act 1012 is unlimited and unrelated to COVID-19 health emergencies or public health emergencies in general. The plaintiffs further state that the reading of sections 3 (1) (a) and 7 demonstrates that Act 1012 may be invoked to provide public safety and protection in all circumstances, including COVID public health. Act 1012 transcends "public health" and "public safety" to public defence and running essential services, including electricity and water supply. On the other hand, article 31(9) provides the circumstances under which a state of emergency may be declared, which include public safety, defence, and supply of essential services which makes the scope, object, and purpose of Act 1012 the same as the emergency provisions under article 31.

The plaintiff again argues that article 21(4) is a limitation rather than a derogation clause. Hence, under article 21(4), the government cannot suspend or derogate from the Fundamental Human Rights provisions. In support of this argument, the plaintiffs recount the constitutional history behind fundamental human rights, specifically from 1960, 1969, 1979 and then Chapter Five of the 1992 Constitution. The plaintiffs further

draw support from the fact that Chapter Five of the 1992 Constitution mimics the International Covenant on Civil and Political Rights (ICCPR's) regime for instituting and maintaining public emergencies. Specifically, article 4 (1) of ICCPR states that in times of public emergency, which threatens the life of a nation, state parties, after an official proclamation, may take measures derogating from their obligation under the covenant, as the exigency of the situation requires but which is not inconsistent with their other obligations under international law. Further, the general comment No. 29 of the United Nations Human Rights Committee indicates that disturbance, catastrophes and armed conflicts may occasion a state of public emergency under article 4 of ICCPR. The plaintiffs assert that the factors immediately mentioned above are not different from those provided by article 31(9) by which a state of emergency may arise. The plaintiffs, therefore, argue that the framers primarily intended the fundamental human rights provisions in the 1992 Constitution to follow the general structure and tenor of the United Nations Bill of Rights.

The plaintiffs further note that articles 21(4) and 31 entail considerations upon which the enjoyment of fundamental human rights may be restricted. However, the restriction methods of basic human rights under both articles differ. The plaintiffs point out that the 1969 Constitution adopted the established concepts of limitations to human rights, the first being a continuing application and the second being limitation that may be imposed during a state of emergency. The plaintiffs explained that the first method allows for the enjoyment of human rights in normal times and extraordinary times subject to certain limitations prescribed by law. The plaintiffs demonstrate these limitations by referring to articles 14, 18, 20, 22, 24, 25, and 26 of the 1992 Constitution. The plaintiffs assert that the group of rights described under article 21 as general fundamental freedoms also have an in-built limitation clause for continuing day-to-day restrictions on the enjoyment of human rights. Hence article 21(4) was not intended to suspend human rights during

public emergencies. The plaintiffs draw attention to the fact that even where the "limitations" on human rights are enacted into legislation, they do not suspend the exercise of those rights in public emergencies but only provide the limitations by which those rights are exercised.

The plaintiffs again quote paragraph 184 of the Memorandum on the Proposal for the Constitution of Ghana, 1968, to buttress their argument that the framers intended article 21(4) to be invoked at normal times (continuing application) and article 31 is to be invoked at extraordinary times such as a state of emergency.

The crux of the Plaintiffs' case is that Act 1012 has created a less restrained and somewhat dictatorial power alternative to the power regime that the 1992 Constitution established for managing public emergencies. According to the plaintiffs, Act 1012 gives the President the power to sidestep articles 31 and 32 of the 1992 Constitution and thereby render otiose the method that the Constitution has established for instituting and managing public emergencies.

The Plaintiffs' arguments, which would be introduced later in the resolution of the agreed issues, are that:

a) The object, scope, and purpose of Act 1012 are the same as those of articles 31 and 32 of the 1992 Constitution.
b) Article 21(4) of the 1992 Constitution, under which Act 1012 was made, is a limitation (not a derogation) clause and, therefore, does not allow the State to suspend human rights at all, let alone in public emergencies.
c) Act 1012 violates the principles of the rule of law and checks and balances in the sense that Parliament has no power to delegate to the President (nor the President the authority to arrogate to themselves) Parliament's duty and the duty of the Chief Justice and the Superior Courts under Article 31 and 32.

THE CASE FOR THE ATTORNEY GENERAL

Firstly, the defendant has argued that the plaintiffs have no cause of action since the plaintiffs have failed the test as set out in the case of Ex Parte Akosah. Also, the plaintiffs have made bare assertions without a demonstration of the acts or omissions by the President, which are unconstitutional. Thus, the general reference to articles 21, 31, 32, 58, 93 (2), and 125 (3) without particularising the act of unconstitutionality is insufficient to invoke the Supreme Court's original jurisdiction.

The defendant also submits that the determination as to whether article 21 may be used to suspend fundamental human rights or freedoms is a cause of action committed to the jurisdiction of the High Court. Further, since Act 1012 does not empower the President to unilaterally suspend fundamental human rights in parts or the whole of Ghana to the total exclusion of the Judiciary and Parliament, the defendant does not see the unconstitutionality of Act 1012 as alleged. The defendant notes that a close reading of article 21 reveals two instances by which restrictions might be imposed, by a court order or by an act of Parliament. Also, unlike article 21 (a) and (b), article 21(c) (d) (e) do not require the intervention of the courts in imposing restrictions. And in so far as Act 1012 vested the President the power to impose restrictions in accordance with any of the circumstances under article 21, the act is constitutional unless there is evidence to prove that it has been applied in a manner that makes it unconstitutional. The defendant poses a question of whether Act 1012 can derive its authority from article 21 (c) (d) and (e). The defendant answers this question with article 21(4), which provides that nothing in or done under the authority of law shall be held to be inconsistent with or in contravention of it, so far as the law (legislative will) make provision for the restriction. Moreover, articles 21 (4) (c) (d) and (e) do not require the court's intervention to impose a restriction. Hence the contention that the court's jurisdiction has been ousted is untenable.

On this point, the defendant finally submits that the power vested in the President to impose restriction when he deems necessary or justifiable, as provided by section 3 of Act 1012, is a mere repetition of the standard provided by the constitution for the imposition of restrictions.

Secondly, on the issue of whether Act 1012 can rightly derive its validity from article 21(4) (c) (d) and (e), the defendant argues that it is untenable that the plaintiffs are alleging a violation of article 31. The defendant submits that the procedure set out under article 31 differs entirely from the procedure provided by article 21 for the imposition of restrictions. The defendant also argues that the President did not declare a state of emergency after the passage of Act 1012. Thus, Act 1012 was just enacted following the explicit provision of the law, which does not make the declaration of a state of emergency a prerequisite. The defendant, therefore, urges this court to reject the strained meaning being canvassed by the plaintiff on article 21(4). The defendant further contends that Act 1012 was enacted following the public health emergency that the Minister of Health declared in line with sections 169 and 170 of Act 851 in response to the Covid 19 Pandemic. The defendant additionally argues that with the state of affairs or condition existing before the imposition of the restrictions, the President was not compelled to proceed to declare a state of emergency under article 31. Consequently, the circumstances dictated the restrictions being contended to be imposed to protect the lives of the citizenry. Therefore, Act 1012 was validly applied to provide powers to the President to impose restrictions as reasonably justifiable to save lives.

In response to the plaintiffs' argument that Act 1012 allows the President to suspend fundamental human rights to the total exclusion of the Parliament and Judiciary, the defendant asserts that the Act was passed following due process. The Hansard of 20th March 2020 indicated that there was extensive involvement of Parliament in the passage of the act, and all concerns raised were addressed.

The defendant submits that the plaintiffs should establish that Act 1012 was unreasonable despite a global pandemic calling for public health and safety.

The defendant finally submits that parliament did not delegate its function but took the steps required to allow the government and other relevant players to provide a practical solution to the problems posed by the corona virus. It is, therefore, the view of the defendant that it was appropriate to rely on articles 21 (4) (c), (d) (e), and it did not result in contravention of articles 21, 31, 32, 58, 93(2) and 125 (3).

The synopsis of the Attorney General's argument is that the regime under article 31 of the 1992 Constitution provides a unique regime and procedure for the exercise of emergency powers by the President and the consequent curtailment of fundamental human rights enjoyable by a person in Ghana, is entirely different from the procedure for imposition of restrictions sanctioned by Article 21(4) of the Constitution.

MEMORANDUM OF ISSUES

The parties filed the following joint memorandum of issues on 14th July 2022:

1. **Whether or not the Plaintiffs have properly invoked the Supreme Court's original jurisdiction.**
2. **Whether the object, scope and purpose of the Imposition of Restrictions Act, 2020 (Act 1012) is in, substance, the same as the object, scope, and purpose of Article 31 and 32 of the 1992 Constitution.**
3. **Whether Article 21(4) (c) or (e) of the 1992 Constitution may be applied to suspend a fundamental human right or freedom during a public emergency.**
4. **Whether Parliament may empower the President to unilaterally suspend a fundamental human right or freedom during public emergency.**

5. **Whether Parliament may exclude the special role of the Chief Justice and the Superior Court of Judicature in maintaining or regulating the suspension of a fundamental human right or freedom during public emergency.**
6. **Whether Parliament may delegate its role of managing and regulating the suspension of a fundamental human right or freedom during public emergency.**
7. **Whether the Imposition of Restrictions Act, 2020 (Act 1012) is inconsistent with Article 21, 31, 32, 58, 93(2) and 125 (3) of the 1992 Constitution.**
8. **Whether or not Article 21(4) (c) or (e) of the 1992 Constitution may be applied to impose restrictions on persons in event or imminence of an emergency.**
9. **Whether or not the Principles of Separation of Powers were upheld in the enactment of the Imposition of Restrictions Act. 2020 (Act 1012).**
10. **Any other issue (issues) that the honourable Court may deem necessary.**

The plaintiffs have invoked this Court's jurisdiction under Article 2(1)(b) of the 1992 Constitution, which as a requirement, necessitates that there should be an "**act or omission of any person**" which is inconsistent with or is in contravention of any provision of the Constitution. After considering the joint memorandum of issues filed by the parties, we think most of the issues raised seek this Court's opinion. In framing reliefs and raising legal issues for determination when invoking our original interpretative or enforcement jurisdiction under articles 2(1) and 130(1), parties must exercise prudence in presenting issues germane to a conclusive and compelling determination. The reliefs and issues must be linked to specific acts or omissions on the part of persons which contravene the supreme law of the land. Failing such linkages, we shall treat the writ as opinion only and will proceed to dismiss it based on our thirty-year-old decision in **Billson v Attorney-General [1993-94] 1 GLR 104, SC.**

In this case, although some issues may convey a semblance of relevancy, pursuing issues such as ***"Whether Article 21(4)(c) or (e) of the 1992 Constitution may be applied to***

suspend a fundamental human right or freedom during a public emergency?" or "***Whether Article 21(4)(c), (d) and (e) of the 1992 Constitution may be applied to impose restrictions on persons in the event or imminence of an emergency?"***, would stretch the boundaries of what is considered essential in determining the matter at hand and would serve as an unnecessary academic exercise, which this Court lacks the jurisdiction and time to entertain.

Thus, upon proper consideration of all the issues raised, only two issues stand germane to the determination of this writ. They are as follows:

a) Have plaintiffs properly invoked the Supreme Court's original jurisdiction?

b) Is the Imposition of Restrictions Act, 2020 (Act 1012) consistent with articles 21, 31, 32, 58, 93(2) and 125(3) of the 1992 Constitution?

THE JURISDICTION OF THE SUPREME COURT TO ENTERTAIN THIS SUIT

The learned Attorney General has challenged the jurisdiction of this Court to entertain this suit because the suit discloses absolutely no cause of action and raises no issue for interpretation and enforcement by this Court. According to the Attorney General, the plaintiff's submissions do not raise any real or genuine issues of constitutional interpretation to justify the invocation of the original jurisdiction of this Court under Articles 2(1) or 130(1). He thus relies on the cases **of Bimpong Buta v General Legal Council [2003-2004] 2 SCGLR 1200 and Ex Parte Electoral Commission [*SIC*] [2005-2006] SCGLR 514,** that this Court will not assume jurisdiction simply because a party is relying on Articles 2(1) and 130(1) of the Constitution to appear before it.

According to the learned Attorney-General, bearing in mind the nature of the plaintiffs' relief (a), the plaintiffs instead make general references to constitutional provisions without a reasonable discussion about the words of those articles having double meaning

or being obscure or else meaning something different from or more than what they said. He argues that the plaintiffs have failed the constitutional interpretation test Anin JA laid down in **Republic v Special Tribunal; Ex Parte Akosah (1980) GLR 592.**

The learned Attorney General, then, submits that the general reference by the plaintiffs to articles 21, 31, 32, 58, 93(2), and 125(3) of the 1992 Constitution as having been violated by the defendant without a particularisation of the exact unconstitutionality, is inadequate to warrant the exercise of this Court's original jurisdiction.

Finally, the Attorney-General submits that the determination of whether Article 21 of the 1992 Constitution, under which Act 1012 was made, may be applied to suspend fundamental human rights or freedoms is not an action to be determined exclusively by the Supreme Court but rather a cause of action recognisable by the High Court under Article 33(1) of the 1992 Constitution.

Before detailing the plaintiffs' submissions regarding this jurisdictional issue, we are inclined to recall this Court's decision in the case of **Danso v. Daaduam II & Anor. [2013-2014] SCGLR 1570,** where Anin Yeboah JSC (as he then was) upheld a preliminary objection challenging the jurisdiction of this Court to determine the suit. His Lordship acknowledged at page 1575 that:

"**The Plaintiff has invoked our original jurisdiction for the reliefs stated above. It is therefore the duty of the Plaintiff to demonstrate to this court that our jurisdiction has been properly invoked. This, he can do by showing as per his writ and reliefs sought that his case presented to this court raises a real or genuine issue for interpretation or enforcement.**"

Applying the dictum above to their case, the plaintiffs maintain that their suit before this Court is competent because a question of interpretation is not a sine qua non to the

exercise of this Court's enforcement powers under articles 2(1) and 130(1). The plaintiffs argue that under the relevant constitutional provisions, this Court's enforcement jurisdiction may still be invoked, even if the case involves provisions whose meanings are plain and uncontested. The plaintiffs argue that regardless of the situation, their case satisfies at least three of the four tests laid down by Anin JA in Ex Parte Akosah (supra). According to the plaintiffs, the parties are pressing on this Court two rival meanings on some provisions of the Constitution, 1992. Further, both parties have ascribed one meaning to two different constitutional provisions, thereby raising a contest as to which of the two provisions should prevail. Finally, the plaintiffs submit that one of the parties is contending that at least one of the provisions means something different from or more than what their letters say.

It has repeatedly been made clear that under Articles 2(1) and 130(1) of the Constitution, the enforcement jurisdiction of the court is one part of its exclusive original jurisdiction, while the interpretative jurisdiction is the other. See cases such as **Sumaila Bielbiel v. Dramani (No 1) [2011] 1 SCGLR 132, Kor v. Attorney General & Anor (2015-2016] 1 SCGLR 114**, **Kan II & Ors v. Attorney-General & Ors [2015-2016] 1 SCGLR 691**, **Annan & Anor v. Attorney General WRIT NO. J1/14/2019 (Dated 31st March 2022) (unreported).**

Consequently, as this Court possesses interpretative and enforcement jurisdictions under Articles 2(1) and 130(1) of the Constitution, no necessity arises that requires a dissection into whether the plaintiffs' suit is justiciable to invoke this Court's original jurisdiction. This is because, after consideration of most of the plaintiffs' reliefs and the statements of the case, there is no doubt that an issue of enforcement arises. However, this enforcement does not pertain to the enforcement of a basic and fundamental human right and freedom as envisaged under Article 33(1) of the Constitution, 1992. In a situation where a person seeks to enforce the Constitution without infringing a fundamental human right, as is

evident in this matter, the proper forum is the Supreme Court under Article 130(1). Because of this, the Attorney-General's argument that determining whether Article 21 of the 1992 Constitution, under which Act 1012 was made, is a cause of action recognisable by the High Court under Article 33(1) of the 1992 Constitution is quite frankly untenable. See the cases of **Yiadom I v Amaniapong [1981] GLR 3, SC; Ghana Bar Association v Attorney-General (Abban's Case) [1995-96] 1 GLR 598, SC; [2003-2004] SCGLR 250; Edusei v Attorney-General [1996-97] SCGLR 1; On Review, Edusei (No 2) V Attorney-General [1998- 99] SCGLR 753; AND Yeboah v Mensah [1998-99] SCGLR 492.**

Apart from the enforcement considerations, a careful examination of the issues raised in this case leads us to opine that interpretation issues are also in contention. In our view, the test for determining whether an issue of interpretation arises was aptly articulated by Anin JA in the case of **Ex Parte Akosah (supra)**. While the test requirements are well-established and require no elaboration, their application, in this case, is crucial. So far, it is evident in this suit that both parties have placed rival meanings on the scope and purpose of Articles 21(4), 31 and 32 of the Constitution, 1992 in the determination of which of these Articles ought to form the basis for the promulgation of Act 1012. It is for this reason that the plaintiffs seek a declaration that the Imposition of Restrictions Act, 2020 (Act 1012) contravenes or is inconsistent with articles 21, 31, 32, 58, 93(2) and 125(3) of the 1992 Constitution. The Attorney General, however, disagrees with this position. Therefore, there is a potential conflict between the plain meaning of articles 21(4) and 31 and 32, necessitating an interpretation of which of these provisions should take precedence in determining the constitutionality or otherwise of Act 1012.

The Constitution, 1992 rightly declares itself as the ultimate law of the land, with Article 1(2) explicitly stating that "**this 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.**" However, the realisation of this provision

depends on implementing the mechanism provided by Article 2(1) of the Constitution, 1992.

Thus, based on the opinion expressed above and to satisfy ourselves that the fundamental human rights protections have not been compromised by passing Act 1012 into law, this Court has the jurisdiction to hear and determine this suit. Accordingly, we overrule the preliminary objection by the learned Attorney-General that the plaintiffs have not properly invoked our original jurisdiction in this matter.

THE CONSTITUTIONALITY OF THE IMPOSITION OF RESTRICTIONS ACT, 2020 (ACT 1012)

Ghana's staunch commitment to protecting and enforcing fundamental human rights and freedoms was hinted at in the introduction to this opinion. Chapter 5 of the Constitution, 1992 reflects the protections the state affords fundamental human rights and freedoms. Article 12 of the Constitution, 1992 provides as follows:

> **Article 12 Protection of Fundamental Human Rights and Freedoms**
>
> **(1) The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution.**
>
> **(2) 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 constitutional provision places a responsibility on all government entities to uphold and enforce provisions related to fundamental rights. Additionally, Clause 2 specifies

that the entitlement to basic human rights and freedoms must be balanced with the rights and freedoms of others and the public interest. This means that individuals have a right to their fundamental rights, but this entitlement must be exercised in a way that does not infringe upon the rights of others or the greater good of society. This portrays that fundamental human rights and freedoms are not absolute and without restriction.

The Committee of Experts on Proposals for a Draft Constitution for Ghana acknowledged that there were restrictions to Human rights when they stated in their 1991 Report as follows:

"157. The fundamental freedoms mentioned above should be exercised subject to the laws of the land, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by this Constitution, restrictions which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Ghana, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Also, Modibo Ocran JSC, in the case of **Gorman & Others v. The Republic [2003 – 2004] SCGLR 784**, at 806 opined that:

"**However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seeks to balance the rights of the individual as against the legitimate interests of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution. Thus, article 14 (1) (d) makes it clear that the liberty of certain individuals, including drug addicts, may be curtailed not only for the purpose of their own care and treatment but also 'for the protection of the community. Article 14 (1) (g)**

sanctions the deprivation of an individual's liberty upon reasonable suspicion of the commission of an offence under the law of Ghana, ostensibly for the protection of the Community and the body politic. Article 21 (4) (c) further authorises the imposition of restrictions on the interest of public safety, and public health among other concerns".

These authorities unequivocally establish that no fundamental right or freedom is absolute and can exist without some form of restriction.

The Nature of Restrictions

It is important to note that two distinct regimes govern the restrictions of human rights, and these are derogations and limitations. A review of the origins of the 1969, 1979, and 1992 Constitutions clearly illustrates that both derogations and limitations as separate regimes are recognised within our legal framework. In the **MEMORANDUM ON THE PROPOSAL FOR A CONSTITUTION OF GHANA, 1968**, the Constitutional Commission stated categorically in paragraph 184 at pages 46-47 as follows:

"Constitutions containing provisions on fundamental human rights usually also specify limitations which may be legitimately placed on those rights. **These limitations are of two kinds. The first is one dealing with continuing application; the second one relates to the limitations which can be imposed during periods of emergency.**" [Our Emphasis]

Subsequently, in the **REPORT OF THE COMMITTEE OF EXPERTS ON PROPOSALS FOR A DRAFT CONSTITUTION OF GHANA, 1991**, the Committee endorsed at paragraph 138 as follows:

"138. **The 1969 and 1979 Constitutions of Ghana eloquently enshrined the classical human rights and freedoms by prescribing specific prohibitions. The Committee generally endorses these provisions**, subject to some modifications, particularly where it was felt that certain stipulated qualifications would erode the essence of the rights". [Our Emphasis]

Thus, while fundamental human rights and freedoms are guaranteed, the law recognises that in certain exceptional circumstances, the state may restrict the fundamental rights of its citizens. While the 1968 Commission Report does not adopt the nomenclature of derogation and limitation, there is a need to distinguish between these two types of restrictions clearly. In short, derogations are often temporary and may suspend a right wholly. This is what the 1968 Committee Report explains can be imposed during periods of emergency. On the other hand, limitations are common to all rights, may be permanent, and are meant to perpetually balance the public interest with the rights of individuals and groups. This is also explained by the 1968 Committee Report to be a continuing application.

As regards the regime of limitation, a limitation to the entitlement of fundamental human rights and freedoms of an individual contained in Chapter 5 of the 1992 Constitution is inherent, as provided under Article 12(2) and other articles of the Constitution. See **Republic v. Tommy Thompson Books Ltd, Quarcoo & Coomson [1996-97] SCGLR 804.**

It is worth emphasising that the group of rights referred to as "General Fundamental Freedoms" under Article 21 of the Constitution, 1992 also contains an inherent limitation clause of particular significance. This set of rights encompasses a wide range of entitlements, including the right to free speech and expression, free movement and assembly, free association, freedom of conscience, belief, religion, academic freedom, right to information, and others. The limitation embedded within these rights pertains to their "continuing application" and is precisely articulated in Article 21(4) of the Constitution as follows:

Article 21 General Fundamental Freedoms

(4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision—

(a) for the imposition of restrictions by, order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

(b) for the imposition of restrictions. by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana; or for the imposition of restrictions that 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; or

(c) for the imposition of restrictions that 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; or

(d) for the imposition of restrictions on the freedom of entry into Ghana, or of movement in Ghana of a person who is not a citizen of Ghana; or

(e) that is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols, and emblems, or incites hatred against other members of the community.

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution.

In the case of **New Patriotic Party v Inspector-General of Police [1993-94] 2 GLR 459 at 508**, it was held that the fundamental human rights as provided under Chapter 5 of the constitution are inalienable and may not be curtailed or derogated except in public emergencies. In the same case, the court held that article 21 (4) cannot be applied to suspend or deny citizens their fundamental human rights (freedom of association). Bamford-Addo JSC illustrated the types of laws under Article 21(4) of the 1992 Constitution. The learned judge made the following statement at page 483 of the judgment:

"Examples of such laws as envisaged by article 21 (4) of the Constitution, 1992 are those referred to by the experts in their report (supra) at p 157, para 73:

> "!57. The fundamental freedoms mentioned above should be exercised subject to the laws of the land, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by this Constitution, restrictions which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Ghana, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. **These laws include the criminal laws of the land**. It means that even where a person has the right to exercise his or her fundamental human rights freely without preconditions, he or she must exercise those rights subject to the respect for the rights and freedoms of others and in the public interest." [Our Emphasis]

Delivering his opinion, **Amua-Sekyi JSC** made the following observation which we deem instructive to the issues at hand at 471-473:

Except in times of war, or when a state of emergency has been declared, it cannot be right for any agency of the executive to suppress the free expression of any opinion, however unpopular that opinion may be… It is important to note that article 21(1), part of which I have already quoted, deals not only with freedom of assembly, but also with other guaranteed freedoms, such as, freedom of speech and expression in sub-clause (a), freedom of thought, conscience and belief in sub-clause (b), freedom to practice any religion and to manifest such practice in sub-clause (c), freedom of association in sub-clause (e), and the right to information in sub-clause (f). More importantly, it deals in sub-clause (g) with freedom of movement which is defined here as "the right to move freely in Ghana, the right to leave and to enter Ghana and immunity from expulsion from Ghana". …. **Article 21(4) does not sanction the placing of any curbs on freedom of assembly.** Sub-clauses (a)-(d) are concerned with freedom of movement, and sub-clause (e) with freedom of speech, thought and religion. What may be banned under sub-clause (e) is the teaching and propagation of a doctrine by speech or writing; but here again, freedom of speech, thought and religion are quite distinct from freedom of assembly. (Emphasis ours)

Hayfron-Benjamin JSC articulated his position at 500 as follows:

"**in article 21 (4)(c) the power as required to control those situations mentioned therein must be granted by a law which imposes reasonable restrictions on the fundamental freedoms but does not deny the citizen the fundamental freedoms to which he is entitled. In other words, the citizen's freedoms may be restricted by law on the grounds stated in the**

Constitution, 1992 but they cannot be denied. Any such denial will be unconstitutional and void."

Other examples of relevant statutes that govern the limitation of rights of a continuing application are as follows:

a) **PUBLIC ORDER ACT. 1994 (ACT 491)**
b) **ELECTRONIC COMMUNICATIONS ACT, 2008 (ACT 775)**
c) **IMMIGRATION ACT, 2000 (ACT 573)**
d) **ANTI-TERRORISM ACT, 2008 (ACT 762)**
e) **SECURITY & INTELLIGENCE AGENCY ACT 2020 (ACT 1030)**
f) **VIGILANTISM AND RELATED OFFENCE ACT, 2019 (ACT 999)**
g) **PUBLIC HEALTH ACT 2012 (ACT 851)**
h) **CRIMINAL AND OTHER OFFENCES ACT 1960 (ACT 29)**

The cumulative effect of the above observations is that the fundamental human rights guaranteed by the Constitution are too precious to be subjected solely to the discretionary power of any person or institution. We are therefore bound to consider the extent to which Act 1012 affects fundamental human rights and whether it makes the exercise of these rights, especially the right to freedom of movement, ineffective or illusory. As already noted, these rights cannot be curtailed or derogated by any ordinary Act of Parliament. The rights are subject to the usual riders, i.e., public interest, etc., laid down in articles 12(2) and 21(4) (c).

We take judicial notice that restrictions imposed on movement during the Covid-19 pandemic curtailed the freedom of movement of persons in the Greater Accra Metropolitan Area and the Greater Kumasi Metropolitan Area in the Ashanti Region of Ghana. People could not freely exercise their right to movement as they would have

ordinarily. Although the right to movement was not taken away, the exercise of freedom needed to be more effective.

Derogation

Besides the regime of limitation, the Constitution 1992 provides a derogation regime through Articles 31 and 32. These constitutional provisions require that any derogation of fundamental human rights and freedoms conform to the specific provisions explicitly stated in the Constitution, 1992. Consequently, any actions taken to limit these rights in the event of an emergency must be in accordance with the guidelines outlined in Articles 31 and 32. They provide as follows:

Article 31 Emergency Powers

(1) The President 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 Ghana for the purposes of the provisions of this Constitution.

(2) Notwithstanding any other provision of this article, where a proclamation is published under clause (1) of this article, the President shall place immediately before Parliament, the facts and circumstances leading to the declaration of the state of emergency.

(3) Parliament shall, within seventy-two hours after being so notified, decide whether the proclamation should remain in force or should; be revoked; and the President shall act in accordance with the decision of Parliament.

(4) A declaration of a state of emergency shall cease to have effect at the expiration of a period of seven days beginning with the date of publication of the

declaration, unless, before the expiration of that period, it is approved by a resolution passed for that purpose, by a majority of all the members of Parliament.

(5) Subject to clause (7) of this article, a declaration of a state of emergency approved by a resolution of Parliament under clause (4) of this article shall continue in force until the expiration of a period of three months beginning with the date of its being so approved or until such earlier date as may be specified in the resolution.

(6) Parliament may, by resolution passed by a majority of all members of Parliament, extend its approval of the declaration for periods of not more than one month at a time.

(7) Parliament may, by a resolution passed by a majority of all the members of Parliament, at any time, revoke a declaration of a state of emergency approved by Parliament under this article.

(8) For the avoidance of doubt, it is hereby declared that the provisions of any enactment, other than an Act of Parliament, dealing with a state of emergency declared under clause (1) of this article shall apply only to that part of Ghana where the emergency exists.

(9) The circumstances under which a state of emergency may be declared under this article include a natural disaster and any situation in which any action is taken or is immediately threatened to be taken by any person or body of persons which—

(a) is calculated or likely to deprive the community of the essentials of life; or

(b) renders necessary the taking of measures which are required for securing 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.

(10) 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 this 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 purposes of dealing with the situation that exists during that period.

Article 32 Persons Detained Under Emergency Laws

(1) Where a person is restricted-or detained by virtue of a law made pursuant to a declaration of a state of emergency, the following provisions shall apply—

(a) he shall as soon as practicable, and in any case not later than twenty-four hours after the commencement of the restriction or detention, be furnished with a statement in writing specifying in detail the grounds upon which he is restricted or detained, and the statement shall be read or interpreted to the person restricted or detained;

(b) the spouse, parent, child or other available next of kin of the person restricted or detained shall be informed of the detention or restriction within twenty-four hours after the commencement of the detention or restriction and be permitted access to the person at the earliest practicable opportunity, and in any case within twenty-four hours after the commencement of the restriction or detention;

(c) not more than ten days after the commencement of his restriction or detention, a notification shall be published in the Gazette and in the media stating that he has been restricted or detained and giving particulars of the provision of law under which his restriction or detention is authorized and the grounds of his restriction or detention;

(d) not more than ten days after commencement of his restriction or detention, and after that, during his restriction or detention, at intervals of not more than three months, his case shall be reviewed by a tribunal composed of not less than three Justices of the Superior Court of Judicature appointed by the Chief Justice; except that the same tribunal shall not review more than once the case of a person restricted or detained;

(e) he shall be afforded every possible facility to consult a lawyer of his choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the restricted or detained person;

(f) at the hearing of his case, he shall be permitted to appear in person or by a lawyer of his choice.

(2) On a review by a tribunal of the case of a restricted or detained person, the tribunal may order the release of the person and the payment to him of adequate compensation or uphold the grounds of his restriction or detention; and the authority by which the restriction or detention was ordered shall act accordingly.

(3) In every month in which there is a sitting of Parliament, a Minister of State authorized by the President, shall make a report to Parliament of the number of persons restricted or detained by virtue of such a law as is referred to in clause (10) of article 31 of this Constitution and the number of cases in which the authority that ordered the restriction or detention has acted in accordance with the decisions of the tribunal appointed under this article.

(4) Notwithstanding clause (3) of this article, the Minister referred to in that clause shall publish every month in the Gazette and in the media—

(a) the number and the names and addresses of the persons restricted or detained;

(b) the number of cases reviewed by the tribunal; and

(c) the number of cases in which the authority which ordered the restriction or detention has acted in accordance with the decisions of the tribunal appointed under this article.

(5) For the avoidance of doubt, it is hereby declared that, at the end of an emergency declared under clause (1) of article 31 of this Constitution, a person in restriction or detention or in custody as a result of the declaration of the emergency shall be released immediately.

These derogation provisions under Articles 31 and 32 emphasise that the Constitution, 1992, is the supreme authority over all aspects of guaranteed fundamental human rights and freedoms. These provisions also serve as the cornerstone of the rule of law, particularly during times of public emergency. It is crucial to note that no other form of rule of law supersedes the constitutional rule of law. In contrast, the limitations under Article 21(4) demonstrate that while certain rights may be restricted in certain circumstances, such restrictions must be within the boundaries set by the Constitution. Thus, the distinction between the two regimes of limitations and derogations is intended to ensure that the Constitution, 1992 remains the ultimate authority in determining the extent to which fundamental human rights and freedoms may be restricted in times of emergency or other exceptional circumstances.

It is apparent from the preceding that the Constitution 1992 acknowledges the validity of both derogation and limitations as lawful mechanisms for restricting human rights.

Is the Imposition of Restrictions Act, 2020 (Act 1012) part of the laws that fall under the ambit of Article 21(4) of the Constitution, 1992?

This Court has been given exclusive jurisdiction to interpret the human rights provisions, which involves determining the scope of requirements and discovering the intent of the

framers of the Constitution. However, it must be noted that in these matters, there is hardly any room for implicit or implied restrictions where there is none. Where the Constitution intends to impose restrictions on fundamental rights and freedoms, these must expressly be stated unless implicit restrictions can be read from the requisite laws. See. **Ahumah Ocansey v. Electoral Commission; Centre For Human Rights & Civil Liberties (CHURCIL) v Attorney-General [2010] SCGLR 575, Per Wood CJ.**

Thus, while we agree with the Attorney General's submission in paragraph 39 of his Statement of Case that Article 31 of the Constitution establishes a distinct regime that differs from the procedure for imposing restrictions authorised by Article 21(4) of the Constitution, we must disagree with his argument that Article 21(4), (c), (d) and (e) is plain in language and unambiguous and is for the imposition of restrictions by an Act of Parliament in the event or imminence of an emergency, disaster, or similar circumstances to ensure public safety, public health, and protection. The Attorney General argues in paragraph 45 of his Statement of Case as follows:

"Article 21(4), (c), (d) and (e) of the 1992 Constitution makes clear provision to the effect that a law that derives its validity and powers from its provisions may be enacted for the imposition of restrictions on persons that are reasonably required in the event or immense of an emergency, disaster or similar circumstance to ensure public safety, public health and protection".

The Attorney General seeks to employ words into the ordinary text of Article 21(4), (c), (d) and (e) of the 1992 Constitution. The Attorney General is attempting to introduce additional meaning into the ordinary language of Article 21(4)(c), (d), and (e) of the 1992 Constitution. On the contrary, we consider tenable the plaintiffs' submission that a literalist interpretive approach must be employed and that the ordinary meaning of the words in Article 21(4) demonstrates that it was not intended to be applied to restrict fundamental human rights during public emergencies. Moreover, the absence of the

phrase "***public emergency***" from Article 21(4) further supports this interpretation. This indicates that the provision is a means of limitation and not derogation. We are fortified in our view by the established principles of constitutional interpretation, which require that constitutional provisions should be interpreted broadly, liberally, generously, or expansively in line with the Constitution's spirit, history, aspirations, core values, principles, and to promote and enhance human rights rather than diminishing them. Sowah JSC's dictum in the celebrated case of **Tuffuor v. Attorney General [1980] GLR 637** at 647-648 is very much still relevant in addition to the plethora of case law cited in more recent decisions of the Supreme Court on the matter. Further, this court has stated that it is not permitted to give an interpretation that seeks to tamper with fundamental human rights but rather to see that they are respected and enforced. See. **New Patriotic Party v. Inspector General Of Police [1993-94] 459 per Bamford Addo JSC, Mensima v. Attorney General [1996-7] SCGLR 676, Nsiah v. Amankwaah; Nsiah v. Mansah (Consolidated) [1998-99] SCGLR 132 at 140; Sophia Akuffo JSC in Okofoh Estates Ltd v. Modern Signs Ltd [1996-97] SCGLR 224, Brown v. Attorney General [2010] SCGLR 183**.

The Attorney General contends that the distinguishing factor between the regimes established by Articles 21(4) and Articles 31 and 32 is the need for a formal declaration of a state of emergency. Specifically, in paragraph 41 of the State's Statement of Case, the Attorney General argues as follows:

"41. A further distinction between the procedure for the imposition of restrictions under Article 21(4) and the declaration of a state of emergency under Article 31 is that **an emergency situation ought not to exist before Parliament may exercise its legislative powers under Article 21 to enact a law providing for the imposition of restrictions** if it considers same necessary ..."

The Attorney General's submission lacks merit, as Act 1012 itself is betrayed by its own Section 1, which requires the existence of an imminent emergency. The provision states that:

> "The object of this Act is to provide for powers to impose restrictions on persons, to give effect to paragraphs (c), (d), and (e) of clause 4 of article 21 of the Constitution in the event or imminence of **an emergency**, disaster, or similar circumstance to ensure public safety, public health, and protection."

Act 1012 is drafted to address situations of imminent emergency, which fall outside the scope of Article 21(4) of the Constitution. Indeed, its object is stated to provide powers to impose restrictions that derogate fundamental human rights during emergencies or disasters. It is pertinent to note that while Act 1012 proceeds to define "disaster" and "essential services explicitly", it fails to provide a clear definition of what constitutes an "***emergency***". This absence of a definition is perceived as an effort to circumvent the prerequisites established by Article 31, which lays out the conditions under which a state of emergency can be declared.

Further, it is apparent that Act 1012 borrows from Article 31 but does so sparingly and potentially in a manner that fails to align with the principles established by the constitutional provision fully. For instance, Section 2 of Act 1012 begins as follows:

"2(1) The President may, acting in accordance **with the advice of the relevant person or body**, by Executive Instrument, impose restrictions specified in paragraphs (c), (d), and (e) of article 21 of the Constitution."

Again, much like the missing definition of "***emergency***", "***the relevant person or body***" has been left at large. The selective inclusion of some aspects of Article 31 in Act 1012, while excluding other crucial requirements and safeguards, poses a significant risk for abusing emergency powers and infringing human rights during emergencies. Article

21(4), on which Act 1012 is founded, provides that: *"Nothing in or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes a provision…except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be* ***reasonably justifiable in terms of the spirit of this Constitution***." Evidently, the failure to provide a clear and specific definition of "***the relevant person or body***" raises concerns about the potential abuse of emergency powers and undermine the constitutionally guaranteed protections of fundamental human rights.

Further, in his submission, the Attorney-General questioned whether Act 1012 was unreasonable despite a global pandemic requiring measures to be taken for public health and safety. This question disregards the scope and the object of Act 1012**.** Per the architecture of Act 1012, no reference was made to the Covid-19 global pandemic. It has no tenure and no sunset clause. Therefore, it could be invoked at any time when any of the matters provided thereunder arise without further recourse to Parliament, thus, making the Act a permanent law.

What are the relevant constitutional provisions that ought to sanction the Imposition of Restrictions Act, 2020 (Act 1012)? It is worth noting that Article 31(10) of the Constitution 1992 provides that any Act of Parliament that authorises the taking of measures during a state of emergency will not be deemed to be inconsistent or in violation of Articles 12 to 30 of the Constitution if those measures are reasonably justifiable for dealing with the situation that exists during the emergency period. This means that any derogation from the fundamental human rights provision must be done through legislation. Indeed, the Constitution has no gap or deficiency regarding the procedures that must be followed when Parliament intends to derogate from fundamental rights and freedoms. Article 31 of the Constitution clearly outlines the circumstances under which a state of emergency may be declared, and any act of Parliament passed during such a period must be

justifiable in dealing with the situation at hand. Therefore, any attempt to circumvent these provisions would be inconsistent with the Constitution. It is important to note that the EMERGENCY POWERS ACT, 1994 (ACT 472) is one such legislation enacted in recognition of the provisions of Article 31(10) of the Constitution, 1992. This is because when a statute deals with matters affecting the rights of individuals prejudicially, the ambit of the power of the authorities acting under the law would be circumscribed by its provisions. It would be unconstitutional to vest indefinite general powers in one body or individual such as the Executive See **Attorney General v. De Keyser's Royal Hotel Ltd. [1920] AC 508** where rights of individual citizens were upheld in the face of exceptional interference by the Executive. The House of Lords, per Lord Dunedin, held that a statute that served to limit the prerogative power, placing it in abeyance temporarily, will not amount to a permanent restriction or abolition of the prerogative.

The Constitution, 1992 tests the validity of all other laws. It seeks to determine the spheres of Executive, Legislative and Judicial powers with meticulous care and precision. The power of judicial review is one feature of our Constitution that, more than any other, is essential to the maintenance of democracy and the rule of law, and it is unquestionably a part of the basic structure of the Constitution. The nature and scope of judicial review have been succinctly stated by Edward Wiredu JSC (as he then was) in his opinion in **Ghana Bar Association v. Attorney-General (Abban Case) [2003-2004] SCGLR 250** at 259 that:

"The Constitution has vested the power of judicial review of all legislation in the Supreme Court. It has dealt away with either an executive or parliamentary sovereignty and subordinated all the arms or organs of State to the Constitution…The arms of State and the institution involved in the appointment of the Chief Justice are all creatures of the Constitution and each, in playing its part, must exercise such

powers as are authorized by it in a democratic manner as enshrined in the Constitution."

It is well-settled that any legislation made in excess of the powers conferred on the legislature by the Constitution, 1992, which is inconsistent with any provision of the Constitution, would be declared a nullity by the Supreme Court in the exercise of its power of judicial review under Article 130(1)(b) of the Constitution. As already hinted, it is an accepted principle that the rule of law constitutes the core of our Constitution, and it is the essence of the rule of law that the exercise of parliament's power to make laws should be within constitutional limitations.

In **Mensima v. Attorney-General [supra],** Acquah JSC (as he then was) stated that:
". . . our Constitution, 1992 like the 1969 and 1979 ones, provides limitations on the exercise of the fundamental human rights and freedoms. Therefore, the duty of the court in a suit alleging inconsistency of a law with a provision of the Constitution is two-fold. First, to determine whether on the face of the alleged constitutional provision the law is, indeed, inconsistent with that provision. If it is not, the applicant fails in his challenge. But if it is, the court must proceed to the next step. And this is, to determine whether notwithstanding the inconsistency on the face of it, the law can be justified on any of the limitations or provisions of the Constitution, 1992. If the law can be justified, then the law is constitutional, and the applicant's action is dismissed. But if the law cannot be justified on any of the provisions of the Constitution, 1992 then that law is inconsistent with the letter and spirit of the Constitution, 1992 and consequently null and void."

It is to be remembered that in testing any law for unconstitutionality, the court should not concern itself with the propriety or expediency of that impugned law but with what it provides. See **New Patriotic Party v. Attorney-General (CIBA CASE) [1996-97] SCGLR**

729. Here, the 1992 Constitution under Articles 31 and 32 has devised a structure of power relations that checks and balances and limits the extent of the powers exercisable under the Constitution. Article 31 of the Constitution, 1992 of Ghana provides Emergency Powers. It comes immediately after the Fundamental Human Rights provisions in the Constitution and is a derogation from fundamental rights and freedoms. Article 31(9) of the Constitution, 1992 provides the basic rationale for giving a state of emergency that can be applied if any extraordinary situation arises that may threaten the public safety, defence, maintenance of public order and supplies and services essential to life. Article 33 of the Constitution, 1992 aims to ensure the safeguarding of human rights, even in the most trying circumstances, such as public emergencies, by protecting against unlawful violations of these rights by the executive, legislative, or judicial branches of the State.

Without a doubt, the framers of the 1992 Constitution, in their infinite wisdom, intended to place restrictions on the powers of the executive and legislature, even in times of emergency. They recognised that emergencies might require a derogation from fundamental rights and freedoms and therefore established mechanisms to ensure that the exercise of such powers is checked and balanced. As a result, those detained or restricted during a state of emergency are afforded rights under Article 32. The declaration and maintenance of a state of emergency are also subject to clear and unambiguous criteria and are not subject to the unfettered discretion of the Executive as the IMPOSITION OF RESTRICTIONS ACT, 2020 (ACT 1012) seeks to do.

We are aware that the Committee of Experts, in their Proposals for a Draft Constitution of Ghana in 1991, had suggested that the President be granted special powers to take necessary actions in situations where the institutions of the state, the proper functioning of the Constitution, or the territorial integrity and independence of the nation were under threat in a fundamental way. The Committee proposed that, in such circumstances, the President should be empowered with full authority to take immediate steps to restore

constitutional order and inform the nation about the measures taken. However, the Consultative Assembly rejected this proposal and did not make the final draft of the Constitution 1992. Notably, even under the proposed conditions by the Committee of Experts for exercising the powers, there were strict limits to the President's authority. These were as follows:

"27. The exercise of these extraordinary powers should be contingent on the following conditions.

1) The President should consult the Prime Minister, Council of State, the Speaker, the majority and minority leaders in Parliament, the Chief of Defence Staff, and the National Security Council prior to invoking these powers.

2) The right of Parliament to sit would not be affected by the exercise of these powers

3) Parliament would meet within 72 Hours of the invocation of these special powers to confirm or terminate the exercise of these powers.

CONCLUSION

The supremacy of the Constitution is upheld in this case. We believe that Act 1012 is founded on the wrong constitutional provision, i.e., Article 21(4), which only sanctions laws that restrict a continuing application. Act 1012, being an Act of Parliament that authorises the taking of measures in the event or eminence of an emergency in one body, i.e., the Executive, is inconsistent with Articles 21, 31 and 32 of the Constitution, 1992 and is hereby declared unconstitutional and, therefore, null and void.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(AG. CHIEF JUSTICE)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

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