

ENHANCING CONSTITUTIONAL OBEDIENCE AND ENFORCEMENT

1. Last week we celebrated the 29th anniversary of the 5th Constitution. Some will say the 6th Constitution. To appreciate the importance of this anniversary and our constitutional journey, it is worth noting that the Constitution is sandwiched between the 40th anniversary of December 31 (“the Revolution”) and the 50th anniversary of January 13 (“the Redemption). Globally, the mean life span of a constitution is about 17 years, with a median of 8 years. Considering this average longevity and that we had 5 or 6 constitutions in the 35 years prior to promulgating this Constitution, it is not an overstatement to assert that it is on the credit side of longevity balance sheet.
2. I am aware of the open campaign, in some quarters, to replace the Constitution with another one. While the Constitution is, like all creations of mankind, undoubtedly imperfect, I am of the firm view that it is imprudent to jettison it for the irrational pursuit of unattainable perfection. Moreover, even as some of its simplest commands are ignored with perfect impunity, merely replacing it will not compel obedience or enforcement of the new one.
3. I stand with many others in the belief that if there are any perceived problems with the constitution’s distribution of the powers of government, it must be fixed through litigation, legislation and ultimately by an amendment using the exact processes stipulated in the document. It is, after all, less cognitively challenging to reflect on a few amendments at a time than to be asked to vote Yes or No on an entirely new and assuredly imperfect Constitution.
4. Constitutional longevity matters and is to be celebrated because the basic functions of a constitution are to express guiding national principles, establish basic rules, and limit the power of government – all of which presuppose enduring values and inter-generational commitment to preserving the principles. Instability of a constitution undermines its claim of supremacy. This is not to say that constitutional longevity means good governance or democratic success. A stark reminder that constitutions are malleable and not self-enforcing. They can be put to good or ill use. As Justice Sowah reminds us, a constitution may have its own legal personality but the sinews of life with which it is endowed are injected into it by human agency. Good governance or democratic success ultimately depends on the character of the people, the elected officials, judges, and the public servants.

5. My mission today is simply to reflect on the extent to which the Constitution's promises are being enforced and to propose some ideas on how we can strengthen its obedience and enforcement.

6. We can think of the Constitution as a complex ecosystem of rights, duties, norms, values, checks, balances, and relationships designed to ensure that there is transparency, accountability, and probity in the public sector and to assure that the people have freedom, justice, liberty, equality of opportunity and, even hopefully, prosperity. For instance, it guarantees and endows the people with numerous rights that it describes as inalienable, fundamental, and entrenched.

7. The Constitution further commands that these rights and freedom "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, and shall be enforceable by the Courts as provided for in this Constitution." In effect, it is everybody's business to respect and uphold these rights and freedom, but the Courts are the ultimate enforcers of those blessings.

8. The Court's role in this ecosystem derives from its authority to invalidate legislative, executive and agency actions which in the Court's judgment, conflict with the Constitution. This power of judicial review has given the Court a crucial responsibility in protecting individual rights, in assuring that the other organs of government and agencies do not act ultra vires, as well as in maintaining a living constitution whose broad provisions are continually applied to complicated new situations.

9. Clearly, this ecosystem works only when you have a functional, fair, neutral, and robust Court that dispenses justice without fear or favour, affection or ill-will; and that at all times uphold, preserve, protect and defend the Constitution and laws of the polity. This is necessary to engender public trust and confidence in the Court, a prerequisite for the public to consider it as a credible forum for enforcement of the constitutional promises.

10. In a sense then, the Constitution is only as good as the Court enforces it and the Court, therefore the Constitution, is good only to the extent that the public has confidence in it.

11. Less well appreciated is the framers' unprecedented determination to preserve and protect this constitutional ecosystem, as epitomized by its innovative standing requirement in Article 2, which provides all persons a direct pathway to the Supreme Court when they believe or suspect that an enactment or any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution to seek a declaration to that effect.
12. To the extent that these ecosystem-defending private Solicitors-General do not derive any personal benefit, this standing innovation is sustainable only if they expect to be treated fairly and to be dispensed timely and inexpensive justice when they embark on this voluntary work.
13. In my opinion, we witnessed the golden age of constitutional enforcement in the period immediately after its promulgation. The Law reports are replete with many cases brought by individuals, political parties, private organizations, etc. to seek enforcement of the Constitution. Cases decided include the December 31 Case [1993], which was filed, argued, and resolved within 14 days, and more important before the contested celebration. Other notable examples include NPP v GBC, upholding the promise of equal opportunity to the airwaves; J. H. Mensah v AG, rejecting carryover appointments; and Tehn Addy v EC, which decided that the right to vote cannot be fettered by unreasonable registration requirements.
14. Unfortunately, over time, constitutional enforcement and justice have become too slow, too expensive, too technical, too narrow, too unpredictable, too incomprehensible, and in the process have outpriced the poor and disadvantaged, have outlawed the non-lawyers, and have increasingly blocked the pathway that the Constitution opened for even the determined and knowledgeable private Solicitors-General.
15. I cannot pretend to know the cause of this backslide. Perhaps, the excitement of operating in this ecosystem has waned over time. Whatever it is, I do believe that the enforcement problems have eroded public confidence in the Court as an enforcer and sentinel of the Constitution. I contend that this trust-deficit, more than the Constitution's imperfections, is the imminent threat to the sustainability and survival of the Constitution.

16. To be sure, public perceptions of the Court are often colored by misunderstandings about its role and the limitation of its jurisdiction, as well as attitude towards its decisions on matters of public interest and debate.
17. But to simply and casually write-off the increasing trust-deficit in the Supreme Court's ability or willingness to dispense justice in constitutional disputes as purely a matter of perception is to utterly dispense with reality.
18. The anecdotal evidence is not encouraging. a. For instance, the EC's assignment under Article 47 of the Constitution is a remarkably simple one — divide Ghana into as many constituencies as the EC may prescribe so that each constituency is represented by one MP. In other words, a division without a remainder. Yet, the EC has converted the task into an Euclidean division with a quotient of 275 and a remainder of 1.
19. The GLC's assignment under the Legal Profession Act to make arrangements for establishing a system of legal education is subject to Article 25(2) of the Constitution, which commands that every person shall have the right to establish and maintain a private school or schools in accordance with such conditions as may be provided by law. In other words, government cannot create a monopolist provider of education at the basic, secondary, tertiary, professional or any level of education. Yet, the GLC holds on to the Ghana School of Law as the only School that can provide "professional" legal education.
20. The citizens' assignment under Article 3 is to defend the Constitution at all times and are empowered under Article 2 to head to the Supreme Court when an enactment or any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution. In other words, all citizens have a duty to be constitutional vigilantes and to head to the Court when there is a violation of a provision of the Constitution. Yet, the Euclidean division and the monopoly persist.
21. The Supreme Court under Article 130 has exclusive original jurisdiction to enforce the Constitution. Combined with Article 2, the Court and the citizens are tasked to always defend and enforce the Constitution. In other words, the doors of the Court should always be opened to citizen vigilantes seeking to enforce the Constitution. Yet, the Court is quick to shut that door under some "kotokiokos" doctrine that it does not want to open the floodgates for constitutional enforcement.

22. The Court must do more to boost public confidence. In turn, the level of confidence rests on the perception of its impartiality and fairness. A fair and impartial court is one that follows the law and is not biased or partisan. Thus, lack of fidelity to the law, particularly the paramount law, is the easiest way for judges to create the perception that they are partial and unfair.

I suggest the following affirmative steps to reverse this increasing trust-deficit.

23. The Court must rethink the entire litigation system under Article 2 and move away from the traditional model of litigation, which is pregnant with technicalities, and focus more on reducing the burden of the individual who seeks to enforce the Constitution. The United States case of *Gideon v Wainwright*, which held that criminal defendants are entitled to right of counsel, was activated by Gideon in a handwritten petition to the Supreme Court. The Indian SC has now perfected this open-door policy by acting on letters written by or on behalf of the oppressed people to facilitate access to justice. The Court is under a heightened compulsion to have an open-door policy, by virtue of Article 2, and must develop various beneficial principles to that effect. This is because the Court's jurisdiction to enforce the Constitution is not only original and exclusive but it also epistolary by virtue of Article 2.

24. This concept is not entirely alien to the Court. In its judgment in *Luke Mensah of Sunyani v AG* (the constituency creating case), the

Acquah Court said "We are convinced that as the highest court of the land, charged with the constitutional authority to interpret and enforce the Constitution, and thereby promote rule of law in our society, we should, in fitting situations, rise up to the occasion and determine disputes likely to endanger our infant democracy. Now having regards to the intense public controversy generated by the EC's decision, we decided that notwithstanding whatever flaws in the plaintiff's action we would go into the merit of the case." The Court's approach to this case, to me, shows a deep appreciation of Article 2 and an understanding of the Court's role as a guardian and sentinel of the Constitution. The Court's position in *Luke Mensah* was apposite and must be further developed, not discarded.

25. The Court must use an asymmetric function in the awarding of cost in Article 2 suits, such that private citizens who seek to enforce the Constitution are not threatened by the potential for having to pay cost but where state actors, found to violate the Constitution, bear the cost and expenses of the successful plaintiff. The principle is a straightforward one. It would not be right to expect public spirited individuals or social action groups to cater from their own coffers the legal costs and court fees when instituting cases to uphold constitutional values or, as it often happens, to protect the rights of the disadvantaged. However, state actors, should not be allowed to abuse the Constitution

under the color of law. Making it expensive for state actors to violate the constitution will incentivize the state to train its employees and to take the Constitution seriously.

26. The Court must not mess with bright line constitutional rules. The Constitution contains both broadly framed and bright-line provisions. Bright-line provisions are those that are framed in such clear terms as to warrant no interpretation or construction. For instance, the Constitution provides that a person who is restricted, detained, or arrested must be brought before a judge within 48 hours; the minimum age for voting is 18 years; elections are held quadrennially; the minimum age to be eligible to stand as an MP is 21 and as President is 40; and the retiring age for public servants is 60 unless otherwise specified by the Constitution itself. Bright-line rules reflect important but settled values. The Court must give effect to these bright-line rules without attempting to subject them to broad or purposive interpretation or construction. For instance, if the Constitution says the voting age is 18, it should mean just that. The people are likely to disbelieve any sophisticated judicial analysis to show otherwise. Further, they are likely to view any such sophistry as evidence of judicial partiality and unfairness.

27. Even when interpreting or construing the broadly framed provisions of the Constitution, the Court must demonstrate that it is not ignoring the text, the purpose of the text as evidenced by the work of the committee of experts and the deliberations of the consultative assembly, the structure of the Constitution, the values embodied in the preamble, and the precedents established by the Court. To this end, it is also time for the Court to develop some broad guidelines or principles that it uses to determine the constitutionality of laws or administrative actions. This will be helpful to the public in ordering their lives. And these guidelines must protect our rights, not dispense with them, under the theory that rights are not absolute, which is an implicit endorsement that power is absolute. The Court's speech jurisdiction that allowed people to go to jail for libel, notwithstanding the expression and media provisions, is a case in point. Similarly, the rationality test employed to uphold public office holding exclusions is antithetical to any conception of political rights.

28. In this social media era, the Court must weigh its words and opinions very carefully because people will scrutinize them. It does the Court no good, and it harms public confidence when the Court's reasoning and holdings are hard to believe, facially absurd, logically flawed or plainly inconsistent with its prior precedents. Social media provide an opportunity for the Court to communicate broadly with greater ease and at far less cost. But it also requires the Court not to compromise on the accuracy, timeliness, and completeness of its decisions. The Court must embrace technology to communicate directly with the people, including electronic filing, electronic conferencing, and electronic delivery of opinions.

29. Constitutional enforcement should be speedy and inexpensive. Otherwise, it subverts the constitutional scheme to protect and uphold rights. The rules must guarantee the resolution of constitutional disputes within a period suited to the contested issues. For instance, the Supreme Court must commit to resolving all constitutional disputes within 180 days, with time-sensitive claims to be put on an even faster track. If the President decides to constructively dismiss the Chief Justice, it represents an attack on the basic structure of the constitution. The Court cannot labour under technicalities and take vacations, thereby becoming a co-conspirator in this scheme. Courts should operate 24/7 to protect the Constitution. Among others, this suggests restructuring so that we have vacation judges.

30. In about 5 recent cases, including one on the constitutionality of the monopoly of the Ghana School of Law, the Court has inexplicably and inappositely shut the door on Article 2 plaintiffs by a theory that makes interpretation a precondition for enforcement or in one of the cases by mistaking an enactment for an act or omission. Surprisingly, these theories are shaped by the Court's concern that there will be a floodgate of cases to the Court in a hostile attack on Article 2. a. The Court is enjoined to protect, defend and enforce the Constitution's provisions and should not create jurisdiction doctrines that divert it from its core constitutional duties. A pattern of inexplicable jurisdictional ousting can chill Private citizens, negate the innovative standing rule provided in Article 2 and increase the trust-deficit. Given the exclusivity of the

Court's jurisdiction, the Court must operate on a presumption that it has jurisdiction to hear cases raising constitutional questions. This, of course, is rebuttable by the opposing parties.

1. The floodgate issue ignores the fact that there is no limit on the number of Justices; that a 5 Justices forms a panel; that the Court is the only Constitutional Court; misunderstands standing to enforce the Constitution at other courts. The court is the exclusive and original avenue for private citizens to enforce and defend the Constitution as mandated by Article 3.
2. No court can be good without good lawyers. We cannot have good lawyers without a competitive legal and quality education system. And law and justice will be a pipe dream if the regulator of the legal profession finds it difficult to follow the law. The current bifurcated legal education model is broken irreparably. It cannot be reformed by the same people who broke it. The Ghana School of Law's monopoly of so called professional legal education offends Article 25(2), which surprisingly the courts have failed to address because of a strange no jurisdiction claim. In any event, practical training, which is the school's mission, should be distinguished from professional education.

3. Our judges need help. At the minimum, a Supreme Court Justice needs 2 clerks to help her with research and drafting of opinions. The Justices must have unlimited access to databases to facilitate their research. But we must also assure high standards of conduct and integrity. We must insist on holding accountable judges who engage in misconduct and be transparent about the disciplinary process.
4. The panel approach has become a tricky problem. First, the public is in the dark as to how the panels are constituted. It is trite knowledge that a case's outcome can turn on who sits on the panel. Thus, opaqueness about this process can only heighten suspicion. Second, there is a rising incidence of panel splits, defined as conflicting rulings on the same issues. For instance, on jurisdiction, there is an Atuguba view and a Date-Bah view and plaintiffs cannot know in advance what to expect.
5. An increasing number of judgments are becoming difficult to comprehend, even by determined people who are lettered in the law. Constitutional decisions address fundamental societal issues that impact the daily lives of the public at large. Such decisions are analyzed by pundits, many of whom have a perspective. It is critical for the Court to present its rulings in a way that is easy to understand. Otherwise, ordinary persons who read the opinion are likely to think that there is an effort to hide the ball or worse rely on the pundits. Constitutional decisions should therefore speak as clearly as possible to the public. This, of course, may have to start with the writs which are often written in a way that are impossible to understand. For instance, save as herein before expressly admitted the defendant denies each and every allegation of fact as if the same was herein set forth and traversed seriatim. What does this mean? Why can't writs and judgments be in plain language that the public can understand? Simplify judgments.
6. Judges must avoid excessive entanglements with the political branches and avoid accepting administrative or other positions that are incompatible with their role as judges. I still do not understand how the 4 most senior members of the Court can sit on the GLC when the citizens' disputes with administrative body are litigated in that same Court. It is also important for the Justices to treat all who appear before them with respect and refrain from comments that suggest they have taken sides or seem to intimidate a party.
7. Let me end by commenting on the enforcement of the provisions relating to elections. I do agree that elections are to be decided by the people and the Court should not interfere with the outcomes if there is substantial compliance with the election laws. I do also

agree that the burden of proof lies with the petitioner. However, I think it is a mistake for this burden to be taken literally. The Electoral Commission, as the election manager, is the custodian of all official materials generated in an election. Thus, it cannot be reasonable to impose the usual burden faced by other civil plaintiffs on a petitioner. The rules of court committee should consider a standard of proof that takes these circumstances into account. In some jurisdictions, the petitioner is required to discharge the initial burden by a prima facie standard of proof. If the petitioner discharges that burden, then the burden shifts to the EC to discharge the burden of proof in rebuttal of the petitioner's allegation on a balance of probabilities. This is entirely reasonable considering that the EC is a duty bearer and is the one charged with managing public elections. In fact, to the extent that we seek to maintain the credibility of our elections, the committee may even consider the rebuttal case to be by a clear and convincing standard of proof.

8. At a time when we have become excessively partisan, it is of utmost importance that people maintain confidence in the Court's neutrality to resolve constitutional issues, especially the politically sensitive issues. Private and unpaid solicitors-general and political actors are unlikely to turn to the Court to enforce the Constitution unless they have confidence in the courts. Democracy and constitutionalism break down without a fair and impartial judiciary.
9. We must all invest in making the Court a credible go to forum for constitutional enforcement. But the Court must lead in this effort by asserting its decisional independence, settling constitutional disputes in a timely manner, making its processes transparent, treating all those who appear before them with dignity, and maintaining absolute fidelity to the text of the Constitution.
10. January 7 is sandwiched between December 31 and January 13 for good reason. It reminds us to enjoy our constitution sandwich, keeping in my mind our duties of obedience and enforcement of the Constitution.

Submission on Newsfile,

Joy FM's News Analysis Program

Saturday, January 15, 2022

Professor Stephen *Kwaku Asare* is a Democracy & Development Fellow in Public Law and Justice at *CDD-Ghana*