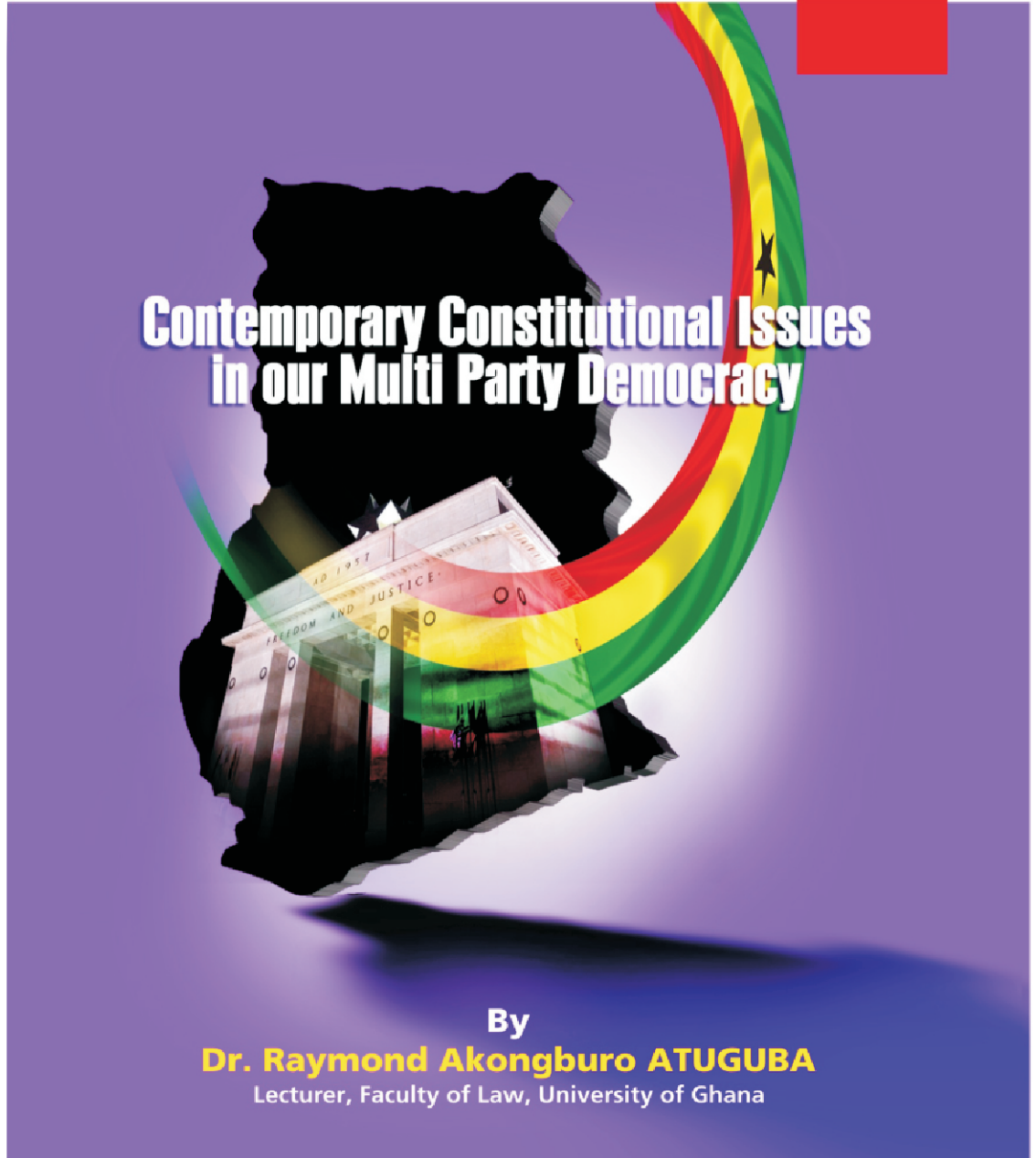




Contemporary Constitutional Issues in our Multi Party Democracy

By
Dr. Raymond Akongburo ATUGUBA
Lecturer, Faculty of Law, University of Ghana



Fourth Annual Re Akoto and Seven Others Memorial Lecture:

2009 ANNUAL LAW WEEK CELEBRATION
GHANA SCHOOL OF LAW
20th-26th April, 2009

Contemporary Constitutional Issues in our Multiparty Democracy

By

Dr. Raymond Akongburo ATUGUBA,
Lecturer, Faculty of Law, University of Ghana

22nd April, 2009, British Council Hall, Accra

© 2009 Ghana School of Law / Friedrich-Ebert-Stiftung, Ghana

All rights reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the permission of the publishers. Any person who does any unauthorised act in relation to this book will be liable to criminal prosecution and claims for damages.

ISBN: 9988-572-92-1

FOREWORD

Dr. Raymond Atuguba held the below published lecture at the “Re Akoto and Seven Others Memorial Lecture” jointly organised by the Ghana School of Law and the Friedrich-Ebert-Stiftung on April 22nd 2009 at the British Council Hall in Accra. The Ghana School of Law organises this Lecture annually since 2006. to commemorate this significant case.

The facts of the case of Re Akoto¹ were beautifully narrated in the first Re Akoto Lecture² by the Late Honourable Peter Ala Adjetey, the second Speaker of the Fourth Republican Parliament and a great and distinguished lawyer of his time, who served as the President of the Ghana Bar Associations on several occasions.

“The Appellants in the case, namely, Baffour Osei Akoto, Senior Linguist to the Asantehene, Peter Alex Danso alias Kwaku Danso, lorry driver, Osei Assibey Mensah, storekeeper, Nana Antwi Kusi Busiako alias John Mensah “Nkofohene” of Kumasi, Joseph Kojo Antwi-Kusi alias Anane Antwi-Kusi, Benjamin Kweku Owusu, produce manager, Andrew Kojo Edusei, auctioneer and letter writer, Alidu Kramo, transport owner, all of Kumasi, Ashanti and one other whose name does not appear in the Report, were arrested and placed in detention on the 10th and 11th days of November, 1959 under the authority of an order made by the Governor-General of Ghana and signed on his behalf by the Minister of the Interior, Mr. A. E. Inkumsah, dated the 10th day of November 1959 and made under section 2 of the Preventive Detention Act, 1953 (No.17 of 1958). The order said that “the Governor-General is satisfied that this Order is necessary to prevent the persons in the Schedule to this Order acting in a manner prejudicial to the security of the State”. The persons named in the Schedule to the order were, of course, the Appellants, Baffour Osei Yaw Akoto and his compatriots.

The Appellants applied to the High Court for writs of habeas corpus but their applications were refused. They then appealed to the old Supreme Court constituted by Korsah, CJ, and Van Lare and Akiwumi, JJSC. They were represented by no less a lawyer than Dr. Joseph Boakye Danquah. He was described by the well-known Watson Commission as the “doyen of Gold Coast politics”. The Commission was appointed to enquire into the

¹Re Akoto [1961] GLR 523, S.C and Re Akoto 2 G & G (Gyandoh & Griffiths), 160.

² Peter Ala Adjetey, “Re Akoto, Its Impact on Constitutional Law Development in Ghana”, Keynote address delivered at the 2006 Annual Law Week celebrations of the Students Representative Council of the Ghana School of Law, (March 2006).

disturbances that took place in the Gold Coast on the 28th and 29th days of February, 1948, following the shooting of Sergeant Adjetei and other ex-servicemen at the Osu Cross Roads on 28th February. The appeal was resisted by the then Attorney-General of Ghana, Mr. Geoffrey Bing, with whom appeared the late Mr. A.N.E Amissah.

Dr. Danquah argued 7 grounds of appeal. One particular ground of appeal which was argued by Dr. Danquah and rejected by the court was that the Preventive Detention Act, 1958, under the authority of which the Appellants were detained was "in excess of the powers conferred on Parliament by the Constitution of the Republic of Ghana with respect to article 13 (1) of the Constitution or is contrary to the solemn declaration of fundamental principles made by the President on assumption of office." A second and equally important ground of appeal was that by virtue of the Habeas Corpus Act, 1816, which was a statute of general application and therefore in force in Ghana at the time the court was required or had a duty to inquire into the truth or otherwise of the grounds upon which the Governor-General said he was satisfied that the order he had made was necessary to prevent the Appellants from acting in a manner prejudicial to the security of the State.

In an unanimous judgment read by Korsah CJ on behalf of the court, the appeals were dismissed on all the grounds argued."

Re Akoto provided a very fine opportunity for our courts to enforce the fundamental rights of Ghanaians. Indeed, the first serious attempt at giving express provision to human rights in Ghana's Constitution was in article 13 (1) of the 1960 Constitution, which was an issue in the case. Article 13 (1) of the 1960 Constitution provided that:

The President shall assume office by taking an oath in the following form ... I ... solemnly swear ... That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law. That no person should be deprived of his property save where the public interest so requires and the law so provides (original emphasis).

The former Supreme Court, however, regrettably held that these declarations were not enforceable or justiciable but were mere declarations of goals to which the government and the President would aspire. As the late Peter Ala Adjetei noted,

“the result was that the Appellants and many others in Ghana who were detained under similar orders remained in prison from the dates of their arrests and detentions in or about 1959 until they were released only after the coup d'etat of 24th February, 1966, after some of them had been in prison for some 8 years without trial. The effect of the judgment was that Ghanaians were left without any protection whatsoever against arrest and detention for whatever reason as long as the head of state could declare that such arrest and detention was necessary to prevent the persons concerned from acting in a manner prejudicial to the safety or security of the State.”³

After the bitter decision of *Re Akoto* endorsing human rights abuses of that time, the good people of Ghana decided to entrench human rights in their Constitutions beginning with the 1969 Constitution. Today, Chapter 5 of the 1992 Constitution does not only make elaborate provisions for the fundamental rights of the people, but also provides for an effective and efficient mechanism for their enforcement.⁴

The Supreme Court has also progressed in a positive direction since *Re Akoto*. In the recent case of *Ghana Lotto Operators Association v. National Lottery Authority* [2007-2008] SCGLR 1089, the court held that a presumption of justiciability in respect of Chapter 6 of the 1992 Constitution, dealing with the Directive Principles of State Policy, would strengthen the legal status of Economic, Social and Cultural rights (ESC Human Rights) in Ghanaian jurisdiction. The court reasoned that the strengthening of the enforcement of fundamental human rights is a core value of the current legal and constitutional system. A presumption of justiciability in relation to the provisions of Chapter 6, therefore, provides a better framework for the analysis and protection of ESC Rights. In this regard, the court observed that the economic objectives set out in article 36 of the 1992 Constitution are legally binding and are not merely a matter of conscience for successive governments of our land.

Ghana Lotto Operators Association v. National Lottery Authority is a marked departure from the bitter experience of *Re Akoto*. It is hoped that the Supreme Court will continue in this positive direction.

³Ibid

⁴*Awuni v. West African Examination Council* [2003 -2004] 1 SCGLR 471

Contemporary Constitutional Issues in our Multiparty Democracy

Your Lordship the Chairman, Prof. Justice Dr. S.K. Date-Bah;
Your Lordships present;
Director and Lecturers of the Ghana School of Law;
Invited Guests;
My dear students;
Ladies and Gentlemen of the Press;
Ladies and Gentlemen.

I cannot pretend that I am happy to deliver this year's Re Akoto Lecture. I am not. I am growing increasingly suspicious of the many institutions which contact me to deliver lectures, often at short notice, provide no research funding to prepare for the lecture, harass me with telephone calls until I agree to deliver the lecture, and reward me with a bottle of coke after the lecture. These institutions are also often not interested in assisting me develop the lecture into a more resolute paper that can be valuable to researchers, consultants and policy makers.

My dear friends and students, this attack is primarily not aimed at you. It is aimed more at my friends in the media who call me up sometimes at midnight and at 5:30am to seek free legal advice, counselling, opinions or commentary on some legal issue or other; and they do not even add the customary bottle of coke afterwards. As they may have noticed, I have decided to refrain from such episodic and obscurantist engagements with the media and focus on a more resolute and sustained engagement which I hope will contribute materially to the growth of our young and often ailing democracy.

As many of you are aware, I have started an ambitious project of exhaustively analyzing the 1992 Constitution from textual, contextual, historical and comparative constitutional perspectives. This project will cost a lot of money and I will soon be calling on various media houses to start bidding for the right to air the finished product. If the media values the constitutional analytical input to their programmes and to the governance of our country, they should be able to put their money where their interests lie.

The second reason why I am not happy is that you are putting me in the same category of heavy weights such as the late Rt. Hon. Peter Ala Adjetey, His Lordship Justice S. A. Brobbey, and His Lordship A.K.P. Kludze who delivered the previous Re Akoto Memorial Lectures. For the avoidance of doubt, I am not in that league of Speakers of Parliament and Supreme Court judges. If you made a mistake in inviting

me here, it is not too late to correct the error. We will just file out now, consume the coke and disperse.

Now to the topic for the day; “Contemporary Constitutional Issues in Our Multiparty Democracy”. The more I thought about this topic in the last few days the more I was tempted to deliver this lecture in one minute. Why do I say this? The topic can be disposed of in three short statements.

1. First, there are no contemporary constitutional issues in Ghana; all the issues that we pretend are contemporary have been discussed for decades unend;
2. Second, a lot of the constitutional matters which we portray as constitutional issues are not issues at all, and cannot, therefore, be constitutional issues; and
3. Third, many of the issues that should be included in the list of constitutional issues have never ever been mentioned by those clamouring for the amendment of the Constitution.

This could easily have been the end of this lecture. However, since those organizing the refreshments are not yet ready, I will spend a little more time doing two things. First, I will say a few things about the Re Akoto Case¹ since this is a Re Akoto Lecture. Second, I will try to explain what I mean by the three points which I say are the summary of this lecture. I will crave your indulgence here to be particularly attentive because I am about to raise issues about the Re Akoto Case which we have always neglected and considered mundane and proceed to establish that they are the most critical issues we need to be focusing on as a nation.

The first observation I will like to make about the Re Akoto Case is that it mostly concerned ordinary persons. Aside BAFFOUR OSEI AKOTO, who was then a Senior Linguist to the Asantehene and NANA ANTWI BUSIAKO ALIAS JOHN MENSAH, “Nkofohene” of Kumasi, the others were PETER ALEX DANSO ALIAS KWAKU DANSO, Lorry Driver; OSEI ASSIBEY MENSAH, Storekeeper; JOSEPH KOJO ANTWI-KUSI ALIAS ANANE ANTWI-KUSI, simply identified in the detention order as “of Kumasi” (he most probably had no fixed address and was unemployed); BENJAMIN KWEKU OWUSU, Produce Manager; ANDREW KOJO EDUSEI, Auctioneer and Letter Writer; and HALIDU KRAMO; Transport Owner. These were very ordinary people. The brunt of dictatorship often falls on ordinary people. Yet ordinary people are

¹Re Akoto [1961] GLR 523, S.C and Re Akoto 2 G & G (Gyandoh & Griffiths), 160.

hardly remembered for suffering so that we all may achieve democratic dividend. Unless you are a judge or a big Chief who is murdered, you do not deserve any attention. The irony of Re Akoto is that ordinary people had to suffer and die for the case to be claimed by the middle and upper class as an example of how they (the middle and upper class) should not be treated. Whilst berating Re Akoto as one of the very low points of constitutionalism and human rights protection in Ghana, we do not care a biscuit that many persons who are accused of committing offences far less severe than what Re Akoto and the others were alleged to have committed wallow in jail without trial for twice as many years as Re Akoto and the others spent in jail or are serving prisons sentences far disproportionate to the crimes they committed or for simply political reasons. And all this is happening in 2008 and 2009 under democratic constitutional rule and in the face of article 14 of the 1992 Constitution which decries the detention of anyone without trial for an unreasonable length of time no matter what crime she may have committed. Most of them die prematurely in prisons, and nobody hears about them unless they are in the middle or upper class of our society. Lawyers, judges, policymakers and civil society operatives must bow their heads in shame at this state of affairs. When a person dies in prison, the expression used to convey the news is: “One fowl die”. When it is a prison officer, the expression is: “One cow die”. These expressions are loaded with meaning which I know will not have passed you by.

The second observation I would like to make about the Re Akoto Case is the quality of the written submissions by counsel on either side of the case; J. B. Danquah and Geoffrey Bing (Assisted by A.N.E. Amissah). I have read these submissions time and again and tried very hard to meet that standard. I have consistently failed to do so. Of late, I have stopped trying very hard to meet that standard for two reasons; the lawyers on the other side of the cases I do, keep strictly to a narrow consideration of the issues and the judges tend to love that. Trying to meet the Re Akoto standards in terms of the quality of submissions is, therefore, becoming an unnecessary bother and a venture which may actually hurt your clients. The remarkable features of the submissions in the Re Akoto Case were the all roundedness of the approach to the case; the links the lawyers created between the immediate issue of *habeas corpus* for a couple of guys and broader issues of constitutionalism and governance; and the depth of legal research that went beyond the bounds of Ghana and the bounds of readily available reported cases. The lawyers in the Re Akoto case displayed learning that qualified them for the title “learned friends”. They were clearly abreast with the latest constitutional developments in the United Kingdom, the United States of America and other smaller commonwealth jurisdictions. This is in sharp contrast to the limited and myopic focus of the law that we experience today. Those submissions could only be the product of a broad and sophisticated legal training

and adroit continuing legal education, formal or otherwise. As we all know, standards in legal education now privilege quantity over quality and is devoid of the give and take between the lecturer and the student in a spirit of deep intellectual engagement, bereft of fear of victimization, which alone can broaden the minds of both lecturer and student and ensure the proliferation of an inventory of ideas from which Ghana may choose preferential options for the twenty-first century. Teachers of the law must realize that today, a student sitting at the back of the class with a palm pilot, blackberry, i-phone or even a Nokia with GSM and GPRS, can access instantaneously far more information and far more credible data from more renowned sources than the lecturer could ever give. Lecturers must also realize that the years of experience which they put so much store on nowadays is in the marketplace for sale. The Dean of Harvard Law School, Prof. Elena Kagan was nominated by President Obama as his Solicitor General when she had virtually no court room experience as Counsel. She will be responsible, however, for defending all civil cases brought against the government. Why did Obama do this? He did this because he was smart enough to realize that anyone who is serious enough, can gather experience or pay for it in a very short timeframe in today's world.

The third comment I would like to make about the *Re Akoto Case* is that the submissions of Counsel for the Respondent contained many pieces of advice to the Supreme Court judges. The Supreme Court was humble enough to accept and abide by the many pieces of advice of Counsel for the Respondent in particular and eventually ruled in his favour. This is in sharp contrast to the terrorism that many a lawyer face before many courts in Ghana today. Our judges need to be told that shouting and raving at lawyers does not help judges, lawyers, their clients and the law. I used to go to the Supreme Court to observe proceedings when I was in law school over a decade ago. I noticed a sharp contrast between the older judges and the newer ones. The newer ones terrorized the lawyers, but significantly, I do not remember anything they said, if they said anything at all in between the shouting and raving. The older ones spoke little, directly, far in-between and with remarkable dignity. I still remember what they said. In one case, for example, the late Mr. Justice Hayfron-Benjamin said something to a young lawyer who had been sent by his senior to the Supreme Court to defend an indefensible case of a procedural character. The newer judges had of course spent some twenty (20) or so minutes of the taxpayers' time venting their spleen on the young man. Right after that, Mr. Justice Hayfron-Benjamin said, "Mr...., when you go back, tell your senior, that it is only the straight and narrow path that leads to salvation." He added nothing to this statement. His tone was dignified, respectful, but forthright and penetrating. I, and I believe the young lawyer, have never forgotten that deep statement of extreme wisdom. First, Justice Hayfron-Benjamin realized that the problem at stake was not

caused by the young lawyer, but by his senior. He was also smart enough to know that learning, to be effective, is not pushed down the throats of students of the law with terrorist gusto.

The antepenultimate comment I would make about the *Re Akoto* Case is the activism, bravery and resilience of the lawyers for the applicants in this case. As you all know, J. B. Danquah fought the wrongful detention cases under the Preventive Detention Act consistently and with all his might until he was detained under that Act and unfortunately died in Prison. That spirit of service to humankind, with a broader view of assisting to build a strong and free society in which no human being will suffer injustice has almost left the legal fraternity in Ghana. Today, raising issues bordering on patent human rights abuses at the Ghana Bar Association (GBA) Conference is near impossible as the Bar is deeply divided along petty political lines. It is alright for members of the GBA to do politics, even if it is to maintain their positions in State Boards and maintain a stream of very well paid government jobs from the sitting government. It is not alright for the GBA, historically noted for fighting against injustices and oppression during the years of dictatorial rule, to not only shut its eyes and ears to injustices during constitutional democratic rule, but also shut up anyone who attempts to raise those issues.

The penultimate comment I would like to make about the *Re Akoto* Case is about the subsisting burden of that case. The burden of *Re Akoto*, which the legal community still carries, is simply that the case exemplifies the harm which a narrow and doctrinaire approach to the interpretation of a Constitution can wreak. It is that type of interpretation which was decried in *Tuffour v. Attorney-General*.² The ghost of *Re Akoto* still haunts the legal community and as if to placate it and keep it at bay, we have instituted the *Re Akoto* Memorial Lectures. A more fitting memorial to *Re Akoto*, in my view, would be a process of ensuring that the keen desire of lawyers and judges to shut the gates of justice through the use of really childish legal technicalities and sophistry will be replaced by the spirit and conscience which informed J. B. Danquah's submissions in the *Re Akoto* case. This is the only way we can ensure that dry legal technicalities, raw procedural hitches, morbid narrow mindedness and rough political expediency do not triumph over commonsense, reasonableness and the true freedom and justice we all yearn for in this country. If we meant for justice to be administered according to the horrible laws that make up the Rule of Law in Ghana and without a fair deal of sophistication, we would not carefully select lawyers of a certain standing and calibre to occupy our seats of justice.

²*Tuffour v. Attorney-General* [1980] G.L.R. 637, C.A (Court of Appeal) sitting as S.C (Supreme Court).

This brings me to the last point about the Re Akoto Case before we get down to business. However we look at it, the Re Akoto Case was an exercise in the maintenance of the colonial state. I have tried to establish elsewhere that the colonial state in Ghana lives on, and that “Ghana @ 50 [is] Colonized and Happy”.³ I also tried to communicate that the colonial state needs to be deconstructed especially by the lawmakers and the courts. What amazes me about the judgment in the Re Akoto Case is the extent to which the judges stubbornly refused to construct a distinct constitutionalism and constitutional jurisprudence for Ghana. The Re Akoto Case was a great opportunity to disapply the laws that were applied in that case. The horrible decisions of *Liversidge v. Anderson*, [1942] A.C. 206; [1941] 3 All E.R. 338, (H.L.); *R. v. Home Secretary, Ex parte Green* [1941] 3 All E.R. 104 (CA); and *R. v. Home Secretary, Ex Parte Budd* [1942] 1 All E.R. 373 (CA) were gladly swallowed by the Supreme Court with relish as they held that it was not lawful for any court to enquire into the reasonableness of the belief of the Secretary of State, in our case the President, that a person ought to be detained without trial for reasons of national security. They also held that the rights provisions of the 1960 Constitution, like the Coronation Oath of the Queen in England was not justiciable. The Supreme Court had effectively re-fastened Ghana to the apron strings of her colonizers and re-connected the umbilical cord to Britain, which umbilical cord was definitively slashed by the 1960 Constitution with the declaration of Republican status barely a year before the Re Akoto decision. The 1960 Constitution, in fact, contained in its article 42(4) the following decolonizing words:

“The Supreme Court shall [not] be...bound to follow the previous decisions of any court on questions of law”.

What is wrong with us? Why couldn't we, after a century of colonialism and imprisonment, become free when the prison guards opened the door? Why have we always insisted on remaining in prison?

Now that I have satisfied the ghost of Re Akoto by making specific comments on the case, I will proceed to discuss the main theme for this lecture: “Contemporary Constitutional Issues in our Multiparty Democracy”. As I noted earlier, there are no contemporary constitutional issues in Ghana; all the issues that we pretend are contemporary have been discussed for decades; a lot of the constitutional matters which we portray as constitutional issues are not issues at all, and cannot, therefore,

³Raymond A. Atuguba, “Ghana @ 50: Colonised and Happy”, in H. J. A. N. Mensa-Bonsu et. al. (eds) *Ghana Law Since Independence: History, Development and Prospects*, (Faculty of Law, University of Ghana, Legon, 2007), p. 571.

be constitutional issues; and third, many of the issues that should be included in the list of constitutional issues have never ever been mentioned by those clamouring for the amendment of the Constitution.

Let us take a quick inventory of just eight (8) of the issues that are making the rounds as possible candidates for consideration in a process of constitutional review:

1. There is the issue of separating the Office of the Attorney-General from that of the Minister for Justice;
2. There is the proposal that the constitutional requirement for selecting at least half of Ministers of State from Parliament be amended or scrapped;
3. There is the proposal to amend the constitution so that private members of parliament may propose bills for the consideration of the House, even if those bills have financial implications;
4. There is the proposal for allowing a greater span of time between parliamentary and presidential elections and the swearing in of a new government in order to ensure a smooth transition;
5. There is the proposal to reconsider the ban on chiefs from participating in politics and from holding some categories of political and constitutional offices;
6. There is the proposal to ensure greater participation of chiefs in the District Assemblies;
7. There are proposals for limiting the tenure of Commissioners of the Constitutional Bodies such as the Electoral Commission, the National Commission on Civic Education and the Commission on Human Rights and Administrative Justice; and
8. There is the proposal to make the position of District Chief Executives elective.

My first submission is that these constitutional issues are not contemporary at all. For example, the Constitution of the Republic of Ghana (Amendment) Bill, 1996 contained provisions meant to allow chiefs to engage in active party politics. Parliament rejected these proposals and did not pass them into law.⁴ The issue of selecting Ministers from the membership of Parliament is what informed the different constitutional regimes in the 1969 and 1979 Constitutions. We seem to have found both extremes undesirable and decided to create a blend in the 1992 Constitution. After trying the left, the right and the centre of the issue, I do not know

⁴K.B. Ayensu and S.N. Darkwa, *The Evolution of Parliament in Ghana*, P. 103 quoted in Justice G. L. Lamptey, *Ten Years of Constitutional Rule in Ghana 1993-2003: An Overview*. IEA Governance Newsletter, (July, 2003).

what other part of the issue it is possible to try. However we look at it, these issues are not contemporary by any stretch of the imagination. They are issues that have been discussed, settled, experimented and decided on many years ago, and the changes in the environment in which they were considered and that need to take place before they are reconsidered have not occurred.

The second point I am trying to make in this lecture is that the list of constitutional issues that we have making the rounds today are not issues at all. For example, we do not need to amend the Constitution in order to separate the Office of the Attorney-General from that of the Minister of Justice. The Constitution does not state that the Attorney-General needs to be a Minister of Justice. Thus, it is possible to appoint an Attorney-General and a Minister of Justice and establish protocols and conventions which ensure that the Attorney-General is not dismissed at will like any other Minister and that the procedure for vetting and approving the nominee in Parliament is thorough enough to ensure that an independent person of integrity is appointed as Attorney-General.

To be brutally frank with you, all the issues I have heard of and read about relating to proposals for the amendment of our Constitution are a conspiracy by the middle and upper classes in Ghana to ensure that their already privileged and comfortable positions become even more comfortable. In this agenda, they are trying to foist upon us an illusion that the Constitution needs to be amended in particular respects and railroad us as willing participants into their agenda.⁵

Let us take the example of separating the Office of the Attorney-General from that of the Minister for Justice. How does that help the common woman who is prosecuted by a police officer, if she gets the chance to be prosecuted at all, before being pushed into Nsawam Prison to await trial for fourteen (14) years. The common woman does not benefit from such a constitutional amendment. What that amendment seeks to do is to ensure a bourgeois arrangement, where the political class, after pillaging national resources or mismanaging them, are ensured of an impartial exercise of prosecutorial discretion by a non-politicized and independent

⁵ Justice G. L.Lamprey, Ten Years of Constitutional Rule in Ghana 1993-2003: An Overview. IEA Governance Newsletter, (July, 2003); Osagyefo Amotia Ofori Panin Okyehene, Ten Years of Constitutional Rule in Ghana 1993-2003-Chieftaincy Matters, IEA Governance Newsletter, (September, 2003); Justice Dixon Kwame Afreh, Special Agencies Under the 1992 Constitution, IEA Governance Newsletter, (June, 2003); Justice D.F. Annan, Ten Years of Constitutional Rule: 1993 to 2003, A Decade of Continuous Constitutional Practice-Perspectives from Parliament, IEA Governance Newsletter (August, 2003); Samuel Kyei-Boateng, Chief Welcomes Proposed Amendment of Constitution, Daily Graphic, Monday, December 1, 2008, p. 55.

Attorney-General when they leave office temporarily for another group of terrorists to pillage the state.

For many years, I worked with the Legal Resources Centre on a Parliamentary Advocacy Project which involved the collation of views on legislation before parliament on a wide range of issue and sometimes all over the country. I learnt a lot during those years. We do not have the time to recount some of those experiences. The short assessment of those years spent in the field is that the issues that we clamour over and fight over and insult each other over in the elite media are so far removed from the concerns of the ordinary Ghanaian. The gap, the divide, is so gapping and menacing that I often cringe at the thought. As we visited the Regions in Ghana during the consultations on the National Reconciliation Bill in the early part of this century, I was educated by the simple folk that they did not care a shear nut fruit about the murder of three judges or some other misadventures of clowns in the cities. They cared more about the number of children dying in the hundreds because their only medical practitioner had to perform medical operations with a lantern. I set this statement against the huge campaign that was mounted in the early 1990s on how nonsensical it was to extend hydro-electricity to Northern Ghana and shuddered.

The third part of my three point delivery is to address constitutional issues that should take centre stage in any amendment of the 1992 Constitution, but which are hardly mentioned or not mentioned at all.

There are serious gender gaps in the 1992 Constitution which have not yet been addressed substantively. To take one clear example, although the Constitution clearly and unequivocally commands Parliament, to as soon as practicable after the coming into force of the Constitution, pass legislation on property rights of spouses, no such legislation has been passed more than 16 years after the coming into force of the Constitution.

Another example is the limited participation of Queenmothers and Women Chiefs in the formal and informal chieftaincy structures, although the constitution in its article 277 defines “chief” to include Queenmothers.⁶

We also seem to forget that article 298 of the 1992 Constitution provides that:

⁶ Betty Mould-Iddrisu, Ghana's 1992 Constitution-The Gender Gaps, IEA Governance Newsletter, (December, 2003).

“Subject to the provisions of Chapter 25 of this Constitution, where on any matter, whether arising out of this Constitution or otherwise, there is no provision, express or by necessary implication of this Constitution which deals with the matter, that has arisen, Parliament shall, by Act of Parliament, not being inconsistent with any provision of this Constitution, provide for that matter to be dealt with.”

This is a wonderful opportunity for Parliament to make laws on constitutional issues.

There is also the issue of the justiciability of the Directive Principles of State Policy. The previous position of the Supreme Court in the case of *New Patriotic Party v. Attorney-General* [1997-98] 1 GLR 378 that Chapter 6 provisions are only directly enforceable when they are tagged along Chapter 5 or other provisions of the 1992 Constitution was not good enough. It should be possible for the Supreme Court to declare that a particular Act of Parliament or act of the Executive is void because it contravenes a provision in the Directive Principles of State Policy. Fortunately, that is the current position of the Court in the recent case of *Ghana Lotto Operators Association v. National Lottery Authority* [2007-2008] SCGLR 1089. What is left is for our judges to operationalize the Directive Principles of State Policy

Next are the many provisions bordering on the human rights, freedom, administrative justice and legitimate exercise of discretionary power of and for the ordinary Ghanaian which are under-theorized, under-applied and misapplied every day in our courts. The substantive provisions on these are well known to you and are contained in articles 33, 23, and 296 of the Constitution. Although we have a human rights procedure in Order 67 and an administrative justice procedure in Order 55 of our Civil Procedure rules, our experience in bringing human rights and administrative justice cases is that many judges fear to apply those procedures and insist that we bring those actions by writ of summons and thereby spend up to five (5) years in court over a matter that needs no more than a few days to address. These are the provisions that we need to amend in the Constitution. We could save the situation by further expounding on articles 23 on administrative justice, article 33 on human rights enforcement and article 296 on the limits on the exercise of discretionary power. I can provide details on some of the cases during the question time. If the courts have refused to do it, we the people must do it for them through a constitutional amendment.

We also need to ensure that we identify in our Constitution for possible amendment, those provisions that deal more with economic governance. We talk too much in this country about our political governance. We have gotten that basically right now. Let us identify in our Constitution, those provisions that need to be amended in order to

generate for the people of Ghana qualitative and accessible healthcare, food and water, education and cash in people's pockets. Our Constitution has the capacity to do this if only we work hard at it. "For in the final analysis constitutional governance is not only about politics, more importantly it is about the economy".⁷ Political governance is a mere framework, economic governance is the substance that must populate the framework. To do this effectively, we need to take a very close look at the Directive Principles of State Policy and decide on how best to operationalize them with or without an amendment to the 1992 Constitution. It is the Rt. Hon. Peter Ala Adjetey who said during the Re Akoto Lectures of 2006, and at page 31, that:

"It is respectively submitted that all the provisions of our 1992 Constitution, including the well-known *Directive Principles of State Policy*, are justiciable. Re Akoto must not be allowed to rear its ugly head again in the administration of justice in this country."

The point that the Rt. Hon. Adjetey was making is that a refusal to give full force to the Directive Principles of State Policy in Chapter 6 of the 1992 Constitution is equivalent to holding, as was done by the Supreme Court in the Re Akoto Case, that where a President is told that he "should" respect fundamental human rights, he may choose not to respect them because the word "shall" was not used in the injunction.

There are other articles that need a careful reconsideration in our Constitution. These include article 39 on the integration of appropriate customary values into the fabric of national life and the preservation and protection of places of historical interest and artifacts.

Why do these critical issues not surface in all the noise about Constitutional reform? There are many reasons. First is the tyranny of the media. One critical observer has recently noted:

"Sociology and psychology have shown that the media can play a central role in influencing people's opinions and decisions. At what point does this influence interfere with the individual's capacity to evaluate and discern freely? And where does one draw the line between influence and manipulation...? Indeed it has now

⁷ Justice D.F. Annan, Ten Years of Constitutional Rule: 1993 to 2003, A Decade of Continuous Constitutional Practice- Perspectives from Parliament, IEA Governance Newsletter (August, 2003).

become axiomatic that the media can dictate taste and create models. Moreover, the word 'media' itself refers to an idea of 'mediated' reality, a reality that is no longer 'immediate'".⁸

Flowing from the above, "the media", as I define it here will include politicians like Members of Parliament and Civil Society Organisation (CSOs) through whom the reality of the common woman is mediated and invariably misunderstood or deliberately distorted to the advantage of the "media". Where "the media" sets the agenda for constitutional reform in accordance with their interests, they are setting an inappropriate agenda for the common woman.

This problem is more serious than we think and will take a lot to address. The dearth of information on the basis of which ordinary people can take decisions about whether or not we need a constitutional amendment is lacking. The sophist consultations that CSOs and consultants engage in nowadays cannot fill this void.

Added to the above are the self acclaimed Constitutional-Demi-God's, whose acclaim lies merely on their number of years on the job, and not the intrinsic integrity and resoluteness of their espousals. When these people speak nothing, it is taken as something, because of the author, not because of the statement. In the face of such Constitutional Demi-God's, the ordinary voices, which alone can voice the real constitutional issues that they confront on a daily basis, will need shut up.

I know I have disappointed you in the course of this lecture by refraining from providing a list of issues for consideration in the amendment of the 1992 Constitution. What I have tried to do in this lecture is to point to how we may be chasing the wind in our effort to amend our Constitution by focusing on issues that are irrelevant to the majority of Ghanaians and completely ignoring issues that are very, very relevant to the survival of the majority of Ghanaians. I have sought to establish that this is not a mistake but a deliberate agenda of the middle and upper class, conscious or unconscious. I have also noted that this state of affairs, which permeates not only the Constitutional amendment process, but all areas of policy and legal change forebode an implosion of our polity which we cannot afford.

The two opposing propositions for and against the amendment of the Constitution are both wanting in significant respects. Those clamouring for an amendment of the Constitution are doing so for the wrong reasons. Those insisting that the

⁸Marilena Amerise, "On the Nedd for a Critical Approach to the Media", *Catholic Standard*, April 19-April 25, P. 2.

Constitution should not be touched are doing so also for the wrong reasons. Interestingly, both the proponents and the opponents of constitutional reform are speaking with one voice when we examine the real reasons for their positions.

Those who wish for the Constitution to be amended are doing so because they need a constitutional ordering which inures to the greater comfort of the wielders of political and economic power. Those insisting that the Constitution should not be amended are confident that the current constitutional ordering is alright to maintain the comfort of the political and economic class and they add that they could achieve greater comfort for themselves since they are the operators of the Constitution anyway. The proponents and opponents are, therefore, speaking in one voice; the end is the same, the method of achieving the end is a little different.

Absent from the discourse is the full range of issues that are of concern to the majority of Ghanaians.

I will end with the usual apology to anyone who has been hurt by my directness of speech. I believe that as long as we continue massaging each other's egos by not daring to speak what we think to people's faces, we will be nurturing a sub-optimal level of discourse about public matters which is dangerous to the growth of creative, innovative and rigorous ideas with which we can grow our nascent democratic constitutionalism.

Finally, let us never ever forget that our Constitution has provided in article 36(2)(e) that “the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty.” I will wish to repeat this provision of our Constitution: “the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty.”

I THANK YOU FOR YOUR ATTENTION.

EVER TRULY YOURS IN THE SERVICE OF MOTHER GHANA, I REMAIN,
DR. RAYMOND AKONGBURO ATUGUBA.

RE AKOTO LECTURE: WEBSITES VISITED AND DATES

1. Legal Control of Discretionary Powers in Ghana: Lessons from English Administrative Law Theory. Available at <http://www.gap.ugent.be/africafocus/pdf/98-14-2-Mensah.pdf>, (last accessed on Friday, April 03, 2009 at 3:39pm).
2. A. K. P. Kludze, Constitutional Rights and their Relationship with International Human Rights in Ghana. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333634, (last accessed on Friday August 14, 2009 at 6:44pm).
3. Kwesi Prempeh's Marbury in Africa. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018752, (last accessed on Friday, August 14, 2009 at 6:44pm).
4. Kwesi Prempeh's- Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa. Available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=kwasi_prempeh, (last accessed on Friday, August 14, 2009 at 6:44pm).
5. E.B.D Ayeetey, RA Atuguba, and B.B. Kumbour-The Right to Development Report: Ghana Country Study at <http://www.hsph.harvard.edu/fxbcenter/RTD/Case%20studies/Ghana%20final%20manuscript%2012-21-04.doc> (last accessed on Friday, April 03, 2009 at 3:39pm). Also on file with author.
6. B. Kumbour- Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons. Available at http://text.www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/kunbor?external=true (last accessed on Friday, April 03, 2009).
7. Ogunbanjo-Human Rights in Africa in the New Global Order. Available at <http://www.afsaap.org.au/Conferences/2003/Ogunbanjo.pdf> (Last accessed on Friday, April 03, 2009).
8. Bimpong Buta-Role of the Supreme Court. Available at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-10142005-111838/unrestricted/thesis.pdf> (last accessed on Friday, April 03, 2009).

